

From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders

Christopher S. Elmendorf

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FROM EDUCATIONAL ADEQUACY TO REPRESENTATIONAL
ADEQUACY: A NEW TEMPLATE FOR LEGAL ATTACKS ON
PARTISAN GERRYMANDERS

CHRISTOPHER S. ELMENDORF*

ABSTRACT

For decades, legal attacks on partisan gerrymanders have foundered on a manageability dilemma: doctrinal standards the Supreme Court has regarded as judicially discoverable have been rejected as unmanageable, whereas the more manageable standards on offer have been dismissed as insufficiently tethered to the Constitution—that is, as undiscoverable. This Article contends that a solution to the dilemma may be found in a seemingly unlikely place: the body of state constitutional law concerned with the adequacy of state systems of public education. The justiciability barriers to partisan gerrymandering claims have near analogues in educational adequacy cases, yet only a minority of the state courts have deemed educational adequacy claims nonjusticiable. Other courts have dealt with putatively standardless education claims by holding that the legislature must adopt educational standards, together with a system of testing, school finance, and accountability reasonably designed to realize those standards. If the legislature drags its feet, courts have issued provisional remedies, which the legislature is free to update or replace. I explain how the same strategy could be adapted for a new generation of “representational adequacy” claims under broadly

* Martin Luther King, Jr. Professor of Law, University of California, Davis. Thanks to Josh Douglas, Rick Hasen, Jim Gardner, Darien Shanske, and Nick Stephanopoulos for very helpful comments on earlier drafts. This Article also benefited greatly from discussion and feedback at the *William & Mary Law Review* Symposium, “2020 Redistricting,” and from exchanges with my colleagues Ash Bhagwat, Alan Brownstein, Jack Chin, Carlton Larson, Brian Soucek, and Aaron Tang. Rac Pimentel and Ken Wang did the research for the Appendix.

worded provisions found in many state constitutions. I also suggest that by anchoring claims to the generally worded provisions about representation found in state constitutions (or possibly Article I of the U.S. Constitution), litigants could mitigate the downside risk of success under the Equal Protection Clause—namely, the inducement of responsiveness-dampening bipartisan gerrymanders. The Online Appendix provides a state-by-state breakdown of constitutional provisions and relevant precedents, highlighting twenty-two states that appear ripe for representational adequacy litigation.

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INTRODUCTION

The moment for legal attacks on partisan gerrymanders may finally have arrived. In the 2004 case of *Vieth v. Jubelirer*, all nine Justices agreed that sufficiently extreme partisan gerrymanders would violate the Equal Protection Clause, but the Court split 4-1-4 on whether these claims are justiciable, with Justice Anthony Kennedy straddling the fence.¹ As this Article goes to press, advocates and observers are eagerly awaiting the Supreme Court's decision in *Gill v. Whitford*, an appeal of the first trial court decision since the 1980s to invalidate a state legislative map as an unconstitutional partisan gerrymander.² The lower court's decision in *Whitford* was soon followed by favorable preliminary rulings in other cases in Maryland and North Carolina.³

Echoing the diversity of thought among legal academics, parties, and amici in these cases have advanced a broad range of ideas about whether and how courts should police partisan gerrymanders. But common to all proposals on offer is a shared assumption about the judicial role: if a constitutionally discernable and judicially manageable standard for policing excessive partisanship exists, it is the courts' responsibility to discover and apply it. This Article suggests that courts might instead recognize an *implied legislative duty to enact a reasonable redistricting framework*, including standards for the "representational adequacy" of legislative maps. Legislatures, not courts, would craft the legally operative standards.

This approach would allow courts to find a constitutional violation (abdication of the legislative duty) without committing to a particular measure of partisan fairness, and without drawing a contestable line between adequate and inadequate fairness. It would also allow courts to delay any decision about remedies. If the legislature in question did not respond by enacting a reasonable framework for redistricting, the court eventually could establish its own judicially

1. 541 U.S. 267 (2004).

2. See *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

3. See *Common Cause v. Rucho*, 240 F. Supp. 3d 376 (M.D.N.C. 2017) (three-judge court) (per curiam) (holding that plaintiffs stated a justiciable partisan gerrymandering claim); *Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016) (same).

manageable standards, but the judge-made standards would be expressly provisional and subject to legislative revision. By casting judge-made standards as a temporary response to the legislature's failure to act, the court would be able to make the standard constraining—which many judges seem to think necessary for manageability—without holding, implausibly, that the Constitution entails that particular standard. Importantly, too, the approach I suggest would allow courts to police partisan gerrymanders without inducing the creation of *bipartisan* gerrymanders, a likely but unwelcome byproduct of successful equal protection attacks on partisan maps.

The legislative-duty approach might seem unprecedented, but it closely parallels what many state courts have done in cases under the broadly worded education clauses found in nearly all state constitutions. That education rights jurisprudence may hold lessons for judicial management of partisan gerrymandering litigation is suggested by some striking but previously unremarked parallels between these domains: The relevant constitutional text is sparse. There is no social scientific or political consensus about how to measure the quality of the system (schools or legislative districts), let alone about where to draw the line between minimally adequate and constitutionally unacceptable quality. Constitutional injuries may arise from the disaggregated, uncoordinated decisions of numerous independent actors. Plaintiffs' claims, if vindicated, would seem to leave trial courts with enormous remedial discretion. And the claims are acutely politically sensitive.

Yet, whereas federal courts have long resisted partisan gerrymandering claims, most state courts have rejected the corresponding nonjusticiability arguments in educational adequacy cases.⁴ Instead, state courts have developed coping mechanisms that mitigate the justiciability problems, including the articulation of legislative duties apparently designed to bring into being more judicially manageable standards and the issuance of provisional injunctive remedies, which the legislature may supplant.

I shall argue that similar strategies could be fruitfully deployed in gerrymandering-of-the-statehouse claims brought under the “free

4. See *infra* Part II.B.

and open elections” or similar provisions found in many state constitutions. Analogous gerrymandering-of-Congress claims might eventually be brought under Article I of the U.S. Constitution, though litigants would be wise to establish state law precedents first.

Whatever the Supreme Court decides in *Whitford*, there will almost certainly be an important role for state courts to play in redistricting litigation going forward. If the Court holds partisan gerrymandering claims nonjusticiable, or announces a standard that will rarely, if ever, be met, then most of the action will shift to state courts. Alternatively, if the Court constitutionalizes a rigorous partisan symmetry requirement, state courts will probably be needed as a backstop against responsiveness-dampening bipartisan gerrymanders. Either way, the arguments and analogies developed in this Article open a new line of attack for litigators concerned with the overall health of democratic systems.

I proceed as follows. Part I briefly describes the doctrinal and pragmatic problems with partisan gerrymandering claims as presently litigated. Part II develops the analogy to educational adequacy, and explains how state courts have managed adequacy litigation. Part III sketches an adequacy-informed template for gerrymandering litigation and responds to objections. The table in the Online Appendix provides a state-by-state summary of the constitutional provisions and education precedents germane to representational adequacy litigation.⁵ I highlight twenty-two states where text and precedent suggest a particularly favorable environment for plaintiffs.

I. THREE DIFFICULTIES WITH PARTISAN GERRYMANDERING CLAIMS

In determining that equal protection entails the rule of one person, one vote, the Supreme Court in *Reynolds v. Sims* famously explained that malapportioned legislative districts deprive citizens in the overpopulated districts of “equally effective voice,” improperly empowering a minority of the voters to elect a majority of the

5. Christopher S. Elmendorf, *Appendix: Text and Precedent for Representational Adequacy Claims Under Fifty State Constitutions*, 59 WM. & MARY L. REV. ONLINE 121 (2018).

representatives.⁶ Soon afterwards, the Court also acknowledged that even equally populated districts could work a similar constitutional harm, insofar as the design of the districts in combination with voter preferences operates to “minimize or cancel out” the electoral voice of a politically distinct segment of the community.⁷ These ideas have anchored partisan gerrymandering litigation ever since.

But equal protection challenges to partisan gerrymanders have not lived up to plaintiffs’ hopes. In the 1986 case of *Davis v. Bandemer*, the Supreme Court glossed “minimize or cancel out” so as to all but guarantee that partisan gerrymandering claims would never succeed.⁸ When the Justices returned to the matter two decades later, in *Vieth v. Jubelirer*, they agreed that *Bandemer* was useless but split on what to do about it.⁹ A four-Justice plurality, led by Justice Antonin Scalia, argued that partisan gerrymandering claims were nonjusticiable for want of a judicially discoverable and manageable standard.¹⁰ Justice Kennedy concurred but only provisionally; he allowed that partisan gerrymandering claims might become justiciable, if only litigants could develop a legal standard that substantially constrained judicial discretion (“manageable”) while being closely tethered to the Constitution (“discoverable”).¹¹ The dissenting Justices issued three opinions, each propounding a different standard.¹²

In the most recent go-round, *League of United Latin American Citizens (LULAC) v. Perry*, Justice Kennedy expressed his continuing

6. 377 U.S. 533, 565 (1964).

7. See *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

8. See 478 U.S. 109, 129-36 (1986) (plurality opinion) (suggesting that a partisan gerrymander would be unconstitutional only if it left the disadvantaged party without any means of influence or a fair opportunity for electoral success over many election cycles); see also *Vieth v. Jubelirer*, 541 U.S. 267, 279-81 (2004) (plurality opinion) (recounting the eighteen-year history of litigation under *Bandemer* and observing that no partisan gerrymandering claim had succeeded in this period).

9. See 541 U.S. at 279-83 (plurality opinion) (discussing and rejecting the *Bandemer* plurality’s standard); *id.* at 308 (Kennedy, J., concurring in the judgment) (agreeing with the plurality’s analysis of *Bandemer*); *id.* at 318-19 (Stevens, J., dissenting) (bracketing question of whether the *Bandemer* plurality stated the proper standard to apply to statewide gerrymander claim, while suggesting a district-specific approach); *id.* at 345 (Souter, J., dissenting) (proposing a “fresh start” to crafting legal standards for partisan gerrymandering claims); *id.* at 356-65 (Breyer, J., dissenting) (proposing yet another standard).

10. See *id.* at 281 (plurality opinion).

11. See *id.* at 306-17 (Kennedy, J., concurring in the judgment).

12. See *supra* note 9.

dissatisfaction with the standards on offer, including a prophylactic rule against mid-decade redistricting.¹³ But Justice Kennedy and others hinted that they might consider claims founded on some metric of “partisan symmetry,” a political science term for balance in the translation of vote shares into seats.¹⁴ (To illustrate, a map of legislative districts is asymmetric with a pro-Democratic bias if a Democratic vote share of 55 percent would probably garner 65 percent of the seats but a Republican vote share of 55 percent would probably leave the Republicans with only 60 percent of the seats.¹⁵)

Taking up Justice Kennedy’s invitation, academics have developed new, simpler measures of partisan bias that do not depend on counterfactual predictions about the share of seats that each party would win under various vote-swing scenarios. Examples include Eric McGhee and Nick Stephanopoulos’s “efficiency gap” (based on tabulations of the number of wasted votes cast for each party’s candidates);¹⁶ Robin Best and Michael McDonald’s mean-median difference (the gap between each party’s median share of a legislative district and its mean share);¹⁷ and further alternatives suggested by Samuel Wang,¹⁸ and Thomas Belin and his colleagues.¹⁹ As of this writing, the efficiency gap is enjoying its day in court. It underwrites *Whitford v. Gill*, the first federal court decision since the 1980s to have found an unconstitutional partisan gerrymander,²⁰ as well as the recently filed challenge to North Carolina’s congressional districts.²¹

13. 548 U.S. 399, 417-19 (2006) (plurality opinion).

14. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 833 (2015) (discussing the opinions of Justices Kennedy, David Souter, and John Paul Stevens).

15. See *id.* at 843.

16. See *id.* at 834.

17. See Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 ELECTION L.J. 312, 317 (2015).

18. See Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1306-07 (2016).

19. See Thomas R. Belin et al., *Using a Density-Variation/Compactness Measure to Evaluate Redistricting Plans for Partisan Bias and Electoral Responsiveness*, STAT., POL. & POL’Y, 2011, art. 3.

20. See 218 F. Supp. 3d 837, 843, 898 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

21. Complaint at 4, *Common Cause v. Rucho*, 240 F. Supp. 3d 376 (M.D.N.C. 2017).

But as this Part will explain, there remain ample reasons for concern. First, the justiciability worries that Justice Kennedy has voiced are not about to disappear.²² Over the years many different Justices, both liberals and conservatives, have suggested that the political sensitivities of redistricting cases necessitate unusually crisp, constraining doctrinal standards.²³ And yet there is no precedent for the Court simply to declare that one particular social scientific measure of partisan bias constitutes *the* constitutional standard, which would seem necessary if the legal standard is to be constraining. Second, if partisan-bias claims become justiciable under the Equal Protection Clause, the likely result is a rash of bipartisan gerrymanders, an outcome already blessed by the Supreme Court but which would probably have bad consequences for Congress. Third, as Adam Cox has argued, claims about the partisan fairness of congressional districts (as opposed to state legislative districts) present exceptional difficulties owing to the disaggregated nature of congressional redistricting.²⁴ Thus, even if the Supreme Court upholds the invalidation of Wisconsin's state legislative districts in *Whitford*, congressional gerrymanders may remain inviolable.

A. "Judicially Discoverable and Manageable" Standards

Since *Vieth*, partisan gerrymandering claims have foundered because the "judicially manageable" standards on offer have not been regarded (by Justice Kennedy) as "judicially discoverable," and because the discoverable standards have been deemed unmanageable.²⁵

22. See, for example, Judge William Griesbach's forceful dissent in *Whitford*, 218 F. Supp. 3d at 942.

23. See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion); *id.* at 306-07 (Kennedy, J., concurring in the judgment); *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment); *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); see also Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 589-90 (2016) (discussing the same theme in redistricting cases under the Voting Rights Act).

24. See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409.

25. It is of course a basic axiom of constitutional law that courts can only adjudicate claims that rest upon "judicially discoverable and manageable [legal] standards." See *Baker*,

Certainly there is a *discoverable* standard for when a partisan gerrymander runs afoul of the Equal Protection Clause. It is this: the gerrymander “goes too far.” All nine Justices in *Vieth* agreed that a sufficiently extreme partisan gerrymander would be unconstitutional.²⁶ But such a know-it-when-I-see-it standard would be paradigmatically unmanageable.²⁷

Manageability in this domain has a very particular reference point: the mechanical jurisprudence of one person, one vote, under which any departure from exactly equally populated congressional districts is presumptively unconstitutional,²⁸ as are departures of more than 10 percent in state and local government districts.²⁹ Because the partisan stakes in redistricting litigation are so high, courts must be bound (it is said) by exceptionally determinate legal standards, so as to avoid both the fact and appearance of judicial favoritism toward one political party or the other.³⁰

In *LULAC v. Perry*, the Supreme Court’s most recent partisan gerrymandering case, the plaintiffs suggested a prophylactic rule against mid-decade redistricting whose “sole motive” was partisan advantage.³¹ Justice Kennedy rejected this standard because it did not require plaintiffs to “show a burden, as measured by a reliable standard, on [their] representational rights.”³²

Yet in order to show a burden on representational rights as measured by a reliable standard, plaintiffs must pick one of the several plausible quantitative definitions of partisan bias. Then they must choose a data source and statistical model. And finally—if the

369 U.S. at 217.

26. See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 782, 797-809 (2005) (recognizing this point and parsing the opinions in *Vieth*).

27. See *Vieth*, 541 U.S. at 291 (plurality opinion) (rejecting “a totality-of-the-circumstances analysis, where all conceivable factors, none of which is dispositive, are weighed with an eye to ascertaining whether the particular gerrymander has gone too far”).

28. See *Karcher v. Daggett*, 462 U.S. 725, 727 (1983).

29. See *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (“Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.”).

30. See Christopher S. Elmendorf, *Empirical Legitimacy and Election Law*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 117, 122-23 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (discussing this theme in cases from *Baker v. Carr* to *LULAC v. Perry*).

31. See 548 U.S. 399, 416-18 (2006) (Kennedy, J.).

32. *Id.* at 418.

standard is to tightly fetter judicial discretion—they must ask judges to constitutionalize *this particular approach* to measuring “burdens on representational rights,” and a particular numerical threshold beyond which gerrymanders “go too far.” Proceeding along these lines, Stephanopoulos and McGhee proposed that courts adopt their efficiency gap measure and “set[] the bar [for presumptive unconstitutionality] at two seats for congressional plans and 8 percent for state house plans, with the further proviso that sensitivity testing show that the efficiency gaps are unlikely to hit zero over the plans’ [anticipated ten-year] lifetimes.”³³ Simon Jackman, the plaintiffs’ expert in *Whitford v. Gill*, subsequently analyzed 206 maps of state legislative districts dating to the early 1970s, and found that 95 percent of the maps with an initial efficiency gap of 7 percent or more favored the same party throughout the life of the map.³⁴ The *Whitford* plaintiffs argued on this basis that 7 percent should be the threshold for presumptive unconstitutionality.³⁵

These suggestions represent perfectly reasonable ways for a legislature to codify limits on partisan gerrymandering, but what in the Equal Protection Clause or any other constitutional provision tells courts to use McGhee’s wasted-votes measure of partisan bias, as opposed to, for example, Gelman and King’s measure of partisan bias,³⁶ or Best and McDonald’s or Wang’s mean-median difference,³⁷ or Chen’s approach based on the distribution of maps generated by a compact-districting computer algorithm,³⁸ or Wang’s definition of

33. Stephanopoulos & McGhee, *supra* note 14, at 887.

34. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 860, 905 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017); Complaint at Exhibit 3, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (No. 3:15-cv-00412-bbc).

35. See *Whitford*, 218 F. Supp. at 860-61, 909 n.311 (explaining this argument but declining to “reach the propriety of the 7% number” because the observed efficiency gaps in the Wisconsin map were well in excess of 7 percent).

36. For defenses of this measure, see ANTHONY J. MCGANN ET AL., *GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY* 58-70 (2016); and Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 *ELECTION L.J.* 2 (2007).

37. See McDonald & Best, *supra* note 17; Wang, *supra* note 18.

38. See Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 *ELECTORAL STUD.* 329, 331 (2016); Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 *Q.J. POL. SCI.* 239, 249 (2013).

an anomalous map based on the current distribution of partisans across congressional districts in the nation as a whole?³⁹ These are all more or less plausible ways of concretizing the idea of partisan bias. Though technically minded academics disagree about which measure is best,⁴⁰ generalist judges are not well-equipped to arbitrate this debate.

It is telling that in other areas of election law, courts have pointedly avoided creating legal standards that would privilege a particular statistical technique or quantitative metric of political fairness. Where courts have created bright-line cutoffs, they have done so using raw data collected by the government and determined by the government to be relevant to the problem at hand.⁴¹ Thus, in malapportionment cases, the courts implemented the rule of “one person, one vote” using population totals from the Census Bureau, rather than transformations of that or other data produced by expert witnesses. Judges were quick to dismiss litigants’ efforts to draw them into political science debates about how best to quantify the concept of “voting power.”⁴² In cases brought by independent

39. See Wang, *supra* note 18, at 1289. For additional measures, see John F. Nagle, *Measures of Partisan Bias for Legislating Fair Elections*, 14 ELECTION L.J. 346 (2015).

40. Compare Stephanopoulos & McGhee, *supra* note 14, at 855-62 (arguing that their “efficiency gap” measure is superior to Gelman & King’s measure of partisan bias based on counterfactual outcomes), with MCGANN ET AL., *supra* note 36, at 58-70 (defending Gelman & King’s measure, and arguing that Stephanopoulos & McGhee’s efficiency gap rests on arbitrary assumptions about vote-to-seat swing ratio and about the number of wasted votes that should be cast for each party’s candidates when the aggregate vote share of each party deviates from 50 percent); compare also Chen & Cottrell, *supra* note 38, at 330-34 (arguing that computer simulation approaches represent an improvement over previous methods that detect partisan gerrymanders by their effects), with Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL’Y 69, 95-96 (2010) (criticizing simulation-based methods on the ground that no proof establishes that the distribution of maps generated by any existing computer algorithm approximates a random sample from the universe of all potential maps that satisfy the designated criteria), Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. 351 (2016) (presenting a new redistricting algorithm with stronger theoretical foundations), and Benjamin Fifield et al., *A New Automated Redistricting Simulator Using Markov Chain Monte Carlo* (Mar. 15, 2017) (unpublished manuscript), <http://imai.princeton.edu/research/files/redist.pdf> [https://perma.cc/G3AV-QJ9D] (same).

41. See *Baker v. Carr*, 369 U.S. 186, 188-92 (1962) (examining apportionment in Tennessee based on census data).

42. See, e.g., *Bd. of Estimate v. Morris*, 489 U.S. 688, 697-99, 699 n.5 (1989) (rejecting “theoretical” measures of voting power).

candidates and third parties seeking access to the ballot, the courts created rough quantitative guidelines based on the percentage of eligible voters whose signatures the candidate or party is required to gather for ballot access.⁴³ The doctrinal standard is again grounded in data (signature counts) that the government chose and deemed relevant for rationing ballot access, not on an inventive political scientist's measure of how easy or hard it actually is, all things considered, for third-party and independent candidates to qualify for the ballot.⁴⁴

To be sure, courts in some areas of election law do rely on statistical estimates of phenomena that the government does not measure itself. The leading example is racial vote dilution law under section 2 of the Voting Rights Act, where plaintiffs are required to prove that political preferences in the defendant jurisdiction are racially polarized.⁴⁵ Yet here the Supreme Court has carefully avoided any suggestion that there is one right way to estimate racial polarization as a matter of law,⁴⁶ and lower courts have consistently rejected arguments for bright-line cutoffs for "legally significant" polarization.⁴⁷ The Supreme Court may yet decide to treat partisan gerrymandering claims in the same way, inviting litigants to present competing measures of partisan bias and giving district judges discretion to decide whether the bias goes too far on the facts of a particular case. But that would mean relaxing or abandoning the manageability premise of *Vieth*, *LULAC*, and the malapportionment cases.⁴⁸

43. For discussion of these cases, see Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 345-53 (2007).

44. *See id.*

45. *See* Elmendorf et al., *supra* note 23, at 589.

46. *See* Thornburg v. Gingles, 478 U.S. 30, 56 (1986) ("A showing that a significant number of minority group members usually vote for the same candidates is *one way* of proving the political cohesiveness necessary to a vote dilution claim." (emphasis added)).

47. *See* Elmendorf et al., *supra* note 23, at 609-19 (discussing judicial practices in a random sample of cases).

48. *See, e.g.,* *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) (plurality opinion) (rejecting a "goes too far" approach).

B. Bipartisan Lockups

Imagine that a post-Scalia Supreme Court declares that partisan gerrymandering claims are justiciable, and tells lower courts to police severe gerrymanders using generally accepted statistical techniques and measures of partisan bias. No particular metric, statistical technique, or threshold of unconstitutional extremity is made decisive.

This declaration from the Supreme Court would substantially alter the strategic calculus of the state legislators who carry out most state and congressional redistricting, and of the members of Congress who seek to influence them.⁴⁹ Redistricters generally face a trade-off between securing partisan advantage and protecting the seats of incumbents.⁵⁰ Partisan advantage is maximized by distributing reliable partisan voters efficiently, so that they comprise just a bit more than 50 percent of the voters in as many districts as possible.⁵¹ But lawmakers who represent such districts are somewhat vulnerable to general election challengers. Most incumbents would prefer a “safe,” politically lopsided district.

If, following *Whitford*, partisan gerrymandering claims remain nonjusticiable, redistricters will be able to pursue either partisan advantage or incumbency protection with little risk of judicial invalidation, so long as the line-drawers comply with the equal-population mandate and the Voting Rights Act. Bipartisan gerrymanders are insulated against constitutional attack by *Gaffney v. Cummings*, in which the Supreme Court held that equal protection scrutiny should be at its “lowest ebb” when a map allocates seats in proportion to each party’s share of the electorate,⁵² and by *LULAC v. Perry*, in which the Court stated that redistricting maps designed to keep prior districts intact “accord with concern for the voters.”⁵³

49. The argument of this Section largely tracks Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 443 (2005).

50. See *id.* at 449-52.

51. See John N. Friedman & Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, but Never Crack*, 98 AM. ECON. REV. 113, 118-20 (2008). The optimal strategy changes if the mapmakers cannot observe the partisan reliability of voters. See Faruk Gul & Wolfgang Pesendorfer, *Strategic Redistricting*, 100 AM. ECON. REV. 1616, 1631 (2010).

52. 412 U.S. 735, 754 (1973).

53. 548 U.S. 399, 441 (2006).

But if partisan gerrymanders become subject to judicial invalidation while incumbency protection plans remain bulletproof, the risk-reward calculus for legislators drawing electoral districts will tilt toward the latter. The likely result is an increase in the proportion of legislative maps drawn primarily to protect incumbents.

This will reduce legislative responsiveness. Bigger partisan waves will be necessary to flip party control of Congress and statehouses. It may also dampen the incentive of party elites to develop a party brand that appeals to the median voter. If there are very few competitive seats, a party's loss of support from voters in the ideological middle will barely dent its legislative representation.⁵⁴ If there are lots of competitive seats, the same loss of support could reduce the party's caucus to an ineffectual rump.⁵⁵ The ratio of competitive to noncompetitive districts may therefore have some bearing on partisan polarization, although other factors are clearly at work too.⁵⁶

C. Congress and the Problem of Disaggregated Redistricting

State legislatures are generally districted by a single entity, typically the legislature itself, pursuant to a single set of criteria

54. See Kang, *supra* note 49, at 459 (describing political dynamics in noncompetitive districts).

55. See *id.*

56. Nolan M. McCarty, *The Limits of Electoral and Legislative Reform in Addressing Polarization*, 99 CALIF. L. REV. 359, 366-68 (2011) (arguing that parallel polarization of the House (districted) and Senate (not districted), along with other pieces of evidence, suggest that partisan gerrymanders are not to blame for congressional polarization). I disagree with McCarty on one important point, however. He points to the literature showing that polarization has been associated with a divergence between the voting behavior of a Democrat and a Republican representing the same district and then asserts that gerrymandering has no effect on this—implying that it *can have* no effect on this. *Id.* at 368 & n.25. However, if gerrymandering affects the proportion of competitive districts, it is likely to affect how Democrats and Republican representatives vote, conditional on representing the same district (whether competitive or not). The reason is that donors, activists, and other party elites would like the party to be able to win control of the legislature, and they are likely to exert pressure on the voting behavior of *all* of the party's representatives, to the extent that voting behavior affects the party brand (and their voting behavior almost certainly will affect the brand, as it affects what legislation the party can enact or block). If the party needs to win a lot of politically moderate districts to obtain a majority of the seats, party elites will probably pressure legislators in most districts (not just the moderate ones) to take more moderate positions.

specified in state law.⁵⁷ By contrast, Congress is districted by fifty different states, pursuant to fifty different sets of state law criteria.⁵⁸

The disaggregated redistricting of Congress leads to a host of difficulties for judicial policing of partisan gerrymanders, which Adam Cox has perceptively explored.⁵⁹ Cox points out that the harms of partisan gerrymanders—such as partisan bias or minority rule—can only be detected at the level of the legislative body as a whole.⁶⁰ To police the gerrymandering of Congress, courts must either “develop tests to measure directly the harm of congressional gerrymanders at the legislature-wide level” or tackle the problem indirectly with “constitutional rules that reduce the *risk* that state redistricting efforts will combine to produce a Congress-wide injury.”⁶¹

Cox concludes that “[t]he first option is wholly impractical,” as a court would have to consider all fifty congressional district maps at once.⁶² The operative set of congressional district maps is always in flux: states draw maps at different times, and legal challenges under state law, the Voting Rights Act, and the U.S. Constitution proceed separately in each state.⁶³ A court trying to evaluate the partisan fairness of the map of congressional districts would be faced with a constantly moving target.⁶⁴

Perhaps graver yet are problems that would arise at the remedy stage. If a court determined that the aggregate map of congressional districts plan is biased toward Democrats, for example, the court could remedy the violation by modifying the map of districts in any number of states. Cox points out that the choice of which state’s maps to undo would be “essentially arbitrary.”⁶⁵

57. Justin Levitt, *Who Draws the Lines?*, LOYOLA L. SCH. L.A., <http://redistricting.lls.edu/who-state.php> [<https://perma.cc/R5UB-L22U>] [hereinafter Levitt, *Who Draws*]. For an overview of redistricting, see Justin Levitt, *All About Redistricting*, LOYOLA L. SCH. L.A., <http://redistricting.lls.edu/> [<https://perma.cc/V2NY-J4BR>].

58. See Levitt, *Who Draws*, *supra* note 57.

59. See generally Cox, *supra* note 24.

60. See *id.* at 418-27.

61. *Id.* at 441.

62. *Id.*

63. *Id.* at 443.

64. *Id.* at 443-44.

65. *Id.* at 444.

In one-person, one-vote and VRA cases, the Supreme Court has guided remedial discretion by telling judges to follow state law and the policy choices reflected in extant maps to the maximum feasible extent.⁶⁶ But for the congressional map as a whole, no overarching criteria or policy choice exists. A judicial decision to remedy a partisan gerrymander by, for example, remapping Texas's congressional districts while leaving Alabama's untouched, would privilege Alabama's redistricting choices over Texas's for no constitutionally discernable reason.⁶⁷

The alternative, as Cox recognizes, is some kind of indirect, risk-based strategy for policing congressional gerrymanders,⁶⁸ such as the "no mid-decade redistricting for partisan reasons" rule proposed by the plaintiffs in *LULAC*.⁶⁹ But as we have seen, Justice Kennedy rejected that test because it did not entail any showing of "burden[s] on representational rights."⁷⁰ This implies that an acceptable legal standard must account for the translation of votes into representation, and thus pushes toward an inquiry into the full set of districts for the legislative chamber as a whole, with all of the attendant difficulties in cases about the House of Representatives.

II. THE EDUCATION ANALOGY⁷¹

The justiciability and remedial problems presented by partisan gerrymandering claims, though hard, are hardly unprecedented. This Part shows that they have near analogues in state court cases concerning the constitutional adequacy of systems of public education. But whereas federal courts have treated these problems as reason to avoid partisan gerrymandering claims, most state courts have deemed educational adequacy claims justiciable. It is therefore

66. See, e.g., *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam); *White v. Weiser*, 412 U.S. 783, 795 (1973); *Hines v. Mayor of Ahuskie*, 998 F.2d 1266, 1271 (4th Cir. 1993).

67. By contrast, *Upham v. Seaman's* principle of deference to policy judgments reflected in state law and the extent map follows naturally from basic propositions about federalism. See *Upham*, 456 U.S. at 43.

68. Cox, *supra* note 24, at 444-51.

69. See *LULAC v. Perry*, 548 U.S. 399, 416-17 (2006) (Kennedy, J.).

70. *Id.* at 446.

71. Some of the description of the education rights case law in this Part also appears in Christopher S. Elmendorf & Darien Shanske, *Solving "Problems No One Has Solved": Courts, Causal Inference, and the Right to Education*, 2018 U. ILL. L. REV. (forthcoming).

worth asking whether the state court experience with education rights litigation has been disastrous, as those who argue for the nonjusticiability of partisan gerrymandering claims might expect. If the state courts have done some good, it is also worth asking whether the strategies they developed for managing the justiciability and remedial problems in educational adequacy cases might be adapted for a new generation of “representational adequacy” claims about the composition of legislative bodies.

I shall use the shorthand “representational adequacy claim” to denote any challenge to legislative districts in which (1) the plaintiffs claim that the quality of representation (or their opportunity to secure quality representation) falls short of constitutional standards, and (2) the plaintiffs’ theory of representational inadequacy requires an assessment of the system of legislative districts as a whole. Examples include partisan gerrymandering claims premised on the notion that citizens who support each major party should have an equal opportunity to rack up seats in the legislature,⁷² or founded on the proposition that the party that wins a majority of the votes should garner a majority of the seats;⁷³ ideological misalignment claims premised on the idea that the median voter in the median legislative district (with districts ranked by median-voter ideology) should be ideologically very close to the median voter in the polity as a whole;⁷⁴ and lack-of-competition claims premised on the notion that the system of legislative districts should include enough competitive seats for the legislature to be appropriately responsive to swings in public opinion.⁷⁵

72. This is the premise of the various symmetry standards proposed by Grofman and King, Stephanopoulos and McGhee, Best and McDonald, Wang, and others. See sources cited *supra* notes 14, 17-19, 36.

73. This is the premise of Justice Breyer’s opinion in *Vieth*. See *Vieth v. Jubelirer*, 541 U.S. 267, 356-62 (2004) (Breyer, J., dissenting) (addressing “unjustified entrenchment”).

74. David Schleicher and I have argued elsewhere for this criterion. See Christopher S. Elmendorf & David Schleicher, *Districting for a Low-Information Electorate*, 121 *YALE L.J.* 1846, 1875-80 (2012). Nick Stephanopoulos has developed related arguments for “ideological alignment” across a number of areas of election law. See Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 *VA. L. REV.* 1425 (2015); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 *COLUM. L. REV.* 283 (2014); Nicholas O. Stephanopoulos et al., *The Realities of Electoral Reform*, 68 *VAND. L. REV.* 761 (2015).

75. Richard H. Pildes, *The Constitution and Political Competition*, 30 *NOVA L. REV.* 253 (2006) (developing a theory of lack-of-competition claims grounded in Article I and the First Amendment); see also Brief for Samuel Issacharoff, Burt Neuborne & Richard H. Pildes as

Section A draws out the justiciability and remedial commonalities between educational adequacy claims and (potential) representational adequacy claims. Section B describes the strategies state courts have used to manage educational adequacy litigation.

A. Of Political Thickets and Stygian Swamps: Barriers to Judicial Review

The arguments for courts to stay out of educational adequacy and representational adequacy disputes are very similar. The relevant constitutional text is sparse. There is no generally accepted measure of the quality of the system (education or representation), let alone a shared norm about where to draw the line between minimally adequate and constitutionally unacceptable quality. Constitutional injuries may arise from the disaggregated, uncoordinated decisions of numerous independent actors. The claims if vindicated would leave trial courts with enormous remedial discretion. And the claims are acutely politically sensitive.

1. Sparse Constitutional Text

a. Education—State Constitutions

Forty-nine of the fifty state constitutions expressly provide for a system of public schools.⁷⁶ The education clauses typically state that the legislature “shall” establish a system of public schools, implying a mandatory duty.⁷⁷ But the texts offer scant guidance for courts

Amici Curiae in Support of Appellants, *LULAC v. Perry*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439) (advancing the same theory).

76. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989).

77. See, e.g., KY. CONST. § 183 (“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”); N.C. CONST. art. IX, § 3 (“The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.”); OKLA. CONST. art. XIII, § 4 (“The Legislature shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the State who are sound in mind and body.”); PA. CONST. art. III, § 14 (“The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”).

asked to determine whether the school system is qualitatively adequate.

Scholars have roughly grouped the education clauses into four categories.⁷⁸ The least demanding provisions state only that the legislature “shall establish” a system of public schools, or free public schools.⁷⁹ Education clauses in the second category describe the school system in very loose qualitative terms, typically calling for a system of “efficient,” “thorough,” or “thorough and efficient” schools.⁸⁰ In the third group are education clauses with an evocative preamble and, arguably, a somewhat stronger mandate.⁸¹ An exemplar is Article IX of the California Constitution, which reads: “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”⁸²

The most demanding provisions describe education as a “fundamental,” “paramount,” or “primary” duty of the state.⁸³ They do not, however, feature any more specific articulation of a constitutional standard of quality.⁸⁴

In view of the ubiquitous lack of detail concerning educational adequacy, or even the appearance of the word “adequacy” in the constitutional text, it is perhaps unsurprising that empirical studies have found no correlation between the type of education clause and judicial rulings on justiciability and other matters.⁸⁵

78. This paragraph draws on Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66-70 (1974); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16 (1985); and Thro, *supra* note 76, at 1661-70.

79. See Grubb, *supra* note 78, at 67.

80. See *id.* at 67-68.

81. See *id.* at 68-69.

82. CAL. CONST. art. IX, § 1.

83. See Grubb, *supra* note 78, at 69-70.

84. As Clay Gillette has observed, the qualitative adjectives found in extant education clauses are “inherently nebulous.” Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 37 (1996).

85. See, e.g., Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010); Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101 (2000); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147 (2000); Yohance C. Edwards & Jennifer Ahern, Note, *Unequal Treatment in State Supreme Courts: Minority*

b. Representation—Federal Constitution

Representational adequacy claims under the U.S. Constitution have, to date, mostly consisted of equal protection claims brought by political parties, although lately plaintiffs have also invoked the First Amendment at the invitation of Justice Kennedy.⁸⁶ Needless to say, the text of the First Amendment and the text of the Equal Protection Clause are equally silent on standards of fair and effective representation.

The most plausible alternative—assuming the Supreme Court is not about to jettison the long line of cases holding the Guarantee Clause nonjusticiable—is to found representational adequacy claims under the U.S. Constitution on Article I.⁸⁷ Section 2 of Article I provides that “[t]he House of Representatives shall be ... chosen ... by the People of the several States.”⁸⁸ Yet Article I also provides that the “Electors” for congressional elections are those qualified to vote for “the most numerous Branch of the State Legislature,”⁸⁹ and that state legislatures shall prescribe by law the time, place, and manner of congressional elections, which regulations Congress “may at any

and City Schools in Education Finance Reform Litigation, 79 N.Y.U. L. REV. 326 (2004). *But see* Bill Swinford, *A Predictive Model of Decision Making in State Supreme Courts: The School Financing Cases*, 19 AM. POL. Q. 336, 347 (1991) (finding a weak relationship concerning equality-oriented claims).

86. Following Justice Kennedy’s invitation, *see* *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment), two district courts have recently adopted First Amendment arguments, *see* *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 WL 341658, at *62 (M.D.N.C. Jan. 1, 2018) (three-judge court). However, efforts to ground partisan gerrymandering claims in the First Amendment run against the grain of many previous Supreme Court decisions rejecting efforts to build a functional theory of voter/party rights into the First Amendment. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595-98 (D. Md. 2016) (three-judge court). *See generally* Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1084-89 (2010) (discussing underenforcement of constitutional norms of democratic accountability); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 101-130 (2004) (critiquing the Supreme Court’s political party rights jurisprudence for relying on analogies to private expressive associations).

87. For a careful argument, grounded in the Federalist Papers, that Article I impliedly limits partisan bias in congressional districts, *see* MCGANN ET AL., *supra* note 36, at 205-10; *see also* Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211 (2018) (investigating the history of the Elections Clause of Article I).

88. U.S. CONST. art. I, § 2.

89. *Id.*

time by Law make or alter.”⁹⁰ Reading these provisions together, one might infer that voter qualifications and time, place, and manner regulations must be such as to enable the People to make a substantively meaningful choice about the composition of Congress. To put this point a bit differently, the language “chosen ... by the People” in Section 2 may establish by implication substantive standards of representativeness and responsiveness for the House of Representatives, the wing of the federal government that the Framers expected to be most closely tethered to public opinion.⁹¹ It may also imply a corresponding responsibility on the part of Congress and the state legislatures to exercise their delegated powers in furtherance of those standards.

The education analogy is instructive. Courts have found states with formally free public schools but many dysfunctional school districts liable for failing to maintain a “system of public schools” within the meaning of the state’s constitution.⁹² The very idea of a “system of public schools” (or a “thorough and efficient” system) arguably implies some minimal level of quality. So too, the very idea of a legislative body “chosen ... by the People” implies some minimal level of responsiveness to shifts in public opinion, and some minimal correspondence between the ideology/party of the median legislator and that of the median voter or citizen.

c. Representation—State Constitutions

The vast majority of state constitutions include both general provisions about the right to vote and fair elections,⁹³ and specific criteria for districting.⁹⁴ (See the Online Appendix for a state-by-state

90. *Id.* § 4.

91. The argument that Article I impliedly limits congressional gerrymander is fleshed out in MCGANN ET AL., *supra* note 36, at 205-10.

92. See Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1201 (2011).

93. See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 app. (2014); James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 647-49 (2004).

94. For a summary, current as of 2010, see Justin Levitt, *Where the Lines Are Drawn—State Legislative Districts*, LOYOLA L. SCH. L.A., <http://redistricting.lls.edu/where-tablestate.php> [<https://perma.cc/RLW7-VNEB>].

summary.⁹⁵) The general provisions are exemplified by clauses that guarantee “free” or “free and equal” elections, or elections with “purity” and “integrity.”⁹⁶ A small number of state constitutions also provide explicitly for “equal representation” or an “equal right to elect” state officials.⁹⁷ As in the education domain, these general provisions are often coupled to a legislative delegation, set forth in mandatory terms. For example: “The General Assembly by law shall ... insure ... the integrity of the election process.”⁹⁸ This implies a legislative duty.

But in contrast to the education domain, where criteria for school quality are generally missing, nearly every state constitution lists

95. Elmendorf, *supra* note 5.

96. Gardner, *supra* note 93, at 648. Josh Douglas reports that twenty-six state constitutions have terms requiring “free,” “free and open,” or “free and equal” elections, and that nearly all state constitutions confer an affirmative right to vote. Douglas, *supra* note 93, at 103, app. James Gardner suggests that the clauses granting the right to vote could provide the hook for partisan gerrymandering claims. *See* Gardner, *supra* note 93, at 647-52. Here I am skeptical. As Douglas shows in the appendix to his article, most of these provisions are cast in terms of voter qualifications. *See* Douglas, *supra* note 93, app. But a provision defining who is *qualified* to vote need not imply anything about the system of districts for aggregating votes into representation.

97. *See, e.g.*, MASS. CONST. pt. 1, art. IX (“[T]he inhabitants of this commonwealth ... have an equal right to elect officers, and to be elected, for public employments.”); N.H. CONST. pt. 1, art. XI (“[E]very inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.”); S.C. CONST. art. I, § 5 (“[E]very inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.”); W. VA. CONST. art. II, § 4 (“Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved.”).

98. ILL. CONST. art. III, § 4; *accord* ARIZ. CONST. art. VII, § 12 (“There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.”); COLO. CONST. art. VII, § 11 (“The general assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise.”); DEL. CONST. art. V, § 1 (“[T]he General Assembly may by law prescribe the means, methods and instruments of voting so as best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat.”); MD. CONST. art. I, § 7 (“The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.”); MICH. CONST. art. II, § 4 (“The legislature shall enact laws to preserve the purity of elections.”); MONT. CONST. art. IV, § 3 (“The legislature ... shall insure the purity of elections and guard against abuses of the electoral process.”); N.M. CONST. art. VII, § 1 (“The legislature shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise.”); WYO. CONST. art. VI, § 13 (“The legislature shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise.”).

some substantive criteria specifically for legislative districts.⁹⁹ (Perhaps this is why plaintiffs have almost entirely overlooked the possibility of challenging gerrymanders under the generally worded electoral provisions.¹⁰⁰) Taking the lay of the land circa 2010, Justin Levitt reported that forty-five of the fifty state constitutions require population equality among state legislative districts, twenty-eight call for districts to track political subdivision boundaries, and seven codify “community of interest” districting criteria.¹⁰¹ Levitt noted that five state constitutions also include a prohibition on “undue favoritism” toward political factions, or require competitive districts.¹⁰² (By my count there are now seven such states.¹⁰³)

The existence of explicit constitutional criteria for legislative districts may support representational adequacy claims in some states, and hinder the claims in others. The criteria are obviously helpful insofar as they target the very thing the plaintiff wants to attack. For example, partisan gerrymandering claims should be available in Hawaii, whose constitution states, “No district shall be so drawn as to unduly favor a person or political faction.”¹⁰⁴ Similarly, insufficient competition claims should be justiciable in Arizona, whose constitution provides, “[C]ompetitive districts should be favored

99. See Levitt, *supra* note 94.

100. In Part III.E.4, I survey state court redistricting decisions following the 1990, 2000, and 2010 rounds of redistricting. Only two decisions mention the generally worded electoral provisions of the state’s constitution, and the plaintiffs in one of those cases never explained to the court what that provision requires (in the redistricting context) beyond compliance with the population equality, compactness, and contiguity criteria also specified in the constitutional text. See *Johnson v. State*, 366 S.W.3d 11, 33 (Mo. 2012) (stating that because the plaintiffs’ “free-and-open elections” argument was predicated on the state’s alleged failure to comply with specified redistricting criteria under another provision of the state constitution, the failure of the latter argument necessarily implied the failure of the former). As Part III.E.4 also explains, three other redistricting claims invoked generic “government in the public interest”-type provisions of a state constitution, which the courts deemed nonjusticiable or unenforceable by private litigants.

101. See Levitt, *supra* note 94; see also James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 894-95 (2006) (“By far the most common, and oldest, anti-gerrymandering provisions are those requiring election districts to be ‘contiguous,’ a provision appearing today in thirty-seven state constitutions, and ‘compact,’ a requirement imposed by twenty-four constitutions.” (footnote omitted)).

102. See Levitt, *supra* note 94.

103. See Elmendorf, *supra* note 5.

104. HAW. CONST. art. IV, § 6(2).

where to do so would create no significant detriment to the other goals.”¹⁰⁵

Yet if the constitution only lists criteria like compactness, contiguity, and respect for subdivision boundaries or communities of interest, a court might infer that these criteria are exclusive,¹⁰⁶ or, even if nonexclusive, that the constitution’s theory of representation is concerned solely with the integrity of what Nick Stephanopoulos calls “territorial communities.”¹⁰⁷ If so, general constitutional provisions about “free and open” elections, “equal representation,” or elections with “integrity” would not support representational adequacy claims premised on a lack of competitive districts, partisan bias, or nonalignment of the median district with the polity-wide median voter.¹⁰⁸

105. ARIZ. CONST. art. IV, pt. 2, § 1, cl. 14(F).

106. See, e.g., *Wilson v. Kasich*, 981 N.E.2d 814, 819-20 (Ohio 2012) (refusing to infer a general command of partisan neutrality from textual requirements of compactness, contiguity, and equality of population).

107. See Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379 (2012). James Gardner has persuasively argued that long-standing state constitutional requirements of contiguity and compactness reflect this theory of representation. See Gardner, *supra* note 93. He notes that a couple of state courts have construed such redistricting criteria as exclusive, *id.* at 969 n.319, but also observes that more general provisions of the state constitution concerning elections might be read to embody a different theory of representation, particularly given the state constitutional legacy of the Progressive and Populist movements, see *id.* at 969-70.

108. Such general electoral provisions would be held not to apply to redistricting. It might be said, for example, that the “purity” and “integrity” of elections is solely a function of whether all eligible voters (and no others) may vote, free of coercion, and have their votes counted. In a few constitutions, the immediate textual context of the provisions about “pure” elections, or elections with “integrity,” suggests that these provisions are mainly concerned with fraud in the casting and counting of ballots. See, e.g., NEV. CONST. art. II, § 6 (“Provision shall be made by law for the registration of the names of the Electors within the counties of which they may be residents and for the ascertainment by proper proofs of the persons who shall be entitled to the right of suffrage, as hereby established, to preserve the purity of elections.”); S.D. CONST. art. VII, § 2 (“Every United States citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote in all elections and upon all questions submitted to the voters of the state unless disqualified by law for mental incompetence or the conviction of a felony. The Legislature may by law establish reasonable requirements to insure the integrity of the vote.”); TENN. CONST. art. IV, § 1 (“The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.”); TEX. CONST. art. VI, § 4 (“[T]he Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box.”).

But it need not follow from the existence of constitutionally codified “traditional districting criteria” that more general electoral provisions cannot support representational adequacy claims about fairness and competition at the level of the legislature as a whole. No state constitution states that the listed districting criteria are exclusive.¹⁰⁹ Perhaps the listed criteria are simply those the constitution’s framers were able to foresee and agree upon as important, and that the legislative duty to guarantee electoral integrity, equal representation, or “free and equal” elections obligates the legislature to spell out and act upon additional redistricting criteria as societal knowledge, norms, and redistricting technology evolve.¹¹⁰

2. No Generally Accepted, Unidimensional Metric of Quality

If there were a political or social scientific consensus about how to measure the quality of schools or representation, the constitutional text’s lack of specificity might not represent a large barrier to the justiciability of adequacy claims. Judges could simply declare a “judicially manageable” standard using the accepted measure of quality, and the underlying consensus would insulate judges against the charge of reading their personal political views into the constitution.

But there is no such consensus in either domain, and the barriers to consensus run deep. In both domains, “quality” has multiple dimensions, and reasonable people will disagree about the relative importance of progress on this or that dimension. Trade-offs are omnipresent. Measurement problems are vexing too. Some dimensions of quality are easier to observe than others, but even as to easier-to-measure dimensions, experts are continually debating, reworking, and refining the available metrics.

109. My research assistants looked up the relevant language in each state constitution and found no language indicating that the listed criteria are exclusive.

110. *Cf.* Gardner, *supra* note 101, at 969-70 (suggesting that general electoral fairness provisions, read against the Progressive and Populist history of many state constitutions, might reasonably be understood to limit partisanship in districting).

a. School Quality

State courts have justified their involvement in school-quality cases with reference to the “fundamental” importance of education for children’s future participation in the political, economic, and social life of the community.¹¹¹ Given this foundation, one might expect courts to evaluate the quality of public schools in terms of their *impact* on students’ future rates of voting, employment, incarceration, and the like. A school system would be deemed inadequate if the state had failed to adopt policies or programs that would demonstrably improve students’ adult outcomes at reasonable cost. Yet there is very little credible evidence concerning the effects of alternative educational policies or programs on such long-run outcomes.¹¹² And even if credible evidence did exist, on what basis is a court to second-guess the legislature’s judgment about which adult outcomes to prioritize?

One response is to define the constitutional minimum standard of adequacy solely in terms of basic literacy and numeracy skills, which are useful in all of life’s domains and which may be measured with standardized tests.¹¹³ But as the contentious politics of educational testing well illustrate,¹¹⁴ there is no consensus about how

111. See INST. FOR EDUC. EQUITY AND OPPORTUNITY, EDUCATION IN THE 50 STATES 2-3 (2008) (arguing that state constitutional education clauses are universally grounded on perceived importance of education for democracy and economic opportunity). This is true of nearly all of the state constitutional decisions about education rights, whether grounded on an “equity” or “adequacy” theory. For equity/equal protection examples, see *Serrano v. Priest*, 487 P.2d 1241, 1255 (Cal. 1971); *Horton v. Meskill*, 376 A.2d 359, 372-73 (Conn. 1977); and *Brigham v. State*, 692 A.2d 384 (Vt. 1997). For adequacy cases making the same point, see, for example, *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 190, 212 (Ky. 1989); *Hancock v. Commissioner of Education*, 822 N.E.2d 1134, 1137 (Mass. 2005) (Marshall, C.J., concurring); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); and *Campbell County School District v. State*, 181 P.3d 43, 50 (Wyo. 2008).

112. See generally Elmendorf & Shanske, *supra* note 71 (reviewing literature and explaining its shortcomings in terms of state control over the production of knowledge about the effects of educational interventions on long-run outcomes).

113. In the early- to mid-2000s, some commentators hoped that the federal No Child Left Behind Act, which established testing and reporting requirements, would come to anchor state constitutional education rights litigation. See, e.g., Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, in SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 1, 2, 16-17 (Martin R. West & Paul E. Peterson eds., 2007).

114. On the politics of testing, see generally LORRAINE M. McDONNELL, POLITICS, PERSUASION, AND EDUCATIONAL TESTING (2004); and Ashley Jochim & Patrick McGuinn, *The Politics*

to measure such skills, or about prioritizing them over other instructional objectives, such as the inculcation of “grit” and socio-emotional competencies.¹¹⁵ Nor does the normative foundation of the education right support such a lexical prioritization: an adult who is poor and marginally literate, yet also free and a regular voter, participates more fully in the political, economic, and social life of the community than an adult who, while better at reading and math, never votes and ends up spending a good share of his years in prison (perhaps a consequence of his failure to develop fellow feeling and conflict resolution skills as a youngster).¹¹⁶

b. Representational Quality

As with schools, so too with representation—there are lots of different, reasonable criteria that one might use to evaluate the overall quality of a system of legislative districts.¹¹⁷ These include ideological alignment between the median legislative district and the median voter in the polity as a whole;¹¹⁸ partisan bias in “wasted

of the Common Core Assessments, 16 EDUC. NEXT 45 (2016).

115. Cf. ANGELA DUCKWORTH, GRIT: THE POWER OF PASSION AND PERSEVERANCE (2016); Joseph A. Durlak et al., *The Impact of Enhancing Students’ Social and Emotional Learning: A Meta-Analysis of School-Based Universal Interventions*, 82 CHILD DEV. 405 (2011).

116. The Nobel laureate James Heckman and coauthors have argued that the impressive long-term economic impacts of certain early childhood educational experiments are due to the inculcation of socio-emotional competencies. See, e.g., Flavio Cunha, James J. Heckman & Susanne M. Schennach, *Estimating the Technology of Cognitive and Noncognitive Skill Formation*, 78 ECONOMETRICA 883 (2010); Mathilde Almlund, Angela Lee Duckworth, James Heckman & Tim Kautz, *Personality Psychology and Economics* (Inst. for the Study of Labor, Discussion Paper No. 5500, 2011); James J. Heckman, Seong Hyeok Moon, Rodrigo Pinto, Peter Savelyev & Adam Yartz, *A New Cost-Benefit and Rate of Return Analysis for the Perry Preschool Program: A Summary* (Inst. for the Study of Labor, Policy Paper No. 17, 2010). Some recent evidence from well-designed experiments also indicates that such interventions substantially increase the treated children’s future political participation as adults. See D. Sunshine Hillygus et al., *The Nitty Gritty: The Unexplored Role of Grit and Perseverance in Voter Turnout* (June 21, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2675326 [<https://perma.cc/CB3F-ULU4>].

117. For a helpful summary, see Altman & McDonald, *supra* note 40, at 84-85. Opponents of judicial policing of partisan gerrymanders have emphasized the diversity of plausible normative criteria. See, e.g., Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 666-72 (2002).

118. See sources cited *supra* note 74.

votes” or in the translation of votes into legislative representation;¹¹⁹ representation for territorial communities of interest;¹²⁰ descriptive representation for historically marginalized groups;¹²¹ and congruence between legislative district boundaries and media-market boundaries, in the interest of informed voting.¹²²

As in the education domain, there are ongoing social scientific debates about how to measure many of these goods. For example, should community-of-interest criteria be implemented using subjective expressions of identity voiced at public meetings, or objective measures of commonality gleaned from census data?¹²³ Should partisan bias be measured using the observed or expected number of wasted votes, a summary measure of asymmetry in the estimated votes-to-seats curve, or simple gaps between the mean number of partisans in a district and the median?¹²⁴

Perhaps more daunting than the measurement problems are the trade-offs. Progress on one normative dimension may require sacrifices on another. For example, the concentration of Democrats and liberals in urban centers means that achieving a reasonable number of competitive districts, or ideological congruence between the median district and the median voter, may require drawing “pie slice” districts that combine city-center liberals with suburban and ex-urban conservatives, in violation of community-of-interest criteria.¹²⁵

119. See *supra* notes 16-19 and accompanying text.

120. For an elaboration and defense of the territorial community norm for districting, see Stephanopoulos, *supra* note 107.

121. See, e.g., CHRISTIAN R. GROSE, CONGRESS IN BLACK AND WHITE: RACE AND REPRESENTATION IN WASHINGTON AND AT HOME (2011); Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* 61 J. POLITICS 628 (1999).

122. See Elmendorf & Schleicher, *supra* note 74, at 1861-71 (reviewing evidence concerning media-market/district congruence and informed voting). This may become less important in the social-media era.

123. For the objective approach, see Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903 (2012). For the subjective, see Karin Mac Donald & Bruce E. Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. IRVINE L. REV. 609 (2013).

124. For arguments in favor of each of these approaches, see sources cited *supra* notes 36-40.

125. See Chen & Rodden, *supra* note 38, at 241-47.

3. *Disaggregated Decision-Making and Remedial Discretion*

As Part I.C explained, any challenge to the overall quality of the system of congressional districts would be greatly complicated by the disaggregated, state-by-state nature of congressional redistricting. Disaggregated districting makes it difficult for courts to pin down the then-operative map of congressional districts, and leaves courts with tremendous remedial discretion.

These difficulties have near analogues in the education domain. Just as the overall quality of congressional representation is the joint product of federal statutes addressing the time, place, and manner of congressional elections and the decisions of fifty different states about the same matters, the overall quality of a state's system of public schools is the joint product of state-level decisions and those of scores of cities, counties, and local school boards. Pointing to these complexities, defendants have often tried to escape liability in education-quality cases by arguing that their decisions were not the proximate cause of poor schools or bad educational outcomes.¹²⁶ The multilayered and substantially disaggregated nature of public school governance also means that the overall quality of a state's school system, like the overall quality of the system of congressional districts, is something of a moving target.

Because the overall quality of the school system is a joint product of state and local decisions, courts in education cases have enormous remedial discretion. They can target state legislative decisions, state administrative decisions, or local school board decisions. Interest groups will show up in court with predictably and radically different demands. Should the court order the state to spend a lot more on "failing" schools, as teachers' unions and local school boards will demand?¹²⁷ Should the court undertake to reform teacher compensation

126. *Cf.* Columbia Falls Elementary Sch. Dist. v. State, No. BDV-2002-528, 2008 Mont. Dist. LEXIS 483, at *72 (Dec. 15, 2008) ("As a result of viewing all of the pie charts, bar graphs and other exhibits presented by the parties, often hashing over the very same numbers with very different results, the Court is unclear whether the problems currently experienced by the Plaintiff districts are a result of a constitutionally inadequate funding system or by choices made by the school districts. The answer to this question is most likely obscured by ... competing interests."). For more on causation defenses in education rights litigation, see Elmendorf & Shanske, *supra* note 71 (manuscript at 17 & n.58) (citing Derek W. Black, *Civil Rights, Charter Schools, and Lessons to be Learned*, 64 FLA. L. REV. 1723, 1731-57 (2012)).

127. *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 412 (N.J. 1990) (requiring state to provide

and tenure rules, as conservative plaintiffs and intervenors nowadays request?¹²⁸ Should the court tell the state to reallocate funds from special education to better serve disadvantaged children with greater cognitive capacity, as a Connecticut trial judge recently decided?¹²⁹ Should the court order the state to adopt new, more flexible rules for state control of local school boards, as an Alaska trial judge did?¹³⁰ Should the court appoint a special master who will tell the state how much to spend, and the school boards how to spend it, as New Jersey's courts have done?¹³¹ The possibilities are endless.

4. *Politics and Judicial Authority*

Justice Felix Frankfurter famously proclaimed that malapportionment cases are essentially “party contests” whose adjudication would sap public confidence in the courts’ impartiality, and hence the courts’ authority.¹³² Judges would come to be seen as partisans in robes rather than neutral arbiters of individual rights. Frankfurter’s warning has shaped redistricting litigation ever since, no doubt informing the rigid equal-population standard for malapportionment claims and leaving many judges extremely reluctant to entertain partisan gerrymandering claims absent a similarly constraining doctrinal standard.

Education cases are not partisan in quite the same way. Control of the government does not turn on the court’s decision. Rather, these cases present “political questions” and threats to judicial

additional funding for special needs of students in high poverty districts); *Abbeville Cty. Sch. Dist. v. State*, 777 S.E.2d 547, 549 (S.C.) (ordering cost study subject to de novo judicial review), *superseded by* 780 S.E.2d 609 (S.C. 2015); *State v. Campbell Cty. Sch. Dist.*, 19 P.3d 518 (Wyo.) (applying strict scrutiny and faulting legislature’s cost study in various respects), *modified on reh’g*, 32 P.3d 325 (Wyo. 2001).

128. *See, e.g.*, *Vergara v. State*, No. BC484642, 2014 WL 6478415, at *5-7 (Cal. Super. Ct. Aug. 27, 2014), *rev’d*, 202 Cal. Rptr. 3d 262 (Cal. Ct. App. 2016), *modified*, 246 Cal. App. 4th 619 (Cal. Ct. App. 2016).

129. *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, No. X07HHDCV145037565S, 2016 WL 4922730, at *27-32 (Conn. Super. Ct. Sept. 7, 2016).

130. *Moore v. State*, No. 3AN049756, 2007 WL 8310251, at *82 (Alaska Super. Ct. June 21, 2007).

131. *See Abbott v. Burke (Abbott V)*, 710 A.2d 450, 473 (N.J. 1998) (summarizing affirmed lower court order), *clarified*, 751 A.2d 1032 (N.J. 2000).

132. *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946) (plurality opinion); *accord Baker v. Carr*, 369 U.S. 186, 324 (1962) (Frankfurter, J., dissenting).

authority in an older sense: there is an acute risk of protracted conflict with other branches of government.¹³³ Remedial orders may be ignored. Legislators who do not want courts telling them how much to spend or where to spend it may retaliate by cutting the judiciary's budget. Judicial opinions and directives will be scrutinized by the press; critics will question their constitutional foundations. Well-organized groups (catering to the narrow self-interest of middle-class suburban parents who do not want their neighborhood schools disrupted or their tax bills to skyrocket) may push for recall elections, arguing that "activist judges" have overstepped their role.

These are not idle speculations. In Kansas, the legislature responded to school finance rulings by stripping the state supreme court of administrative control over trial courts.¹³⁴ A later bill stipulated that if the administrative limitation were held unconstitutional, all public spending on the court system would immediately cease.¹³⁵ The Kansas Supreme Court responded by threatening to enjoin all state spending on public schools unless the state appropriated sufficient funds for poor schools by a specified date.¹³⁶ Lawmakers then introduced a bill broadening the grounds for impeachment.¹³⁷ Washington's Supreme Court held the legislature as a whole in contempt for failing to fix the public schools.¹³⁸ Ratcheting up the pressure, the court fined the legislature \$100,000 a day for missing

133. *Cf. Giles v. Harris*, 189 U.S. 475, 487-88 (1903) (refusing to adjudicate an alleged Fifteenth Amendment violation because of remedial concerns while hinting that such claims might become justiciable if the United States were a party and prepared to enforce the court's decision).

134. *See Solomon v. Kansas*, BRENNAN CTR. FOR JUST. (Dec. 23, 2015), <https://www.brennancenter.org/legal-work/solomon-v-kansas> [<https://perma.cc/2MQF-8CAC>].

135. *See id.*

136. *See* Erik Eckholm, *Outraged by Kansas Justices' Rulings, Republicans Seek to Reshape Court*, N.Y. TIMES (Apr. 1, 2016), <http://www.nytimes.com/2016/04/02/us/outraged-by-kansas-justices-rulings-gop-seeks-to-reshape-court.html> [<https://perma.cc/TV3k-66NM>].

137. *See id.*; *see also Attempt to Enact Constitutional Amendment Fails in New Hampshire*, SCHOOLFUNDING.INFO (June 27, 2012), <http://schoolfunding.info/news/attempt-to-enact-constitutional-amendment-fails-in-new-hampshire/> [<https://perma.cc/JV4Y-HBBU>] (noting that in New Hampshire, numerous constitutional amendments have been proposed to restrict judicial review of educational adequacy).

138. Joseph O'Sullivan, *Contempt Ruling Ups Ante in Fight to Fund Public Schools*, SEATTLE TIMES (Sept. 12, 2014, 10:16 AM), <http://www.seattletimes.com/seattle-news/contempt-ruling-ups-ante-in-fight-to-fund-public-schools/> [<https://perma.cc/P2K5-BMFJ>] ("For the first time in history, the Washington Supreme Court has held the Legislature in contempt for failing to obey a court order.").

court-imposed deadlines to enact remedial legislation.¹³⁹ In New Jersey, the game of chicken between court and legislature resulted in the court ordering *all* of the state's schools closed for an eight-day period.¹⁴⁰ State supreme courts in Ohio and Alabama finally capitulated in the face of legislative intransigence.¹⁴¹

This is not to say that judicial involvement in education quality cases has been fruitless. The precarious judicial-legislative dance has often resulted in salutary educational and funding reforms. The best available evidence suggests that judicially induced spending increases have on average yielded both test-score and lifetime-outcome gains for students in the benefited districts.¹⁴² My point is simply that when courts deem an education-quality claim justiciable, they embark on an uncertain, highly scrutinized journey, the ultimate success of which depends on the cooperation of the legislative and executive branches of government—cooperation which may be difficult for the courts to secure.

The prospect of this journey has been too much for some courts to stomach. Reviewing the history of school finance litigation in Arkansas, Kansas, Texas, Alabama, and New Jersey, the Nebraska Supreme Court wrote:

139. See Joseph O'Sullivan & Jim Brunner, *School Funding Back on Table as Court Fines State \$100,000 a Day*, SEATTLE TIMES (Aug. 13, 2015, 10:51 AM), <http://www.seattletimes.com/seattle-news/education/supreme-court-orders-100000-per-day-fines-in-mccleary-case/> [<https://perma.cc/9CHR-KXP5>].

140. See Joe Robertson, *Kansas School Shutdown Would Follow New Jersey's Contentious Path 40 Years Ago*, KAN. CITY STAR (June 8, 2016, 1:45 PM), <http://www.kansascity.com/news/local/article82533292.html> [<https://perma.cc/4QRQ-RT4W>].

141. In Alabama, the capitulation was complete and *de jure*. See *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002) (per curiam) (holding education-clause claims nonjusticiable because of remedial/separation of powers concerns, notwithstanding a decision of the same court five years earlier holding these claims reviewable). For a summary of the Alabama litigation, see *Alabama*, SCHOOLFUNDING.INFO, <http://schoolfunding.info/litigation-map/alabama/> [<https://perma.cc/WQE6-ZPU8>]. In Ohio, the supreme court, in its fifth opinion in the same case, held that the trial court had no authority to supervise crafting of a remedy by the legislature. See *State ex rel. State v. Lewis (DeRolph V)*, 789 N.E.2d 195, 202 (Ohio 2003). For a summary of the Ohio litigation, see *Ohio*, SCHOOLFUNDING.INFO, <http://schoolfunding.info/litigation-map/ohio/> [<https://perma.cc/5JGN-9ATM>].

142. See C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q.J. ECONOMICS 157, 212 (2016); Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement* 5, 39 (Nat'l Bureau of Econ. Research, Working Paper No. 22011, 2016).

[A] justiciable issue must be susceptible to immediate resolution and capable of present judicial enforcement. But courts have been unable to immediately resolve school funding disputes.

....

The landscape is littered with courts that have been bogged down in the legal quicksand of ... challenges to their states' school funding systems.... [W]e refuse to wade into that Stygian swamp.¹⁴³

And yet, only about a third of the state supreme courts to have faced the question deemed claims under the education clauses nonjusticiable.¹⁴⁴ The rest entered the Stygian swamp and developed strategies to navigate through it. Perhaps this willingness to engage reflects the strong representation-reinforcement argument for *some* judicial involvement in the education sphere.¹⁴⁵ It goes without saying that similar arguments counsel for some judicial role in enforcing constitutional values of representational adequacy.

B. Mucking Through the Stygian Swamp: How State Courts Have Managed Education-Rights Litigation

At the dawn of modern era of education rights litigation, legal scholars John Coons, William Clune, and Stephen Sugarman argued that the central challenge was to develop a clear, coherent, and easy-to-apply doctrinal standard.¹⁴⁶ Ad-hocery would “evoke nothing but criticism of the court and evasion by the legislatures.”¹⁴⁷ This is, of course, the same “manageability” conviction that has thwarted

143. *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 182-83 (Neb. 2007) (footnote omitted).

144. As of 2010, twenty-six state supreme courts had “addressed education finance constitutional challenges at least partly founded on theories of adequacy”; only eight “held that the courts may not engage in merits review.” Bauries, *supra* note 85, at 741. The Online Appendix provides a current, state-by-state summary of nonjusticiability rulings (including lower court decisions that were not appealed or that the state supreme court elected not to review). Elmendorf, *supra* note 5.

145. For a sketch of the argument—emphasizing the status of children as nonvoters, the lack of political power of the poor, and the normative foundations of the education right in political as well as economic opportunity—see Elmendorf & Shanske, *supra* note 71 (manuscript at 21-22).

146. JOHN E. COONS, WILLIAM H. CLUNE III & STEPHEN D. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 290-91 (1970).

147. *Id.*

partisan gerrymandering litigation. Yet the courts that entered the Stygian Swamp of education rights litigation largely *did not* follow Coons and his colleagues' directive.¹⁴⁸ Instead they developed coping strategies that allowed them to intervene at opportune moments in politically delicate disputes. These strategies include (1) combining opaque, multifaceted liability rulings with "legislative remand" remedies; (2) discovering implied legislative duties to enact a reasonable framework for public education; and (3) issuing provisional injunctive remedies, which the legislature is free to replace.

1. The Rose Template: Kitchen-Sink Liability Rulings and Legislative Remand Remedies

Courts have described the education right as entitling students to a reasonably adequate or roughly equal education,¹⁴⁹ thus placing questions about the *quality* of the school system front and center.¹⁵⁰ Yet instead of constitutionalizing a metric of school quality, courts, particularly in their early interventions, announced very general qualitative goals and then found the state liable on the basis of an open-ended weighing of everything in the record that tended to make the state's schools or school system look bad relative to schools elsewhere. The seminal example is the Kentucky Supreme Court's opinion in *Rose v. Council for Better Education, Inc.*¹⁵¹

The *Rose* court established loose performance standards such as "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization."¹⁵² But the court did not identify particular schools or school districts that were falling short of the standards, or particular state actions that could bring them up to par. Nor did it set forth a standard of review. Instead the court just made an open-ended determination about

148. See William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185 (2003) (arguing that fuzzy standards rather than clear rules had carried the day, with courts mixing arguments about equity with arguments about adequacy and generally providing little guidance about what must be done to achieve constitutional compliance).

149. See *id.* at 1193-94.

150. Elmendorf & Shanske, *supra* note 71 (manuscript at 8-9) (collecting sources).

151. 790 S.W.2d 186 (Ky. 1989).

152. *Id.* at 212.

whether the State was doing a good enough job in the domain of education, in light of everything in the record.¹⁵³ Typical factors in *Rose*-style opinions include: disparities among states, districts, schools, or demographic groups in test-score results and graduation rates (so-called “output” measures of education quality); analogous disparities in “inputs,” such as funding, teacher salaries, curricula, facilities, and class sizes; government reports on problems with the school system; and evidence of legislative inattention to the problems, sometimes expressed as the legislature’s failure to commission a study estimating the cost of achieving the state’s educational standards.¹⁵⁴

Having found the State liable, the *Rose* court remanded to the legislature for a remedy.¹⁵⁵ This is a way for courts to pressure the legislature and support reformers without actually resolving any of the difficult questions about how best to measure the quality of education being provided to the state’s children, or about which funding or policy reforms would most likely improve the education of disadvantaged children.

153. *See id.* at 196-99. As the court explained, “The evidence in this case consists of numerous depositions, volumes of oral evidence heard by the trial court, and a seemingly endless amount of statistical data, reports, etc.... The tidal wave of the appellees’ evidence literally engulfs that of the appellants.” *Id.* at 196-97.

154. *See, e.g.*, *Op. of the Justices*, 624 So. 2d 107, app. at 126-36 (Ala. 1993) (broad list of shortcomings); *Montoy v. State*, 112 P.3d 923, 939 (Kan. 2005) (per curiam) (“[O]utputs are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the legislature.”); *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 552-54 (Mass. 1993) (broad list of shortcomings); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 162 (S.C. 2014) (“Plaintiff Districts argue, and we agree, that the proper question is whether the education funding apparatus as a whole gives rise to a constitutional violation.”), amended by 777 S.E.2d 547 (S.C. 2015), and superseded by 780 S.E.2d 609 (S.C. 2015); *see also* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1233 (2008) (“Seventeen state courts of last resort have ruled in favor of school finance plaintiffs since 1989, the advent of the so-called adequacy wave of cases. If one studies these opinions, an interesting pattern emerges: Time and again, courts have focused on disparities in funding, curricular and extracurricular offerings, qualified teachers, school facilities, and instructional materials.” (footnote omitted)).

155. *Rose*, 790 S.W.2d at 216. Though concurring and dissenting justices in *Rose* criticized the legislative remand remedy as a judicial abdication of responsibility, *see id.* at 216-18 (Gant, J., concurring), or impermissibly advisory, *see id.* at 223-25 (Leibson, J., dissenting), the legislative remand is the now-standard initial remedy in school finance cases. *See Koski, supra* note 148, at 1241 (“[I]n all nineteen final state supreme court educational finance decisions that favored plaintiffs, the courts issued declaratory relief and ordered the legislature to develop a remedial finance scheme.”).

That so many courts have followed *Rose* perhaps suggests that the demand for “manageable standards”—understood as constraining, determinate rules—is misplaced. Fuzzy standards can be useful tools for handling politically delicate cases, allowing courts to make headway when the political stars align, while saving face—backtracking without overruling precedent—as may be necessary.¹⁵⁶

2. Legislative Duties: Standards, Testing, and Evidentiary Records

Faced with competing arguments about the quality of the state’s schools and the likely efficacy of various interventions, some courts have subtly proceduralized the education right. In these courts, liability rulings depend less on the absolute quality of the state’s schools than on whether the state legislature *exercised its implied duty* under the constitution to establish a *reasonable framework* for implementing the education right.¹⁵⁷

This duty, the courts have said, obligates the legislature to “defin[e] or giv[e] substantive content to ‘basic education,’”¹⁵⁸ within the meaning of the state constitution; to provide for student testing calibrated to the legislature’s gloss on the constitutional standard; and to establish accountability mechanisms.¹⁵⁹ Several courts have

156. See Koski, *supra* note 148, at 1296-98.

157. For a defense of this approach, see Elmendorf & Shanske, *supra* note 71 (manuscript at 21-25).

158. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 95 (Wash. 1978).

159. See *id.*; see also Moore v. State, No. 3AN049756, 2007 WL 8310251, at *75-76 (Alaska Super. Ct. June 21, 2007) (holding that legislature’s constitutional duty has four components: promulgating “rational educational standards”; establishing “an adequate method of assessing whether children are actually learning what is set out in the standards”; ensuring “adequate funding so as to accord schools the ability [sic] to provide instruction in the standards”; and providing for “adequate accountability and oversight”); Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 261 (Mont. 2005) (faulting legislature for not defining quality); Londonderry Sch. Dist. SAU No. 12 v. State, 907 A.2d 988, 995-96 (N.H. 2006) (ordering legislature to define constitutional standard of quality); Claremont Sch. Dist. v. Governor (*Claremont IV*), 794 A.2d 744, 751-58 (N.H. 2002) (deeming the accountability system constitutionally inadequate); *Abbott V*, 710 A.2d 450, 468 (N.J. 1998) (addressing accountability systems), *clarified*, 751 A.2d 1032 (N.J. 2000); Hoke Cty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *69 (N.C. Super. Ct. Oct. 12, 2000) (reading constitution to require accountability system), *aff’d in part as modified, rev’d in part*, 599 S.E.2d 365 (N.C. 2004); DeRolph v. State (*DeRolph II*), 728 N.E.2d 993, 1019-20 (Ohio 2000) (discussing need for standards and standards-aligned assessment tests); cf. Hancock v. Comm’r of Educ., 822

also required the legislature to commission a study estimating the cost of meeting state educational standards, and to enact and justify a school-funding formula in light of that study.¹⁶⁰ The legislature may not arbitrarily reallocate school funding in response to interest group or local government pressures.¹⁶¹ In short, the legislature must create a plan to implement the education clauses of the constitution and then put shoulder to the wheel absent some good reason to change course.¹⁶²

One can understand the legislative-duty cases as an ingenious response to the lack of a judicially discoverable and manageable standard of educational quality. Instead of dismissing plaintiffs' adequacy claims as nonjusticiable, the court tells the legislature to *bring into being* a reasonable quality standard, and a framework to measure and publicize whether that standard is being met.¹⁶³ This

N.E.2d 1134, 1144 (Mass. 2005) (upholding educational system now that "objective, data-driven assessments of student performance and specific performance goals ... inform a standardized education policy and direct the Commonwealth's public education resources").

160. See, e.g., *Montoy v. State*, 102 P.3d 1160, 1164 (Kan. 2005) (per curiam) ("[T]he financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise."); *Columbia Falls Elementary Sch. Dist. No. 6*, 109 P.3d at 262 (faulting legislature for not "link[ing] the [school funding] formula to any factors that might constitute a 'quality' education"); *DeRolph v. State (DeRolph I)*, 677 N.E.2d 733, 738 (Ohio 1997) (invalidating school-finance system because, inter alia, the "formula amount" was a "budgetary residual," rather than an amount determined on the basis of an estimate of "what it actually costs to educate a pupil"); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 234 (Tenn. 2002) (invalidating school-funding formula because it "contains no mechanism for cost determination or annual cost review of teachers' salaries"); *McCleary v. State*, 269 P.3d 227, 253-57 (Wash. 2012) (finding school-finance system unconstitutional because legislature had established new performance standards without concurrently updating the funding rules to reflect those standards); *State v. Campbell Cty. Sch. Dist.*, 19 P.3d 518, 526 (Wyo.) (ordering legislature to provide for cost studies updated every five years), *modified*, 32 P.3d 325 (Wyo. 2001).

161. See, e.g., *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, No. X07HHDCV14503 7565S, 2016 WL 4922730, at *12 (Conn. Super. Ct. Sept. 7, 2016).

162. To be clear, the quasi-procedural, legislative-duty theory of liability reflected in the "framework" decisions is not always clearly distinguished from the more substantive, school-quality theory of liability manifested in *Rose*-style opinions. Many of the opinions about framework duties also include findings about the state's failure to educate disadvantaged students effectively. See sources cited *supra* notes 159-60. It is often unclear whether such findings serve as flourishes, as triggering conditions for the legislative duty to promulgate a reasonable framework, or as independent and potentially ongoing bases for liability insofar as the framework fails to generate better outcomes.

163. See, e.g., *Londonderry Sch. Dist. SAU No. 12*, 907 A.2d at 993 (invalidating legislative response to prior judicial decision requiring legislature to define educational adequacy because "under the statutory scheme there is no way a citizen or a school district in this State

sets up the court to decide future educational adequacy cases on a more principled basis. The court will be able to apply standards the legislature has promulgated, using data the legislature has required school districts to collect.¹⁶⁴

The requirement of a record-justified funding formula also greatly eases judicial review of school finance decisions. Rather than resolving difficult first-order disputes about whether more money, somehow distributed, would materially improve the plaintiffs' schools, the court can revert to familiar administrative law modalities of review: Did the legislature¹⁶⁵ consider a reasonable range of funding alternatives, and explain the chosen formula in light of its own educational standards and the evidence in the record?¹⁶⁶

To be clear, the quasi-procedural, legislative-duty theory of liability that this Section has described is, in practice, not fully distinct from the schools-are-not-good-enough theory of liability

can determine the distinct substantive content of a constitutionally adequate education," thus leaving the system "impervious to meaningful judicial review").

164. Or so one might reasonably hope. Scott Bauries has questioned whether legislated educational standards are sufficiently concrete and realistic to determine outcomes in cases under the education clauses. *See Bauries, supra* note 85, at 722-24. *But see Gannon v. State*, 319 P.3d 1196, 1236-37 (Kan. 2014) (per curiam) ("[A]dequacy ... is met when the public education financing system ... is reasonably calculated to have all Kansas public education students meet or exceed the standards ... presently codified in K.S.A.2013 Supp. 72-1127."); *Hoke Cty. Bd. of Educ.*, 2000 WL 1639686, at *87 ("[T]he [state's] standard of [educational] performance now in place may not be lowered."); *see also* Benjamin Michael Superfine, *Deciding Who Decides Questions at the Intersection of School Finance Reform Litigation and Standards-Based Accountability Policies*, 23 EDUC. POL'Y 480, 490-500 (2009) (discussing other cases in which courts treated state educational standards as a guidepost in determining constitutional adequacy of the school system).

165. Or the legislature's delegate. Some states, such as Oregon, have charged administrative agencies with the development of school-funding formulas. *See* JOINT SPECIAL COMM. ON PUB. EDUC. APPROPRIATION, REPORT ON ADEQUACY OF PUBLIC EDUCATION FUNDING AS REQUIRED BY ARTICLE VIII, SECTION 8, OF THE OREGON CONSTITUTION 3 (2016) (describing formation and goals of Oregon Quality Education Commission).

166. *See, e.g., Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 262 (Mont. 2005) (faulting legislature for "not link[ing] the [school-funding] formula to any factors that might constitute a 'quality' education"). For more on the similarities between judicial review under the education clauses and judicial review under the Federal Administrative Procedure Act, *see Elmendorf & Shanske, supra* note 71 (manuscript at 23-24); *see also Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 437 (N.J. 1997) ("The State contends that experts were involved in formulating the amounts of [funding] and that the Court should defer to their determinations.... We are unwilling ... to accede to putative expert opinion that does not disclose the reasons or bases for its conclusions.").

manifested in *Rose*-style opinions.¹⁶⁷ Many of the courts that articulated legislative duties also made findings about the state's

167. Perhaps the purest illustration of the quasi-procedural/legislative-duty theory is the line of decisions from New Hampshire's supreme court, which consistently declined to pass on the constitutional sufficiency of school quality while insisting that the legislature promulgate clear standards and a system of testing that would enable the court and other observers to ascertain whether the standards are being met. See *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1376 (N.H. 1993) (holding that the state constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child ... and to guarantee adequate funding," and remanding for trial); *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1354, 1357-58 (N.H. 1997) (clarifying legislative duty to promulgate standards, and finding a constitutional flaw in the tax system, while declining to reach district court's conclusion that school quality was inadequate under any of the several possible standards); *Claremont Sch. Dist. v. Governor (Claremont III)*, 744 A.2d 1107, 1108-09 (N.H. 1999) (addressing revised tax system while again deferring decision on school quality); *Claremont IV*, 794 A.2d 744, 759-60 (N.H. 2002) (finding accountability system constitutionally inadequate while deferring decision on quality); *Londonderry Sch. Dist. SAU No. 12*, 907 A.2d at 993-96 (ordering the legislature to define a constitutional standard of quality and threatening appointment of a special master to make said determination if the legislature continues to fail to do so).

failure to effectively educate disadvantaged students.¹⁶⁸ These findings may represent an independent basis for liability.¹⁶⁹

3. *Provisional Injunctive Remedies*

The legislative remand has become the standard remedy for violations of the education clauses.¹⁷⁰ But what happens next if the legislature does nothing or issues a wholly inadequate response? In most states this question has not been squarely met, because the legislature did respond and the court gave substantial deference to

168. See, e.g., *Moore v. State*, No. 3AN049756, 2007 WL 8310251, at *75-76 (Alaska Super. Ct. June 21, 2007) (providing abstract, seemingly non-record-specific statement of what the education clauses require in terms of legislated standards, testing, and accountability systems—but only after discussing persistent, intergenerational failure of state to educate certain populations of students); *Hull v. Albrecht*, 950 P.2d 1141, 1144-45 (Ariz. 1997) (finding the legislation unconstitutional because it both created substantial facilities funding disparities between school districts and failed to establish minimum adequacy standards for such funding); *Columbia Falls Elementary Sch. Dist. No. 6*, 109 P.3d at 262-63 (holding that legislature must define “quality” and tie school funding to legislated definition of quality, and then reciting the district court’s findings about educational problems and stating that current funding levels are insufficient); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 95, 102-03 (Wash. 1978) (holding that the legislature failed “to comply with its constitutional duty [to] defin[e] and giv[e] substantive meaning to [the constitutional term ‘basic education’]” and sustaining the trial court’s conclusion that school funding was inadequate under any of three possible definitions of that term).

In some states, an initial *Rose*-style opinion finding the state liable for the poor education provided in certain schools or school districts has been followed by an opinion cast more in terms of legislative duties. Compare *DeRolph I*, 677 N.E.2d 733, 742-45 (Ohio 1997) (finding the state liable after canvassing deteriorated physical facilities, lack of instructional materials, limited curricular offerings, poor access to technology, and poor test scores in focal school districts), with *DeRolph II*, 728 N.E.2d 993, 1018-20 (Ohio 2000) (finding the state liable for inadequate articulation of standards, inadequate accountability system, and ongoing failure to link funding to standards), *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 552-53 (Mass. 1993) (finding the state liable on the basis of holistic comparison of educational inputs/outputs in plaintiff districts and more affluent “comparison’ districts”), and *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1151-56 (Mass. 2005) (acknowledging continuing and “profound” educational failures, but ruling against the plaintiffs because the state had established a comprehensive system of standards, testing, funding, and accountability, was making some progress, and could no longer be said to be “neglecting” its constitutional duty).

169. Under the first interpretation, the state would remain liable so long as student performance and other indicia of “quality” fell below the level that the court deemed constitutionally acceptable. Under the second interpretation, the state could escape liability by establishing performance standards, a reasonable funding system calibrated to those standards, and a reasonable accountability system.

170. See *Koski*, *supra* note 148, at 1241.

the legislature's fix.¹⁷¹ But where the question has been faced, we see two emergent patterns. First, a number of courts have ramped up pressure on the legislature with deadlines backed by *penalty defaults*.¹⁷² These courts require legislative action by a specified date and threaten either to hold the legislature in contempt or to shut down all public schools in the state if the deadline is not met.¹⁷³ The deadline or deadline-plus-penalty remedy often emerges from a specific conception of the separation of powers. The animating idea is that when there are multiple ways to achieve constitutional compliance, it is for the political branches, not the courts, to choose the path forward.¹⁷⁴

The other remedial strategy is to appoint a special master or expert panel with broad authority over constitutionally inadequate schools or school districts. The leading example is the *Abbott* line of cases from New Jersey.¹⁷⁵ Seven years after its initial liability

171. As Koski observes, “[S]tate supreme courts have recognized their institutional limitations and paid significant deference to the legislative and executive branches.” *Id.* at 1188. Yet research showing that state court rulings in the adequacy cases have led states to increase spending on the schools, and to allocate that spending in ways that substantially benefit disadvantaged students, demonstrates that legislatures generally do respond—productively—to judicial findings of liability. *See supra* note 142 and accompanying text.

172. This is an unusual constitutional remedy but not without precedent. For other examples, see John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 845-50 (2006) (illustrating a concept of penalty defaults in constitutional law with the release of prisoners in habeas cases and exclusion of evidence obtained without a warrant).

173. *See supra* notes 138-40 and accompanying text.

174. *See McCleary v. State*, 269 P.3d 227, 258-61 (Wash. 2012). For academic papers developing these ideas, see Bauries, *supra* note 85, at 721-33 (reviewing literature and concluding that “[s]cholars have ... reached a rough consensus that, once the merits [of an adequacy case] are adjudicated, courts should abstain from ordering or compelling any specific, judge-made remedial measures, but should instead engage in dialog with the coordinate branches to encourage reform”); and Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 594-96 (2004) (arguing on separation of powers grounds that courts in educational adequacy cases should issue no remedy beyond a declaration of unconstitutionality).

175. Other examples include *Lake View Sch. Dist. No. 25 v. Huckabee*, 144 S.W.3d 741 (Ark. 2004) (per curiam) (order appointing special masters); *Londonderry Sch. Dist. SAU No. 12 v. State*, 907 A.2d 988, 995-96 (N.H. 2006) (stating that if the legislature fails to establish a reasonable precise, measurable definition of adequacy, the court may invalidate the existing funding system and/or appoint a special master “to aid in the determination of the definition of a constitutionally adequate education”); *Abbeville Cty. Sch. Dist. v. State*, 777 S.E.2d 547 (S.C.) (remedial order prescribing a three-person expert panel to evaluate the state’s proposed remedy, to be reviewed by the court de novo), *superseded by* 780 S.E.2d 609 (S.C. 2015). There are also a few cases in which courts trying to remedy a constitutional

ruling, and following its rejection of legislative responses, the New Jersey Supreme Court “found that the continuing constitutional deprivation had persisted too long and clearly necessitated a remedy.”¹⁷⁶ The court issued an “interim remedy” of “parity funding,” resourcing the *Abbott* districts at the average level of an identified set of rich, suburban districts.¹⁷⁷ The court also authorized the trial judge to appoint a special master and told the State’s Commissioner of Education to submit a plan to the trial court for improving education in the *Abbott* districts.¹⁷⁸

The trial court then appointed a professor of education to serve as special master.¹⁷⁹ The professor and the State’s Commissioner of Education developed a detailed school-reform plan, which the court put into effect.¹⁸⁰ Importantly, the New Jersey Supreme Court indicated that the constitution did not *require* these particular remedies. Parity of funding with suburban districts, the court said, “can ... be understood in the nature of provisional or interim relief.”¹⁸¹ This remedy would be “mooted” if the State demonstrated that funding at some lesser level would suffice to achieve a “thorough and efficient education” in the *Abbott* districts, or if the State identified “genuine inefficiencies or excesses” in the *Abbott* districts’ use of state funds.¹⁸²

Like the penalty default used in some other states, the provisional injunctive remedy honors the political branches’ primacy in the domain of education. New Jersey’s constitution requires the *Abbott* schools to be decent schools. It is indifferent between various ways of making them decent. If New Jersey’s legislature or education

violation go deep into the weeds of educational policy making without appointing a special master. See Benjamin Michael Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 668 (2010) (citing and discussing cases).

176. *Abbott V*, 710 A.2d 450, 456 (N.J. 1998) (referring to *Abbott IV*, 693 A.2d 417 (N.J. 1997)), clarified by 751 A.2d 1032 (N.J. 2000).

177. See *Abbott IV*, 693 A.2d 417, 439 (N.J. 1997).

178. See *id.* at 444-45. This remedial directive is succinctly summarized in the court’s next *Abbott* opinion. See *Abbott V*, 710 A.2d at 456.

179. *Abbott V*, 710 A.2d at 456.

180. See *id.* at 456-57.

181. *Abbott IV*, 693 A.2d at 442. To borrow John Ferejohn and Barry Friedman’s terminology, this provisional remedy is a *model default rule*—one which the legislature may alter, but which the court believes to be well crafted to achieve constitutional compliance. See Ferejohn & Friedman, *supra* note 172, at 850-53.

182. *Abbott IV*, 693 A.2d at 442.

department develops a different reasonable vision for how to make the *Abbott* schools decent, they are free to pursue it.

III. TOWARD REPRESENTATIONAL ADEQUACY CLAIMS UNDER STATE AND FEDERAL CONSTITUTIONS

Part I of this Article argued that a legal strategy for attacking partisan gerrymanders should aim to (1) unravel the manageability knot that has confounded litigation to date under the Equal Protection Clause (the judicially discoverable standards are thought to be unmanageable, and the judicially manageable standards undiscoverable); (2) deter or remedy responsiveness-harming bipartisan gerrymanders; and, insofar as the strategy targets congressional gerrymanders, (3) answer the distinctive justiciability concerns associated with disaggregated redistricting.

This Part argues that these goals can be realized by finding in the relevant constitution an *implied legislative duty* to promulgate a *redistricting framework* addressed to the overall adequacy of representation. (The relevant constitution is the state constitution for cases about gerrymanders of the statehouse; for cases about congressional districts, it is the U.S. Constitution.¹⁸³) I shall call this the representational adequacy/legislative duty approach. Developed with reference to the education cases, the strategy relies on a quasi-procedural theory of liability, a legislative remand remedy, and the threat of provisional judge-made standards should the legislature fail to remediate the constitutional violation. Section A describes the strategy; Section B argues that changed conditions warrant judicial recognition of the legislative duty; Section C explains how the strategy resolves the problems surveyed in Part I; Section D considers the textual basis for it; and Section E responds to objections.

183. Because the harms from a congressional gerrymander in one state depend on how other state's congressional districts are drawn, *see supra* Part I.C, the criteria for congressional districting need to be established at the national level and thus by Congress or the U.S. Constitution (not a given state's constitution).

A. A Sketch of the Idea

The premise of the representational adequacy/legislative duty approach is that there exists an implied constitutional duty for the legislature to act reasonably, in furtherance of basic democratic norms, in drawing or overseeing the drawing of legislative districts. What this duty of care entails depends on substantive democratic norms, such as majoritarianism and responsiveness, the available technology for advancing or thwarting those norms, voter preferences, and spatial patterns in the distribution of voters. The entailments of the legislative duty therefore vary over time, as technology develops and citizens sort themselves into geographic communities.

Several generations ago, no one imagined that state courts would find in the education clauses of their constitutions an implied legislative duty to create reasonably precise educational content standards, a system of testing calibrated to those standards, and an associated school-funding formula justified on the basis of an evidentiary record.¹⁸⁴ But as education became ever more important for socioeconomic mobility, and as technologies for measuring educational attainment improved, courts began to recognize constitutional limits on legislative discretion with respect to the provision of education.¹⁸⁵ Similar developments should inform judicial interpretation of generally worded constitutional provisions about electoral districts, electoral integrity, and the time, place, and manner of elections. Just as courts have held that the legislature, in “providing for” a system of public schools, must establish reasonably clear

184. Regarding understandings of the education clauses at different points in history, see generally John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927 (2007); and John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 AM. J. LEGAL HIST. 1 (1998).

185. See, e.g., *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993) (“The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society.”); *Claremont II*, 703 A.2d 1353, 1359 (N.H. 1997) (“Mere competence in the basics—reading, writing, and arithmetic—is insufficient in the waning days of the twentieth century to insure that this State’s public school students are fully integrated into the world around them.” (emphasis added)); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (“We cannot ignore the fact that times have changed and that [education] which may have been ‘ample’ in 1889 may be wholly unsuited for children confronted with contemporary demands wholly unknown to the constitutional convention.”).

objectives for the school system, measure whether those objectives are being realized, and set up a corrective process for schools or school districts that fall short,¹⁸⁶ so too may courts find in the representation clauses of the relevant constitution an implied legislative duty to establish a reasonable framework for partisan/ideological fairness and responsiveness in districting and for correcting district maps that fall short of the standards.

A court ruling on the existence of this legislative duty might sketch general guidelines for redistricting criteria, but the court would leave the details to be worked out in the future. As in the education cases, the initial remedy would be a legislative remand. The redistricting framework developed by the legislature on remand would govern judicial review of partisan fairness and responsiveness claims going forward—provided that the framework is substantively reasonable and sufficiently determinate for judicial application in politically sensitive cases.

What happens if the legislature does nothing or issues a wholly inadequate response to the initial judicial ruling? The education cases foreground two possibilities. As noted above, some state courts have held on separation of powers ground that they lack authority to make the discretionary choice among potential educational remedies.¹⁸⁷ Occasionally these courts have fined intransigent legislatures, or have ordered or threatened a temporary shutdown of the schools.¹⁸⁸ In representational adequacy cases, a court operating under this conception of the separation of powers might fine the legislature for failing to adopt a reasonable framework for redistricting. But the court would not pass on the adequacy of district maps unless or until the legislature establishes suitable criteria for judicial review.

The other, and to my mind more attractive, response to legislative intransigence is to follow the path of the New Jersey courts in the *Abbott* litigation.¹⁸⁹ After many years of inadequate legislative responses, the trial court finally appointed a professor of education as special master to develop programs and funding procedures for the

186. *See supra* Part II.B.

187. *See supra* Part II.A.4.

188. *See supra* notes 139-40 and accompanying text.

189. *See supra* notes 176-82 and accompanying text.

Abbott school districts.¹⁹⁰ All the while, the courts made clear that these programmatic and funding remedies were provisional, subject to displacement if and when the State developed a decent plan for the *Abbott* districts.¹⁹¹

In the representational adequacy setting, courts issuing provisional remedies might prescribe a metric of partisan bias and an upper limit. The court might also adopt a metric of competitiveness and set a target proportion of competitive seats. In cases about Congress, the provisional relief would include a protocol for determining which state's congressional districts would be judicially redistricted in the event of a violation.¹⁹² These measures would govern subsequent representational adequacy litigation until such time as the appropriate legislature adopts a reasonable framework for districting and judicial review.

Though some critics have portrayed the *Abbott* litigation as a horror story of judicial micromanagement,¹⁹³ it should be clear that analogous provisional remedies for representational inadequacy would not be nearly as intrusive. The management of high-poverty school districts is an ongoing process, and once the courts held that New Jersey had to provide for the particularized needs of impoverished children in the *Abbott* districts, it was inevitable that school administrators would return to court again and again with new ideas for how to better serve those needs. In the redistricting context, by contrast, the provisional remedy need only establish a couple of reasonably clear-cut benchmarks, compliance with which would be litigated once a decade.¹⁹⁴

B. Changed Conditions

In the previous Section, I suggested that much as changes in the value of education and in state capacity to provide and monitor

190. See *supra* notes 179-80 and accompanying text.

191. See *supra* notes 181-82 and accompanying text.

192. Cf. *supra* Part I.C (discussing the problem of remedial discretion owing to disaggregated redistricting of Congress).

193. See, e.g., *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) (“The volume of litigation and the extent of judicial oversight [in the *Abbott* cases] provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.”).

194. To preclude more frequent litigation, the court might establish a per se rule against mid-decade redistricting, as some courts have done already. See *infra* Part III.E.1.

educational systems (arguably) altered what the duty of care requires of legislatures in this domain, so too may changes in representation and redistricting obligate legislatures to establish new frameworks for districting, including meaningful standards and accountability systems. It is worth considering these changes in some detail. Because representational adequacy/legislative duty claims would not, in general, draw upon clearly directive constitutional text or a constitutional tradition of legislative self-limitation in districting, arguments from changed conditions invariably loom large. Two recent changes are particularly important.

The first is the development by political scientists, statisticians, and law professors of various quantitative metrics of legislative maps' partisan or ideological bias and the competitiveness of legislative seats. While rudimentary measures of partisan bias and competitiveness have been available for decades,¹⁹⁵ there has been an explosion of recent work in this area, with a number of scholars developing metrics of partisan fairness that are easily implemented with open-source software.¹⁹⁶ Several decades ago, it might have been reasonable to argue that legislators had no duty to establish judicially enforceable limits on biased maps of legislative districts because enforcement of those limits would have been so discretionary, inviting judges to substitute their preferences with respect to particular maps for the legislature's. Today that argument is a nonstarter, now that a menu of easily implemented and potentially bright-line standards exists for legislatures to choose among.

The second and equally important development is the emergence of data vendors that use public and commercial datasets to estimate partisan "support scores" and turnout propensities for every registered voter.¹⁹⁷ Piggybacking on newly digitized state voter files, the Democratic and Republican National Committees began constructing national electronic voter registries in the mid-2000s, and private firms such as Catalist entered the field as well.¹⁹⁸ The resulting

195. See, e.g., Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 POL. METHODOLOGY 295 (1983); Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540 (1973).

196. For prominent examples, see sources cited *supra* note 40.

197. See generally EITAN D. HERSH, *HACKING THE ELECTORATE: HOW CAMPAIGNS PERCEIVE VOTERS* (2015); David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. ECON. PERSP. 51 (2014).

198. See HERSH, *supra* note 197, at 66-69. Catalist, now a leading liberal-side firm, started

databases combine individual-level voter histories and demographics from state voter files, individual-level records of campaign contacts and donations, block-level data from the census, and, frequently, individual-level data from consumer databases.¹⁹⁹ These datasets have made it possible for campaigns to generate or purchase predictions *for each registered voter* of the probability that the voter will turn out in an election, support a particular candidate or political party, give money, or respond in a specified fashion to a campaign communication.²⁰⁰ As a shorthand, I will refer to the voter file supplemented with behavioral and political-preference predictions as the “augmented voter file.”

Writing in 2014, political scientists and campaign consultants David Nickerson and Todd Rogers reported that many campaigns were generating support scores and turnout propensities using rudimentary statistical models “taught in standard undergraduate ... classes.”²⁰¹ More sophisticated actors were beginning to apply the machine-learning tools used by the private sector in marketing and other predictive-analytics applications.²⁰² As the augmented voter file grows with each successive campaign (merging in more records of campaign contacts and voter behavior), and as statisticians and computer scientists develop ever more powerful tools for machine learning with big data, the partisan-preference and turnout predictions are sure to improve.

Why does this matter for districting? The answer follows from an important 2008 paper by John Friedman and Richard Holden.²⁰³ Friedman and Holden showed that the optimal strategy for a political party that controls redistricting depends on what the redistricters know about the political preferences of individual voters.²⁰⁴ If voter preferences can be observed, and voters placed on a continuum from strong Republican (or extreme conservative) to strong Demo-

working closely with the Democratic Party in 2006. *Id.* at 68.

199. See Nickerson & Rogers, *supra* note 197, at 55-58.

200. See HERSH, *supra* note 197, at 72-73; Nickerson & Rogers, *supra* note 197, at 58-59.

201. Nickerson & Rogers, *supra* note 197, at 59.

202. See *id.* at 60-61.

203. See Friedman & Holden, *supra* note 51.

204. Compare Friedman & Holden, *supra* note 51, at 115 (establishing optimal strategy under the assumption that voter preferences are observable), with Gul & Pesendorfer, *supra* note 51, at 1616-17 (showing contrary results for a world in which redistricters cannot observe individual voter preferences).

crat (or extreme liberal), then the politically optimal strategy is to create districts composed of “matched slices” of the electorate—strong Republicans paired with strong Democrats, center-right Republicans paired with center-left Democrats, and so forth.²⁰⁵ When Democrats control redistricting, the Democratic “slice” in as many districts as possible will be slightly larger than the Republican slice; when Republicans run the show, the opposite will be true. The core idea is to neutralize the opposing party’s most reliable voters by combining them in a district with a slight majority of the redistricting party’s most reliable voters.²⁰⁶

The augmented, geocoded voter file—with party support scores and turnout propensities for each registered voter—is precisely what redistricters need to implement matched-slice gerrymanders. It will be a game changer. To see why, consider how partisan gerrymanders were effected after the 2010 census, before anyone had figured out how to exploit augmented voter files for districting. We know something about gerrymandering techniques in the 2010 round of redistricting from the claims currently being litigated. The picture is most complete with respect to Wisconsin, as only *Whitford v. Gill* has gone to trial, but court filings in *Shapiro v. McManus* and *League of Women Voters v. Rucho* suggest that partisan gerrymanders were executed similarly in North Carolina and Maryland.²⁰⁷

205. See Friedman & Holden, *supra* note 51, at 115.

206. See *id.*

207. In North Carolina, as in Wisconsin, redistricters proxied the partisan strength of a district using the statewide vote for Republican candidates in recent elections. See Complaint, *supra* note 21, at 14 (quoting the following instruction from Republican legislators in charge of the redistricting process: “The only data other than population data to be used to construct congressional districts shall be *election results in statewide contests* since January 1, 2008, not including the last two presidential contests.” (emphasis added)).

In Maryland, plaintiffs challenging a Democratic partisan gerrymander claim that the redistricters were provided with the state Board of Election’s voter file, with “highly detailed geographic information about voter registration, party affiliation, and voter turnout across the State.” *Shapiro v. McManus*, 203 F. Supp. 3d 579, 586 (D. Md. 2016) (quoting the Complaint). But there was no allegation that the redistricters had access to or used partisan-support or turnout-propensity scores. Rather, Democrats implemented the gerrymander simply by shifting a large number of registered Republicans out of the target district and replacing them with a large number of registered Democrats. See *id.* at 587.

Kareem Crayton reports that in some states, some interested parties did purchase augmented voter files and used them to draft or evaluate maps, but the practice was not common, and the predictions were probably of much lower quality than the predictions will be in 2020 (with better models and more years of voter behavior in the file). Interview with Kareem Crayton, Managing Partner, Crimcard Consulting Services, in Washington, D.C. (Dec. 16, 2016).

The actors who created Wisconsin's notorious partisan gerrymander were not craftily matching slices of strong Democrats and strong Republicans. Rather, they treated ward-level results from 2004-2010 statewide races as a rough proxy for the expected, ward-level vote share of a state assembly candidate in an open-seat race.²⁰⁸ They aggregated these expected vote shares within legislative districts, and on this basis rated proposed districts as "Safe," "Lean," or "Swing" for each party.²⁰⁹

This approach treats as interchangeable any ward in which the Republican candidate won (on average) a given percentage of the vote in recent statewide elections. But some such wards are likely to perform quite differently than other such wards in legislative elections in the future. One reason is demographic change: the Republican-preferring share of the ward's voting-eligible population could be rising or falling over time. Another and probably more important issue is that a ward composed of, say, 55 percent "weak Republicans" and 45 percent "weak Democrats" is likely to yield about the same *average* vote share for Republican candidates in statewide elections as a ward composed of 55 percent "strong Republicans" and 45 percent "strong Democrats," *yet these wards will perform very differently* in elections where one candidate is an incumbent, or otherwise unusually strong or weak, and also in years in which the Republican party brand is unusually strong or weak. The Republican vote share in the ward composed of weak partisans will be much more volatile. A matched-slice gerrymander would account for this variation, but the political scientist who advised the Wisconsin redistricters had no individual-level data on partisan reliability. He evaluated the robustness of the Republican advantage in proposed maps by "shift[ing] the vote share of each district ten points [from the predicted level] in either direction," and calculating the number of seats that Republicans would win under these scenarios.²¹⁰ He made no effort to account for systematic *differences* in the likelihood that a voter, or a ward, would "swing" with the tide. To be clear, this was not a failure on the consultant's part. As the plaintiff's expert in *Whitford v. Gill* attested, the Republicans'

208. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 848 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

209. *Id.* at 849-50.

210. *Id.* at 892.

consultant used standard methods—indeed the same methods that the plaintiff’s expert would use to construct and evaluate the map he submitted to the court.²¹¹

Sophisticated partisan gerrymanders after the 2020 census are likely to be carried out quite differently. Using augmented voter files, it will be possible to group voters into “slices” by party support score and turnout propensity, and to calculate the distribution of voter types in each proposed district. Though analysts have had some difficulty creating accurate predictions from data in the augmented voter files about who is likely to be a swing voter (as opposed to a hard-to-classify strong partisan),²¹² it will be easy enough to distinguish strong partisans from ambiguously classified voters, and to match slices of strong partisans. It will also be feasible to create much more realistic simulations of the distribution of voter turnout across legislative districts in high-turnout and low-turnout elections (using individual-level data on turnout propensities), and of the geographic distribution of partisan swings in “good” or “bad” years for a political party (by assuming not a uniform swing but a swing concentrated among voters classified as weak partisans). Absent legal or political constraints, the theoretical world conjured by Friedman and Holden will become our reality.²¹³

Though the changed-conditions case for a legislative duty to promulgate redistricting standards is largely about technology, two further considerations may deserve some weight.

First, a growing body of work on political geography has made clear that in some states, the distribution of voters results in highly asymmetric gerrymandering opportunities.²¹⁴ When one party’s

211. *See id.* at 847.

212. *See* HERSH, *supra* note 197, at 166.

213. Rebecca Green wonders whether the failure of quantitative prognosticators to predict the outcome of the 2016 presidential election will make redistricters reluctant to rely on the augmented voter file in the 2020 redistricting. Interview with Rebecca Green, Professor of the Practice of Law, William & Mary Law School, in Washington, D.C. (Dec. 16, 2016). I doubt it. Data acquired during and after the 2016 presidential election is likely to prove very useful for distinguishing reliable partisans from potential swing voters, as President Donald Trump appears to have dramatically underperformed with certain Republican demographic groups and dramatically overperformed with certain Democratic demographic groups. *See, e.g.*, Nate Silver, *Education, Not Income, Predicted Who Would Vote for Trump*, FIVETHIRTYEIGHT (Nov. 22, 2016, 2:53 PM), <http://fivethirtyeight.com/features/education-not-income-predicted-who-would-vote-for-trump/> [<https://perma.cc/M7GC-AUVS>].

214. *See, e.g.*, Chen & Rodden, *supra* note 38; *cf.* MCGANN ET AL., *supra* note 36, at 100-21

supporters are more geographically clustered than the other party's voters, intentional gerrymanders by the less clustered party result in extraordinary levels of bias, whereas gerrymanders by the more clustered party may achieve little more than an unbiased map.²¹⁵ Under these conditions, it may also be particularly difficult to build a political consensus to limit partisan bias.

However, at the present time, it is not easy to make a strong changed-conditions argument based on political geography in the nation as a whole. The idea that political geography matters for gerrymandering and that liberals are inefficiently distributed is not new.²¹⁶ And despite much popular and academic attention to the "partisan sort" playing out in our nation as a whole, there is actually little evidence that the sorting of voters into politically like-minded territorial communities is systematically advantaging Republicans relative to Democrats in the nation as a whole.²¹⁷ Compact-district simulations conducted by Jowei Chen and David Cottrell suggest that Republicans following the 2010 round of redistricting would most likely win almost exactly half of the congressional districts drawn by a computer—not the large majorities implied by the

(acknowledging that geographic distribution creates gerrymandering opportunities but arguing that political choice is still critical).

215. See MCGANN ET AL., *supra* note 36, at 104-06 (using Illinois as an example of a state where, because of political geography, intentional Democratic gerrymandering achieved only an unbiased map); *id.* at 115-16 (acknowledging that in states such as Pennsylvania, where Democratic voters are concentrated in a few urban areas, it is relatively easy to create maps with strong pro-Republican bias).

216. For an early paper on the subject, see Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234 (1972).

217. The sorting of voters into politically like-minded territorial communities could, in principle, advantage either party or no party, depending on which voters are moving or changing their political preferences. See MCGANN ET AL., *supra* note 36, at 118-19. Empirically, McGann and his colleagues find a net *decrease* in Democratic concentration at the county level between 2000 and 2010, suggesting that, if anything, pro-Republican gerrymanders are becoming harder, not easier, to create. *Id.* at 119-21. (Note, though, that the authors' choice of counties as a geographic unit for assessing skewness in partisan geography is rather arbitrary, because there is no requirement that electoral districts be drawn around county boundaries.) Simon Jackman's analysis of the "efficiency gap" in state legislative maps in the post-*Reynolds* era does show a trend toward greater pro-Republican bias. See Complaint, *supra* note 34, Exhibit 3 at 44-48. It does not, however, distinguish "population sorting" from "intentional gerrymandering" explanations for this trend. McGann and his colleagues find much greater pro-Republican bias in congressional district maps following the 2010 round of redistricting, as compared to the 2000 round, but attribute most of the difference to politics, not geography. See MCGANN ET AL., *supra* note 36, at 173-76.

inefficient-clustering-of-liberals hypothesis.²¹⁸ In sum, evidence of inefficient clustering may bolster the case for a legislative duty to promulgate standards *with respect to state legislatures in certain states*, but it does not add much to the case for a congressional duty to promulgate standards with respect to congressional districts.

The other consideration, which does bear on congressional duties, is the unusual present-day dominance of the Republican Party in state government. In the wake of the 2016 elections, twenty-six states are under unified Republican control, as compared to six states under unified Democratic control.²¹⁹ If this pattern persists through 2020, it means that Democratic and Republican gerrymanders of congressional district maps are unlikely to offset one another in the aggregate. There will be systematic pro-Republican bias, probably exacerbating the pro-Republican bias that has existed since the 2010 round of redistricting.²²⁰ Moreover, the Supreme

218. See Chen & Cottrell, *supra* note 38, at 336-39, 339 fig.7 (noting the very symmetrical distribution of predicted Republican victory probabilities).

Bear in mind that the algorithm used in Chen and Cottrell's study (and most other "automated redistricting" exercises) does not actually sample, even approximately, from the underlying distribution of potential districting maps with a specified degree of compactness. Cf. Fifield et al., *supra* note 40 (manuscript at 17-21) (introducing a new algorithm and showing limits of previous methods with a simple, hypothetical example in which the universe of potential plans can be enumerated—something which cannot be done with real-world examples).

219. See *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas [<https://perma.cc/E8DR-D7D4>].

220. Scholars using different methods have come to different conclusions about the degree of pro-Republican bias in the post-2010 congressional map, but the different methods consistently show *some* bias toward Republicans. Compare MCGANN ET AL., *supra* note 36, at 70-73 (finding that 2010 round of redistricting increased pro-Republican bias in the aggregate map of congressional districts from roughly 3 percent to 9 percent), *with* Chen & Cottrell, *supra* note 38, at 336-38 (finding that the 2010 aggregate map in expectation awarded Republicans one more seat in the House of Representatives than they probably would have won under computer-generated maps of compact districts). In 2012, Republicans won a majority of the seats in the House of Representatives even though Republican candidates for the House received 1.5 million fewer votes than Democratic candidates. Michael P. McDonald, *Geography Does Not Necessarily Lead to Pro-Republican Gerrymandering*, HUFFINGTON POST: THE BLOG (July 1, 2013, 3:13 PM), http://www.huffingtonpost.com/michael-p-mcdonald/geography-does-not-necess_b_3530099.html [<https://perma.cc/FR3G-JK6R>]. In 2016, Trump lost the popular vote to Hillary Clinton by about 2 percentage points, Nora Kelly, *Hillary Clinton's Lead Is Greater than Multiple Former Presidents*, ATLANTIC (Nov. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/11/clinton-vote-lead/508667/> [<https://perma.cc/6JWF-XTRB>], but won the median congressional district by more than 3.5 percentage points, Nate Silver (@NateSilver538), TWITTER (Jan. 21, 2017, 4:25 PM), <https://twitter.com/NateSilver538/status/822917985388138498> [<https://perma.cc/DA4U-Z9M2>].

Court's decision in *Shelby County v. Holder*, which enjoined enforcement of the preclearance regime of the Voting Rights Act,²²¹ removed a substantial constraint on pro-Republican gerrymanders in the South.²²² There is, then, an exceptional risk of pro-Republican bias in the aggregate map of congressional districts following the 2020 redistricting. (Whether risks specific to a particular round of redistricting ought to weigh heavily in judicial conclusions about legislative duties is, of course, a question on which reasonable people may disagree.²²³)

To summarize, there is a decent but not unassailable changed-conditions argument that the legislative duty to act reasonably with respect to districting now requires the promulgation of partisan fairness and responsiveness standards. However, because much of the argument turns on the existence of data and technology that have not yet been exploited for redistricting, a judge might take a wait-and-see approach, declining to require standards until such time as this data is exploited and the consequences become apparent, most likely after the 2020 round of districting.²²⁴

C. *The Three Difficulties, Reconsidered*

I began this Article by outlining three problems with partisan gerrymandering claims under the Equal Protection Clause.²²⁵ Let us now consider how the representational adequacy/legislative duty approach responds to them.

221. 133 S. Ct. 2612, 2631 (2013).

222. Nick Stephanopoulos estimates that as many as one-third of the electoral districts in the South where the minority community has the "ability to elect" a Black or Latino representative (almost certain to be Democratic districts) are not protected by section 2 of the Voting Rights Act, though they were protected by section 5. See Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 87-96. Redistricting simulations indicate that the section 5 preclearance regime was also an important constraint on pro-Republican gerrymanders, see Chen & Cottrell, *supra* note 38, at 336, as does the theoretical argument developed in Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553 (2011).

223. But note that the 2010 round of congressional districting also resulted in pro-Republican bias. See MCGANN ET AL., *supra* note 36, at 174.

224. Cf. Altman & McDonald, *supra* note 40, at 72 ("Each decadal redistricting since 1960 brought with it tremendous advances in computing technology and repeated promises of electoral salvation by computer.").

225. See *supra* Part I.

Bipartisan Lockups? The approach I have sketched is unlikely to induce a spate of bipartisan gerrymanders, because the adequacy theory just as readily supports legal attacks on responsiveness-damaging bipartisan gerrymanders as it does attacks on one-party gerrymanders that result in gross asymmetries in the translation of votes into representation. This is so because, in most cases, the judicial decisions about whether legislated representational adequacy criteria are constitutionally sufficient would be grounded on general electoral integrity and fairness provisions, rather than on provisions of the constitutional text that narrowly target partisanship in redistricting. (As Part II.A.1 explained, only a few state constitutions expressly address partisan fairness in districting.)

Congress and Disaggregated Redistricting. The representational adequacy/legislative duty approach can handle the disaggregated redistricting of Congress. We saw in Part I that disaggregated redistricting means that the national map of congressional districts is often in flux, which makes it hard for a court to establish how severe the partisan bias or lack of responsiveness is at any point in time. We also saw that disaggregated redistricting leaves courts with massive, standardless discretion at the remedy stage because partisan-bias or lack-of-responsiveness violations could be remedied by redrawing congressional districts anywhere in the country.

If plaintiffs develop a theory of legislative duty by analogy to the education cases, it is not so critical that they identify “the map” of congressional districts at any point in time. As Part II.A.3 explained, the overall quality of the system of public schools is a joint product of state and local decisions, which are constantly in flux. This has not prevented courts from recognizing a legislative duty to issue standards or finding the state’s school system as a whole constitutionally inadequate. Findings of unconstitutionality in the education context are usually associated with severe, persistent educational inequalities.²²⁶ It is the track record and likely future of the state’s educational system that prompts judicial intervention, rather than the level of educational quality or opportunity observed at a moment in time.²²⁷ Similarly, the strength of the plaintiffs’ argument for implied legislative duties in representational adequacy

226. See generally Ryan, *supra* note 154.

227. See *supra* note 168.

cases will turn much more on the evidence concerning the history and likely future of representational harms than on the particulars of the legally operative map of legislative districts at a moment in time.

As for remedying aggregate harms from disaggregated redistricting, a court that finds an implied congressional duty to establish partisan fairness and responsiveness standards for the system of congressional districts could easily hold that any reasonable legislative remedy must include procedures for ascertaining compliance with the legislated standards and curing violations. In the education setting, courts have told the legislature to establish mechanisms for oversight and reform of schools that persistently fall short of state standards.²²⁸ At least two courts have found their state's school accountability system constitutionally inadequate, and other courts have carefully reviewed accountability systems before approving them.²²⁹ Translating this idea to congressional districting, a court might hold that Congress must enact legal norms or presumptions that would allow courts to determine as matter of law what is "the map" of congressional districts, and that would channel the court's remedial discretion.²³⁰

The Manageability Puzzle. The Gordian Knot of partisan gerrymandering litigation is that the judicially discoverable constitutional standards have been regarded as unmanageable, and the judicially manageable standards as undiscoverable, that is, as insufficiently tethered to constitutional norms.²³¹ The representational adequacy/legislative duty approach untangles this knot by partitioning responsibilities across institutions. It calls on courts to "discover" mainly that the Constitution under present conditions requires *some reasonable limitation* on redistricting for partisan advantage, and that the Constitution vests primary responsibility for the

228. See *supra* Part II.B.2.

229. See cases cited *supra* note 159.

230. For example, the legislated framework might provide: (1) that for purposes of representational adequacy challenges to congressional districts, "the map" of districts is the then-operative map in each state or, if no such map exists, a judge-drawn map that mimics the most recently operative map to the maximum feasible extent; and (2) that violations shall be remedied by permuting a list of the fifty states and redrawing state congressional delegations in order, going down the permuted list until compliance with the legislated standards is achieved.

231. See *supra* Part I.A.

development of standards in the legislature. The first proposition is not far removed from the recognition in *Vieth* that extreme partisan gerrymanders are unconstitutional,²³² and the second accords with the Supreme Court's repeated statements that redistricting is primarily a job for the political branches.²³³ As between various reasonable limitations on partisan/ideological bias and lack of responsiveness, the Constitution is indifferent. But if the legislature, given an ample period of time, fails to adopt *some* reasonable limitation, the courts would prescribe a "manageable" fallback, subject to legislative revision. In this way, the courts could create bright-line rules for policing gerrymanders without also holding, implausibly, that the Constitution *entails* a particular metric of bias and a particular cutoff to separate constitutionally acceptable from unconstitutionally extreme bias.

As a solution to the manageability problem, the representational adequacy/legislative duty approach heavily depends on an idea voiced by Justice Scalia in *Vieth v. Jubelirer*: the manageability of a less-than-determinate legal standard depends on *how frequently* it must be applied.²³⁴ The representational adequacy/legislative duty approach would engender three distinct species of partisan gerrymandering claims, which are likely to be litigated with different frequencies, and which would be resolved on the basis of different kinds of standards.

One set of cases (Type I) would concern triggering conditions for the legislative duty. The court would decide whether representational adequacy had deteriorated (or been threatened) to such a degree, and whether the technology for standard setting had developed to such a degree, that the legislature must establish a redistricting framework with enforceable criteria for partisan/ideological fairness and responsiveness. Type II cases would concern the reasonableness of legislatively promulgated frameworks. Type III cases would assess redistricters' compliance with the framework.

232. See Berman, *supra* note 26, at 782.

233. See, e.g., Upham v. Seamon, 456 U.S. 37, 41 (1982) (per curiam) ("From the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination." (quoting White v. Wieser, 412 U.S. 783, 794-95 (1973))).

234. See 541 U.S. 267, 285-86 (2004) (plurality opinion) (rejecting the plaintiffs' argument for policing partisan gerrymanders using standards adapted from racial gerrymandering cases because partisan motives in redistricting are ubiquitous whereas racial motives are much less common).

Type I representational adequacy cases—raising the question of whether the legislature must promulgate a redistricting framework for representational adequacy—would be largely one-shot cases in much the same way as justiciability cases are one-shot cases. They would be litigated on the basis of similarly indeterminate legal standards and kitchen-sink evidentiary records.²³⁵ Just as the threshold question of whether to treat a constitutional injury as justiciable requires an open-ended weighing of costs and benefits,²³⁶ so too does the threshold question of whether to require legislative promulgation of redistricting standards. Note also that Type I decisions would not invalidate any map of legislative districts; as such, these cases have less potential than conventional partisan gerrymander claims to engender criticism of the courts for partisan favoritism. The need for a constraining legal standard is therefore less acute.

Of course, the decision about whether to recognize a justiciable legislative duty in a Type I case must account for potential manageability problems in Type II and Type III cases.

In the education setting, courts have usually handled Type II cases by spelling out a few loose guidelines for the legislature to follow,²³⁷ giving broad but not unquestioning deference to legislation enacted to implement the guidelines.²³⁸ The same strategy could work for redistricting. For example, a court might say that the legislated standards must be designed to ensure that the party that wins a majority of the votes earns a majority of the seats; that there is a reasonable number of competitive seats; and that the map is roughly symmetrical between the parties according to the legislatively chosen measure of symmetry. And, just as some courts have

235. To be sure, if a court were to find that no such duty exists given current conditions, the duty question could be relitigated in the future if conditions change. But that is not much different than asking the courts to revisit a nonjusticiability holding in light of changed conditions.

236. See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1295 (2006).

237. See, e.g., *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 176-79 (S.C. 2014) (declining on separation of powers grounds “to provide the General Assembly with a specific solution to the constitutional violation” but discussing as “instructive” the educational frameworks commended by courts in New York and Wyoming), *amended by* 777 S.E.2d 547 (S.C. 2015), *and superseded and amended by* 780 S.E.2d 609 (S.C. 2015).

238. Some courts have refrained from issuing guidelines; others have been quite specific in “advising” the legislature. For a review of the academic commentary on this point, see Bauries, *supra* note 85, at 721-34.

required the legislature to provide for accountability measures that kick in when schools fail to achieve educational standards,²³⁹ a court might require the legislature to specify a process for updating maps when the fairness and responsiveness standards are not achieved.²⁴⁰

Naturally, judicial evaluation of the reasonableness of legislated frameworks would be informed by justiciability considerations. If judges believe that they may *only* review partisan or ideological fairness claims concerning particular legislative maps using bright-line rules, then the legislature in promulgating standards will have breached its duty of care if the standards are not sufficiently precise.²⁴¹ To the extent that judges insist on legislative promulgation of bright-line rules in Type II cases, there is no need to worry about the manageability of Type III cases. These cases will be manageable by construction. Courts will simply refuse to hear them until such time as appropriate, judicially manageable standards come into being. In all likelihood these will be legislated standards, but if the legislature drags its feet or issues ridiculous standards, the courts may institute a provisional judge-made alternative.

I concede that there is some risk of a protracted conflict between courts and lawmakers over the reasonableness of legislated redistricting frameworks, such as in Type II cases. I respond to this concern in the “objections” Section below.²⁴²

D. State Law, Article I, or Equal Protection?

As a pragmatic strategy for policing partisan gerrymanders, the representational adequacy/legislative duty approach is quite attractive. Doctrinally it may prove a harder sell. We saw in Part II.A.1 that neither the U.S. Constitution nor most state constitutions specifically address partisan/ideological fairness or responsiveness in districting. A theory about representational adequacy and legislative duties will in most cases have to be patched together from textual provisions cast at a high level of generality. This Section offers

239. See cases cited *supra* note 159.

240. As noted above, this provision would be critical for any framework for congressional districting because of the remedial-discretion problem.

241. Unless, perhaps, the legislature provides for review and enforcement of the standards by a nonjudicial institution.

242. See *infra* Part III.E.1.

a few thoughts about strategies for establishing the theory. I revisit several potential textual anchors, including state constitutional provisions, Article I, and the Equal Protection Clause of the Fourteenth Amendment.

Litigators should probably advance the theory first under state constitutional law, focusing on two sets of states: (1) those whose constitutions include what Justin Levitt terms “prohibitions on undue favoritism” in districting;²⁴³ and (2) those whose courts have recognized legislative duties under generally worded education clauses, and whose constitution has similarly general provisions about “free and open” elections or voters’ “equal right to elect.”²⁴⁴ The former states present the best opportunity for making strong arguments grounded in the constitutional text; the latter for arguments by analogy to education precedents.²⁴⁵ The table in the Online Appendix identifies these states—twenty-two in total.²⁴⁶

Attorneys bringing state law claims should aim their fire on state legislative gerrymanders, not congressional districting. Because the normative value of a competitive or party-symmetric map of congressional districts in a given state depends on how congressional districts are drawn in other states,²⁴⁷ it makes little sense to read state constitutions as establishing a legislative duty to promulgate state-specific criteria for congressional districting.²⁴⁸

243. See Levitt, *supra* note 94.

244. The existence of such general provisions is designated in columns one and two of the table in the Online Appendix. Elmendorf, *supra* note 5.

245. The arguable separation of powers objection to “abstract” judicial declarations about legislative duties will be substantially undercut if the state’s courts have made such declarations under analogous provisions of the state’s constitution.

246. See Elmendorf, *supra* note 5. Litigators should also target states whose electorates are roughly split between Democrats and Republicans. In one-party states, the high court and the legislature are likely to be closely politically aligned, both presently and in their expectations about the future, and the court may therefore resist arguments for constitutional limitations on political gerrymanders.

247. See *supra* Part I.C.

248. However, if a group of states were to undertake to develop a coordinated process for congressional districting, subject to normative criteria that would apply to all of their districts, courts in these and other states might read their state constitutions as obligating the legislature to cooperate in this effort. (A bill to form an interstate redistricting compact between Maryland and Virginia has been introduced in Maryland. See Rob Richie & Austin Plier, *Maryland Can’t Act Alone to End Gerrymandering*, WASH. POST (Mar. 25, 2016), https://www.washingtonpost.com/opinions/maryland-cant-act-alone-to-end-gerrymandering/2016/03/25/cc27542-e61d-11e5-bc08-3e03a5b41910_story.html?utm_term=.f7d84a541387 [<https://perma.cc/E39B-VJRL>].) But without some prospect of coordinated redistricting, it is

Given the collective action barriers to bottom-up coordination of congressional redistricting across states, partisan fairness and responsiveness standards for the aggregate map of congressional districts and procedures for adjusting state-specific maps to comport with those standards probably have to come from Congress. Article I *may* provide the requisite textual hook for an implied congressional duty to enact a redistricting framework addressed to partisan/ideological fairness and responsiveness, but litigating this theory would be an uphill climb for many reasons.²⁴⁹ I see little prospect for a robust representational adequacy jurisprudence under Article I—unless state courts lead the way in recognizing analogous duties under state constitutions and the state constitutional experiment comes to be seen as a great success.

The remaining option is to try to shoehorn the representational adequacy approach into equal protection or First Amendment doctrine. It *may* be possible to do this using rebuttable presumptions that function as penalty defaults and thereby prod legislatures into promulgating partisan/ideological fairness criteria. However, because it may be mooted by *Whitford*, I shall provide only a brief,

doubtful that a state constitutional commitment to representational adequacy has much bearing on the drawing of congressional districts. At most, the commitment might require that congressional districts keep “communities of interest” and/or media markets intact, absent a legitimate reason to depart from these criteria.

249. The Supreme Court has described the Elections Clause, U.S. CONST. art. I, § 4, cl.1, as “impos[ing] the duty” to regulate congressional elections upon the states, while conferring upon Congress “the power to alter [state] regulations or supplant them altogether.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). The implication is that Congress’s role is discretionary, though perhaps it would be an abuse of discretion for Congress not to prescribe a new redistricting framework under contemporary conditions. *See MCGANN ET AL.*, *supra* note 36, at 205-10.

A further complication is the lack of precedent for judicial review of congressional inaction. There would also be serious questions about standing because “representational inadequacy” is a broadly shared injury; because it is speculative whether any voter presently dissatisfied with her congressional district would see her district redrawn if Congress were to establish a new framework for congressional districting; and because federal courts might conclude that they lack authority to provide a remedy if Congress fails to act. Some of these barriers might be overcome by analogy to administrative law, where courts have allowed challenges to agency failures to initiate rulemaking, *see, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 532-35 (2007), and relaxed causation and redressability requirements when plaintiffs allege that the agency failed to comply with proper procedures, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (“The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.”).

footnote-level sketch of the argument, leaving its development for another day.²⁵⁰

250. The argument would run roughly as follows: All nine Justices in *Vieth* agreed that partisan gerrymanders that “go too far” violate the Equal Protection Clause. See Berman, *supra* note 26, at 782. Yet the lesson of *Bandemer*, *Vieth*, and *LULAC* is that the crafting of effects-based standards for policing partisan gerrymanders is beyond the judicial ken. This seems to leave courts with two choices: either hold partisan gerrymanders nonjusticiable, or presume that partisan intent renders the map of legislative districts unconstitutional. A *conclusive* presumption of excessive partisanship from partisan intent would be contrary to the position of all nine Justices in *Vieth* that such gerrymanders are permissible if they do not go too far. See *id.* Additionally, a conclusive presumption would contravene Justice Kennedy’s premise that partisan gerrymandering claims generally should not succeed unless plaintiffs “show a burden, as measured by a reliable standard, on [their] representational rights.” *LULAC v. Perry*, 548 U.S. 399, 418 (2008) (Kennedy, J.).

But these problems would not arise if states could rebut the presumption of excessive partisanship by showing that the map at issue complied with reasonable, legislatively promulgated standards for partisan or ideological fairness. This rebuttable-presumption framework would have two important effects. First, it would give legislators a very strong political incentive to enact fairness criteria, because without such criteria partisan objectives could not be pursued at all. Consequently, it is unlikely that courts would often strike legislative maps as partisan gerrymanders without plaintiffs “show[ing] a burden, as measured by a reliable standard, on [their] representational rights.” See *id.* The reliable standard in question would be chosen and codified by the relevant legislature. Different states would no doubt come up with different standards, but that is a feature, not a bug. On this understanding, what equal protection requires is simply that states, in drawing legislative districts, act in accordance with some reasonable conception of democratic fairness. See *id.* at 414 (majority opinion). Because there are many such conceptions, the standards can vary from state to state, so long as they are reasonably designed to achieve certain minimal objectives, such as preventing an ideological or partisan minority from securing a majority of seats in the legislature.

Notice that this approach would shunt much of the litigation over partisan bias into state court, at least in cases about state legislative maps. This follows from *Grove v. Emison*, which states that federal courts must “defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.” 507 U.S. 25, 33 (1993). Federal courts would determine whether a state’s redistricting framework was sufficient to rebut the presumption of excessive partisanship, but the retail-level decisions about whether particular enacted maps comply with a state’s partisan fairness criteria and procedural rules would be made in state tribunals. *Id.* This is significant for the manageability of the federal courts’ equal protection jurisprudence, for as we have seen, the manageability of a legal standard for political question purposes depends on the frequency with which the courts must apply it. See *supra* note 234 and accompanying text. However, cases about congressional maps would probably be litigated in federal court since the corresponding criteria for partisan/ideological fairness would almost certainly have to be prescribed in federal legislation. It would not make sense to treat compliance with state-specific criteria as sufficient to rebut the presumption of excessive partisanship with respect to congressional maps, because, as we saw in Part I.C, extreme bias in any given state’s map may actually reduce rather than increase the level of bias in the congressional map as a whole.

E. Some Objections

This Section addresses four objections to the idea of fashioning a partisan gerrymandering jurisprudence on the template of the educational adequacy cases: (1) that the model will merely induce protracted, standardless battles over the reasonableness of legislatively promulgated standards; (2) that the model is motivated by a mistaken premise about “judicially discoverable and manageable” standards; (3) that the model runs afoul of the separation of powers; and (4) that the model depends too much on state courts, which may lack the necessary political independence to police gerrymanders. In considering the last objection, I provide an overview of cases litigated under state constitutional theories in connection with the 1990, 2000, and 2010 redistricting cycles. Almost all of these cases concern compliance with explicit criteria for legislative districts, rather than broadly worded provisions about electoral fairness and integrity.

1. Reverse-Engineered Standards and Intractable “Type II” Disputes

There are two respects in which the representational adequacy problem may diverge from its educational analogue in ways that might be thought to undermine the legislative-duty strategy for “managing” constitutional disputes.

First, politics: Courts in education cases *sometimes* provide useful political cover for lawmakers who want to pursue reforms but face resistance from constituents or interest groups.²⁵¹ This dynamic is unlikely to be present in representational adequacy cases, where judicial interventions could jeopardize incumbents’ job security and the majority party’s ability to protect its majority. Judges weighing representational adequacy claims will probably anticipate intense pushback from the legislative branch.

Second, computer technology has made it very easy to draw maps and evaluate them according to any number of specified criteria and

251. See Koski, *supra* note 148, at 1271-72 (discussing political context of the Kentucky Supreme Court’s seminal decision in *Rose*).

metrics.²⁵² Legislators could try to exploit the variety of plausible normative criteria and metrics by first drawing the map they want—say, to protect incumbents, or to advantage the dominant political party—and then reverse engineering normative “standards” that would justify the map. (It is harder to reverse-engineer educational standards so as to justify a program of educational reform.²⁵³)

If courts find a legislative duty to promulgate redistricting criteria in advance of mapmaking, we might enter a world in which many state legislatures issue *a new set* of reverse-engineered criteria every ten years, shortly after the release of the census data. Plaintiffs who dislike the ensuing map will ask courts to invalidate the legislated criteria. The survival of the legislature’s criteria will turn on judicial application of a fuzzy “reasonableness” standard,²⁵⁴ with the fate of the maps likely hanging in the balance. If the court rejects the legislated standards and invalidates the maps, the legislature may respond by issuing a new set of reverse-engineered criteria and then another map, forcing the court to apply the fuzzy reasonableness test yet again. The world so feared by opponents of standardless judicial review in partisan gerrymandering cases will have been realized, albeit with the battle shifting from the Type III question of whether the enacted maps are constitutionally permissible to the Type II question of whether the legislature reasonably exercised its duty to promulgate an adequate redistricting framework.

This scenario is not far-fetched, but neither is it fatal to my proposal. There are at least three reasonable ways for courts to deal with it, short of simply rejecting the premise that such conflicts are to be avoided.²⁵⁵ First, a cautious court could adopt a very deferential

252. For a high-tech example, see Yan Y. Liu et al., *PEAR: A Massively Parallel Evolutionary Computation Approach for Political Redistricting Optimization and Analysis*, 30 *SWARM & EVOLUTIONARY COMPUTATION* 78, 80-86 (2016). For discussion of lower-tech examples tailored for use by the general public, see Micah Altman & Michael P. McDonald, *Technology for Public Participation in Redistricting*, in *REAPPORTIONMENT AND REDISTRICTING IN THE WEST* 247, 250-58 (Gary F. Moncrief ed., 2011).

253. This is so because of tremendous uncertainty about what reforms would help to achieve state standards, particularly for high-poverty student populations. See generally Elmendorf & Shanske, *supra* note 71 (manuscript at 8-20).

254. Alternatively, the court would apply the previous legislated standards, if deemed reasonable.

255. That courts have managed educational adequacy litigation with fuzzy standards

standard of review for Type II cases. Virtually any legislative choice of nonpartisan districting criteria would be accepted. If the upshot is a spate of reverse-engineered partisan gerrymanders or incumbency-protection plans, so be it. At least the legislature will have to justify its plans according to *some* set of public-spirited criteria, rather than as partisan power grabs. As Justin Levitt has suggested, any reform that induces redistricters to explain their choices in public-regarding terms should help to reinforce norms of fair play.²⁵⁶

Alternatively, the court could spell out some pretty clear limits on what it will accept as “reasonable” redistricting criteria. For example, the court might say that because voting and representation is largely mediated by political parties,²⁵⁷ the legislature *must* justify

perhaps suggests that the familiar arguments for bright-line rules in partisan gerrymandering cases are overblown.

256. Justin Levitt, Presentation at the William & Mary Law Review Symposium: 2020 Redistricting (Feb. 18, 2017).

257. Legislators self-organize into party caucuses and delegate critical responsibilities to party leaders. See JOHN H. ALDRICH, *WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 208-11 (1995). Within a party caucus, the roll-call votes of representatives are only weakly correlated with district-level measures of citizen ideology. See Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 670-72 (2009) (estimating that 80 percent of polarization in the House of Representatives reflects divergence between how a Democrat and Republican would represent the same district, as opposed to divergence in voter preferences across districts). To be sure, some territorial representation does occur in the form of constituent service, but even this is filtered through party: citizens greatly prefer to communicate with own-party legislators. See David E. Broockman & Timothy J. Ryan, *Preaching to the Choir: Americans Prefer Communicating to Copartisan Elected Officials*, 60 AM. J. POL. SCI. 1093 (2016). Likewise, legislators systematically discount the opinions of constituents who affiliate with the other party. See Daniel M. Butler & Adam M. Dynes, *How Politicians Discount the Opinions of Constituents with Whom They Disagree*, 60 AM. J. POL. SCI. 975 (2016).

Vote choice in congressional and state legislative elections appears to be largely driven by partisanship, retrospective evaluations of the President, and to some extent ideological proximity. The relevant literature is vast. See, e.g., GARY C. JACOBSON & JAMIE L. CARSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 123-24 (9th ed. 2016) (discussing partisanship and voting in congressional elections); Stephen Ansolabehere & Philip Edward Jones, *Constituents' Responses to Congressional Roll-Call Voting*, 54 AM. J. POL. SCI. 583, 589-90, 596 (2010) (discussing partisanship and perceived agreement with roll-call votes as factors in voting in congressional elections); Danielle A. Joesten & Walter J. Stone, *Reassessing Proximity Voting: Expertise, Party, and Choice in Congressional Elections*, 76 J. POLITICS 740, 741, 749-50 (2014) (finding that the vast majority of voters support the more ideologically proximate candidate in congressional elections, but that “cross-pressured” partisans—self-identified Democrats who are ideologically closer to the Republican candidate, and self-identified Republicans who are closer to the Democratic candidate—voted more often for the

its redistricting framework in terms of a theory of effective partisan competition. The court might further hold that this requires drawing districts so that: (1) the median district leans toward the party preferred by most eligible voters in the state; (2) partisan asymmetry (somehow measured) is not more than one standard deviation worse than the historical average; and (3) the number of competitive districts exceeds some constitutional minimum. Though aggressive, this holding would allow the legislature to choose among the professionally accepted metrics of partisan bias, competition, and district-level preference. It would also give the legislature a zone of discretion to make trade-offs between partisan fairness and other considerations, such as respect for territorial communities or adherence to political subdivision boundaries. What is most important for present purposes is that this holding would define the zone of legislative discretion with clarity. Decisions in the zone would pass muster; everything outside of it would be rejected.

The third way for courts to respond to envelope-pushing legislatures in Type II cases is to hold that any reasonable redistricting framework must address and limit *incentives* for partisan and incumbency-protection excesses. This might be done with timing rules, as Adam Cox has argued.²⁵⁸ For example, the court might hold that legislated criteria must be established at least one session prior

copartisan than the ideologically proximate candidate); Benjamin J. Kassar & Charles J. Finocchiaro, *Responsiveness and Electoral Accountability in the U.S. Senate*, 39 AM. POL. RES. 1019, 1027-38 (2011) (modeling effects of ideological extremity, presidential approval, and other factors); Steven Rogers, *National Forces in State Legislative Elections*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 207, 220 (2016) (finding that, compared to state legislative approval, “changes in presidential approval have at least three times the impact on voters’ decision-making in state legislative elections”); Boris Shor & Jon C. Rogowski, *Ideology and the US Congressional Vote*, POL. SCI. RES. & METHODS, May 23, 2016, at 1-3, 17-19, 26, <https://www.cambridge.org/core/journals/political-science-research-and-methods/article/ideology-and-the-us-congressional-vote/0694B5A73DDA9594D16A46E71B1D0E26> [https://perma.cc/Q5MV-9CRW] (finding strong evidence of spatial voting in congressional elections, albeit with Democratic and Republican respondents strongly biased toward their copartisan candidates).

Because few voters know much about the actions of their legislative representatives, electoral accountability must be mediated by political parties. See generally Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363. Members of Congress behave as if their personal electoral fortunes are strongly tied to public opinion about the majority party as a whole. See Andrew J. Taylor, *Which U.S. House Members Present Their Legislative Records? Models of Electoral Accountability and the Content of Press Releases*, 44 CONGRESS & PRESIDENCY 102, 104 (2017).

258. See Adam B. Cox, *Designing Redistricting Institutions*, 5 ELECTION L.J. 412 (2006).

to the drawing of maps. Standing and ripeness doctrines could then be used to defer legal challenges to the criteria until the legislature revises the map. If the legislature's criteria were *not* accepted by the court, the legislature on remand would be unable to enact new criteria to govern mapmaking for the next election. The maps would have to be redrawn in accordance with previously established criteria, or provisional judge-made standards, rather than new criteria reverse-engineered to justify the current legislature's preferred map.

To further discourage legislative overreach, the court might deem mid-decade redistricting constitutionally impermissible (several state courts have done so already²⁵⁹). That would prevent the legislature from answering a judicial invalidation of its criteria by issuing new criteria and then a new map in the next legislative session. If legislated redistricting criteria cannot be evaluated by the courts pre-redistricting (because of ripeness/standing), and if the legislature cannot respond to an adverse court decision by revising the criteria for purposes of maps that will govern *the next decade* of elections (because of the one-session-in-advance rule for issuing criteria and the no-mid-decade-redistricting rule), then the legislature will probably adopt criteria that stay well within the bounds of reasonableness.²⁶⁰

Importantly, the no-mid-decade-redistricting rule would reduce the *number* of Type II cases that the courts confront.²⁶¹ The rule would have this effect directly by precluding re-redistricting between census years. As well, by raising the stakes of judicial invalidation of legislated criteria, the rule would encourage legislatures to redistrict pursuant to previously established, judicially validated criteria. Finally, insofar as the rule discourages legislative overreach in the choice of redistricting standards, there would be fewer "strong" potential claims for plaintiffs to bring when standards are

259. See Justin Levitt & Michael P. McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1264-66 (2007).

260. Cox argues that prohibitions on mid-decade redistricting are salutary because they put line-drawers behind a "partial veil of ignorance" regarding the distribution of voters across districts over the life of the plan. Cox, *supra* note 258, at 418-19.

261. Recall, per *Vieth*, that the manageability of a fuzzy standard depends on how often it must be applied in sensitive cases. See *supra* note 234 and accompanying text.

adopted or changed, and thus, in all likelihood, fewer Type II claims reaching the courts.

Beyond the timing rules, state supreme courts may discourage legislative overreach by establishing venue and case-management procedures that engender *ex ante* uncertainty about the ideology of reviewing courts.²⁶² For example, redistricting cases could be assigned to a trial judge chosen by lot from the state's population of trial judges. Complementing this randomization, the state supreme court could hold that questions about the reasonableness of legislated criteria, and about maps' compliance with the criteria, are mixed questions of law and fact subject to clear error appellate review.²⁶³ This would privilege the reasonableness judgment of an "ideologically random" trial court over the judgment of the state supreme court, whose ideology will usually be known to mapmakers. The resulting uncertainty should induce legislators to exercise some restraint even during periods when a majority of the state supreme court is ideologically aligned with the majority party in the legislature.

Finally, the state supreme court could invite the legislature to establish checks on *judicial* overreaching. To illustrate, the legislature might partition merits-review and remedial responsibilities among judges, stipulating that if a court finds the legislated framework for redistricting unconstitutional, the remedy stage of the proceeding and the determination of whether enacted maps are permissible must be assigned to other judges. This partitioning of responsibilities would ensure that no judge could arrogate map-invalidation or map-redrawing powers to himself by holding the redistricting framework unconstitutional.²⁶⁴

262. In twenty-two states, the state supreme court has exclusive rulemaking authority with respect to the judicial system. *See generally* CHRISTOPHER REINHART & GEORGE COPPOLO, CAL. OFFICE OF LEGISLATIVE RESEARCH, 2008-R-0430, COURT RULES IN OTHER STATES—LEGISLATIVE APPROVAL (2008).

263. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 78-79 (1986) (holding that clear error review applies to a district court's finding of vote dilution under the Federal Voting Rights Act).

264. A power-loving trial judge is probably less likely to find the redistricting criteria unconstitutional if he has been divested of map-review and remedial authority.

2. *Is the Legislative Duty Superfluous?*

This Article's account of the manageability dilemma that has confounded equal protection challenges to partisan gerrymanders presupposes that federal courts, having determined that the Constitution requires some limit on partisanship in redistricting, may not simply pick a metric of partisan bias and a threshold for how much is too much unless the Constitution (properly understood) actually privileges *that particular metric and cutoff*.²⁶⁵ The recognition of a legislative duty to promulgate standards is a way around this dilemma, because it vests the choice among metrics/thresholds in another institution and conceptualizes any judicially established standard as a stop-gap remedy for the legislature's failure to act, rather than as a specification of what the Constitution commands.

But perhaps the legislative-duty part is unnecessary. Perhaps the courts, having determined that some limit is necessary, may pick whatever metric and cutoff seems best at the time, while allowing legislative revisions.²⁶⁶ Many scholars have argued that the U.S. Supreme Court sometimes creates legislatively revisable doctrinal rules to implement constitutional norms.²⁶⁷ The leading example is *Miranda v. Arizona*, which established the rule that police officers, prior to interrogating a person in custody, must inform the subject "in clear and unequivocal terms that he has the right to remain silent."²⁶⁸ But the Court also indicated that the *Miranda*-warning requirement was provisional.²⁶⁹ It was to remain in place unless or until "we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."²⁷⁰ Similarly, in *Smith v.*

265. See *supra* Part I.A.

266. For a thoughtful argument along these lines, see Berman, *supra* note 26.

267. The seminal paper in this vast literature is Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975) (arguing that the Supreme Court produces both "*Marbury*-shielded constitutional exegesis and congressionally reversible constitutional law"). For a more recent effort to typologize judge-made constitutional rules subject to legislative revision or avoidance, see Ferejohn & Friedman, *supra* note 172.

268. 384 U.S. 436, 467-68 (1966).

269. See *id.* at 467.

270. *Id.* As the Court remarked,

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of

Robbins, the Court characterized the procedure for withdrawal of defense counsel stipulated by *Anders v. California*²⁷¹ as a “prophylactic framework” intended “to vindicate the constitutional right to appellate counsel,” rather than as a “constitutional command.”²⁷² Because “the Constitution itself does not compel the *Anders* procedure,” the states remained free to adopt alternatives.²⁷³

If one sees legislatively revisable rules as an ordinary part of constitutional doctrine, then the Gordian Knot of partisan gerrymandering jurisprudence is pretty easy to untangle. The courts just need to choose a metric of partisan bias and a cutoff for how much is too much, while stating that legislatures may enact reasonable alternatives. I am sympathetic to this approach, which seems much more plausible than holding that equal protection entails a particular metric and cutoff, but there remain significant objections.

First and most basically, the proposition that federal courts have authority to craft doctrinal standards that go beyond what the Constitution “commands” is hotly disputed.²⁷⁴ Second, the leading examples of this practice, such as *Robbins* and *Miranda*, address situations where constitutional noncompliance (ineffective appellate counsel and coerced confessions) may be hard for courts to observe absent the prophylactic rule.²⁷⁵ In both cases, the provisional judge-made rule is information forcing. In the redistricting context, by contrast, any judicially selected metric of partisan bias and cutoff

their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.

Id.

271. 386 U.S. 738, 744 (1967) (requiring appointed criminal defense counsel who concludes that appeal would be frivolous to file “a brief referring to anything in the record that might arguably support the appeal”).

272. *Smith v. Robbins*, 528 U.S. 259, 273 (2000) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)).

273. *Id.*

274. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 457-61 (2000) (Scalia, J., dissenting) (attacking prophylactic rules as illegitimate and offering backhanded praise to the majority for not expressly embracing the position that *Miranda* was an unexceptional exercise of an established judicial power to craft such rules); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101-02, 123-29, 163-64 (1985) (challenging constitutional legitimacy of prophylactic rules).

275. *See Robbins*, 528 U.S. at 280-81; *Miranda*, 384 U.S. at 461.

would essentially define the constitutional norm—how much of a burden on partisan representational rights is too much—rather than generate information that courts or other actors need to measure the burden. To treat such norm-defining doctrinal standards as legislatively revisable would represent a fairly substantial break with conventional, *Marbury*-derived understandings about the judicial role, and might end up destabilizing important election law precedents, such as the one-person, one-vote requirement of *Reynolds v. Sims*.²⁷⁶

3. *Reviewing Maps vs. Requiring Frameworks: Separation of Powers Objections*

One might argue on separation of powers grounds for an interpretive presumption against implied legislative duties. For a court to find a legislative duty is, in effect, to exert control over the legislative agenda, and due regard for the coordinate branches of government arguably counsels against this. Also, when courts undertake to implement broadly worded constitutional provisions about education or representation by directing the legislature to establish standards and evaluation systems, rather than by making record-based determinations that *particular* schools or *particular* legislative maps are in fact constitutionally inadequate, the courts are engaged in an essentially speculative enterprise. This is in tension with the familiar notion that the courts' job is to find facts and apply law to facts, leaving more speculative, policy-minded determinations to the legislature.²⁷⁷

276. 377 U.S. 533 (1964); cf. Berman, *supra* note 26, at 836 (“[T]he one-person, one-vote rule, at least as applied in congressional districting, is a [nonstandard] decision rule that directs courts to conclusively presume that the challenged scheme is arbitrary and capricious from the mere fact that it minimally departs from perfect equipopulousness.”). If equal protection’s “operative proposition”—the constitutional command—requires only a nonarbitrary distribution of population across legislative districts, and if legislatures are generally free to replace judge-made “decision rules” with other decision rules that reasonably implement the “operative proposition,” then massive deviations from population equality could suddenly become permissible. Cf. Berman, *supra* note 26, at 835-36. For example, a state could probably require apportionment on a county basis rather than a population basis, at least as to one house of the state legislature (by analogy to the U.S. Senate).

277. Cf. *LULAC v. Perry*, 548 U.S. 399, 419-20 (2006) (Kennedy, J.) (casting doubt on a proposed symmetry standard for a partisan gerrymandering claim because it would enable courts to invalidate maps before the predicted partisan injury had actually materialized). Note

These arguments invite a couple of responses. The “it is too speculative” objection papers over the fact that rulings about the existence of manageable standards always depend on a speculative, forward-looking weighing of costs and benefits.²⁷⁸ A ruling on the existence and contours of the legislative duty would be analogous to a justiciability ruling about manageable standards. The considerations to be weighed are very similar, and the holding would be meant to bring about the establishment of manageable standards.²⁷⁹

As for judicial incursions on the legislative agenda, the extent of the incursion depends greatly on the remedy for legislative inaction. If the remedy would be a provisional, judge-made standard, the initial legislative remand just gives the legislature the option to act, without compelling it. The intrusion would be far more severe if the court threatened to hold the legislature in contempt, fine lawmakers, or otherwise coerce legislative action. This is a reason for courts to think carefully about remedies, but not to reject the representational adequacy/legislative duty approach altogether.

4. *Dependence on Dependent State Courts*

A final objection to the strategy I have sketched is that it relegates the policing of state legislative gerrymanders to state courts. State courts were notorious in the pre-*Reynolds* era for passivity in the face of grossly malapportioned legislative districts.²⁸⁰ This passivity may have reflected a lack of political independence from state legislatures, on whom state courts depend for their budgets.²⁸¹ Such dependencies may make state courts equally reluctant today to hear or vindicate “representational adequacy” claims. Moreover, many states in the present day are essentially one-party democracies, in which Democrats or Republicans control the legislative and executive branches and comprise a supermajority of the electorate.²⁸² The

also that one justice dissented from the canonical educational adequacy decision on the ground that the court was issuing an advisory opinion. *See* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 223-25 (Ky. 1989) (Leibson, J., dissenting).

278. *See supra* note 236 and accompanying text.

279. *See supra* Part III.B.

280. *See* STEPHEN ANSOLABEHRE & JAMES M. SNYDER JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* 95-99 (2008).

281. *See id.* at 96.

282. *See* BALLOTPEdia, *supra* note 219.

justices in these one-party states are likely to identify with the dominant party, and may be reluctant to circumscribe its control over redistricting.

These are potent concerns. Yet state courts appear to be wakening to the problem of the gerrymander. Writing in 2006, David Schultz compared state constitutional litigation in the 1990 and 2000 rounds of redistricting.²⁸³ In the 1990s, eleven state courts heard challenges to reapportionment plans, but “only four ... undertook more than a perfunctory analysis of their constitutions and only two used it to invalidate all or part of a reapportionment plan.”²⁸⁴ Both plaintiff victories turned on provisions requiring legislative maps to respect political subdivision boundaries.²⁸⁵ After the 2000 round of redistricting, nine cases were litigated in state court.²⁸⁶ In seven of these cases, courts provided a substantial state constitutional analysis, and in five cases, the map at issue was invalidated in whole or in part.²⁸⁷ (Two state courts held mid-decade redistricting unconstitutional on state grounds, in contrast to the U.S. Supreme Court’s decision in *LULAC v. Perry*, which rejected this per se rule.²⁸⁸)

My research assistants extended Schultz’s analysis and found that state court engagement with redistricting increased during the 2010 cycle. State constitutional claims were litigated in nineteen states.²⁸⁹ Plaintiffs prevailed in whole or in part in six of these

283. See David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L.J. 1087 (2006).

284. *Id.* at 1129.

285. *Id.* at 1112.

286. *Id.* at 1129.

287. *Id.* Also, in a decision postdating Schultz’s paper, the Arizona Supreme Court engaged in a substantial state constitutional analysis. See *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d 676, 686-87, 689 (Ariz. 2009) (upholding challenged maps because, inter alia, the redistricting commission “engage[d] in a deliberative effort to accommodate” competitiveness and other goals).

288. Schultz, *supra* note 283, at 1131.

289. See *In re 2011 Redistricting Cases*, 294 P.3d 1032 (Alaska 2012) (concerning compliance with judge-made procedures designed to ensure that VRA districts do not deviate from state constitutional requirements more than necessary); *Vandermost v. Bowen*, 269 P.3d 446 (Cal. 2012) (concerning interim maps to be used when enacted maps are put to a referendum vote); *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108 (Colo. 2011) (per curiam) (concerning compliance with state constitutional requirement about political subdivision splits); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015) (concerning partisan intent); *Solomon v. Abercrombie*, 270 P.3d 1013 (Haw. 2012) (per curiam)

cases;²⁹⁰ additionally, the Arizona Supreme Court intervened to protect the independence of the state's nonpartisan redistricting body.²⁹¹ Notable too is that some of the courts that ruled for defendants nonetheless carved out or suggested a substantial judicial role in policing the redistricting process.²⁹²

(concerning state constitutional requirement about apportionment on the basis of "permanent residents"); *Twin Falls County v. Idaho Comm'n on Redistricting*, 271 P.3d 1202 (Idaho 2012) (concerning political subdivision splits); *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905 (Ky. 2012) (concerning political subdivision splits and inconsistent application of criteria used to justify departures from perfect population equality); *In re 2012 Legislative Districting*, 80 A.3d 1073 (Md. 2013) (concerning subdivision splits); *State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601 (Mo. 2012) (per curiam) (concerning county splits); *Willems v. State*, 325 P.3d 1204 (Mont. 2014) (concerning drawing of districts in relation to "holdover" state senators and compliance with transparency and public participation requirements); *City of Manchester v. Sec'y of State*, 48 A.3d 864 (N.H. 2012) (per curiam) (concerning compliance with traditional districting criteria); *Gonzales v. State Apportionment Comm'n*, 53 A.3d 1230 (N.J. Super. Ct. App. Div. 2012) (concerning legal standards and availability of private right of action under generally worded provision of state constitution); *Cohen v. Cuomo*, 969 N.E.2d 754 (N.Y. 2012) (per curiam) (concerning permissibility of adding an additional state senate seat); *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015) (concerning judge-made procedures for compliance with traditional state constitutional criteria and the VRA and justiciability of claims under the "Good of the Whole" provision of state constitution), *vacated*, 137 S.Ct. 2186 (2017); *Wilson v. Kasich*, 981 N.E.2d 814 (Ohio 2012) (concerning compliance with compactness, contiguity, and community-of-interest requirements, and whether there exists an implied constitutional requirement of nonpartisanship in districting); *Wilson v. Fallin (Wilson I)*, 262 P.3d 741 (Okla. 2011) (concerning subjects for expedited, pre-implementation review of redistricting maps in the state supreme court and the availability of more "fact-intensive" state constitutional claims in post-enactment litigation in district court); *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711 (Pa. 2012) (per curiam) (concerning compliance with compactness, contiguity, and political subdivision integrity requirements); *Moore v. State*, 436 S.W.3d 775 (Tenn. Ct. App. 2014) (concerning county splits); *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368 (W. Va. 2012) (concerning partisan gerrymandering).

290. See *In re 2011 Redistricting Cases*, 294 P.3d at 1033, 1035, 1039 (invalidating map because redistricters failed to follow judge-made procedures which require initially drawing map to comply with the state constitution and then making the smallest possible adjustments to bring map into compliance with VRA); *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d at 109 (invalidating the map for inadequate minimization of political subdivision splits); *Detzner*, 172 So. 3d at 416 (upholding the trial court's finding of constitutionally proscribed partisan intent); *Solomon*, 270 P.3d at 1023-24 (invalidating the map for inadequate efforts to comply with constitutional requirement of apportionment on the basis of "permanent residents"; redistricters failed to follow staff suggestions about adjustment of census data); *Twin Falls County*, 271 P.3d at 1203 (invalidating the map on the basis of excessive political subdivision splits); *Holt*, 38 A.3d at 761 (invalidating the map for inadequate compliance with traditional districting criteria).

291. See *Ariz. Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1278 (Ariz. 2012) (holding that the Governor's stated grounds for removing the chairperson were constitutionally deficient).

292. See, e.g., *Wilson v. State ex rel. State Election Bd. (Wilson II)*, 270 P.3d at 155, 159

In the post-2010 round of state constitutional redistricting litigation, a number of plaintiffs asserted claims that went beyond arguments about noncompliance with traditional districting criteria, such as minimization of political subdivision splits. In Florida, the courts found violations of a recently enacted state constitutional prohibition on redistricting for partisan advantage.²⁹³ To similar effect, Kentucky's courts struck down a map because the legislature had not *consistently* applied the criteria said to justify departures from population equality.²⁹⁴ The inconsistency suggested that some other impermissible purpose was probably at work.²⁹⁵ Most recently, the Pennsylvania Supreme Court invalidated the state's congressional district map as a partisan gerrymander in contravention of the "free and equal elections" clause of the state constitution.²⁹⁶ On the other hand, the Ohio Supreme Court declined to infer a general obligation of partisan impartiality from explicit constitutional requirements for compact, contiguous, and equally populated legislative districts,²⁹⁷ and the West Virginia Supreme Court rejected a state constitutional partisan gerrymandering claim largely on the basis of U.S. Supreme Court's decisions under the federal constitution.²⁹⁸

In Alaska and North Carolina, courts carefully reviewed circa-2010 legislative maps for compliance with judge-made *procedures* for redistricting.²⁹⁹ The procedures in question were crafted to help

(Okla. 2012) (Colbert, C.J., concurring) (stating that partisan gerrymanders should be policed by courts in fact-intensive, post-implementation litigation); *Wilson I*, 262 P.3d at 749-50 (Colbert, C.J., concurring) (emphasizing that political gerrymanders can and should be policed indirectly by insisting on compliance with traditional criteria such as compactness and respect for communities of interest and political subdivisions); *Moore*, 436 S.W.3d at 788 (reviewing county splits deferentially but intimating that a different approach might have been taken if evidence of a bad motive had been presented).

293. See *Detzner*, 172 So. 3d at 369, 416.

294. See *Fischer*, 366 S.W.3d at 908, 919.

295. See *id.*

296. *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017, 2018 WL 750872 (Pa. Feb. 7, 2018); *League of Women Voters of Pennsylvania v. Commonwealth*, 175 A.3d 282 (Pa. 2018) (order) (per curiam).

297. See *Wilson v. Kasich*, 981 N.E.2d 814, 819-20, 823 (Ohio 2012). The court did not consider whether other, more generally worded provisions of the state constitution might yield such a requirement.

298. See *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 388-90 (W. Va. 2012).

299. *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1033, 1036-38 (Alaska 2012) (requiring redistricter to first draw maps pursuant to state constitutional criteria, without regard to VRA, and then to make the minimal adjustments necessary to comply with VRA); *Dickson v. Rucho*, 781 S.E.2d 404, 413 (N.C. 2015), *vacated*, 137 S. Ct. 2186 (2017) (reviewing legisla-

courts ascertain whether redistricters' ostensible efforts to comply with the federal Voting Rights Act's required substantial departures from state constitutional criteria.³⁰⁰ For present purposes, the particulars of these procedures are much less important than the larger principle for which they stand: judges may concoct procedural requirements for redistricting so as to facilitate judicial enforcement of otherwise-hard-to-enforce constitutional norms. This is broadly in keeping with the representational adequacy/legislative duty approach.³⁰¹

Finally, plaintiffs litigating post-2010 maps in New Jersey, North Carolina, and Missouri sought to remedy partisan bias or a lack of competitive districts by invoking hortatory constitutional provisions about popular authority and public officials' duty to govern "for the good of the whole."³⁰² These claims failed—and understandably so, as the constitutional provisions in question were not addressed to the electoral process as such. By contrast, the clauses on which plaintiffs have relied in educational adequacy cases are unquestionably *about education*.³⁰³ Similarly, the textual hooks for representational adequacy claims discussed in Part II.A.1 of this Article are *about elections*. It is worth noting, however, that the Missouri Supreme Court did analogize the "good of the whole" provision of the

ture's compliance with "nine criteria that the General Assembly must follow in drawing new district lines," including a temporal sequence for drawing "VRA" and "non-VRA" districts and a number of bright-line rules about the crossing of county borders).

300. See *In re 2011 Redistricting Cases*, 294 P.3d at 1033, 1036-38; *Dickson*, 781 S.E.2d at 413. Curiously, while both courts require maps to be drawn in a particular sequence, one requires VRA districts to be drawn before anything else, *Dickson*, 781 S.E.2d at 413, and the other requires the initial maps to be drawn blind to the VRA, *In re 2011 Redistricting Cases*, 294 P.3d at 1033, 1036-38.

301. Of course, under the approach I have sketched, the legislature would have primary responsibility for crafting these procedures. See *supra* Part III.A.

302. See *Pearson v. Koster*, 359 S.W.3d 35, 42 (Mo. 2012) (per curiam) (deeming "good of the whole" and "general welfare" provisions of the state constitution nonjusticiable); *Gonzales v. State Apportionment Comm'n*, 53 A.3d 1230, 1254-55 (N.J. Super. Ct. App. Div. 2012) (finding no private right of action to enforce state constitutional provision which provides, "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it." (quoting N.J. CONST. art. 1, para. 2(a))); *Dickson*, 781 S.E.2d at 440 (finding nonjusticiable a state constitutional provision which provides, "All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. CONST. art. 1, § 2.).

303. See *supra* Part II.A.1.a.

state constitution to the education clause.³⁰⁴ In earlier school finance cases, Missouri courts had found the education clause too lacking in “specificity or direction” to be enforced judicially.³⁰⁵ Unsurprisingly, the state supreme court deemed the even flabbier “good of the whole” provision nonjusticiable.³⁰⁶ State courts in New Jersey and North Carolina have been much more receptive to claims under the education clauses,³⁰⁷ yet as best I can tell, the education analogy was not advanced in redistricting litigation brought under “good of the whole”-type provisions of the North Carolina and New Jersey Constitutions.³⁰⁸

In summary, while there are reasons to worry about state court dependence and partisanship, the trends in state court redistricting jurisprudence leave me cautiously optimistic. State courts are willing to enforce explicit redistricting criteria, and the stage is now set for a new generation of claims under more open-ended electoral provisions. No doubt some of these claims will fail on justiciability grounds, but, with the education analogy and precedents close at hand, others may well succeed.

CONCLUSION

This Article has outlined a new legal strategy for attacking maps of legislative districts with high levels of ideological/partisan bias or

304. See *Pearson*, 359 S.W.3d at 42 (discussing Mo. CONST. art. IX, § 1(a) (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools.”)).

305. *Id.* (discussing *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 488 (Mo. 2009)). Recall that nonjusticiability is the minority position among state courts in educational adequacy cases. See *supra* note 144 and accompanying text.

306. *Pearson*, 359 S.W.3d at 42. In another Missouri redistricting case, plaintiffs invoked the “free and open elections” provision of the Missouri Constitution, Article I, Section 25, but never advanced a theory about what it requires beyond the compactness, contiguity, and population equality requirements found in Article III, Section 2 of the state constitution. See *Johnson v. State*, 366 S.W.3d 11, 18 (Mo. 2012) (“[Plaintiffs] claim that the plan is unconstitutional ... because the districts do not meet the requirements of contiguous territory, compactness, and population equality.” (citing MO. CONST. art I, §§ 2, 25)).

307. See *New Jersey*, SCHOOLFUNDING.INFO, <http://schoolfunding.info/litigation-map/new-jersey> [<https://perma.cc/3YCD-2AGB>]; *North Carolina*, SCHOOLFUNDING.INFO, <http://schoolfunding.info/litigation-map/north-carolina> [<https://perma.cc/25VL-9C3V>].

308. Neither education clauses nor educational adequacy precedents were mentioned by the courts in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *vacated*, 137 S. Ct. 2186 (2017), or *Gonzales v. State Apportionment Commission*, 53 A.3d 1230 (N.J. Super. Ct. App. Div. 2012).

low levels of responsiveness. Inspired by the educational adequacy cases, the strategy asks courts to recognize a legislative duty to promulgate standards for districting, as well as a framework for enforcing those standards. If the legislature abdicates its duty, courts would issue provisional, judge-made standards, subject to legislative revision.

I leave for future work a related question: Might the education analogy prove equally valuable in cases about barriers to voting, such as identification requirements, rollbacks in early voting, and the like? Litigants have generally attacked these barriers piecemeal,³⁰⁹ but a number of judges, both liberals and conservatives, have suggested that the permissibility of any given voting requirement probably ought to depend on what else the state has done to enable, or thwart, political participation.³¹⁰ The educational adequacy cases, which often turn on holistic evaluations of the state's system of public schools, may again prove instructive as courts feel their way toward new models for judicial superintendence of the voting process.

309. For a rare exception, see *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 466 (6th Cir. 2008) (“[P]laintiffs ... filed a sixty-six page, 212-paragraph complaint alleging ‘a voting system in Ohio’ that suffers from ‘non-uniform standards, processes, and rules, and that employs untrained or improperly trained personnel, and that has wholly inadequate systems, procedures, and funding.’”).

310. See, e.g., *Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring) (“A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting [electoral] participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms.”); *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (“To the extent outcomes help to decide whether the state has provided an equal opportunity, we must look not at Act 23[, the state’s voter-ID requirement,] in isolation but to the entire voting and registration system.”); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014) (“By inspecting the different parts of House Bill 589 as if they existed in a vacuum, the district court failed to consider the sum of those parts and their cumulative effect on minority access to the ballot box.”); *N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 349 (M.D.N.C. 2014) (suggesting that the fact “that black North Carolinians have reached ‘parity’ with whites in turnout for presidential elections” should figure heavily in the analysis of alleged barriers to voting under section 2 of the Voting Rights Act), *aff’d in part, rev’d in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).