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## A Newfound Power: How the Ohio Supreme Court Should Approach the Next Partisan Gerrymander

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# A Newfound Power: How the Ohio Supreme Court Should Approach the Next Partisan Gerrymander

BRADLEY DAVIS\*

*Partisan gerrymandering is a practice as old as the nation itself and a problem both state and federal courts continue to struggle with. In 2015, the people of Ohio overwhelmingly voted to amend the state constitution to prevent overly partisan outcomes in state legislative redistricting. Following the 2021 redistricting cycle, the Ohio Supreme Court narrowly struck down several redistricting proposals in what devolved into a protracted fight with legislators and executive officials. This Note carefully lays out the development of redistricting jurisprudence, Ohio's relevant constitutional provisions, and various state and federal judicial approaches to alleged gerrymanders. Using a combination of these judicial approaches, this Note makes two suggestions for how the Ohio Supreme Court can better adjudicate future partisan gerrymanders.*

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#### INTRODUCTION

Every ten years, following the U.S. Census, state and local governments must redraw congressional and state legislative districts to reflect population changes over the previous decade.<sup>1</sup> In the majority of states, the state legislature has the responsibility of drawing new district boundaries for both congressional and state legislative seats.<sup>2</sup> A minority of states conduct redistricting through various commissions as outlined by constitution or statute.<sup>3</sup>

While redistricting, when done properly, can ensure fair and accurate representation of the people, redistricting also creates an opportunity for politicians to manipulate proposed maps to their own advantage.<sup>4</sup> Gerrymandering, as it has long been known, has been a frequent subject of litigation beginning in the twentieth century. Despite the Supreme Court repeatedly recognizing the constitutional wrongs of gerrymandering, gerrymandering for political advantage (partisan gerrymandering) was ruled nonjusticiable by the Supreme Court in 2019.<sup>5</sup> Even before this decision took partisan gerrymandering out of federal courts, state legislatures and state courts had been developing their own methods of preventing partisan gerrymandering.<sup>6</sup> Ohio is one such state, amending its constitution in 2015

1. *Redistricting*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/gerrymandering-fair-representation/redistricting> [<https://perma.cc/6NVX-D8NA>].

2. Loyola L. Sch., *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/redistricting-101/who-draws-the-lines/> [<https://perma.cc/6GR6-L84M>].

3. *Id.*

4. See BRENNAN CTR. FOR JUST., *supra* note 1.

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

6. See Loyola L. Sch., *supra* note 2.

and providing greater protections against partisan gerrymandering than those provided by the federal constitution.<sup>7</sup>

Following the 2020 census and subsequent redistricting, the Ohio Constitution's new anti-partisan-gerrymandering provisions faced their first test. The Ohio Supreme Court was given an opportunity to rule on the partisan balance of redistricting proposals—an issue it was previously unequipped to tackle.<sup>8</sup> Unfortunately, what began as an original challenge to a gerrymandered apportionment plan devolved into a drawn-out battle between the Ohio Redistricting Commission, the Ohio Supreme Court, and the Republican and Democratic parties. In the end, the Ohio Supreme Court rejected five redistricting proposals,<sup>9</sup> brought two contempt hearings against the Ohio Redistricting Commission,<sup>10</sup> faced calls to impeach Chief Justice Maureen O'Connor,<sup>11</sup> and was ignored by a federal court that ended up instituting a set of twice-rejected maps to break the impasse and ensure maps would be in place for the August primary races.<sup>12</sup>

This Note proposes that the Ohio Supreme Court's first attempt(s) to alleged partisan gerrymanders, while similar to valid methods in use by other courts, could be improved by using better standards and guidelines. Part I of this Note will detail common, neutral redistricting requirements and explain the development of gerrymandering case law. Part II will explain Ohio's recent developments in partisan gerrymandering, including the amended constitutional provisions and the litigation merry-go-round that ensued. Part III will discuss several methods used by other courts in adjudicating gerrymandering claims. Part IV will discuss two changes the Ohio Supreme Court should make in analyzing alleged partisan gerrymanders in the wake of recent precedent.

## I. THE DEVELOPMENT OF GERRYMANDERING JURISPRUDENCE

Gerrymandering as a practice is nearly as old as the nation itself. The term can be traced back to Founding Father Elbridge Gerry—congressman and governor from Massachusetts and the fifth Vice President of the United States—who designed an

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7. See OHIO CONST. art. XI.

8. See *Wilson v. Kasich*, 981 N.E.2d 814, 820 (Ohio 2012).

9. See *League of Women Voters v. Ohio Redistricting Comm'n (League I)*, 192 N.E.3d 379 (Ohio 2022); *League of Women Voters v. Ohio Redistricting Comm'n (League II)*, 195 N.E.3d 974 (Ohio 2022); *League of Women Voters v. Ohio Redistricting Comm'n (League III)*, 198 N.E.3d 812 (Ohio 2022); *League of Women Voters v. Ohio Redistricting Comm'n (League IV)*, 199 N.E.3d 532 (Ohio 2022).

10. Susan Tebben, *Redistricting Commission Again Answers for Contempt Charges*, OHIO CAPITAL J. (May 13, 2022, 3:50 AM), <https://ohiocapitaljournal.com/2022/05/13/redistricting-commission-again-answers-for-contempt-charges/> [<https://perma.cc/LWQ9-YAJ2>].

11. Marty Schladen, *LaRose Would 'Be Fine With' Chief Justice's Impeachment Over Redistricting Rulings*, OHIO CAPITAL J. (Apr. 1, 2022, 4:05 PM), <https://ohiocapitaljournal.com/2022/04/01/larose-would-be-fine-with-chief-justices-impeachment-over-redistricting-rulings/> [<https://perma.cc/B4SH-EMWJ>].

12. See *Gonidakis v. LaRose*, No. 2:22-cv-0773, 2022 U.S. Dist. LEXIS 95341, at \*4–5 (S.D. Ohio May 27, 2022).

1812 redistricting plan that favored Republicans over Federalists.<sup>13</sup> During the early Republic, gerrymandering, particularly partisan gerrymandering, was both intense and widespread.<sup>14</sup> Prior to the twentieth century, there were no safeguards ensuring the equal population of legislative districts, nor requirements for equal protection of voters during the redistricting process.<sup>15</sup> State legislatures were essentially free to draw legislative districts however they pleased.<sup>16</sup> Section A will survey the most basic constitutional redistricting requirements imposed by both federal and state courts. Section B will explore developments in racial gerrymandering jurisprudence. Section C will discuss the historical difficulties courts have faced in ruling on partisan gerrymanders.

### *A. Basic Redistricting Requirements*

The free reign of state legislatures to draw congressional and state legislative districts ended in the mid-twentieth century through a series of Supreme Court decisions that securely placed certain gerrymandering claims within reach of federal courts. The first of these cases, *Baker v. Carr*, reviewed the constitutionality of Tennessee's state legislative districts, which had been in place for more than sixty years.<sup>17</sup> This was the first time the Court held that claims challenging state legislative redistricting were within the jurisdiction of the federal judiciary.<sup>18</sup> Two years later, in *Wesberry v. Sanders*, the Court addressed a claim involving a Georgia congressional district that was three-times as populous as another.<sup>19</sup> Not only did the Court reject the district court's assertion that the complaint presented a nonjusticiable political question, but it also held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>20</sup> This requirement that congressional districts be, to the extent practicable, equal in population was just the first constitutional requirement for redistricting.

In the same year as *Wesberry*, the Court began instituting constitutional requirements on the redistricting of state legislative seats.<sup>21</sup> The equal-population

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13. Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 987 (2019); see Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN MAG. (July 20, 2017), <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/> [https://perma.cc/4UNJ-HLMK]. One of the districts drawn in Eldridge Gerry's infamous gerrymander was so oddly shaped that the press at the time noted it looked like a salamander and subsequently coined the term. See DAVID SCHULTZ, *ELECTION LAW AND DEMOCRATIC THEORY* 141 (2014).

14. Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1388 (2020).

15. *Id.*

16. ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* 194 (2016).

17. 369 U.S. 186 (1962).

18. *Id.* at 204.

19. 376 U.S. 1 (1964).

20. *Id.* at 7–8.

21. *Wesberry*, 376 U.S. at 1.

requirement was instituted for state legislative districts in *Reynolds v. Sims*.<sup>22</sup> As in *Baker*, the Alabama legislative districts in *Reynolds* had not been redrawn in over sixty years; and, as in *Wesberry*, several districts had vast population discrepancies.<sup>23</sup> Continuing on the “one-person, one-vote” path series of cases that began with *Wesberry*, the *Reynolds* court held that state legislative districts must be drawn to achieve “substantial equality of population” among the districts so that each citizen’s vote is approximately equal to that of any other citizen of the state.<sup>24</sup>

However, the requirements for equal population for congressional districts and state legislative districts are not equally stringent. Deviations for congressional-district populations are more stringent and require relatively small deviations. States must make a good-faith effort to maintain equal population, and the constitutionality of any deviations depends on the practicality of avoiding them and whether a legitimate state interest necessitates the population differences.<sup>25</sup> State legislative-district populations, however, are more flexible. While a redistricting plan is generally considered suspect if there is a maximum population deviation (that between the largest and smallest districts) of greater than ten percent,<sup>26</sup> such disparities may be upheld if the state can produce a compelling justification.<sup>27</sup> Approximately equal population for both congressional and state legislative districts is just one requirement, however instituted, for redistricting.

One of the three most popular state-imposed requirements for redistricting is contiguity.<sup>28</sup> Contiguity requires that districts must be a single geographic piece, or put even more simply, that a person must be able to travel the entirety of one district without crossing into another.<sup>29</sup> This rule is not absolute, like most redistricting requirements, as many states only require contiguity to the extent possible.<sup>30</sup> Currently, forty-five states require contiguity for state legislative districts and eighteen for congressional districts.<sup>31</sup> Second, the political-boundaries rule mandates

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22. 377 U.S. 533 (1964).

23. *Id.*; see *Baker*, 369 U.S. at 204; *Wesberry*, 376 U.S. at 2. The largest Alabama Senate district was roughly forty-one times more populous than the smallest and the largest House district was sixteen times more populous than the smallest. *Reynolds*, 377 U.S. at 545.

24. *Reynolds*, 377 U.S. at 579. “The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.” *Id.* at 564 n.41 (quoting *MacDougall v. Green*, 335 U.S. 281, 290 (1948) (Douglas, J., dissenting)).

25. *Tennant v. Jefferson Cnty. Comm’n*, 567 U.S. 758, 759–60 (2012) (citing *Karcher v. Dagget*, 462 U.S. 725, 734–41 (1983)).

26. *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (holding that maximum population deviations of greater than ten percent creates a prima facie case of discrimination that must be justified by the state).

27. See *Mahan v. Howell*, 410 U.S. 315 (1973) (upholding a sixteen percent deviation because preserving political subdivisions is a rational objective); cf. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1341–42 (N.D. Ga. 2004) (“The record makes abundantly clear that the population deviations in the Georgia House and Senate were not driven by any traditional redistricting criteria such as compactness, contiguity, and preserving county lines.”).

28. See generally *Loyola L. Sch.*, *supra* note 2.

29. See CHARLES S. BULLOCK III, REDISTRICTING 99–100, (2d ed. 2021).

30. See *Loyola L. Sch.*, *supra* note 2.

31. *Id.*

that district lines follow political boundaries like county, city, or town lines.<sup>32</sup> Thirty-four states have this requirement for state legislative districts and fifteen for congressional districts.<sup>33</sup> The third common requirement is compactness.<sup>34</sup> Generally speaking, districts where people live closer together are more compact than those where people live farther apart.<sup>35</sup> Oddly shaped districts are also considered less compact.<sup>36</sup> Thirty-two states require state legislative districts to be compact and seventeen have the same requirement for congressional districts.<sup>37</sup>

### *B. Developments in Racial Gerrymandering*

Redistricting considerations and requirements based on race and ethnicity stem from the provisions of the Voting Rights Act of 1965 (VRA).<sup>38</sup> After years of relatively ineffectual attempts to prevent state disenfranchisement of minority voters, especially African Americans, Congress determined existing antidiscrimination laws were insufficient to enforce the Fifteenth Amendment.<sup>39</sup> As stated by Senator Jacob Javits of New York, the VRA “was designed not only to correct an active history of discrimination, the denying to [African Americans] of the right to register and vote, but also to deal with the accumulation of discrimination.”<sup>40</sup> President Lyndon Johnson signed the VRA into law on August 6, 1965,<sup>41</sup> with the express goal of enforcing the Fifteenth Amendment.<sup>42</sup> Of particular importance for redistricting and gerrymandering cases is the VRA’s prohibition of vote dilution and using race as a predominant factor in redistricting.

#### 1. Section 2 Prohibition on Dilution of Minority Votes

Section 2 of the Voting Rights Act of 1965, as originally passed, provided that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied to by any State or political subdivision to deny or abridge the right of any citizen . . . to vote on account of race or color.”<sup>43</sup> Early examples of gerrymandering litigation following passage of the VRA came in challenges to multi-member districts in *Whitcomb v. Chavis*<sup>44</sup> and *White v.*

32. *Id.*

33. *Id.* Some states impose more specific political boundary requirements. Ohio, for example, requires no two congressional districts share more than one county unless the county population exceeds 400,000. OHIO CONST. art. XIX.02(B)(7).

34. See Loyola L. Sch., *supra* note 2.

35. *Id.*

36. See *id.*

37. *Id.*

38. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

39. *History of Federal Voting Rights Laws*, DEP’T OF JUST., <https://www.justice.gov/crt/history-federal-voting-rights-laws> [https://perma.cc/S3RV-WZBJ].

40. 111 CONG. REC. 8295 (1965).

41. DEP’T OF JUST., *supra* note 39.

42. 79 Stat. 437.

43. § 2, 79 Stat. at 437.

44. 403 U.S. 124 (1971).

*Regester*.<sup>45</sup> While neither case directly implicated section 2, both cases expressly stated that claims alleging the dilution of minority votes require the plaintiff to show proof of racially discriminatory purpose, just like any other equal protection claim.<sup>46</sup> These cases, despite not being challenged under the VRA, nevertheless influenced subsequent VRA litigation on gerrymandering claims.<sup>47</sup> The constitutionality of vote dilution under section 2 would appear before the Court in 1980 and ultimately lead to an important change to the VRA that remains in place today.

In *City of Mobile v. Bolden*, the Supreme Court was faced with a challenge to Mobile, Alabama's at-large voting system for city commissioners.<sup>48</sup> In a class action brought on behalf of all African American residents of Mobile, the complainants alleged the at-large system unfairly diluted the class's voting power in violation of section 2 of the VRA and the Fourteenth and Fifteenth Amendments.<sup>49</sup> The district court that originally heard the case relied on a pre-*Washington v. Davis* decision from the Fifth Circuit stating that proof of discriminatory effect was sufficient to find a violation of the Equal Protection Clause.<sup>50</sup> The Court ultimately reversed the district court's judgment for the plaintiffs, finding that the plaintiffs had not "prove[d] that the [at-large system] was 'conceived or operated as [purposeful devices] to further racial . . . discrimination.'"<sup>51</sup> In response to the Court's holding—that minority vote dilution must include proof of a racially discriminatory purpose—and the public backlash that ensued,<sup>52</sup> Congress amended section 2 of the VRA in 1982.<sup>53</sup> The amended section 2 provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgment of the right of any citizen . . . to vote on account of race or color."<sup>54</sup> This amendment changed the burden of proof for a racial gerrymandering claim brought under section 2 from a standard equal protection discriminatory *purpose* test to a discriminatory *effect* test.<sup>55</sup>

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45. 412 U.S. 755 (1973).

46. *Whitcomb*, 403 U.S. at 149 (stating the Court does not hesitate to strike down "schemes allegedly conceived or operated as purposeful devices to further racial discrimination."); *White*, 412 U.S. at 765–66 (holding the burden of proof is on the plaintiffs to show the political process was not equally open).

47. See DEP'T OF JUST., *supra* note 39.

48. 446 U.S. 55, 58 (1980).

49. *Id.* at 58.

50. *Id.* at 71; see also *Zimmer v. McKeithen*, 485 F.2d 1297, 1304–05 (5th Cir. 1973); *Washington v. Davis*, 426 U.S. 229 (1976) (holding facially neutral laws that have racially disproportionate impact are not automatically unconstitutional).

51. *Mobile*, 446 U.S. at 66 (quoting *Whitcomb*, 403 U.S. at 149).

52. See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1355 (1983) ("The Supreme Court's decision in *Mobile* produced an avalanche of criticism, both in the media and within the civil rights community.").

53. Pub. L. No. 97-205, 96 Stat. 131.

54. *Id.* (emphasis added).

55. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone."). The *Gingles* decision applied to multimember districts, for unconstitutionality of certain single-member districts. See *Voinovich v. Quilter*, 507 U.S. 146 (1993).



Discriminatory effect remains the overarching consideration in racial gerrymandering challenges alleging vote dilution.

Just like pre-amendment racial gerrymandering, post-amendment also focused on vote dilution of racial minorities. In *Thornburg v. Gingles*, black citizens of North Carolina challenged seven of the state's new general assembly districts, alleging that the redistricting scheme impaired their ability to elect the candidates of their choice in violation of the Fourteenth and Fifteenth Amendments and section 2 of the VRA.<sup>56</sup> The district court ultimately found that six of the seven challenged districts violated section 2 by diluting African American votes, and the Supreme Court affirmed the ruling as to five of the six improper districts.<sup>57</sup> The long-term significance of this ruling has proven to be the three-part test the Court created for determining when a "majority-minority" district—"one in which a racial or language minority group comprises a voting majority"—must be drawn to avoid diluting the minority's votes.<sup>58</sup> To show that the VRA requires the drawing of a majority-minority district, plaintiffs bringing a section 2 action must first show that the group "is sufficiently large and geographically compact to constitute a majority in a single-member district."<sup>59</sup> Second, the minority group must be politically cohesive.<sup>60</sup> And third, it "must be able to demonstrate that the white majority votes sufficiently as a bloc as to enable it . . . usually to defeat the minority's preferred candidate."<sup>61</sup> Later, in 2009, the Court elaborated on the first prong by specifying that the party claiming a section 2 violation must show by a preponderance of the evidence that the minority population occupies greater than fifty percent of the district.<sup>62</sup> The three-prong test established by the Court in *Gingles* remains the standard for plaintiffs seeking to demonstrate that a redistricting plan requires the creation of a majority-minority district to avoid vote dilution.

## 2. Race as a Predominant Factor

While section 2 may in some circumstances require the creation of majority-minority districts to prevent vote dilution, the Court has also held that race cannot be the predominant factor in redistricting without running afoul of the Fourteenth Amendment.<sup>63</sup> The Equal Protection Clause of the Fourteenth Amendment provides that no state shall deny any person within its jurisdiction equal protection of the laws,<sup>64</sup> with the central purpose of this provision being "to prevent the States from purposefully discriminating between individuals on the basis of race."<sup>65</sup> In *Shaw v. Reno*, the Court faced such an equal protection challenge over, once again, North

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56. 478 U.S. at 35.

57. *Id.* at 80.

58. L. PAIGE WHITAKER, CONG. RSCH. SERV., CONGRESSIONAL REDISTRICTING AND THE VOTING RIGHTS ACT: A LEGAL OVERVIEW 2 (2015).

59. *Gingles*, 478 U.S. at 50.

60. *Id.*

61. *Id.* at 51.

62. *Bartlett v. Strickland*, 556 U.S. 1, 19–20 (2009).

63. *See Shaw v. Reno*, 509 U.S. 630 (1993).

64. U.S. CONST. art. XIV, § 1.

65. *Shaw*, 509 U.S. at 642 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

Carolina's redistricting maps.<sup>66</sup> Applying strict scrutiny, the *Shaw* Court ultimately held that a redistricting statute or proposal, though race neutral on its face, violates the Equal Protection Clause when it cannot be explained on grounds other than race.<sup>67</sup>

The Court elaborated on the plaintiff's burden of proof for a *Shaw*-like equal protection challenge in *Miller v. Johnson*.<sup>68</sup> In *Miller*, the Court established that "[t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor" in redistricting.<sup>69</sup> The key outcome from both *Shaw* and *Miller* is that race cannot subordinate traditional redistricting guidelines, such as those described in Section I.A of this Note. The Court has ruled to such an effect in *Bush v. Vera*, stating that a district drawn using race as a predominant factor must be reasonably compact to survive strict scrutiny,<sup>70</sup> and in *Alabama Legislative Black Caucus v. Alabama*, holding that racial motivations cannot override the constitutional requirement for equal population.<sup>71</sup> Therefore, while the VRA may, in some circumstances, mandate the creation of a majority-minority district, courts will be very skeptical of the over-use of race as a factor in redistricting.

### C. Partisan Gerrymandering's Life and Death

Racial considerations are not the only redistricting factors that courts have historically been skeptical of. As stated in Part I, the term gerrymander resulted from a redistricting plan that favored one political party over another.<sup>72</sup> In essence, partisan gerrymandering substitutes the consideration of voters' race or ethnicity with the consideration of voters' party affiliation. Just like racial gerrymandering, it commonly uses tactics such as "cracking," splitting a group of voters sharing a common characteristic into multiple voting districts; and "packing," placing a group of voters into a single district, to divide and isolate the political strength of the minority party.<sup>73</sup> Unlike racial gerrymandering, however, partisan gerrymandering "is a relative newcomer as a constitutional wrong," despite being in practice since nearly the inception of the United States.<sup>74</sup> An important distinction to be made in

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66. *Id.* at 633.

67. *Id.* at 650.

68. 515 U.S. 900 (1995).

69. *Id.* at 916.

70. 517 U.S. 952 (1996). The *Vera* Court specified that in cases where race is used as a proxy for political characteristics, strict scrutiny remains the applicable standard. *Id.* at 969, 972. See also *Cooper v. Harris*, 581 U.S. 285 (2017) (holding partisanship cannot be used to justify a racial gerrymander).

71. See 575 U.S. 254, 275 (2015) (holding section 5 of the VRA "requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice").

72. Eisler, *supra* note 13 and accompanying text.

73. Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 12, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [<https://perma.cc/6G6M-34VW>].

74. See Eisler, *supra* note 13, at 987; see also BULLOCK, *supra* note 29, at 128 ("That a

analyzing partisan gerrymandering claims is the difference between political intent and *invidious* partisan intent. Political intent takes the form of drawing district lines in order to allocate seats proportionally to major political parties.<sup>75</sup> As the Court stated in *Gaffney v. Cummings*: “The very essence of districting is to produce a different—a more ‘politically fair’—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment.”<sup>76</sup> The Court has, more than once, upheld redistricting plans that apportion legislative seats in rough proportion to statewide voting preferences.<sup>77</sup> As in racial gerrymandering cases, however, invidious or suppressive partisan intent to “burden, disfavor, or punish citizens because of their political preferences,” is invalid.<sup>78</sup>

While the Supreme Court had addressed partisan considerations such as political vote dilution and treated such considerations the same as racial considerations for many years,<sup>79</sup> it did not substantively address the partisan gerrymandering until *Davis v. Bandemer* in 1986.<sup>80</sup> In *Bandemer*, Indiana Democrats challenged the redistricting plans for the state assembly under the Equal Protection Clause.<sup>81</sup> Noting the purely political nature of this equal protection claim, a plurality of the Court ultimately held that partisan gerrymandering is a justiciable issue for federal courts and that such claims could be brought under the Equal Protection Clause:

As *Gaffney* demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability. That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case.<sup>82</sup>

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party would take advantage of its opponent in the course of redistricting seemed so obvious that it contributed to the Supreme Court’s refusal to consider a 1940s challenge to the malapportioned Illinois congressional delegation.”).

75. G. Michael Parsons, *The Institutional Case for Partisan Gerrymandering Claims*, 2017 CARDOZO L. REV. DE NOVO 155, 160–61.

76. 412 U.S. 735, 753 (1973). The Court later noted that while it did address a “purely political equal protection claim” in *Gaffney*, it did not expressly hold that such a claim is justiciable. *Davis v. Bandemer*, 478 U.S. 109, 119 (1986).

77. See *Gaffney*, 412 U.S. at 754; *Easley v. Cromartie*, 532 U.S. 234 (2001).

78. Parsons, *supra* note 75, at 163.

79. See Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional*, 24 WM. & MARY BILL OF RTS. J. 1107, 1123 & n.122 (2016).

80. Eisler, *supra* note 13, at 987 & n.37 (“While *Bandemer* did not weave the idea that discriminatory politicized districting was illegal out of thin air, none of the prior cases provided detailed guidance on how districting on the basis of party affiliation should be managed.”); 478 U.S. 109.

81. See 478 U.S. at 113–18.

82. *Id.* at 122–25.

The Court also held that a showing of discriminatory vote dilution was required for a *prima facie* challenge under equal protection.<sup>83</sup>

While the *Bandemer* plurality may have expressly ruled partisan gerrymandering claims justiciable in federal courts, it created a standard that was nearly impossible to meet. By stating that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or group of voters’ influence on the political process as a whole,”<sup>84</sup> the standard to find a partisan gerrymander was so high that, for almost twenty years, no claims succeeded under this test.<sup>85</sup> The *Bandemer* test was so unworkable that the Supreme Court abandoned it in 2004.<sup>86</sup> In *Veith v. Jubelirer*, four of the five majority justices believed that not only should the *Bandemer* test be abandoned, but that partisan gerrymandering claims are altogether nonjusticiable and should be excluded from federal courts under the political question doctrine.<sup>87</sup>

Justice Kennedy, the fifth justice in the *Veith* majority, refused to rule partisan gerrymandering claims nonjusticiable.<sup>88</sup> Despite concerns over the lack of comprehensive and neutral principles to draw districts and rules limiting judicial intervention,<sup>89</sup> Justice Kennedy believed partisan gerrymandering claims could potentially be brought under the First Amendment.<sup>90</sup> Justice Kennedy also stated that an alleged gerrymander must be based on more than a political classification to be unlawful, it must “rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.”<sup>91</sup> Thus, while the *Veith* court struck down the *Bandemer* test, it failed to reach a majority regarding justiciability and did not replace the test with a more workable alternative.

Partisan gerrymandering claims survived, in theory, for fifteen more years before receiving a justiciability death blow in *Rucho v. Common Cause*.<sup>92</sup> The five-vote majority, authored by Chief Justice Roberts, stated that “[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their [actions].”<sup>93</sup> The majority opinion notes that partisan gerrymandering claims rely primarily on the minority party’s inability to translate statewide support

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83. *Id.* at 143 (reversing the district court’s judgment as appellees did not meet this threshold requirement).

84. *Id.* at 132.

85. Parsons, *supra* note 79, at 1126; *see also* Kang, *supra* note 14, at 1415 (“[N]o trial court for almost twenty years ultimately found that a partisan gerrymander shut a party out of the political process.”).

86. *See Veith v. Jubelirer*, 541 U.S. 267, 288 (2004) (“Even if the [*Bandemer*] standard were relevant, however, it is not judicially manageable.”).

87. *See id.* at 306.

88. *Id.* at 314 (Kennedy, J., concurring in the judgment).

89. *Id.* at 306–07. (Kennedy, J., concurring in the judgment).

90. *Id.* at 314 (Kennedy, J., concurring in the judgment).

91. *Id.* at 307 (Kennedy, J., concurring in the judgment).

92. 139 S. Ct. 2484 (2019) (challenging redistricting plans in North Carolina and Maryland as partisan gerrymanders).

93. *Id.* at 2507.

into legislative seats, but that no such expectation exists in the federal electoral system.<sup>94</sup> Furthermore, there is no constitutional requirement for proportional representation nor is there a requirement that seats be allocated in proportion to statewide voting preferences.<sup>95</sup> Similar to the proportionality claims, the majority rejects the application of “one-person, one-vote” cases in the partisan gerrymandering context: “[The] requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters.”<sup>96</sup> While this holding stated that one-person, one-vote protections do not extend to political parties, the *Gill* decision (which *Rucho* did not explicitly overrule) established that a claimant can establish standing on a vote dilution theory by showing that he or she lives in a cracked or packed district.<sup>97</sup>

Not only was the majority unable to find a constitutional grant of authority, but it also could not create a precise standard to judge the fairness of a redistricting plan. After pondering several possible definitions of a fair apportionment plan, Justice Roberts concluded: “There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.”<sup>98</sup> The majority opinion goes on to state that, without a clear standard, federal courts cannot begin to determine at what point permissible partisanship in redistricting becomes unconstitutional.<sup>99</sup> Without a constitutional mandate or any clear derivative standard, the majority ultimately held that partisan gerrymandering claims are beyond the expertise of federal courts and are nonjusticiable.<sup>100</sup>

Justice Kagan, however, vehemently disagreed with the majority’s position, believing that a proper standard did exist and that partisan gerrymandering cases were well within the reach of federal courts.<sup>101</sup> Contrary to the majority’s position that one-person, one-vote cases are inapplicable in the partisan gerrymandering context, Justice Kagan does not distinguish between districts cracked or packed on racial motivations from those cracked or packed on political motivations.<sup>102</sup> Justice Kagan also dismisses the majority’s concerns over a proper understanding of what a “fair” apportionment bill would look like.<sup>103</sup> Justice Kagan points out that, contrary

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94. *Id.* at 2499.

95. *Id.* (citing *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O’Connor, J., dissenting)).

96. *Id.* at 2501.

97. *See Gill*, 138 U.S. 1916 (2018).

98. *Rucho*, 139 S. Ct. at 2500.

99. *Id.* at 2501. “A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent ‘predominates.’” *Id.* at 2503.

100. *Id.* at 2506–07.

101. *See id.* at 2522 (Kagan, J., dissenting).

102. *Id.* at 2514 (Kagan, J., dissenting) (“The constitutional injury in a partisan gerrymandering case is much the same, except that dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens’ votes, and thereby deprive them of their capacity to ‘full[y] and effective[ly] participate[e] in the political process[.]’” (alterations in original)). Justice Kagan also writes that partisan gerrymandering implicates the First Amendment, as voters’ efforts to translate association into political representation would be frustrated. *Id.*

103. *Id.* at 2520 (Kagan, J. dissenting).

to the majority's suggestions, the lower courts that weighed the effects of the North Carolina and Maryland apportionments at issue did not try to create an ideally fair district map.<sup>104</sup> Instead, they compared the maps the states passed against those they could have passed in the absence of partisan intent.<sup>105</sup> This comparison fit into the second step of the three-part test used by both district courts and indeed endorsed by Justice Kagan. In the first prong, intent, the plaintiffs must prove that district maps were drawn with the predominate intent to entrench the majority and dilute the votes of political rivals.<sup>106</sup> In the second prong, effect, the plaintiffs must establish that the lines drawn did in fact substantially dilute their votes.<sup>107</sup> If the plaintiffs can make both showings, the burden then shifts to the state in the third prong, causation, whereby the map can be saved only if there is a legitimate, non-partisan justification.<sup>108</sup> Justice Kagan states that there is no reason to doubt the federal judiciary's ability to make judgments following this standard three-part test.<sup>109</sup> In fact, in the years leading up to *Rucho v. Common Cause*, plaintiffs had successfully beaten back partisan gerrymanders in congressional redistricting in North Carolina and Ohio and both congressional and state legislative plans in Michigan.<sup>110</sup>

Nevertheless, the *Rucho* majority ruled that partisan gerrymandering is beyond the federal courts and instead punted the issue to the states.<sup>111</sup> As Justice Roberts noted, prior to *Rucho*, states were already instituting redistricting reforms.<sup>112</sup> In 2010, only eight states had some form of regulations to protect against overly partisan outcomes in redistricting.<sup>113</sup> Now, nineteen states have some sort of constitutional provision(s) that speak directly to preventing overly partisan outcomes.<sup>114</sup>

## II. OHIO'S REDISTRICTING REFORM AND RELAPSE

Recognizing the difficulties federal courts were facing in dealing with partisan gerrymandering cases, numerous states have instituted various constitutional restrictions on the use of politics in redistricting decisions. Thirteen states have constitutional provisions prohibiting state legislative district lines from being drawn to favor or disfavor incumbents; twelve states have the same prohibition for

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104. *Id.*

105. *Id.* At the North Carolina map's trial, one expert, on behalf of the plaintiffs, produced 3000 potential maps drawn without partisan intent, and compared the variations between the partisan-free maps and those North Carolina actually accepted. *Id.* at 2518.

106. *Id.* at 2516–17.

107. *Id.* at 2517.

108. *Id.* at 2516.

109. *Id.* at 2522. Unlike the majority, Justice Kagan believes federal courts are able to not only conduct purpose inquiries, as is common in other Equal Protection contexts like *Miller v. Washington* and *Washington v. Davis*, but that they can also determine whether a map "substantially dilutes" the minority party's votes. *Id.*

110. BULLOCK, *supra* note 29, at 151.

111. *Rucho*, 139 S. Ct. at 2507–08.

112. *Id.* Chief Justice Roberts discusses state constitutional reforms and judicial solutions in Florida, Colorado, Michigan, Missouri, Iowa, and Delaware. *Id.*

113. Loyola L. Sch., *supra* note 2.

114. *Id.*

congressional district lines.<sup>115</sup> Nineteen states regulate partisan outcomes in state legislative redistricting and seventeen do the same for congressional redistricting.<sup>116</sup> Ohio is one of the states to currently have such protections written into its constitution.<sup>117</sup>

Prior to 2015, the Ohio General Assembly district boundaries were drawn by a five-person redistricting commission consisting of the governor, state auditor, secretary of state, and two members selected by leaders of the two major parties.<sup>118</sup> To be clear, this was not a bipartisan commission. In fact, Republicans held four of the five seats during the 2011 redistricting cycle.<sup>119</sup> In 2011, the Ohio Supreme Court faced a similar conundrum—at least as Chief Justice Roberts would see it—as the U.S. Supreme Court later would in *Rucho*.<sup>120</sup> In *Wilson v. Kasich*, a case challenging the constitutionality of General Assembly maps on the basis of partisan gerrymandering, the Ohio Supreme Court held that nothing in the Ohio Constitution required political neutrality, competitive districts, or representational fairness when apportioning state legislative districts.<sup>121</sup> Section A will discuss the Ohio constitutional reforms that currently govern the state legislative redistricting process, while Section B will review the litigation subsequent to the 2021 redistricting process.

#### *A. Issue 1: The Move Toward Bipartisan Redistricting*

After thirty years of frustrating failures to institute redistricting reform,<sup>122</sup> Ohioians managed to insert protections into its constitution via ballot initiative in 2015. The 2015 statewide ballot included the Ohio Bipartisan Redistricting Amendment (“Issue 1”). A legislatively referred constitutional amendment (amending Article XI), Issue 1 sought to “[e]nd the partisan process for drawing [General Assembly] districts, and replace it with a bipartisan process,” by creating a new bipartisan redistricting commission, requiring greater minority party support,

115. *Redistricting Criteria*, NAT’L CONF. OF STATE LEGISLATORS (July 16, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-criteria> [<https://perma.cc/H68E-8W75>].

116. *Id.* The Michigan Constitution provides “[d]istricts shall not provide a disproportionate advantage to any political party.” MICH. CONST. art. IV, § 6(13)(d). The Missouri Constitution goes a step further and prescribes that district be drawn to achieve both “partisan fairness and, secondarily, competitiveness.” MO. CONST. art. III, § 3(b)(5).

117. *See infra* Section II.A.

118. *Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015)*, BALLOTPEdia, [https://ballotpedia.org/Ohio\\_Bipartisan\\_Redistricting\\_Commission\\_Amendment\\_Issue\\_1\\_\(2015\)](https://ballotpedia.org/Ohio_Bipartisan_Redistricting_Commission_Amendment_Issue_1_(2015)) [<https://perma.cc/D4YP-GX6T>].

119. *See id.* In 2011, four of the five commission members were Republican. *Id.*

120. *See Wilson v. Kasich*, 981 N.E.2d 814 (Ohio 2012); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986)) (“Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation . . .”).

121. 981 N.E.2d 814, 820 (Ohio 2012).

122. *See* BALLOTPEdia, *supra* note 118 (showing failed citizen initiatives for redistricting reforms in 1981, 2005, and 2012).

and greater transparency in the redistricting process.<sup>123</sup> The Issue passed with widespread support, 71.47% to 28.53%.<sup>124</sup>

The amended Article XI of the Ohio Constitution reflects the changes instituted by Issue 1. The new bipartisan redistricting commission consists of seven individuals: the governor, state auditor, secretary of state, one person appointed by the speaker of the house, one person appointed by the legislative leader of the largest party in the house of which the speaker is not a member, one person appointed by the president of the senate, and one person appointed by the legislative leader of the largest party in the senate of which the president of the senate is not a member.<sup>125</sup> Put more simply, the redistricting commission consists of the governor, state auditor, secretary of state, one person from the majority party in each chamber of the General Assembly, and one person from the minority party in each chamber. This makes Ohio one of seven states that draw state legislative districts by a “politician commission.”<sup>126</sup> To approve an apportionment plan, four members of the Commission, including two members from the minority party, must vote in the affirmative.<sup>127</sup> However, if the Commission fails to adopt an apportionment plan before September 1 of a year ending in the numeral one (2001, 2011, 2021, etc.), the Commission can adopt a proposed plan with only a simple majority vote.<sup>128</sup> A plan adopted by a simple majority, however, is only effective for four years.<sup>129</sup>

The amended Article XI has numerous requirements for redistricting. First are several *mandatory* requirements the Ohio Redistricting Commission must adhere to: contiguity,<sup>130</sup> preservation of political subdivisions,<sup>131</sup> substantially equal population,<sup>132</sup> and single-member districts.<sup>133</sup> The amended Article XI also includes several requirements that the Ohio Redistricting Commission “shall attempt” to meet.<sup>134</sup> First, Article XI, section 6(A) enumerates that “[n]o general assembly

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123. *Id.* For more information on the amendment process at hand, see Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281 (2016).

124. BALLOTPEdia, *supra* note 118.

125. OHIO CONST. art. XI, § 1(A).

126. Loyola L. Sch., *supra* note 2 (defining a politician commission as one where elected officials serve as members). Hawaii, New Jersey, and Virginia are the only states that use politician commissions for congressional apportionment. *Id.*

127. OHIO CONST. art. XI, § 1(B)(3).

128. *Id.* § 8(A)(1). After a proposed plan is submitted and after a simple majority vote, a public hearing occurs where the public can offer testimony and the Commission can offer amendments before the plan becomes final. *Id.* § 8(A)(2)–(3).

129. *Id.* § 8(C)(1)(a). The Ohio Constitution specifically provides a plan passed by simple majority “shall remain effective until two general elections for the house of representatives have occurred under the plan,” which would be four years. *Id.*

130. *Id.* § 3(B)(3).

131. *Id.* § 7.

132. *Id.* § 3 (“The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, and the population of each senate district shall be substantially equal to the ratio of representation in the senate.”).

133. *Id.* § 2 (“Each house of representatives district shall be entitled to a single representative in each general assembly. Each senate district shall be entitled to a single senator in each general assembly.”).

134. *Id.* § 6.



district plan shall be drawn primarily to favor or disfavor a political party,”<sup>135</sup> directly addressing the central holding in *Wilson v. Kasich*. Second, section 6(B) enumerates that “[t]he statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.”<sup>136</sup> And third, “General assembly districts shall be compact.”<sup>137</sup>

The Ohio Supreme Court maintains “exclusive, original jurisdiction in all cases” challenging an apportionment plan.<sup>138</sup> Article XI, section 9(B), provides that if “any general assembly district plan made by the Ohio redistricting commission . . . is determined to be invalid,” the Commission shall convene to draw a new apportionment plan effective until the next round of redistricting.<sup>139</sup> Separately, the Ohio Constitution provides that if a redistricting proposal “does not comply with the requirements of section 2, 3, 4, 5, or 7” of Article XI, then it can order either amendment of the proposal<sup>140</sup> or order the Commission to draft a new proposal altogether.<sup>141</sup> When considering an apportionment plan adopted by a simple majority of the Commission, the Ohio Supreme Court “shall order” the Commission to adopt a new plan if two conditions are met. First, if the proposed plan “violates those requirements in a manner that materially affects the ability of the plan to contain districts whose voters favor political parties in an overall proportion that corresponds closely to the statewide political party preferences of the voters.”<sup>142</sup> And second, if the statewide proportion mandated in section 6(B) does not closely correspond to statewide voting preferences.<sup>143</sup> The nationwide redistricting that took place following the 2020 census was the first—and second, third, fourth, and fifth—time the Ohio Supreme Court was called upon to interpret and apply these new provisions.<sup>144</sup>

### *B. Issue 1 Comes off the Bench*

The Ohio Redistricting Commission released the first proposed apportionment plan on September 16, 2021.<sup>145</sup> As this occurred after the September 1 deadline

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135. *Id.* § 6(A).

136. *Id.* § 6(B).

137. *Id.* § 6(C).

138. *Id.* § 9(A).

139. *Id.* § 9(B).

140. *Id.* § 9(D)(3)(a) (“If the court finds that the plan contains one or more isolated violations of those requirements, the court shall order the commission to amend the plan to correct the violation.”).

141. *Id.* § 9(D)(3)(b) (stating a new proposal is necessary where six or more House districts, two or more Senate districts, or both, must be amended).

142. *Id.* § 9(D)(3)(c).

143. *Id.*

144. *See infra* Section II.B.

145. Jackie Borchartt, *Ohio Redistricting Plan Approves 4-year Statehouse District Maps*, *See the Maps Here*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/politics/2021/09/16/ohio-redistricting-commission-statehouse-maps-good-four-years/8360843002/> [<https://perma.cc/4SUT-WZBA>] (Sept. 16, 2021, 11:28 AM). The Commission is currently occupied by five Republicans and two

mandated by section 8(A), only a simple majority vote was required. The proposed plan was approved by the Commission in a five-to-two vote, along party lines.<sup>146</sup> The Republican commission members explained that in the previous ten years, Republicans had won thirteen of sixteen statewide contests (81% of contests) and that the proportion of statewide votes favoring Republicans to Democrats was 55% to 45%.<sup>147</sup> The Republican commission members thus reasoned that voter preferences for Republicans are between 55% and 81%, with the first proposed plan consisting of 65.9% of districts favoring Republicans and 34.1% favoring Democrats.<sup>148</sup> These maps would have given Ohio Republicans a veto-proof majority in the General Assembly.<sup>149</sup> Not long after the first proposal was approved, the League of Women Voters of Ohio filed a lawsuit under Article XI of the Ohio Constitution alleging violations of sections 6(A) and 6(B).<sup>150</sup>

The Ohio Supreme Court weighed the constitutionality of this proposed apportionment plan in *League of Women Voters of Ohio v. Ohio Redistricting Commission* (“*League P*”).<sup>151</sup> In *League I*, a four-to-three majority of the Ohio Supreme Court struck down the first proposed plan as a partisan gerrymander because the Commission did not attempt to comply with the section 6(A) requirements on partisan intent,<sup>152</sup> and because the plan did not closely correspond to statewide voter preferences.<sup>153</sup> In analyzing the section 6(A) violation, the court focused on the Commission’s map-drawing process, finding that the process was controlled entirely by Republican members of the Commission, that the legislative caucuses of the two parties drew the maps as opposed to the Commission itself, and that the “partisan skew” of the proposed maps cannot be explained by nondiscriminatory factors.<sup>154</sup>

Looking at the section 6(B) violation, the court criticized the Republican Commission members for using the proportion of statewide offices won over the last

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Democrats.

146. *Id.*

147. *Ohio GOP Redistricting Statement-Statehouse Maps*, SCRIBD, <https://www.scribd.com/document/525661036/Ohio-GOP-Redistricting-Statement-Statehouse-maps> [<https://perma.cc/XS7G-N89A>].

148. *Id.*

149. Borchardt, *supra* note 145. Senate President Matt Huffman stated the proposed maps would likely give Republicans a sixty-two to thirty-seven advantage in the House and a twenty-three to ten advantage in the Senate. *Id.*

150. Complaint at 4, *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 192 N.E.3d 379 (2022) (No. 2021-1193). An affidavit accompanying the complaint found that Democrats are likely to get 13–14% fewer Senate seats than their share of votes would reflect and 12–13% fewer House seats. See Warshaw Affidavit, *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 192 N.E.3d 379 (Ohio 2022) (No. 2021-1193).

151. 192 N.E.3d 379 (Ohio 2022).

152. *Id.* at 413.

153. *Id.* at 409.

154. *Id.* at 410–12. The “partisan skew” measure, referred to later as “seat-share,” is the measure of seats a party is expected to win if it obtains a certain percentage of votes in an election. *Id.* One expert’s analysis in *League I* showed that if Republicans obtained 54% of statewide votes, they would receive 64% of House seats. *Id.*

decade rather than votes cast for each party.<sup>155</sup> Most importantly, the court determined that voter preferences from the last decade demonstrated a 54–46% split in favor of Republicans and that the Commission failed to come close enough to this proportion.<sup>156</sup> The Ohio Supreme Court ordered the Commission back to the drawing board, and so began a battle between the Ohio Supreme Court and the Commission that Justice Kennedy compared to the movie *Groundhog Day*.<sup>157</sup>

The Ohio Supreme Court would go on to strike down three more redistricting proposals, all by the same four-to-three vote as *League I*.<sup>158</sup> The *League II*, *League III*, and *League IV* maps were all declared invalid for nearly identical reasons. The Ohio Supreme Court looked to the map-drawing process and found section 6(A) violations through, among other pieces of circumstantial evidence, the use of revised plans instead of entirely new drafts,<sup>159</sup> the lack of Democrat participation in the map-drawing process,<sup>160</sup> and the possibility of more proportional maps drawn by independent mapmakers.<sup>161</sup>

The court also conflated the section 6(A) and 6(B) analyses by looking at the proportionality and statistical makeup of proposed plans. The *League II* maps were struck down, in part, because the maps failed to comply with the mandated 54–46% split.<sup>162</sup> The *League III* and *IV* maps, however, were struck down despite achieving strictly proportional representation.<sup>163</sup> The court struck down these maps in large part because of the existence of competitive, Democratic-leaning districts—those voting Democrat between 50 and 52%—limits a plan’s proportionality and thus must be excluded since they only slightly lean Democrat.<sup>164</sup> The court reasoned these competitive districts contribute to an unconstitutional “partisan asymmetry” that contributes both to improper partisan intent and a lack of true proportionality.<sup>165</sup>

Partisan symmetry measures the number of legislative seats each party would receive in a hypothetical, evenly tied election. If the share of seats received by one party in the hypothetical tie is greater than 50%, then it reflects a favorable bias

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155. *Id.* at 408.

156. *Id.*

157. *League of Women Voters of Ohio v. Ohio Redistricting Comm’n (League IV)*, 199 N.E.3d 485, 510 (Ohio 2022) (Kennedy, J., dissenting).

158. *League of Women Voters of Ohio v. Ohio Redistricting Comm’n (League II)*, 195 N.E.3d 974 (Ohio 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n (League III)*, 198 N.E.3d 812 (Ohio 2022); *League IV*, 199 N.E.3d 485.

159. *League II*, 195 N.E.3d at 985–87; *League IV*, 199 N.E.3d at 497–99.

160. *League IV*, 199 N.E.3d at 499.

161. *League II*, 195 N.E.3d at 988 (discussing how the existence of more proportional maps was probative evidence used to find section 6(A) violations in *League I* and *II*).

162. *Id.* at 990.

163. *League III*, 198 N.E.3d at 820–23; *League IV*, 199 N.E.3d at 393–94; *see also* Andrew J. Tobias, *Ohio Supreme Court Rejects Republicans’ Fourth Set of State Legislative Maps*, CLEVELAND.COM (Apr. 14, 2022, 4:21 PM), <https://www.cleveland.com/news/2022/04/ohio-supreme-court-rejects-republicans-fourth-set-of-state-legislative-maps.html> [<https://perma.cc/9YAA-75X3>].

164. *E.g.*, *League II*, 195 N.E.3d at 992 (“But competitive districts . . . must either be excluded from the proportionality assessment or be allocated to each party in close proportion to its statewide vote share.”).

165. *Id.* at 987–89; *League III*, 198 N.E.3d at 822–23, 826 n.8.

toward that party.<sup>166</sup> The use of partisan symmetry, however, has been critiqued because it requires that votes be “shifted” in order to create this hypothetical tie, detaching the metric somewhat from reality.<sup>167</sup> Nevertheless, the Ohio Supreme Court repeatedly used the existence of partisan asymmetry to find violations of both section 6(A) and 6(B) and subsequently forced the Commission to make adjustments to create both symmetrical *and* proportional plans.<sup>168</sup>

Following the rejection of the fourth set of maps in *League IV*, in a serious blow to the 2015 constitutional reforms, a panel of three federal judges ruled that they would step in if the Ohio Redistricting Commission and Ohio Supreme Court could not institute constitutional maps by May 28.<sup>169</sup> In a two-to-one vote, the panel chose to institute the maps rejected in *League III* if the state entities could not find a solution, stating these maps are “the best of our bad options.”<sup>170</sup> This decision was heavily criticized because it created little incentive for the Republican members of the Commission to draw new, constitutional maps.<sup>171</sup> The critics were right, as the Commission resubmitted the already-rejected *League III* maps rather than drawing new ones, and the Ohio Supreme Court rejected them yet again.<sup>172</sup> Shortly after, the federal panel ordered Ohio Secretary of State Frank LaRose to use the *League III* maps for the 2022 election only.<sup>173</sup> This means, following the 2022 election, the Ohio Redistricting Commission and Ohio Supreme Court will have to go through this process all over again.

### III. STANDARDS FOR PARTISAN GERRYMANDERING

All five *League* decisions resulted in a deeply divided court. The four-to-three decisions were split almost down party lines, except for Chief Justice Maureen O’Connor joining the three liberal justices in each of the majority opinions.<sup>174</sup> The

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166. *Partisan Bias*, PLANSCORE, <https://planscore.campaignlegal.org/metrics/partisanbias/> [<https://perma.cc/8SPU-WDD7>].

167. Nicolas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2015).

168. *League III*, 198 N.E.3d at 816 n.4, 822–23 (describing the use of partisan symmetry in both *League II* and *League III*); *League IV*, 199 N.E.3d at 501–03 (describing the Commissions efforts to achieve greater partisan symmetry and revise the number of competitive Democrat-leaning districts).

169. Jessie Balmert, *Federal Judges to Pick Maps Rejected by Ohio Supreme Court if Redistricting Leaders Don’t Act*, CINCINNATI ENQUIRER (Apr. 20, 2022, 7:06 PM), <https://www.cincinnati.com/story/news/politics/elections/2022/04/20/ohio-redistricting-federal-judges-could-pick-rejected-maps-may-28/7354517001/> [<https://perma.cc/M4EC-NYL8>].

170. *Gonidakis v. LaRose*, No. 2:22-cv-0773, 599 F. Supp. 3d 642, 678–79 (S.D. Ohio Apr. 20, 2022).

171. See Balmert, *supra* note 169.

172. *League of Women Voters of Ohio v. Ohio Redistricting Comm’n (League V)*, 199 N.E.3d 532 (Ohio 2022) (per curiam).

173. See *Gonidakis v. LaRose*, No. 2:22-cv-0773, 2022 U.S. Dist. LEXIS 95341, at \*4–6 (S.D. Ohio May 27, 2022).

174. See *League of Women Voters of Ohio v. Ohio Redistricting Comm’n (League I)*, 192 N.E.3d 379 (Ohio 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*

three consistent dissenters—Justices DeWine, Kennedy, and Fischer—raised both factual and legal objections. Their dissents first disputed whether the Ohio Supreme Court has jurisdiction to hear stand-alone section 6(A) and 6(B) violations in a four-year plan. They interpret article XI, section 9(D) to require a predicate violation of section 2, 3, 4, 5, or 7 before the court can reach an alleged section 6 violation.<sup>175</sup> In contrast, the majority interprets section 9(A) and 9(B) as providing broad authority to “invalidate ‘any general assembly district plan,’” adding that section 8(C)—the section that declares a plan adopted by a simple majority only lasts four years—does not limit the court’s jurisdiction.<sup>176</sup> This Note takes a middle-ground approach to adjudicating alleged partisan gerrymanders, whereby the Court maintains the stand-alone jurisdiction over section 6(A) and 6(B) claims it repeatedly reaffirmed in the *League* decisions, but narrows and refines the tools it uses to judge the merits of such claims to strike down an entire apportionment plan.

The dissenting opinions also disputed the majority’s characterization of what constitutes an “attempt” to satisfy section 6(A)<sup>177</sup> and in interpreting “competing evidence” of whether the Commission was acting primarily to favor or disfavor a political party. Justices Kennedy and DeWine, for example, believe that the majority wrongly derived improper intent from the Commission’s drawing of competitive districts.<sup>178</sup> Justices Kennedy, DeWine, and Fischer also object to the exclusion of competitive districts from the section 6(B) proportionality analysis and the use of partisan symmetry in addition to proportionality.<sup>179</sup>

Before discussing possible changes to the Ohio Supreme Court’s analysis, this Part will outline three approaches used by different federal and state courts and discuss their strengths and weaknesses in order to provide context for the changes proposed in Part IV. Section A will discuss the race-based sorting analysis used by federal courts. Section B will discuss North Carolina’s use of statistical metrics. Section C will discuss Florida’s intent-only based approach to alleged gerrymanders.

### A. Federal Gerrymandering and Race-Based Sorting

Prior to the doctrinal divergence of racial and partisan gerrymandering claims, both scholars and the U.S. Supreme Court understood that the same test used for

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(*League II*), 195 N.E.3d 974 (Ohio 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n (League III)*, 198 N.E.3d 812 (Ohio 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n (League IV)*, 199 N.E.3d 485, 497–99 (Ohio 2022) (per curiam); *League V*, 199 N.E.3d at 532.

175. *League II*, 195 N.E.3d at 974, 999–1000 (Kennedy, J., dissenting).

176. *League I*, 192 N.E.3d at 379, 398 (quoting OHIO CONST. art. XI, § 9(B)); see *League II*, 195 N.E.3d at 985 (explaining section 9(B) gives the court the power to invalidate an entire plan without a predicate violation).

177. Compare *id.* at 403 (construing attempt to mean section 6 must be met unless it runs afoul of mandatory requirements of Article XI, sections 2, 3, 4, 5, and 7), with *id.* at 442 (Kennedy, J., dissenting) (disagreeing with the majority by saying the plain meaning of “attempt” means only to make an effort, not a requirement to succeed in that effort).

178. See *League II*, 195 N.E.3d at 1002–03 (Kennedy, J. & DeWine, J., dissenting); *League III*, 198 N.E.3d 812 at 837–38 (Kennedy, J. & DeWine, J., dissenting).

179. See, e.g., *League IV*, 199 N.E.3d at 522 (DeWine, J., dissenting).

racial gerrymandering may aptly be applied to partisan gerrymanders. As Michael Parsons noted, until *Davis v. Bandemer*, the Court accepted that the standard “intent-plus-effect” intentional vote dilution test equally applied to both racial and partisan gerrymanders.<sup>180</sup> While this diversion, beginning with *Davis v. Bandemer*, ultimately led to the alleged disintegration of a workable test for partisan gerrymandering<sup>181</sup> and the death of its justiciability, the racial gerrymandering intent-plus-effect analysis has some merit for partisan gerrymandering cases.

Justice Kagan’s majority opinion in *Cooper v. Harris* clearly and efficiently outlines the current form of the Supreme Court’s approach to racial gerrymandering.<sup>182</sup> “First, the plaintiff must prove that ‘race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.’”<sup>183</sup> “Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny.”<sup>184</sup> Third, “[t]he burden thus shifts to the State to prove that its race-based sorting”<sup>185</sup> was narrowly tailored to serve a “compelling interest.”<sup>186</sup> Compliance with section 2’s prohibition on minority vote dilution is considered a compelling state interest.<sup>187</sup> If the state raises compliance with section 2, the analysis then shifts to the three factors enumerated in *Thornburg v. Gingles*.<sup>188</sup> First, that the “‘minority group’ [is] ‘sufficiently large and geographically compact . . . .’”<sup>189</sup> Second, that “‘the minority group [is] ‘politically cohesive.’”<sup>190</sup> Third, that the majority is politically cohesive enough to “defeat the minority’s preferred candidates.”<sup>191</sup> This two stage analysis—plaintiffs needing to show the use of race-based sorting followed by needing to show the avoidance of voter dilution by the state—could at least in part be used to adjudicate partisan gerrymandering claims as well.

Applied to partisan gerrymandering, the first part of this analysis would look nearly identical to the racial gerrymandering used in *Cooper v. Harris*.<sup>192</sup> The first question a court would need to address would be whether partisanship was the predominant factor motivating the legislature’s decision to place a significant number of voters into a congressional or legislative district. The first part of this analysis fits within the same equal protection violation committed by race-based sorting. In racial gerrymandering cases, “the constitutional offense was in the

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180. Parsons, *supra* note 79, at 1123–24; 478 U.S. 109 (1986).

181. 478 U.S. 109 (1986); *see supra* Section I.C.

182. 581 U.S. 285 (2017).

183. *Id.* at 291 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

184. *Id.* at 292.

185. *Id.*

186. *Id.* (quoting *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788, 800 (2017)).

187. *Id.* at 301 (“[W]e have long assumed that complying with the VRA is a compelling interest.”).

188. *Id.* at 301–03 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)). Once the Court determines the three *Gingles* factors are met, then the state is permitted under section 2 of the VRA to draw a majority-minority district. *Id.*

189. *Id.* at 301 (quoting *Gingles*, 478 U.S. at 50).

190. *Id.* at 301–02 (quoting *Gingles*, 478 U.S. at 51).

191. *Id.* at 302 (quoting *Gingles*, 478 U.S. at 51).

192. *Id.*

predominant and facially evident use of [racial classification].”<sup>193</sup> In partisan gerrymandering, the constitutional offense is the vote dilution caused by the political classification of voters.<sup>194</sup> While political affiliation lacks the suspect classification that the immutable characteristic of race receives under the Equal Protection Clause, the proper question here is if, like racial consideration, partisanship *predominates* the redistricting process and subserviates traditional redistricting considerations such as contiguity, political boundaries, and compactness. In *Cooper v. Harris*, the predominance of racial considerations was shown, in part, by statements made by state legislators and directions establishing clear racial targets.<sup>195</sup> Likewise, with partisan gerrymandering allegations, the predominance of partisan considerations can be shown by legislator statements and documents relating to the redistricting process.<sup>196</sup> Thus, the type of evidence used to prove a racial gerrymander can also be used by courts to find a partisan gerrymander.

The principal difficulty with adopting this approach, however, is the inherent difference between racial and political considerations in redistricting. First, while racial gerrymandering is inherently suspect and racial discrimination in redistricting is automatically unconstitutional,<sup>197</sup> political considerations are regarded by a majority of the Supreme Court as inseparable from the redistricting process.<sup>198</sup> Thus, as the Court has repeatedly stated, the question becomes how much partisan intent is too much.<sup>199</sup> As Chief Justice Roberts wrote in the *Rucho* majority: “A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent ‘predominates.’”<sup>200</sup> Of course, even the *Rucho* Court disagreed as to the level of constitutional harm partisan gerrymandering creates.<sup>201</sup> Irrespective of the Supreme Court’s disagreement on how to address partisan gerrymandering, the fact remains that partisan intent can predominate for partisan and bipartisan purposes,<sup>202</sup> making it more difficult for courts to sort out whether predominance is truly improper.

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193. Parsons, *supra* note 79, at 1151.

194. See Emmet J. Bondurant, *Rucho v. Common Cause—a Critique*, 70 EMORY L.J. 1049, 1059–60 (2021).

195. See 581 U.S. at 300 (“Similarly, [Representative] Lewis informed the House and Senate redistricting committees that the district must have ‘a majority black voting age population.’ And that objective was communicated in no uncertain terms to the legislators’ consultant.”).

196. See *infra* Section III.C.

197. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019) (“[I]t is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting . . . .”) (citation omitted).

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

199. See *id.* at 754; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 418 (2006) (explaining that just as race can be a factor, but not dictate the outcome of, redistricting, so to can partisanship so long as it does not predominate).

200. *Rucho*, 139 S. Ct. at 2503.

201. See *id.* at 2514–15 (Kagan, J., dissenting) (“Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering . . . violates the Constitution.”).

202. See Parsons, *supra* note 79, at 1143 (describing how bipartisan efforts such as advancing competitive elections or proportional representation may, by necessity, require

*B. North Carolina: Equal Protection Plus*

Unlike Ohio and the roughly eighteen other states that have constitutional restrictions on partisan gerrymandering,<sup>203</sup> North Carolina has no specific constitutional prohibition against drawing district maps to favor or disfavor a political party.<sup>204</sup> Instead, North Carolina relies on a series of robust provisions in its constitution to restrict and strike down partisan gerrymanders; provisions that provide greater protections than the U.S. Constitution.<sup>205</sup> The first of these is the state's free elections clause.<sup>206</sup> The free elections clause has been interpreted to protect against partisan gerrymandering because redistricting plans that entrench political power and dilute votes are contrary to the fundamental rights of North Carolinians to have free and fair elections.<sup>207</sup> The second and third are North Carolina's freedom of assembly and freedom of speech clauses,<sup>208</sup> as voting under gerrymandered maps "unconstitutionally burdens speech where it renders disfavored speech *less effective*, even if it does not ban such speech outright."<sup>209</sup>

More important for partisan gerrymandering post-*Rucho* is North Carolina's equal protection analysis. The North Carolina equal protection clause protects "the fundamental right of each North Carolinian to substantially equal voting power,"<sup>210</sup> and holds that the classification of voters based on partisanship to pack or crack them into districts denies them this equal voting power.<sup>211</sup> While the North Carolina equal protection clause provides greater protection from partisan gerrymanders through broader interpretations of state constitutional provisions, compared to the federal Equal Protection Clause,<sup>212</sup> North Carolina courts use the same three-step equal protection test: intent, effect, and causation.<sup>213</sup>

In the first step of this analysis, plaintiffs must show that the legislature's "predominant purpose in drawing district lines was 'to entrench [their] party's political power' by diluting the votes of citizens favoring their rival[s]."<sup>214</sup> In

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some level of partisan gerrymandering).

203. Loyola L. Sch. *supra* note 2.

204. See N.C. CONST. art. II, §§ 3, 5 (for state legislative redistricting); see also NAT'L CONF. OF STATE LEGISLATORS, *supra* note 115. Of course, the lack of constitutional provisions specifically combatting gerrymandering could be why "[f]or decades North Carolina's congressional maps have been ground zero for gerrymandering lawsuits." BULLOCK, *supra* note 29, at 135.

205. See *Common Cause v. Lewis*, 18 CVS 014001, 2019 N.C. Super. LEXIS 56 (Sept. 3, 2019).

206. N.C. CONST. art. I, § 10 ("All elections shall be free.").

207. *Lewis*, 2019 N.C. Super. LEXIS 56, at \*339.

208. N.C. CONST. art. I, §§ 12, 14.

209. *Lewis*, 2019 N.C. Super. LEXIS 56, at \*370.

210. *Stephenson v. Barlett*, 562 S.E.2d 377, 394 (N.C. 2002).

211. *Lewis*, 2019 N.C. Super. LEXIS 56, at \*354–56 (citing *Stephenson*, 562 S.E.2d at 394).

212. See *id.* at 346–350.

213. *Lewis*, 2019 N.C. Super. LEXIS 56, at \*349 ("[O]ur courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis.").

214. *Id.* (quoting *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787,



*Common Cause v. Lewis*, the Wake County Superior Court used testimony by state legislators that the redistricting maps in question “were ‘designed specifically to preserve [a Republican] supermajority’”<sup>215</sup> and statistical evidence to show that political considerations subordinated traditional redistricting criteria to “maximize [partisan] advantage.”<sup>216</sup> Thus a finding that map drawers purposefully subordinated traditional redistricting criteria to partisan intent satisfies the first part of the equal protection analysis.

The second part of the analysis is as straightforward as it sounds—plaintiffs must show the enacted legislative districts actually had the effect of discriminating or subordinating the minority party by cracking or packing their voters.<sup>217</sup> In *Lewis*, the North Carolina court determined that the effect prong of the equal protection test was met through nearly 200 pages summarizing several statistical findings dealing with vote-share versus seat-share and vote efficiency.<sup>218</sup> Vote-share versus seat share is the difference between the proportion of votes received by one party to the proportion of seats it acquires in the legislature.<sup>219</sup> Vote efficiency determines where votes are devalued by cracking or packing and thus do not contribute to a candidate’s win.<sup>220</sup>

Vote efficiency operates by comparing the inefficiency of votes—all votes cast for the losing candidate or votes over fifty percent cast for the winning candidate—in past elections.<sup>221</sup> Vote efficiency, also known as the efficiency gap, is a particularly useful metric in analyzing alleged gerrymanders because it is easy to compute, measures “undeserved” seats, accommodates the natural bonus the winning party receives in single-member districts, is effective in both competitive and uncompetitive districts and races, and can be calculated using real election results without manipulating data.<sup>222</sup> Some scholars have advocated for the use of efficiency gap over partisan symmetry, due to its use of actual election results instead of hypothetical, “counterfactual” elections that may be “unmoored entirely from the actual election outcomes.”<sup>223</sup> Others have praised its simplicity and ease of use, since “[a] hundred different judges can examine the same maps” and reach “identical conclusions” about a map’s presumptive constitutionality.<sup>224</sup>

After the statistical analysis to find the effect of an allegedly gerrymandered map, the last part of this standard equal protection analysis is the government’s

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791 (2015) (first alteration in original)).

215. *Id.* at \*34.

216. *Id.* at \*352. The evidence the court relied on to find partisan intent was produced by an outside party Republican legislators hired to draw district maps. *See id.* at \*14–18. The subpoenaed files showed the outside party used three separated “partisanship formulas” to maximize Republican shares of legislative seats. *Id.* at \*37.

217. *Id.* at \*354.

218. *Id.* at \*33–223.

219. *See id.* at \*17–18 (discussing vote-share versus seat-share results in prior statewide elections).

220. *See* Campaign Legal Ctr., *Efficiency Gap*, PLANSCORE, <https://planscore.campaignlegal.org/metrics/efficiencygap/> [<https://perma.cc/MWA4-M742>].

221. *See id.*

222. Stephanopoulos & McGhee, *supra* note 167, at 853–55.

223. *Id.* at 862.

224. *Efficiency Gap*, BALLOTPEDIA, [https://ballotpedia.org/Efficiency\\_gap](https://ballotpedia.org/Efficiency_gap) [<https://perma.cc/QL9K-ML2F>].

justification. In partisan gerrymandering, the justification is given by the party drawing the maps. If the plaintiffs make the first two showings—discriminatory intent and discriminatory effect—the redistricting party “must provide a legitimate, non-partisan justification (*i.e.*, that the impermissible intent did not cause the effect) to preserve its map.”<sup>225</sup>

Justice Kagan endorsed this analysis of partisan gerrymandering claims in her dissent. As Justice Kagan notes, this three-part analysis was used by the lower courts in that case.<sup>226</sup> The statistical analysis when used within a totality of the circumstances approach, is particularly useful for courts to find both discriminatory intent and dilutive effect.<sup>227</sup> Not only is the intent-effect-causation test familiar to both federal (prior to *Rucho*) and state courts overseeing partisan gerrymandering claims, but the statistical analysis of vote dilution claims is a practical way to demonstrate the constitutional harm.<sup>228</sup>

However, while the *Lewis* court demonstrated the usefulness of statistical analysis, mainly through expert testimony and affidavits, the court’s focus was not on enforcing proportional representation.<sup>229</sup> The plaintiffs in *Lewis* were not seeking proportional representation but were rather alleging vote dilution under North Carolina’s equal protection clause.<sup>230</sup> The experts that provided affidavits found “that nonpartisan plans that do not intentionally discriminate against Democratic voters may well not provide for proportional representation” while also finding that “the fact that the enacted plans may have resulted in proportional seats-to-votes outcomes in individual county groupings that are heavily Democratic is not evidence of a lack of gerrymandering.”<sup>231</sup> Furthermore, because single-member districts are winner-takes-all and naturally give the winning party “bonus” above proportionality, some plans may satisfy a partisan symmetry standard but fail to achieve proportional representation.<sup>232</sup> This demonstrates that there can be a disconnect between maps that achieve proportional representation and partisan symmetry.

### C. Florida: Intent and Intent Alone

Florida, unlike North Carolina, is one of the nineteen states with gerrymandering protections for state legislative districts and one of the seventeen with protections for congressional districts.<sup>233</sup> In fact, Florida has identical

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225. *Common Cause v. Lewis*, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at \*349 (Sept. 3, 2019) (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting)).

226. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

227. *See Parsons*, *supra* note 79, at 1159–60.

228. For proposed statistical tests of partisan gerrymanders, see Eisler, *supra* note 13 and Samuel S.-H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 15 *Election L.J.* 367 (2016).

229. *See* 2019 N.C. Super. LEXIS 56, at \*85, \*307–08.

230. *See id.* at \*8.

231. *Id.* at \*307–09 (emphasis omitted).

232. *See* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 *Election L.J.* 1 (2007).

233. *See* Loyola L. Sch., *supra* note 2.

constitutional provisions for congressional and state legislative redistricting: “No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . .”<sup>234</sup> However, unlike the federal equal protection standard, the Florida Supreme Court has interpreted these provisions to prohibit *any* level of partisan intent, not just invidious partisan intent.<sup>235</sup> As the Florida Supreme Court has stated: “The Florida Constitution now expressly prohibits what the United States Supreme Court has in the past termed a proper, and inevitable, consideration in the apportionment process.”<sup>236</sup> Moreover, there need not be any actual effect or result of favoring or disfavoring a political party—only unconstitutional intent is necessary to invalidate an apportionment plan.<sup>237</sup>

The analysis the Florida Supreme Court undertakes to validate or invalidate a redistricting plan for improper intent is simple: look to the legislature itself.<sup>238</sup> The intent inquiry is framed as the legislature’s motive in drawing the challenged districts the way they did.<sup>239</sup> This determination of the legislature’s intent is different from that in a traditional lawsuit challenging statutory enactment—redistricting in Florida is considered a statute.<sup>240</sup> Whereas a traditional statutory challenge derives legislative intent through traditional tools of statutory construction, the approach in redistricting cases looks to the actions and statements of the legislators and their staff to determine intent.<sup>241</sup> In *League of Women Voters of Florida v. Detzner*, the trial court found evidence of unconstitutional intent in legislators meeting with political operatives and holding nonpublic meetings, and by comparing drafts of the redistricting plan before and after input from party consultants.<sup>242</sup>

The primary benefit of this approach to partisan gerrymandering claims is that it navigates around Chief Justice Robert’s concerns in *Rucho*. Solely focusing on the legislature’s intent in this way removes what Chief Justice Roberts thought was an inevitable part of the redistricting process,<sup>243</sup> leaving the legislature to use only constitutional, nonpartisan considerations when redrawing district boundaries.<sup>244</sup> The intent-only approach also eliminates the consideration of what an ideally fair redistricting bill or map would look like. Courts would not have to rely on statistical analysis from experts to find partisan gerrymanders. Instead, courts would rely solely

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234. FLA. CONST. art. III, §§ 20(a), 21(a).

235. *In re* Senate Joint Resol. of Legis. Apportionment 1176 (*Apportionment I*), 83 So. 3d 597, 617 (2012).

236. *Id.* at 616.

237. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 375 (Fla. 2015) (quoting *Apportionment I*, 83 So. 3d at 617) (“‘Florida’s constitutional provision prohibits intent, not effect,’ which is to say that a map that has the effect or result of favoring one political party over another is not per se unconstitutional in the absence of improper intent.”).

238. *Id.* at 376–86 (summarizing the trial court’s findings).

239. *Id.* at 388.

240. *See id.*

241. *Id.* at 388–89. Because the focus is on state legislators and their staff, the Florida Supreme Court has rejected claims of legislative privilege seeking to prevent evidence as to intent from being disclosed to the Court. *Id.* (citing *League of Women Voters of Fla. v. Fla. House of Representatives (Apportionment IV)*, 132 So. 3d 135, 149 (Fla. 2013)).

242. *Id.* at 379–87.

243. *See Apportionment I*, 83 So. 3d at 616.

244. For nonpartisan considerations, see *supra* Section I.A.

on the statements, documents, procedure, etc. introduced into evidence as to what the map drawers' motives were.

The effectiveness of Florida's approach to partisan gerrymandering, however, is not without criticism. While Chief Justice Roberts believes that the Florida constitutional provisions create sufficient "standards and guidance" for state courts to apply to alleged partisan gerrymanders,<sup>245</sup> Justice Kagan felt that the guidance created by the Florida Constitution "is in fact a good deal less exacting than the one [federal] District Courts below applied."<sup>246</sup> The intent-only approach, Justice Kagan believes, may actually force courts to insert themselves into the political sphere, a concern that dominated the majority opinion.<sup>247</sup>

An intent-only approach can also be problematic in instances where proportional representation is achieved because "a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority."<sup>248</sup> Some scholars have even suggested that proportional representation may preclude a plaintiff's ability to demonstrate invidious partisan intent.<sup>249</sup>

#### IV. SHIFTING OHIO'S FOCUS

Both the Ohio Constitution and the Ohio Supreme Court's analysis in the *League* decisions share similarities with the methods used by federal courts in racial gerrymandering cases and Florida and North Carolina courts in partisan gerrymandering cases. The *League* decisions, however, are not without fault and could be improved by focusing on different measures of a partisan gerrymander. This Part briefly compares the *League* analysis to the methods described in Part III and advocates for a change in the measures the Ohio Supreme Court uses to find a partisan gerrymander in stand-alone section 6(A) and 6(B) challenges.

##### A. Neutral Measures of Intent

On paper, the article XI, section 6(A) prohibition on district plans "drawn primarily to favor or disfavor a political party"<sup>250</sup> is similar to the Florida prohibition on drawing district maps with the "intent to favor or disfavor a political party."<sup>251</sup>

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245. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) ("We do not understand how the dissent can maintain that a provision saying that no districting plan 'shall be drawn with the intent to favor or disfavor a political party' provides little guidance on the question.").

246. *Id.* at 2524 n.6 (Kagan, J., dissenting).

247. See *id.*

248. *LULAC v. Perry*, 548 U.S. 399, 419 (2006).

249. Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2023 (2018).

250. OHIO CONST. art. XI, § 6(A).

251. FLA. CONST. art. III, § 21(a). In fact, the majority opinion in *League I* cited *Detzner* to support the proposition that "circumstantial evidence may establish that a [re]districting plan was drawn primarily to favor one political party over another." *League I*, 192 N.E. 3d 379, 410 (Ohio 2022) (citing *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 375–76 (Fla. 2015)).

Ohio's burden, however, is far less exacting since it merely requires that the Commission *attempts* to draw a plan that does not *primarily* favor or disfavor a political party.<sup>252</sup> While the Florida Supreme Court must only find improper partisan intent, the Ohio Supreme Court must first determine if an attempt was made, then whether there was improper partisan intent. This makes the analysis for a stand-alone section 6(A) challenge more similar to the analysis conducted in racial gerrymandering cases before federal courts because the proper question is whether that improper intent predominates.<sup>253</sup>

In practice, however, the 2022 redistricting saga demonstrated that the stand-alone section 6(A) analysis falls into the same problem that Chief Justice Roberts found in *Rucho*: how much partisan intent is too much?<sup>254</sup> Indeed, the Ohio Supreme Court had the constitutional tools to act on improper partisan intent and even looked to many of the same indicators used by Florida courts to judge partisan intent.<sup>255</sup> The lack of agreement over what qualifies as an “attempt” and the point at which a competitive district truly favors or disfavors a political party embodies the repeated Supreme Court concerns over whether there are politically neutral standards for drawing that can be reliably applied to differentiate between constitutional and unconstitutional partisan intent.<sup>256</sup>

There may very well be no perfect method to weigh partisan intent without the Ohio Supreme Court wading too far into the political sphere. But there may be a simpler way. By closely mirroring the test used in federal racial gerrymandering cases, as outlined in *Cooper v. Harris*,<sup>257</sup> the Ohio Supreme Court could apply more neutral redistricting criteria to find impermissible partisan intent and avoid making overly subjective interpretations of Commission members' intent, particularly where the Commission has met the section 6(B) proportionality requirement. The Ohio Supreme Court could focus its predominate-intent analysis, absent a clear statement expressing partisan preference, on whether the traditional, mandatory redistricting requirements of contiguity,<sup>258</sup> preservation of political subdivisions,<sup>259</sup> and equal population<sup>260</sup> were subserviated to political classifications.<sup>261</sup> If deviations in these

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252. OHIO CONST. art. XI § 6(A).

253. See *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

254. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019); *LULAC v. Perry*, 548 U.S. 399, 420 (2006).

255. See, e.g., *League I*, 192 N.E. 3d 379, 410–13 (Ohio 2022) (analyzing Commission statements, the drafting process, and use of staff outside the commission).

256. *Rucho*, 139 S. Ct. at 2499; cf. *Vieth v. Jubelirer*, 541 U.S. 267, 306–07 (2004) (Kennedy, J., concurring) (noting lack of comprehensive and neutral principles in drawing district boundaries and lack of judicial constraint to keep courts from assuming political, not legal, responsibility to decide redistricting disputes).

257. See *supra* Section III.A.

258. OHIO CONST. art. XI, § 4.

259. *Id.* § 7.

260. *Id.* § 3.

261. Indeed, Justices Kennedy and DeWine criticized one of the independently drawn maps favored by the majority for dividing political subdivisions in urban areas into noncompact districts to create more solidly Democratic leaning districts. *League IV*, 199 N.E. 3d 485, 523 (Ohio 2022) (DeWine, J. dissenting) (stating these urban districts failed a basic

requirements—even when not arising to the level of a constitutional violation on their own—can only be explained as an effort to limit a party’s representation, then the Ohio Redistricting Commission would have to show that the deviations were necessary to comply with a compelling interest such as satisfying the section 6(B) proportionality requirement. This narrower approach would address the dissent’s concerns over the “wholly subjective standards of section 6”<sup>262</sup> by relying primarily on objective measurements while avoiding completely divesting the Ohio Supreme Court’s power to invalidate plans that violate section 6(A), as the dissents repeatedly advocate.<sup>263</sup>

This would, of course, limit the other forms of circumstantial evidence the Ohio Supreme Court could rely on to find impermissible partisan intent. But, this suggestion does not preclude the court from using statements from the Commission that demonstrate a clear partisan preference, similar to those in *Cooper v. Harris*.<sup>264</sup> Instead, this suggestion seeks to install clearer standards for the court to use and constraints to prevent the court from assuming political, not legal, responsibility to resolve redistricting disputes.<sup>265</sup> It would also more closely resemble a traditional intent-effect-causation test used by federal courts in racial-gerrymandering<sup>266</sup> and North Carolina courts in partisan-gerrymandering cases,<sup>267</sup> since the Ohio Redistricting Commission would still have to show it met (or failed to meet) closely proportional representation.

### B. Proportionality Versus Symmetry

Section 6(B) of the Ohio Constitution focuses solely on the effect of a redistricting plan, fitting into the second part of the intent-effect-causation test used by North Carolina courts and borrowed from federal courts. To determine whether a redistricting plan establishes closely proportional representation,<sup>268</sup> the Ohio Supreme Court correctly used expert affidavits to analyze each redistricting proposal’s proportionality similar to what the North Carolina court did in *Lewis* to find vote dilution.<sup>269</sup> Yet the majority went beyond requiring that a redistricting proposal be “closely proportional” by introducing the concept of partisan symmetry as it relates to the exclusion of competitive districts from the proportionality analysis, described in Part A.<sup>270</sup>

The focus on achieving partisan symmetry between competitive Republican and Democratic districts is misguided because, as the experts in the *Lewis* case stipulated,

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“eyeball test” for compactness).

262. *League III*, 198 N.E. 3d 812, 843 (Ohio 2022).

263. *See, e.g., id.*

264. 581 U.S. 285, 298–301 (2017).

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

266. *See supra* Section III.A.

267. *See supra* Section III.B.

268. OHIO CONST. art. XI, § 6(B).

269. *See, e.g., League I*, 192 N.E. 3d 379, 409 (Ohio 2022); *League III*, 198 N.E. 3d 812, 836–37 (Ohio 2022) (Kennedy & DeWine, JJ., dissenting).

270. *See League IV*, 199 N.E. 3d 485, 522 (Ohio 2022) (DeWine, J., dissenting).

symmetrical redistricting proposals may not lead to proportional representation.<sup>271</sup> In fact, “[e]lectorate systems that mandate versions of proportional representation do not necessarily produce partisan symmetry.”<sup>272</sup> Furthermore, attempting to measure and achieve partisan symmetry requires the Ohio Supreme Court to consider hypothetical 50/50 election ties,<sup>273</sup> as opposed to considering past election results.<sup>274</sup> This degrades the metric’s accuracy and, therefore, its usefulness because “the metric assesses the results of a counterfactual election, [and] it sometimes may be unmoored entirely from the actual election outcomes that are of primary concern.”<sup>275</sup> Thus, trying to achieve partisan symmetry in Ohio is not only a problematic endeavor, but it also violates section 6(B)’s requirement that proportionality be based on the *previous* ten years of statewide and federal election results.<sup>276</sup> Partisan symmetry, instead relies on conjecture as to how voters will position themselves in the future.<sup>277</sup>

However, since strict proportionality in single-member districts is nearly impossible to achieve, given the “bonus” the winning party receives,<sup>278</sup> the Ohio Supreme Court should still use another statistical metric in addition to just proportionality. Instead of focusing on partisan symmetry, the court should consider the efficiency gap of a proposal and individual districts just as the *Lewis* court did.<sup>279</sup> The Ohio Supreme Court would be better able to determine if political minority votes are less powerful than majority votes in both competitive and noncompetitive districts, thus determining to what extent a political minority district is cracked or packed.<sup>280</sup> The court would also be able to adhere to section 6(B)’s requirement that proportionality be based on past election results since the efficiency gap does not use speculative election results like partisan symmetry does.<sup>281</sup> The efficiency gap is also closely tied to the proportionality-based measures of seat-share and vote-share,<sup>282</sup>

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271. *Common Cause v. Lewis*, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at \*308 (Sept. 3, 2019).

272. Grofman & King, *supra* note 232, at 8 n.37.

273. The Ohio Supreme Court dedicates a portion of its analysis in *League III and League IV* discussing hypothetical, future election results that would shift seats towards Republicans and Democrats disproportionately. See *League III*, 198 N.E. 3d at 822–23; *League IV*, 199 N.E. 3d at 500.

274. See Stephanopoulos & McGhee, *supra* note 167 (stating, after detailed comparison of partisan symmetry and efficiency gap, that there is no good reason to use partisan symmetry when analyzing partisan gerrymandering).

275. *Id.* at 862.

276. OHIO CONST. art. XI, § 6(B).

277. *LULAC v. Perry*, 548 U.S. 399, 420 (2006) (“Even assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.”).

278. See *supra* note 232 and accompanying text.

279. See *Common Cause v. Lewis*, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, \*132, \*243 (Sept. 3, 2019).

280. See Campaign Legal Ctr., *supra* note 220; see also Stephanopoulos & McGhee, *supra* note 167, at 862.

281. Stephanopoulos & McGhee, *supra* note 167, at 861–62.

282. *Id.* at 853–56.

and accommodates the natural bonus that occurs in elections for single-member districts<sup>283</sup> and makes strict proportionality nearly impossible to achieve.<sup>284</sup>

#### CONCLUSION

Adopting the above changes would allow the Ohio Supreme Court to better adjudicate stand-alone section 6(A) and 6(B) claims. Focusing on whether partisan intent subordinates traditional, nonpartisan redistricting criteria tempers the concerns over the lack of objective standards shared by the dissenting opinions in the *League* cases,<sup>285</sup> and Chief Justice Roberts in *Rucho*.<sup>286</sup> Using the efficiency gap metric over partisan symmetry would give the Ohio Supreme Court a more accurate understanding of whether minority-party votes are weakened through partisan gerrymandering, due to the efficiency gap's greater accuracy across a variety of election scenarios and its use of actual, rather than hypothetical, election results.<sup>287</sup>

In the broader context of partisan gerrymanders nationwide, the saga that played out in Ohio casts some doubt on Chief Justice Roberts' belief that states are better equipped than federal courts to fight partisan gerrymanders.<sup>288</sup> While Ohio certainly had the constitutional standards for drawing more politically fair maps and the backing to review such maps in court, it nonetheless demonstrated some of the same weaknesses (and some strengths) revealed in gerrymandering cases in federal, North Carolina, and Florida courts. For the sake of Ohioans on both sides of the political spectrum, both the Ohio Redistricting Commission and the Ohio Supreme Court need to do better to live up to Issue 1's aspirations to fairer redistricting.<sup>289</sup>

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283. *See id.* at 854.

284. *See supra* note 232 and accompanying text; *cf. Efficiency Gap*, BALLOTPEDIA, [https://ballotpedia.org/Efficiency\\_gap](https://ballotpedia.org/Efficiency_gap) (stating the efficiency gap imports a proportionality requirement to redistricting) [<https://perma.cc/QL9K-ML2F>].

285. *See, e.g., League III*, 198 N.E. 3d 812, 843–44 (Ohio 2022) (Kennedy & DeWine, JJ., dissenting) (“Because the subjective standards turn on the perception of each member of this court, few principles can be identified to guide and confine the court’s review of them.”).

286. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).

287. *See supra* Section IV.B.

288. *See Rucho*, 139 S. Ct. at 2507–08 (outlining various state efforts to combat partisan gerrymanders).

289. *See supra* Section II.A.