

By Daniel Hessel¹ / July 17, 2018

LITIGATING PARTISAN GERRYMANDERING CLAIMS UNDER STATE CONSTITUTIONS

Introduction

In June 2018, the Supreme Court of the United States was expected to clarify if and when claims of partisan gerrymandering are justiciable under the U.S. Constitution. Unfortunately, in both *Gill v. Whitford* and *Benisek v. Lamone*, the Court punted on the merits and used procedural mechanisms to send the cases back to the trial courts for further development of the evidentiary record.² This means that voters throughout the country will have to wait a year or more to hear from the Supreme Court as to whether partisan gerrymandering claims are justiciable at the federal level, and if so, how one can prove an impermissible gerrymander has occurred.

In *Whitford*, a group of Wisconsin voters affiliated with the Democratic Party challenged their state's assembly map under the federal Constitution, claiming the map had been drawn to favor the Republican Party in violation of the First and Fourteenth Amendments. Specifically, they claimed that these maps constituted impermissible political discrimination.³ In *Benisek*, a group of Republican voters challenged Maryland's congressional map, alleging the map had been drawn to burden their rights under the First Amendment.⁴

Whitford and *Benisek* were the latest of several cases in the past three decades in which the Court grappled with partisan gerrymandering. First in *Davis v. Bandemer* (1986),⁵ again in *Vieth v. Jubelirer* (2004),⁶ and most recently in *League of United Latin American Citizens v. Perry* (2006),⁷ a majority of the Court indicated that partisan gerrymandering likely violates the federal Constitution. At the same time, the Court has never struck down a map as an unconstitutional partisan gerrymander. In *Vieth*, a four-Justice-plurality indicated that partisan gerrymandering claims were non-justiciable because courts lacked judicially manageable standards by which to judge them. Justice

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² Another two cases alleging that the North Carolina congressional plan of 2016 is a partisan gerrymander, *League of Women Voters of North Carolina v. Rucho* and *Common Cause v. Rucho*, 17A745 (U.S.), were also sent back to the trial court for further review.

³ See generally, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016); *Gill v. Whitford*, 585 U.S. ___, 138 S. Ct. 1916 (2018).

⁴ See generally, *Benisek v. Lamone*, 585 U.S. ___, 138 S. Ct. 1942 (2018).

⁵ 478 U.S. 109 (1986).

⁶ 541 U.S. 267 (2004).

⁷ 548 U.S. 399 (2006).

Kennedy concurred in the judgment, but refused to rule out the possibility of a manageable standard, inviting further litigation on the issue.

The Wisconsin state assembly map at issue in *Whitford* was drawn with precision to systematically advantage voters of one political party and disadvantage voters of the opposing party for the entire decade, regardless of the will of the electorate. The plaintiffs in the case proposed a three-part standard by which courts can judge partisan gerrymanders.

The Court was conspicuously silent on the merits of the test proposed in *Whitford*, but only two Justices would have entirely dismissed the case. Seven Justices thought it worthwhile to send the case back to the trial court for the hearing of additional district-specific evidence as to standing, and perhaps liability. This suggests that there may still be a federal standard set for judging unconstitutional partisan gerrymandering.

Regardless of what (if anything) the Court eventually says about the justiciability of partisan gerrymandering claims under the federal Constitution, state law may provide an important bulwark against politicians manipulating district maps for their own gain. A majority of state constitutions contain provisions that address redistricting and include requirements that map-drawers must follow. If the Supreme Court renders partisan gerrymandering claims non-justiciable under the federal Constitution, or sets a standard that addresses only the most extreme gerrymanders, these state provisions could be used to challenge gerrymanders that might survive federal constitutional scrutiny.

In any event, the next round of redistricting is steadily approaching and with it, the next round in the fight against partisan gerrymandering will begin. The Supreme Court may help chart the course of that fight, but state constitutional provisions will also prove crucial. Indeed, in several states, courts have already used such provisions to strike down politically motivated maps.

This issue brief examines how state constitutional provisions have been used to challenge political gerrymanders. It begins by discussing several types of provisions included in various state constitutions. Next, it delves into the details of some exemplary cases in which state courts have held that districting plans violate state constitutional provisions. Finally, the Appendix provides an overview of state constitutions that include the provisions outlined in Part II.

Relevant State Constitutional Provisions

There are several types of state constitutional provisions that address redistricting. Many of these provisions have been used to challenge district plans on partisan gerrymandering grounds. The initial discussion of these provisions is somewhat generalized; while multiple states have similar types of provisions, the provisions are not necessarily identical and do not necessarily have the same legal effect in each state.

Explicit Prohibitions on Undue Favoritism

Several states have constitutional prohibitions on districts that unduly favor or disfavor political parties, incumbents, or groups.⁸ In several instances, such provisions were

⁸ See, e.g., CAL. CONST. art. XXI, § 2(e); FLA. CONST. art. III, § 20(a).

included in state constitutions as part of broader amendments to create independent redistricting commissions.⁹ In such cases, the commissions remove (to varying extents) the districting process from the hands of politicians, which might in and of itself curb extreme partisan gerrymandering.

However, these provisions are not exclusive to states that have independent commissions,¹⁰ and can serve as an important constitutional check on legislatures that engage in partisan gerrymandering. Indeed, these provisions – particularly those that mention political parties – are the most explicit ways in which state constitutions prohibit partisan gerrymanders.

Compactness and Contiguity Requirements

The most common state constitutional provisions affecting political gerrymandering are those that require districts to be compact and/or contiguous. While these two criteria are technically distinct from one another, they often operate together.

Contiguity is the simpler of the two criteria. Typically, courts define a contiguous district as one in which the district's territory is entirely connected and uninterrupted by other territory.¹¹ In other words, the contiguity requirement implies that any geographical point in a district can be reached from any other point in that district without crossing into another district. In some cases, this definition allows for a district to be connected through bodies of water, rather than land.

Courts have had a more difficult time developing a precise definition of compactness and have used several different standards for assessing whether a district is compact. In some cases, compactness is determined by mathematical formulas to measure, for example, whether a district's boundaries “are as nearly equidistant as possible from the geographic center of the area.”¹² In other instances, compactness is assessed through “visual inspection” of a district's shape¹³ or can require districts with the absence of irregular shapes and finger-like extensions.¹⁴ At times, compactness is not defined solely geographically or geometrically. Some courts have held that compactness refers to “more than mere geography,”¹⁵ and that it may refer not “to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency.”¹⁶

⁹ See, e.g., ARIZ. CONST. art. IV, part 2; CAL. CONST. art. XXI, § 2(e).

¹⁰ See, e.g., FLA. CONST. art. III, § 20(a).

¹¹ See, e.g., *In re Constitutionality of House Joint Resolution 25E*, 863 So.2d 1176, 1179 (Fla. 2003) (“This Court has defined ‘contiguous’ as ‘being in actual contact: touching along a boundary or at a point.’ A district lacks contiguity ‘when a part is isolated from the rest by the territory of another district’ or when the lands ‘mutually touch only at a common corner or right angle.’” (citation omitted)); *In re 2003 Legislative Apportionment of the House of Representatives*, 827 A.2d 810, 815-16 (Me. 2003); *In re Legislative Districting of the State*, 805 A.2d 292, 320 (Md. 2002) (“[C]ontiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory.”)

¹² *In re Reapportionment of the Colo. Gen. Assembly*, 647 P.2d 191, 193 (Colo. 1982) (en banc) (quoting *Acker v. Love*, 496 P.2d 75, 76 (Colo. 1972)).

¹³ *Mellow v. Mitchell*, 607 A.2d 204, app. A at 216 (Pa. 1992).

¹⁴ *Kawamoto v. Okata*, 868 P.2d 1183, 1186 n.7 (Haw. 1994). Importantly, *Kawamoto* further noted that “reapportionment plans that do not meet [compactness and contiguity] requirements normally fail because there is evidence of an intent to discriminate.” *Id.*

¹⁵ *Parella v. Montalbano*, 899 A.2d 1226, app. A at 1252 (R.I. 2006) (“[C]ompactness[] refer[s] to something more than mere geography.”).

¹⁶ *Wilson v. Eu*, 823 P.2d 545, 553 (Cal. 1992) (en banc).

With a few exceptions, courts have been generally reluctant to strike down districting plans based on allegations of non-compactness or non-contiguity. As a general matter, courts have held that constitutional mandates of compactness are not absolute and can be considered as one of myriad districting factors.¹⁷ Consequently, courts will generally not require a map to contain maximally compact districts; even when plaintiffs present alternate maps with more compact districts, courts tend not to second-guess the legislature.

Notwithstanding most state courts' reluctance to overturn legislative maps based on insufficient compactness and contiguity, the highest courts in some states have been more aggressive. As discussed more extensively below, several state courts have held unconstitutional maps featuring non-compact districts. In each of these cases, courts found that compactness was subverted to political considerations, such as incumbent protection.

Moreover, even as other state courts have declined to use compactness and contiguity requirements to overturn legislative maps, some have acknowledged that such requirements are designed to check extreme political gerrymanders. For example, even as it deferred to the legislature while acknowledging that the state's districts were "to say the least, irregular in form," New York's highest court noted that its state's constitutional compactness and contiguity requirements were "adopted for the salutary purpose of averting the political gerrymander."¹⁸ As politicians become more blatant in their attempts to draw partisan gerrymanders – and as technology allows them to do so with unprecedented precision – courts may breathe new life into compactness requirements.

Political and Geographic Boundaries

Several states have redistricting criteria that require maps to consider existing political boundaries, such as municipal and/or county lines within the state. In some respects, these requirements overlap with compactness requirements. In Rhode Island, for example, there is no explicit constitutional requirement that maps follow existing political boundaries, but the state's Supreme Court has interpreted the constitutional compactness requirement to refer to historical and political boundaries at least as much as district shape.¹⁹ In other instances, however, provisions requiring that existing political boundaries be respected stand alone, and are interpreted independently of compactness requirements.

Like compactness provisions, these types of provisions are rarely considered absolute in their own right and courts have generally allowed legislatures to draw maps that prioritize other factors over political boundaries. This is especially true given the requirement that states comply with federal obligations, such as population equity and the creation of majority-minority districts. Notwithstanding a general willingness of courts to allow legislatures to draw maps that cross existing political boundaries, there has been at least one instance of a court overturning maps for failure to comply with

¹⁷ For a recent decision with similar reasoning, see e.g., *Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739 (Va. 2018).

¹⁸ *Matter of Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 (N.Y. 1972).

¹⁹ *Parella*, 899 A.2d at 1244.

existing boundaries.²⁰ In this regard, such provisions might be useful to combat partisan gerrymanders.

Preserving Communities of Interests

Several states constitutions requires mapmakers to consider and preserve communities of interest; some also define the term. California's Constitution, for example, defines a community of interest as "a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation."²¹ It includes as examples of such shared interests "those common to an urban area, a rural area, an industrial area, or an agricultural area, and 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."²² Colorado's Constitution also offers a non-exclusive list of characteristics to consider: "ethnic, cultural, economic, trade area, geographic, and demographic factors."²³ Other constitutions refer to socio-economic areas,²⁴ which may imply a more precise and limited set of criteria by which to gauge a community of interest.

Perhaps reflecting the vagueness of the term, California's Constitution makes clear that "[c]ommunities of interest shall not include relationships with political parties, incumbents, or political candidates."²⁵ While most other states do not have similar constitutional clarifications, it does not appear that "communities of interest" clauses have been used to allow nakedly partisan gerrymanders. Rather, in at least one case, discussed in more detail below, the failure to preserve such communities played a part in rendering a partisan gerrymander unconstitutional.

As with the preservation of political and geographic boundaries, this requirement may overlap to some extent with compactness criteria, such as in states that have defined compactness as citizens' ability to relate to one another rather than in geographic or geometric terms. To the extent that communities of interest may live in the same county or municipality, there may also be overlap with the requirement that existing political boundaries be respected.

Equal Protection Clauses

Most states have equal protection clauses in their constitutions. In the federal context, lawsuits challenging partisan gerrymanders have rested largely on the federal Equal Protection Clause, on the theory that extreme partisan line-drawing impermissibly discriminates against members of the disfavored party by diluting the votes of supporters of that party. To date, the Supreme Court has acknowledged this logic and has suggested that partisan gerrymanders may indeed violate the Equal Protection

²⁰ See *In re Legislative Districting of the State*, 805 A.2d 292 (Md. 2002).

²¹ CAL. CONST. art. XXI, § 2(d)(4).

²² *Id.*

²³ COLO. CONST. art. V, § 47(3). There are currently two proposed ballot initiatives to reform the redistricting process in Colorado, one for state legislative redistricting and the other for congressional, that will be on the ballot in November 2018. The initiatives would amend this provision, among others, to further explain its definitions and to explicitly exclude from the definition of "Community of Interest" any partisan political considerations. See, e.g., Proposed Initiative #170 at 2-3, <http://leg.colorado.gov/sites/default/files/initiatives/2017-2018%2520%2523170.pdf>.

²⁴ See, e.g., ALASKA CONST. art. VI, § 6; HAW. CONST. art. IV, § 6.

²⁵ CAL. CONST. art. XXI, § 2(d)(4).

Clause, but has not settled on a judicially manageable standard for assessing the claims.

Nevertheless, the federal Supreme Court's interpretation of the federal Equal Protection Clause does not necessarily govern state courts' interpretation of state equal protection clauses. Consequently, regardless of federal jurisprudence on this issue, state constitutional equal protection clauses might prove to be viable means of challenging partisan gerrymanders in state courts.

Whether or not plaintiffs can use a particular state's equal protection clause to challenge a partisan gerrymander may depend on that state's "lockstep" jurisprudence. The term "lockstep" refers to a state's courts interpreting a state constitutional provision to mirror federal courts' interpretation of its federal counterpart (*i.e.*, the state clause operates in "lockstep" with the federal clause).²⁶ If federal law ultimately declines to use the Equal Protection Clause to strike down partisan gerrymanders, those seeking to challenge partisan gerrymanders in a "lockstep" state will be unable to use the state equal protection clause in a way that exceeds the federal Equal Protection Clause.

Nevertheless, the theory could prevail in those states that use a "primacy" approach rather than a "lockstep" approach. The former refers to jurisprudence in which state courts consider a state constitutional right independently of its federal equivalent, thus giving it "primacy" before turning to federal jurisprudence on the federal right.²⁷ While the federal right constitutes a floor, state courts using the "primacy" approach can interpret the state right as having a higher ceiling by reading it more expansively than the federal right.

In such instances, the same theory that underlies *Whitford* and its predecessors – that a partisan gerrymander impermissibly discriminates against members of the disfavored party – may prevail under state equal protection clauses, notwithstanding the federal Supreme Court's decision regarding the federal Equal Protection Clause.

Free Association/Expression Clauses

Most states have constitutional clauses guaranteeing freedom of association and/or expression. In the federal context, lawsuits challenging partisan gerrymanders have relied in part on the federal Constitution's First Amendment guarantees of free association and expression. Part of plaintiffs' theory in *Whitford*, for example, is that Wisconsin's partisan gerrymander violates their First Amendment rights by diluting their voting power and thus constitutes viewpoint discrimination that penalizes them for their political beliefs. The *Benisek* plaintiffs' theory also rests largely on the federal First Amendment; they claim that their communities were drawn out of a district as a retaliatory measure for their historically Republican voting patterns, in violation of the First Amendment's prohibition on retaliation for political views.

Like equal protection claims, the U.S. Supreme Court's future decisions in *Whitford* and *Benisek* may inform free association and/or free expression claims under state constitutional provisions due to the lockstep doctrine. That said, state right claims might also be different, as federal jurisprudence does not necessarily dictate interpretations of states' corresponding clauses. Some states explicitly interpret their state free expression and/or free association clauses to mirror interpretation of the

²⁶ Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2013).

²⁷ *Id.*

federal clauses. In these states, federal Supreme Court jurisprudence on partisan gerrymandering claims will dictate the possibility of suit under corresponding state claims. In states where courts take a primacy approach, however, claims that challenge partisan gerrymanders based on state provisions may prevail. Importantly, courts do not necessarily take a blanket approach to the lockstep doctrine. Some states' courts will interpret one state constitutional provision in lockstep with the federal Constitution while interpreting another provision as affording greater protection than its federal counterpart. Consequently, even in states where an equal protection claim might fail due to the lockstep doctrine, a First Amendment-equivalent claim might prevail, or vice-versa.

Free Elections Clauses

Twenty-five states have provisions in their constitutions that reference free elections. In some instances, the constitutional provisions guarantee “free” elections²⁸; in others, the language is “free and equal”²⁹; finally, several states use the phrase “free and open.”³⁰ Sometimes, these clauses are interpreted to protect more than the formal right to cast a ballot and mean that votes must be effective. As one court has explained, such provisions mean that “the vote of each voter [must be] equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot.”³¹ Indeed, as discussed in more detail below, Pennsylvania’s Supreme Court used its “free and equal” clause to strike down a congressional partisan gerrymander on the theory that the map’s dilutive effect rendered elections unequal.

Although free elections clauses have no explicit federal counterpart, the lockstep doctrine is still relevant to their interpretation. Because the U.S. Supreme Court has interpreted the federal Fourteenth Amendment to protect the right to vote, some state courts have interpreted their free elections clauses to operate in lockstep with federal voting rights doctrine. Others have interpreted free elections clauses as affording greater protections than federal doctrine. Often, free elections clause decisions have implicated the ability of citizens to cast ballots (for example, in the context of voter ID laws). Nevertheless, with the recent Pennsylvania Supreme Court decision, future challenges to partisan gerrymandering and vote dilution will likely be based on free elections clauses. In this regard, it will be crucial to gauge the extent to which a state court interprets a free election clause independently of federal Fourteenth Amendment doctrine.

Examples of Successful Suits

This section of the issue brief examines some instances in which plaintiffs have successfully used state constitutional provisions to challenge partisan gerrymanders. It includes examples in which the plaintiffs claimed the challenged maps were partisan gerrymanders that subverted constitutional principles to partisan discrimination. It also includes instances of courts finding that the state had privileged other political considerations – such as incumbent protection or maintaining maps similar to those

²⁸ See, e.g., NEB. CONST. art. 1 § 22; N.C. CONST. art. 1 § 10.

²⁹ See, e.g., ILL. CONST. art. 3 § 3; TENN. CONST. art. 1 § 5.

³⁰ See, e.g., N.M. CONST. art. 2 § 8; S.C. CONST. art. 1 § 5.

³¹ *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932). The Pennsylvania Supreme Court referenced this principle in its partisan gerrymandering decision. See *League of Women Voters of Pa. v. Commonwealth*, Opinion 178 A.3d 737, 813 n.71 (Pa. 2018).

that had existed prior to the redistricting process – over constitutional principles. While prioritizing incumbent protection or maintaining existing districts do not necessarily equate to a partisan gerrymander, they can indicate one.

More importantly, the past use of state constitutional provisions to strike down maps that prioritized political factors can foretell the possibility of using them to strike down future partisan map drawing; if a court has struck down a map because it impermissibly subverted constitutional requirements to political factors, even if those factors were not rooted in partisanship, then it has created precedent that might increase its willingness to strike down a map that subverts constitutional requirements to partisan political considerations.

This section does not include every case in which a court has struck down a map for violating a state constitutional provision, as these have been numerous. Instead, the cases discussed herein are examples in which a court explicitly referenced some form of political consideration (partisan or otherwise) as a culprit in the constitutional error.³²

Pennsylvania – Free and Equal Elections (2010s)

In its January 2018 order in *League of Women Voters of Pennsylvania v. Pennsylvania* (“*LWVP*”), the Pennsylvania Supreme Court struck down the state’s congressional map as a partisan gerrymander that “clearly, plainly and palpably violate[d]” the state constitution.³³

The *LWVP* plaintiffs had claimed that the map was an intentional partisan gerrymander, in violation of the state constitution’s free expression, free association, equal protection, and free and equal elections clauses. In many regards, the plaintiffs’ free expression, association, and equal protection claims mirrored those made *Gill v. Whitford*, except their claims were based on the state constitution: first, that a partisan gerrymander impermissibly discriminates against members of the disfavored party, thus violating party members’ equal protection rights; and second, that the gerrymander violates their free association rights because the discrimination is based on their affiliation with the disfavored party, as well as their free expression rights because the discrimination is based on their partisan political expression.

The Pennsylvania court did not reach the merits of these arguments, instead basing its decision exclusively on the state Free and Equal Elections Clause.³⁴ The court explicitly held that this Clause offered greater protections to voters than the federal Constitution, meaning that it did not have to follow the U.S. Supreme Court’s lead in partisan gerrymandering cases.

The court found it “axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation.”³⁵ Moreover, it found that partisan cracking (placing voters in districts where their votes will be wasted

³² Moreover, this issue brief does not purport to include every instance in which a partisan gerrymandering claim was accepted by a state court because claims about partisan gerrymandering might sometimes be brought as claims challenging non-compactness or the failure to follow political boundaries. Litigants and courts are limited, of course, by the laws they can invoke, and challenged non-compactness, for example, might reflect partisan intents, even if that is not indicated in the four corners of a court decision.

³³ Order, *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282, 284 (Pa. Jan. 22, 2018) (No. 159 MM 2017).

³⁴ See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018)

³⁵ *Id.* at 814.

on candidates likely to lose) and/or packing (concentrating voters in a district where their votes will simply run up the vote totals of candidates likely to win) of voters was vote dilution and thus violated the state constitution's guarantee that "every Pennsylvania voter [] have the same free and equal *opportunity* to select his or her representatives."³⁶

In applying this legal principle, the court held that violations of the state constitution's neutral redistricting criteria can be evidence of impermissible vote dilution that violates the Free and Equal Elections Clause. The Pennsylvania Constitution requires maps to be compact, contiguous, and to avoid unnecessary divisions of existing geographical boundaries. The court acknowledged that other factors play a permissible role in redistricting, but viewed them as "wholly subordinate" to the neutral constitutionalized factors, which "provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of such districts."³⁷

Thus, the court found, when "it is demonstrated that . . . these neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as . . . unfair partisan political advantage," the Free and Equal Elections Clause is violated.³⁸ Importantly, the court explicitly rejected the inverse proposition that compliance with these neutral criteria renders a plan permissible; instead, it noted that "there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative."³⁹

In examining the congressional map at issue in the case, the court found that the legislature had impermissibly diluted Democratic votes in a way that violated the Free and Equal Elections Clause. The court credited several expert witnesses' statistical testimony, which demonstrated that the maps did not conform to the traditional redistricting criteria of compactness.⁴⁰ Moreover, the court noted that the map did not pass a visual test of compactness, and was "comprised of oddly shaped, sprawling districts which wander seemingly arbitrarily across Pennsylvania."⁴¹ Additionally, the court noted that the map unnecessarily split existing political subdivisions, an assessment based both on alternative maps presented by experts and comparisons to past maps, which split fewer counties and municipalities.

The court found sufficient evidence "to establish that [the map] violate[d] the Free and Equal Elections Clause"⁴² because it could not "as a statistical matter, be a plan directed

³⁶ *Id.* (emphasis in original).

³⁷ *Id.* at 817.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 818-822.

⁴¹ *Id.* at 819.

⁴² *Id.* at 820. The Court also noted: "However, this is not the exclusive means by which a violation of Article I, Section 5 may be established. As we have repeatedly emphasized throughout our discussion, the overarching objective of this provision of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens. We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral "floor" criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative. . . . However, as the case at bar may be resolved solely on the basis of

at complying with traditional redistricting requirements.”⁴³ At the same time, but as a secondary matter, it cited the strong evidence that the non-compliance had the effect of benefiting the Republican Party. This suggests that non-compliance with the traditional districting criteria is alone enough to render a map violative of the Free and Equal Elections Clause, and that plaintiffs need not show extensive evidence of partisan intent. This seems to accord with the court’s assessment of these criteria as a neutral “floor” to ensure that votes are not diluted.

Florida - Compactness & Undue Favoritism (2010s)

In 2010, Florida voters approved a ballot measure to add the so-called Fair Districts Amendment to the state constitution. The Amendment prohibits the Florida Legislature from drawing a redistricting plan or an individual district with the “intent to favor or disfavor a political party or an incumbent.”⁴⁴ The state’s Supreme Court has noted that the Amendment “expressly prohibits”⁴⁵ redistricting “practices that have been acceptable in the past,”⁴⁶ granting “explicit constitutional protection” to Florida voters “against partisan political gerrymandering.”⁴⁷

Following the 2010 decennial Census, Florida’s legislature drew new maps for the state’s legislative and congressional districts, both of which came before the state’s Supreme Court.

The court first examined the legislative maps in 2012, upholding the maps for the state House of Representatives while striking down the maps for the state Senate.⁴⁸ It explained that the Florida Constitution creates two tiers of violations. “Tier-one” violations include, *inter alia*, the prohibited intent to favor a political party or incumbent, while “tier-two” violations involve a failure to follow certain other requirements of the state constitution, including, *inter alia*, compactness and utilization of existing political and geographic boundaries.⁴⁹

In assessing how to gauge whether the legislature acted with prohibited partisan intent, the court explained that “the inquiry focuses on whether the plan or district was drawn with this purpose in mind.”⁵⁰ The court explained that such “intent to favor or disfavor a political party can be discerned from the Legislature’s level of compliance with [the] constitution’s tier-two requirements,” because the tier-two violations reflect traditional redistricting principles.⁵¹ In other words, a court can infer improper partisan attempt from a failure to draw compact districts that utilize, when practicable, existing political boundaries.

The court defined compactness geographically, explicitly rejecting the notion put forth by the legislative mapmakers that compactness referred to more than mere geography.

consideration of the degree to which neutral criteria were subordinated to the pursuit of partisan political advantage, as discussed below, we need not address at this juncture the possibility of such future claims.”
Id. at 817.

⁴³ *Id.*

⁴⁴ FLA. CONST. art. III, § 20(a).

⁴⁵ *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 616 (Fla. 2012).

⁴⁶ *Id.* at 607.

⁴⁷ *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013)

⁴⁸ *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597 (Fla. 2012).

⁴⁹ *Id.* at 615-38.

⁵⁰ *Id.* at 618.

⁵¹ *Id.*

The mapmakers had asserted that compactness referred to “both a geographical component and a functional component and should be construed to include such concepts as communities of interest,” pointing to examples from certain other states.⁵² The court relied instead on what it deemed the more ordinary definition of compactness, *i.e.* a geographical assessment.⁵³ The court’s process of gauging compactness involved an initial visual inspection of the maps, as well as the consideration of mathematical models that measure compactness.⁵⁴

In order to gauge whether tier-two violations, such as a lack of compactness, indicate a tier-one violation of partisan intent, the court “evaluate[d] the shapes of districts together with undisputed objective data, such as the relevant voter registration and elections data, incumbents’ addresses, and demographics.”⁵⁵ Similarly, “the inquiry for intent to favor or disfavor an incumbent focuse[d] on the shape of the district in relation to the incumbent’s legal residence, as well as other objective evidence of intent.”⁵⁶

In its substantive analysis of the Senate maps, the court found that, in several instances, Senate districts were not as compact as they could have been.⁵⁷ Moreover, in several instances the new maps split counties more often than previous maps had. Consequently, in light of these tier-two violations, as well as other evidence of improper intent, the court held that these districts were unconstitutionally motivated by partisanship and thus invalid.

Subsequently, the congressional district map was challenged under the new Amendment and the case worked its way to the state Supreme Court. In *League of Women Voters v. Detzner*, the court affirmed a lower court’s finding that the legislature had violated the Amendment in drawing the state’s congressional map, but held that the lower court did not go far enough in its analysis of particular districts.⁵⁸

In *Detzner*, the court further clarified how to determine whether maps were motivated by the type of “intent” prohibited by the Fair Districts Amendment. Unlike more traditional lawsuits against legislative action, which look at statutory construction and the actions of the legislature as a whole, in the context of redistricting, “the intent of individual legislators and legislative staff members involved in the drawing of the redistricting plan is relevant in evaluating legislative intent.”⁵⁹ Based on evidence that these individual legislators and staff members acted with partisan intent, the court “reject[ed] the Legislature’s assertion that the finding of unconstitutional intent could not be ascribed to the Legislature as a whole.”⁶⁰

In terms of procedure, the court held that those challenging the state’s districts have the burden of showing that the legislature acted with partisan intent in drawing the districts. Then, “[o]nce a direct violation of the Florida Constitution’s prohibition on

⁵² *Id.* at 632.

⁵³ *Id.* at 632.

⁵⁴ *Id.* at 634-35.

⁵⁵ *Id.* at 618.

⁵⁶ *Id.* at 618-19.

⁵⁷ *Id.* at 663-79.

⁵⁸ 172 So.3d 363 (Fla. 2015).

⁵⁹ *Id.* at 388.

⁶⁰ *Id.* at 390.

partisan intent in redistricting [is] found, the burden . . . shift[s] to the Legislature to justify its decisions in drawing the congressional district lines.”⁶¹

The *Detzner* court also clarified that the trial court had erred in approving certain districts because it could not infer improper intent from a “flagrant” lack of compactness or other factors in that particular district, and that it should not have required such flagrancy once it had found tier-one violations.⁶² According to the Supreme Court, the trial court mistakenly “ignored the general evidence of improper intent that it found to exist in the process.”⁶³ The trial judge should have instead “view[ed] the configuration of these districts through the lens of the direct and circumstantial evidence of improper intent presented at trial.”⁶⁴

Relatedly, the Supreme Court ruled that the trial court had erred in requiring evidence of tier-two violations in particular districts before considering improper intent (the tier-one violation). The court explained that “[o]nce a tier-one violation of the constitutional intent standard is found, there is no basis to continue to afford deference to the Legislature.”⁶⁵ Moreover, the court noted that once improper intent for the plan as a whole is established, focusing on tier-two violations in particular districts is inappropriate because there are multiple ways to draw compact districts, for example.⁶⁶ Rather than requiring a plaintiff to demonstrate a tier-two violation for each challenged district, once improper intent has been found, the legislature must bear the burden of justifying why it chose one particular way to draw a compact district, and show that this decision was not motivated by improper partisan intent.⁶⁷ In other words, the legislature must be able to justify its choice and may not rely only on the lack of tier-two violations in a particular district.

By establishing this framework, the court built on its decision regarding the state Senate districts. There, it looked largely to tier-two violations in particular districts in order to infer tier-one violations; here, the trial court had found evidence of improper intent plaguing the whole process, meaning it should not have required plaintiffs to show tier-two violations for every challenged district. Importantly, under this framework, “challengers still must identify some problem with the Legislature’s chosen configuration . . . showing a nexus between the unconstitutional intent and the district.”⁶⁸ Nevertheless, they do not bear the burden of showing a tier-two violation in the district.

Based on this formulation, the Florida Supreme Court found that the trial court had not done enough to remedy the improper intent. It affirmed the trial court’s order to redraw several districts affected by a tier-two violation (specifically non-compactness and a failure to follow geographic and political boundaries).⁶⁹ However, it held that the trial court improperly allowed several other districts to remain unchanged because they were unplagued by tier-two violations even though they were affected by unconstitutional intent.⁷⁰ This remedy, the Supreme Court reasoned, was “effectively no

⁶¹ *Id.* at 371.

⁶² *Id.* at 407.

⁶³ *Id.* at 395 (internal marks omitted).

⁶⁴ *Id.* at 407.

⁶⁵ *Id.* at 400.

⁶⁶ *Id.*

⁶⁷ *Id.* at 401.

⁶⁸ *Id.* at 371.

⁶⁹ *Id.* at 402-06.

⁷⁰ *Id.* at 406-13.

different than the remedy if there had been no finding of unconstitutional intent” (since the districts it had ordered redrawn were plagued by distinct constitutional violations).⁷¹ It concluded that for several districts in the state, even though the trial court had not found tier-two violations, the legislature had failed to meet its burden of justifying its configuration when compared to other plausible alternatives. Thus, the court ordered these redrawn, too.⁷²

Maryland – Political Subdivision Splits (2000s)

In 1972, Maryland voters amended the state constitution to require that “[e]ach legislative district [] consist of adjoining territory, be compact in form, and of substantially equal population,” with due regard “to natural boundaries and the boundaries of political subdivisions.”⁷³

Voters have used this provision to challenge district maps in each recent round of redistricting since then. The state prevailed in four of five such cases, although in one instance, the court found that the legislative plan came “perilously close” to violating the constitution’s “due regard” requirement in the way it split existing political subdivisions.⁷⁴

Indeed, this requirement – that legislative maps give “due regard” to political subdivisions – has been central to many of the recent challenges to Maryland’s maps and was the basis for the Maryland Court of Appeals (the state’s highest court) striking down state legislative maps drawn in the post-2000 Census round of redistricting.⁷⁵ In that case, the court assigned the burden of proof to the state to show that the maps complied with state constitutional requirements.⁷⁶ The court explained that, when it placed the burden on the state, it “made clear that the Plan raised sufficient issues with respect to those requirements as to require further explanation.”⁷⁷ Later in the opinion, the court noted that “a legislative districting plan is entitled to a presumption of validity,”⁷⁸ which may be overcome by a strong showing by plaintiffs “or when, having been allocated the burden of proof, the State fails to carry it.”⁷⁹ The court has subsequently clarified how Maryland uses a burden shifting procedure: plaintiffs “carry the burden of demonstrating the law’s invalidity,” but once “a proper challenge . . . 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.”⁸⁰

The state was unable to meet that burden in justifying the increased number of districts crossing from one city or county into another. It argued that the “due regard” provision was “suggestive” rather than mandatory, and that its requirements were “fluid.”⁸¹ The state argued that the increase in border crossings was justified by the

⁷¹ *Id.* at 396.

⁷² *Id.* at 406-13.

⁷³ MD. CONST. art. III, § 4.

⁷⁴ *Legislative Redistricting Cases*, 629 A.2d 646, 666 (Md. 1993).

⁷⁵ *In re Legislative Districting of the State*, 805 A.2d 292 (Md. 2002).

⁷⁶ *Id.* at 325.

⁷⁷ *Id.*

⁷⁸ *Id.* at 328.

⁷⁹ *Id.*

⁸⁰ *In re 2012 Legislative Districting of the State*, 80 A.3d 1073, 1082 (Md. 2013) (internal marks omitted).

⁸¹ *In re Legislative Districting of State*, 805 A.2d at 327.

desire to protect experienced legislative incumbents, whose seats would be eliminated if their new districts did not cross borders.⁸²

The court explicitly rejected this view and the view of its appointed Special Master that “the due regard requirement may be subordinated to achieve ‘a rational goal.’”⁸³ It held that “accepting a ‘rational goal’ as a basis for avoiding a clear requirement under that section is to allow a constitutional mandate to be overridden by a non-constitutional one.”⁸⁴ In this instance, the court explained, “the goals of avoiding the loss of experienced legislators and reducing incumbent contests, though rational, do not override the constitutional requirement that due regard be given the subdivision boundaries.”⁸⁵

The court also rejected the state’s argument – which the Special Master had accepted – that the political subdivision crossings were justified because at least some were necessary to keep the cores of existing districts.⁸⁶ While the court acknowledged that this “may be an appropriate and even laudable goal,” it was a non-constitutional discretionary factor and thus could not be prioritized over the constitutional requirements of preserving political subdivisions and compactness.⁸⁷ In this context, the court noted that “preserving the core of a district may, and often will, be in conflict with the due regard provision and, perhaps, the compactness requirement, inasmuch as it tends to perpetuate the status quo.”⁸⁸ It held that allowing the state to subvert constitutional requirements “in order to use an existing plan as a constraint, especially if that constraint were allowed to override constitutional requirements, is to dictate a continuation of the deficiencies in the old plan.”⁸⁹

Colorado – Compactness & Communities of Interest (1980s)

Colorado’s redistricting process is bifurcated, with the legislature drawing congressional maps⁹⁰ and a political commission drawing state legislative maps.⁹¹ The political commission consists of eleven members; four from the legislative branch, four appointed by the Chief Justice of the state Supreme Court, and three appointed by the governor.⁹²

The Colorado Constitution states that “[e]ach [legislative] district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible.”⁹³ Additionally, it prohibits the splitting of counties except when necessary for population equality⁹⁴ and requires that communities of interest,

⁸² *Id.* at 328.

⁸³ *Id.* at 327.

⁸⁴ *Id.* at 328.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 328.

⁸⁹ *Id.*

⁹⁰ COLO. CONST. art. V, § 44. There are currently two proposed ballot initiatives that would require a commission to draw the state legislative and congressional maps. See, e.g., Proposed Initiative #170, <http://leg.colorado.gov/sites/default/files/initiatives/2017-2018%2520%2523170.pdf>.

⁹¹ COLO. CONST. art. V, § 48.

⁹² COLO. CONST. art. V, § 48(1)(b).

⁹³ COLO. CONST. art. V, § 47(1).

⁹⁴ COLO. CONST. art. V, § 47(2).

“including [those defined by] ethnic, cultural, economic, trade area, geographic, and demographic factors,” be maintained within single districts whenever possible.⁹⁵

The Commission’s maps are automatically reviewed by the state Supreme Court.⁹⁶ Following the 1980 decennial Census, the Supreme Court struck down two Senate districts in the Commission’s map. The procedural posture of the case was atypical. The Commission’s initial map placed two incumbent Senators in one district and created another Senatorial district without an incumbent.⁹⁷ Colorado’s senators serve four year terms with staggered elections and, in the district with two incumbents, the Commission determined that one of the incumbents’ term would expire in 1982, while the other’s would expire in 1984. This meant that, from 1983 until 1985, the district would have two Senators – the victor of the 1982 election and the holdover Senator. Meanwhile, the Commission’s plan did not schedule elections in the vacant district until 1984, meaning that the district would remain unrepresented for two years.

The court rejected this formulation and ordered the Commission to revisit the plan, with the suggestion that the new plan simply revise the election schedule.⁹⁸ The Commission declined and instead redrew the districts in Denver. This prompted challenges from several groups, alleging violations of both the compactness requirements and the requirement that communities of interest be maintained.⁹⁹

The court analyzed the putative non-compactness of the new Denver-area districts by comparing them to the districts in the initial iteration of the map.¹⁰⁰ It noted that in Colorado, “a ‘compact’ district is defined as ‘a geographic area whose boundaries are as nearly equidistant as possible from the geographic center of the area being considered.’”¹⁰¹ The court assessed compactness through two mathematical measures. The first “compar[ed] each district’s perimeter to its area,” with a “smaller perimeter/area ratio indicat[ing] compactness.”¹⁰² The second method “quantifie[d] the distribution of the points in a region around its geographic center,” with “a region in which the points are more closely grouped around the region’s geographic center . . . [being] more compact.”¹⁰³ Under each measure, the newly drawn districts were less compact than the initial iterations.¹⁰⁴

Additionally, the court noted that “preservation of communities of interest[] provides the most dramatic contrast between the two plans.”¹⁰⁵ It found that, while the original plan “concentrated the Chicano vote in two districts[,] the new plan divide[d] the same voting strength among three districts.”¹⁰⁶ Moreover, the court found that one of the newly drawn districts paired parts of Denver with “cultural differences of religion, ethnicity, age and life-style,” and that one neighborhood with an identifiable community was split between two districts.¹⁰⁷

⁹⁵ COLO. CONST. art. V, § 47(3).

⁹⁶ COLO. CONST. art. V, § 48(1)(e).

⁹⁷ See *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 191 (Colo. 1982) (en banc).

⁹⁸ *Id.* at 199.

⁹⁹ *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 209 (Colo. 1982).

¹⁰⁰ *Id.* at 211-12.

¹⁰¹ *Id.* at 211 (quoting *Acker v. Love*, 496 P.2d at 76).

¹⁰² *Id.* at 212.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Much of the court's analysis compared the two plans and the court explicitly declined to grant deference to the Commission due to the procedural posture.¹⁰⁸ While the court "recognize[d] that reapportionment is not without political considerations,"¹⁰⁹ it reasoned that such "considerations are not among [Colorado's] constitutional criteria and the Commission may not allow them to outweigh the constitutional criteria." In this case, the court found that the Commission had subverted constitutional criteria to political factors, rendering the new maps unconstitutional.¹¹⁰ The court specifically pointed to the fact that the Commission approved these maps on a six-to-five party line vote, "corroborat[ing] the partisan political nature of the Commission's action."¹¹¹

Rhode Island – Compactness (1980s)

Rhode Island's Constitution requires that State General Assembly and State Senate districts be "as compact in territory as possible."¹¹² The state's Supreme Court has explained that compactness in Rhode Island refers to "effective representation" and not to geography or geometry:

While a division into tightly packed districts with regular lines might literally satisfy the constitutional requirement, our state with its irregular boundaries, its bays and its inlets, its islands, its rivers and lakes and its many other geographical features is obviously not susceptible to being divided into circular planes or squares.

...

The term 'compact' then, as it is used in the constitution, has reference to a principle, rather than to a definition, and has meaning only within an appropriate factual context. Its origins as a constitutional requirement lie in an intention to provide an electorate with effective representation rather than with a design to establish an orderly and symmetrical geometric pattern of electoral districts.¹¹³

Both state and federal courts have relied on the state's compactness requirement to strike down partisan gerrymanders. In *Licht v. Quattrocchi*, plaintiffs challenged the post-1980 Census decennial redistricting of the state's Senate Districts.¹¹⁴ Although Rhode Island's Constitution does not mandate contiguity, the court viewed a lack of contiguity as indicative of non-compactness.¹¹⁵ As such, the court held several districts unconstitutional because they "unnecessarily and improperly crossed natural boundaries and violated the principle of contiguity for impermissible purposes."¹¹⁶ The Supreme Court's opinion in *Licht* was a brief affirmation of the trial court's decision that does not provide much insight. The trial court in the case had found that "plaintiffs had proven, beyond a reasonable doubt, that the districts had been crafted to achieve a political gerrymander, and the challenged districts were either not compact, not

¹⁰⁸ *Id.* at 211.

¹⁰⁹ *Id.* at 213.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² R.I. CONST. art. VIII, § 1.

¹¹³ *Op. to the Governor*, 221 A.2d 799, 802 (R.I. 1966).

¹¹⁴ 449 A.2d 887 (R.I. 1982)

¹¹⁵ *Id.*

¹¹⁶ *Id.*

contiguous, or both.”¹¹⁷ The trial court had struck down the map because it was drawn “without a rational or legitimate basis, was not enacted in good faith, and was not free from the taint of arbitrariness or discrimination,” and traditional boundaries were eliminated “for no rational or legitimate reason, but for the prohibited political purpose of protecting some incumbents while punishing others.”¹¹⁸

In a federal court case striking down the state’s Senate maps, the federal court read Rhode Island state precedent to establish a two-part test: “First, it must be determined whether district lines deviate from natural, historical, geographical and political lines. Second, assuming that such a deviation exists, it must be justified by rational and legitimate considerations, made in good faith, and free from any taint of arbitrariness or discrimination.”¹¹⁹ The court found “no legitimate, nondiscriminatory explanation” for some areas of the map and found that “the only plausible explanation of the defendants’ proposed [] district lines . . . is that they were drawn for a specific political purpose. . . . to preserve the senatorial seats of incumbents favorable to the democratic leadership and punish incumbents critical of that leadership.”¹²⁰ As such, it struck down the maps based on its interpretation of state law.

Subsequently, the state’s Supreme Court clarified the way in which state courts should approach claims of non-compactness, seemingly rejecting the federal court’s approach and endorsing greater deference to the legislature. First in *Holmes v. Farmer*¹²¹ and again more than two decades later in *Parella v. Montalbano*, the state court explained that “the compactness clause is violated ‘only when a reapportionment plan creates districts solely for political considerations, without reference to other policies, in such a manner that the plan demonstrates a complete abandonment of any attempt to draw equal, compact and contiguous districts.’”¹²² The court has also made clear that plaintiffs challenging the compactness of a map bear the burden throughout the case and must show beyond a reasonable doubt that compactness was sacrificed to impermissible political considerations.¹²³ Together, these cases strongly suggest that the Rhode Island courts’ departure from previous willingness to strike down maps or, at the very least, the federal court’s interpretation of prior state court precedent.

Iowa – Compactness (1970s)

Iowa’s Constitution requires that each state House and Senate district “be of compact and contiguous territory.”¹²⁴ Following the 1970 round of redistricting, a group of Iowa voters successfully contended that the legislature’s proposed maps “sacrifice[d] compactness as a requirement for legislative districts in order to protect incumbency and provide partisan political advantage.”¹²⁵

The Iowa Supreme Court read the compactness requirement “to mean as compact as practicable, having proper regard for equality of population between the several districts,”¹²⁶ noting that “[t]he goal of any apportioning authority must be to provide for

¹¹⁷ *Parella*, 899 A.2d at 1244-45 (R.I. 2006) (describing the *Licht* trial court’s decision).

¹¹⁸ *Id.*

¹¹⁹ *Farnum v. Burns*, 561 F. Supp. 83, 91 (D.R.I. 1983).

¹²⁰ *Id.*

¹²¹ 475 A.2d 976 (R.I. 1984).

¹²² 899 A.2d at 1252 (quoting *Holmes*, 475 A.2d at 986).

¹²³ *Id.* at 1232-33.

¹²⁴ IOWA CONST. art. III, § 34.

¹²⁵ *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784, 786 (Iowa 1972).

¹²⁶ *Id.* at 790.

equality of population and territorial compactness as nearly as practicable.”¹²⁷ The court’s view of compactness was visual and geometrical, as it began its assessment by noting the “strange shapes” of districts.¹²⁸ The court indicated that challenges under the compactness clause include a burden shifting: once the court noted the “strange shapes” of some districts, “respondent had the burden of proof and he failed to sustain the burden to show why the legislature could not comply with the compactness requirement,” because “[n]othing appear[ed] to indicate the strange shapes [were] necessitated by considerations of population equality or result[ed] from unfeasibility.”¹²⁹

The opinion did not make precisely clear whether, in justifying non-compactness, the legislature may point to factors other than population equality – *i.e.* whether other factors would render less-than-maximally-compact districts unconstitutional. The court favorably cited the federal Supreme Court’s decision in *Burns v. Richardson* for the proposition that “the minimization of [incumbent versus incumbent] contests would not in and of itself be an impermissible consideration,”¹³⁰ suggesting that the legislature may permissibly consider non-constitutionalized factors. This, in turn, suggests that districts need not be maximally compact (while still complying with population equality), since a requirement of maximum compactness would render consideration of discretionary factors irrelevant.

At the same time, the opinion suggests that while these discretionary factors may be considered, they do not justify non-compactness. In this case, while the consideration of incumbency might have been permissible in some circumstances, “where, as here, a conscious effort is obviously present to devise and propose a plan which the legislature would adopt because it would protect the individual legislators at the polls, and districts lacking population equality or compactness are created for this political purpose, invidiousness is established.”¹³¹ In short, the legislature may not sacrifice compactness in order to protect incumbents or for other political reasons, even if those factors might otherwise be permissible considerations justifying something short of maximally compact districts.

Conclusion

With continued uncertainty over the ability to successfully litigate partisan gerrymandering in federal courts, state-based partisan gerrymandering claims, such as those discussed in this issue, serve as another method to achieve fair maps across the country. Litigants have the opportunity to breathe new life into long-ignored state constitutional clauses, and voters in states with ballot initiative processes can amend their constitutions to include and clarify the types of provisions that have curbed partisan gerrymandering in the past. If the federal Supreme Court eventually considers partisan gerrymandering non-justiciable, or develops a toothless jurisprudence, then state court litigation and independent redistricting commissions will be the only fortresses standing between American democracy and complete manipulation of district lines for partisan advantage.

¹²⁷ *Id.* at 791.

¹²⁸ *Id.* at 791.

¹²⁹ *Id.*

¹³⁰ *Id.* at 790 (citing *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)).

¹³¹ *Id.*

Appendix

This table sets out where in each state constitution or statutes there is a provision that could possibly be used for a state partisan gerrymandering claim, like those set out in this issue brief. We make no guarantees that any case will be successful, and only assure you that this table is up to date as of July 2018.

State	Equal Protection Clause	Freedom of Expression and Association	Free, Equal, and Open Elections	Compactness and/or Contiguity	Political Subdivision Splits	Prohibition on Undue Favoritism
Alabama		Art. I §§ 4, 25		Art. IX § 200	Art. IX §§ 198, 199, 200	
Alaska	Art. 1, § 1	Art. I §§ 5, 6		Art. VI § 6	Art. VI § 6	
Arizona	Art. 2, § 13	Art. 2 §§ 5, 6	Art. II, Section 21	Art. 4 § 2, pt. 2 (14)(C)	Art. 4 § 2, pt. 1 (14)	Art. 4 § 2, pt. 1 (14)(F)
Arkansas	Art. 2, Section 3	Art. 2 §§ 4, 6	Art. 3, § 2	Art. 8 § 3	Art. 8 § 2	
California	Art. 1, § 7	Art. I §§ 2(a), 3(a)		Art. XXI § 2(d)(3)-(5)	Art. XXI § 2(d)(4)	Art. XXI § 2(e)
Colorado		Art. II §§ 10, 24		Art. V § 47	Art. V § 47(2)	
Connecticut	Art. 1, § 1	Art. I §§ 4, 5, 14		Art. III § 4	Art. III § 4	
Delaware		Art. I § 5, 16	Art. 1, Section 3	Art. II § 2A		
Florida		Art. I § 4, 5		Art. III § 16(a)	Art. III § 20(b)	Art. III §§ 20, 21
Georgia	Art. 1, § 1. Par. 2	Art. I § I ¶¶ V, IX		Art. III § II ¶ II		
Hawaii	Art. 1, § 5	Art. I § 4, 5		Art. IV § 6	Art. IV §§ 4, 5, 6(1)	Art. IV § 6
Idaho	Art. 1, § 2	Art. I § 9, 10		Art. III § 5	Art. III § 5	
Illinois	Art. 1, § 2	Art. I § 4, 5	Art. 3, Section 3	Art. IV § 3(a)		

State	Equal Protection Clause	Freedom of Expression and Association	Free, Equal, and Open Elections	Compactness and/or Contiguity	Political Subdivision Splits	Prohibition on Undue Favoritism
Indiana		Art. 1 § 9	Art. 2, Section 1	Art. 4 § 5		
Iowa		Art. I § 7		Art. III § 34	Art. III § 37	
Kansas	Bill of Rights, § 2	Bill of Rights § 3, 11				
Kentucky	Bill of Rights, § 3	Bill of Rights, § 1	Bill of Rights § 6	§ 33	§ 33	
Louisiana	Art. 1, § 3	Art. I § 7, 9				
Maine		Art. I § 4, 7		Art. IV, pt. 1, § 2	Art. IV, pt. 1, § 2; Art. IX § 24(1), 25	
Maryland		Declaration of Rights Art. 10 , 13		Art. III § 4	Art. III § 4	
Massachusetts		Articles of Amendment LXXVII; Pt. I Art. XIX	Art. 1, Section 9	Articles of Amendment Art. CI Section 1, 2	Articles of Amendment Art. CI	
Michigan	Art. 1, § 2	Art. I § 3, 5		Art. IV § 3	Art. IV §§ 3, 2	
Minnesota		Art. I § 3		Art. IV § 3	Art. IV § 3	
Mississippi		Art. III § 11, 13		Art. XIII § 254	Art. III § 7	
Missouri	Art. 1, § 2	Art. I § 8, 9	Art. 1, Section 25	Art. III § 2	Art. 3 § 5	
Montana	Art. 2, § 4	Art. 2 § 6, 7	Art. 2, Section 13	Art. 5 § 14(1)		
Nebraska	Art. 1, § 3	Art. 1 § 5, 19		Art. 3 § 5		
Nevada		Art. 1 § 9, 10				

State	Equal Protection Clause	Freedom of Expression and Association	Free, Equal, and Open Elections	Compactness and/or Contiguity	Political Subdivision Splits	Prohibition on Undue Favoritism
New Hampshire	Art. 1, § 11	Bill of Rights, Art. 22, 32	Art. 1, Section 11	Pt. 2 House of Representatives, Art. 11	House of Representatives, Arts. 9, 11; Senate, Arts. 26, 26a	
New Jersey		Art. 1 §6, 18		Art. 4 §2(1)	Art. 4 §2(1)	
New Mexico		Art 2. §17	Art. 2, Section 8			
New York	Art. 1, § 11	Art. 1 §9(1), 8		Art. 3 §4(c)(3)-(4)	Art. 3 §§ 4(a), 4(c)(5)	Art. 3 § 4(c)
North Carolina		Art. 1 §12, 14	Art. 1, Section 10	Art. 2 §§ 2, 3, 5(2)	Art. 2 §§ 3(3), 5(3)	
North Dakota		Art. 1 §4, 5		Art. 4 §2		
Ohio	Art. 1, § 1	Art. 1 §3, 11		Art. 11 §3 (B)(3), (D)(1), (E), §4(A)	Art. 11 §3	Art. 1 §6
Oklahoma		Art. 2 §3, 22	Ar. III, Section 5		Art. 5 §§ 9A, 10A	
Oregon	Art. 1, §20	Art. 1 §8, 26	Art. 2, Section 1	Art. 4 §7	Art. 4 §7	
Pennsylvania		Art. 1 §7, 20	Art. 1, Section 5	Art. 7 § 9	Art. 2 §16	
Rhode Island	Art. 1, § 2	Art. 1 §20, 21		Art. 7 §1; Art. 8 §1		
South Carolina	Art. 1, § 3	Art. 1 §2	Art. 1, Section 5		Art. 3 §3	
South Dakota		Art. 6 §4, 5	Art. 7, § 1			
Tennessee		Art. 1 §19, 23	Art. 1, Section 5		Art. 2 §§ 4, 5, 6	
Texas	Art. 1, Section 3a	Art. 1 §8, 27		Art. 3 §25-26	Art. 3 §26	

State	Equal Protection Clause	Freedom of Expression and Association	Free, Equal, and Open Elections	Compactness and/or Contiguity	Political Subdivision Splits	Prohibition on Undue Favoritism
Utah		Art. 1 §1, 15	Art. 1, Section 17			
Vermont		Art. 1 §13, 20	Chapter 1, Art. 8	Art. 2 §13, §18	Art. 2 §§ 13, 18	
Virginia		Art. 1 §12	Art. 1, Section 6	Art. 2 §6		
Washington		Art. 1 §4, 5	Art. 1, Section 19	Art. 2 §6, 43(5)	Art. 2 §43(5)	Art. 2 § 43(5)
West Virginia		Art. 3 §7, 16		Art. 6 §4	Art. 6 § 6	
Wisconsin		Art. 1 §3, 4		Art. 4 §§ 4,5	Art. 4 §§ 4, 5	
Wyoming	Art. 1, Section 3	Art. 1 §20, 21	Art. 1, Section 27	Art. 3 §49	Art. 3 §§ 3, 49	