Reflecting on the 2020 Redistricting Cycle: A Proposal for Interstate Redistricting Agreements

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ABSTRACT

Reversing historical trends, 2020 congressional redistricting produced national partisan parity. However, as this Article argues, all is not well with our congressional districts. With partisan gerrymandering now a bipartisan affair, electoral competition has diminished. Federal redistricting reform efforts have stalled. The Supreme Court declared partisan gerrymandering nonjusticiable. And future redistricting cycles or state-law litigation could re-bias the national House map.

This Article analyzes the pitfalls of recent political and legal developments in redistricting and proposes a solution: interstate redistricting agreements. Through interstate redistricting agreements, sets of states with offsetting partisan gerrymanders could agree to standardize redistricting in procedure, substance, or both. These agreements could deescalate "redistricting warfare," bolster electoral competition, and increase state legislators' own electoral opportunities without ceding partisan advantage. This Article addresses policy design questions and interstate redistricting agreements' constitutionality under the Compact Clause.

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Table of Contents

I. INTRODUCTION

In November 2021, Illinois Democrats finalized the state's congressional maps for the next decade.[1] Fourteen of its 17 House seats now lean Democratic—up from 13 of 18 under the old map—while the number of highly competitive seats has declined from two to one.[2] In the 2022 elections, Democrats won 14 of the 17 seats[3]—over 80%—even while statewide Democratic candidates only pulled approximately 55% of the vote.[4] The map was hailed as a success in the Democratic effort to claw back some of the national Republican advantage from the prior redistricting cycle. Under the previous decade's maps, Democrats had to win as much as 54% of the national vote to have even odds of controlling the chamber.[5]

Far to the south, Texas Republicans drew lines that shored up incumbents and ensured their party would benefit from the state's population growth. Texas's new maps reduced the number of highly competitive U.S. House districts from six to one.[6] The state's two new House seats in the 2020 reapportionment cycle were drawn as one solidly Republican district and one "swing seat," even though much of the state's population growth came from Democratic-leaning populations.[7] Republicans won 25 of the state's 38 seats[8]—66%—despite taking only 55% of the vote in the top-of-the-ticket gubernatorial race.[9]

New York Democrats attempted something similar, passing maps that leaned their way in 20 of the state's 26 seats (and with an additional two seats that were highly competitive but still slightly Democratic).[10]

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1. *See What Redistricting Looks Like in Every State – Illinois*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://perma.cc/CWW7-LTVX.

2. *Id.* This Article follows election analysts in using the term "highly competitive" to refer to districts whose partisanship is within five points of the national average. *See id.*

3. *Illinois Election Results*, POLITICO (Dec. 6, 2022, 10:34 PM), https://perma.cc/6F6M-CUMW.

4. *Election Results – 2022 General Election*, ILL. STATE BD. OF ELECTIONS (last visited Sept. 24, 2023), https://perma.cc/4NPY-BAKT.

5. ALEX KEENA, MICHAEL LATNER, ANTHONY J. MCGANN & CHARLES ANTHONY SMITH, GERRYMANDERING THE STATES: PARTISANSHIP, RACE, AND THE TRANSFORMATION OF AMERICAN FEDERALISM 4 (2021).

6. *What Redistricting Looks Like in Every State – Texas*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://perma.cc/LW3T-YGLB.

7. *See* Elvia Limón, *Gov. Greg Abbott Signs Off on Texas' New Political Maps, Which Protect GOP Majorities While Diluting Voices of Voters of Color*, TEX. TRIB. (Oct. 25, 2021, 3:00 PM), https://perma.cc/JQ3D-TTYF.

8. *Texas Election Results*, POLITICO (Dec. 6, 2022, 10:34 PM), https://perma.cc/E7HP-CTJ5.

9. *Election Results: How Texas Voted in the November 2022 Midterms*, TEX. TRIB. (Nov. 30, 2022), https://perma.cc/CW45-K78W.

10. *What Redistricting Looks Like in Every State – New York*, FIVETHIRTYEIGHT (Jul. 19, 2022, 3:50 PM), https://perma.cc/CRT8-TFEJ.

This would have increased the number of projected Democratic seats even as the state lost one seat overall in 2020 reapportionment.[11] The number of highly competitive seats would have decreased from three to two.[12] However, the proposed map was struck down by the state's high court for violating a 2014 state constitutional amendment promoting fair redistricting.[13] In 2022, under the court-implemented replacement map, Democrats won 15 of the state's 26 congressional districts,[14] which roughly matched their share of the vote in the state's gubernatorial race.[15] New York's congressional elections were relatively competitive—five seats were decided by five percentage points or fewer[16]—but many national Democrats blamed their New York counterparts' failure to secure a more favorable map for their party's narrow loss of its House majority.[17] Meanwhile, New York Democrats are already seeking to redraw congressional maps in time for the 2024 elections.[18]

These states together tell the story of the latest redistricting cycle. After Republican efforts in the 2010 redistricting cycle gave the party a significant advantage in the national House map, Democrats in the 2020 redistricting cycle worked to enact favorable maps in states where they controlled the process. Thanks to each party's aggressive redistricting efforts, the latest redistricting cycle created something close to national partisan parity despite the Supreme Court's 2019 decision in *Rucho v. Common Cause* that all but eliminated the hope of challenges to partisan gerrymanders under federal law and the failure of federal legislative proposals for redistricting reform.[19] Through a mix of partisan gerrymandering by both parties, nonpartisan maps enacted in some states, and successful court challenges under state law,[20] the latest elections have come close to achieving partisan parity nationwide. The 2022

11. *Id.*

12. *Id.*

13. *See* Harkenrider v. Hochul, 197 N.E.3d 437, 454 (N.Y. 2022); Nicholas Fandos, *How N.Y. Democrats Lost a Critical Redistricting Battle*, N.Y. TIMES (Apr. 28, 2022), https://perma.cc/9SHB-N73N.

14. *New York Election Results*, POLITICO (Dec. 6, 2023, 10:34 PM), https://perma.cc/9VFB-6VZ9.

15. *New York Governor Election Results*, POLITICO (Dec. 6, 2023, 10:34 PM), https://perma.cc/AXF4-W8QV.

16. *New York Election Results*, *supra* note 14.

17. *See, e.g.*, Joshua Solomon, *NY's Redistricting Failure Helped Tip the Scales in Congress*, TIMES UNION (Dec. 27, 2022, 11:27 AM), https://perma.cc/X3DM-4F2D.

18. *See* Bill Mahoney, *Mid-level Court Hands Democrats Victory in New York Redistricting Case*, POLITICO (July 13, 2023, 11:56 AM), https://perma.cc/KN6V-NUMS.

19. *See infra* Sections III.C.1 (discussing the *Rucho* decision and the history of partisan gerrymandering litigation under federal law) and II.C.3 (discussing federal legislative proposals for redistricting reform).

20. *See infra* Section III.C.2 (discussing challenges to partisan gerrymanders on state-law grounds).

congressional elections, the first under the post-2020 Census maps, produced national partisan representation that closely aligned with partisan vote share.[21]

This Article argues that this surprising result, while lauded by many, masks structural concerns. First, national partisan parity has come at the cost of electoral competition: the number of House districts likely to produce closely contested elections fell by about one-third in the latest redistricting cycle.[22] While electoral competition is not an unmitigated good, it helps ensure that changes in voter opinion produce changes in representation, a critical democratic linkage.[23] Partisan congressional maps, by contrast, often insulate incumbents from electoral risk.

Second, this partisan equality is tenuous because it is the product not of political or legal commitments to unbiased redistricting but rather of largely partisan forces that happened to produce roughly equal and opposite effects in the latest redistricting cycle. When partisan gerrymandering is the norm, bias in the national House map can turn on which party happens to control the levels of redistricting power during the decennial redistricting process. And while many observers have approved of recent successes in challenging partisan gerrymanders under state law, this movement creates risks of its own. The success of state-court gerrymandering litigation is far from universal.[24] If asymmetric judicial polarization exists, state-law litigation could be disproportionately successful in states of one partisan stripe. If one party's gerrymanders are thus invalidated while the other's are upheld, state-law litigation could increase partisan bias in the national map.

This Article thus presents the first sustained scholarly analysis of a novel fix for line-drawing: interstate redistricting agreements.[25] States

21. For more on the shift from national partisan bias to partisan parity, see discussion *infra* notes 37–40 and accompanying text.

22. *See* Joseph Ax & Jason Lange, *Analysis: In U.S. Battle over Redistricting, Competition Is the Biggest Loser*, REUTERS (Feb. 9, 2022, 3:31 PM), https://perma.cc/DCG6-FBJ7; *What Redistricting Looks Like in Every State*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://perma.cc/T483-FZTP.

23. For discussion of the value of electoral competition and the harms of its decline, see *infra* Sections II.A–B.

24. *See*, *e.g.*, Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 493 (Wis. 2021) (holding that partisan gerrymandering claims were nonjusticiable under Wisconsin law); *see also* Norman R. Williams, *Partisan Gerrymandering: The Promise and Limits of State Court Judicial Review*, 106 MARQ. L. REV. 949 (2023) (discussing the difficulties of using state-court judicial review to remediate partisan gerrymandering).

25. This Article uses the terms "agreement" and "compact" interchangeably to mean any mechanism by which states agree to enact particular redistricting procedures conditional on at least one other state doing the same. This usage follows the Supreme Court's decision not to distinguish between the terms in the context of the Compact Clause. *See infra* Section V.B.

Only one other academic article discusses interstate redistricting proposals and does so primarily to discuss the possibility of using them to implement multimember districts.

could, through ordinary legislation or voter referendum, enter into binding agreements with other states to use fair redistricting procedures or standards. By brokering agreements with states controlled by the other party, states can achieve "mutual disarmament" in the bipartisan gerrymandering contest, promoting fair districts without conceding partisan advantage. Our system of disaggregated, state-legislature-led redistricting incentivizes and permits legislators to prioritize partisan concerns. But interstate agreements offer a way to leverage these same features to promote experimentation and cooperation across states and parties.[26] While national legislative and judicial solutions to congressional gerrymandering are blocked, subnational redistricting agreements are a way to sidestep the very real pressures of partisanship while increasing electoral opportunities for state legislators and promoting democratic values.

This Article makes two interlinked contributions to the partisan gerrymandering literature. First, it provides a novel synthesis of trends in redistricting and anti-gerrymandering litigation since *Rucho* and the 2020 redistricting cycle.[27] Perhaps because of the allure of national partisan parity, legal scholars have largely failed to discuss the continued decline of electoral competition in the latest House elections. Likewise, scholars and practitioners have been quick to note the merits of state-law gerrymandering challenges but have been quieter about the possibility of asymmetric litigation successes that reproduce partisan bias nationwide.

This analysis leads to this Article's second contribution: the first in-depth scholarly analysis of interstate redistricting agreements.[28] While some state legislators have generated proposals for interstate redistricting, the idea has received little scholarly or public attention in recent years. Drawing on original interviews with state legislators, legislative histories of prior proposals for interstate redistricting, and an analysis of recent redistricting developments, this Article argues that interstate agreements offer a path out of the redistricting thicket. This Article also suggests potential methods of enactment and addresses these agreements' constitutionality under the Compact Clause.

This Article proceeds as follows. Part II describes redistricting's status quo, with an empirical focus on declining electoral competition in states with party-driven redistricting processes and a normative discussion of the harms of noncompetitive districts. Part II also discusses the recent

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This arguably misses the distinct value of interstate redistricting: a way to achieve partisan fairness in a hyperpartisan redistricting environment. *See* discussion *infra* note 197 and accompanying text.

26. *See infra* Part IV.

27. *See infra* Part II.

28. *See infra* Parts IV–V; *see also infra* text accompanying note 197.

history of attempts to reform redistricting—either through federal legislation or litigation in state or federal court. Part III traces the causes of redistricting's status quo back to our system of disaggregated redistricting, the incentives for state legislators in a partisan national environment, and parties' increasing technological capacity to gerrymander effectively. Part IV turns to the idea of interstate redistricting compacts. Part IV discusses previous attempts to create interstate redistricting agreements and demonstrates their potential to increase electoral competition and reduce partisan bias while accommodating state legislators' position within a national party system. Part V addresses policy design choices for interstate redistricting compacts and analyzes the constitutionality of interstate redistricting agreements under the Compact Clause even without congressional consent. Part VI concludes.

II. THE PROBLEM: REDISTRICTING'S STATUS QUO

A. Disaggregated Redistricting, Partisan Balance, and Declining Electoral Competition

After each decennial census, states draw new lines for their House districts. While federal law places some constraints on the processes and outcomes of mapmaking,[29] redistricting is largely the purview of states. Moreover, congressional redistricting is currently "disaggregated," to borrow Professor Adam B. Cox's term.[30] It is disaggregated in two senses: procedurally and substantively. Redistricting is disaggregated *procedurally* insofar as the processes each state uses to draw its own districts operate independently from other states.[31] In most states, the legislature controls redistricting, though states vary as to the level of legislative support needed to enact a map and whether maps are subject to gubernatorial veto.[32] Some states use independent commissions or "politician commissions" to advise on or draw maps, though some commissions are subject to legislative override.[33] While federal and state judges do not draw district lines in the first instance, successful legal challenges to maps may leave the judiciary holding the pen. However, each state's redistricting process is generally carried out by actors involved solely in their own state's process, and which process to use (e.g. whether

29. *See* SARAH J. ECKMAN, CONGRESSIONAL REDISTRICTING CRITERIA AND CONSIDERATIONS, CONG. RSCH. SERV., IN11618, at 1–2 (2021), https://perma.cc/U6NY-BBKG.

30. Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409 (2004).

31. *See id.* at 413–14.

32. *See Who Draws the Lines?*, ALL ABOUT REDISTRICTING (2020), https://perma.cc/69MB-C2DL.

33. *Id.*

to use an independent redistricting commission) is a matter decided only by people in that state.

Redistricting is also disaggregated *substantively*. Beyond the requirements set by federal law—which includes no standards for partisan fairness after the Supreme Court's decision in *Rucho v. Common Cause*[34]—states are free to adopt (or not adopt) their own constitutional or statutory standards for district-drawing. Those standards, if extant at all, are independent of those in other states. Texas's redistricting choices have no direct impact on New York's, and vice versa.

On this redistricting petri dish, pathogens grow. Most notable is the possibility for partisan bias. By strategically "gerrymandering" voters, parties that control the redistricting process can draw maps that help one party win a share of a state's congressional seats well in excess of its share of the statewide congressional vote.[35] When one party gerrymanders more successfully than the other—whether because it has more power to gerrymander or fewer compunctions about doing so—it skews the structure of representation nationally.[36] This was the case after the 2010 redistricting cycle. Due at least in part to aggressive Republican redistricting, Democrats in 2012 would have had to win well over 54% of the two-way House vote to win a majority of seats.[37] Instead, Republicans won a comfortable House majority despite losing the House popular vote.[38]

In the 2020 redistricting cycle, however, Democrats pursued redistricting with similar vigor. Their aggressive line-drawing efforts and successful state-court challenges to Republican-drawn maps achieved something close to partisan balance in the 2022 national House map.[39] In

34. Rucho v. Common Cause, 139 S. Ct. 2484, 2498 (2019).

35. *See Why Should We Care?*, ALL ABOUT REDISTRICTING (2020), https://perma.cc/9GUV-EMAF.

36. *See* Cox, *supra* note 30, at 410–11.

37. KEENA ET AL., *supra* note 5, at 4.

38. *See* Sam Wang, Opinion, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), https://perma.cc/B6XD-ZHXH.

39. *See* Nathaniel Rakich & Elena Mejía, *The House Map's Republican Bias Will Plummet in 2022 — Because of Gerrymandering*, FIVETHIRTYEIGHT (Mar. 31, 2022, 6:00 AM), https://perma.cc/AP6C-9EC8. This analysis predated the New York Court of Appeals' decision to strike down that state's Democratically drawn maps. *See generally* Harkenrider v. Hochul, 197 N.E.3d 437 (N.Y. 2022). But the overall result of the redistricting cycle—a shift towards partisan parity accompanied by a decline in the number of competitive seats—has persisted. *See What Redistricting Looks Like in Every State*, *supra* note 22; *see also* Ronald Brownstein, *The Hidden Dynamic that Could Tip Control of the House*, CNN (Jan. 23, 2023, 8:56 AM), https://perma.cc/EHV2-JMZG ("[M]ost experts agree the 2020 maps yielded a more equitable set of districts than the maps produced after 2010.").

fact, one post-election analysis found that Democrats won *more* seats relative to their share of the two-party vote in contested races.[40]

But nationwide partisan parity is not the sole criterion for good districts or good redistricting processes. Moreover, the present balance may prove fleeting because it is the product of an assemblage of maps drawn largely for partisan advantage, not a deliberate attempt at parity. There is no guarantee that the 2030 redistricting cycle will produce similar results if different parties control redistricting in different states. Imbalance may even come sooner: Republicans are already considering drawing new, mid-decade maps in North Carolina and Ohio after more sympathetic justices were elected to those states' high courts.[41]

And national equality does not assuage the concerns of voters in lopsided districts who can never elect a candidate of their choice. Partisan equality in the national map has papered over a sharp drop in the number of competitive House races. Going into the 2022 election, one prominent redistricting tracker estimated that the number of highly competitive seats—those with a partisanship within five percentage points of the nation's as a whole—would decline from 46 to 40.[42] Consistent with expectations, the election resulted in only 42 of the 435 House seats being decided by five percentage points or fewer.[43] One recent study summed up the situation:

> [P]artisan gerrymandering is widespread in the 2020 redistricting cycle, but most of the electoral bias it creates cancels at the national level . . . . [But,] we find that partisan gerrymandering reduces electoral competition and makes the partisan competition of the US House less responsive to shifts in the national vote.[44]

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40. *See* Aaron Blake, *Why the GOP's Popular-Vote Edge Hasn't Translated to More House Seats*, WASH. POST (Nov. 15, 2022, 10:14 AM), https://perma.cc/9MSM-TMSR. *See also* Justin Fox, *How Republicans Lost Their House Edge in Midterms*, WASH. POST (Dec. 9, 2022, 1:56 PM), https://perma.cc/E66A-UP5A (reaching a similar conclusion).

41. *See* Brownstein, *supra* note 39.

42. *See What Redistricting Looks Like in Every State*, *supra* note 22; *see also* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, BRENNAN CTR. FOR JUSTICE (Aug. 11, 2022), https://perma.cc/D2QF-M47G.

43. FIX OUR HOUSE, *Single-Winner Districts and the Failures of Redistricting* 4, https://perma.cc/7PH7-7RS2 (last visited Dec. 17, 2023). Only 30 House elections were decided by four percentage points or fewer. Chris Leaverton, *Three Takeaways on Redistricting and Competition in the 2022 Midterms*, BRENNAN CTR. FOR JUSTICE (Jan. 20, 2023), https://perma.cc/GC3H-PGR3.

44. Christopher T. Kenny, Cory McCartan, Tyler Simko, Shiro Kurawaki & Kosuke Imai, *Widespread Partisan Gerrymandering Mostly Cancels Nationally, but Reduces Electoral Competition*, 120 PNAS e2217322120, at 1 (2023), https://perma.cc/QAN5-KXXU. For a set of studies on the effects of gerrymandering other than partisan bias, including an increase in legislative gridlock and a decrease in the number of women elected to Congress, see Akhil Rajan, *Beyond Left and Right: How Redistricting Changes the*

This lack of electoral competition has real democratic harms.

B. "Vanishing Marginals" and the Costs of Noncompetitive Districts

The decline in electoral competition is not new. Since the 1970s, political scientists have noted the phenomenon of "vanishing marginals": the declining number of "marginal" U.S. House districts that are closely contested in each election.[45] Early research observed a decline in electoral competitiveness between the 1950s and 1970s.[46] Later scholarship saw a similar decline into the 1980s.[47] The story is more muddled lately, with some scholars noting that the number of closely contested elections (as measured by the ultimate margin of victory) was not lower in the 2012–2020 election cycles than in past decades.[48] Moreover, redistricting is only one of a number of potential causes of declining electoral competitiveness. Other possible culprits include geographical partisan polarization and congresspeople's increasing skill at using the prerogatives of incumbency for electoral gain.[49]

Though other factors may contribute, redistricting is surely a main reason for declining electoral competitiveness. In particular, redistricting done by partisans, rather than independent commissions or courts, seems to drive declines in electoral competition. One study of 40 years of House elections found that districts drawn by commissions or courts were associated with greater electoral competitiveness than those drawn by legislatures alone.[50] The 2022 results are instructive: approximately half

Shape of Our Democracy (Apr. 30, 2021) (unpublished manuscript), https://perma.cc/R2ZV-KFUV.

45. *See* David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295, 295–97 (1974).

46. *See id.*

47. *See* Stephen Ansolabehere, David Brady & Morris Fiorina, *The Vanishing Marginals and Electoral Responsiveness*, 22 BRIT. J. POL. SCI. 21 (1992).

48. Alan I. Abramowitz, *Redistricting and Competition in Congressional Elections*, SABATO'S CRYSTAL BALL (Feb. 24, 2022), https://perma.cc/T5BW-BR63. *But see* SUNDEEP IYER & KEESHA GASKINS, REDISTRICTING AND CONGRESSIONAL CONTROL: A FIRST LOOK, BRENNAN CTR. FOR JUSTICE 19 tbl.A.1 (2012) https://perma.cc/ET9Z-W3KP (noting a decline in the number of projected "marginal" seats following the post-2010 redistricting cycle).

49. *See* Abramowitz, *supra* note 48; Mayhew, *supra* note 45.

50. *See* Jamie L. Carson, Michael H. Crespin & Ryan D. Williamson, *Reevaluating the Effects of Redistricting on Electoral Competition, 1972-2012*, 14 STATE POL. & POL'Y Q. 165, 165 (2014); *see also* Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 14 STATE POL. & POL'Y Q. 455 (2004) (finding that, in elections under 1992 and 2002 district lines, "more competitive elections occur when courts and commissions are directly involved in the redistricting process").

of all districts, but only a quarter of the most competitive ones, were drawn by parties rather than commissions or courts.[51]

Critically, electoral competition may be low even if districts are unbiased relative to the partisanship of a state or the country as a whole. Imagine a state with 60% Democratic voters and 40% Republican voters. The state could be split into five districts, three of which are entirely Democratic and two of which are entirely Republican. The resulting congressional delegation would perfectly mirror the composition of the state as a whole—but general elections would hardly ever be competitive, and incremental changes in voter opinion would be unlikely to result in representational shifts. The example is extreme, but reflects redistricting's status quo. The 2022 elections produced a House delegation with little partisan bias, but also relatively little electoral competition, particularly in states using traditional partisan redistricting methods.

This state of affairs—unbiased representation through noncompetitive districts—has key democratic harms. Samuel Issacharoff, in his seminal work theorizing the harms of noncompetitive "political markets" controlled by parties acting as "political cartels" by protecting incumbents through gerrymandering, notes that "[t]he key to this approach is to view competition as critical to the ability of voters to ensure the responsiveness of elected officials to the voters' interests through the after-the-fact capacity to vote those officials out of office."[52] On this view, it is not just the capacity to vote, but the capacity to cast a vote *that might actually result in an incumbent losing her job*, that is the "guarantor of democratic legitimacy."[53] When redistricters draw lines that protect incumbents or result in many districts with strong partisan leans to either side but few in the middle, they act as "political cartels" that protect officeholders by limiting outside competition.

Political noncompetition may produce poor representation in either (or both) of two ways. First, elected officials might be subpar in a technocratic sense—inattentive in committee meetings, uninspired to draft new bills, lazy in providing constituent services, or even not cognitively up to the task of legislating. Second, officials may not adequately respond to voters' policy preferences.[54] In Justice John Paul Stevens's words, "[m]embers of Congress elected from such safe districts need not worry

51. *See* Leaverton, *supra* note 43.

52. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615 (2002).

53. *Id.*

54. *See* John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. POL. 911, 911 (2006) (finding that less competitive districts produce less responsive representatives).

much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities within their district."[55]

Moreover, in a time of political polarization, this nonresponsiveness likely pushes representation towards the ends of the ideological spectrum. A district where winning the primary is tantamount to election may skew representation by nominating and then electing a candidate from a party's ideological fringe, far from the district's median voter.[56] When partisan primaries pose bigger threats to incumbents than general elections do, officials may cater to the most outspoken—and often most extreme—voters to fend off primary challenges. Conversely, representatives from more competitive districts may be forces of moderation and bipartisanship in an era of sharp political division. As a telling example, of the ten Republican House members who voted to impeach President Trump following the January 6 Capitol attack, fully half hailed from the few districts whose partisanship was within five points of the national average.[57]

Electoral competition also benefits the electorate itself. Voters in more competitive electoral units show greater interest in politics and know more about their elected officials' policy positions.[58] In short, voters may live up or down to the expectations set by their political system: those whose elected officials are structurally unresponsive to their views may not take it upon themselves to develop well-informed opinions.

There are two noteworthy critiques of the political-cartels view—one empirical, one normative. Neither critique, however, extinguishes concerns regarding noncompetitive districts. First, the empirical critique: do noncompetitive districts actually produce the harms alleged? The best answer seems to be "yes, in part." One political scientist summarizes the empirical research: "while gerrymandering may not be as pernicious as it is often portrayed, neither is it entirely innocent."[59] On the technocratic front, one study has found that legislators in competitive districts are more

55. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 470–71 (2006) (Stevens, J., concurring in part).

56. *See* Issacharoff, *supra* note 52, at 627–29.

57. These members were Representatives Fred Upton (MI-06), Jamie Herrera Beutler (WA-03), Peter Meijer (MI-03), John Katko (NY-24), and David Valadao (CA-21). *See* Domenico Montanaro, *These Are The 10 Republicans Who Voted to Impeach Trump*, NAT'L PUB. RADIO (Jan. 14, 2021, 5:01 AM), https://perma.cc/5QK6-AAFS; David Wasserman & Ally Flinn, *Introducing the 2021 Cook Political Report Partisan Voting Index*, COOK POL. REP. (Apr. 15, 2021), https://perma.cc/XR2G-JGWK (data on district partisanship).

58. *See* Philip Edward Jones, *The Effect of Political Competition on Democratic Accountability*, 35 POL. BEHAV. 481, 481 (2013).

59. STEPHEN K. MEDVIC, GERRYMANDERING: THE POLITICS OF REDISTRICTING IN THE UNITED STATES 139 (2021).

effective at pushing bills towards enactment.[60] As for the relationship between district competitiveness and elected officials' ideology, there is a strong correlation between representatives' ideology (as expressed through legislative votes) and their districts' partisanship, meaning more competitive districts will have less ideologically extreme representation.[61] Moreover, districts that undergo significant changes in redistricting have been shown to drive polarization in the House.[62]

It is true that the increase in Congressional polarization is hardly the sole product of redistricting. A nationalized media environment, better methods of ensuring party discipline, and the increasing importance of individual contributors in campaign fundraising all may play a role.[63] One study found that while changes in House districts were associated with more polarized voting between the 1970s and the 2000s, redistricting produced at most 20% of the increase in House polarization over that span.[64] Another study blamed redistricting for only roughly 10–15% of political polarization since the 1970s.[65]

But even if redistricting is only a partial cause of polarization, it might still play a powerful a role in *de*polarization. Redistricting that affirmatively seeks to produce more competitive districts could mitigate polarization even if it did not cause it.

Second, the normative critique: are districts with more partisan homogeneity and less electoral competition substantively bad? Professor Nathaniel Persily has made the case for "no." He notes that in a world of uniformly moderate districts, every member of both major parties would be expected to trend towards "converging ideological positions" to stay competitive.[66] Doing so would increase competition but decrease real choice and the chance for political diversity—the choice between two

60. *See* Soren J. Schmidt & Matthew B. Young, *Electoral Competitiveness and Legislative Productivity*, 34 SIGMA: J. POL. & INT'L STUD. 119, 120 (2017).

61. *See* Micah Altman & Michael McDonald, *Redistricting and Polarization*, *in* AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 45 (James A. Thurber & Antoine Yoshinka eds., 2015).

62. *See* Jamie L. Carson, Michael H. Crespin, Charles J. Finocchiaro & David W. Rohde, *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AM. POL. RSCH. 878, 878 (2007); *see also* Alexander Kustov, Maikol Cerda, Akhil Rajan, Frances Rosenbluth & Ian Shapiro, *The Rise of Safe Seats and Party Indiscipline in the U.S. Congress* 1 (Yale Univ., Working Paper, 2021), https://perma.cc/MP4V-DUBX ("[S]eat safety causes ideological extremism.").

63. *See* Michael Barber & Nolan McCarthy, *Causes and Consequences of Polarization*, *in* NEGOTIATING AGREEMENT IN POLITICS 19, 37 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

64. SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 68–69 (2008).

65. Nolan McCarthy, Kevin T. Poole & Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 667 (2009).

66. Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 669 (2002).

similar candidates may not be a meaningful choice at all.[67] Moreover, more competitive elections would increase the number of voters presumptively dissatisfied with their representation: narrowly decided elections produce more people who voted for the losing candidate than do landslides.[68] Finally, increased competition, if it led to increased legislative turnover, might also reduce the benefits of having experienced legislators.[69] Longtime representatives may win more benefits for their constituents, thanks to the prerogatives of seniority, or might simply learn to do their jobs better with more years of experience.[70] And constituents may like having long-term, stable representation so that they can build lasting relationships with legislators.[71]

One could argue around the edges of some of these claims—if competitive elections are associated with higher voter turnout,[72] might more competitive elections produce higher numbers of voters who *did* cast a ballot for their representative, in addition to more voters who didn't? If competitive elections produce a more informed citizenry,[73] would that justify having more voters who "lose" elections? Does the popularity of term limits mean that voters want more electoral turnover?[74] And given that competitive districts attract higher-quality candidates,[75] aren't more competitive districts likely to give voters more meaningful electoral choices, even if the ideological distance between them is smaller?

However, the critical point is likely just that redistricting inevitably involves tradeoffs. Furthermore, different modes of redistricting may in

67. *See id.*

68. *See id.* at 668.

69. *See id.* at 670–72. Relatedly, increased competition may lead to increased time spent campaigning—and hence less time legislating—thereby decreasing the quality of representation.

70. *See id.*

71. *See id.*

72. Whether or not electoral competitiveness in fact increases turnout is a contested question. *Compare, e.g.*, Daniel Stockemer, *What Affects Voter Turnout? A Review Article/Meta-Analysis of Aggregate Research*, 52 GOV'T & OPPOSITION 698, 710 (describing the relationship between turnout and competitiveness as "complex"), *with* Daniel J. Moskowitz & Benjamin Schneer, *Reevaluating Competition and Turnout in U.S. House Elections*, 14 Q.J. POL. SCI. 191, 191 (2019) (finding the effect of increased electoral competitiveness on turnout to be "near zero").

73. *See* KEENA LIPSITZ, COMPETITIVE ELECTIONS AND THE AMERICAN VOTER 13 (2011).

74. *See* McLaughlin & Associates for U.S. Term Limits, *National Congressional Term Limits Poll: Executive Summary*, (2021), https://perma.cc/3C63-7G74 (finding 80% national support for congressional term limits).

75. *See* Nicholas O. Stephanopoulous & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGIS. STUD. Q. 609, 610 (2020); L. Sandy Maisel, Cherie D. Maestas & Walter J. Stone, *The Impact of Redistricting on Candidate Emergence*, *in* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 31 (Thomas E. Mann & Bruce E. Cain eds., 2005) [hereinafter PARTY LINES].

time change our democratic institutions in deep and unpredictable ways.[76] If increased electoral competition leads to more legislative turnover, we might lose the benefits of having longtime representatives serve as community pillars, but we might also see activism, energy, and money channeled into other community institutions like labor unions, nonprofits, or businesses. Greater policy convergence across parties might result in a less dramatic choice between candidates in a general election but might also mean that a greater range of voters may actually find multiple candidates palatable. A choice between two palatable candidates may be more meaningful, and might better promote any number of democratic ends, than a choice between candidates whose views are completely irreconcilable. While the chance to elect candidates far from the median may allow some voters to feel more accurately represented, it may also detract from clear debate over what policies the parties would actually implement if given the chance.[77]

Persily's critiques helpfully force us to reckon with the different visions of democracy inherent in different views of redistricting. But insofar as we share Issacharoff's fears of "partisan lockups" in redistricting, we should try to increase the number of districts that are likely to see real electoral competition cycle-to-cycle and having maps that reflect states' partisan alignments well enough at least to register when that partisanship shifts. And while a redistricting process wholly independent from politics may be impossible—"[p]olitics and political considerations are inseparable from districting and apportionment," in the Court's words[78]—that does not mean that redistricting procedures glaringly entangled with political considerations are democratically harmless.[79] While these concerns are not new, recent legal developments show the need for a new solution.

76. For one discussion of how historical changes in redistricting, such as the decline in the frequency of redistricting, have changed the nature of American politics more generally, see ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 8–10 (2021).

77. *See* Ian Shapiro, *Collusion in Restraint of Democracy: Against Political Deliberation*, 146 DAEDALUS 77, 81 (2017).

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

79. *See* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 352, 376 (2017) (discussing a "norm against government partisanship," which, even if rejected by the Court as a constitutional mandate in redistricting, surely captures many citizens' intuitions regarding the separation of governance and partisan advocacy).

C. Partisan Gerrymandering Litigation and Prior Legislative Proposals

For decades, litigants and legislators alike have challenged partisan gerrymandering. A variety of partisan groups and nonpartisan advocacy organizations have challenged electoral maps in both federal and state courts while arguing that state maps violate a variety of federal or state constitutional provisions. However, a recent landmark Supreme Court decision held that the Federal Constitution provides no justiciable grounds for challenges to partisan gerrymandering.[80] Though state-law suits have occasionally succeeded, recent developments show both the limits of litigation and how such litigation may even magnify the problems with our system of disaggregated redistricting. Meanwhile, federal legislative proposals have gotten stuck in congressional gridlock. Interstate redistricting agreements offer an alternative.

1. Partisan Gerrymandering in the Federal Courts

The Supreme Court's 2019 decision in *Rucho v. Common Cause* brought an apparent end to a generations-long effort to challenge partisan gerrymandering as unconstitutional. After the "reapportionment revolution" of the 1960s—a series of Supreme Court cases and new federal legislation targeting population imbalances and racial gerrymandering in state and federal electoral districts[81]—the Court has held out, narrowed, and finally foreclosed the possibility of constitutional challenges to overly partisan redistricting plans.

In the 1986 case of *Davis v. Bandemer*, the Court considered an Indiana state legislative plan and held for the first time that claims that partisan gerrymanders violate the Equal Protection Clause are justiciable.[82] However, foreshadowing the future of partisan gerrymandering jurisprudence, the Court could not coalesce around an approach for determining which redistricting plans were

80. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

81. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (holding that legislative districts drawn intentionally to disempower Black residents violated the Fifteenth Amendment); Baker v. Carr, 369 U.S. 186, 209 (1962) (holding that challenges to a state's method of legislative apportionment was justiciable under the Fourteenth Amendment's Equal Protection Clause); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (requiring population equality among a state's congressional districts); Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended in 52 U.S.C. §§ 10101–10702) (barring state voting rules and procedures that deny or abridge the right of any citizen to vote on account of race or color); *see also Gaffney*, 412 U.S. at 752 (upholding a Connecticut legislative districting plan with small population imbalances among districts in order to achieve what the legislature considered "political fairness": "a rough approximation of the statewide political strengths of the Democratic and Republican Parties").

82. *See* Davis v. Bandemer, 478 U.S. 109, 125 (1986).

unconstitutionally partisan. The four-Justice plurality determined that the challengers' claim was justiciable, but the redistricting plan at issue had not been shown to have a "sufficiently adverse effect" on one party's political power to create a constitutional violation;[83] a showing of more than "a mere lack of proportionate results in one election" was required.[84] Justice Powell, joined by Justice Stevens, concurred that partisan gerrymandering claims were justiciable.[85] Those two would have gone further by holding that the district court's findings of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group," plus other factors like "shapes of voting districts and adherence to established political subdivision boundaries," were sufficient to make out a claim of unconstitutional political discrimination.[86] Conversely, Justice O'Connor wrote for herself and two others in holding the partisan gerrymandering claim nonjusticiable.[87]

The Court's partisan gerrymandering jurisprudence after *Bandemer* would follow the same pattern: fractured majorities finding partisan gerrymandering claims justiciable while rejecting the claims in the cases at hand and providing little clarity as to what exactly *would* constitute unconstitutional partisan gerrymandering. In the 2004 case *Vieth v. Jubelirer*, the Court rejected a claim by Pennsylvania Democratic voters that their state's congressional districts were unconstitutionally gerrymandered.[88] Justice Scalia wrote for a four-Justice plurality and adopted O'Connor's nonjusticiability argument: the Equal Protection Clause, Scalia wrote, creates no "judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."[89] Four dissenting Justices produced three separate opinions, each of which insisted on the justiciability of partisan gerrymandering claims and presented its own standard for adjudicating them.[90] Justice Kennedy's solo controlling concurrence in the judgment sided against the plaintiffs but only on the grounds that they had not presented any "workable standard" by which partisan gerrymandering

83. *Id.* at 129 (plurality opinion).

84. *Id.* at 139.

85. *Id.* at 161 (Powell, J., concurring in part and dissenting in part).

86. *Id.* at 161, 173.

87. *See id.* at 144 (O'Connor, J., concurring in the judgment). Chief Justice Burger joined O'Connor's opinion but also wrote his own two-paragraph opinion concurring in the judgment and insisting that responsibility for correcting gerrymandering lay not with the courts but rather "the people." *Id.* at 143–44 (Burger, C.J., concurring in the judgment).

88. Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).

89. *Id.* at 305.

90. *See id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting) (joined by Justice Ginsberg); *id.* at 355 (Breyer, J., dissenting).

claims could be judged.[91] Kennedy concluded that partisan gerrymandering claims were justiciable (under either the Fourteenth or First Amendments) and held out hope that suitable standards for adjudicating such claims would "emerge in the future."[92] Therefore, five Justices—Kennedy and the four dissenters—preserved *Bandemer*'s holding that partisan gerrymandering claims are justiciable, even if the question of *how* to judge them remained uncertain.

Just two years later, *League of United Latin American Citizens v. Perry* produced a similar stalemate.[93] The Court heard a challenge to Texas's unusual mid-decade redistricting plan, which Republicans implemented after taking power in the 2002 state elections and which replaced court-drawn maps from after the 2000 Census.[94] A fractured Court, addressing both racial and partisan gerrymandering claims, produced six opinions, which ranged from providing distinct standards under which the plan was an unconstitutional partisan gerrymander to holding that partisan gerrymandering claims were nonjusticiable.[95] Justice Kennedy's plurality opinion held, as he wrote in *Vieth*, that partisan gerrymandering claims were justiciable but that, because the appellants failed to present a workable standard by which to identify an unconstitutional gerrymander, they "established no legally impermissible use of political classifications."[96] The Court mustered a majority for little about partisan gerrymandering beyond a single spare paragraph, stating, "[w]e do not revisit [*Bandemer*'s] justiciability holding."[97] Judicial intervention against partisan gerrymanders remained conceivable on paper if elusive in practice.

However, in 2019, the Court shut the justiciability door that *Bandemer* and its progeny had carefully, if tenuously, left open. Just as states began preparing for the 2020 Census and another round of map-drawing, the Supreme Court (this time neatly coalesced into just a majority and dissenting opinion) decided *Rucho v. Common Cause*, which rejected

91. *Id.* at 311 (Kennedy, J., concurring in the judgment).

92. *Id.*

93. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

94. *See id.* at 410–13. For more on the saga of Texas's 2003 re-redistricting, including the flight out-of-state by some Democratic legislators in an attempt to deprive the Texas Legislature of the quorum necessary to enact the new maps, see Jeffrey Toobin, *Drawing the Line*, NEW YORKER (Feb. 26, 2006), https://perma.cc/4HDN-8KCC.

95. *See League of United Latin Am. Citizens*, 548 U.S. at 447 (Stevens, J., concurring in part and dissenting in part); *id.* at 491 (Breyer, J., concurring in part and dissenting in part); *id.* at 511 (Scalia, J., concurring in the judgment in part and dissenting in part).

96. *Id.* at 423 (plurality opinion).

97. *Id.* at 414. Justices Stevens, Souter, Ginsberg, and Breyer joined this portion of Justice Kennedy's opinion. Justices Stevens and Breyer, however, would have found Texas' maps to be unconstitutional partisan gerrymanders under the Equal Protection Clause. *See id.* at 447–62 (Stevens, J., concurring in part and dissenting in part); *id.* at 491–92 (Breyer, J., concurring in part and dissenting in part).

challenges to North Carolina and Maryland's congressional maps on the ground that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."[98] The years following *Vieth* saw a flowering of mathematically sophisticated research to develop metrics for assessing partisan bias in district maps, precisely the sort of "workable standards" for judging gerrymanders that Justice Kennedy had called for.[99] But the *Rucho* Court determined that none of these metrics provided "a limited and precise standard that is judicially discernible and manageable" and, more strikingly, that none ever would.[100] Partisan gerrymandering, while "incompatible with democratic principles,"[101] posed no constitutional issue that courts could remedy. Despite advocates' efforts, ostensibly justiciable claims of unconstitutional partisan gerrymandering had never won at the high court;[102] after *Rucho*, it seems, they never will.

2. State Court Litigation and its Limits

Sometimes, when one door shuts, another opens. Increasingly after *Rucho*, parties opposing partisan gerrymanders have sued in state courts, sometimes relying on state constitutional provisions with no federal analogue. These suits have succeeded in some states, leading many scholars to suggest that state-law claims now offer the best hope of challenging partisan gerrymanders.[103] However, state-law partisan

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

99. *See generally, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015) (proposing one metric for assessing the degree of partisan unfairness in a proposed map, the "efficiency gap"); Nicholas O. Stephanopoulos & Eric M. McGee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503 (2018) (comparing a variety of potential metrics of redistricting partisanship).

In fact, a few years before *Rucho*, a three-judge federal panel embraced one of these new metrics as a "workable standard" when it invalidated Wisconsin's state assembly districts as an unconstitutional partisan gerrymander. Whitford v. Gill, 218 F. Supp. 3d 837, 898 (W.D. Wis. 2016). However, the Court vacated that decision on standing grounds. Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018). *Rucho* was decided the year after.

100. *Rucho*, 139 S. Ct. at 2502, 2506–07.

101. *Id.* at 2506 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

102. *See id.* at 2507 ("We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years.").

103. In particular, a breakthrough 2018 Pennsylvania decision striking down the state's congressional maps, *see* discussion *infra* notes 105–106 and accompanying text, produced a bumper crop of scholarship on the possibility of using state constitutions to challenge partisan gerrymanders. *See generally, e.g.*, Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymanders*, 22 J. CONST. L. 203 (2019); Aroosa Khokher, Note, *Free and Equal Elections: A New State Constitutionalism for Partisan Gerrymandering*, 52 COL. HUM. RTS. L. REV. 1 (2020); Russell Spivak, *State Solutions to State Problems: Using State Constitutions to Fight Voter Suppression*, 88 FORDHAM L. REV. ONLINE 179 (2020), Taylor Larson & Joshua Duden, Note, *Breaking the Ballot Box: A Pathway to Greater Success in*

gerrymandering claims, it is already clear, are not a panacea. Challenges in some states have been rejected on similar grounds as in federal court. Additionally, even successful suits can take so long that challenges filed during one election cycle may not have an impact until the next. Most fundamentally, state-law challenges to partisan redistricting only reinforce the currently *disaggregated* nature of redistricting and therefore may not be well-suited to fix its flaws.

While state courts have long provided fora for gerrymandering challenges,[104] the 2018 case of *League of Women Voters of Pennsylvania v. Commonwealth* broke new ground by striking down Pennsylvania's congressional districts on grounds of excessive partisanship (rather than noncompactness or racial discrimination).[105] The Supreme Court of Pennsylvania struck down the state's congressional districts as being designed to secure "unfair partisan advantage" in violation of the Pennsylvania Constitution's Free and Equal Election Clause.[106] Similarly, in 2022, New York's highest court struck down that state's congressional maps as reflecting "unconstitutional partisan intent," in violation of a 2014 state constitutional amendment.[107]

While state challenges to partisan gerrymanders have, in some cases, achieved their aims, they have also shown the strategy's limits. Sometimes, of course, the lawsuits simply do not succeed. After Wisconsin's governor vetoed the legislature's enacted state and federal plans following the 2020 census, the Wisconsin Supreme Court was tasked with choosing new maps from among various proposals to meet equal-population requirements. While litigants urged the court to adjust the maps to account for what they saw as partisan bias in the previous decade's maps, the court instead adopted a "least change" approach: the court would modify the old districts as little as possible, just enough to satisfy equal-

Addressing Political Gerrymandering Through State Courts, 22 CUNY L. REV. 104 (2019); *see also* Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania (2018), 17 ELECTION L.J. 264, 266 (2018).

104. *See generally, e.g.*, *In re* Legis. Districting, 475 A.2d 428 (Md. 1982) (hearing a challenge to Maryland's state legislative maps under the state constitution's compact districting requirement).

105. *See* Charlie Stewart, *State Court Litigation: The New Front in the War Against Partisan Gerrymandering*, 116 MICH. L. REV. ONLINE 152, 158–61 (2018) (discussing *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737 (Pa. 2018)).

106. *League of Women Voters of Pennsylvania,* 178 A.3d at 821; *see also* PA. CONST. art. 1, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

107. *See* Harkenrider v. Hochul, 197 N.E.3d 437, 440, 451–53 (N.Y. 2022); N.Y. CONST. art. 3, § 4(c)(5) ("Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.").

population requirements.[108] Extensively citing *Rucho*, the court determined that the Wisconsin Constitution (despite some distinctive textual provisions) followed its federal counterpart in leaving issues of "partisan fairness" outside the court's competency.[109] The court eventually chose maps that only minimally altered the state's status quo.[110]

Other times, new judicial personnel erode jurisprudential victories. In 2022, the North Carolina Supreme Court held that the state's new legislative and congressional districts violated state constitutional rights to equal protection, free elections, and free speech and assembly by "depriv[ing] a voter of his or her fundamental right to substantially equal voting power" "on the basis of partisan affiliation."[111] However, after just one year—and two elections of new conservative Justices—the case was reversed on rehearing. Echoing *Rucho* and explicitly reversing its own previous decision, the court now held that the plaintiffs' claims of partisan gerrymandering presented nonjusticiable political questions.[112] Moreover, it held that none of the state constitutional provisions the court had invoked the year before in fact barred partisan gerrymandering.[113]

Finally, if some decisions are ephemeral, others take too long. Litigating takes time, as does redrawing impermissible maps. But election dates are fixed, and district maps are best settled well in advance of election dates to allow for campaigning, primary elections, and the sundry preparations needed to administer an election. Hence the Supreme Court has embraced the so-called "*Purcell* principle": "federal district courts ordinarily should not enjoin state election laws in the period close to an

108. Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 488–92 (Wis. 2021).

109. *Id.* at 482–89. For more on Wisconsin's redistricting litigation, see generally Comment, *Johnson v. Wisconsin Elections Commission,* 136 HARV. L. REV. 998 (2023).

110. *See What Redistricting Looks Like in Every State – Wisconsin*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://perma.cc/33UX-AC5C; Patrick Marley, *Wisconsin Supreme Court Picks Democratic Gov. Tony Evers' Maps in Redistricting Fight*, MILWAUKEE J. SENTINEL (Mar. 23, 2022, 12:57 PM), https://perma.cc/3F9G-9QY3.

In 2023, one of the Wisconsin Justices who had voted against significant district changes retired, and the subsequent election was won by a candidate who campaigned against gerrymandering. Reid J. Epstein, *Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers*, N.Y. TIMES (Apr. 4, 2023), https://perma.cc/59MJ-HWAW. Later that year, the new Justice joined a 4-3 majority striking down Wisconsin's state legislative districts for violating the state constitution's contiguity requirements and holding that the "least change" approach would not be used for subsequent court-drawn maps. *See* Clarke v. Wis. Elections Comm'n, 988 N.W.2d 370, 377 (Wis. 2023).

111. Harper v. Hall, 868 S.E.2d 499, 552 (N.C. 2022).

112. *See* Harper v. Hall, 886 S.E.2d 393, 416–32 (N.C. 2023).

113. *See id.* at 432–43.

election."[114] While this apparently does not apply to state courts,[115] the same logistical realities underpinning *Purcell* also constrain state courts' capacity to implement new maps in the run-up to an election, which can even lead to elections taking place using maps ultimately held to be unconstitutional.[116]

Ohio's experience is indicative. Between January and April 2022, the Ohio Supreme Court struck down four successive state legislative maps adopted by the Ohio Redistricting Commission—one per month—on state constitutional grounds.[117] On April 20, 2022, facing an upcoming primary election date, a three-judge federal panel resolved a challenge to Ohio's delay in finalizing election maps by stating that unless the state implemented a legal map by May 28, it would be ordered to use "Map 3"—which the Ohio Supreme Court had already held unconstitutional under state law—for the 2022 elections.[118] Come May, the state court rejected another map,[119] and the federal court issued its promised order.[120] A similar saga marked the effort to enact Ohio's congressional maps.[121] The upshot: Ohio's 2022 elections used districts that the state's highest court, interpreting state law, had already declared unconstitutional.[122]

State courts might not find the legal means to remediate partisan gerrymanders and, even if they do, might not be willing or able to fix maps

114. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) (staying, on *Purcell* grounds, a district court decision invalidating Alabama's congressional maps); *see* Purcell v. Gonzalez, 549 U.S. 1, 5–6 (2006); *see also* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427 (2017) (coining the "*Purcell* principle").

115. But for a analysis of recent cases concluding that it is "far from certain" that federal courts will continue to permit state courts to make late changes to state election rules, see Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. REV. 941, 979–81 (2021). The Supreme Court's recent suggestion that the Federal Constitution's Article I, Section 4 Elections Clause ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof") creates some limits on state courts' review of legislative decisions regarding elections may provide an opening to extend *Purcell* to state courts. *See* Moore v. Harper, 600 U.S. 1, 30 (2023).

116. For a discussion of the timing challenges related to redistricting litigation, see Williams, *supra* note 24, at 994–1006.

117. *See* League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 199 N.E.3d 487, 488 (Ohio 2022).

118. *See* Gonidakis v. LaRose, 599 F. Supp. 3d 642, 678–79 (S.D. Ohio 2022) (per curiam).

119. *See* League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 200 N.E.3d 197 (Ohio 2022).

120. *See* Gonidakis v. LaRose, No. 22-cv-0773, 2022 WL 1709146, at *1 (S.D. Ohio May 27, 2022).

121. *See* Jessie Balmert, *Redistricting: Ohio Supreme Court Rejects Congressional Map Used in May, Orders New One*, COLUMBUS DISPATCH (July 19, 2022, 11:34 AM), https://perma.cc/4Y8L-F6K3.

122. *See id.*

in time for any given election. But even successful state lawsuits do not directly mitigate national harms and, in some cases, may even exacerbate them. Because redistricting is disaggregated, a successful state-law challenge to one state's congressional districts will directly change the structure of national representation without impacting any other state's districts. No matter what is understood to constitute fair redistricting, if some states adopt it and others don't, a successful lawsuit by a party disadvantaged in one state but advantaged nationally could actually make the House *less* fair overall.

This risk is heightened under conditions of what has been called "asymmetric polarization."[123] Legal scholars and political scientists have noted the recent trend of political *polarization*—that voters, elected officials, and even judges (who, at the state level, often belong to the second category) are likely to think and act in ways aligned with their partisan affiliations.[124] To the extent this phenomenon is *asymmetric*—more prominent among one party than the other—the impacts of state-court gerrymandering claims could be asymmetric as well. If both parties gerrymander in their own interest but judges with affinities for only one party are willing to scrutinize those maps, the aggregate result would be partisan imbalance. The states controlled by the party with more partisan judges would have maps tilting one way, and the rest will be fair—skewing representation nationally.

Even without asymmetric polarization, state-law suits could systematically skew the national results under some plausible circumstances. If states with the kinds of constitutional provisions being used to challenge partisan gerrymanders are disproportionately controlled by one party—for example, if states with Democratic gerrymanders are more likely to have a "free elections clause"[125]—even consistent application of those provisions would lead to partisan bias nationally.[126]

123. *See, e.g.*, Jacob S. Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, *in* SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 59, 59 (Nathaniel Persily ed., 2015).

124. *See, e.g.*, Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 918 n.11 (2018); Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. L. & POL. SCI. 261, 262 (2019). For more on partisan polarization, see *infra* Section III.C.

125. *See Free and Equal Elections Clauses in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 4, 2019), https://perma.cc/48GW-PX8Y.

126. A full examination of whether states of a particular partisan stripe are more likely to have a free elections provision or another constitutional provision invoked in recent gerrymandering challenges is beyond the scope of this piece. My point here is that even complete judicial isolation from partisan pressures would not guarantee that state-law lawsuits have a neutral net impact on the partisan bias of the national House map.

3. Legislative Proposals

Perhaps the most natural fix for partisan gerrymandering is federal legislation. If gerrymandering's harms are national, the solution should be too.[127] Even if the Constitution creates no "manageable standards" for adjudicating partisan gerrymanders, a federal statute could.[128]

Modern congressional efforts to reduce redistricting's partisan entanglement date back at least to 1979. That year, several bills were introduced that sought to require states to establish independent redistricting commissions and bar favoritism of any political party in redistricting, among other provisions.[129] None of these proposals became law.

More recent Congresses have seen the introduction of similar bills. Senator Amy Klobuchar's Freedom to Vote Act of 2021, for example, would have (1) barred redistricting plans that in intent or effect favored either party and (2) established procedures for creating, adjudicating, and remediating district maps.[130] In a Senate split evenly on party lines, the bill failed to overcome the sixty-vote cloture threshold.[131] The House considered two similar bills barring undue partisan favoritism in redistricting;[132] one would have also required states to create independent redistricting commissions.[133] Both bills passed the House but made little headway in the Senate.

Even with Congress under one party's control, legislative gridlock has stymied redistricting reform. While political winds can always shift, there is little indication of that happening any time soon.[134] Moreover, there is at least one obvious reason not to expect redistricting reform from

127. *See generally, e.g.*, Kevin Wender, Note, *The "Whip Hand": Congress's Elections Clause Power as the Last Hope for Redistricting Reform After* Rucho, 88 FORDHAM L. REV. 2085 (2020); Brian O'Neill, *The Case for Federal Anti-Gerrymandering Legislation*, 38 U. MICH. J.L. REFORM 683 (2005).

128. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019). Such a statute, at least as applied to congressional districts, would be constitutional as an exercise of Congress's power to regulate elections for federal officials under the Elections Clause. U.S. CONST. art. I, § 4, cl. 1; *see* Foster v. Love, 522 U.S. 67, 69 (1997) ("The Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–833 (1995))).

129. *See Congressional Anti-Gerrymandering Act of 1979: Hearing Before the Sen. Comm. On Gov't Affs.*, 96th Cong. 31–37 (1979) (written statement of Reps. Jim Leach, Robert Kastenmeier, and Bill Frenzel).

130. *See* Freedom to Vote Act, S. 2747, 117th Cong. (2021).

131. The bill received 49 votes for cloture on a party-line vote.

132. *See* For the People Act of 2021, H.R. 1, 117th Cong. (2021); Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2021).

133. *See* For the People Act of 2021 § 2401.

134. *See, e.g.*, Sahil Kapur, *As Democrats Make Redistricting Gains, Senate GOP Still Opposes a Ban on Partisan Gerrymandering*, NBC NEWS (Feb. 10, 2022, 4:36 AM), https://perma.cc/EZN8-5CKG.

Congress, or at least from the House: Representatives may be loath to change the systems that created their current—often comfortably partisan—districts.

III. THE CAUSES: DRIVERS OF "REDISTRICTING WARFARE"

Part III now turns to a discussion of the causes of partisan gerrymandering by state legislators—who remain, in most states (including many of the most skewed ones), primarily responsible for drawing district maps. These causes include intra-party pressures, technological capabilities, and partisan polarization generally. Examining the drivers of partisan redistricting helps contextualize gerrymandering in contemporary politics and points the way towards viable reforms.

A. Party Pressures Despite Voter Skepticism

State legislators considering partisan gerrymandering face competing demands. On the one hand, voters don't like gerrymandering. At least in the abstract, redistricting by legislatures and maps with partisan bias are quite unpopular. To the extent that voters have opinions about redistricting, they generally oppose what they perceive as partisan gerrymandering in their state. In the words of one former state party chairman, when it comes to redistricting, "there's good politics to looking like a reformer."[135] In a 2019 poll, at least 60% of Democratic, Republican, and independent voters all favored the use of independent commissions to draw district lines.[136] Even more voters—about 70% of each group—thought the Supreme Court should establish limits on "partisan gerrymandering."[137] And 65% of voters, in roughly even numbers across parties, claimed that they would prefer maps without a partisan bias to those that advantage their own party.[138] While the actual salience of redistricting as an electoral issue may be minor—redistricting rarely becomes a key issue in legislative elections—the voting public largely opposes partisan bias in district maps.

It is less clear as to whether voters prefer competitive elections. Polling on the topic is sparse. On the one hand, voters seem to agree that representatives should not be insulated from electoral competition. 54% of respondents in a recent Louisiana survey said it was "very important" that

135. Telephone Interview with David Pepper, Former Chairman, Ohio Democratic Party (Apr. 19, 2022).

136. *New Bipartisan Poll on Gerrymandering and the Supreme Court*, CAMPAIGN LEGAL CTR., ALG RSCH. & GS STRATEGY GRP. 2 (Jan. 25, 2019), https://perma.cc/FBP7-QSC8.

137. *Id.*

138. *See id.* at 4.

the state's new maps create "more competitive districts."[139] However, in a 2006 survey, 62% of respondents said that politicians who face tough competition were apt to focus too much on campaigning and fundraising, compared to just 22% who said that competition would make politicians work harder for their district.[140] Regardless, voters in the most gerrymandered states are at least skeptical of the maps those states adopted. In one Texas poll, voters of all parties said that the state's latest redistricting process had reduced their trust in state government.[141]

But while the tides of popular opinion flow against partisan gerrymanders, powerful currents pull legislators in the opposite direction. Most critical is the desire to shore up their own party's national standing. While nominally a state affair, congressional redistricting inevitably has national stakes.[142] Moreover, it is precisely those national stakes—changes in the composition of Congress—that have proved most resistant to judicial scrutiny.[143] Congressional redistricting is a key battleground for national politics, where national partisan concerns may well outweigh local ones. National parties and elected officials invest time and treasure into building state-level political power and converting that power into House seats through control over redistricting.

Examples of party influence on congressional line-drawing abound. After the 2010 Census, Republican redistricters in Michigan met with all nine of the state's congressional Republicans.[144] Similarly, Illinois state Democrats took input from the Democratic Congressional Campaign Committee and incumbent co-partisans.[145] Congresspeople providing

139. *Redistricting Poll*, PUB. POL'Y POLLING (Jan. 2022), https://perma.cc/P2NK-KP6C.

140. Tom Rosentiel, *Lack of Competition in Elections Fails to Stir Public*, PEW RSCH. CTR. (Oct. 27, 2006), https://perma.cc/H9Y9-Z5SX. At least one study does suggest, though, that more competitive districts are in fact home to more productive legislators. Schmidt & Young, *supra* note 60, at 120.

141. *See* Sami Sparber, *Most Texans Oppose Gerrymandering but Tuned out this Year's GOP-led Redraw, News/UT-Tyler Poll Finds*, DALLAS MORNING NEWS (Nov. 21, 2021, 6:00 AM), https://perma.cc/S5AR-FCVR.

142. *See* Cox, *supra* note 30, at 410–11.

143. *See id.* at 411 (noting that harms from partisan gerrymanders often "turn on the structure of representation in Congress *as a whole*," confounding judicial review focused on the harms within a single district or even a single state).

144. *See* Michael K. Romano, Todd A. Curry & John A. Clark, *Michigan: Republican Domination During a Population Exodus*, *in* THE POLITICAL BATTLE OVER CONGRESSIONAL REDISTRICTING 187, 197 (William J. Miller & Jeremy D. Walling eds., 2013).

145. *See* Kent Redfield, *Drawing Congressional Districts in Illinois: Always Political, not Always Partisan*, *in* THE POLITICAL BATTLE OVER CONGRESSIONAL REDISTRICTING, *supra* note 144, at 369, 385.

"advice" to state legislators on how to draw their own districts is decennially *de rigueur*.[146]

Partisan stakeholders' efforts to influence redistricting are not limited to casual communications to state legislators. Rather, national party apparatuses engage in sophisticated efforts to maximize their advantage in the state. The 2010 redistricting cycle was a watershed moment in national party involvement in state redistricting. The Republican "REDMAP" initiative invested tens of millions of dollars in campaigns to win control of targeted state legislatures, which were then able to draw favorable maps for the next House elections.[147] Federal legislators and national party officials applied political pressure and provided technical expertise to partisan state redistricting processes. For example, during Ohio's redistricting process, Ohio Senate President Tom Niehaus expressed in private emails his desire to draw a congressional map that his co-partisan and fellow Ohioan "Speaker Boehner fully supports."[148] The chief of staff to Representative Paul Ryan, then an up-and-coming House member (and later a vice-presidential nominee and Speaker of the House) received redistricting software and data from the Republican National Committee and sent a Wisconsin congressional map proposal to state powerbrokers.[149]

Democrats, after being caught flat-footed in the 2010 election and subsequent redistricting cycle, founded the National Democratic Redistricting Committee ("NDRC") as an answer to REDMAP.[150] In states like Illinois,[151] Oregon,[152] and others, the NDRC provided technical, legal, and political support to state map-drawers who in turn passed maps that helped Democrats but diminished electoral competitiveness.[153]

As House redistricting has become more salient to national party elites, state politicians with eyes on higher offices have viewed redistricting as an opportunity to prove their partisan bona fides. For

146. *See, e.g.*, Joel Kurth & Lindsay VanHulle, *Emails Suggest Republicans Gerrymandered Michigan to Weaken 'Dem Garbage*,*'* BRIDGE MICH. (July 25, 2018), https://perma.cc/8MXR-CCQQ (describing how one congressional aide suggested changes to his boss's district).

147. *See generally* DAVID DALEY, RATF**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY (2016).

148. Rich Exner, *Emails, Documents Are Stark Reminder of Ohio's Secret Gerrymandering Process*, CLEVELAND.COM (Nov. 1, 2017, 3:12 PM), https://perma.cc/9NP7-MFY6.

149. *See* DALEY, *supra* note 147, at 145.

150. *See* Jim Newell, *How Democrats Avoided a Total Redistricting Nightmare*, SLATE (Feb. 11, 2022, 9:59 AM), https://perma.cc/Z5KF-5PLE.

151. *See* Sara Burnett, *Illinois Dems Embrace Gerrymandering in Fight for US House*, AP NEWS (Oct. 28, 2021, 11:16 PM), https://perma.cc/3XX6-7VRU.

152. *See* Dirk VanderHart, *National Democratic Group Steps in to Defend Oregon's New Congressional Map*, OR. PUB. BROAD. (Oct. 18, 2021, 4:24 PM), https://perma.cc/BJ3V-Q7GR.

153. *See* Burnett, *supra* note 151; VanderHart, *supra* note 152.

example, Florida's Governor Ron DeSantis—a Republican and an aspirant to the presidency in 2024—pushed the Republican-controlled legislature to eliminate the districts of two of the state's four Black Democratic Representatives while increasing the number of GOP-leaning districts.[154] Strikingly, DeSantis's desired map was even more aggressive than the one desired by his fellow Republicans in the state legislature, and his plan was enacted only after he vetoed the legislature's first design.[155] The legality of DeSantis's map hinges on what Florida's Republican House Speaker called "novel" arguments,[156] but success in ongoing litigation would make DeSantis's map a model for Republicans and raise his political profile nationwide.[157]

B. Technological Developments

If political dynamics have increased the *demand* for partisan redistricting, technological developments have increased the *supply*. Computerized redistricting tools (one popular program: "Maptitude") and the availability of fine-grained voter data have made it easy to assemble districts block-by-block while keeping a watchful eye on their partisan composition.[158] Mapmakers can incorporate historical data to project election results in a strong or weak year for each party, ensuring that favored representatives have a buffer against the inevitable ebbs and flows of public opinion.[159] As noted by Justice Elena Kagan:

> [B]ig data and modern technology . . . make today's gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today's world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before . . . . The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides.[160]

154. *See* Gary Fineout, *Florida Supreme Court Rejects DeSantis' Redistricting Push*, POLITICO (Feb. 10, 2022, 12:20 PM), https://perma.cc/FRT6-3DA8.

155. *See id.*; Joshua Kaplan, *How Ron DeSantis Blew Up Black-Held Congressional Districts and May Have Broken Florida Law*, PROPUBLICA (Oct. 11, 2022, 6:00 AM), https://perma.cc/W29D-F6HW.

156. *See id.*

157. *See id.*

158. *See* DALEY, *supra* note 147, at 51–60; Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1441 (2020).

159. *See* DALEY, *supra* note 147, at 51–60.

160. Rucho v. Common Cause, 139 S. Ct. 2484, 2512–13 (2019) (Kagan, J., dissenting).

But just as technological developments have enabled more sophisticated gerrymanders, they may also help create fairer maps. The "apportionment revolution" of the 1960s coincided with the first efforts to use digital computers to draw fair maps.[161] Recent research has developed new methods of drawing maps and assessing their fairness.[162] These quantitative methods may not answer the hard normative questions about what makes a district map "fair." But the methods at least offer the possibility of a "clear, manageable, and politically neutral" standard that could be incorporated into interstate redistricting agreements.[163]

C. Partisan Polarization

The various and related problems that new modes of redistricting might solve—noncompetitiveness and ideological polarization—cannot be wholly attributed to district maps. Powerful political trends have contributed. For example, American politics has been marked in recent years by multiple distinct forms of "sorting." First, voters (especially those most invested in politics) are more ideologically "sorted" into parties now than in the past. Whereas both major parties previously included an array of voters from across the ideological spectrum, and voters would often have liberal views on some issues and conservative views on others, most Democrats today are quite liberal on most issues, and most Republicans are consistently conservative.[164] Additionally, this "sorting" has arguably coincided with "polarization": voters in each party having more ideologically *extreme* (not just consistent) views or having more sharply negative views of the opposition.[165] Finally, voters have become more geographically sorted: Democrats are more likely to live near Democrats, and Republicans more likely to live near Republicans.[166]

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161. *See* Alma Steingart, *Law, Computing, and Redistricting in the 1960s*, *in* POLITICAL GEOMETRY: RETHINKING REDISTRICTING IN THE US WITH MATH, LAW, AND EVERYTHING IN BETWEEN 163, 165 (Moon Duchin & Olivia Walch eds., 2022) [hereinafter POLITICAL GEOMETRY].

162. *See* discussion *infra* notes 266–268 and accompanying text.

163. *Rucho*, 139 S. Ct. at 2498.

164. The literature on sorting is extensive. For some exemplary sources, see POLITICAL POLARIZATION IN THE AMERICAN PUBLIC, PEW RSCH. CTR. 6 (2014), https://perma.cc/FF6P-242D; and MORRIS P. FIORINA, HOOVER INST., THE POLITICAL PARTIES HAVE SORTED 1 (2016), https://perma.cc/JSS3-JWEY.

165. *See* Yphtach Lelkes, *Affective Polarization and Ideological Sorting: A Reciprocal, Albeit Weak Relationship*, 16 FORUM 67, 67–68 (2018).

166. *See generally, e.g.*, BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2009); Jacob R. Brown & Ryan D. Enos, *The Measurement of Partisan Sorting for 180 Million Voters*, 5 NATURE HUM. BEHAV. 998, 998 (2021).

These trends of ideological and geographical sorting have ramifications for redistricting. If partisan voters are "naturally"[167] clustered geographically, neutral redistricting principles may lead to few competitive districts because voters tend to live only among co-partisans. Uneven partisan clustering can also lead to "unintentional gerrymandering" when neutral redistricting principles lead to maps that are biased towards the party whose supporters are more optimally distributed.[168]

Furthermore, affective polarization may make it more difficult to strike the kind of interstate, interparty deals proposed in this Article. When opposing parties are seen not as merely political competitors but rather existential threats to democracy or national wellbeing, "bargaining with the devil" becomes less appealing. But there is still some hope for interstate redistricting. Fair districting retains popular appeal; redistricting that is perceived as overly partisan is unpopular even among those who ought to see themselves as beneficiaries.[169] Moreover, partisan antipathy could be leveraged to support redistricting reforms: mapmakers who make both parties' districts more competitive could boast of forcing the most loathed members of the opposition into electoral jeopardy.[170]

The normative question of what constitutes "good" districts is complex. Even accepting that increased electoral competition is a laudable goal, many of the potential benefits of competition—greater responsiveness to voters, particularly those not on the ideological extremes—are undermined by the polarization trend.

Still, interstate redistricting agreements have the potential to improve democratic functioning in a highly partisan environment. The next part turns, then, to the promise of interstate redistricting as a proposal aimed not at idealists but at realists: state legislators who are pursuing their own ambitions amidst pressures from voters, donors, and party elites.

IV. THE SOLUTION: INTERSTATE REDISTRICTING AGREEMENTS

Given the causes of partisan gerrymandering discussed above, interstate redistricting offers a realistic way to increase electoral competition and deescalate partisan redistricting warfare. In the absence

167. American human geography, of course, has been profoundly shaped by government policies of racial segregation in the residential housing market. *See, e.g.*, Christopher S. Fowler, *Race, Space, and the Geography of Representation*, *in* POLITICAL GEOMETRY, *supra* note 161, at 201, 207–11.

168. Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 240 (2013).

169. *See supra* Section III.A.

170. The political rhetoric is easy enough to conceive. Imagine, for example, a Republican state legislator campaigning on the deal he struck to push a member of "the Squad" into a more competitive district.

of federal legislation or judicial involvement, sets of states controlled by opposite parties could agree jointly to implement redistricting reforms. Interstate agreements to reform redistricting procedures or create standards for district competitiveness or bias could increase competition and create fairer districts without granting the opposition party a leg up in the national House race. These interstate agreements could be enacted via the ordinary legislative process or, in some states, through ballot initiatives for constitutional amendments or statutes.

Critically, interstate redistricting is a project that can be undertaken by partisans. Interstate redistricting does not rely on partisan legislators' or voters' willingness to engage in self-sacrifice for the benefit of grand principles. Rather, it is an idea for partisan insiders who see redistricting just as it is currently: a zero-sum game played for practical advantage, not principle. Interstate redistricting leverages both vertical and horizontal federalism to create new possibilities for redistricting reform in a polarized era. And by bundling states' redistricting policies together to limit partisan advantage-seeking,[171] interstate redistricting minimizes the temptation of "backsliding" by a party whose pursuit of fair districts harms it electorally.[172]

This part discusses prior attempts at interstate redistricting and show why the concept is viable, whether enacted by state legislators or popular ballot initiatives. I also detail the legislative history of prior reform efforts to understand past obstacles to reform and argue that contemporary political and legal developments make interstate redistricting more viable today. In the part after, I turn to interstate redistricting agreements in detail to discuss their legal mechanics and policy design questions.

A. Past Attempts and the Reasons for Failure

Interstate redistricting has, haltingly, been attempted before. Prior bills have failed to become law. However, the legislative history of these efforts shows the reasons for their failure—and shows why the current political and legal climate may be more promising for interstate redistricting.

One high-profile reform proposal was made by then-Maryland Senator Jamie Raskin in 2016.[173] Raskin's bill, dubbed the Potomac Compact for Fair Representation (the "Potomac Compact"), would have

171. *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 694 (2011).

172. *Cf.* Nicholas Riccardi, *Democrats See Consequences from Redistricting Reform Push*, ASSOC. PRESS (Sept. 4, 2021, 12:07 PM), https://perma.cc/7MSR-BSZV (discussing possible Democratic regret at pursuing redistricting reform).

173. Since 2017, Raskin has represented Maryland in the United States House of Representatives.

created a multistate "Independent Congressional Redistricting Commission" with bipartisan representation from each state that joined the compact.[174] The Commission would have proposed congressional maps for each party state. Each state's map would then have needed some support from commissioners of both parties and from commissioners representing the state in question.[175] After being passed by the Commission, each state's map would have been subject to an up-or-down vote by that state's legislature—no amendments allowed.[176] The first proposed Potomac Compact would not have immediately bound states to the Commission's proposals: it explicitly exempted states from needing to "implement the plan adopted by the Commission for the party state until at least one other party state" had done so.[177] But presumably the political pressure to adopt these nonpartisan maps would have been high. A later version of the bill more clearly delineated the consequences if a party state failed to adopt a proposed plan: the Commission would prepare an alternative plan, and if this also failed to pass, the state high court would draw the map.[178]

The Potomac Compact would have come into force only if Virginia or one of several other specified states—Republican-leaning, midsize states—enacted a similar bill to join the compact.[179] This proviso was designed to win support from Maryland Democrats wary of giving up their advantage in the state's House delegation without a corresponding payoff elsewhere.[180] Senator Raskin's Potomac Compact also contained provisions promoting multimember electoral districts and limited the Compact from taking effect until Congress had approved their use.[181]

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174. Potomac Compact for Fair Representation S.B. 762, 2016 Leg., 436th Sess. (Md. 2016) [hereinafter Potomac Compact].

175. *See id.* § 1.

176. *See id.*

177. *Id.*

178. *See* S.B. 204, 2020 Leg., 441st Sess. (Md. 2020).

179. Potomac Compact, *supra* note 174, § 2.

180. The 2014 House elections in Virginia preceding the Potomac Compact's introduction in early 2016 gave Republicans eight seats to Democrats' three despite winning only 57% of the two-way House vote statewide. *Virginia Election Results*, N.Y. TIMES (Dec. 17, 2014, 12:28 PM), https://perma.cc/527L-7DFU. Maryland, meanwhile, sent seven Democrats and a lone Republican to the House after Democrats received 58% of the two-way vote. *Maryland Election Results*, N.Y. TIMES (Dec. 17, 2014, 12:28 PM), https://perma.cc/7VNG-AUH4.

181. A discussion of the Potomac Compact would be incomplete without reference to its promotion of multimember districts—districts that would be represented by multiple people in Congress. So, for example, Maryland's eight Representatives could be assigned to represent one of two districts, with four Representatives apiece. Each party could win the number of seats in proportion to their vote share.

The Commission would have been required to "consider the adoption of a multi-seat [i.e. multimember] congressional redistricting plan for a party state." Potomac Compact, *supra* note 179, § 1. And the Compact would have only taken effect if Congress had

The legislative history of the Potomac Compact and related later bills points to two key reasons for their failure: skepticism of multimember districts and the possibility of alternative modes of reform. Senator Raskin's Potomac Compact would have required the redistricting commission to consider adopting a plan with multimember districts and would not have been effective until Congress lifted the requirement for single-member congressional districts. Even though the Potomac Compact would not have strictly required the use of multimember districts, the concept proved both confusing and substantively disagreeable to some elected officials. In a committee hearing on the bill, multiple senators expressed skepticism about the concept, particularly inasmuch as it needed federal legislation to take effect.[182] One senator was also concerned that using multimember districts would reduce geographic representation, as multimember districts might only elect people from the most populous parts of each district.[183] A slightly revised version of the Potomac Compact, introduced by Delegate Alfred C. Carr, Jr. as H.B. 622 in the 2017 legislature, retained the multimember focus and died in committee, where one member called federal approval of multimember districts "wildly unlikely."[184] A year later, when the bill was reintroduced as H.B. 477, the committee's questioning again focused skeptically on the need for congressional involvement.[185]

A handful of other proposals dropped the emphasis on multimember districts, and their failure can be traced to one root cause: hope for other alternatives. The most promising effort was the Mid-Atlantic States Regional Districting Process, introduced as S.B. 1023 and H.B. 367 in

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approved the use of multimember congressional districts, even though their implementation was not required by the bill. *Id.* § 2. Single-member House districts are currently mandated by federal law. *See* 2 U.S.C. § 2c (2018).

The only other scholarship to discuss the Potomac Compact in any detail focuses on its push toward multimember districts rather than its effort to think of redistricting in *multistate* ways. *See* Grant Geary, Comment, *Partisan Gerrymandering: Maryland's Attempt at Reform and Steps Towards Proportional Representation*, 86 UMKC L. REV. 443, 452–64 (2017). I focus instead on the latter and see interstate redistricting as a flexible and powerful tool that would creatively use the opportunities federalism provides to allow states to solve national problems.

182. *See March 3 Hearing Before the S. Comm. on Educ., Health, & Env't. Affs.*, 2016 Leg., 436th Sess., at 3:52–58 (Md. 2016) (statements of unidentified Sen. and Sen. Stephen M. Waugh, Members, S. Comm. on Educ., Health, & Env't. Affs.), https://perma.cc/U9EY-ZJU2.

183. *See id.* at 4:00 (statement of Sen. Ronald N. Young, Member, S. Comm. on Educ., Health, & Env't. Affs.).

184. *March 3 Hearing Before the H. Comm. on Rules & Exec. Nominations*, 2017 Leg., 437th Sess., at 0:15 (Md. 2017) (statement of Del. Nicholaus R. Kipke, Member, H. Comm. on Rules & Exec. Nominations), https://perma.cc/E24J-4VDV.

185. *See February 26 Hearing Before the H. Comm. on Rules & Exec. Nominations*, 2018 Leg., 438th Sess., at 0:48 (Md. 2018) (statement of Del. Kumar P. Barve, Member., H. Comm. on Rules & Exec. Nominations), https://perma.cc/KDY2-CHTA.

2017.[186] The bill would have created an independent redistricting commission and come into effect upon passage of similar legislation by five other nearby states: New York, New Jersey, Pennsylvania, Virginia, and North Carolina.[187] The legislation passed both chambers with largely Democratic support but was vetoed by Republican Governor Larry Hogan. Hogan's veto message railed against S.B. 1023 as "a cynical effort to stifle meaningful redistricting reform"—referring to his own proposal to have Maryland unilaterally implement redistricting reform, which would have increased the number of likely Republican seats.[188] Subsequent versions, introduced annually by Delegate Kirill Reznick, received unfavorable reports or died in committee for somewhat opaque reasons, but which seem to relate to the possibility of alternative methods of action.[189] While legislative history on these bills is sparse, the few questions in committee hearings focus on the possibility for federal legislation or judicial decisions to obviate the need for state action.[190] In fact, in 2019, Reznick introduced his bill in a committee hearing by acknowledging the oddity of passing it while the Supreme Court was weighing the constitutionality of partisan gerrymandering.[191]

A different proposal was introduced in Illinois in 2016 and passed that state's Senate with bipartisan support through the sponsorship of then-Senator Kwame Raoul.[192] That bill, the Interstate Compact for Fair Representation Act (the "Interstate Compact"), would have bound each party state to create an independent redistricting commission to draw maps

186. *See* S.B. 1023, 2017 Leg., 437th Sess. (Md. 2017).

187. *Id.*

188. Veto Message from Lawrence J. Hogan, Jr, Governor of Maryland for Senate Bill 1023 to Thomas V. Mike Miller, President of the Senate, at 1 (May 8, 2017), https://perma.cc/AV43-2NDA. For more contemporaneous criticism of the proposal, see Delegate Trent Kittleman, *Special Edition on Redistricting*, NEWS FROM ANNAPOLIS (2017), https://perma.cc/AM4W-FGD5 (constituent newsletter from Republican Delegate decrying Democratic reticence to "unilaterally disarm").

189. *See* H.B. 537, 2018 Leg., 438th Sess. (Md. 2018); H.B. 67, 2019 Leg., 439th Sess. (Md. 2019). Both bills received unfavorable reports without comment from the House Rules and Executive Nominations Committee. Another version of Del. Reznick's proposal received a brief hearing from that committee in March 2020 just before the Covid-19 pandemic began in earnest; no further action was taken on the bill. *See* H.B. 182, 2020 Leg., 440th Sess. (Md. 2020).

190. *See February 26 Hearing Before the H. Comm. on Rules & Exec. Nominations*, *supra* note 185, at 0:58 (statement of Del. Kumar P. Barve, Member., H. Comm. on Rules & Exec. Nominations).

191. *See March 4 Hearing Before the H. Comm. on Rules & Exec. Nominations*, 2019 Leg., 439th Sess., at 1:23 (Md. 2019) (statement of Del. Kirill Reznick, sponsor of H.B. 67), https://perma.cc/6XTD-FY4E. *Rucho v. Common Cause* would be argued later that month alongside the companion case *Lamone v. Benisek*, which concerned Maryland's own congressional maps.

192. *See* Interstate Compact for Fair Representation, S.B. 322, 99th Gen. Assemb. (Ill. 2016) [hereinafter Interstate Compact]; *see also Senate Oks Interstate Redistricting Plan*, STATE J.-REG. (May 12, 2016, 3:42 PM), https://perma.cc/U97X-WP8E.

for both state legislative and congressional districts.[193] The Interstate Compact, unlike the Potomac Compact, aspired to be nearly national in scope: it would have come into effect only when *all* states with three or more representatives agreed to its terms.[194] If a state received its third representative in a decennial apportionment, the Interstate Compact would have been suspended until that state joined.[195] Unlike with the Potomac Compact, map-drawing under the Interstate Compact would have remained procedurally an *intra*state affair. States would commit to using similar procedures and standards for redistricting, but the work of line-drawing would be done solely by single-state bodies.[196] After passing the Illinois Senate, the bill was referred to the House Rules Committee where no further action was taken.

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The only scholarship to consider the Potomac Compact or other possibilities for interstate redistricting in any detail focuses on the Compact's original push towards multimember districts.[197] But the proposals discussed above involve a much more fundamental insight: making redistricting an interstate affair creates opportunities and incentives for reform that would otherwise be politically impossible. A party with unilateral control over its state redistricting process has little to bargain for within that state, and the minority party may have few chips to bargain with. But redistricting is a national game played state-by-state. Interstate cooperation gives parties new moves to make, potentially to the benefit of voters and democracy at large.

For example, recall the experiences of New York, Illinois, and Texas in the current redistricting cycle. In New York, state Democrats took control of the redistricting process after the state's redistricting commission deadlocked on new maps. The party enacted a congressional map that favored Democrats in 22 of 26 House seats and reduced the number of highly competitive seats to just two. Illinois Democrats made similar moves after their state lost a seat in apportionment, increasing the number of likely Democratic seats by two and cutting the number of highly competitive seats from two to one.[198] Texas Republicans, meanwhile, drew maps that favored their party while reducing the number of closely contested seats from six to one.[199]

Looking within their state borders, each party likely saw little reason to take any other action. Even a partisan who recognized the harms of

193. *See* Interstate Compact, *supra* note 192, § 5, arts. III & V.
194. *See id.* § 5, art. XV.
195. *See id.*
196. *See id.* § 5, arts. III–V.
197. *See supra* note 181.
198. *See What Redistricting Looks Like in Every State – Illinois*, *supra* note 1.
199. *See supra* notes 6–7 and accompanying text.

electoral noncompetition would likely not want her party to mitigate those harms by reducing the number of seats her party would safely win in-state and jeopardizing its chances of controlling the House. But by expanding their legislative horizons across state borders, lawmakers may find opportunities to strike deals to increase electoral competition and decrease partisan bias without hamstringing their party's chances at national control.[200]

B. Legislators' Incentives for Interstate Redistricting

The most straightforward method of enacting interstate redistricting agreements is to do so through states' ordinary legislative processes. But what benefits might interstate redistricting have for state legislators? If state legislators are, to broaden David Mayhew's formulation, "single-minded seekers of re-election" or election to higher office,[201] what incentives might lure them away from the status quo? If legislators engage in partisan redistricting to improve their own party's prospects for federal power, what might motivate them to do things differently?

There are of course electoral incentives to pass popular bills. And the popularity of redistricting reform has been enough to make it happen in some states.[202] But interstate redistricting not only solves the very real

200. Aaron Goldzimer and Nicholas Stephanopoulos have made an interesting proposal closely related to interstate redistricting agreements. They suggest that an individual state could enact multiple congressional maps during decennial redistricting, one that fairly reflects the state's partisanship and one that is gerrymandered in the controlling party's favor. For a state using this multi-map strategy, which map eventually took effect would depend on the national redistricting landscape. If congressional maps were, in national aggregate, fair, the state's fair map would go into effect. But if the national map were biased against the state's controlling party, the state map with an opposite skew would be implemented. *See* Aaron Goldzimer & Nicholas Stephanopoulos, *The Novel Strategy Blue States Can Use to Solve Partisan Gerrymandering by 2024*, SLATE (May 6, 2022, 2:41 PM), https://perma.cc/SA2V-E3YE.

Relative to interstate redistricting agreements, the primary advantage of their idea is that it provides an avenue for a single state to reduce gerrymandering unilaterally without partisan disarmament. Given the difficulties of interstate and interparty coordination, this is no small benefit. However, as Goldzimer and Stephanopoulos acknowledge, the multi-map idea creates thorny problems related to timing. *See id.* A state following their proposal would have to wait until most other states had completed their own redistricting to determine which map to implement. Moreover, if multiple states adopted the multi-map strategy, a stalemate could result where each state waited for the others to finalize maps before doing so themselves. Lengthy litigation over another state's maps could also delay implementation. In essence, the multi-map proposal trades challenges of interstate and interparty coordination for difficulties related to temporal sequencing. It is an intriguing solution to the problems described in this Article that is worthy of consideration alongside interstate redistricting agreements.

201. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (2d ed. 2004).

202. For more on the popularity of redistricting reform, see *supra* notes 135–138 and accompanying text.

challenges faced by state legislators who support redistricting reform in the abstract but are loath to cede a partisan advantage in congressional maps. Interstate redistricting may also create more electoral opportunities for those wishing to seek higher office. This is the product of a key quirk of a system that is sometimes described with only partial accuracy as "letting politicians choose their voters."[203] In fact, state legislators often choose voters for federal representatives. State legislators often leverage this power to benefit their party or those currently in higher office; they could also do so to benefit themselves.

1. Increasing Electoral Opportunity

Increased competition in congressional races may benefit voters, but it could also benefit the state legislators who draw those districts by creating new and more frequent opportunities for them to run for higher office. Contrary to the notion that "[n]one of the political actors involved in redistricting favor electoral competition,"[204] state legislators in fact could have good reason to draw competitive congressional districts. Consider the vantage point of a state legislator interested in running for higher office in a House district drawn to favor one party. If the district tilts against her party, the door may be open for her to win the primary and have the chance to run in November, but her odds of winning the general election are slim. If the district's lean is extremely favorable to her party, meanwhile, the district may be occupied by an entrenched incumbent with all the electoral advantages of incumbency, little chance of losing reelection, and little desire to retire to avoid the rigors of a competitive and uncertain reelection campaign. Indeed, the current average tenure of a House member hovers around an historical high,[205] while the percentage of Representatives who either voluntarily retire or are defeated in reelection bids are close to historical lows.[206]

Insofar as competitive districts experience higher turnover, they present more quality opportunities for state legislators to run for higher office. Notably, this is true for members of *both parties*. Given legislators' general reticence to launch primary campaigns against members of their

203. *See, e.g.*, Zach Wamp, Opinion, *Voters Should Choose Their Politicians, Not the Other Way Around*, NEWSWEEK (Sept. 7, 2021, 6:30 AM), https://perma.cc/L5TD-U3Q5 (op-ed from former Congressman).

204. Bruce E. Cain, Karin Mac Donald & Michael McDonald, *From Equality to Fairness: The Path of Political Reform Since* Baker v. Carr, *in* PARTY LINES, *supra* note 75, at 31–33.

205. *See* SARAH J. ECKMAN & AMBER HOPE WILHELM, CONG. RSCH. SERV., R41545, CONGRESSIONAL CAREERS: SERVICE TENURE AND PATTERNS OF MEMBER SERVICE, 1789–2023, at 3 fig.1 (2023), https://perma.cc/6TJ8-5C5Z.

206. *See id.* at 5–6 figs.2 & 3. Redistricting is hardly the only cause of incumbent entrenchment, but it at least contributes. *See id.* at 7.

own party, most will choose to run only against an opposite-party incumbent or when an incumbent from their own party retires. A district that "flips" every two years gives upstart candidates from the other party more chances to compete for their party's nomination and ultimately for a congressional seat.

For a striking example, compare the electoral turnover in Iowa and Ohio after the 2010 redistricting cycle (2012 through 2020 elections). Iowa follows a unique redistricting process driven by a nonpartisan state agency.[207] Iowa's four congressional districts during this decade were all at least somewhat competitive, and three spent at least some time in Democratic hands. Still, seven Republicans (and four Democrats) won at least one House term over the course of the decade.[208]

Ohio's districts show the opposite phenomenon. The state had 16 congressional districts—12 in Republican control. No seat changed party hands during the whole decade, and only four new Republicans took office: most Republican seats had the same Representative the whole time. Thus Ohio's 16 districts elected a total of 16 Republicans to the 113th through 117th Congresses. By contrast, Iowa's four seats gave seven different Republicans a chance in the House. Even though Iowa actually gave a higher proportion of House terms to Democrats than Ohio did, Iowa still gave nearly twice as many individual Republicans per district a term in the House compared to Ohio.[209]

Ohio and Iowa of course represent two extremes of a complicated empirical picture.[210] Congressional turnover is a function of not just redistricting, but also a state's underlying political geography, voters' propensity to "swing" cycle-to-cycle, and myriad other factors. But the Iowa and Ohio comparison should serve at least to show how, perhaps surprisingly, competitive districts can create more opportunities for majority-party members over time even while also improving the other party's standing.

Increased electoral turnover may come with tradeoffs. First, victors' spoils may be less rich: incumbency in a deeply partisan seat may be more desirable than standing for election every two years in a closely divided swing seat. But given the value—intrinsic and even financial[211]—of

207. *See The "Iowa Model" for Redistricting*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 25, 2021), https://perma.cc/85GT-8XDB.

208. Election results are available at *Election Statistics: 1920 to Present*, U.S. HOUSE OF REPRESENTATIVES (2023), https://perma.cc/4YMH-ELY8.

209. In Iowa's four seats across five Congresses, eight of 20 total terms (40%) were won by Democrats. *Id.* In Ohio, Democrats only won 20 of 80 total terms (25%). *Id.*

210. *See supra* Section II.B.

211. *See* Maxwell Palmer & Benjamin Schneer, *Capitol Gains: The Returns to Elected Office from Corporate Board Directorships*, 78 J. POL. 181, 181 (2015) (finding

spending time in federal office, enterprising state legislators might be glad to make that tradeoff. Second, increased turnover would, on average, reduce the seniority of a state's congressional delegation. Longer-serving members are sometimes said to be better able to secure preferred committee assignments and chairmanships or win more "pork-barrel" spending for their state.[212] However, this conventional wisdom may be overstated. In eras of strong party leadership, seniority alone holds less value, because party leaders—not necessarily the most senior members—dominate congressional agenda-setting.[213] Empirical studies have challenged whether securing preferred committee assignments in fact increases legislators' policy efficacy and whether senior members win more appropriations dollars.[214] Senior representatives (and their staffs) may also be less likely to invest time and effort in the constituent services "casework"—assistance in securing individual government benefits or federal grant money—that is the most pressing need of many voters.[215]

Interstate redistricting could alternatively be spearheaded by an enterprising gubernatorial candidate, rather than state legislators.[216] A politician who is above the fray of actually running for election in legislature-drawn districts and has greater ability to withstand pressures from federal representatives may wish to capitalize on a "good government" idea with broad popular appeal.

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that serving as a Senator or governor is associated with a 30% increase in the likelihood of later serving on a corporate board).

212. *See* David E. Broockman & Daniel M. Butler, *Do Better Committee Assignments Meaningfully Benefit Legislators? Evidence from a Randomized Experiment in the Arkansas State Legislature*, 2 J. EXPERIMENTAL POL. SCI. 152, 152–163 (2015); Anthony Fowler & Andrew B. Hall, *Congressional Seniority and Pork: A Pig Fat Myth?*, 40 EUR. J. POL. ECON. 42, 44 (2015).

213. *See* Andrew B. Hall & Kenneth A. Shepsle, *The Changing Value of Seniority in the U.S. House: Conditional Party Government Revised*, 76 J. POL. 98, 99 (2014).

214. *See* Broockman & Butler, *supra* note 212, at 152; Fowler & Hall, *supra* note 212, at 42; *see also* Michael Kellermann & Kenneth A. Shepsle, *Congressional Careers, Committee Assignments, and Seniority Randomization in the US House of Representatives*, 4 Q.J. POL. SCI. 87, 87 (2009) (finding that seniority helps members pass more legislation within the jurisdiction of their initially assigned committee, but not outside it).

215. *See* Joshua Bone, Note, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 YALE L.J. 1406, 1426 (2014).

216. *See* Telephone Interview with Mark Batinick, Rep. & Republican Floor Leader, Ill. House of Representatives (Apr. 21, 2022). Representative Batinick was a chief co-sponsor of Illinois' proposed Interstate Compact. *See Bill Status of SB0322, 98th General Assembly*, ILL. GEN. ASSEMBLY (last visited November 8, 2023), https://perma.cc/VR3K-KE2W; *see also* Ben Szalinski, *Illinois Gov. JB Pritzker Backtracks on Redistricting, but GOP Not Changing Tone*, STATE J.-REGISTER (Apr. 29, 2021, 5:13 AM), https://perma.cc/AH4Y-B2CJ (discussing a candidate-turned-governor's shifting view on redistricting reform).

2. Deflecting Intraparty Pressures

The obstacles to this otherwise elegant solution—that state legislators push congresspeople into competitive districts, give themselves the chance to run for office, increase electoral competition, and maybe improve democracy in the process—stem from the fact that state legislators may draw lines, but they don't operate independently. State legislators face tremendous pressure to draw districts favoring both incumbents and their party.[217] There are generally strong pressures to be seen as a "team player" for one's party; drawing maps that reduce partisan advantage may be frowned upon by national party leadership, donors, and partisan voters.[218] Moreover, maps that push safe incumbents into competitive elections are likely to draw the ire of those accustomed to easy reelection. State legislators may not want to make enemies of their federal brethren who may be powerful players in state politics despite their formal separation from it.

However, interstate redistricting offers an opportunity to mitigate at least some of these pressures. By making redistricting an interstate—and interparty—affair, legislators can obviate backlash from partisans who might be concerned about giving up advantages in the national House contest. State legislators could even boast to their fellow partisans that they busted an opposing party's gerrymander elsewhere—a Texas Republican might brag of forcing nefarious New York Democrats to run in competitive elections. Meanwhile, interstate redistricting could insulate legislators from accusations of party betrayal by allowing them to say that their actions were, on balance, neutral to the party's chances to control the House. In some cases, party leadership might even quietly support the opportunity to throw troublesome caucus members into electoral trouble if doing so would not jeopardize their national standing. It's not hard to imagine that Speaker John Boehner might have been glad to push out of office, or at least put into a more moderate district, a fellow Ohio Republican he once referred to as a "political terrorist."[219]

Leadership in redistricting reform will never be without political risk. Redistricting always produces winners and losers, and hence friends and enemies. And it is in the states where reform is most promising—those with very biased or uncompetitive districts—where dominant parties or incumbents have the most to lose. But in a "hyperpartisan" environment,[220]

217. *See supra* Section III.A.

218. *See* James Coleman Battista & Jesse T. Richman, *Party Pressure in the U.S. State Legislatures*, 36 LEGIS. STUD. Q. 397, 398 (2011).

219. *See Former House Speaker John Boehner Accuses Some in Congress of Being "Political Terrorists*,*"* CBSNEWS (Apr. 9, 2021, 12:32 PM), https://perma.cc/5MPA-3HUD.

220. *See* Kang, *supra* note 158, at 1416–21 (discussing "the new hyperpartisanship").

interstate redistricting allows legislators to fulfill public desires for reform while neutralizing criticism from their own side.

C. Interstate Redistricting by Initiative

Interstate redistricting could also be established by ballot initiative. Around half of the states offer a way for voters to enact constitutional amendments or statutes by popular vote.[221] Generally, like candidates for elected office, ballot initiative proponents must gather a certain number of voter signatures to place their proposals on the ballot. In some states, statutes enacted by initiative are protected from legislative repeal by waiting period or supermajority requirements.[222] State constitutional amendments, of course, can only be modified by another amendment.

If legislators are hesitant to pass redistricting reform, popular initiatives offer an alternative route. A number of states have already used ballot initiatives to enact unilateral redistricting reforms.[223] When legislative action is not forthcoming, voters could use initiatives to craft interstate reform agreements.[224] And while some states' unilateral reforms have been designed in ways that ultimately allowed the redistricting process to continue under partisan control,[225] stronger reforms may be

221. *See Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 15, 2023), https://perma.cc/6DKV-H4NF.

222. *See, e.g.*, MICH. CONST. art. 2, § 9 (three-quarters supermajority requirement); NEV. CONST. art. 19, § 2 (three-year waiting period).

223. *See, e.g.*, Ben Botkin, *Colorado Amendments Y and Z: Measures Pass Handily*, DEN. POST (Jan. 25, 2019, 2:29 PM), https://perma.cc/BNY2-5T7A (describing passage of two Colorado constitutional amendments, Amendments Y and Z, to reform redistricting).

224. Ballot initiatives for interstate electoral reform have already been proposed: two former chairs of the Michigan Democratic and Republican Parties previously announced a campaign for a state initiative to join the National Popular Vote Interstate Compact. *See* Craig Mauger, *National Popular Vote Campaign Says It's Shooting for 2024 Ballot, Not 2022*, DET. NEWS (Dec. 16, 2021, 5:58 PM), https://perma.cc/5PGB-FYCW. For more on the National Popular Vote Interstate Compact, see *infra* Section V.B.1.

225. A full discussion of past attempts at state-level redistricting reform is far beyond this Article's scope, but New York's experience with reform is illustrative. A 2014 reform via constitutional amendment passed by both the state legislature and popular vote has been described as "designed to fail" for creating a bipartisan, ten-member commission that ultimately deadlocked and allowed the Democratic state legislature to enact favorable congressional maps. Samar Khurshid, *There's a Lot of Finger-Pointing Around New York Redistricting; What Actually Happened?*, GOTHAM GAZ. (Nov. 16, 2022), https://perma.cc/A7CC-ZGX9. The state ultimately used a court-drawn map in 2022 after New York's Court of Appeals held that legislature's map violated the amendment's substantive limitations of partisan bias. *See supra* notes 10–18.

After a Democratic outcry that the New York saga helped Republicans take over the U.S. House, Democrats have already pushed to re-draw maps before 2024. *See* Nicholas Fandos, *Could Democrats Get Another Shot at Redistricting in New York?*, N.Y. TIMES (June 8, 2023), https://perma.cc/8AZU-Y3KY. Meanwhile, when New York's Democratic governor had the opportunity to appoint a new Justice to the state's high court, potential nominees received scrutiny over their positions on redistricting. *See* Kate Lisa, *Questions*

more politically feasible if voters in one-party-dominated states are assured that such reforms would take effect only with a partisan counterweight elsewhere.

While any set of states could enter into agreements via initiative (and there is nothing to stop one party from joining an agreement via the legislature while another does so via initiative), a look at the map presents some possibilities. Illinois and Ohio, for example, are similarly sized states with regional affinities,[226] allow constitutional amendments via ballot initiative,[227] opposite-party control, and received "F" grades from the Princeton Gerrymandering Project in the latest cycle.[228] A Midwest agreement between the two states could create fairer maps in two of the largest and most gerrymandered states.

Most Western states have an initiative process, creating additional opportunities for interstate agreements via ballot initiative. Utah voters narrowly enacted an anti-gerrymandering statute through a 2018 initiative, but the state legislature significantly weakened the reform and enacted a map "cracking" Democrats in the Salt Lake City area across the state's four—almost assuredly Republican—congressional districts.[229] Nearby Oregon enacted a map that favored Democrats in four of the state's six congressional districts (and created a fifth toss-up district).[230] Twin initiatives in Oregon and Utah could create redistricting procedures with likely offsetting results—and a partisan "stick" if either state reneged.[231]

Interstate redistricting initiatives would not sidestep the need to build political will for reform. And interstate redistricting agreements of any sort would require careful policy choices regarding substantive measures of fairness and procedures that are robust to partisan gamesmanship. But

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Mount About Political Motivations Behind Hochul's Chief Judge Pick, SPECTRUM NEWS 1 (Apr. 11, 2023, 9:23 PM), https://perma.cc/6FAL-YNBA.

This is simply to say that not all redistricting reforms are created equal. Some reforms have left procedural openings for partisan influence or created vague substantive standards for adjudication that can become a target for manipulation through judicial appointments and elections. But when the terms of redistricting reforms bind both parties, albeit in different states, the incentive to leave "wiggle room" is smaller.

226. A number of state legislators who spoke with me suggested that states within the same region might be more willing to forge redistricting agreements.

227. *See* ILL. CONST. art. 14, § 3; OHIO CONST. art. 2, § 1a.

228. *See* Stef W. Knight, *Congressional Mapmakers Receive "F" Grade in Five States*, AXIOS (Dec. 14, 2021), https://perma.cc/QD4N-ERGP.

229. *See* Lee Davidson, *Anti-gerrymandering Compromise Headed to Utah Governor*, SALT LAKE TRIB. (Mar. 11, 2020, 8:27 PM), https://perma.cc/4AX7-L9FN; *see also What Redistricting Looks Like in Every State – Utah*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://perma.cc/UBZ3-Q6S9.

230. *What Redistricting Looks Like in Every State – Oregon*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://perma.cc/4T3C-UWZT.

231. Both states have mechanisms for ballot initiatives. *See* OR. CONST. art. 4, § 1; UTAH CONST. art. 6, § 1.

where legislators are reluctant to reform redistricting, ballot initiatives can allow voters to do so directly.

D. Feasibility and Urgency After the 2020 Redistricting Cycle

Interstate redistricting agreements, as discussed above, received some legislative attention in the 2010s but ultimately failed to become law. While scholarly policy discussion need not be collapsed into political triangulation,[232] and the many "vetogates" [233] in the legislative process mean that quirks like a hostile committee chair or simple lack of time in the legislative calendar can prevent a bill's advance,[234] the reasons for the failures of prior reform efforts illustrate how and why interstate redistricting is viable today.

For example, in Maryland, significant obstacles to reform included state legislators' preference for and belief in the possibility of federal action, interparty and interbranch conflict (between the Democratic legislature and the Republican governor), and a reluctance to acknowledge the partisan motivations involved in redistricting. The magnitude of each obstacle has diminished significantly in the years since.

First, the Maryland efforts encountered resistance from those who preferred federal action, either by Congress or the Supreme Court. Maryland's legislative efforts largely took place before the *Rucho* decision, when a national, judicially created standard for partisanship in redistricting was still a possibility. Even would-be reformers at the time acknowledged the desirability of federal judicial intervention.[235] But the Court has since rejected the notion that "the solution [to partisan gerrymandering] lies with the federal judiciary."[236] Similarly, while even sympathetic legislators queried whether "it [would] make more sense . . . for an independent system . . . to actually be enacted by the federal government and imposed on all fifty states,"[237] federal redistricting

232. I am counseled in this regard by Kate Andrias and Benjamin I. Sachs' reminder in *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 131 YALE L.J. 546, 635 (2021) ("None of this is to suggest that enacting [such] laws . . . would be likely . . . . But, in a democracy, these objections must be overcome.").

233. *See* William N. Eskridge Jr., *Vetogates and American Public Law*, 31 J.L. ECON & ORG. 756 (2015).

234. For example, Maryland's regular legislative session is only 90 calendar days per year. *See About the General Assembly,* MD. GEN. ASSEMBLY, https://perma.cc/7WQM-TDR7 (last visited Sept. 26, 2023).

235. *See supra* note 191 and accompanying text.

236. Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019).

237. *February 7 Hearing on H.B. 477 Before the H. Comm. on Rules & Exec. Nominations,* 2018 Leg., 438th Sess., 0:58 (Md. 2018) (statement of Del. Kumar P. Barve), https://perma.cc/83WD-DNFG, at 0:58–0:59.

legislation seems unlikely.[238] In this state of affairs, agreements by state legislatures appear more viable.[239]

Second, a major obstacle to reform in Maryland was a divided state government. Former Governor Larry Hogan, a Republican, vetoed a Democratic-led proposal for a six-state compact because enactment would have hindered his own proposal and given the opposition a legislative "win."[240] But Maryland now has a Democratic governor along with its legislature, reflecting a broader trend away from divided state government and towards unified partisan control.[241] Somewhat counterintuitively, the consolidation of party control over *intra*state government may make it easier to reach *interstate* agreements because the party in power can claim credit entirely for itself.

Third, and perhaps most critically, the squeamishness that once existed around acknowledging the partisan imperatives in gerrymandering now seems like a quaint relic of the past. One theme in the Maryland committee hearings was minority-party legislators trying to corner majority-party members into admitting they had used the redistricting process to partisan advantage. One smirking Delegate asked a reform bill sponsor, "With this bill . . . are you agreeing then that the last process wasn't done fairly?"[242] The sponsor awkwardly replied:

> I think there is a consensus on both sides of the aisle that we need to give assurance to the population that this process is transparent and done properly. The last process was fair . . . However, the view, by many, is that the process should change, and I agree with that.[243]

While overt defenses of partisan gerrymandering remain rare, politicians are increasingly frank about the topic.[244] Redistricters of both parties are increasingly willing to push for partisan advantage.[245] Even the

238. *See supra* Section III.C.3.

239. Federal legislation of course remains an option, as some Maryland legislators suggested. But the challenges of enacting federal redistricting reform illustrate the challenges of that strategy. *See* discussion *supra* Section III.C.3. While state courts can, and have been, active in policing gerrymanders, relying on state courts only recreates the possibility for asymmetric gerrymandering. *See* discussion *supra* Section II.C.2.

240. *See supra* note 188 and accompanying text.

241. *See* Dakota Thomas, *Partisan Control of States After the 2022 Election*, COUNCIL OF STATE GOV'TS. (Nov. 15, 2022), https://perma.cc/G84U-CDLF.

242. *March 2 Hearing Before the H. Comm. on Rules & Exec. Nominations*, 2020 Leg., 440th Sess., at 0:05 (Md. 2020) (statement of Del. Wendell R. Beitzel, Member, H. Comm. on Rules & Exec. Nominations) https://perma.cc/WLY5-J2UV.

243. *Id.* (statement of Del. Kirill Reznick, sponsor of a later version of the Potomac Compact).

244. *See, e.g.*, Clara Hill, *Republican Congressman Admits Gerrymandering Should Help GOP Take Back House*, INDEPENDENT (June 21, 2021, 4:15 PM), https://perma.cc/26S7-CC4P.

245. *See supra* notes 147–153 and accompanying text.

Court's tonal shift, from handwringing over what degree of partisan vote dilution crosses the constitutional line to simply acknowledging that "[p]artisan gerrymandering is nothing new,"[246] seems to concede that redistricting is an activity of men and women, not angels.[247] Interstate redistricting agreements are a way for legislators to avoid the harms of partisan gerrymandering without sacrificing their party's electoral fortunes. The more this dynamic can be acknowledged frankly, the more likely it is that interstate redistricting agreements can advance politically.

Other factors also point to the viability and wisdom of reform at this point in time. The nature of the problem posed by redistricting has changed. In the 2010s, the national Democratic party's priority in redistricting was catching up to Republican gerrymandering capacity and levelling the electoral playing field.[248] But while the partisan-balance problem has been solved to some degree, the problem of electoral competition has worsened.[249] The cross-party, interstate redistricting agreements described herein are well-suited to address the latter concern.

In addition, redistricting researchers and mathematicians have developed increasingly sophisticated approaches to analyzing and drawing fair district maps.[250] In her dissent in *Rucho*, Justice Kagan noted the proliferation and advancement of gerrymandering technology and analytics.[251] These developments, though, could be used to make interstate redistricting reforms more credible and effective: particular metrics or technical procedures could be standardized across states, reducing fears that one party to a compact will get the short end of the stick.[252]

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246. *Compare* Davis v. Bandemer, 478 U.S. 109, 129–34 (1986), *with* Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019).

247. *Cf.* THE FEDERALIST: NO. 51 (James Madison or Alexander Hamilton), https://perma.cc/76LA-9NM3 (last visited Oct. 15, 2023) ("If men were angels, no government would be necessary.").

248. *See supra* Section II.A and text accompanying notes 147–153.

249. *See supra* Section II.B.

250. For a bevy of recent mathematical approaches to redistricting, see POLITICAL GEOMETRY, *supra* note 161.

251. *See supra* text accompanying note 160.

252. *See* discussion *infra* notes 266–268 and accompanying text. Despite the Court's desire for "manageable standards," it is possible that one barrier to redistricting reform is the existence of too many plausible metrics for understanding district maps, rather than too few. Current redistricting technology, data, and law already form a system that one lawmaker described as "bafflingly complex." Telephone Interview with Jamie Raskin, Rep., U.S. House of Representatives (June 7, 2022). Given the resource constraints on state governments, state legislators may be challenged to sort through the morass of possible redistricting methods and metrics and choose the best. *See* Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187 (2022). But this, too, is an argument for making interstate redistricting an interstate phenomenon: well-resourced think tanks and other nationally focused "intense policy demanders" may be well-situated to wade through redistricting research and promote particular procedures or metrics for interstate adoption. *See id*. at 2204.

Reformers can also learn lessons from past challenges. For example, a number of Maryland proposals used interstate redistricting as a vehicle to promote the use of multimember districts, but substantive concerns with the policy as well as the need for congressional action to move away from multimember districts made those proposals nonstarters.[253] Future interstate redistricting proposals can jumpstart dialogue within and among states while avoiding policy proposals that have failed to gain traction.

Finally, it should be noted that interstate redistricting allows states, and the country as a whole, to benefit from federalism's most extolled virtue: experimentation.[254] The multitude of redistricting metrics and procedures may make federal lawmakers wary to impose any single one on all states. Subnational agreements help redistricting reform surmount partisan objections while allowing experimentation with a variety of redistricting policy design choices.

V. INTERSTATE REDISTRICTING AGREEMENTS IN DETAIL

Interstate redistricting could take a variety of forms. This Part outlines various potential design choices to be made in implementing an interstate redistricting compact and discusses the costs and benefits of those choices. Finally, this Part turns to legal questions around interstate redistricting agreements and defends their constitutionality.

A. Design Considerations

1. Number of States

The two prior proposals for interstate redistricting show diametrically opposed ways of aggregating redistricting: a few states at a time or all at once. The Potomac Compact could have come into force across just two states,[255] while the proposal in Illinois would have required approval of *every* state with at least three House members—38 states after the latest apportionment.[256]

Future proposals for interstate redistricting should follow the Potomac Compact and come into force even with only a few participating states in order to increase interstate redistricting's political practicality. Obviously, the key goal of interstate redistricting—reducing the ability of

253. *See supra* text accompanying notes 182–185.

254. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Derek T. Muller, *Nonjudicial Solutions to Partisan Gerrymandering*, 62 HOW. L. REV. 791, 802–03 (2019) (suggesting that federalism in redistricting is better seen as a way to allow a variety of policies to coexist in response to normative complexity rather than a way to converge on a single "ideal" policy).

255. *See* Potomac Compact, *supra* note 174, § 2.

256. *See* Interstate Compact, *supra* note 192, § 5, art. XV.

state legislators to engage in partisan gerrymandering that stymies electoral competition—supports nationwide expansion. However, triggering the Illinois proposal would require participation from even more states than needed to pass a constitutional amendment and would likely be more difficult than enacting a federal statute regulating congressional redistricting. And creating even a few more competitive districts in a couple of midsize states could have significant ramifications for national politics. Having a greater number of competitive districts makes it more likely that changes in the national political mood will shift control of the House, increasing electoral responsiveness. Moreover, members from competitive districts—with their reelections more at-risk year-to-year—may be uniquely incentivized to achieve bipartisan compromises to pass legislation in periods of split government control.

2. Redistricting Requirements

Interstate redistricting agreements could require a variety of procedural mechanisms to draw lines. In particular, states could each keep control of their redistricting processes while standardizing them (e.g., by requiring each state to create its own independent redistricting commission) or they could cede redistricting power to a third party. The former is likely more politically feasible.

Both of the previously proposed frameworks for interstate redistricting—the Potomac Compact and the Interstate Compact—would have created commissions responsible for critical steps in the redistricting process. Illinois's proposed Interstate Compact, despite its name, would have functioned effectively *intra*state: each member state would create its own independent redistricting commission consisting of residents of that state.[257] Maps approved by each state's redistricting commission would have been filed directly with the state's secretary of state or equivalent official and "presumed valid."[258]

The Potomac Compact, by contrast, sought to create an interstate redistricting commission with representation from each member state.[259] The commission would be empowered to propose maps for each state.[260] The maps would then have been subject to approval (but not modification) by each state's legislature.[261]

257. *See id.* § 5, art. III.

258. *See id*. § 5, art. XII.

259. *See* Potomac Compact, *supra* note 174, § 1. It should be noted that later versions of the Maryland bill, for example, S.B. 204, 2020 Leg., 441st Sess. (Md. 2020), would have done away with a truly interstate commission and instead required each compacting state to create its own independent redistricting commission—essentially replicating the Illinois plan's structure but without the nationwide scope.

260. *See* Potomac Compact, *supra* note 174, § 1.

261. *See id*.

A third option would be to have state legislatures, or at least legislatures who currently have mapmaking power,[262] make deals more directly. A gerrymandered state could, for example, pass two sets of maps: one would take effect if a partner state passes maps that meet specified standards of partisan fairness and competition, and another if the state fails to do so.[263]

Each method presents different risks and benefits. True interstate redistricting as proposed by the Potomac Compact—with one body drawing maps for all member states—arguably is most likely to achieve uniformity across states. Having the same commissioners drawing lines for multiple states may best ensure that standards of fairness and competition will be applied uniformly. However, this heightens one risk of truly aggregated redistricting—the impact of "bad" mapmaking is multiplied when it's done across multiple states. Moreover, interstate redistricting commissions may be a political nonstarter.[264]

The immediate future of interstate redistricting agreements, then, may lie in proposals that keep line-drawing power in-state while increasing procedural uniformity and district fairness. These could take a variety of forms. States could agree to jointly implement particular redistricting *procedures* like independent commissions, as in the Illinois proposal and Maryland's later proposals.[265]

Alternatively, or additionally, states could jointly establish enforceable *standards* for their congressional maps. Recent quantitative work has spawned a wide array of metrics for assessing the fairness of a district map.[266] States could agree to create maps that meet specified

262. Some states have passed constitutional amendments mandating particular redistricting processes. New York and Ohio, for example, give independent redistricting commissions the first chance to draw maps; those maps are then subject to approval by their respective legislatures (though these processes have not proved robust enough to prevent gerrymandering). In some of these cases, interstate redistricting might be able to operate as a statutory overlay on state-constitutional requirements: statutes could impose more stringent requirements on one state's maps so long as another target state implements the same requirements. In other cases—and especially if reforms attempted to delegate map-drawing power to a new interstate body—the existing redistricting processes would have to be repealed in order to establish new ones.

263. This would be a version of the proposal by Stephanopoulous and Goldzimer. *See* discussion *supra* note 200.

264. Maryland Delegate Kirill Reznick, a proponent of redistricting reform, shared this view. *See* Telephone Interview with Kirill Reznick, Del., Md. House of Delegates (Apr. 22, 2022). Reznick sponsored bills for interstate redistricting reform after the original Potomac Compact proposal. However, Reznick's bills would have had an independent redistricting commission in each state draw that state's maps, rather than one interstate commission drawing multiple maps. *See supra* note 259.

265. *See supra* note 259.

266. *See, e.g.*, ROBERT SCHAFER, RESOLVING GERRYMANDERING: A MANAGEABLE STANDARD 63–73 (2022). Many of the most promising methods of quantifying the degree to which a state is gerrymandered, called "ensemble methods," operate by randomly

quantitative standards of partisan fairness and competition. These standards could be applied regardless of whether maps are drawn by commissions or legislatures.

Hard-coded redistricting standards are far from foolproof. No single measurement is likely to provide a neat litmus test for whether a map is fair.[267] Maps that score highly on one metric may do poorly on others, and any one metric may not capture the full range of normative concerns with a district plan.[268] Maps might produce congressional delegations that fairly reflect the partisanship of a state, for example, but have very few competitive seats. And if redistricting is left in partisan hands, mapmakers will undoubtedly seek to maximize partisan gain within the parameters set by law.

But well-designed substantive standards at least have the potential to constrain the degree of bias and noncompetition in redistricting maps. Clear standards also may reduce the likelihood of drawn-out redistricting litigation, and they provide a way for states in interstate redistricting agreements to "trust but verify" that other states are living up to their commitments—that partisans in one state are not unilaterally disarming in the redistricting wars.

B. Legal Questions: Is Congressional Approval Necessary?

The most important legal question raised by interstate redistricting compacts is whether congressional approval would be necessary under the Compact Clause. The Constitution mandates that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with

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generating large numbers of district maps for a state. The actual map is then compared to the "ensemble" of randomly drawn maps to determine how much of an outlier the chosen map is on a variety of metrics. *See id.* A map that produces more skewed representation relative to most of the randomly drawn maps is suspect. Ensemble methods' critical advantage is that they establish a baseline for district maps that factors in the partisan geography of a state; they account for the "natural" skew of a state's maps given the way voters are distributed throughout the state, but still identify gerrymanders that go far beyond that skew. *See* Brief for Mathematicians, Law Professors, and Students as Amici Curiae Supporting Respondents, at 14–26, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (Nos. 18-422, 18-726). These methods have been primarily proposed as a method of assessing racial and partisan *bias* in maps, but similar ones could be used to analyze the degree of "unnatural" *noncompetition* as well.

To be clear, even the best quantitative methods do not preclude debate over empirics, much less norms. *Compare* Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L.J. 862 (2021), *with* Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 YALE L.J.F. 744 (2021) (disagreeing over the likely outcomes of certain redistricting reforms as well as their normative propriety). But redistricting metrics and methods provide a vocabulary that states can use in formulating agreements that cabin their freedom to engage in redistricting shenanigans.

267. *See* Moon Duchin, *Introduction* to POLITICAL GEOMETRY, *supra* note 161, at 1, 25.

268. *See id*.

another State."[269] Of course, Congress could directly regulate congressional redistricting and preempt state regulations.[270] Congress could also expressly consent to interstate redistricting agreements to satisfy the Compact Clause's requirements if the Clause were held to apply. But given that federal redistricting reform efforts appear stalled,[271] actions that do not rely on congressional approval may be the best way forward for multistate redistricting reform. However, the Compact Clause's coverage is not as broad as its text might seem, and interstate redistricting agreements likely would not require congressional consent.

In Compact Clause doctrine, two key questions determine the necessity of congressional consent for interstate agreements: first, whether the actions or agreements actually constitute a compact, and second, whether that compact threatens to alter the balance of power among states or between states and the federal government such as to require congressional consent. Fortunately for interstate redistricting advocates, Compact Clause jurisprudence suggests that while the most viable forms of interstate redistricting agreements would be considered "compacts," they would not require congressional approval.

The leading case on the Compact Clause, *Virginia v. Tennessee*,[272] established fundamental principles governing both what constitutes a compact and which compacts must receive congressional consent. *Virginia* defined "agreements and compacts" broadly and did not distinguish between the two: a "legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it. . . . The mutual declarations may then be reasonably treated as made upon mutual considerations."[273] But *Virginia* excluded from the Compact Clause's congressional consent requirement the "many matters upon which different states may agree that can in no respect concern the United States."[274] These could include basic commercial contracts for land or services as well as agreements for cooperation on issues of mutual concern, like administration of a "disease-producing district" located between two states.[275]

The Court held that the Compact Clause instead applied only to interstate agreements that altered the balance of power within the federal

269. U.S. CONST. art. I, § 10, cl. 3.

270. *See id.* § 4, cl. 1.

271. *See, e.g.*, Freedom to Vote Act, S. 2747, 117th Cong. (2021); John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021).

272. Virginia v. Tennessee, 148 U.S. 503 (1893).

273. *Id*. at 520.

274. *Id.* at 518.

275. *Id.*

system.[276] The *Virginia* Court established the key test for whether an interstate compact required congressional consent: whether the compact is "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[277]

The Court has subsequently clarified both the nature of a compact and the congressional consent requirement. Nearly a century after *Virginia v. Tennessee*, the Court in *Northeast Bancorp* considered the constitutionality of a set of statutes in New England states governing the acquisition of in-state banks by banks from out of state.[278] The laws authorized acquisitions from out of state so long as the state of the acquiring bank had passed a statute granting reciprocal permission for acquisitions by banks from the state of the bank to be acquired.[279] In dicta, the Court expressed doubt as to whether these statutes were even compacts at all. Writing for the majority, then-Justice Rehnquist noted that while the statutes "require reciprocity and impose a regional limitation" and were clearly enacted through coordination across the legislatures, "several of the classic indicia of a compact are missing."[280] The statutes did not create any interstate coordinating body, each state remained free to change or repeal its law, and, "[m]ost importantly, neither statute require[d] a reciprocation of the regional limitation."[281] That is, while some states had chosen to allow bank acquisitions by banks only from New England states, all participating states were free to (and some indeed did) allow reciprocal acquisitions with any state nationwide.[282] Regardless, the Court determined that even if the banking agreements did form a compact, they did not bolster some states' political power at the expense of others nor interfere with federal prerogatives and, therefore, did not require Congress's approval.[283]

276. *See id.* For a helpful overview of Compact Clause jurisprudence, see generally MICHAEL L. BUENGER, JEFFREY B. LITWAK, RICHARD L. MASTERS & MICHAEL H. MCCABE, THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS 68–75 (2d ed. 2016).

277. *Virginia*, 148 U.S. at 519; *see also* New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (citing the *Virginia* test as authoritative).

278. *See* Ne. Bancorp v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 162–64 (1985).

279. *See id.*

280. *Id.* at 175.

281. *Id.*

282. *See id.* The Supreme Court has not yet revisited these "indicia," though lower courts have adopted them. *See, e.g.*, Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Plan. Council, 786 F.2d 1359, 1363 (9th Cir. 1986) (describing the indicia of compacts as "establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness"); United States v. California, 444 F. Supp. 3d 1181, 1195 (E.D. Cal. 2020).

283. *See Ne. Bancorp*, 472 U.S. at 176.

1. Interstate Redistricting Agreements Are Likely "Compacts"

The most viable forms of interstate redistricting agreements likely would not escape scrutiny as a compact. While interstate coordinating bodies—one of the hallmarks of an interstate compact—are not necessary for effective interstate redistricting agreements,[284] a compact without "mutual consideration"—enforceable guarantees as to the other state's redistricting process—would not be worth much.[285] Imagine an interstate redistricting agreement between two states controlled by different parties. One state might wait for another to complete its redistricting process under the agreed-upon standards but then change its laws to exit the compact and enact a partisan gerrymander. But if the agreement creates legally enforceable rights between the states—that is, to the extent that the first-mover state could sue to require the other state to carry out redistricting by the agreed-upon method—it becomes more difficult to see as anything other than a compact.[286] An interstate redistricting agreement would likely need to include some way to prevent reneging. For example, the proposed National Popular Vote Interstate Compact, which would require party states to pledge their presidential electors to the winner of the national presidential popular vote, bars states from exiting the compact within six months prior to each Inauguration Day.[287] Any practicable interstate redistricting agreement would need similar language, which would make it hard to claim that the agreement did not create the kind of binding reciprocal obligations that are the hallmarks of interstate compacts.

2. Interstate Redistricting Agreements Would Not Require Congressional Consent

Nearly any interstate redistricting agreement worth enacting would create the kind of binding obligations that would render it a "compact." But the Court's Compact Clause jurisprudence suggests that most interstate redistricting agreements would not require congressional consent.

Derek T. Muller, a scholar of election law and federal courts, outlines two types of interests that the Compact Clause protects through the congressional consent requirement.[288] First, the Clause protects the federal

284. *See supra* Section V.A.2.

285. *See* Virginia v. Tennessee, 148 U.S. 503, 520 (1893).

286. *See also* Gillette Co. v. Franchise Tax Bd., 62 Cal. 4th 468, 478 (2015) (focusing on whether an agreement to create an advisory tax board was a "binding reciprocal agreement" as the key criterion for determining whether an agreement was a compact for the purposes of the Compact Clause), *cert. denied*, 137 S.Ct. 294 (2016).

287. *See* Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 389 (2007).

288. *See id.* at 384.

government's power vis-à-vis the states. Hence, it requires congressional approval for interstate compacts that infringe on federal power. In the Court's most recent major statement on the scope of the Compact Clause, it noted that the augmentation of state capabilities through interstate compacts was not a problem *per se*: an interstate tax commission that made recommendations for state tax policies and would, upon request, conduct tax audits on behalf of states did not require congressional consent.[289] Compacts that increase states' power do not inherently require congressional consent; "the test is whether the [c]ompact enhances state power *quoad* the National Government. [If a] pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence," it does not require consent.[290]

Interstate redistricting agreements should pass this test. A state that establishes standards for its own redistricting in conjunction with another state is not exercising any power it could not exercise otherwise. Congress of course remains free to intervene in redistricting under its Elections Clause power.[291] But otherwise, states remain free to conduct their own redistricting pursuant to extant federal rules. So long as states comply with federal redistricting mandates, it is hard to see how they would be intruding on federal power. Even if states vest line-drawing power in an interstate redistricting commission that draws binding maps for multiple states, the power exercised on other states would hardly infringe on federal prerogatives.

Second, Muller notes that the Compact Clause protects the "sister state interest" of noncompacting states vis-à-vis those in a compact.[292] The *Northeast Bancorp* Court noted that congressional consent would have been required for an agreement that would "enhance the political power of the New England States [who were enacting the agreements] at the expense of other [noncompacting] States."[293] But again, noncompacting states suffer no cognizable harm from interstate redistricting compacts. Most obviously, compacts do not diminish or enhance states' voting power in Congress. They may change the tenor of a state's congressional delegation but would never impact its size. Redistricting agreements also would not somehow dilute the efficacy of noncompacting states'

289. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468–69 (1978). The Court's most recent case touching on the Compact Clause was decided just last year, but it dealt with a compact that had received explicit congressional approval and so did not require analysis of which compacts required Congress's consent. *See generally* New York v. New Jersey, 598 U.S. 218 (2023).

290. *U.S. Steel Corp.*, 434 U.S. at 472–73.

291. *See* U.S. CONST. art. I, § 4, cl. 1.

292. Muller, *supra* note 287, at 385.

293. Ne. Bancorp v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 176 (1985) (emphasis omitted).

representation. While the National Popular Vote Interstate Compact arguably infringes on sister-state interests,[294] interstate redistricting agreements do nothing to dilute the voting power of other states. Representatives from compacting states would not be obligated to vote together in ways that could override the preferences of other states.

True interstate redistricting—with one interstate commission having control or leverage over redistricting in multiple states—may, depending on the commission's structure, create a risk of one bloc of states unduly controlling other states' redistricting. But any states so affected would be parties to the compact. To the extent the Court recognizes sister-state interests that would trigger a need for congressional consent, it focuses on the interest of *noncompacting* states.[295] The *Northeast Bancorp* Court, for example, focused on the balance of power between the New England states that were parties to the agreements and other states who were not.[296] Similarly, the Court in a case concerning the Multistate Tax Commission examined whether "the Compact impairs the sovereign rights of *nonmember* States."[297] The Compact Clause protects against blocs of states seeking to increase their own power at other states' expense. But it does not shield states from entering into agreements to allow sister states to influence their affairs. And even if the Court did seek to protect states from entering into compacts that diminished their *own* power—that is, to prevent imbalances of power among compacting states—it is unlikely that interstate redistricting compacts would require consent. The compacts that have been proposed have protections against one bloc of compacting states steamrolling others into adopting particular redistricting plans.[298] Even without those protections, redistricting agreements would not dilute or alter any state's voting power in Congress, much less a noncompacting state. Without that kind of impact, interstate redistricting agreements do not infringe state power so as to trigger the Compact Clause's

294. A bloc of states that controls a majority of electoral votes and agrees to vote in unison according to the national popular vote does indeed render other states' electoral votes, if not their popular votes, superfluous. Muller argues that this dynamic makes the National Popular Vote Initiative Compact unconstitutional without congressional consent. *See* Muller, *supra* note 287, at 384. Others have disagreed. *See, e.g.*, Michael Brody, *Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny Under the Compact Clause*, 5 LEGIS. & POL'Y BRIEF 33, 61 (2013). Without weighing in on the constitutionality of the national popular vote proposal, my point is only that even if that compact were held to require congressional consent, there are strong reasons to think that interstate redistricting agreements would not.

295. *See* Muller, *supra* note 287, at 385–87.

296. *See Ne. Bancorp*, 472 U.S. at 176.

297. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 477 (1978) (emphasis added).

298. *See supra* note 175 and accompanying text.

congressional consent requirement. Thus, these agreements allow states to reform redistricting in unison without needing congressional action.

VI. CONCLUSION

Redistricting reform is at an impasse. Federal redistricting legislation is stalled.[299] The Supreme Court has declared partisan gerrymandering claims nonjusticiable.[300] While state courts have, to some extent, filled the federal void, state-law gerrymandering claims may not succeed in all states,[301] and they may even, in the aggregate, exacerbate partisan imbalance. Partisan gerrymandering is more than ever a bipartisan affair, which has led to rough partisan parity in the next decade's House maps. But this parity is the result of dumb luck—partisan efforts in statehouses, independently drawn maps, and court decisions combined to form a more or less balanced map. And partisan fairness obscures a dearth of competitive seats, depriving voters of the benefits of democratic competition.

Interstate redistricting agreements offer a way forward. By jointly enacting procedural or substantive requirements for fairer redistricting, state legislatures of opposite partisanship can find a way to reduce partisan bias in their state, create more competitive districts, or both, without giving up an edge in the race for the House.

Interstate redistricting is a tool, not a cure-all: its efficacy will depend on legislatures' willingness to enact procedures or standards that effectively curb the problems of contemporary redistricting. And it is most politically viable as a way to reduce gerrymandering in federal rather than state districts because more competitive districts could give state legislators new opportunities to pursue higher office and because congressional gerrymandering has more direct impacts on other states.

But insofar as fears of national partisan imbalance drive partisan gerrymandering despite normative reservations, interstate redistricting agreements offer a practicable way to assuage those fears and improve redistricting two (or more) states at a time. While these agreements would not create immediate nationwide reform, they could meaningfully increase electoral competition, prevent future partisan bias in the national House map, and perhaps eventually spur federal redistricting reform.

299. *See* sources cited *supra* note 271.

300. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2502–07 (2019).

301. *See* Nick Corasaniti & Reid J. Epstein, *As Both Parties Gerrymander Furiously, State Courts Block the Way*, N.Y. TIMES (Apr. 4, 2022), https://perma.cc/Y24R-U8YX.