LABORATORIES OF DEMOCRACY REFORM: STATE CONSTITUTIONS AND PARTISAN GERRYMANDERING

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ABSTRACT

Partisan gerrymandering has proliferated in the last two decades, yet the Supreme Court has declined to rein in the offense by identifying a judicially manageable standard for evaluating claims in federal courts. This Article highlights a second, promising path to remediating partisan gerrymandering: claims in state courts. In the American federal system, state courts are the arbiters of their own constitutions and statutes and are allowed to offer protections that go beyond those afforded by the Federal Constitution. We begin by discussing the U.S. Supreme Court's opinion in Gill v. Whitford, *138 S. Ct. 1916 (2018), which lays out two distinct theories for evaluating partisan gerrymandering claims, either on a statewide basis, or on a district-by-district basis. The reasoning in these theories emanates from the U.S. Constitution, but state constitutions contain similar principles, including protection of freedom of association and equal protection of the law. Because states are free to confer more voting rights protections than those contained in federal doctrine, these avenues are in no way foreclosed by the recent* Rucho v. Common Cause, *139 S. Ct. 2484 (2019), decision. We also highlight unique state constitutional provisions with no analog in federal law, such as guarantees of free and fair elections and prohibitions on the passage of special laws. We conclude by reviewing states where partisan gerrymandering offenses are likely, with special focus on states with potentially receptive courts, most recently North Carolina. The Article is accompanied by two Appendices: one listing state court precedents striking down election laws and redistricting plans under theories of state law, and one listing constitutional protections that could be cited in a partisan gerrymandering complaint. In summary, this Article seeks to provide a coherent theoretical framework for challenging partisan gerrymanders using federalist principles.*

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INTRODUCTION

> I believe that the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in, without rebuke, that it threatens not only the peace of the people, but the permanency of our free institutions. The courts alone, in this respect, can save the rights of the people and give to them a fair count and equality in representation.
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> —*Giddings v. Blacker* (1892) (Morse, C.J., concurring)[1]

Until recently, redistricting was not considered a topic to move the hearts of voters. But over the past decade, gerrymandering, the practice of manipulating district lines for the benefit of one group or candidate to the detriment of others, has taken center stage in American politics. Gerrymandering is the subject of voter initiatives, news articles, and even commemorative jewelry in the shape of creatively-drawn districts.[2] And legal challenges to redistricting plans have proliferated.

This wave of new interest coincides with increases in partisan gerrymandering. The last few decades have been a time of narrowly divided national sentiment. Under such circumstances, electoral advantages accrue by prevailing in close contests. In the several cycles before the 2000s, redistricting disputes focused largely on individual districts and targeted racial groups. Since 2000, a record number of statewide district plans have

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1 Giddings v. Blacker, 52 N.W. 944, 948 (Mich. 1892) (Morse, C.J., concurring).

2 GERRYMANDER JEWELRY, http://www.gerrymanderjewelry.com (last visited Oct. 11, 2019).

given an advantage to a whole political party.[3] Thus gerrymandering has emerged as a newly significant threat to fair representation of the major parties.

Record partisan gerrymandering has been enabled by three factors: means, motive, and opportunity. The means comes from partisan loyalty, which has reached new heights.[4] The increased clustering of like-minded voters by location leads to communities with different voting behavior which can be separated by district lines.[5] Partisan voter loyalty enables the use of sophisticated map-drawing technology to produce reliable election outcomes in greater numbers than would arise under neutral principles.[6] The motivation emerges from the sharpened partisanship of U.S. politics, in which the ideological distance between the two major political parties has steadily increased since the 1970s, making legislative compromise less likely.[7]

The rewards of gerrymandering are greatest in states with close partisan divisions, where over one-third of the seats can swing purely as a function of redistricting.[8] With control of the U.S. House or a state legislature in the

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3 *See* Sam Wang & Brian Remlinger, *Slaying the Partisan Gerrymander,* AM. PROSPECT (Fall 2017), https://prospect.org/article/slaying-partisan-gerrymander.

4 *See* Alan I. Abramowitz & Steven W. Webster, Taking It to A New Level: Negative Partisanship, Voter Anger and the 2016 Presidential Election 1 (Nov. 9–10, 2017) (unpublished manuscript) (available at https://www.uakron.edu/bliss/state-of-the-parties/papers/abramowitz+webster.pdf) (describing the trend of increasingly negative partisanship in the United States in the 21st Century).

5 *See* BILL BISHOP & ROBERT G. CUSHING, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART, 5–7 (2008).

6 The Brennan Center for Justice at the New York University School of Law maintains an excellent web page on ongoing redistricting litigation. Michael Li, Thomas Wolf, & Annie Lo, *The State of Redistricting Litigation*, BRENNAN CTR. FOR JUSTICE (last updated Sept. 13, 2019), https://www.brennancenter.org/blog/state-redistricting-litigation. Justin Levitt, a professor at Loyola Law School, Los Angeles, maintains an excellent website summarizing redistricting litigation from the 2010 and 2000 redistricting cycles. *See All About Redistricting*, http://redistricting.lls.edu/cases.php (last visited Oct. 11, 2019).

7 *See* David R. Jones, *Party Polarization and Legislative Gridlock*, 54 POL. RES. Q. 125 (2001); Sheryl G. Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html.

8 For example, between 2010 and 2012, the North Carolina House delegation swung from 8 Democrats, 5 Republicans to 10 Republicans, 3 Democrats despite the statewide vote moving toward Democrats. This move of 5 seats represented over one-third of the 13-seat delegation. *See 2010 Federal Elections*, NORTH CAROLINA STATE BOARD OF ELECTIONS RESULTS, https://er.ncsbe.gov/?election_dt=11/02/2010&county_id=0&office=FED&contest=0 (last visited Oct. 11, 2019); *2012 Federal Elections*, NORTH CAROLINA STATE BOARD OF ELECTIONS

balance, manipulating even a small number of seats can take on central significance.

The final factor, opportunity, arrived with the wave election of 2010.[9] Partisan gerrymandering is enabled when redistricting comes under the control of a single party.[10] For Republicans this occurred in Florida, Michigan, North Carolina, Ohio, Pennsylvania, and Wisconsin.[11] On the Democratic side, one state, Maryland, has shown clear evidence for partisan representational distortion since 2012.

The net consequence of these gerrymanders was to ensure nearly 100 safe or nearly-safe House seats in total for Democrats and Republicans combined. In the wave election of 2018, 46 out of 435 House seats changed partisan hands, an incumbent-party loss rate of nearly 11%.[12] In contrast, in the five states with surviving gerrymanders (Maryland, Michigan, North Carolina, Ohio, and Wisconsin), the incumbent party lost reelection only 3% of the time in the 2018 midterms.[13] Meanwhile, in Pennsylvania, where districts were overturned by a state court, four out of eighteen seats flipped parties, or 22%.[14] These election results show that while incumbents are re-elected more often than not, the placement of district lines can strongly influence their odds of survival.[15] Representationally speaking, the net result of gerrymandering this decade was that Republicans won about a dozen

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RESULTS, https://er.ncsbe.gov/?election_dt=11/06/2012&county_id=0&office=FED&contest=0. (last visited Oct. 11, 2019).

9 For a discussion on what constitutes a "wave election," see Charlie Cook, *Midterm Elections Could Be a Wave, But Who's Going to Drown?*, YAHOO! NEWS (July 30, 2013), https://news.yahoo.com/midterm-elections-could-wave-whos-going-drown-080230757.html.

10 In most states, this is referred to as a "trifecta," in which one party controls both chambers of the legislature and the governorship. However, there are some variations, such as in North Carolina, where the governor plays no role in the redistricting process. *See Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUSTICE (Jan. 30, 2019), https://www.brennancenter.org/analysis/who-draws-maps-states-redrawing-congressional-and-state-district-lines.

11 *See* Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1263–1321 (2016).

12 *See Results of the House of Representatives Elections to the United States Congress*, BALLOTPEDIA, https://ballotpedia.org/United_States_House_of_Representatives_elections,_2018 (last visited Oct. 11, 2019).

13 Sam Wang, *Letter to the Editor*, THE ECONOMIST, Jan. 19, 2018, https://www.economist.com/letters/2019/01/19/letters.

14 *Id.*

15 *Id.*

additional seats in Congress compared with neutral districting principles, and many more state legislative seats.[16]

Partisan gerrymanders and other forms of gerrymandering are not mutually exclusive. Race and class have become better predictors of party voting preference, a phenomenon called conjoined polarization.[17] These increasingly tight links create incentives for partisans to commit other types of gerrymander, including the packing or cracking of minorities as a means of achieving an overall advantage. In some but not all cases, these offenses are covered by federal law concerning the use of race in redistricting.[18]

Because partisan gerrymandering removes general elections as a route for removing legislators, reformers have turned to courts for relief.[19] But unlike race-based redistricting doctrine, partisan gerrymandering doctrine is incomplete. After decades of flirting with the idea that partisan gerrymanders are justiciable,[20] the Supreme Court declined this year to articulate a standard for discerning permissible versus impermissible partisanship in redistricting, failing at the last moment in two bitterly divided

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16 *See* Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1298–99 (2016).

17 *See* Bruce Cain & Emily Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L. J. 867, 869 (2016) (defining conjoined polarization as the alignment of race, party, and ideology—particularly since the passage of the Voting Rights Act in 1965).

18 Race-based redistricting law focuses on protecting the interests of minority groups with a history of discriminatory treatment by creating districts in which they have an opportunity to elect candidates of their choice. Racial gerrymandering, meanwhile, polices the use of race in redistricting in any form, whether benevolent (to help minority groups) or malevolent (to harm minority groups). The power of an individual vote is deemed to be diluted under federal law in two ways: as a constitutional doctrine under the Fifteenth Amendment and as a statutory cause of action under section 2 of the Voting Rights Act. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding that the restructuring of electoral district lines to deny equal representation to African-Americans violated the Fifteenth Amendment). The future of these doctrines is uncertain as the Supreme Court has declared other, related protections for minority groups to be unconstitutional in recent years. *See* Shelby County v. Holder, 570 U.S. 529 (2013) (striking down section 4(b) of the Voting Rights Act, whose formula delineated those jurisdictions required to obtain "preclearance" before making any changes to their election laws, as unconstitutional as applied).

19 *See* Gill v. Whitford, 138 S. Ct. 1916, 1934–35 (2018) (Kagan, J., concurring) ("Partisan gerrymandering, as this Court has recognized, is 'incompatible with democratic principles.' More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches.") (internal citations omitted).

20 *See* Davis v. Bandemer, 478 U.S. 109, 110 (1986).

opinions in *Rucho v. Common Cause*.[21] However, the route leading to that failure generated concepts and theories that are now available for state courts to use if they so choose.

In *Davis v. Bandemer*, the Supreme Court held that partisan gerrymandering could violate the Equal Protection Clause.[22] Since that time, plaintiffs, advocacy groups, and academics have sought to develop a judicially manageable test for partisan gerrymandering claims. Nearly twenty years passed between *Bandemer* and the next partisan gerrymandering case to reach the Court, *Vieth v. Jubelirer*.[23] A plurality of four Justices in *Vieth* wrote that the failure of lower courts to coalesce behind a single standard meant there was no judicially discernable standard, and that partisan gerrymandering claims should be declared non-justiciable.[24] The four dissenting Justices could not agree on a single standard. Writing separately, Justice Kennedy suggested that advances in technology might yet lead to a judicially manageable standard based on statewide harms under the First Amendment.[25]

Reformers then sought to create standards which Justice Kennedy could accept. But in the spring of 2018, when two cases[26] with new legal theories came before the Supreme Court, the Court sent the cases back to the district courts on narrow procedural grounds. Less than two weeks later, Justice Kennedy retired.[27] Justice Kennedy's replacement, Justice Brett Kavanaugh, was suspected to be less receptive than Kennedy on questions of voting rights.[28] Thus it fell to Chief Justice Roberts, likely the deciding vote, to face the challenge of how and whether to address partisan

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21 139 S. Ct. 2484 (2019).

22 *Bandemer*, 478 U.S. at 110.

23 541 U.S. 267 (2004).

24 *Id.* (plurality opinion).

25 *Id.* at 312–13 (Kennedy, J., concurring).

26 Gill v. Whitford, 138 S. Ct. 1916 (2018); Benisek v. Lamone, 138 S. Ct. 1942 (2018).

27 *See* Michael Wines, *Kennedy's Exit Could Cripple Efforts to Abolish Gerrymandering*, N.Y. TIMES, June 30, 2018, at A24.

28 *See* Sarah Jones, *We're About to Find Out What Brett Kavanaugh Thinks of Gerrymandering,* N.Y. MAGAZINE, Jan. 4, 2019, http://nymag.com/intelligencer/2019/01/the-supreme-court-will-take-up-gerry mandering-in-march.html ("The court's makeup has obviously changed since it declined to consider gerrymandering cases in June; Brett Kavanaugh is now a justice, which tilts the court even more dramatically to the right. That shift, combined with the court's own record on voting rights, makes the court's possible rulings difficult to predict.").

gerrymandering without further harming the Court's reputation.[29] In a divisive 5–4 opinion written by the Chief Justice, the Court declared partisan gerrymandering to be a non-justiciable question, punting the issue to the political branches of the government and to the states.[30]

In its failure to act in *Rucho*, the Supreme Court declined to continue the work it began in *Gill v. Whitford*, which laid out two intellectual frameworks for action, one by Chief Justice Roberts and one by Justice Kagan. Chief Justice Roberts, writing for a unanimous court, had suggested that voter rights could be harmed on a district-by-district basis under the Equal Protection Clause of the Fourteenth Amendment, analogous to the Court's pre-existing racial gerrymandering doctrine.[31] Justice Kagan's concurrence, joined by the Court's liberal justices, described a harm that could come to an entire party or group of partisan voters on a statewide basis under the First Amendment's protections of speech and association.[32]

Even though the Supreme Court did not use these theories to put federal guardrails on the practice of partisan gerrymandering, judges in other courts still can. All state constitutions protect freedom of speech, forty-seven protect the freedom of association, and twenty-four guarantee the equal protection of the laws.[33] All of these rights have counterparts in the Federal Constitution. And under the well-known principle of federalism, state constitutions can offer residents greater protections than afforded by the U.S. Constitution.[34] For this reason, state courts present an attractive route toward achieving reform.

For many reasons, state constitutional litigation in state courts has been an "under-the-radar" method of attacking illegal district maps. Perhaps the

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29 *See* Joan Biskupic, *9-0 Ruling Masks Deep Divisions on Gerrymandering at Supreme Court*, CNN POLITICS, June 21, 2018, https://www.cnn.com/2018/06/18/politics/gerrymandering-roberts-kagan-supreme-court/index.html.

30 Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

31 *See* Gill v. Whitford, 138 S. Ct. 1916 (2018).

32 *See id.* at 1938 (Kagan, J., concurring).

33 *See* James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 887–89 (2006) (discussing state constitutions and how courts have historically applied them to partisan gerrymanders).

34 *See, e.g.*, Linda J. Wharton, Roe *at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469 (2009) (discussing how some state constitutions provide greater abortion rights than those embodied in the Supreme Court's jurisprudence, and how state constitutional litigation can enhance those protections in the event that *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), is overturned).

most significant reasons are that (1) following the Warren revolution on the U.S. Supreme Court, the federal system became a staunch defender of fundamental rights, including the right to vote; and (2) state courts have historically been perceived as either themselves partisan or susceptible to undue influence from the partisan branches of their respective governments.[35] The broader redistricting reform movement, particularly in the thirty-plus years since *Bandemer*, has focused on achieving a federal solution rather than pursuing reform in individual states. Scholarly efforts have focused on federal issues. Here we turn the spotlight to state-level efforts and review examples in which state courts have served as a successful venue for changing district plans. We will organize the examples into a theoretical framework, setting the stage for a more systematic approach in state courts and providing a primer for litigants and activists.

Reformers won a landmark victory in 2018, not in the U.S. Supreme Court, but in the Supreme Court of Pennsylvania. Pennsylvania was the keystone in the Republican Party's strategy for national dominance in Congress: despite winning 51%, 44% and 46% of the statewide two-party vote share for Congress in 2012, 2014, and 2016, Democrats won only 28% of the state's Congressional seats each year.[36] In response to this disparity between votes cast and seats won, plaintiffs brought a lawsuit alleging that the Pennsylvania congressional districting plan violated the Free and Equal Elections Clause of the Commonwealth's Constitution.[37]

In its opening paragraph, the Pennsylvania Supreme Court laid out its argument for why the Commonwealth's founding document offered the petitioners relief the U.S. Constitution could not:

> It is a core principle of our republican form of government that voters should choose their politicians, not the other way around. . . . While federal courts

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35 *See* 16 AM. JUR. 2D *Constitutional Law* § 88 (Westlaw rev. ed. 2019) ("The protections in the Federal Constitution provide a constitutional floor such that the Federal Constitution establishes a minimum level of protection to citizens of all states, but nothing prevents a state court from equaling or exceeding the federal standard. In other words, a state constitution may be construed to afford broader but not narrower rights than similar federal constitutional provisions.").

36 *See Tests*, PRINCETON GERRYMANDERING PROJECT, gerrymander.princeton.edu/tests/ (click the Commonwealth of Pennsylvania on the interactive map; click the left arrow next to the year displayed in the upper right-hand corner until you reach the reports analyzing data on the 2012, 2014, and 2016 congressional elections, respectively) (last visited Oct. 11, 2019).

37 *See League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, BRENNAN CTR. FOR JUSTICE, Oct. 29, 2018, https://www.brennancenter.org/legal-work/league-women-voters-v-pennslyvania.

> have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter. The people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding document is the ancestor, not the offspring, of the federal Constitution. We conclude that, in this matter, it provides a constitutional standard, and remedy, even if the federal charter does not. Specifically, we hold that the 2011 Plan violates Article I, Section 5—the Free and Equal Elections Clause—of the Pennsylvania Constitution.[38]

By declaring its founding document a better guarantor of personal liberty than the Federal Constitution, the Pennsylvania Supreme Court achieved two goals: it undid years of harm to its citizens, and it did so in a way that could not be reversed by the U.S. Supreme Court. When the legislative defendants tried to appeal the opinion to the U.S. Supreme Court, Justice Samuel Alito, the Justice responsible for emergency appeals from the Third Circuit, summarily rejected the request without consulting his colleagues.[39] In the end, Pennsylvania's congressional map was redrawn, and the November 2018 election resulted in a 55% Democratic, 45% Republican statewide vote and a 9-9 congressional split.[40]

A second victory for reformers came in September 2019 via a North Carolina case, *Common Cause v. Lewis*.[41] That case, heard in the Superior Court of North Carolina, concerned the maps for both chambers of the General Assembly, which had previously been partially redrawn in response to a finding of racial gerrymandering. The unanimous decision by three judges, two Democrats and one Republican, found that both the House and Senate maps violated four separate clauses of Article I of the state constitution: section 10, the free elections clause; section 12, concerning freedom of assembly; section 14, concerning freedom of speech; and section 19, concerning equal protection. The court directed that the gerrymandered

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38 League of Women Voters v. Commonwealth, 178 A.3d 737, 740–41, (Pa.), *cert. denied sub nom.* Turzai v. Brandt, 139 S. Ct. 445 (2018) (mem.) (internal citations omitted).

39 *See* Sam Wang, *Pennsylvania Congressional Gerrymander Overturned – and It Seems Likely to Stick*, PRINCETON ELECTION CONSORTIUM, Feb. 5, 2018, http://election.princeton.edu/2018/01/22/pennsylvania-congressional-gerrymander-overturned-and-its-likely-to-stick/#more-20320 (last visited Oct. 11, 2019).

40 *See Tests*, PRINCETON GERRYMANDERING PROJECT, gerrymander.princeton.edu/tests/ (click the Commonwealth of Pennsylvania on the interactive map; as of October 2019, the 2018 election map automatically appears; if a later year appears, click on the arrow left of the year to scroll to the appropriate Congressional election year) (last visited Oct. 11, 2019).

41 Common Cause v. Lewis, 18 CVS 014001, slip op. (N.C. Super. Ct. Sept. 3, 2019).

maps may not be used for the 2020 election. It further directed that the General Assembly redraw both maps without favoring a political party or using election data, at public hearings and in full public view.[42] The remedial line-drawing process occurred over an eight-day period with legislators relying on maps algorithmically created by Dr. Jowei Chen.[43] At the end of the process, the plaintiffs accepted the new Senate map, but objected to the House districts in two county clusters as being an insufficient remedy. As of this writing, their appeal is pending in the state court of appeals.[44] On the same day as the *Common Cause* plaintiffs filed their objections, another lawsuit, *Harper v. Lewis*, was filed challenging North Carolina's congressional districts based upon claims mirroring those in *Common Cause v. Lewis*.[45] The same three-judge court has been assigned to Harper as heard Common Cause, and a new Congressional map for 2020 appears likely.[46]

In this Article, we argue that it is time to look beyond federal courts for solutions. With the Supreme Court's move toward a more restrictive interpretation of voting rights under the U.S. Constitution, the way forward for election reform there is uncertain, especially for cases with partisan overtones. We propose that reformers should instead follow the examples of Pennsylvania and North Carolina and turn to state courts and state constitutions to achieve their goals. While lacking the sweeping breadth of a U.S. Supreme Court opinion, claims based on state law in state courts have three distinct advantages: (i) they can avoid removal to a federal venue; (ii) they can base their arguments in legal provisions that are broader than the First and Fourteenth Amendments alone; and (iii) they can interpret their

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42 *Id.* at 349.

43 *See* Melissa Boughton, *It's Up to the Court Now: A Redistricting Update After the Final Round of Filings*, N.C. POL'Y WATCH (Oct. 10, 2019), http://www.ncpolicywatch.com/2019/10/10/its-up-to-the-court-now-a-redistricting-update-after-the-final-round-of-filings/.

44 Order Denying Petition for Discretionary Review and Motion to Suspend Appellate Rules, Common Cause v. Lewis, 18 CVS 014001 (Sup. Ct. N.C. Nov. 15, 2019) (available at https://www.brennancenter.org/sites/default/files/2019-11/2019-11-15-Order.pdf) (denying a motion asking the state supreme court to review the petition prior to a state court of appeals decision).

45 Complaint, Harper v. Lewis, 19 CVS 012667 (Wake Cty. Super. Ct. Sept. 27, 2019) (available at https://www.brennancenter.org/sites/default/files/legal-work/2019-09-27-Harper%20v.%20Lewis%20Complaint.pdf).

46 *See* Melissa Boughton, *It's Up to the Court Now: A Redistricting Update After the Final Round of Filings*, N.C. POL'Y WATCH (Oct. 10, 2019), http://www.ncpolicywatch.com/2019/10/10/its-up-to-the-court-now-a-redistricting-update-after-the-final-round-of-filings/.

constitutional provisions with federal analogues more broadly than the U.S. Supreme Court interprets the federal clauses.[47]

In Part I, we analyze the history of the U.S. Supreme Court's voting rights jurisprudence, laying out an argument for why the Court has struggled to reach a consensus on a justiciable partisan gerrymandering standard. Part II analyzes the district-by-district and statewide theories articulated in *Gill v. Whitford* more fully, creating two different groupings within which state constitutional provisions could fall. It also briefly describes the types of evidence plaintiffs would need to prove standing under either standard, drawing from legal opinions and scholarship. Part III surveys the types of protections offered by individual states, and how they fit into the district-by-district and statewide frameworks established by Chief Justice Roberts and Justice Kagan. It also surveys a rich history of state supreme court cases striking down districting plans under state law, demonstrating that state courts are not dispositionally opposed to ruling on such claims. Part IV briefly summarizes the types of evidence plaintiffs will need to bring successful claims under these various constitutional provisions. Part V evaluates legal routes in states with present and potential post-2020 gerrymanders.

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47 Under the United States' federal system, state courts are the final arbiters of their own laws and constitutions, so long as they do not conflict with federal doctrine. This gives state courts a choice: they can either interpret their constitutional protections of things like Due Process, Equal Protection, or Freedoms of Speech and Association to be identical to their federal analogues, or they can interpret them more broadly than their federal analogues. If a state court chooses to follow the former path, the state is said to interpret its constitution in "lockstep" with the federal provision. When a state interprets its own constitutional provision in lockstep with a federal analog, the U.S. Supreme Court retains the right to review a state court interpretation of its own constitutional provision for fidelity to precedents interpreting the federal clause. But if a state does not interpret its constitutional provisions in lockstep with federal analogues, state courts are free to interpret their constitutions as offering greater protections than the Federal Constitution. *See* D.C. Court of Appeals v. Feldman, 460 U.S.462, 476 (1983); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550-51 (1986); William Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Andrew A. Matthews, Jr., *The State Courts and the Federal Common Law*, 27 ALB. L. REV. 73, 76 (1963). For more information on lockstep, see Daniel Hessel, *Litigating Partisan Gerrymandering Claims Under State Constitutions*, CAMPAIGN LEGAL CTR., July 17, 2018, https://campaignlegal.org/sites/default/files/2018-07/CLC%20Issue%20Brief%20Litigating%20Partisan%20Gerrymandering%20under%20State%20Constitutions_0.pdf.

I. VOTING, REPRESENTATION, AND THE THREE TIERS OF VOTING RIGHTS

The phrase "voting rights" typically evokes laws and processes such as voter registration and identification laws, or long lines at polling places.[48] These are examples of the individual right to vote. But even if all citizens were to gain and use their right to vote, they can still be denied fair representation. This broader concept of voting rights requires a theory about how groups of voters ought to be represented, whether the groups are sorted by race, ethnicity, party, or some other classification.

Professor Pamela Karlan articulated this multi-tier framework of voting rights in her article *All Over the Map: The Supreme Court's Voting Rights Trilogy*.[49] Detailing the Court's precedents from *Colegrove v. Green*[50] to *Shaw v. Reno*,[51] Professor Karlan highlights how the Supreme Court has slowly pivoted from a position of avoiding the "political thicket" to entering it for limited purposes.[52] In the first tier of individual voting rights, *Wesberry v. Sanders*[53] and *Reynolds v. Sims*,[54] the Court guaranteed the right of every qualified citizen to have his or her ballot counted.[55] A second tier of voting rights occurs at the group level: the right of a group of citizens to have their votes aggregated in a way that gave them a chance of winning an election (aggregation rights). At this level, the Court has made some progress in the domain of race.

The most prominent examples of court involvement in aggregation rights arise from the Fourteenth Amendment and the Voting Rights Act. Because American representative democracy centers around the geographic aggregation of votes into districts, rather than proportional representation,

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48 This conception of the "right to vote" is typically thought of as a right possessed by the individual which is abridged by administrative burdens, such as Voter ID laws, long lines at polling places, and issues regarding the counting of ballots. As with the protections discussed *infra*, state constitutions frequently protect the right to vote. For a more in-depth view of state constitutional guarantees of the right to vote, see Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–05 (2014).

49 *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 247 (1993).

50 328 U.S. 549 (1946).

51 509 U.S. 630 (1993).

52 *See* Karlan, *supra* note 49, at 247.

53 367 U.S. 1 (1964).

54 377 U.S. 533 (1964).

55 *See* Karlan, *supra* note 49, at 245.

aggregation cases necessarily center around how those boundaries are drawn.[56] Unlike participation barriers such as poll taxes or literacy tests, challenges to aggregation barriers, namely cracking and packing,[57] are not fundamental rights subject to strict scrutiny under the Due Process Clause, nor are political parties or their voters suspect classes under the Equal Protection Clause;[58] instead, challengers must prove both discriminatory intent and discriminatory effect to win their constitutional claims.[59]

The third tier of voting rights has been the most challenging to police: the right of voters whose candidates were victorious to have their representatives participate in the process of governing (governance rights). The Voting Rights Act guarantees to qualifying minority groups[60] certain aggregation rights, but no governance rights. This can create problems for minority groups trying to achieve the policy goals their very representatives, elected to legislative bodies as a result of districts created by the Voting Rights Act, seek to achieve. As Professor Karlan notes:

> Aggregation and governance interests do not always point toward the same [districting] plan. A plan that maximizes the number of representatives a group directly elects could produce a generally unfriendly legislature. For example, the creation of majority-black districts may enable black voters to elect some representatives to an assembly but may result in the election of hostile delegates from the remaining, majority-white districts; if the black community's representatives are consistently outvoted within the legislature, the black community may have achieved its aggregation interest at the expense of a real role in governance. Thus, apportionment poses fundamental choices about the nature of representation and the right to vote.[61]

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56 *See id.* at 249 ("Perhaps the most pervasive set of aggregation rules in American politics concerns the geographical allocation of voters among electoral jurisdictions. The way in which districts are drawn often determines which voters will be able to elect their preferred candidates and which voters will have their preferences go unsatisfied.").

57 *See* Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1271 (2016) (defining cracking and packing).

58 *Id.* at 252–53 (internal citations omitted). It should be noted that there are certain fundamental rights which are subject to lower levels of scrutiny, such as the right to vote in the context of voter ID laws. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) (plurality opinion) (applying *Anderson-Burdick* balancing to determine the appropriate level of scrutiny to apply to Indiana's voter ID law).

59 Karlan, *supra* note 49, at 250.

60 *See* Bartlett v. Strickland, 556 U.S. 1, 12 (2009); Thornburg v. Gingles, 478 U.S. 30, 46 n.12 (1986).

61 Karlan, *supra* note 49, at 252–53 (internal citations omitted).

Partisan gerrymandering straddles the line between aggregation rights and governance rights. Because partisan gerrymandering directly affects the ability of a party to enact a political agenda, it may create a concern that courts would have to go beyond what has worked for aggregation-type rights, i.e., apply a mechanical rule to a districting plan to determine if it is constitutional or not.[62] Even presuming partisan intent, partisan effect is nuanced for several reasons. First, party is a malleable characteristic, unlike race. Second, a major party's strength among voters is more likely than that of a minority group to be at near-parity with the side that commits the offense. For these reasons, the establishment of a doctrine to handle partisan gerrymandering requires courts to break new intellectual ground.

Some reformers sought to find a simple mathematical rule for identifying partisan gerrymanders which go "too far." Their hope was to apply advances in political science to create a bright-line test for revealing when a partisan gerrymander has occurred. In his *Vieth* concurrence, Justice Kennedy put lower courts on notice that they should be ready to order relief should such a standard emerge. In response, academics from mathematical, scientific, and social-scientific disciplines offered a variety of measures, each quantifying a different aspect of the fairness of either a single district's election or a statewide set of elections.[63] In some cases, the mathematical tools were designed specifically for the problem of representation;[64] other tools had a long history going back as far as a century of use in other practical domains such as the manufacture of beer.[65] Importantly, many tools measure the degree to which districts are packed or cracked in the aggregate, but without explicitly relying on the amount of representation won by either side.[66] In all cases, the measures were designed to convert electoral unfairness into a numerical measure that would be useful to courts.

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62 Karlan, *supra* note 49, at 253.

63 *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

64 *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 884 (2014); *see also* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 242 (2013).

65 *See* Brief for Heather K. Gerken et al. as Amici Curiae Supporting Appellees at 19, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

66 Relying on the amount of representation won by either party has been criticized as a form of proportional representation. Even if a mathematical measure does not hold up the ideal of strict proportionality, using the number of wins in any way might be criticized as imposing a view as to the outcome that ought to arise from a statewide vote total. Some mathematical approaches instead

II. *GILL V. WHITFORD* GIVES RISE TO TWO APPROACHES FOR ANALYZING PARTISAN GERRYMANDERS, DISTRICT-BY-DISTRICT AND STATEWIDE

Gill v. Whitford and *Benisek v. Lamone* arose from two extreme gerrymanders of the 2010 redistricting cycle: Wisconsin's State Assembly and Maryland's Sixth Congressional District, respectively.

Following the 2010 elections, Republicans found themselves newly in control of Wisconsin's legislature and governor's mansion, giving them control over the state's redistricting process. The legislature drew state legislative and congressional maps designed to provide a durable advantage over election outcomes for the decade.

In Maryland, Democrats already dominated state politics. In the redistricting process, they sought to enlarge their 6-2 majority in the state's Congressional delegation. Targeting a long-time Republican incumbent from the state's rural western mountain district, Democrats redrew the Sixth District to turn an R+13% district in the 2010 election into a D+2% district in the 2012 election, bringing the Congressional delegation to seven Democrats, one Republican.[67]

In Wisconsin, Bill Whitford and co-plaintiffs sued the State of Wisconsin and the General Assembly in federal court, arguing the State Assembly maps were so biased in favor of Republicans that they violated the First and Fourteenth Amendments.[68] Plaintiffs relied on a new measure of partisan symmetry, the efficiency gap, as well as partisan bias and demonstrative maps. Relying on all of the measures, the district court struck down the State Assembly map as an unconstitutional partisan gerrymander.[69] This was the

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use the pattern of win margins to detect whether one side's voters have been systematically packed or cracked. Such tests escape the proportional-representation problem, and have been broadly termed tests of inequality of opportunity. *See* Samuel S.-H. Wang, Brian Remlinger, and Ben Williams, *An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into Tests of Opportunity and Outcome*, 17 Election L.J. 302 (2018).

67 Benisek v. Lamone, 266 F. Supp. 3d 799, 826 (D. Md. 2017) (Niemeyer, J., dissenting), *aff'd*, 138 S. Ct. 1942 (2018). The Partisan Voter Index (PVI) measures how strongly a United States congressional district or state leans toward the Democratic or Republican Party, compared to the nation as a whole. A rating of R+13% means that a district's Republican partisan vote share is thirteen points larger than the national average.

68 *See* Gill v. Whitford, 138 S. Ct. 1916 (2018) (remanding that initial suit to permit voters to prove particularized harms).

69 *See* Whitford v. Gill, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016).

first time in nearly three decades that a federal court had struck down a redistricting plan on partisan gerrymandering grounds.

The plaintiffs in *Benisek v. Lamone*[70] sued the State of Maryland under a different theory. Instead of arguing that election outcomes proved an injury, plaintiffs contended that the redrawn district itself contained the necessary evidence. They argued that by moving thousands of people in and out of the state's Sixth District based on citizens' voting history, the government had retaliated against citizens' speech at the ballot box, thus violating First Amendment freedoms of speech and association. In short, Republican and Republican-leaning voters of western Maryland had been denied an equal opportunity to elect a representative.

Gill was argued in the Supreme Court in October 2017 on the merits, while *Benisek* reached the Supreme Court via interlocutory appeal[71] and was argued in March 2018. Both cases were decided in June 2018. In *Benisek*, the Court affirmed the District Court's denial of the injunction in a short per curiam opinion avoiding the merits. In *Gill*, Chief Justice Roberts also avoided the merits of the case, writing a unanimous opinion vacating the district court's judgment in *Gill* due to a lack of standing.[72] But he also took a step toward defining a justiciable claim.

A. Chief Justice Roberts's District-by-District Theory: Individual Harms Require Alternative Maps

Chief Justice Roberts described what "concrete and particularized" harms must be suffered to make the Wisconsin plaintiffs' claims justiciable. He laid out a district-by-district theory focusing on the harms suffered by individual voters, rather than by groups of voters.[73] Rather than accepting the district court's finding that standing was satisfied by the dilution of the plaintiffs' votes as members of the Wisconsin Democratic Party,[74] the Chief Justice referred to the *Reynolds v. Sims*[75] finding that the right to vote is

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70 At the time of filing, the case was called *Shapiro v. McManus*. 136 S. Ct. 450 (2015).

71 Benisek v. Lamone, 138 S. Ct. 1942 (2018).

72 *Gill*, 138 S. Ct. at 1923.

73 A related doctrine is the right to vote under state constitutions. For an excellent summary of those provisions, see Joshua Douglas, *The Right to Vote Under State Constitutions,* 67 VAND. L. REV. 89 (2014).

74 *Gill*, 138 S. Ct. at 1926.

75 377 U.S. 533, 561 (1964).

"individual and personal in nature."[76] By this reasoning, the dilution of a vote must be analyzed in the context of where it was cast, in a specific, individual district.[77] In analogy to racially-based claims, Roberts noted that a voter who suffers an unconstitutional racial gerrymander can be provided relief by courts without redrawing the state's entire map.[78] Thus, he concluded, claims of party-based vote-dilution claims must be concrete and particularized enough to meet Article III standing.

1. A Single-District Approach for Partisan Harm is Reminiscent of Race-Based Harms

In the opinion for the Court, the Chief Justice laid out the steps a plaintiff would need to take to allege a vote-dilution claim under the Fourteenth Amendment. While acknowledging that he had no quarrel with the mathematics of the efficiency gap and other measures of partisan unfairness, he noted that such measures "do not address the effect that a gerrymander has on the votes of particular citizens" but rather measure the overall average "effect that a gerrymander has on the fortunes of political parties."[79]

Chief Justice Roberts further noted that under the plaintiffs' proposed alternative districting plans, some plaintiffs would end up in a district with nearly the same partisan breakdown, meaning that their particular situation could be explained by natural geography rather than partisan intent.[80] He concluded that the remedy must be "tailored to redress the plaintiff's particular injury."[81]

This formulation of the district-by-district theory may be synthesized into the following working checklist for what a plaintiff must prove to win a case under an Equal Protection, single-district argument:

- The plaintiff must live in a district in which their vote could help elect their candidate of choice;
- The district the plaintiff currently lives in is drawn in such a way as to make the plaintiff's casting of a ballot futile; and
- The current construction of the district is unusual, or is unlikely to have arisen by chance.

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76 *Gill*, 138 S. Ct. at 1929.

77 *Id.* at 1930.

78 *Id.* at 1931.

79 *Id.* at 1933.

80 *Id.*

81 *Id.* at 1934 (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006)).

This checklist defines whether a voter has been denied the opportunity to elect a representative. Conceptually, it is reminiscent of the use of race in defining whether a minority-group voter has been denied the chance to elect a representative. This conceptualization of a party-based harm under the Fourteenth Amendment would require an analysis which considers a state's political and physical geography to determine whether a challenged district is abnormal or unusual.

Demonstration of such a harm requires the drawing of alternative maps. In her four-vote concurrence, Justice Kagan noted that it would "not be hard" to prove packing or cracking because a plaintiff could produce an alternative map to show how the plaintiff's vote could carry more weight under a different map.[82] While Justice Kagan was correct that a single map can be valuable evidence, an even more persuasive way to make such a determination is by creating an ensemble of thousands or even millions of hypothetical maps, all of which comply with state and federal requirements. Modern computing can do this with ease. An analyst can then compare the challenged district to the districts in the ensemble to determine whether the plaintiff's situation is typical for the distribution, or an outlier.[83]

An ensemble-map method was most recently used in the North Carolina partisan gerrymandering case *Common Cause v. Rucho*.[84] There, the three-judge panel struck down the state's congressional districting scheme, relying in part on the expert testimony of Professor Jonathan Mattingly, a mathematician from Duke University.[85] Dr. Mattingly used an algorithm to draw over 24,000 hypothetical congressional districting plans for North Carolina. Comparing his ensemble of plans to the challenged plan, Dr. Mattingly concluded that the challenged plan was unlikely to arise from chance because over 99% of districting plans in his ensemble elected fewer

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82 *See id.* at 1936 (Kagan, J., concurring) ("In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight.").

83 Indeed, Judge Frank Easterbrook also concluded that such evidence may be permissible to prove such a constitutional harm. *See* Gonzalez v. City of Aurora, 535 F.3d 594 (7th Cir. 2008) (stating that plaintiffs could have used ensemble mapmaking to prove their alleged harm, though they did not in this case).

84 Common Cause v. Rucho, 279 F. Supp. 3d 587 (M.D.N.C.), *vacated*, 138 S. Ct. 2679, *remanded to* 318 F. Supp. 3d 777 (M.D.N.C. 2018) (requiring further consideration in light of *Gill v. Whitford*).

85 *Id.* at 642.

Republican members of Congress than the challenged plan did.[86] This analysis can also be used to compare an individual voter's district-wide partisan environment with many possible alternative plans, thus turning a generalized claim of targeting into a concrete demonstration of harm to them individually.

2. Single-District Harms Add a Requirement for Big Data

In contrast to claims of individual harm based on race, the demonstration of individual harm based on party requires several kinds of data, including information that is not collected in the Census. First, the drawing of alternative maps requires accurate knowledge of voting precinct boundaries. This is necessary because districts are typically constructed from precincts. Second, it is necessary to know how each precinct voted, so that the voting behavior of an alternative district can be estimated. This latter information comes from election results, unlike race, which comes from the Census. Precincts are normally constructed of multiple census blocks although there is no requirement in all states that boundaries be coterminous.

A single-district claim creates a demand for data and computation. This data is more difficult to acquire than lawyers (and likely, Supreme Court Justices) appreciate.[87] Creating alternative maps requires precinct boundary data for every election in which they wish to measure partisan performance of proposed alternative districts. Voting precinct boundaries are not static, but are frequently changed by state legislatures, by local election administrators, or by both. This could act as a bar to plaintiffs without the resources or backing of outside organizations. Efforts are now underway to make such information available broadly.[88]

For plaintiffs lacking money or informational resources, prospective plaintiffs may find it more attractive to demonstrate harms at a statewide level using simple statistical measures. It should be noted that the Roberts opinion applies specifically to standing. Indeed, he noted that "we need not

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86 *Id.* at 643–45.

87 *See* Michal Migurski, *Open Precinct Data*, MEDIUM, Apr. 9, 2018, https://medium.com/planscore/open-precinct-data-eec479287715.

88 One example of such an effort is OpenPrecincts.org, an initiative of the Princeton Gerrymandering Project which seeks to create a national database of precinct boundaries and election results and develop tools with which to use them. *See* OPENPRECINCTS, http://openprecincts.org/ (last visited Oct. 11, 2019).

doubt the plaintiffs' math."[89] Once the plaintiffs have established standing, statistical measures of statewide harms may still be useful. Thus, when combined with traditional legal evidence like witness testimony and legislative records, a plaintiff has multiple ways to demonstrate vote dilution.

B. Justice Kagan's Statewide Harms Theory: Maps and Statistical Tests Are Both Sufficient

While the theory of vote dilution has long been at the center of voting rights theories,[90] partisan gerrymandering "causes other harms"[91] than those suffered by individual voters. In a four-vote concurrence in *Gill v. Whitford*, Justice Kagan states that partisan gerrymanders can "infringe [upon] the First Amendment rights of association held by parties, other political organizations, and their members."[92] Rather than measuring the "harm" for Article III standing purposes by the relative strength of an individual voter's ballot, associational harms from gerrymandering could include increased difficulty in party "fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office."[93] Gerrymanders, says Kagan, weaken a party's ability to perform all of these functions because gerrymandering places the state party at an "enduring electoral disadvantage."[94] Because these harms are suffered by parties or other groups across district lines, they have no need to prove district-by-district harm to satisfy the requirements of Article III.

In these cases, standing would be established by (1) proving that the current plan, as enacted, is a partisan gerrymander; and (2) that the gerrymander's deleterious effects on the party or organization diminish the organization's ability to advance its goals or recruit others to its fold. As with district-by-district claims, the former point could be proven via either alternative maps or an outlier analysis. Indeed, Dr. Mattingly offered this exact argument in analyzing the makeup of North Carolina's congressional

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89 Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018).

90 Indeed, vote-dilution cases have been possible under the Constitution since *Gomillion v. Lightfoot* identified a dilution cause of action under the Fifteenth Amendment. 364 U.S. 339 (1960). However, modern dilution claims are frequently based on section 2 of the Voting Rights Act rather than the Fifteenth Amendment.

91 *Gill*, 138 S. Ct. at 1934 (Kagan, J., concurring).

92 *Id.* at 1938.

93 *Id.*

94 *Id.*

districts as a whole in the federal partisan gerrymandering case *Common Cause v. Rucho*.[95]

Because the inequities of gerrymandering can manifest themselves in different ways in different states, there is no single mathematical measure which courts can apply in all circumstances. Indeed, there are many tests a court receptive to such claims could use to measure partisan intent.[96] These tests should not be thought of as being numerous to the point of confusion. Instead, they should be considered as comprising a diverse toolkit, being applicable to a diversity of situations.

Tests may be categorized into two broad groups: tests of inequality of opportunity and tests of inequitable outcomes.[97] Judges applying a familiar test of discriminatory intent and discriminatory effect could simply look to the variety of tests which all measure the same constitutional harm (and frequently reach the same conclusion about the presence of partisan gerrymandering) to determine whether discriminatory intent or discriminatory effect exists. Indeed, the Justices were informed of this argument by amici in *Gill*.[98]

Proving both intent and effects is necessary to satisfy standing under Justice Kagan's formulation of standing because plaintiffs must prove an "enduring electoral disadvantage."[99] For example, when measuring for inequality of opportunity, measuring for consistent advantage (the mean-median difference)[100] is most accurate in large, closely contested states. But

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95 279 F. Supp. 3d 587, 644 (M.D.N.C. 2018).

96 *Id.* at 1933 (citing Brief of Heather K. Gerken et al. as Amici Curiae Supporting Appellees at 27, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161) (citing Sam Wang, *Let Math Save Our Democracy*, N.Y. TIMES, Dec. 5, 2015, https://nytimes.com/2015/12/06/opinion/sunday/let-math-save-our-democracy.html)).

97 For more on this, see *infra* Part V.

98 *See* Brief for Heather K. Gerken et al. as Amici Curiae Supporting Appellees at 19–21, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

99 *Gill*, 138 S. Ct. at 1938.

100 In large states with parties closely divided in strength, engineering a representational advantage usually results in a large mean-median difference. Wang et al., *An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into Tests of Opportunity and Outcome*, 17 ELECTION L.J. 302, 309–10 (2018). Developed by Karl Pearson in 1895, the mean-median difference compares the average statewide vote captured by each party with the median district (the district that falls in the middle when they are ranked by one party's vote share). A map which does not mistreat one party would have a difference between the mean and median that is close to zero; a map which does

in states where one party dominates, measures of uniform wins (the chi-squared test)[101] can identify when a gerrymander has occurred.

III. THE FOUNDATION: STATE CONSTITUTIONAL PROVISIONS WHICH CAN COMBAT GERRYMANDERING, SORTED INTO THE DISTRICT-BY-DISTRICT VS. STATEWIDE FRAMEWORK

Chief Justice Roberts and Justice Kagan offer two different paths to vindicating representational rights in courts. But their ideas are not limited to federal law. State constitutions protect these same rights, and more. Federal and state law work together to determine the rules and conduct of local elections.[102] Under this federalist arrangement, the Supreme Court defers to a state supreme court which bases its opinion solely on issues of state constitutional law.[103] When there are federal and state issues intertwined in a case, the Adequate and Independent State Grounds Doctrine can prevent the U.S. Supreme Court from reviewing the state court's decision so long as the opinion rests substantially on state law.[104]

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mistreat one party would see its median district tilted strongly toward one party, meaning one party gained a consistent advantage in the map's districts.

101 In large states in which one party dominates the political landscape, the natural distribution of districts would create a "median" district which strongly favors one party over another. *Id.* at 309–10. Thus, analysts substitute in the chi-squared test for the mean-median difference. In these single-party states, a map drawn without partisan intent would be expected to produce districts for the dominant party which vary in strength. Some are blowout wins for the party, while others are carried by narrow margins. A partisan gerrymander in these states would seek to maximize its wins by making its wins small enough to avoid wasting votes, but large enough to secure its majority for the next decade. The chi-squared test identifies this artificial uniformity, and the underlying intent, in ways the other tests cannot.

102 *See* U.S. CONST. art. I, § 4 ("The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.").

103 *See* Donald L. Bell, *The Adequate and Independent State Grounds Doctrine: Federalism, Uniformity, Equality and Individual Liberty*, 16 FLA. ST. U. L. REV. 365, 365–66 (1988); *see also* Robert Barnes, *Supreme Court Refuses to Stop New Congressional Maps in Pennsylvania*, WASH. POST (Mar. 19, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-refuses-to-stop-new-congressional-maps-in-pennsylvania/2018/03/19/128d9656-215e-11e8-badd-7c9f29a55815_story.html.

104 *See* Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1053–54 (1999) ("The United States Supreme Court has constitutional and statutory authority to review the final judgments of state courts in cases involving federal questions. Under the Adequate and Independent State Grounds Doctrine . . . , however, the Supreme Court will not

Because state supreme courts are the final authority for interpreting their own states' constitutions, similarly worded provisions across different states can have extremely varied interpretations. Some courts interpret their constitutional protections of freedom of speech, association, and equal protection in lockstep with their federal analogues. In these cases, state supreme court rulings depend on federal interpretations, and the Supreme Court may review those decisions. Other states can give their constitutional provisions their own independent meaning, affording greater protections than the Federal Constitution.[105] In these latter cases, state supreme courts have the option of looking to intellectual arguments laid out by Justices Roberts and Kagan in *Gill*, whether or not those arguments are eventually used to make federal law. Both Roberts' district-by-district theory and Justice Kagan's statewide theory can easily be applied to protections anchored in state law. In short, as the final arbiters of their founding documents, state courts are free to strike down unfair districting schemes.[106] We will next show that state courts have a longstanding tradition of doing so.

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review a . . . final opinion on state law that is independent of the federal issues and adequate to support the judgment. In other words, if the Supreme Court's opinion on the federal issues would not change the outcome of the case because the judgment rests on unreviewable state law, the Supreme Court will not review the federal issues in the case.") (internal citations omitted). However, the Adequate and Independent State Grounds Doctrine is not the total bar that avoiding federal issues altogether is, because the Supreme Court may review the case to determine if there are "adequate and independent" grounds for the state court's opinion. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1044 (1983) (holding that the Supreme Court did not lack jurisdiction to decide a case on the asserted ground that the decision of the Michigan Supreme Court rested on adequate and independent state grounds). Thus, while including federal issues in a complaint may nevertheless avoid federal review if a state court bases its ultimate opinion on adequate and independent state grounds, it is more advantageous for the plaintiffs to base their claim solely on state law grounds if they wish to preserve immunity from federal review.

105 Rather than provide guidance on how each state's courts have historically interpreted these decisions in the gerrymandering context (if they have at all) ourselves, we confine our analysis to a discussion of constitutional guarantees. Litigators can apply their knowledge of their individual states to determine historical interpretations of each pertinent provision, and, if necessary, develop the arguments necessary to persuade a state court to adopt the arguments articulated therein.

106 While we do not warrant that we have found every case throughout American history to strike down a redistricting plan under state constitutional law, any further cases found by resourceful researchers would only reinforce the core thesis of this Part: that state courts have a long and rich history of protecting representational rights by striking down districting schemes for violating their respective constitutions.

A. State Constitutional Protections Against District-by-District Partisanships

By defining partisan vote dilution as an infringement on an individual's right to vote, Chief Justice Roberts defined a theory focused on individual liberties. State constitutions contain three protections which plaintiffs could bring on a district-by-district basis: (1) Equal Protection; (2) Due Process; and (3) Prohibitions on Uniform or Special Laws. While some states have interpreted these provisions to mirror the Federal Constitution, they are not bound to do so in the future. Conversely, many states offer greater protections than those afforded by the Federal Constitution's Fourteenth Amendment. In this respect, state and federal law can be seen as complementary and equal partners in protecting voting rights.

1. Equal Protection/Due Process

All fifty state constitutions contain provisions guaranteeing equal protection of the laws, due process of law, or a similar provision[107] which state courts have interpreted to be analogous.[108] While it is most common to make a direct analogy to constitutional protections, several states, including Alaska and California, interpret their provisions more broadly than the federal Equal Protection Clause. In *Hickel v. Southeast Conference*,[109] the Alaska Supreme Court applied the state's Equal Protection Clause to the recently enacted legislative districting plan and struck parts of it down by stating:

> "In the context of voting rights in redistricting and reapportionment litigation, there are two principles of equal protection, namely that of 'one person, one vote'—the right to an equally weighted vote—and of 'fair and effective representation'—the right to group effectiveness or an equally powerful vote." The former is quantitative, or purely numerical, in nature; the latter is qualitative.
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> The equal protection clause of the Alaska Constitution has been interpreted along lines which resemble but do not precisely parallel the interpretation given the federal clause. While the first part, "one person, one

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107 While this Article focuses on the way state courts give these general provisions broad meaning, potentially encapsulating a future partisan gerrymandering challenge, they have been used in ways similar to the Federal Constitution to find racial and equipopulation harms in redistricting. *See, e.g.*, *In re* S. J. Res. of Legis. Apportionment 1176, 83 So. 3d 597, 618 (Fla. 2012); *infra* Appendix A (column on state provisions guaranteeing equal population among its legislative or congressional districts).

108 *See* Appendix A, *infra*, for a table containing all fifty constitutional provisions.

109 846 P.2d 38, 47 (Alaska 1992).

> vote," has mirrored the federal requirement, the second part, "fair and effective representation," has been interpreted more strictly than the analogous federal provision.[110]

Several other state courts have also taken a more expansive view of the equal protection concept than their federal analogues in other contexts. The country's most influential state court, the Supreme Court of California,[111] has held that its Equal Protection Clause has "independent vitality" which can guarantee greater protections than those afforded by the federal clause.[112] The Idaho Supreme Court has held that its constitution "stands on its own, and although we may look to the rulings of the federal courts on the United States Constitution for guidance in interpreting our own state constitutional guarantees, we interpret a separate and in many respects independent constitution."[113] The Supreme Court of Illinois notes that, while it looks for "guidance and inspiration" from the federal courts "in interpreting our State constitution, we make the final determination."[114] And the Michigan Supreme Court has held that it has a "constitutional duty" to independently interpret the Michigan Constitution.[115]

In short, guarantees of equal protection and due process are present in every state constitution, and are nearly universally applied to laws passed by their state legislatures. The examples of the Alaska, Idaho, California, and

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110 *Hickel*, 846 P.2d at 47 (quoting Kenai Peninsula Borough v. State, 743 P.2d 1352, 1366 (Alaska 1987)) (citing Groh v. Egan, 526 P.2d 863 (Alaska 1974)) (clarifying the meanings of "one person, one vote" and "fair and effective representation") (internal citations omitted).

111 *See* Stephen J. Choi, Mitu Gulati, and Eric Posner, *Which States Have the Best (and Worst) High Courts?* 1–2 (John M. Olin Program in Law and Economics, Working Paper No. 405, 2008) (ranking the Supreme Court of California as the court whose majority opinions are cited most frequently by out-of-state state courts).

112 *See* Assembly v. Deukmejian, 639 P.2d 939, 960 (Cal. 1982) ("Since [Legislature v. Reinecke, 492 P.2d 385 (Cal. 1972) (in bank)], this court has also held that our state's equal protection clause, adopted in 1974, has 'independent vitality' which at times may require greater protection than that afforded by the federal Constitution.") (internal citations removed).

113 Hellar v. Cenarrusa, 682 P.2d 539, 543 (Idaho 1984).

114 People *ex rel.* Burris v. Ryan, 588 N.E.2d 1023, 1027 (Ill. 1991).

115 *See In re* Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 496 (Mich. 2007) ("When interpreting our constitution, therefore, '[t]he right question is not whether [the] state's guarantee is the same as or broader than its federal counterpart as interpreted by the [United States] Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.' And though the United States Supreme Court's interpretation of the Federal Constitution may be a polestar to help us navigate to the correct interpretation of our constitution, it is no more than that. Ultimately, it is our constitutional duty to independently interpret the Michigan Constitution.") (internal citations omitted).

Illinois Supreme Courts show that in states dominated by either major party, courts are not afraid to wield those provisions against laws that threaten the liberty of their citizens. Combined with the equal protection argument laid out by Chief Justice Roberts, these guarantees offer an intuitive and straightforward rationale for litigation against partisan gerrymanders.

2. Prohibitions on Special or Local Laws

Thirty-four states[116] prohibit the passage of special or local laws. These prohibitions have most often been construed to mirror federal equal protection guidelines, frequently applying rational-basis review to such laws.[117] But several states have interpreted the prohibition more strictly, applying heightened scrutiny under the theory that these laws violate the rights of individuals to be treated equally under the law.

Of particular interest are California, Georgia, Kentucky, and Ohio. The California Supreme Court applies heightened scrutiny to all cases in which the plaintiff is a member of a suspect class.[118] The Supreme Court of Georgia applies a variable standard of scrutiny depending on the status of the plaintiff, but the standard falls above rational basis.[119] The Kentucky Supreme Court, meanwhile, applies a standard slightly higher than rational basis,[120] as does the Ohio Supreme Court.[121] State courts in North Dakota,[122]

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116 *See infra* Appendix B.

117 Courts applying rational basis review will uphold a statute or regulation if it is rationally related to a legitimate governmental interest. *See* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016) (discussing rational basis review).

118 *See In re* Mary G., 151 Cal. App. 4th. 184, 198–99 (Cal. Ct. App. 2007).

119 Dev. Auth. v. State, 684 S.E.2d 856, 859 (Ga. 2009) (holding that the state constitution's requirement of uniform operation of general laws requires "alike operation" on all persons who come under its scope).

120 *See* Parker v. Webster Cty. Coal, LLC (*Dotiki Mine*), 529 S.W.3d 759, 770 (Ky. 2017) (holding that legislation is unconstitutional special law when it arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others).

121 *See* State *ex rel.* Zupancic v. Limbach, 568 N.E.2d 1206, 1211–12 (Ohio 1991) (holding that a statute is constitutional under Ohio's prohibition on special laws if it achieves a legitimate governmental interest and operates equally on all persons or entities or persons included within its provisions).

122 *See* State v. Hamilton, 129 N.W. 916, 918 (N.D. 1910) (holding that a law for the nomination of candidates for office which required different levels of support in different counties in the state was unconstitutionally non-uniform).

Pennsylvania,[123] and Kansas[124] have used the provisions in the past to strike down statutes relating to elections or education that treated classes of persons differently.

These prohibitions on local or special laws are helpful to plaintiffs bringing vote-dilution claims because they are conceptually independent of the Federal Constitution. Without a direct federal analog, a state court may feel freer to depart from U.S. Supreme Court interpretations of equal protection and establish its own, independent standards. This raises the possibility that these provisions, rather than due process or equal protection analogs, may offer plaintiffs hope to bring a district-by-district claim using Justice Roberts' theory, even if a Fourteenth Amendment-based claim is someday found to be non-justiciable.

B. Finding Proscriptions Against Partisanship in Statewide-Harm Constitutional Provisions

State constitutional protections are not limited to the district-by-district framework envisioned by Chief Justice Roberts. Claims can also be grounded in the rights of free speech and association, as well as mandates that elections be free, equal, or pure.

1. Freedom of Speech/Expression/Association (Retaliation Theory)

All fifty state constitutions protect the freedom of speech in various ways. The most common structure is exemplified by Alabama, which protects the "liberty of speech or of the press" and permits any person to "speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty."[125] Some states go further rhetorically: North Carolina's Constitution says that "[f]reedom of speech and of the press are two of the

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123 *See* Butcher v. Bloom, 203 A.2d 556, 573 (Pa. 1964) ("[A] legislative scheme which creates single-member districts and multi-member districts in an arbitrary manner would be objectionable. . . . [I]n the absence of any reasonable explanation or justification (historical or otherwise), such districting might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious.").

124 State *ex rel.* Jackson v. Sch. Dist. No. 2, 34 P.2d 102, 103 (Kan. 1934) (holding that a statute detaching land from one school district and attaching it to another was an unconstitutional attempt to delegate legislative power to certain landowners, making the law a special law).

125 ALA. CONST. § 4; *see also* CAL. CONST. art. I, § 2(a) ("Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.").

great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse."[126] Furthermore, forty-seven state constitutions guarantee freedom of association, the exceptions being Maryland, Minnesota, and New Mexico.[127]

The U.S. Supreme Court has used the First Amendment's speech protections to strike down election laws.[128] This is particularly true in the realm of campaign finance. In *Citizens United v. Federal Election Commission*,[129] the Court struck down the prohibition in the Bipartisan Campaign Reform Act of 2002 (BCRA) which prohibited corporations and labor unions from making independent expenditures in federal elections. Holding that prior precedents of the Court finding a right to restrict corporate spending in politics to prevent distortions in electoral discourse interfered with the open marketplace of ideas protected by the First Amendment, the Supreme Court overruled the line of cases as unconstitutional.[130] The Court extended this logic to strike down aggregate contribution limits in 2014,[131] leaving contribution limits to individual campaigns and bans on soft money as the only remaining restriction of BCRA.

Although the Supreme Court has not yet extended First Amendment-based reasoning to redistricting, Justice Anthony Kennedy first discerned such a route in his concurrence in *Vieth v. Jubelirer*.[132] He wrote that targeting the placement of voters in districts based on partisanship to reduce their power was a form of viewpoint discrimination.[133] Justice Kagan furthered

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126 N.C. CONST. art I, § 14.

127 Rather than reading a "freedom of association" into another constitutional provision, such as substantive due process, all three states' highest courts have largely applied the Supreme Court's incorporation doctrine of the First Amendment against the states when doing an association analysis.

128 Notably, the Court has also used the First Amendment to abolish government censorship in other areas, even in gruesome areas such as pornographic depictions of animal cruelty, so-called "crush videos." United States v. Stevens, 559 U.S. 460 (2010) (declaring statute criminalizing the depiction of animal cruelty unconstitutional prohibition on free speech).

129 558 U.S. 310, 361–62 (2010).

130 *Id.* at 354 ("*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment.").

131 McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014).

132 541 U.S. 267 (1994).

133 *Id.* at 314 (Kennedy, J., concurring) ("First Amendment concerns arise when a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First

this theory in her own concurrence in *Gill v. Whitford*.[134] The Supreme Court declined to use this reasoning in 2019 in two cases: *Benisek v. Lamone* and *Rucho v. Common Cause*.[135] Nonetheless, state supreme courts may still use Justice Kagan's concurrence as guidance for how to pursue their claims under state constitution-based protections of viewpoint and association.

Historically, most state courts which have struck down election laws as violations of Free Speech protections have modeled, if not entirely followed, the U.S. Supreme Court's doctrinal lead by focusing on campaign finance regulations. Foreshadowing the Roberts Court's approach, in 2000, the Supreme Court of Nebraska struck down an independent expenditure law as an infringement on free speech under the state constitution's Free Speech Clause.[136] Some state supreme courts have resisted non-retaliation arguments under a Freedom of Speech argument, instead reframing quasi-vote-dilution cases using Equal Protection arguments.[137] However, with insights of Justice Kagan's concurrence available to them, state courts may be more receptive to a retaliation argument under First Amendment analogues in future litigation.

2. Free and Equal/Purity of Elections Clauses

We now turn to a state constitutional provision which lacks a counterpart in the Federal Constitution: a mandate that elections be some combination

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Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.").

134 Gill v. Whitford, 138 S. Ct. 1916 (2018) (Kagan, J., concurring).

135 These two cases were consolidated in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

136 State *ex rel.* Steinberg v. Moore, 605 N.W.2d 440, 449 (Neb. 2000) ("Based upon our independent review, we determine that § 14, as codified at § 32-1614, unconstitutionally infringes upon the right of groups and committees to engage in political speech through the making of independent expenditures as defined by Nebraska law.").

137 *See* Legislative Redistricting Cases, 331 Md. 574, 601, 629 (Md. 1993) ("Skinner and Weiner claim that the population disparities among the legislative districts in the Governor's plan also violate their First Amendment right to freedom of speech. They argue that by assigning them fewer representatives per resident than other areas, the Governor's plan dilutes their vote and hence their 'political expression' relative to other Maryland citizens. The Special Master rejected this assertion 'as simply another way of framing the contentions under the 14th Amendment' with regard to population equality. The Special Master was right"). While the quoted language relates to the Court of Appeals of Maryland (Maryland's highest court) analyzing the Federal Constitution, it is likely that the Court's interpretation would be similar under its own state constitution because it could have found for Skinner and Weiner under the state's guarantees, but elected not to do so.

of free, equal, or pure. Twenty-eight state constitutions have provisions calling for elections to be "free and equal," "free and fair," or meet some other similar standard like "purity." For example, Arkansas's Constitution similarly guarantees that "[e]lections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage."[138] Vermont's Constitution goes even further, noting that elections "ought to be free and without corruption."[139] And Colorado's Constitution mandates purity in its elections: "The general assembly [sic] shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise."[140] These provisions date back to the earliest days of the United States, appearing in the constitutions or bills or declarations of rights of Pennsylvania, North Carolina, and Virginia in 1776; Vermont in 1777; Massachusetts in 1780; New Hampshire in 1784; and Kentucky and Maryland in 1792.

In early 2018, the Pennsylvania Supreme Court relied on such a provision in its own Constitution to strike down the state's congressional map. In *League of Women Voters v. Commonwealth*,[141] the Pennsylvania Supreme Court held that under Article I, Section 5 of the Pennsylvania Constitution, which mandates that elections "shall be free and equal," laws placing voters into individual districts must "make their votes equally potent"[142] in their ultimate elections for congressional representatives:

> [O]ur Commonwealth's commitment to neutralizing factors which unfairly impede or dilute individuals' rights to select their representatives was borne of our forebears' bitter personal experience suffering the pernicious effects resulting from previous electoral schemes that sanctioned such discrimination. Furthermore, adoption of a broad interpretation guards against the risk of unfairly rendering votes nugatory, artificially entrenching representative power, and discouraging voters from participating in the electoral process because they have come to believe that the power of their individual vote has been diminished to the point that it "does not count." A broad and robust interpretation of Article I, Section 5 serves as a bulwark against the adverse consequences of partisan gerrymandering.[143]

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138 ARK. CONST. art. III, § 2.

139 VT. CONST. ch. I, art. VIII.

140 COLO. CONST. art VII, § 11.

141 178 A.3d 737 (Pa. 2018).

142 *Id.* at 792–93 (Pa. 2018) (quoting Patterson v. Barlow, 60 Pa. 54, 75 (1869) (upholding a poll tax against claims that it violated the "free and equal" clause)); *id.* at 814.

143 *Id.*

The decision relied solely on the "free and equal" provision, but also invoked protections in the Pennsylvania Constitution of free speech, freedom of assembly, equal protection, compactness, contiguity, and respect for the integrity of political subdivisions in support of it.[144]

However, although the Pennsylvania Supreme Court ultimately described the harm they found as "vote dilution," it was not the same vote dilution contemplated in *Gill* by Chief Justice Roberts. Instead, it was the vote dilution to an individual voter, which necessarily implicates the votes of other voters, requiring wholesale changes to the map as a remedy.[145]

Pennsylvania's and North Carolina's state courts are not the only ones to use the guarantees of free, equal, or pure elections to strike down election-related laws. Over a century ago, the Colorado Supreme Court held that the connivance of private corporations with county officials to create voting precincts controlled by corporations to the exclusion of the people violated the state's guarantee to all citizens of "the free exercise of the right of suffrage."[146] And in 2009, the Arizona Court of Appeals held that its constitution's guarantee of "free and equal" elections was implicated when ballot machines did not properly count ballots.[147] Judicial interpretations of

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144 *Id.*

145 *Id.* at 804–14.

146 Neelley v. Farr, 158 P. 458, 466–68 (Colo. 1916) ("These companies plainly connived with certain county officials to secure the creation of election precincts, bounded so as to include their private property only, and with lines marked by their own fences, or guarded by their own armed men, and within which were only their own employés. They excluded the public from entrance to such election precincts, labeled the same as private property, and warned the public that entrance thereon constituted trespass. They denied the right of free public assemblage within such election precincts, and likewise the right of free or open discussion of public questions therein. They denied the right to circulate election literature or the distribution of the cards of candidates within such precincts. They secured the selection of their own employés exclusively as judges and clerks of election, and by the location of precinct boundaries no other than their employees could so serve. They apparently made the registration lists from their pay rolls. They kept such lists in their private places of business and in charge of their employés. They prohibited all public investigation within such election precincts as to the qualification of the persons so registered as electors of the precinct. Through their employés acting as election officials they assisted numerous non English-speaking persons to vote by marking their ballots for them, in plain violation of the law. They provided other non English-speaking persons with the fraudulent device heretofore described, by which such persons might be enabled to vote the Republican ticket without being able to read either the name of the candidate or the party ticket for which they so voted. They coerced and intimidated their employés in many instances.").

147 *See* Chavez v. Brewer, 214 P.3d 397, 408 (Ariz. Ct. App. 2009) (holding that the plaintiffs had stated a valid cause of action under the state constitution's "free and equal" provision based on voting

a "pure" election are less common, but they typically center on issues where some event has occurred which throws the election's result into doubt. In the partisan gerrymandering context, an argument could be made that the votes of a targeted group could be so diluted as to render the legitimacy of an election in doubt. These examples, as well as others, provide a rich history of case law which plaintiffs in various states can rely on to expand the doctrine governing partisan gerrymandering.

A few state constitutions are even more explicit in their calls for equitable representation, providing explicitly for "equal representation" or "an equal right to elect" state officials. These provisions could be interpreted as implying that each vote should have an equal effect in determining representation.[148] Such provisions are found in several states with no mechanism for enacting independent redistricting commissions, such as North Dakota ("The legislative assembly shall guarantee, as nearly as practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates"),[149] South Carolina ("All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office"),[150] and West Virginia ("Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved").[151] The West Virginia Supreme Court of Appeals has already used this language to strike down laws electing delegates to a state constitutional convention on malapportionment grounds.[152]

Eleven states require that elections be "pure." Vermont calls for elections to be "free and pure,"[153] while Illinois requires that the legislature "insure . . .

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machines not counting ballots properly); *see also* Gunaji v. Macias, 31 P.3d 1008, 1013 (N.M. 2001) (discussing the New Mexico Constitution's "free and open" elections clause).

148 *See, e.g.*, MASS. CONST. pt. I, art. IX ("[T]he inhabitants of this commonwealth . . . have an equal right to elect officers, and to be elected, for public employments."); N.H. CONST. pt. I, art. XI ("[E]very inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.").

149 N.D. CONST. art. IV, § 2.

150 S.C. CONST. art. I, § 5.

151 W. VA. CONST. art. II, § 4.

152 *See* State *ex rel.* Smith v. Gore, 143 S.E.2d 791, 794–95 (W. Va. 1965).

153 VT. CONST. ch. I, art. VIII.

the integrity of the election process."[154] Michigan's Constitution mandates that the Legislature "enact laws . . . [to] preserve the purity of elections."[155] Michigan's Supreme Court interpreted this clause to mean that "any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm," defining "purity of elections" as requiring "fairness and evenhandedness in the election laws."[156] Tennessee's Constitution gives the General Assembly discretion on whether to enact laws securing "the freedom of elections and the purity of the ballot box."[157] A multitude of cases have construed the applicability of purity constitutional provisions to individual voting rights such as voter identification and ballots.[158]

To apply the free-and-equal and purity provisions of state constitutions to block excessively partisan redistricting, the next step would be identifying indicia of an offense. Such evidence would include single-party control of redistricting, as well as patterns of behavior such as the active exclusion of the opposing major political party in the redistricting process. Mathematical evidence could come from a wide variety of tests which can be sorted into two categories: violations of the opportunity to elect representatives, and inequitable outcomes.[159]

To summarize, guarantees of free, equal, and elections have a rich history in American jurisprudence. They have been used to strike down unfair or biased election laws for more than a century. The recent example set by the Pennsylvania Supreme Court shows how such a route may be used to regulate extreme partisan gerrymanders.

C. Regulations on Partisanship in Districting & Competitiveness

Some states have adopted constitutional provisions which regulate the partisan outcomes in drawing district lines. These fall into two categories: (1) prohibitions on district lines favoring parties or persons, whether unduly or explicitly; and (2) requirements that districts be competitive.

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154 ILL. CONST. art. III, § 4.

155 MICH. CONST. art. II, § 4(2).

156 McDonald v. Grand Traverse Cty. Election Comm'n, 662 N.W.2d 804, 816–17 (Mich. Ct. App. 2003) (quoting Socialist Workers Party v. Sec'y of State, 317 N.W.2d 1, 10 (Mich. 1982)) (quoting Wells v. Kent Cty. Bd. of Election Comm'rs, 168 N.W.2d 222, 227 (Mich. 1969)); *see also* Elliott v. Sec'y of State, 294 N.W. 171, 173 (Mich. 1940).

157 TENN. CONST. art. IV, § 1.

158 *See infra* Appendices A, B.

159 *See, e.g.*, Samuel S.-H. Wang et al., *An Antidote to Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into Tests of Opportunity and Outcome*, 17 ELECTION L.J. 302, 305 (2018).

1. Prohibitions on Redistricting to Protect a Party or Person

Sixteen states have adopted reforms explicitly aimed at eliminating partisan gerrymandering. They have inserted language into their state constitutions or enacted statutes prohibiting the construction of districts to either favor or disfavor a political party, incumbent, or candidate. Other states have prohibited the use of political data altogether, except where necessary to comply with the Voting Rights Act. These tools are potentially effective at attacking gerrymanders, subject to interpretation by their state supreme courts.[160] And because these provisions directly attack partisan gerrymanders,[161] they will obviously be cited in states which contain them.[162]

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160 Because stare decisis is not an absolute constraint on courts of last resort, state supreme courts which have in the past interpreted constitutional prohibitions on partisan gerrymandering or traditional districting principles strictly may nevertheless change course in later decades. For an example of such vacillation on proper redistricting standards, see the varying interpretations of the Maryland Court of Appeals regarding the State's compactness metric. *Compare In re* 2012 Legislative Districting of the State, 80 A.3d 1073, 1082 (Md. 2012) ("These challengers, as do all challengers to a legislative reapportionment plan, carry the burden of demonstrating the law's invalidity. Once, however, a proper challenge under Art. III, Sec. 4 is made and is supported by 'compelling evidence,' the State has the burden of producing sufficient evidence to show that the districts are contiguous and compact, and that due regard was given to natural and political subdivision boundaries.") *with In re* Legislative Districting, 805 A.2d 292, 326 (Md. 2002) ("[I]f in the exercise of discretion, political considerations and judgments result in a plan in which districts: are non-contiguous; are not compact; with substantially unequal populations; or with district lines that unnecessarily cross natural or political subdivision boundaries, the plan cannot be sustained. That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution 'trumps' political considerations. Politics or non-constitutional considerations never 'trump' constitutional requirements.") *and* Legislative Redistricting Cases, 629 A.2d 646, 654 (Md. 1993) ("[Districts may assume] an unusual shape in order to comply with the various other legal requirements for districts, such as population equality and due regard for political boundaries.").

161 *See, e.g.*, League of Women Voters of Fla. v. Detner, 172 So.2d 363, 370–75 (Fla. 2015) ("These 'express new standards' thus afford Florida citizens 'explicit constitutional protection' under article III, section 20, of the Florida Constitution, 'against partisan political gerrymandering.'").

162 The states which contain some variation on this provision in either their statutes or constitutions (and thus, the only states where this provision is pertinent) are Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Michigan, Montana, New York, Ohio, Oregon, Utah and Washington. *See* ARIZ. CONST. art. IV, pt. II, § 1(15) ("Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered."); CAL. CONST. art. XXI, § 2(e) ("The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political

Outside of those states, these provisions offer little to prospective plaintiffs,

party."); COLO. CONST. art. V, §§ 44.3(4)(a) & 48.1(4)(a) ("No map may be approved by the commission or given effect by the supreme court if: (a) it has been drawn for the purpose of protecting one or more incumbent members, or one or more declared candidates, of the [united states house of representatives/senate or house of representatives], or any political party . . . ."); DEL. CONST. art. II § 2A ("Redistricting and reapportionment . . . shall be accomplished in accordance with the following criteria: each new Representative District shall, insofar as is possible . . . shall not be so created as to unduly favor any person or political party."); FLA. CONST. art. III, §§ 20, 21 ("In establishing congressional district boundaries . . . no apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent"; "In establishing legislative district boundaries . . . no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . ."); HAW. CONST. art. IV, § 6(2) ("No district shall be so drawn as to unduly favor a person or political faction."); MICH. CONST. art. IV, § 6(13) ("[C]ommunities of interest do not include relationships with political parties, incumbents, or political candidates. Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage shall be determined using accepted measures of partisan fairness. Districts shall not favor or disfavor an incumbent elected official or a candidate."); N.Y. CONST. art. III, § 4(c)(5) ("Districts shall not be drawn . . . for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."); OHIO CONST. art. XI, § 6(A) ("No General Assembly plan shall be drawn primarily to favor or disfavor a political party."); WASH. CONST. art. II, § 43(5)("The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group."); Idaho Stat. Code 72-1506(8) ("Counties shall not be divided to protect a particular political party or a particular incumbent."); Iowa Code § 42.4(5) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group . . . . In establishing districts, no use shall be made of any of the following data: (1) Addresses of incumbent legislators or members of Congress. (2) Political affiliations of registered voters. (3) Previous election results."); Mt. Code Ann. 5-1-115(3) ("A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress. The following data or information may not be considered in the development of a plan: (a) addresses of incumbent legislators or members of congress; (b) political affiliations of registered voters; (c) partisan political voter lists; or (d) previous election results, unless required as a remedy by a court."). Oregon Rev. Stat. 188.010 ("The Legislative Assembly or the Secretary of State, whichever is applicable, shall consider the following criteria when apportioning the state into congressional and legislative districts: . . . (2) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person."); Utah Code Ann. 20A-19-103(3) ("The Legislature and Commission may not divide districts in a manner that purposefully or unduly favors or disfavors any incumbent elected official, candidate, or prospective candidate for elective office, or any political party."). Missouri uses a slightly different provision; instead of a negative provision like the prohibitions above, it uses a positive provision mandating partisan fairness in the construction of districts. *See* MO. CONST. art. III, § 3(c)(1)(b) ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. Partisan fairness means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."). It should be noted that the majority of states with these provisions also use redistricting commissions, of some form, to redraw district lines.

although some state supreme courts have been willing to entertain common law prohibitions on partisan gerrymandering in unique circumstances.[163]

2. Competitiveness/Proportional Representation

Four states, Arizona,[164] Colorado,[165] Missouri,[166] and Washington[167], have laws which specifically call for creating competitive districts. Ohio requires a different concept, proportional representation.[168] These provisions can combat gerrymandering by making districting plans strive for competition in districts, or satisfy some type of distribution of seats depending on a state's two-party vote share. As with prohibitions on partisan gerrymandering or the use of political data, these provisions place a direct constraint on how districts may be constructed from a partisan standpoint.

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163 *See, e.g.*, Peterson v. Borst, 786 N.E.2d 668, 669–71 (Ind. 2003) (per curiam) ("[W]e conclude that the Superior Court's adoption of a plan that has been uniformly supported by one major political party and uniformly opposed by the other is incompatible with applicable principles of both the appearance and fact of judicial independence and neutrality. Because of the emergency nature of this appeal, we adopt a plan that we have drawn with the consideration of only factors required by applicable federal and State law, and without consideration of party affiliation or incumbency."); *see also* Burling v. Chandler, 804 A.2d 471, 486 (N.H. 2002) (reapportioning districts to uphold "the fundamental democratic principle of one person/one vote").

164 AZ. CONST. art. IV, pt II, § 1(14)F ("To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals").

165 COLO. CONST. art. V, § 44.3(3)(a) & (d) and § 48.1(3)("(a) Thereafter, the commission shall, to the extent possible, maximize the number of politically competitive districts. . . . For purposes of this subsection, 'competitive' means having a reasonable potential for the party affiliation of the district's representative to change at least once between federal decennial censuses. Competitiveness may be measured by factors such as a proposed district's past election results, a proposed district's political party registration data, and evidence-based analyses of proposed districts.").

166 MO. CONST. art III, § 3(c)(1)(b) ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. Partisan fairness means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency. Competitiveness means that parties' legislative representation shall be substantially and similarly responsive to shifts in the electorate's preferences.").

167 Wash. Rev. Stat. 44.05.090(5) ("The commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition.").

168 OHIO CONST. art. XI, § 6(B) ("The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.").

D. Other Arguments: District-by-District Constitutional Provisions

All of the provisions discussed to this point have addressed how state constitutional provisions may protect more general rights of fairness in redistricting. But plaintiffs should also consider more explicit constitutional mandates with which districting plans must comply. For example, cases relying on compactness can often be seen as a proxy for preventing gerrymandering,[169] and other traditional criteria like contiguity and preserving pre-existing political boundaries contain a rich jurisprudence of striking down districting plans.[170] By pegging their broader arguments about vote dilution and mistreatment of voters to these more tried and true provisions, plaintiffs can give courts a safe path of precedent.

1. Compactness

Thirty-three states require that state legislative districts, congressional districts, or both be compact, either constitutionally or by statute. Compactness has several dozen legally accepted meanings, some based purely on geometric shape and some on population patterns. Courts' struggles with defining compactness have led some state courts to conclude that legislatures themselves get to decide whether a district is compact, effectively neutering the provision altogether.[171] But some state courts see compactness provisions in their intended light, as a check on the power of the legislature. From this conclusion, it necessarily follows that the courts, not legislatures, should determine which definitions of compactness to use when evaluating such claims.[172] Missouri's Constitution states: "In general, compact districts are those which are square, rectangular, or hexagonal in

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169 *See, e.g.*, Micah Altman, *Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders*, 17 POL. GEOGRAPHY 989 (1998); Richard Niemi, Bernard Grofman, Carl Carlucci, and Thomas Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155 (1990).

170 Because these three criteria are considered to be "traditional," the Supreme Court has held that they are the only permissible reasons for which a state may depart from the one person, one vote requirement.

171 *See* Vesilind v. Va. State Bd. of Elections, 813 S.E.2d 739 (Va. 2018) ("(S)ocial scientists have developed at least 50 different methods of measuring compactness.").

172 *See, e.g.*, *In re* 2001 Redistricting Cases, 44 P.3d 141 (Alaska 2002); Hall v. Moreno, 270 P.3d 961 (Colo. 2012); *In re* S. J. Res. Of Leg. Apportionment 1176, 83 So.3d 597 (Fla. 2012).

shape to the extent permitted by natural or political boundaries."[173] Missouri has used this compactness requirement as an explicit check on partisan gerrymandering.[174]

2. Contiguity

Along with compactness, contiguity is one of the oldest redistricting requirements. Forty-two state constitutions require that districts be contiguous, and all fifty states require it in some form (statute, constitution, or judicial precedent).[175] Although a few cases have overturned redistricting plans based on the contiguity requirement, many have "stretched" the provision to include rivers, highways, mountain ranges, or even two corners meeting in a single point.[176] While contiguity is a fairly weak requirement, it does prevent the packing of voters into isolated islands based on their voting

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173 MO. CONST., art. III, § 3(c)(1)(e).

174 *See* State *ex rel.* Barrett v. Hitchcock, 146 S.W. 40, 65 (Mo. 1912) ("There, as here, the evident intention of the people of the state, as manifested in said constitutional provisions, is that, when counties are combined to form a district, they must not only touch each other, but they must be closely united territory, and thereby guard, as far as practicable, the system of representation adopted in the state against the legislative evil commonly known as the 'gerrymander.' In a republican form of government, each citizen should have an equal voice in the enactment of the laws, their interpretation, and execution. This is the true spirit and meaning of our Constitution and laws, and the judge upon the bench, in construing and giving them effect, should put aside party feeling and be governed solely by the spirit of the old proverbial saying, 'Tros Tyriusque mihi nullo discrimine agetur.' Inequality of representation in a republican form of government is just as offensive and unjust as is taxation without representation. Both are repugnant to and inconsistent with the American idea of government and true citizenship.").

175 *See Redistricting Criteria*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx (last updated Apr. 23, 2019); *see also infra* Appendix A.

176 *See In re* Apportionment Law Appearing as S. J. Res. 1 E, 414 So. 2d 1040, 1051 (Fla. 1982) (holding that a district lacks contiguity only when a part is isolated from the rest by the territory of another district, and that because the touching of points means there is no district between two parts of a single district, point contiguity satisfies the contiguity requirement); Bd. of Superiors of Houghton v. Blacker, 52 N.W. 951, 953 (Mich. 1892) (holding that islands in the Great Lakes could be contiguous over water); *In re* Sherill v. O'Brien, 81 N.E. 124 (N.Y. 1907) (holding that the ordinary and plain meaning of the word "contiguous" is not a reference to nearness or proximity, but rather territory which is touching, adjoining, and connected, as distinguished from territory separated by other territory); Parella v. Montalbano, 899 A.2d 1226, 1244–45 (R.I. 2006); Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 849, 869–70 (Ariz. Ct. App. 2005) (holding that a narrow, 103-mile serpentine corridor partially following the Colorado River through the Grand Canyon to connect two Native American tribes' reservations into a single majority-minority district satisfied the contiguity requirement because the district was geographically connected).

history, instead requiring at least some nominal connection between the various points in a district.

3. Preserving Pre-Existing Political Boundaries

Thirty-three state constitutions place limits on dividing local government units or crossing local government boundaries in the creation of election districts.[177] The most frequently addressed government unit is the county.[178] Historically, counties in many cases reflected "communities of interest," another traditional redistricting principle in many state constitutions. Early state constitutions frequently had bicameral legislatures with at least one house based on representation by county, until *Lucas v. 44th General Assembly of Colorado*[179] and *Reynolds v. Sims*[180] declared such systems of representation unconstitutional. These two 1964 cases struck down state prohibitions against crossing political boundaries and created a requirement that districts be of near-equal population (the "one person, one vote" requirement).[181]

A multitude of state courts have found counties to be a critical "administrative community of interest" due to their performance of critical governmental functions and their role in interacting with the state

177 *See, e.g.*, ARIZ. CONST. art. IV, pt. II, §1(14) ("To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts."); CAL. CONST. art. XXI, §2(d)(4) ("The geographic integrity of any city, county, city and county, local neighborhood, or local community of interest shall be respected in a manner that minimizes their division to the extent possible . . . ."); COLO. CONST. art V, §44.3 (2) (a) ("As much as is reasonably possible, the commission's plan must preserve . . . whole political subdivisions, such as counties, cities, and towns."); IOWA. CONST. art. III, § 37 ("When a congressional district is composed of two or more counties it shall not be entirely separated by a county belonging to another district and no county shall be divided in forming a congressional district."); MD. CONST. art. III, § 4 ("Due regard shall be given to natural boundaries and the boundaries of political subdivisions."); N.C. CONST. art. II, § 3(3) ("No county shall be divided in the formation of a senate district . . . ."); N.C. CONST. art. III, § 5(3) ("No county shall be divided in the formation of a representative district . . . .").

178 In Louisiana, counties are referred to as "parishes."

179 377 U.S. 713 (1964).

180 377 U.S. 533 (1964).

181 For examples of cases striking down districting plans for violating the one person, one vote principle, see Gray v. Sanders, 372 U.S. 368 (1963); Legislative Research Comm'n v. Fischer, 366 S.W.3d 905, 919 (Ky. 2012); Fischer v. State Bd. of Elections, 879 S.W.2d 475, 479 (Ky. 1994); *In re* Legislative Districting of State, 805 A.2d 292, 295 (Md. 2002); State *ex rel.* Teichman v. Carnahan, 357 S.W.3d 601, 607 (Mo. 2012); State *ex rel.* Lockert v. Crowell, 631 S.W.2d 702, 714–15 (Tenn. 1982); Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971); Clements v. Valles, 620 S.W.2d 112 (Tex. 1981); *In re* S.B. 177, 294 A.2d 653 (Vt.), *modified*, 294 A.2d 657 (Vt. 1972).

government.[182] These cases frequently express concern that the efficiency of legislative representation would be undermined by crossing county lines.[183] There is no consensus among the states as to whether there is a ceiling on the number of permissible county splits in a plan, or if the number of county splits is a holistic analysis taken in consideration of the other principles that are considered when drawing a districting plan. For example, the Colorado Supreme Court in 1992 used a holistic analysis in striking down a state legislative district as unconstitutionally noncompact,[184] while the Idaho Supreme Court adopted a rigid ranking of criteria which gave that State's prevention of county splits preeminence, second only to federal mandates.[185] Similarly, Nebraska follows a practicability standard, requiring that districts be constructed of whole county units wherever practicable.[186] The absence of a unified approach will require each state to establish its own route to identifying if and when counties and other political boundaries have been split too many times.

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182 *In re* Legislative Districting of State, 805 A.2d 292, 319 (Md. 2002); *In re* Reapportionment of Colo. Gen. Assembly, 45 P.3d 1237, 1248 (Colo. 2002); Scrimminger v. Sherwin, 291 A.2d 134, 141 (N.J. 1972); Jackman v. Bodine, 205 A.2d 713, 718 (N.J. 1964); Stephenson v. Bartlett, 562 S.E.2d 377, 385 (N.C. 2002).

183 Legislative Redistricting Cases, 629 A.2d 646, 666 (Md. 1993); *In re* Reapportionment of Towns of Hartland, Windsor & W. Windsor, 624 A.2d 323, 330 (Vt. 1993); Wilson v. Eu, 823 P.2d 545, 553 (Cal. 1992); Brown v. Saunders, 166 S.E. 105, 107–08 (Va. 1932).

184 *In re* Colo. Gen. Assembly, 828 P.2d 185, 195–96 (Colo. 1992) (holding that making an assertion that a county split is necessary to comply with other criteria, such as compactness, did not justify the creation of a protrusion splitting the city of Aspen and Pitkin County). The analysis in this case highlights the importance of considering traditional redistricting principles in concert with one another, because state courts frequently consider evidence of a potential violation of one criterion as supporting evidence for the violation of another criterion.

185 In other words, counties must be kept whole first before applying any nonfederal criterion. *See* Bingham Cty. v. Idaho Comm'n for Reapportionment, 55 P.3d 863, 869 (Idaho 2002).

186 *See* Day v. Nelson, 485 N.W.2d 583, 586 (Neb. 1992) ("[T]he only counties in this state where a single legislative district could lawfully follow the entire county boundaries are Lincoln County and Madison County. It is obvious that according to the plain language of article III, § 5, Madison County must constitute a single district unless not 'practicable.' It is also obvious that the presence of a number of proposed plans that apportion the state leaving District 21 substantially intact makes following that county's boundaries 'practicable.' The suggestion by the State in its brief that the process is entirely political ignores the mandatory 'shall' in the constitutional section and would equate it with the permissive 'may.'").

4. Preserving Communities of Interest

Of all the criteria considered by most states, perhaps the most malleable and least quantifiable[187] yet, of central conceptual importance, is that districts preserve "communities of interest." The justification of states considering communities of interest in the redistricting process was well stated in *Maestas v. Hall*: "The rationale for giving due weight to clear communities of interest is that to be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents."[188]

A few states define communities of interest.[189] Among the more specific provisions, the Alaska Constitution defines communities of interest as "a relatively integrated socioeconomic area."[190] The California Constitution describes a community of interest as a "contiguous population which shares common social and economic interests that should be included within a single district for purposes of fair representation . . . [such as] an urban area, a rural area, an industrial area, or an agricultural area" as well as "those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access

187 An empirical approach to defining communities of interest is described by Stephen J. Malone in his article *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 480 (1997):

> Yet a community of interest may still exist within the district because of inherent socio-economic characteristics among district residents that cause them to share the same concerns. In such situations, empirical data may identify these latent communities of interest. Census data on population density, race, national origin, income, education, ancestry, occupation, religion and household size can point to commonalities within the population that may indicate the existence of a community of interest.

With the rise of Big Data, it is not outside the realm of possibility that things such as Google search terms, or purchasing habits, could also be used to define such definitions. The diametric approach would be to use only data collected by the Census. But speculating on the scope of how to empirically capture a community of interest is beyond the scope of this Article.

188 274 P.3d 66, 78 (N.M. 2012) (internal citations omitted).

189 Apart from the states set out below, Vermont also provides a definition of community of interest beyond a bare-bones recitation of the phrase. Vt. Stat., tit. 17, § 1903(b)(2) (2018) ("The representative and senatorial districts shall be formed consistent with the following policies insofar as practicable: . . . recognition and maintenance of patterns of geography, social interaction, trade, political ties, and common interests.").

190 ARK. CONST. art. VI, § 6.

to the same media of communication relevant to the election process."[191] Colorado, meanwhile, defines communities of interest in terms of "issues" voters care about, such as issues of education, employment, environment, public health, transportation, water needs, or issues of demonstrable regional significance.[192] Colorado goes further, explicitly noting that racial, ethnic, and language minority groups could also constitute communities of interest.[193] California and Colorado explicitly prohibit political parties, incumbents, or candidates from factoring into any consideration of what constitutes a community of interest.[194] Most states[195] leave the term wholly undefined, leaving it up to legislatures and courts to read meaning into the phrase.[196]

There is also precedent for using the concept of communities of interest in the absence of statutory or constitutional language. Alabama and

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191 CAL. CONST. art. XXI, § 2(d)(4). Additionally, several California Commissioners described to members of the Princeton Gerrymandering Project and graduate students at Princeton University's Woodrow Wilson School of Public and International Affairs that the "public comment" process inherent in California's independent Citizens Redistricting Commission was a useful tool for defining communities of interest. Thus, litigants can look to public input sessions for information on what considerations may have been made by legislators in creating districts, and whether public input was heeded or disregarded.

192 COLO. CONST. amend. Z.

193 *Id.*

194 CAL. CONST. art. XXI, § 2(d)(4) ("Communities of interest shall not include relationships with political parties, incumbents, or political candidates."); COLO. CONST. amend. Z ("'Community of interest' does not include relationships with political parties, incumbents, or political candidates.").

195 Thirty-one states require that either their congressional or state legislative districts (or both) be drawn with communities of interest in mind: nine by constitutional provision, eight by statute, the rest by resolutions or guidelines. For examples of states without definitions of the phrase, see, *e.g.*, ARIZ. CONST. art. IV, pt. II, § 1(14)(D) ("District boundaries shall respect communities of interest to the extent practicable . . . ."); N.Y. CONST. art. III, § 4 ("The Commission shall consider . . . communities of interest."). For an example of resolutions adopted by legislatures or guidelines laid out by commissions, see *Redistricting Criteria Approved by the Courts*, ARK. BOARD OF APPORTIONMENT, http://www.arkansasredistricting.org/redistricting-criteria (last visited Oct. 12, 2019).

196 Courts have gone far afield. In *Hall v. Moreno*, 270 P.2d 961, 975–80 (Colo. 2012), the Supreme Court of Colorado identified the following "communities of interest": regulation of oil and gas development in light of fracking; agricultural lands; Hispanic voting strength; the Western Slope; water scarcity; local units of government; Rocky Flats radioactive cleanup; the I-70 corridor; Rocky Mountain national park; the pine bark beetle kill infestation; state universities; health and high-tech industries; rural populace; ranching; mining; tourism; alternative energy production; unemployment rate; mass transportation; open space and wildlife; military bases; and infrastructure improvement.

Arkansas give consideration to communities of interest despite no constitutional mandate to do so. Conversely, the New Hampshire Supreme Court has frowned upon attempting to argue a common law right to the representation of communities of interest in districting.[197] Thus the concept of communities of interest is potentially available in the construction of a complaint, but highly dependent on the willingness of a court in applying such reasoning.

IV. EVIDENTIARY BURDENS: ORGANIZING GERRYMANDERING TESTS INTO TESTS OF INEQUALITY OF OPPORTUNITY AND INEQUITABLE OUTCOME

Because each state has multiple constitutional provisions upon which a well-pleaded complaint could be founded, the key question is how to prove such a claim. While many excellent articles have recently been written on this very question pertaining to proof for Free and Equal Elections Clause claims (as occurred in Pennsylvania), cookie-cutter evidence to prove other constitutional claims will not suffice.[198] A wide variety of statistical tests is available to courts to evaluate the degree to which a district or statewide plan has treated a political party unfairly. These tests can be thought of as falling into two major categories: inequality of opportunity and inequitable outcome.

For example, if political party *A*'s average wins are much larger than the others, that would be evidence that the wins had been engineered to pack many of party *A*'s voters into a few districts, while cracking their other voters

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197 *See* City of Manchester v. Sec'y of State, 48 A.3d 864, 878 (N.H. 2012) (holding that "[n]othing in the New Hampshire Constitution requires a redistricting plan to consider 'communities of interest,'" and that, "although preservation of communities of interest [may be] a legitimate redistricting goal," it does not mean that there is an individual right to have one's particular community contained within a district). *See also In re* Legislative Districting of State, 475 A.2d 428, 445 (Md. 1984), *appeal dismissed sub nom.* Wiser v. Hughes, 459 U.S. 962 (1982) (mem.).

198 *See* Bernard Grofman & Jonathan Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania (2018), 17 ELECTION L. J. 264 (2018). Joshua Douglas at the University of Kentucky has produced excellent work on the similar, yet slightly adjacent issue of the right to vote under state constitutions. *See* Joshua Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2015). However, Mr. Douglas's work predates the decision in *League of Women Voters v. Commonwealth of Pennsylvania* and does not address its potential future impacts.

across many other districts to allow wins by party *B*. This would constitute a systematic deprivation of the opportunity to elect representatives at a statewide level. The same districting pattern could be examined to see whether it has led to inequities of representational outcome. A variety of tests of outcome have been developed, including the efficiency gap,[199] non-map-based computer simulation,[200] and detailed examination of maps using Monte Carlo map drawing methods.[201]

It should be noted that the appropriate tests will vary by state. For example, closely divided states such as North Carolina would be most appropriately tested using measures of partisan symmetry such as the lopsided wins test or the reliable wins test. A more lopsided partisan state such as Maryland would benefit from an examination of whether a districting plan was drawn to give excessively uniform wins to Democratic voters, thus allowing Democrats to win more districts than would be expected from a more natural pattern.[202] In all cases, a detailed examination of alternative maps provides a way of testing whether the actual map gives an exceptional advantage to a political party, in the context of the state's particular geographic and political circumstances, as well as the specific laws governing redistricting in that state.[203]

V. A STATE-BY-STATE VIEW OF FIELD OF PLAY

With causes of action abounding in state constitutions, the next question reformers must ask is whether a court is the likeliest route for achieving a remedy. This can be difficult to ascertain. Unlike federal courts, judges in

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199 *See* Nick Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 900 (2015).

200 *See* Sam Wang, *Let Math Save Our Democracy*, N.Y. TIMES (Dec. 5, 2015), https://www.nytimes.com/2015/12/06/opinion/sunday/let-math-save-our-democracy.html.

201 *See* Ben Fifield et al., A New Automated Redistricting Simulator Using Markov Chain Monte Carlo (July 1, 2019) (unpublished manuscript), https://imai.fas.harvard.edu/research/files/redist.pdf. Monte Carlo map-drawing methods involve taking a starting map, or "seed" map, and running a computer program which makes very small changes many, many times.

202 For a treatment of how to select tests, see Michael D. McDonald, *Making a Case for Two Paths Forward in Light of* Gill v. Whitford, 17 ELECTION L.J. 315, 316 (2018); Samuel S.-H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 15 ELECTION L.J. 367, 376 (2016).

203 *See* Gregory Herschlag et al., *Quantifying Gerrymandering in North Carolina* (Jan. 9, 2018) (unpublished manuscript), https://arxiv.org/pdf/1801.03783.pdf.

state courts are selected via a variety of methods: lifetime appointments, appointments with retention elections, and partisan or nonpartisan elections. State court judges' opinions may be colored by the ramifications for their continued employment.[204] On the flip side, the nominal political party of the judge may not always reflect how judges will decide an issue.

Nonetheless, partisanship provides a starting point for evaluating the tilt of a court. We believe there are three broad categories of state courts which may be receptive to partisan gerrymandering claims: first, states where a substantial fraction of the high court's membership is of opposite partisanship to the state legislature that drew an offending plan; second, courts that are philosophically inclined to take an expansive view of voting rights; and third, courts with histories of policing redistricting. This Part will highlight examples of states which exemplify these reform opportunities.[205] Details for all states can be found in Appendix B.

A. Philosophically Inclined Towards Expansive Views of Voting Rights: Pennsylvania

When the Pennsylvania Supreme Court struck down the Commonwealth's congressional partisan gerrymander, observers and legislators noted that the decision may not have been based on the law, but instead stemmed from a partisan divide: the Court was controlled by Democrats, while Republicans dominated the state legislature.[206] Some members of the legislature were so incensed by the decision that they

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204 Caperton v. A. T. Massey Coal Co., Inc., 556 U.S. 868 (2009) ("Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.") (internal citations omitted).

205 These categories are not mutually exclusive; it is possible (if not probable) that several states will fall into multiple categories. Those multiple-category states are very ripe for partisan gerrymandering challenges in their courts.

206 *See, e.g.*, Robert Barnes, *Supreme Court Refuses to Block Pa. Ruling Invalidating Congressional Map*, WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-refuses-to-block-pa-ruling-invalidating-congressional-mapdecision-means-2018-elections-in-the-state-will-probably-be-held-in-districts-far-more-favorable-to-democrats/2018/02/05/2d758f90-0aa3-11e8-8890-372e2047c935_story.html; David Jackson, *Trump Urges Pennsylvania Republicans to Take Congressional District Map Fight to High Court*, USA TODAY (Feb. 20, 2018), https://www.usatoday.com/story/news/politics/2018/02/20/trump-urges-pennsylvania-republicans-take-congressional-district-map-fight-high-court/354088002/; Joseph Ax, *Supreme Court Upholds Pennsylvania Election Map in Win for Democrats*, REUTERS (Mar. 19, 2019), https://www.reuters.com/article/us-usa-politics-pennsylvania/supreme-court-upholds-pennsylvania-election-map-in-win-for-democrats-idUSKBN1GV2BZ.

threatened to impeach the justices in the majority. The decision was seen as a threat to the independence of the judiciary,[207] and Republican leadership ultimately did not take up the impeachment movement.[208]

B. The Opposite Party of the Offending Legislature: North Carolina

The North Carolina electorate is closely divided between Democrats and Republicans, and partisan warfare there has been especially bitter over the last decade. North Carolina is also a state where redistricting is not subject to gubernatorial veto.[209] Thus, without a check on its power, the dominant party in the General Assembly can potentially maintain power indefinitely. The congressional and legislative district maps of North Carolina are among the most biased in the nation[210] and have inspired a tremendous amount of litigation.[211] Under these circumstances, a judicial check takes on central importance.

In 2018, Anita Earls was elected to the North Carolina Supreme Court, changing the court from four Democrats, three Republicans to five Democrats, two Republicans.[212] Justice Earls is also known for her advocacy of voting rights. (In light of recent retirements, the Democrats now command an imposing 6–1 majority on the State's supreme court.) Reformers brought a lawsuit within one week of the 2018 election. They contended that the state legislative plan violated three separate provisions of

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207 Jan Murphy, *PA Supreme Court Chief Justice Sees Impeachment Resolutions as 'Attack Upon an Independent Judiciary*,' PENNLIVE (Mar. 22, 2018), https://www.pennlive.com/politics/2018/03/pa_supreme_court_chief_justice.html.

208 *See Pennsylvania Lawmakers Threaten to Impeach Judges*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/opinions/pennsylvania-lawmakers-threatened-to-impeach-state-judges-its-a-dangerous-trend/2018/03/27/be83cd78-312f-11e8-94fa-32d48460b955_story.html.

209 Justin Levitt, *All About Redistricting: Professor Justin Levitt's Guide to Drawing the Electoral Lines*, http://redistricting.lls.edu/states-NC.php (last visited Oct. 12, 2019).

210 *State-by-State Redistricting Reform: The Local Routes*, PRINCETON GERRYMANDERING PROJECT, http://gerrymander.princeton.edu (last visited Aug. 20, 2019). This, of course, may change following the conclusion of the *Lewis* case's remedial phase.

211 *See All About Redistricting: Professor Justin Levitt's Guide to Drawing the Electoral Lines*, http://redistricting.lls.edu/states-NC.php#litigation (last visited Aug. 20, 2019).

212 The North Carolina GOP went to exceptional lengths to try to prevent Justice Earls from winning her seat on the court, repeatedly changing the laws around election to the court in an effort to bolster the Republican incumbent. In the end, two Republicans and Earls ran on the partisan ballot, with Earls winning by double-digits. *See* Will Doran, *Democrat Anita Earls Claims Victory in NC Supreme Court Race*, NEWS & OBSERVER (Nov. 6, 2018), https://www.newsobserver.com/news/politics-government/article221037190.html.

the North Carolina Constitution: the Equal Protection Clause, the Free Elections Clause, and the Free Speech and Association clauses.[213] Defendants made a motion to move the case to federal court. Because of the lack of subject matter jurisdiction, the case was remanded to the state court.[214]

In the Superior Court, a three-judge panel unanimously found that the plan was unconstitutional and ordered it to be redrawn. The court cited twenty-seven North Carolina precedent cases in the section of its opinion dealing with claims under the North Carolina Constitution, ten of them construing the "Fair Elections" provision (four of which were decided in the 19th century), seven construing Equal Protection, six construing Free Speech and Assembly, and nine on expression. The depth of case law on the "Fair Elections" provision relied heavily on state rather than federal cases. The other subsections relied heavily on U.S. Supreme Court decisions, especially that of Justice Kagan in *Gill*.[215] Legislators declined to appeal the case to the North Carolina Supreme Court, perhaps because doing so would create a binding precedent for future cases.

C. A History of Policing Gerrymanders: Maryland

Maryland has a history of judicially reviewing districting plans, focused on the issue of compactness. Since the legislative compactness provision was added to the state constitution in 1972, the Maryland Court of Appeals has considered the issue of compactness each decade. In 1982, the court went so far as to say that the compactness provision was an anti-partisan gerrymandering constitutional amendment:

> [T]he compactness requirement in state constitutions is intended to prevent political gerrymandering. Oddly shaped or irregularly sized districts of themselves do not, therefore, ordinarily constitute evidence of gerrymandering and noncompactness. On the contrary, an affirmative showing is ordinarily required to demonstrate that such districts were intentionally so drawn to produce an unfair political result, that is, to dilute or enhance the voting strength of discrete groups for partisan political advantage or other impermissible purposes. Thus, irregularity of shape or

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213 *See* Common Cause v. Lewis, 358 F. Supp. 3d 505, 507–08 (E.D.N.C. 2019).

214 *Id.* at 507.

215 Common Cause v. Lewis, No. 18 CVS 014001, slip op. at 298 (N.C. Super Ct. Sept. 3, 2019).

> size of a district is not a litmus test proving violation of the compactness requirement.[216]

In the end, the Court of Appeals declined to strike down the plan, instead showing deference to the legislature. After the 1990 redistricting cycle, faced with another compactness case, the Court once again declined to strike down a plan as unconstitutionally noncompact.[217]

In 2002, the Court of Appeals finally struck down a legislative districting plan as unconstitutionally noncompact.[218] In so doing, the court clarified the previously broad deference granted to the legislature, stating that while the responsibility to redistrict requires the latitude to consider factors mandated by the constitution as well as other factors (which may well be political in nature), the constitution ultimately trumps political considerations.[219] While the Court declined to rule on the compactness challenge to state legislative districts in 2011, the Court of Appeals' willingness to strike down legislative districting plans in the past may make them predisposed to make a similar ruling about the state's congressional gerrymander or other future gerrymanders.[220]

This route for litigation would have to be balanced against the fact that another route for redress is available. Maryland redistricting requires the signature of the Governor, at this time Larry Hogan, a Republican. Reformers may be able to achieve less partisan redistricting in the 2020 cycle that way.

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216 *In re* Legislative Districting of the State, 475 A.2d 428, 436–40 (Md. 1982).

217 Legislative Redistricting Cases, 629 A.2d 646, 658 (Md. 1993).

218 *In re* Legislative Districting of the State, 805 A.2d 292, 295 (Md. 2002).

219 *Id.* at 326 ("That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution 'trumps' political considerations. Politics or non-constitutional considerations never 'trump' constitutional requirements.").

220 Like Pennsylvania and North Carolina, Maryland's Constitution guarantees that all elections must be "free and frequent." MD. CONST. art. VII. However, the provision comes after a reference to the legislature, so it may be limited to legislative elections. Even if that is the case, the Maryland Constitution protects freedom of speech, freedom of association, the equal protection of the laws, and the purity of elections. *See infra* Appendix A.

CONCLUSION

With fifty different judicial systems evolving their own histories and doctrines, it is inevitable that some states will emerge with more active judiciaries in the redistricting context than others. Some states have a history of requiring judicial review of at least some of their plans. Other states simply have a history of scrutinizing redistricting schemes over the years.[221] Reformers should consult the precedents of their individual state supreme courts to find histories of review. Even if they do not find a broad history of policing gerrymandering claims, decisions on other election law issues may invite an opening to similar decisions in the redistricting context. If the U.S. Supreme Court takes limited action or fails to act, federalism offers states an opportunity to take a locally specific approach to placing guardrails on the practice of partisan gerrymandering.

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221 Examples include Alaska, California, Florida, Kentucky, Maryland, Michigan, and Missouri.

APPENDIX A:

Table 1: Major Cases Striking Down Redistricting Plans Under State Constitutional Protections[222]

State	Case Name	Citation	Pertinent Constitutional Provisions
Florida	Apportionment I	83 So.3d 597 (2018)	Prohibition on partisan gerrymandering
California	Assembly of State of Cal. v. Deukmejian	639 P.2d 939 (1982)	One Person, One Vote (state & fed)
Idaho	Bingham Co. v. Idaho Comm'n for Reapportionment	55 P.3d 863 (2002)	One Person, One Vote (state & fed) Preexisting Political Boundaries
Virginia	Brown v. Saunders	166 S.E. 105 (1932)	One Person, One Vote (state & fed)
Illinois	Burris v. Ryan	588 N.E.2d 1023 (1991)	Compactness One Person, One Vote
Alaska	Carpenter v. Hammond	667 P.2d 1204 (1983)	Compactness One Person, One Vote (state) Communities of Interest

222 While state-level issues are frequently intertwined with federal claims, the fact that those cases are almost universally heard in federal court means they are not indicative—necessarily—of state judges' thought processes, regardless of how well the federal judges guess their intent as required by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). As a result, the authors have decided to exclude those cases from this paper.

North Carolina	Common Cause v. Lewis	18 CVS 014001, slip op. (Wake County, N.C. Super Ct. Sept. 3, 2019)	Free Elections Equal Protection Freedom of Speech Freedom of Assembly
Nebraska	Day v. Nelson	485 N.W.2d 583 (1992)	Preexisting Political Subdivisions
Idaho	Hellar v. Cenarrusa	682 P.2d 539 (1984)	Equal Protection (state & federal) Right to Vote Preexisting Political Subdivisions
Alaska	Hickel v. Southeast Conference	846 P.2d 38 (1992)	Communities of Interest Compactness
Alaska	*In re* 2001 Redistricting Cases	44 P.3d 141 (2002)	Compactness One Person, One Vote (state & fed)
Maryland	*In re* Legislative Districting of State	805 A.2d 292 (2002)	Preexisting Political Subdivisions Not Following Natural Boundaries
New York	*In re* Livingston	160 N.Y.S. 462 (Sup. Ct., Kings Co., 1916)	Compactness
Colorado	*In re* Reapportionment of Colo. Gen. Assembly	45 P.3d 1237 (2002)	Preexisting Political Subdivisions

Vermont	*In re* Reapportionment of Towns of Hartland, Windsor & W. Windsor	624 A.2d 323 (1993)	Communities of Interest
Florida	*In re* S. J. Res. of Leg. Apportionment 1176	83 So.3d 597 (2012)	Prohibition on Partisan Gerrymandering
Alaska	Kenai Peninsula Borough v. State	743 P.2d 1352 (1987)	Equal Protection (state)
Florida	League of Women Voters of Fla. v. Detzner	172 So.3d 363 (2015)	Prohibition on Partisan Gerrymandering
Pennsylvania	League of Women Voters of Pennsylvania v. Commonwealth	181 A.3d 1083 (2018)	Free and Equal Elections
Colorado	Mauff v. People	123 P. 101 (1912)	Purity of Elections
Colorado	Neelley v. Farr	158 P. 458 (1916)	Freedom of Speech (state) Freedom of Assembly (state) Free and Open Elections
Missouri	Pearson v. Koster	359 S.2.3d 35 (2012)	Compactness

Colorado	People *ex rel.* Salazar v. Davidson	79 P.3d 1221 (2003)	Prohibition on mid-decade Redistricting
New Jersey	Scrimminger v. Sherwin	291 A.2d 134 (1972)	One Person, One Vote (federal) Preexisting Political Subdivisions
Missouri	State *ex rel.* Barrett v. Hitchcock	146 S.W. 40 (1912)	Compactness Preexisting Political Subdivisions
West Virginia	State *ex rel.* Smith v. Gore	143 S.E.2d 791 (1965)	One Person, One Vote (state)
North Dakota	State v. Hamilton	129 N.W. 916 (1910)	Uniform Laws
Delaware	Young v. Red Clay Consol. Sch. Dist.	122 A.3d 784 (Del. Ch. 2015)	Elections Clause (state's Equal Protection clause for election issues)

Table 2: Major Cases Striking Down Election Laws Under State Constitutional Protections

State	**Case Name**	**Citation**	**Pertinent Constitutional Provisions**
Kentucky	Ferguson v. Rohde	449 S.W.2d 758 (1970)	Free & Fair Elections (ballot construction)
New Mexico	Gunaji v. Macias	31 P.3d 1008 (2001)	Free & Open Elections (counting of ballots)

Kentucky	Hillard v. Lakes	172 S.W.2d 456 (1943)	Free and Fair Elections (ballot construction)
Missouri	Kasten v. Guth	375 S.W.2d 110 (1964)	Right to Vote (for write-in candidates)
Kentucky	Lakes v. Estridge	172 S.W.2d 454 (1943)	Right to Vote Free & Fair Elections (denial of ballot)
Kentucky	Lee v. Commonwealth	565 S.W.2d 634 (1978)	Prohibition on Special Laws (campaign finance)
California	Serrano v. Priest	557 P.2d 929 (1976)	Equal Protection (state) (public school financing)
Michigan	Socialist Workers Party v. Sec'y of State	317 N.W.2d 1 (1982)	Purity of Elections Equal Protection (state) First Amendment (federal) Fourteenth Amendment (federal) (ballot access)
Michigan	Wells v. Kent County Bd. of Elections Comm'rs	186 N.W.2d 222 (1969)	Purity of Elections (ballot design)

APPENDIX B:

Table 3: State Constitutional Provisions, Power Balances within States in 2021, and Whether the Political and Judicial Branches are Politically Opposed[223]

State Name & Relevant Citations	**Relevant Constitutional &Statutory Provisions & Guidelines**	**Trifecta in 2021 guaranteed as of 10/2019?**	**State High Court Opposed to Legislature?**
Alabama I § 4 I § 25 I §§ 1, 6 I §§ 1, 22 #Reapportionment Committee 2011 IX § 200 IX § 200 IV § 104(29)	Freedom of Speech Freedom of Assembly Due Process Equal Protection Compactness Contiguity No Splitting Pre-existing Political Boundaries No Uniform/Special Laws	Yes	No

223 For guidance on ascertaining whether particular judges may be receptive to these arguments on partisan gerrymandering, *see* Joshua A. Douglas, *State Judges and the Right to Vote*, 77 Ohio St. L.J. 1, 48 (2016).

Alaska**		No; Legislative Elections In 2020	No
I § 5	Freedom of Speech		
I § 6	Freedom of Assembly		
I § 7	Due Process		
I § 1	Equal Protection		
VI § 6	Compactness		
VI § 6	Contiguity		
VI § 6	No Splitting Pre-Existing Political Boundaries		
VI § 6	Communities of Interest		
II § 19	No Uniform/Special Laws		
Arizona		No; Legislative Elections In 2020 (districts drawn by commission)	No
II § 6	Freedom of Speech		
II § 5	Freedom of Assembly		
II § 4	Due Process		
II §§ 1–2, 13	Equal Protection		
II § 21	Free and Equal/Open Elections		
VII § 12	Purity of Elections/Ballot		
IV Pt2 § 1(15)	No Gerrymandering for Party		
IV Pt2 § 1(15)	No Gerrymandering for Person/Incumbent		

IV Pt2 § 1(14)F	Encourage Competition		
IV Pt2 § 1(14)C	Compactness		
IV Pt2 § 1(14)C	Contiguity		
IV Pt2 § 1(14)E	No Splitting Pre-Existing Political Boundaries		
IV Pt2 § 1(14)D	Communities of Interest		
IV Pt2 § 19	No Uniform/Special Laws		
<u>Arkansas</u>		No; Legislative Elections In 2020	No
II § 6	Freedom of Speech		
II § 4	Freedom of Assembly		
II § 8	Due Process		
II § 3	Equal Protection		
III § 2	Free and Equal/Open Elections		
#Board of Apportionment	No Gerrymandering for Party		
#Board of Apportionment	Compactness		
VIII § 3	Contiguity		
VIII § 3	No Splitting Pre-Existing Political Boundaries		
#Board of Apportionment	Communities of Interest		

V § 25	~No Uniform/Special Laws		
California**		No; Legislative Elections In 2020 (districts drawn by commission)	No
I § 2(a)	Freedom of Speech		
I § 3(a)	Freedom of Assembly		
I § 7	Due Process		
I § 7	Equal Protection		
II § 3; IV § 1.5	Free and Equal/Open Elections		
II § 4	Purity of Elections/Ballot (prohibits improper practices)		
XXI § 2(e)	No Gerrymandering for Party		
XXI § 2(e)	No Gerrymandering for Person/Incumbent		
XXI § 2(d)(5)	Compactness		
XXI § 2(d)(3)	Contiguity		
XXI § 2(d)(4)	No Splitting Pre-Existing Political Boundaries		
XXI § 2(d)(4)	Communities of Interest		
IV § 16	No Uniform/Special Laws		

Colorado**		No; Legislative Elections In 2020 (districts to be drawn by commission)	No
II § 10	Freedom of Speech		
II § 24	Freedom of Assembly		
II § 25	Due Process		
II § 5	Free and Equal/Open Elections		
VII § 11	Purity of Elections/Ballot		
V §§ 44.3, 48.1	No Gerrymandering for Party		
V §§ 44.3, 48.1	No Gerrymandering for Person/Incumbent		
V §§ 44.3, 48.1	Encourage Competition		
V §§ 44.3, 48.1	Compactness		
V §§ 44.3, 48.1	Contiguity		
V §§ 44.3, 48.1	No Splitting Pre-Existing Political Boundaries		
V §§ 44.3, 48.1	Communities of Interest		
V § 25	No Uniform/Special Laws		

<u>Connecticut</u> I § 4 I § 14 I § 8 I § 20 VI § 4 III §§ 3, 4 III § 4	 Freedom of Speech Freedom of Assembly Due Process Equal Protection Purity of Elections/Ballot (prohibits improper conduct) Contiguity No Splitting Pre-Existing Political Boundaries	No; Legislative Elections In 2020	No
<u>Delaware</u> I § 5 I § 16 I § 7 I § 3 & V § 1 V § 1 II § 2A II § 2A II § 2A	 Freedom of Speech Freedom of Assembly Due Process Free and Equal/Open Elections Purity of Elections/Ballot No Gerrymandering for Party No Gerrymandering for Person/Incumbent Contiguity	No; Legislative and Governor Elections In 2020	No

Florida I § 4 I § 5 I § 9 III §§ 20, 21 III §§ 20, 21 III §§ 20, 21 III §§ 20, 21 III §§ 20, 21	Freedom of Speech Freedom of Assembly Due Process No Gerrymandering for Party No Gerrymandering for Person/Incumbent Compactness Contiguity No Splitting Pre-Existing Political Boundaries	No; Legislative Elections In 2020	No
Georgia I § 1, ¶V I § 1, ¶IX I § 1, ¶I I § 1, ¶II #2011 Reapportionment Committee III § 2, ¶II #2011 Reapportionment Committee #2011 Reapportionment Committee	Freedom of Speech Freedom of Assembly Due Process Equal Protection Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest	No; Legislative Elections In 2020	No

III § 6, ¶IV	No Uniform/Special Laws		
Hawaii**		No; Legislative Elections In 2020	No
I § 4	Freedom of Speech		
I § 4	Freedom of Assembly		
I § 5	Due Process		
I § 5	Equal Protection		
IV § 6	No Gerrymandering for Party		
IV § 6	No Gerrymandering for Person/Incumbent		
IV § 6	Compactness		
IV § 6	Contiguity		
IV § 6	No Splitting Pre-Existing Political Boundaries		
IV § 6	Communities of Interest		
Idaho**		No; Legislative Elections In 2020	No
I § 9	Freedom of Speech		
I § 10	Freedom of Assembly		
I § 13	Due Process		
I § 2	Equal Protection		
Stat. 72-1506(8)	No Gerrymandering for Party		

Stat. 72-1506(8) Stat. 72-1506(4) III § 5 III § 5 Stat. 72-1506(2)	No Gerrymandering for Person/Incumbent Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest		
<u>Illinois</u> I § 4 I § 5 I § 2 I § 2 III § 3 III § 4 IV § 3(a) IV § 3(a) IV § 13	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections Purity of Elections/Ballot (integrity) Compactness Contiguity No Uniform/Special Laws	No; Legislative Elections In 2020	No

<u>Indiana</u> I § 9 I § 31 I § 1 I § 12 II § 1 IV § 5 IV § 23	 Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections Contiguity No Uniform/Special Laws	No; Legislative and Governor Elections In 2020	No
<u>Iowa</u> I § 7 I § 20 I § 9 Stat. 42.4(5) Stat. 42.4(5) Leg § 34 Leg § 34 Leg § 37 Leg § 30	 Freedom of Speech Freedom of Assembly Due Process No Gerrymandering for Party No Gerrymandering for Person/Incumbent Compactness Contiguity No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws	No; Legislative Elections In 2020 (districts drawn by commission)	No

Kansas BR § 11 BR § 3 BR § 18 BR § 2 #Guidelines and Criteria for 2012 Redistricting #Guidelines and Criteria for 2012 Redistricting #Guidelines and Criteria for 2012 Redistricting #Guidelines and Criteria for 2012 Redistricting II § 17	Freedom of Speech Freedom of Assembly Due Process Equal Protection Communities of Interest Compactness Contiguity No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws	No; Legislative Elections In 2020	No
Kentucky BR § 1(fourth), 8 BR § 1(sixth) BR §§11, 14 BR § 3	Freedom of Speech Freedom of Assembly Due Process Equal Protection	No; Legislative and Governor Elections In 2019	No

BR § 6 Leg § 33 Leg § 33 #1991 Redistricting Subcommittee Guidelines Leg § 59	Free and Equal/Open Elections Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest No Uniform/Special Laws		
<u>Louisiana</u> I § 7 I § 9 I § 2 I § 3 #2011 Senate & Governmental Affairs Committee Rules for Redistricting #2011 Senate & Governmental Affairs Committee Rules for Redistricting	Freedom of Speech Freedom of Assembly Due Process Equal Protection Contiguity No Splitting Pre-Existing Political Boundaries	No; Legislative and Governor Elections In 2019	No

Maine I § 4 I § 15 I § 6-A I § 6-A IV 1st § 2; IX § 24 IV 1st § 2; IX § 24 IV 1st § 2; IX § 24 St21-A § 1206A	Freedom of Speech Freedom of Assembly Due Process Equal Protection Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest	No; Legislative Elections In 2020	Yes
Maryland DR §§ 10, 40 DR § 24 DR § 19 DR § 7 I § 7 III § 4 III § 4 III § 4 III § 33	Freedom of Speech Due Process Equal Protection Free and Equal/Open Elections Purity of Elections/Ballot Compactness Contiguity No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws	No; Legislative Elections In 2020	No

Massachusetts LXXVII 1st XIX 1st X 1st Am. CVI 1st Art. IX Am. CI §§ 1, 2 Am. CI §§ 1, 2	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections Contiguity No Splitting Pre-Existing Political Boundaries	No; Legislative Elections In 2020	No
Michigan** I § 5 I § 3 I § 17 I § 2 II § 4(2) IV § 6(13)(d) IV § 6(13)(e) IV § 6(13)(g) IV § 6(13)(b) IV § 6(13)f)	Freedom of Speech Freedom of Assembly Due Process Equal Protection Purity of Elections/Ballot No Gerrymandering for Party No Gerrymandering for Person/Incumbent Compactness Contiguity No Splitting Pre-Existing Political Boundaries	No; Legislative Elections In 2020 (districts to be drawn by commission)	No

IV § 6(13)(c) IV § 29	Communities of Interest No Uniform/Special Laws		
Minnesota I § 3 I § 7 #S.F. No. 1326 #S.F. No. 1326 IV § 3 Stat. 2.91 #S.F. No. 1326 XII § 1	Freedom of Speech Due Process No Gerrymandering for Party No Gerrymandering for Person/Incumbent Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest No Uniform/Special Laws	No; Legislative Elections In 2020	No
Mississippi III § 13 III § 11 III § 14 XII § 247 Code § 5-3-101	Freedom of Speech Freedom of Assembly Due Process No Gerrymandering for Person/Incumbent Compactness	No; Legislative and Governor Elections In 2019	No

XIII § 254 Code § 5-3-101 IV § 87	Contiguity No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws		
Missouri** I § 8 I § 9 I § 10 I §§ 2, 14 I § 25 III §§ 3(c), 7 III §§ 3(c), 7 III §§ 3(c), 7, 45 III §§ 3(c), 7, 45 III §§ 3(c), 7 III § 40	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections No Gerrymandering for Party Encourage Competition Compactness Contiguity No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws	No; Legislative and Governor Elections In 2020 (districts to be drawn by nonpartisan demographer and approved by legislature)	Yes

Montana**		No; Legislative and Governor Elections In 2020	No
II § 7	Freedom of Speech		
II § 6	Freedom of Assembly		
II § 17	Due Process		
II § 4	Equal Protection		
II § 13	Free and Equal/Open Elections		
IV § 3	Purity of Elections/Ballot		
Code 5-1-115(3)	No Gerrymandering for Party		
Code 5-1-115(3)	No Gerrymandering for Person/Incumbent		
V § 14(1)	Compactness		
V § 14(1)	Contiguity		
Code 5-1-115(2)	No Splitting Pre-Existing Political Boundaries		
#2010 Districting Apportionment Commission	Communities of Interest		
V § 12	No Uniform/Special Laws		

<u>Nebraska</u> I § 5 I § 19 I § 3 I § 3 I § 22 #2011 Legislative Resolution 102 #2011 Legislative Resolution 102 III § 5 III § 5 III § 5 III § 18	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections No Gerrymandering for Party No Gerrymandering for Person/Incumbent Compactness Contiguity No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws	No; Legislative Elections In 2020	No
<u>Nevada</u> I § 9 I § 10 I § 8.2 II § 6	Freedom of Speech Freedom of Assembly Due Process Purity of Elections/Ballot	No; Legislative Elections In 2020	No

Guy v. Miller, No. 11 OC 00042 1B, 2011 WL 7665875, at *6 (D. Nev. Oct. 27, 2011) IV § 5 IV §§ 20–21	Compactness No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws		
<u>New Hampshire</u> 1st § 22 1st § 32 1st § 15 1st §§ 2, 6 1st § 11 2nd §§ 11, 26 2nd §§ 9, 11, 26	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections Contiguity No Splitting Pre-Existing Political Boundaries	No; Legislative and Gubernatorial Elections In 2020	No

New Jersey** I § 6 I § 18 IV § II(3) IV § II(1), (3) IV § II(1), (3)	Freedom of Speech Freedom of Assembly Compactness Contiguity No Splitting Pre-Existing Political Boundaries	No; Legislative Elections In 2019 (districts drawn by commission)	Yes
New Mexico II § 17 II § 18 II § 18 II § 8 VII § 1(B) Stat § 2-8D-2 Stat § 2-7C-3 #Guidelines for Redistricting 2011 #Guidelines for Redistricting 2011 IV § 24	Freedom of Speech Due Process Equal Protection Free and Equal/Open Elections Purity of Elections/Ballot Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest No Uniform/Special Laws	No; Legislative Elections In 2020	No

<u>New York</u> I § 8 I § 9(1) I § 6 I § 11 III § 4(c)(5) III § 4(c)(5) III § 4(c)(4) III § 4(c)(3) III § 4(a), (c)(6) III § 4(c)(5) III § 17	Freedom of Speech Freedom of Assembly Due Process Equal Protection No Gerrymandering for Party No Gerrymandering for Person/Incumbent Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest No Uniform/Special Laws	No; Legislative Elections In 2020	No
<u>North Carolina</u> I § 14 I § 12 I § 19 I § 19 I § 10 II §§ 3(2), 5(2)	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections Contiguity	Single-party control since governor does not have veto power over districting plan; Legislative and Governor Elections In 2020	Yes

II §§ 3(3), 5(3) XIV § 3	No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws		
North Dakota I § 4 I § 5 I § 9 IV § 2 IV § 2 IV § 13	Freedom of Speech Freedom of Assembly Due Process Compactness Contiguity No Uniform/Special Laws	No; Legislative and Governor Elections In 2020	No
Ohio** I § 11 I § 3 I § 16 I § 2 XI § 6(A) XI § 6(B) XI § 6(C) XI §§ 3(B), 4(A) XI § 3(C), (D)	Freedom of Speech Freedom of Assembly Due Process Equal Protection No Gerrymandering for Party Encourage Competition Compactness Contiguity No Splitting Pre-Existing Political Boundaries	No; Legislative Elections In 2020	No

II § 26	No Uniform/Special Laws		
<u>Oklahoma</u> II § 22 II § 3 II § 8 III § 5 V § 9A V § 9A V § 9A V § 9A V § 59	Freedom of Speech Freedom of Assembly Due Process Free and Equal/Open Elections Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest No Uniform/Special Laws	No; Legislative Elections In 2020	Yes
<u>Oregon</u> I § 8 I § 26 I § 10 I § 20 II § 1 Stat. 188.010	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections No Gerrymandering for Party	No; Legislative Elections In 2020	No

Stat. 188.010	No Gerrymandering for Person/Incumbent		
IV § 7	Contiguity		
IV § 7	No Splitting Pre-Existing Political Boundaries		
Stat. 188.010	Communities of Interest		
<u>Pennsylvania</u>		No; Legislative Elections In 2020	No
I § 7	Freedom of Speech		
I § 20	Freedom of Assembly		
I § 9	Due Process		
I § 5	Free and Equal/Open Elections		
II § 16; VII § 9	Compactness		
II § 16; VII § 9	Contiguity		
II § 16	No Splitting Pre-Existing Political Boundaries		
III § 32	No Uniform/Special Laws		
<u>Rhode Island</u>		No; Legislative Elections In 2020	No
I §§ 20, 21	Freedom of Speech		
I § 21	Freedom of Assembly		
I § 2	Due Process		
I § 2	Equal Protection		

VII § 1; VIII § 1 St11-100, -106 St11-100, -106	Compactness Contiguity No Splitting Pre-Existing Political Boundaries		
South Carolina I § 2 I § 2 I § 3 I § 3 I § 5 #2011 Redistricting Guidelines #2011 Redistricting Guidelines #2011 Redistricting Guidelines #2011 Redistricting Guidelines	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest	No; Legislative Elections In 2020	No

<u>South Dakota</u> VI § 5 VI § 4 VI § 2 VI §§ 1, 26 VI § 19; VII § 1 III § 5 III § 5 Code 2-2-41(3) Code 2-2-41(2) III § 23	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest No Uniform/Special Laws	No; Legislative Elections In 2020	No
<u>Tennessee</u> I § 19 I § 23 I § 8 I § 5 IV § 1 Cd3-102, -103	Freedom of Speech Freedom of Assembly Due Process Free and Equal/Open Elections Purity of Elections/Ballot Contiguity	No; Legislative Elections In 2020	No

II § 5 & 6 XI § 8	No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws		
<u>Texas</u> I § 8 I § 27 I § 19 I §§ 3a, 13 VI §§ 2, 4 III § 25, 26 III § 26 III § 56	Freedom of Speech Freedom of Assembly Due Process Equal Protection Purity of Elections/Ballot Contiguity No Splitting Pre-Existing Political Boundaries No Uniform/Special Laws	No; Legislative Elections In 2020	No
<u>Utah</u> I § 15 I § 1 I § 7 I § 17 Cd20A-19-103	Freedom of Speech Freedom of Assembly Due Process Free and Equal/Open Elections No Gerrymandering for Party	No; Legislative and Governor Elections In 2020 (districts to be drawn by commission and approved by legislature)	No

Cd20A-19-103	No Gerrymandering for Person/Incumbent		
Cd20A-19-103	Compactness		
Cd20A-19-103	Contiguity		
Cd20A-19-103	No Splitting Pre-Existing Political Boundaries		
Cd20A-19-103	Communities of Interest		
I § 24; VI § 26	No Uniform/Special Laws		
<u>Vermont</u> I § 13	Freedom of Speech	No; Legislative and Governor Elections In 2020	No
I § 20	Freedom of Assembly		
I § 4	Due Process		
I § 8	Free and Equal/Open Elections		
I § 8	Purity of Elections/Ballot		
II § 13, 18	Compactness		
II § 13, 18	Contiguity		
III § 13, 18	No Splitting Pre-Existing Political Boundaries		
St17:34A1903	Communities of Interest		

Virginia I § 12 I § 12 I § 11 I § 11 I § 6 II § 6 II § 6 #Exec. Order No. 31 (2011) #Comm. on Privileges & Elections IV §§ 14, 15	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest No Uniform/Special Laws	No; Legislative Elections In 2019	No
Washington I § 5 I § 4 I § 3 I § 12 I § 19 II § 43(5)	Freedom of Speech Freedom of Assembly Due Process Equal Protection Free and Equal/Open Elections No Gerrymandering for Party	No; Legislative and Governor Elections In 2020	No

Cd44.05.090(5) II § 43(5) II §§ 6, 43(5) Cd44.05.090(2) Cd44.05.090(2)	Encourage Competition Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest		
<u>West Virginia</u> III § 7 III § 16 III § 10 I § 4; VI § 4 I § 4; VI §§ 4, 6 Cd § 1-2-1(c)(4) Cd § 1-2-1(c)(5) VI § 39	Freedom of Speech Freedom of Assembly Due Process Compactness Contiguity No Splitting Pre-Existing Political Boundaries Communities of Interest No Uniform/Special Laws	No; Legislative and Governor Elections In 2020	No
<u>Wisconsin</u> I § 3 I § 4 I §§ 1 & 8 I §§ 9, 15 IV § 4	Freedom of Speech Freedom of Assembly Due Process Equal Protection Compactness	No; Legislative Elections In 2020	No

IV §§ 4, 5	Contiguity		
IV §§ 4, 5	No Splitting Pre-Existing Political Boundaries		
Cd4.001(3)	Communities of Interest		
IV § 32	No Uniform/Special Laws		
Wyoming		No; Legislative Elections In 2020	No
I § 20	Freedom of Speech		
I § 21	Freedom of Assembly		
I § 6	Due Process		
I § 3	Equal Protection		
I § 27	Free and Equal/Open Elections		
VI § 13	Purity of Elections/Ballot		
III § 49	Compactness		
III § 49	Contiguity		
III § 49	No Splitting Pre-Existing Political Boundaries		
I §§ 27, 34	No Uniform/Special Laws		

^Puerto Rico**		No; Legislative and Governor Elections In 2020 (districts are drawn by a commission)	No
II § 4	Freedom of Speech		
II § 4	Freedom of Assembly		
II § 2	Purity of Elections/Ballot (protect against coercion)		
II § 7	Due Process		
II § 7	Equal Protection		
III § 4	Compactness		
III § 4	Contiguity		

Note: Washington, D.C. is omitted from this list because its Supreme Court is the D.C. Circuit Court of Appeals, meaning it is subject to federal review regardless of its own charter.

Legend

**= Commission states (independent or partisan)

^= not a state

Cd= state code

#=reference to guidelines of legislative committees or state agencies

~=State constitutional provision in Art. 5, Sec. 25 prohibiting special or local law is discretionary, not mandatory, for the legislature to follow. *See Haase v. Starnes*, 323 Ark. 263 (1996)