



Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering

**Samuel S.-H. Wang,
Richard F. Ober, Jr., and
Ben Williams**

Princeton University



**Program in Law and
Public Affairs**

416A Robertson Hall
Princeton University
Princeton, NJ 08544-1013
(609) 258-5626

<http://lapa.princeton.edu>

This paper can be downloaded without charge from the Social Research
Network electronic library at: <https://ssrn.com/abstract=3335622>

*Laboratories of Democracy Reform:
State Constitutions and Partisan Gerrymandering*

By Samuel S.-H. Wang, Richard F. Ober, Jr., and Ben Williams

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.¹

Giddings v. Blacker, 93 Mich. 1, 13-14, 52 N.W. 944, 948 (1892).

Introduction²

Redistricting is not usually 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.³ And legal challenges to redistricting plans have proliferated.⁴

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 given an advantage to a whole political party. 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 highs. The increased sorting of 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

¹ *Giddings v. Blacker*, 93 Mich. 1, 13–14, 52 N.W. 944, 948, 16 L.R.A. 402 (1892).

² The authors thank William T. Adler, Joshua Douglas, David Hollander, and Stephen Wolf for reading and commenting on this article.

³ *Gerrymander Jewelry*, <https://gerrymanderjewelry.com/> (last visited Feb. 12, 2019).

⁴ As of January 2019, the Brennan Center for Justice at New York University School of Law summarized the state of redistricting litigation. See Michael Li, Thomas Wolf, & Annie Lo, *The State of Redistricting Litigation*, BRENNAN CTR. FOR JUSTICE (Feb. 12, 2019, 8:42 AM), <https://www.brennancenter.org/blog/state-redistricting-litigation>.

⁵ See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2009).

arise under neutral principles.⁶ The motive 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. 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. With control of the U.S. House or a state legislature in the balance, manipulating even a small number of seats can take on central significance.

The final factor, opportunity, arrived with the wave election of 2010. Partisan gerrymandering is enabled when redistricting comes under the control of a single party.⁷ For Republicans this occurred in Florida, Michigan, North Carolina, Ohio, Pennsylvania, and Wisconsin.⁸ 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 for either party. In the wave election of 2018, 46 out of 435 House seats changed partisan hands, an incumbent-party loss rate of nearly 11%. 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.⁹ 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.¹⁰ Representationally speaking, the net result of gerrymandering this decade was that Republicans won about a dozen additional seats in Congress compared with neutral districting principles, and many more state legislative seats.¹¹

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. 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.¹²

⁶ The Brennan Center for Justice at NYU School of Law maintains an excellent web page on ongoing redistricting litigation. Li, Wolf & Lo, *supra* note 4. 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>.

⁷ In most states, this is defined 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.

⁸ See Sam Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263 (2016).

⁹ Sam Wang, Letter to the Editor, *ECONOMIST* (Jan. 19, 2018), <https://www.economist.com/letters/2019/01/19/letters>.

¹⁰ *Id.*

¹¹ See Sam Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1298-99 (2016).

¹² 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)

Because partisan gerrymandering removes general elections as a route for removing legislators, reformers have turned to courts for relief.¹³ But unlike race-based redistricting doctrine, partisan gerrymandering doctrine is unresolved. The Supreme Court has held that partisan gerrymanders are justiciable,¹⁴ but has not articulated a standard for discerning permissible versus impermissible partisanship in redistricting. In *Davis v. Bandemer*, the Supreme Court held that partisan gerrymandering could violate the Equal Protection Clause.¹⁵ 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*.¹⁶ 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.¹⁷ Those 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.¹⁸

Reformers then sought to create standards which a majority of the Supreme Court, including Justice Kennedy, could accept. But in the spring of 2018, when two cases¹⁹ with new legal theories came before the Supreme Court, it sent the cases back to the district courts on narrow, procedural grounds. Less than two weeks later, Justice Kennedy retired.²⁰ The views of his replacement, Brett Kavanaugh, on partisan gerrymandering claims are unknown, but Kavanaugh is not expected to be receptive to questions of maintained or expanded voting rights.²¹ Chief Justice Roberts, a likely deciding vote, now faces the challenge of how and whether to address partisan gerrymandering without further harm to the Court's reputation²².

Despite the lack of resolution, the Supreme Court did use *Gill v. Whitford* to lay out two intellectual frameworks for action, one by Justice Roberts and one by Justice Kagan. Chief Justice Roberts, writing for a unanimous court, suggested that voter rights could be harmed on a district-by-district basis under the Equal Protection Clause of the Fourteenth Amendment,

(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).

¹³ *Gill v. Whitford*, 138 S.Ct. 1916, 1935-36 (2018) (Kagan, J., concurring) ("Partisan gerrymandering, as this Court has recognized, is 'incompatible with democratic principles.' More effective 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)).

¹⁴ *Davis v. Bandemer*, 478 U.S. 109 (1986).

¹⁵ *Id.*

¹⁶ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

¹⁷ *Id.* (plurality opinion).

¹⁸ *Id.* (Kennedy, J., concurring in the judgment).

¹⁹ *Gill v. Whitford*, 138 S.Ct. 1916 (2018); *Benisek v. Lamone*, 138 S.Ct. 1942 (2018).

²⁰ See Michael Wines, "Kennedy's Retirement Could Threaten Efforts to End Partisan Gerrymandering," N.Y. TIMES (Jun. 30, 2018), <https://www.nytimes.com/2018/06/30/us/kennedy-scotus-gerrymandering.html>.

²¹ 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-gerrymandering-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.").

²² See Joan Biskupic, *9-0 ruling masks deep divisions on gerrymandering at Supreme Court*, CNN.COM (Jun. 21, 2018), <https://www.cnn.com/2018/06/18/politics/gerrymandering-roberts-kagan-supreme-court/index.html>.

analogous to the Court’s pre-existing racial gerrymandering doctrine.²³ 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.²⁴

Even if the Supreme Court does not use these theories to put guardrails on the practice of partisan gerrymandering, judges in other courts can. All state constitutions protect the freedom of speech, forty-seven protect the freedom of association, and twenty-four guarantee the equal protection of the laws.²⁵ 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.²⁶ For this reason, state courts present an attractive route toward reform.

Reformers won a landmark victory earlier this year 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 44% and 51% of the statewide two-party vote share for Congress in 2012, 2014, and 2016, Democrats won only 28% of the state’s Congressional seats.²⁷ 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 & Fair Elections Clause of the Commonwealth’s constitution.²⁸

In its opening paragraph, the Pennsylvania 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 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.

²³ See *Gill v. Whitford*, 138 S.Ct. 1916 (2018).

²⁴ See *id.* (Kagan, J., concurring).

²⁵ See James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881 (2006) (discussing the state constitutions and how courts have historically applied them to partisan gerrymanders).

²⁶ See George Blum et al., *Federal Constitution as Providing Floor for State Constitutional Rights*, AMERICAN JURISPRUDENCE CONSTITUTIONAL LAW §88, (“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.”).

²⁷ See Princeton Gerrymandering Project, *Tests* (Feb. 11, 2019), <http://gerrymander.princeton.edu/tests/>.

²⁸ See Brennan Center for Justice, *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania Case Summary*, BRENNAN CTR. FOR JUSTICE (Oct. 29, 2018), <https://www.brennancenter.org/legal-work/league-women-voters-v-pennsylvania>.

League of Women Voters v. Commonwealth, 178 A.3d 737, 740-41, (Pa. 2018), 181 A.3d 1083, 1084 (Pa. 2018). Order at 175 A.3d 282 (Pa. 2018).

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 state's 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.²⁹ In the end, Pennsylvania's Congressional map was redrawn. The November 2018 election resulted in a 55% Democratic, 45% Republican statewide vote and a 9-9 congressional split.³⁰

In this article, we argue that it is time to turn away from 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 example of Pennsylvania and turn to state courts and constitutions to achieve their goals. While lacking the sweeping breadth of a U.S. Supreme Court opinion, claims based on state law have two distinct advantages: (i) they can avoid removal to a federal venue, and (ii) they can base their arguments in legal provisions that are broader than the First and Fourteenth Amendments alone.

In Section I, we analyze the history of the U.S. Supreme Court's voting rights jurisprudence, laying out the Court's movement toward a justiciable partisan gerrymandering standard. Section 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. Section III surveys the types of constitutional 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. Section IV briefly summarizes the types of evidence plaintiffs will need to bring successful claims under these various constitutional provisions. Section V evaluates legal routes in states with present and potential post-2020 gerrymanders.

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.³¹ These are examples of the individual

²⁹ See Sam Wang, *Pennsylvania Congressional gerrymander overturned—and it seems likely to stick*, PRINCETON ELECTION CONSORTIUM (Jan. 22, 2018), <http://election.princeton.edu/2018/01/22/pennsylvania-congressional-gerrymander-overturned-and-its-likely-to-stick/#more-20320>.

³⁰ See Sam Wang, *Introducing the new Pennsylvania Congressional map*, PRINCETON ELECTION CONSORTIUM (Feb. 19, 2018), <http://election.princeton.edu/2018/02/19/introducing-the-new-pennsylvania-congressional-map/>.

³¹ There is conception of the “right to vote” is, thus, 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 Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

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*.³² Detailing the Court's precedents from *Colegrove v. Green*³³ to *Shaw v. Reno*,³⁴ Professor Karlan highlights how the Supreme Court has slowly pivoted from a position of avoiding the "political thicket" to entering it for limited purposes. In the first tier of individual voting rights, in *Wesberry v. Sanders*³⁵ and *Reynolds v. Sims*³⁶ the Court guaranteed the right of every qualified citizen to have his or her ballot be counted.³⁷ A second tier of voting rights occurs at the group level: the right of a group of citizens to have its 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. American representative democracy centers around the geographic aggregation of votes into districts, and aggregation cases focus on how those boundaries are drawn.³⁸ Unlike participation barriers like poll taxes or literacy tests, challenges to aggregation barriers, namely cracking and packing, 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;³⁹ instead, challengers must prove both discriminatory intent and discriminatory effect to win their constitutional claims.⁴⁰

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 groups⁴¹ 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:

³² See Pamela S. Karlan, *All over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SCTR 245 (1993).

³³ 328 U.S. 549 (1946).

³⁴ 509 U.S. 630 (1993).

³⁵ 367 U.S. 1 (1964).

³⁶ 377 U.S. 533 (1964).

³⁷ Karlan, *supra* note 32.

³⁸ 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.")

³⁹ *Id.* at 250. 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 Co. Electoral Bd.*, 553 U.S. 181 (2008) (applying *Anderson-Burdick* Balancing to determine the appropriate level of scrutiny to apply to Indiana's voter ID law).

⁴⁰ Karlan, *supra* note 32, at 250.

⁴¹ See *Thornburg v. Gingles*, 478 U.S. 30 (1986) (laying out prerequisite criteria a plaintiff must satisfy in order to qualify for relief under Section 2 of the Voting Rights Act); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (clarifying that the minority group must be a numerical majority in the area where a plaintiff claims a district should be drawn in their favor pursuant to Section 2 of the Voting Rights Act in order to satisfy the compactness requirement of the *Gingles* criteria).

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.⁴²

Karlan, *supra* note 32, at 253.

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 court 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.⁴³ Even presuming partisan intent, partisan effect is nuanced for several reasons. First, party is considered by courts to be a malleable characteristic, unlike race. Second, a major party's strength among voters is generally greater than the size of a minority group, and can 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. In some cases, the mathematical tools were designed specifically for the problem of representation;⁴⁴ 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.⁴⁵ In all cases, the measures were designed to convert electoral unfairness into a numerical measure that would be useful to courts.

⁴² Karlan, *supra* note 32, at 253 (internal citations omitted).

⁴³ *Id.*

⁴⁴ See Nicholas Stephanopoulos and Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2014); see also Jowei Chen and Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 QUARTERLY J. OF POL. SCI. 239 (2013).

⁴⁵ See Brief of Heather K. Gerken, Jonathan N. Katz, Gary King, Larry J. Sabato, and Samuel S.-H. Wang as Amici Curiae in Support of Appellees, *Gill v. Whitford*, 138 S.Ct. 1916 (2018) (16–1161), 2017 WL 3774485.

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 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 into a D+2% district, bringing the Congressional delegation to 7 Democrats, 1 Republican.⁴⁶

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.⁴⁷ 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.⁴⁸ This was the 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*⁴⁹ 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 contended 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 appeal⁵⁰ 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.⁵¹ But he also took a step toward defining a justiciable claim.

⁴⁶ *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2018 WL 5816831 (D. Md. Nov. 7, 2018), at *8. The Partisan Voter Index (PVI) measures of 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 13 points larger than the national average.

⁴⁷ See Complaint, *Whitford v. Gill*, 218 F.Supp.3d 837 (W.D. Wis. 2016) (No. 15-421).

⁴⁸ *Whitford v. Gill*, 218 F.Supp.3d 837 (W.D. Wis. 2016).

⁴⁹ At the time of filing, the case was called *Shapiro v. McManus*.

⁵⁰ See Brennan Center for Justice, *Summary Webpage: Benisek v. Lamone* (last updated Feb. 8, 2019), <https://www.brennancenter.org/legal-work/benisek-v-lamone-amicus-brief>. The appeal was denial of a motion for a permanent injunction against use of the maps in future elections.

⁵¹ *Gill*, 138 S.Ct. at 1923.

A. Chief Justice Roberts’ “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.⁵² 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,⁵³ the Chief Justice referred to the *Reynolds v. Sims*⁵⁴ finding that the right to vote is “individual and personal in nature.”⁵⁵ By this reasoning, the dilution of a vote must be analyzed in the context of where it was cast, in a specific, individual district.⁵⁶ 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.⁵⁷ Thus, he concluded, claims of party-based vote dilution claims must be concrete and particularized enough to meet Article III standing.

(i) 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.”

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.⁵⁸ He concluded that the remedy must be “tailored to redress the plaintiff’s particular injury.”⁵⁹

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, and/or is unlikely to have arisen by chance.

⁵² 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).

⁵³ *Gill*, 138 S.Ct. at 1926.

⁵⁴ 377 U.S. 533 (1964).

⁵⁵ *Gill*, 138 S.Ct. at 1929.

⁵⁶ *Id.* at 1930.

⁵⁷ *Id.* at 1931.

⁵⁸ *Id.* at 1933.

⁵⁹ *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 voter of a minority group has been denied the a 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.⁶⁰ 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.⁶¹

An ensemble-map method was most recently used in the North Carolina partisan gerrymandering case *Common Cause v. Rucho*. There, the Court struck down the state’s congressional districting scheme, relying in part on the expert testimony of Professor Jonathan Mattingly, a mathematician from Duke University. 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 Republican members of Congress than the challenged plan did. 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.

(ii) Single-District Harms Add a Significant Data Requirement

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.

⁶⁰ See *Gill*, 138 S.Ct. 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.”).

⁶¹ Indeed, Judge Frank Easterbrook also concluded that such evidence may be permissible to prove such a constitutional harm. See *Gonzalez v. City of Aurora, Ill.*, 535 F.3d 594 (2008) (stating that plaintiffs could have used ensemble mapmaking to prove their alleged harm, though they did not in this case).

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) appreciate⁶². 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.⁶³

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 doubt the plaintiffs’ math. 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,⁶⁴ partisan gerrymandering “causes other harms”⁶⁵ 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.”⁶⁶ 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.”⁶⁷ 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.”⁶⁸ 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, cited *supra*, offered this exact argument in

⁶² See Michael Migurski, “Open Precinct Data,” MEDIUM (Apr. 9, 2018), <https://medium.com/planscore/open-precinct-data-eec479287715>.

⁶³ One example of such an effort is OpenPrecincts, 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.

⁶⁴ 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.

⁶⁵ *Gill*, 138 S.Ct. at 1934.

⁶⁶ *Id.* at 1938.

⁶⁷ *Id.*

⁶⁸ *Id.*

analyzing the makeup of North Carolina’s congressional districts as a whole in the federal partisan gerrymandering case *Common Cause v. Rucho*.

Because the inequities of gerrymandering can manifest 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.⁶⁹ 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 (for more on this *see* Section IV, *infra*). 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*.⁷⁰

Proving both intents and effects is necessary to satisfy standing under Justice Kagan’s formulation of standing because plaintiffs must prove an “enduring political disadvantage.”⁷¹ For example, when measuring for inequality of opportunity, measuring for consistent advantage (the mean-median difference)⁷² is most accurate in large, closely contested states. But in states where one party dominates, measures of uniform wins (the chi-squared test)⁷³ can identify when a gerrymander has occurred.

In the end, the two paths forward laid out by Chief Justice Roberts and Justice Kagan are both achievable in federal courts if five justices can agree on a standard. As of this writing, several cases provide a suitable route to the Supreme Court in the 2018 or 2019 terms.⁷⁴

⁶⁹ *Id.* at 1933 (citing Brief for Heather K. Gerken et al. as *Amici Curiae* 27 (citing Wang, Let Math Save Our Democracy, N.Y. Times, Dec. 5, 2015).

⁷⁰ *See* Brief of Heather Gerken, Samuel S.-H. Wang, Larry Sabato, Jonathan Katz, and Gary King as *Amicus Curiae* in Support of Appellees, *Gill v. Whitford*, 138 S.Ct. 1916 (2018) (16–1161), 2017 WL 3774485..

⁷¹ *Gill*, 138 S.Ct. at 1938.

⁷² In large states with parties closely divided in strength, engineering a representational advantage usually results in a large mean-median difference. *See* 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 (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). *Id.* 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 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. *Id.*

⁷³ 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. WANG ET AL., AN ANTIDOTE FOR GOBBLEDYGOOK (Forthcoming 2018). Thus, analysts substitute in the chi-squared test for the mean-median difference. *Id.* 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. *Id.* 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. *Id.* The chi-squared test identifies this artificial uniformity, and the underlying intent, in ways the other tests cannot. *Id.*

⁷⁴ *See* Robert Barnes, “North Carolina’s gerrymandered map is unconstitutional, judges rule, and may have to be redrawn before the midterms,” WASH. POST. (Aug. 27, 2018), https://www.washingtonpost.com/local/public-safety/marylands-congressional-voting-map-is-back-in-court-in-gerrymandering-case/2018/10/03/96c6e790-c656-11e8-9b1c-a90f1daae309_story.html?utm_term=.9741677c4837.

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.⁷⁵ Under this federalist arrangement, the Supreme Court defers to a state Supreme Court which bases its opinion solely on issues of state constitutional law. 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.⁷⁶

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.⁷⁷ 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's district-by-district theory and Justice Kagan's statewide theory can easily be applied to protections anchored in state law.⁷⁸ In short, as the final arbiters of their founding documents,

⁷⁵ See U.S. CONST. art. I, Sec. 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 chusing Senators.”).

⁷⁶ See Cynthia 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 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 (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 guarantee immunity from federal review.

⁷⁷ 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 herein.

⁷⁸ EDITORS: We have analyzed all 50 state constitutions, and have linked to all of the constitutional provisions checked henceforth in a spreadsheet. We can submit it to you on request. Please contact bw18@princeton.edu for the most updated version (we frequently double-check it for errors).

state courts are free to strike down unfair districting schemes.⁷⁹ We will next show that state courts have a longstanding tradition of doing so.

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

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 offering 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 provision⁸⁰ which state courts have interpreted to be analogous.⁸¹ 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*,⁸² 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. 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 vote," has mirrored the federal requirement, the second part, "fair and effective representation," has been interpreted more strictly than the analogous federal provision [internal citations omitted].

⁷⁹ 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 section: that state courts have a long and rich history of protecting representational rights by striking down districting schemes for violating their respective constitutions.

⁸⁰ 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. For example, *see, e.g., In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 618 (Fla. 2012); Appendix A (column on state provisions guaranteeing equal population among its legislative and/or congressional districts).

⁸¹ See Appendix B, *infra*, for a table containing all 50 constitutional provisions.

⁸² *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).

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

Several other state courts have also taken an 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,⁸³ has held that its Equal Protection Clause has "independent vitality" which can guarantee greater protections than those afforded by the federal clause.⁸⁴ 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."⁸⁵ The Supreme Court of Illinois notes that, while it looks for "guidance and inspiration" from the U.S. Supreme Court "in interpreting our State constitution, we make the final determination."⁸⁶ And the Michigan Supreme Court has held that it has a "constitutional duty" to independently interpret the Michigan Constitution.⁸⁷

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 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 states⁸⁸ 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.⁸⁹ 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.

⁸³ See Stephen J. Choi, Mitu Gulati, and Eric Posner, Working Paper, *Which States Have the Best (and Worst) High Courts?* (2008), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2803&context=faculty_scholarship (ranking the Supreme Court of California as the court whose majority opinions are cited most frequently by out-of-state state courts).

⁸⁴ See *Serrano v. Priest*, 18 Cal.3d 728, 764, 135 Cal. Rptr. 345, 557 P.2d 929 (1976) ("Since *Reinecke I*, this court has also held that our state's equal protection clause (see art. I, Sec. 7), adopted in 1974, has "independent vitality which at times may require greater protection than that afforded by the federal Constitution.").

⁸⁵ *Hellar v. Cenarrusa*, 106 Idaho 586, 590, 682 P.2d 539, 543 (1984).

⁸⁶ *People ex rel. Burris v. Ryan*, 147 Ill. 2d 270, 280, 588 N.E.2d 1023, 1027 (1991).

⁸⁷ See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 97, 740 N.W.2d 444, 496 (2007) ("When interpreting our constitution, therefore, 'the 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.' [citation omitted]. 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).

⁸⁸ See Appendix B.

⁸⁹ Courts applying rational basis review will uphold a statute or regulation if it is rationally related to a legitimate governmental interest. It is the lowest level of scrutiny applied in constitutional review. See Thomas Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627 (2016) (discussing rational basis review).

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.⁹⁰ 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.⁹¹ The Kentucky Supreme Court, meanwhile, applies a standard slightly higher than rational basis,⁹² as does the Ohio Supreme Court.⁹³ State courts in North Dakota,⁹⁴ Pennsylvania,⁹⁵ and Kansas⁹⁶ 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

⁹⁰ See *In re Mary G.*, 151 Cal.App.4th. 184 (2007).

⁹¹ *Development Authority of DeKalb County v. State*, 684 S.E.2d 856 (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).

⁹² *Parker v. Webster County Coal, LLC (Dokoti Mine)*, 529 S.W.3d 759 (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).

⁹³ *State ex rel. Zupancic v. Limbach*, 568 N.E.2d 1206 (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).

⁹⁴ See *State v. Hamilton*, 20 N.D. 592, 129 N.W. 916, 918 (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).

⁹⁵ See *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556, 573 (1964) (“A legislative scheme which creates single-member districts and multi-member districts in an arbitrary manner would be objectionable. In 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.”).

⁹⁶ *State ex rel. Jackson v. Sch. Dist. No. 2*, 140 Kan. 171, 34 P.2d 102, 103 (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).

responsible for the abuse of that liberty.”⁹⁷ Some states go further rhetorically: North Carolina’s constitution says that “[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.”⁹⁸ Furthermore, forty-seven state constitutions guarantee freedom of association, the exceptions being Maryland, Minnesota, and New Mexico.⁹⁹

The U.S. Supreme Court has used the First Amendment’s speech protections to strike down state and federal election laws.¹⁰⁰ This is particularly true in the realm of campaign finance. In *Citizens United v. Federal Election Commission*,¹⁰¹ 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.¹⁰² The Court extended this logic to strike down aggregate contribution limits in 2014,¹⁰³ 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*.¹⁰⁴ He wrote that targeting the placement of voters in districts based on partisanship to reduce their power was a form of viewpoint discrimination.¹⁰⁵ Justice Kagan furthered this theory in her own concurrence in *Gill v. Whitford*. The Supreme Court has an opportunity to use this reasoning in 2019 in two cases: *Benisek v. Lamone*¹⁰⁶ and *Rucho v. Common Cause*.¹⁰⁷ Whether or not they do so, state supreme courts may use Justice Kagan’s concurrence as intellectual guidance for how to pursue their claims under state constitution-based protections of viewpoint and association.

⁹⁷ ALA. CONST. Sec. 4. See also CAL. CONST. art. 1, Sec. 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.”).

⁹⁸ N.C. CONST. Preamble, Sec. 14.

⁹⁹ Rather than reading a “freedom of association” into another constitutional provision, such as substantive due process, all three states’ Supreme Courts have largely applied the Supreme Court’s incorporation doctrine of the First Amendment against the states when doing an association analysis.

¹⁰⁰ 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).

¹⁰¹ 558 U.S. 310 (2010).

¹⁰² *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (“*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”).

¹⁰³ *McCutcheon v. FEC*, 572 U.S. 185 (2014).

¹⁰⁴ 541 U.S. 267 (1994).

¹⁰⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (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 Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters’ representational rights.”).

¹⁰⁶ See Brennan Center for Justice, *Case Summary Page: Benisek v. Lamone* (last updated Feb. 8, 2019), <https://www.brennancenter.org/legal-work/benisek-v-lamone-amicus-brief>.

¹⁰⁷ See SCOTUSblog, *Case Summary Page: Rucho v. Common Cause* (last updated Feb. 11, 2019), <https://www.scotusblog.com/case-files/cases/rucho-v-common-cause-2/>.

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.¹⁰⁸ It should also be noted that 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.¹⁰⁹ 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 of free, equal, or pure. Twenty-eight state constitutions have provisions calling for elections to be "free and equal," "free and fair," or similar terms. For example, 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."¹¹⁰ 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."¹¹¹ Vermont's Constitution goes even further, noting that elections "ought to be free and without corruption."¹¹² 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 a prominent recent example, the Pennsylvania Supreme Court relied on such a provision in its own Constitution in early 2018 to strike down the state's congressional map. In *League of Women Voters v. Commonwealth*, the Pennsylvania Supreme Court held that under Art. I, Sec. 5 of the state Constitution, which mandates that elections "shall be free and equal," laws placing voters into individual districts must "make their votes equally potent"¹¹³ in their ultimate elections for congressional representatives.

¹⁰⁸ *State ex rel Steinberg v. Moore*, 258 Neb. 738, 751, 605 N.W.2d 440, 449 (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.").

¹⁰⁹ *See Legislative Redistricting Cases*, 331 Md. 574, 601, 629 A.2d 646, 659 (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 Maryland Supreme 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 it elected not to do so.

¹¹⁰ COLO. CONST. art VII, Sec 11.

¹¹¹ ARK. CONST. art. 3, Sec. 5.

¹¹² VT. CONST. chapt. I, Art. 8th.

¹¹³ Quoting its 1869 decision in *Patterson v. Barlow*, 60 Pa. 54, a decision upholding a poll tax against claims that it violated the 'free and equal' clause.

(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.

The decision 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.

To back up its constitutional reasoning, the Pennsylvania Supreme Court used evidence relating to compactness, contiguity, and respect for political subdivisions. 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 a vote dilution to an individual voter which necessarily implicates the votes of other voters, requiring wholesale changes to map as a remedy.¹¹⁴

Pennsylvania is not the only state court 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 the corporations to the exclusion of the people violated the state’s guarantee to all citizens of “the free exercise of the right of suffrage.”¹¹⁵ And in 2009, the Arizona Court of Appeals held that its constitution’s guarantee of “free and equal” elections was implicated when

¹¹⁴ League of Women Voters of Pennsylvania v. Commonwealth, 175 A.3d 282 (Pa. 2018), 178 A.3d 737, 804-814 (Pa. 2018), 181 A.3d 1083, 1084 (Pa. 2018). Order at 175 A.3d 282 (Pa. 2018). Application for stay denied 138 S.Ct. 1323 (Mem), 200 L.Ed.2d 466, 86 USLW 3464 (2018). Appeal to the Supreme Court dismissed as moot 138 S.Ct. 1323 (Mem), 200 L.Ed.2d 466, 86 USLW 3464 (2018).”

¹¹⁵ Neelley v. Farr, 61 Colo. 485, 507-13, 158 P. 458, 466-68 (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 employees. 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 employees 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 employees. 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 employees 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 employees in many instances.”

ballot machines did not properly count ballots.¹¹⁶ Judicial interpretations of 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 doctrine which plaintiffs in various states can rely on to expand the doctrine governing partisan gerrymandering. As of this writing, in North Carolina, a state with extreme partisan gerrymandering¹¹⁷ and where the governor has no veto power over redistricting plans, plaintiffs have challenged the General Assembly maps under the state constitution’s free elections clause.¹¹⁸

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.¹¹⁹ 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”),¹²⁰ 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”),¹²¹ 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”).¹²² 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.¹²³

Eleven states require that elections be “pure.” Vermont calls for elections to be “free and pure,”¹²⁴ while Illinois calls for “ensuring integrity” in elections.¹²⁵ Michigan’s Constitution mandates that the Legislature “enact laws to preserve the purity of elections.”¹²⁶ Michigan’s Supreme Court used 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”.¹²⁷ Tennessee’s Constitution

¹¹⁶ *Chavez v. Brewer*, 222 Ariz. 309, 320, 214 P.3d 397, 408 (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 machines not counting ballots properly).

¹¹⁷ See *Tests Page*, PRINCETON GERRYMANDERING PROJECT (updated Jan. 31, 2019), <http://gerrymander.princeton.edu/tests/>.

¹¹⁸ See N.C. CONST. art. I, Sec. 10.

¹¹⁹ See, e.g., MASS. CONST. P. 1, 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. 1, XI (“[E]very inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.”).

¹²⁰ N.D. CONST. art. IV, Sec. 2.

¹²¹ S.C. CONST. art. I, Sec. 5.

¹²² W.V. CONST. art. II, Sec. 4.

¹²³ See *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965).

¹²⁴ VT CONST. art. I, Sec. 8.

¹²⁵ ILL. CONST. art. III, Sec. 3.

¹²⁶ MICH. CONST. art. II, Sec. IV.

¹²⁷ *McDonald v. Grand Traverse Cty. Election Comm’n*, 255 Mich. App. 674, 692–93, 662 N.W.2d 804, 816–17 (2003). See also *Wells v. Kent Cty. Bd. of Election Comm’rs*, 382 Mich. 112, 168 N.W.2d 222 (1969); *Socialist Workers Party v. Sec’y of State*, 412 Mich. 571, 596, 317 N.W.2d 1, 10 (1982);

gives the General Assembly discretion on whether to enact laws securing “the freedom of elections and the purity of the ballot box.”¹²⁸ A multitude of cases have construed the applicability of purity constitutional provisions to individual voting rights such as voter identification and ballots.

To apply the free-and-equal 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.¹²⁹

To summarize, guarantees of free, equal, and/or pure 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. While these provisions are somewhat outside the scope of what this article attempts to achieve, they are included here for completeness sake.

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 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.¹³⁰ And because these

Elliott v. Sec'y of State, 295 Mich. 245, 294 N.W. 171 (1940).

¹²⁸ TENN. CONST. art. IV, Sec. I.

¹²⁹ See, e.g., 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 (2018).

¹³⁰ 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. See *Matter of 2012 Legislative Districting of the State*, 436 Md. 121, 137-38 (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.”); *Matter of Legislative Districting*, 370 Md. 312 (Md. 2002) (“If 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

provisions directly attack partisan gerrymanders, they will obviously be cited in states which contain them.¹³¹¹³² Outside of those states, these provision offer little to prospective plaintiffs, although some state Supreme Courts have been willing to entertain common law prohibitions on partisan gerrymandering in unique circumstances.¹³³

never ‘trump’ constitutional requirements.”); *Legislative Redistricting Cases*, 331 Md. 574, 591 (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.”).

¹³¹ 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. 4, Pt. 2, Sec. 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, Sec. 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 party”); COLO. CONST. art. V, Sec. 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 senate or house of representatives, or any political party”); Del. CONST. art. II Sec. 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. Secs. 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”); HAWAII CONST. art. IV, Sec. 6 (“No district shall be so drawn as to unduly favor a person or political faction”); Idaho Stat. Code 72-1506(8) (“Counties shall not be divided to protect a particular political party or a particular incumbent”); Iowa Code Sec. 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”); MICH. CONST. art. II, Sec. 6 (“Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness”); 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”); N.Y. CONST. art. III, Sec. 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, Sec. 6 (“No General Assembly plan shall be drawn primarily to favor or disfavor a political party”); 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(4) (“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”); Wash. Rev. Code 44.05.090(5) (“In a redistricting plan . . . The commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition. The commission’s plan shall not be drawn purposely to favor or discriminate against any political party or group.”). 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. 3, Sec. 3 (“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.

¹³² *See* 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.’”).

¹³³ *See, e.g.,* Peterson v. Borst, 786 N.E.2d 668, 659–71 (Ind. 2003) (“[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

2. Competitiveness/Proportional Representation

Four states, Arizona,¹³⁴ Colorado,¹³⁵ Missouri,¹³⁶ and Washington¹³⁷, have laws which specifically call for creating competitive districts. Ohio requires a different concept, proportional representation.¹³⁸ 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.

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,¹³⁹ and other traditional criteria like contiguity and preserving pre-existing political boundaries contain a rich jurisprudence of striking down districting plans.¹⁴⁰ 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.

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.”).

¹³⁴ ARIZ. CONST. art. IV, Part. 2, Sec. 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”).

¹³⁵ CO CONST. Art. V, Sec.44.3(3)(a) & (d) and Sec 48.1(3)(a).“(a) Thereafter, the commission shall, to the extent possible, maximize the number of politically competitive districts.*** (d) For purposes of this subsection (3), ‘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.”).

¹³⁶ MO. CONST. Art III, Sec. 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.”)

¹³⁷ Wash. Rev. Stat. 44.05.090(5) (“The commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition.”).

¹³⁸ OHIO CONST. art. XI, Sec. 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.”).

¹³⁹ See, e.g., Micah Altman, *Modeling the effect of mandatory district compactness on partisan gerrymanders*, 17 POL. GEO. 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. OF POL. 1155 (1990).

¹⁴⁰ 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.

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.¹⁴¹ 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.¹⁴² Two states define compactness in their state constitutions. Michigan's constitution requires districts to be "as rectangular in shape as possible."¹⁴³ Missouri's Constitution states: "In general, compact districts are those which are square, rectangular, or hexagonal in shape to the extent permitted by natural or political boundaries."¹⁴⁴ Missouri has used this compactness requirement as an explicit check on partisan gerrymandering.¹⁴⁵

2. Contiguity

Along with compactness, contiguity is one of the oldest redistricting requirements. Forty-two state constitutions require that districts be contiguous, and all 50 states require it in some form (statute, constitution, or judicial precedent).¹⁴⁶ 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.¹⁴⁷

¹⁴¹ See *Vesilind v. Va. State Bd. of Elections*, 295 Va. 427, 813 S.E.2d 739 (2018). "(S)ocial scientists have developed at least 50 different methods of measuring compactness."

¹⁴² See, e.g., *In re Senate Joint Res. Of Leg. Apportionment 1176*, 83 So.3d 597 (Fla. 2012).

¹⁴³ U.S. CONST. art. 4, Sec. 2.

¹⁴⁴ Constitution, Art. III, Sec. 3(c)(1)(e)

¹⁴⁵ See *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 65 (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.")

¹⁴⁶ See Nat'l. Conf. of State Legislatures, *Redistricting Criteria*,

<http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx>. See also Appendix B.

¹⁴⁷ See *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n*, 211 Ariz. 337, 363-64, 121 P.3d 843, 849, 869-70 (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); *In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session; Constitutionality Vel Non*, 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 Sup'rs of Cty. of Houghton v. Blacker*, 92 Mich. 638, 646, 52 N.W. 951, 953 (1892) (holding

While contiguity is a fairly weak requirement, it does prevent the packing of voters into isolated islands based on their voting 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.¹⁴⁸ The most frequently addressed government unit is the county.¹⁴⁹ 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*¹⁵⁰ declared such systems of representation unconstitutional. These two 1964 cases struck down state prohibitions against crossing political boundaries created a requirement that districts be of near-equal population (the “one person, one vote” requirement).¹⁵¹

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 government.¹⁵² These cases frequently express concern that the efficiency of legislative representation would be undermined by crossing county lines.¹⁵³ 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

that islands in the Great Lakes could be contiguous over water); *In re Sherill* (State Report Title: *Matter of Sherrill v. O'Brien*), 188 N.Y. 185, 207, 81 N.E. 124 (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).

¹⁴⁸ See, e.g., IOWA CONST. art. III, Sec. 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, Sec. 4 (“Due regard shall be given to natural boundaries and the boundaries of political subdivisions”); N.C. CONST. Art. 2, Sec. 3(3) (“No county shall be divided in the formation of a senate district”); N.C. CONST. art. 3, Sec. 5(3) (“No county shall be divided in the formation of a representative district”).

¹⁴⁹ In Louisiana, counties are referred to as “parishes.”

¹⁵⁰ 377 U.S. 713 (1964).

¹⁵¹ For examples of cases striking down these kinds of plans, see *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 479 (Ky. 1994); *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 919 (Ky. 2012); *In re Legislative Districting of State*, 370 Md. 312, 318, 805 A.2d 292, 295 (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 Senate Bill 177*, 130 Vt. 358, 294 A.2d 653, *supplemented*, 130 Vt. 365, 294 A.2d 657 (1972).

¹⁵² *Stephenson v. Bartlett*, 562 S.E.2d 377, 385 (N.C. 2002); *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); *Jackman v. Bodine*, 205 A.2d 713, 718 (N.J. 1964); *Scriminger v. Sherwin*, 291 A.2d 134, 141 (N.J. 1972).

¹⁵³ *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).

legislative district as unconstitutionally non-compact,¹⁵⁴ while the Idaho Supreme Court adopted a rigid ranking of criteria meaning which gave that state's prevention of county splits preeminence, second only to federal mandates.¹⁵⁵ Similarly, Nebraska follows a practicability standard, requiring that districts be constructed of whole county units wherever practicable.¹⁵⁶ The absence of a unified approach will require each state to establish its own route to identifying if and when counties have been split too many times.

4. Preserving Communities of Interest

Of all the criteria listed considered by most states, perhaps the most malleable and least quantifiable,¹⁵⁷ yet of central conceptual importance, is that districts preserve "communities of interest." The justification of states considering communities of interest in the redistricting process is 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."¹⁵⁸

A few states define communities of interest¹⁵⁹. Among the more specific provisions, the Alaska Constitution defines communities of interest as "a relatively integrated socio-economic

¹⁵⁴ In re Colorado 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.

¹⁵⁵ See *Bingham Cty. v. Idaho Comm'n for Reapportionment*, 137 Idaho 870, 876, 55 P.3d 863, 869 (2002).

¹⁵⁶ See *Day v. Nelson*, 240 Neb. 997, 1000–01, 485 N.W.2d 583, 586 (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, Section 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.").

¹⁵⁷ 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.

¹⁵⁸ 274 P.3d 66 (N.M. 2012) (internal citations omitted).

¹⁵⁹ Apart from the states set out below, Vermont also provides a definition of community of interest beyond a barebones recitation of the phrase. Vt. Code, Title 17, Chapter 34A, Sec 1903(b)(2) ("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).

area.”¹⁶⁰ The California Constitution describes communities 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 to the same media of communication relevant to the election process.”¹⁶¹¹⁶² 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.¹⁶³ Colorado goes further, explicitly noting that racial, ethnic, and language minority groups could also constitute communities of interest.¹⁶⁴ California and Colorado explicitly prohibit political parties, incumbents, or candidates from factoring into any consideration of what constitutes a community of interest.¹⁶⁵ Most states leave the term wholly undefined, leaving it up to legislatures and courts to read meaning into the phrase.¹⁶⁶¹⁶⁷

There is also precedent for using the concept of communities of interest in the absence of statutory or constitutional language. Alabama and 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.¹⁶⁸ Thus the concept of communities of interest is

¹⁶⁰ ALASKA CONST. art. VI, Sec. 6.

¹⁶¹ CAL. CONST. art. XXI, Sec. 2(d)(4).

¹⁶² 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’ 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.

¹⁶³ COLO. CONST. art. V, Sec. 44(3)(b).

¹⁶⁴ *Id.*

¹⁶⁵ CAL. CONST. art. XXI, Sec. 2(d)(4) (“Communities of interest shall not include relationships with political parties, incumbents, or political candidates); COLO CONST. art. V, Sec. 44(3)(b)(iv) (“‘Community of interest’ does not include relationships with political parties, incumbents, or political candidates.”).

¹⁶⁶ Thirty-one states require that either their congressional or state legislative districts (or both) be drawn with communities of interest in mind; eight by constitutional provision, nine by statute, the rest by resolutions or guidelines. For examples of states without definitions of the phrase, *see, e.g.*, ARIZ. CONST. art. IV, Part 2, Sec. 1(14)(D) (“District boundaries shall respect communities of interest to the extent practicable”); N.Y. CONST. art. III, Sec. 5 (“The Commission shall consider . . . communities of interest”). For examples of resolutions adopted by Legislatures or guidelines laid out by commissions, *see* Arkansas Board of Apportionment, “Court Approved Criteria,” <http://www.arkansasredistricting.org/redistricting-criteria>; Alabama Legislature, “Reapportionment Committee Guidelines for Congressional, Legislative, and Board of Education Redistricting,” <http://www.legislature.state.al.us/aliswww/reapportionment/Reapportionment%20Guidelines%20for%20Redistricting.pdf>.

¹⁶⁷ Courts have gone far afield. In *Hall v. Moreno*, 270 P.2d 961 (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.

¹⁶⁸ *See City of Manchester v. Sec’y of State*, 163 N.H. 689, 708, 48 A.3d 864, 878 (2012) (holding that Nothing in the New Hampshire Constitution requires a redistricting plan to consider “communities of interest,” and although preservation of communities of interest may be a legitimate redistricting goal, it doesn’t mean that there is an

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.¹⁶⁹ With 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 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 as to whether it has led to inequities of representational outcome. A variety of tests of outcome have been developed, including the efficiency gap,¹⁷⁰ non-map-based computer simulation,¹⁷¹ and detailed examination of maps using Monte Carlo map drawing methods.¹⁷²

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 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.¹⁷³ In all cases, a detailed examination of alternative maps provides a way of testing whether the actual map gives an

individual right to have one's particular community contained within a district). *See also* Matter of Legislative Districting of State, 299 Md. 658, 692–93, 475 A.2d 428, 445 (1984), appeal dismissed sub nom. *Wiser v. Hughes*, 495 U.S. 962 103 S.Ct. 286, 74 L.Ed.2d 272 (1982).

¹⁶⁹ *See* Bernard Grofman and Jonathan Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania*, 17 ELECTION L. J. 268 (2018). An excellent work on the similar, yet slightly adjacent issue of the Right to Vote under state constitutions is by Joshua Douglas at the University of Kentucky. *See* Joshua Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2015). Unfortunately, Mr. Douglas's work predates the decision in *League of Women Voters v. Commonwealth of Pennsylvania* and does not address its potential future impacts. The authors eagerly await a supplemental piece from Mr. Douglas!

¹⁷⁰ *See* Nick Stephanopoulos and Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

¹⁷¹ *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>.

¹⁷² *See* Ben Fifield et al., *A New Automated Redistricting Simulator Using Markov Chain Monte Carlo*, <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.

¹⁷³ For a treatment of how to select tests, *see* Samuel S.-H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 15 ELECTION L.J. 367 (2016); Michael D. McDonald, *Making a Case for Two Paths Forward in Light of Gill v. Whitford*, 17 ELECTION L.J. 315 (2018).

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.¹⁷⁴

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 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.¹⁷⁵ 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 section will highlight examples of states which exemplify these reform opportunities.¹⁷⁶ Details for all states can be found in Appendix B.

1. Philosophically Inclined for 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.¹⁷⁷ Some members of the legislature were so incensed by the decision that they threatened to impeach the justices in the majority. The

¹⁷⁴ See Herschlag and Mattingly, Working Paper, *Quantifying Gerrymandering in North Carolina*, available at <https://arxiv.org/abs/1801.03783>.

¹⁷⁵ *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252 (2009)

¹⁷⁶ 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.

¹⁷⁷ 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?utm_term=.263e2522aee5; David Jackson, "Trump urges Pennsylvania Republicans to take congressional district map fight to high court," USA TODAY (Feb. 20, 2018, 9:18 AM EST), <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, 1:29 PM), <https://www.reuters.com/article/us-usa-politics-pennsylvania/supreme-court-upholds-pennsylvania-election-map-in-win-for-democrats-idUSKBN1GV2BZ>.

decision was seen as a threat to the independence of the judiciary,¹⁷⁸ and Republican leadership ultimately did not take up the impeachment movement.¹⁷⁹

2. 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.¹⁸⁰ Thus, without a check on its power, the dominant party in the General Assembly can potentially maintain itself in power indefinitely. The congressional and legislative district maps of North Carolina are among the most partisan in the nation,¹⁸¹ and have inspired a tremendous amount of litigation.¹⁸² Under these circumstances, a judicial check takes on central importance.

In 2018, Anita Earls, a voting rights advocate, was elected to the North Carolina Supreme Court. This changed the court's composition from 4 Democrats, 3 Republicans to 5 Democrats, 2 Republicans.¹⁸³ (A recent retirement of Chief Justice Mark Martin, a Republican, may lead to a further change when Democratic Governor Roy Cooper appoints his replacement). Reformers brought a lawsuit within one week of the election. They contended that the state legislative plan violated three separate provisions of the North Carolina Constitution: the Equal Protection Clause, the Free Elections Clause, and the Free Speech and Association clauses.¹⁸⁴ Defendants have made a motion to move the case to federal court. Because of the lack of subject matter jurisdiction, it is expected that the case will be remanded to the state court.¹⁸⁵

3. A History of Policing Gerrymanders: Maryland

Maryland has a history of judicial review of 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:

¹⁷⁸ Jan Murphy, "Pa. Supreme Court Chief Justice sees impeachment resolutions as 'attack upon an independent judiciary,'" PENN. LIVE (Mar. 22, 2018), https://www.pennlive.com/politics/index.ssf/2018/03/pa_supreme_court_chief_justice.html.

¹⁷⁹ See Editorial Board, "Pennsylvania Judges Threaten to Impeach Lawmakers. It's a Dangerous Trend," 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?utm_term=.1037ac02207f.

¹⁸⁰ See All About Redistricting, *North Carolina*, <http://redistricting.ils.edu/states-NC.php>.

¹⁸¹ See Princeton Gerrymandering Project, *Tests* (last updated Feb. 11, 2019), <http://gerrymander.princeton.edu/tests>.

¹⁸² See All About Redistricting, *North Carolina: Litigation*, <http://redistricting.ils.edu/states-NC.php#litigation>.

¹⁸³ 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>.

¹⁸⁴ See Complaint at 60-64, *Rucho v. Common Cause*, 318 F.Supp.3d 377 (2018).

¹⁸⁵ For additional states which may fit into this category, see Appendix B.

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

Matter of the Legislative Districting of the State, 299 Md. 658, 675-682 (Md. 1982).

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.¹⁸⁶

In 2002, the Court of Appeals finally struck down a legislative districting plan as unconstitutionally noncompact.¹⁸⁷ 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 both factors mandated by the constitution as well as other factors (which may well be political in nature), the constitution ultimately “trumps” political considerations.¹⁸⁸ 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.¹⁸⁹

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 reduced partisan redistricting in the 2020 cycle through the regular legislative process.

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.¹⁹⁰ 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

¹⁸⁶ Legislative Redistricting Cases, 331 Md. 574 (1993).

¹⁸⁷ *Matter of Legislative Districting*, 370 Md. 312 (2002).

¹⁸⁸ *Id.* at 370 (“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.”).

¹⁸⁹ Like Pennsylvania and North Carolina, Maryland’s constitution guarantees that all elections must be “free and frequent.” MD CONST. art. 7. 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* Appendix A.

¹⁹⁰ Examples include Alaska, California, Florida, Kentucky, Maryland, Michigan, and Missouri.

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.

Appendix A:

Major Cases Striking Down Redistricting Plans Under State Constitutional Protections¹⁹¹

State	Case Name	Citation	Pertinent Constitutional Provisions
Florida	<i>Apportionment I</i>	83 So.3d 597 (2018)	<ul style="list-style-type: none"> ● Prohibition on partisan gerrymandering
California	<i>Assembly of State of Cal. v. Deukmejian</i>	639 P.2d 939 (1982)	<ul style="list-style-type: none"> ● One person, one vote (state & federal)
Idaho	<i>Bingham Co. v. Idaho Comm'n for Reapportionment</i>	55 P.3d 863 (2002)	<ul style="list-style-type: none"> ● One person, one vote (state & federal) ● Preexisting political boundaries
Virginia	<i>Brown v. Saunders</i>	166 S.E. 105 (1932)	<ul style="list-style-type: none"> ● One person, one vote (state & federal)
Illinois	<i>Burris v. Ryan</i>	588 N.E.2d 1023 (1991)	<ul style="list-style-type: none"> ● Compactness ● One person, one vote
Alaska	<i>Carpenter v. Hammond</i>	667 P.2d 1204 (1983)	<ul style="list-style-type: none"> ● Compactness ● One person, one vote (state) ● Communities of interest
Nebraska	<i>Day v. Nelson</i>	485 N.W.2d 583 (1992)	<ul style="list-style-type: none"> ● Preexisting political subdivisions
Idaho	<i>Hellar v. Cenarrusa</i>	682 P.2d 539 (1984)	<ul style="list-style-type: none"> ● Equal protection (state & federal) ● Right to vote ● Preexisting political subdivisions
Alaska	<i>Hickel v. Southeast Conference</i>	846 P.2d 38 (1992)	<ul style="list-style-type: none"> ● Communities of interest ● Compactness

¹⁹¹ This Appendix includes several cases with intertwined state and federal constitutional issues. Because this is relevant to several analyses, including the Adequate and Independent State Grounds doctrine, we elected to include those federal provisions the courts cited as justification for their holdings in this chart.

Alaska	<i>In re 2001 Redistricting Cases</i>	44 P.3d 141 (2002)	<ul style="list-style-type: none"> ● Compactness ● One person, one vote (state & federal)
Maryland	<i>In re Legislative Districting of State</i>	805 A.2d 292 (2002)	<ul style="list-style-type: none"> ● Preexisting political subdivisions ● Not following natural boundaries
New York	<i>In re Livingston</i>	160 N.Y.S. 462 (Sup. Ct., Kings Co., 1916)	<ul style="list-style-type: none"> ● Compactness
Colorado	<i>In re Reapportionment of Colo. Gen. Assembly</i>	45 P.3d 1237 (2002)	<ul style="list-style-type: none"> ● Preexisting political subdivisions
Vermont	<i>In re Reapportionment of Towns of Hartland, Windsor & W. Windsor</i>	624 A.2d 323 (1993)	<ul style="list-style-type: none"> ● Communities of interest
Florida	<i>In re Senate Joint Resolution of Legislative Apportionment 1176</i>	83 So.3d 597 (2012)	<ul style="list-style-type: none"> ● Prohibition on partisan gerrymandering
Alaska	<i>Kenai Peninsula Borough v. State</i>	743 P.2d 1352 (1987)	<ul style="list-style-type: none"> ● Equal protection (state)
Florida	<i>League of Women Voters of Fla. v. Detzner</i>	172 So.3d 363 (2015)	<ul style="list-style-type: none"> ● Prohibition on partisan gerrymandering
Pennsylvania	<i>League of Women Voters of Pennsylvania v. Commonwealth</i>	181 A.3d 1083 (2018)	<ul style="list-style-type: none"> ● Free and equal elections
Colorado	<i>Mauff v. People</i>	123 P. 101 (1912)	<ul style="list-style-type: none"> ● Purity of elections
Colorado	<i>Neelley v. Farr</i>	158 P. 458 (1916)	<ul style="list-style-type: none"> ● Freedom of speech (state) ● Freedom of assembly (state) ● Free and open elections

Missouri	<i>Pearson v. Koster</i>	359 S.2.3d 35 (2012)	<ul style="list-style-type: none"> ● Compactness
Colorado	<i>People ex rel. Salazar v. Davidson</i>	79 P.3d 1221 (2003)	<ul style="list-style-type: none"> ● Prohibition on mid-decade redistricting
New Jersey	<i>Scrimminger v. Sherwin</i>	291 A.2d 134 (1972)	<ul style="list-style-type: none"> ● One person, one vote (federal) ● Preexisting political Subdivisions
Missouri	<i>State ex rel. Barrett v. Hitchcock</i>	146 S.W. 40 (1912)	<ul style="list-style-type: none"> ● Compactness ● Preexisting political subdivisions
West Virginia	<i>State ex rel. Smith v. Gore</i>	143 S.E.2d 791 (1965)	<ul style="list-style-type: none"> ● One person, one vote (state)
North Dakota	<i>State v. Hamilton</i>	129 N.W. 916 (1910)	<ul style="list-style-type: none"> ● Uniform laws
Delaware	<i>Young v. Red Clay Consol. Sch. Dist.</i>	122 A.3d 784 (Del. Ch. 2015)	<ul style="list-style-type: none"> ● Elections clause (state's equal protection clause for election issues)

**Major Cases Striking Down Election
Laws Under State Constitutional Protections**

State	Case Name	Citation	Pertinent Constitutional Provisions
Kentucky	<i>Ferguson v. Rohde</i>	449 S.W.2d 758 (1970)	<ul style="list-style-type: none"> ● Free & fair elections (ballot construction)
New Mexico	<i>Gunaji v. Macias</i>	31 P.3d 1008 (2001)	<ul style="list-style-type: none"> ● Free & open elections (counting of ballots)
Kentucky	<i>Hillard v. Lakes</i>	172 S.W.2d 456 (1943)	<ul style="list-style-type: none"> ● Free and fair elections (ballot construction)
Missouri	<i>Kasten v. Guth</i>	375 S.W.2d 110 (1964)	<ul style="list-style-type: none"> ● Right to vote (for write-in candidates)
Kentucky	<i>Lakes v. Estridge</i>	172 S.W.2d 454 (1943)	<ul style="list-style-type: none"> ● Right to vote ● Free & Fair Elections (denial of ballot)
Kentucky	<i>Lee v. Commonwealth</i>	565 S.W.2d 634 (1978)	<ul style="list-style-type: none"> ● Prohibition on special laws (campaign finance)
California	<i>Serrano v. Priest</i>	557 P.2d 929 (1976)	<ul style="list-style-type: none"> ● Equal protection (state) (public school financing)
Michigan	<i>Socialist Workers Party v. Sec'y of State</i>	317 N.W.2d 1 (1982)	<ul style="list-style-type: none"> ● Purity of elections ● Equal

			protection (state) <ul style="list-style-type: none"> • First Amendment (federal) • Fourteenth Amendment (federal) (ballot access)
Michigan	<i>Wells v. Kent County Bd. of Elections Comm'rs</i>	186 N.W.2d 222 (1969)	<ul style="list-style-type: none"> • Purity of elections (ballot design)

Appendix B:

**State Constitutional Provisions,
Power Balances within States in 2021,
And Whether the Political and Judicial Branches are Politically Opposed¹⁹²**

State	Relevant Constitutional Provisions	Trifecta in 2021 guaranteed as of 2/2019?	State High Court Opposed to Legislature?
Alabama	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● No Splitting Pre-existing Political Boundaries ● No Uniform/Special Laws 	Yes	No
Alaska**	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● Communities of Interest ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No

¹⁹² For guidance on ascertaining whether particular judges may be receptive to these arguments on partisan gerrymandering, see Joshua Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1 (2016).

Arizona	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Purity of Elections/Ballot ● No Gerrymandering for Party ● No Gerrymandering for Person/Incumbent ● Encourage Competition ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● Communities of Interest ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No
Arkansas	<ul style="list-style-type: none"> ● 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
California**	<ul style="list-style-type: none"> ● 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 	No; Legislative Elections In 2020	No

	<ul style="list-style-type: none"> ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● Communities of Interest ● No Uniform/Special Laws 		
Colorado**	<ul style="list-style-type: none"> ● 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 ● Encourage Competition ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● Communities of Interest ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No
Connecticut	<ul style="list-style-type: none"> ● 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

Delaware	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● 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	<ul style="list-style-type: none"> ● 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 	No; Legislative Elections In 2020	No
Georgia	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Contiguity ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No

Hawaii**	<ul style="list-style-type: none"> ● 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; Legislative Elections In 2020	No
Idaho**	<ul style="list-style-type: none"> ● 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; Legislative Elections In 2020	No
Illinois	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Purity of Elections/Ballot ● Compactness ● Contiguity ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No

Indiana	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Free and Equal/Open Elections ● Contiguity ● No Uniform/Special Laws 	No; Legislative and Governor Elections In 2020	No
Iowa	<ul style="list-style-type: none"> ● 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 ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No
Kansas	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No

Kentucky	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative and Governor Elections In 2019	No
Louisiana	<ul style="list-style-type: none"> ● 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	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries 	No; Legislative Elections In 2020	Yes
Maryland	<ul style="list-style-type: none"> ● Freedom of Speech ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Purity of Elections/Ballot ● Compactness ● Contiguity ● No Splitting Pre-Existing Political 	No; Legislative Elections In 2020	No

	<ul style="list-style-type: none"> ● Boundaries ● No Uniform/Special Laws 		
Massachusetts	<ul style="list-style-type: none"> ● 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**	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Equal Protection ● Free and Equal/Open Elections ● Purity of Elections/Ballot ● 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

Minnesota	<ul style="list-style-type: none"> ● Freedom of Speech ● Due Process ● Equal Protection ● Contiguity ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No
Mississippi	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● No Gerrymandering for Person/Incumbent ● Contiguity ● No Uniform/Special Laws 	No; Legislative and Governor Elections In 2019	No
Missouri**	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Free and Equal/Open Elections ● Encourage Competition ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative and Governor Elections In 2020	Yes

Montana**	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● 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 and Governor Elections In 2020	No
Nebraska	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● No Gerrymandering for Person/Incumbent ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No
Nevada	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Purity of Elections/Ballot ● Compactness ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No

<p>New Hampshire</p>	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Contiguity ● No Splitting Pre-Existing Political Boundaries 	<p>No; Legislative and Governor Elections In 2020</p>	<p>No</p>
<p>New Jersey**</p>	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries 	<p>No; Legislative Elections In 2019</p>	<p>Yes</p>
<p>New Mexico</p>	<ul style="list-style-type: none"> ● Freedom of Speech ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Purity of Elections/Ballot ● No Gerrymandering for Person/Incumbent ● Compactness ● Contiguity ● Communities of Interest ● No Uniform/Special Laws 	<p>No; Legislative Elections In 2020</p>	<p>No</p>

New York	<ul style="list-style-type: none"> ● 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
North Carolina	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative and Governor Elections In 2020	Yes
North Dakota	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Compactness ● Contiguity ● No Uniform/Special Laws 	No; Legislative and Governor Elections In 2020	No

Ohio**	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● No Gerrymandering for Party ● No Gerrymandering for Person/Incumbent ● Encourage Competition ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No
Oklahoma	<ul style="list-style-type: none"> ● 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 ● Communities of Interest ● No Uniform/Special Laws 	No; Legislative Elections In 2020	Yes

Oregon	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● No Gerrymandering for Party ● No Gerrymandering for Person/Incumbent ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● Communities of Interest 	No; Legislative Elections In 2020	No
Pennsylvania	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No
Rhode Island	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Compactness 	No; Legislative Elections In 2020	No

<p>South Carolina</p>	<ul style="list-style-type: none"> ● 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 ● Communities of Interest 	<p>No; Legislative Elections In 2020</p>	<p>No</p>
<p>South Dakota</p>	<ul style="list-style-type: none"> ● 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 	<p>No; Legislative Elections In 2020</p>	<p>No</p>
<p>Tennessee</p>	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Purity of Elections/Ballot ● Contiguity ● No Splitting Pre-Existing Political Boundaries 	<p>No; Legislative Elections In 2020</p>	<p>No</p>

	<ul style="list-style-type: none"> ● No Uniform/Special Laws 		
Texas	<ul style="list-style-type: none"> ● 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
Utah	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Free and Equal/Open Elections ● 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 and Governor Elections In 2020	No

Vermont	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Purity of Elections/Ballot ● Gerrymandering for Party ● Gerrymandering for Person/Incumbent ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● Communities of Interest 	No; Legislative and Governor Elections In 2020	No
Virginia	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Free and Equal/Open Elections ● Gerrymandering for Party ● Gerrymandering for Person/Incumbent ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● Communities of Interest ● No Uniform/Special Laws 	No; Legislative Elections In 2019	No

Washington	<ul style="list-style-type: none"> ● 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 ● Communities of Interest ● No Uniform/Special Laws 	No; Legislative and Governor Elections In 2020	No
West Virginia	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● Communities of Interest ● No Uniform/Special Laws 	No; Legislative and Governor Elections In 2020	No
Wisconsin	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No

Wyoming	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● Due Process ● Equal Protection ● Compactness ● Contiguity ● No Splitting Pre-Existing Political Boundaries ● No Uniform/Special Laws 	No; Legislative Elections In 2020	No
^Puerto Rico**	<ul style="list-style-type: none"> ● Freedom of Speech ● Freedom of Assembly ● “Equal and Universal Suffrage” ● Due Process ● Equal Protection ● Compactness ● Contiguity 	No; Legislative and Governor Elections In 2020	No

Please Note: Washington, D.C. is omitted from this list because its Supreme Court is the D.C. Circuit, meaning it is subject to federal review regardless of its own charter (it is a creature of Congress and cannot escape federal review).

Legend

**= Commission states (independent or partisan)

= not a state