

GERRYMANDERED BY DEFINITION: THE DISTORTION OF “TRADITIONAL” DISTRICTING CRITERIA AND A PROPOSAL FOR THEIR EMPIRICAL REDEFINITION

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What are “traditional” districting criteria? The meaning of that term is critical to curbing abusive districting practices because adherence to traditional criteria grants districting plans a prima facie impression of constitutionality and serves as a strong defense to racial gerrymandering claims. Yet, the Supreme Court has never intelligibly defined “traditional” districting criteria or its indicative qualities. Exploiting this silence, various actors are attempting to define that term in service of their own interests, usually at the expense of the public’s. For example, legislatures pushing redistricting plans that would advantage certain parties or incumbents claim that those districting goals are “traditional”—and therefore must be judicially protected—by relying on anecdotal examples of a state having used them.

This Article proposes a definition of “traditional” districting criteria that would both reduce such abuse and adhere to a commonly understood meaning of that word: widely accepted as standard practice. Under this alternative, which we call the empirical definition, a criterion is “traditional” only if a majority of states require or allow it *and* fewer than a quarter prohibit it in state constitutions, statutes, or legislative guidelines. According to the empirical definition and our database of the fifty states’ redistricting laws, compactness, contiguity, equal population, and preserving county and city boundaries are traditional criteria. Among others, partisan advantage, incumbent protection, and preserving communities of interest are nontraditional. The empirical definition would not only curb abusive districting but also reduce the influence of undesirable judicial activism by binding judges’ discretion to an objectively discernible definition of “traditional” criteria.

Constitutional theory also validates the empirical definition. Responding to concerns of judicial legislation, we argue that the empirical definition merely defines a central element of redistricting law—one that the Supreme Court has failed to specifically define—according to the public will and the Court’s requirement of traditionality. The empirical definition also advances a constitutional principle that courts purport to, but often do not, follow: redistricting must not unduly discriminate against any candidate. In the status quo, courts would uphold discriminatory criteria such as incumbent protection if they are applied consistently to all electoral districts in a state. Moreover, the courts’ status-quo “consistent application” approach would contradict their own precedents by incorrectly deeming certain criteria such as the contiguity principle to be nontraditional. The empirical definition would neither commit

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♦ We thank Professors Rick Hall, Ellen Katz, Ken Kollman, Barbara Koremenos, Lisa Manheim, Jim Morrow, Scott Page, G. Michael Parsons, David Schleicher, and Nicholas Stephanopoulos for their valuable and insightful comments. Any opinions or errors are to be attributed solely to the authors.

such self-contradiction nor condone abusive redistricting on the condition that everyone suffer from it.

Introduction	102
I. The Current Definition of “Traditional” Districting Criteria and Its Abuse	109
A. A Definition Built on Logical Fallacies and Conflicts of Interest	109
B. Existing Scholarship on the Status Quo Definition of Traditional Districting Criteria	120
1. Resignation or Denial	120
2. Quantifiable Measures and Intuitive Ideas at the Expense of Useful Solutions	123
II. The Empirical Definition’s Practical Justifications	126
A. The Legal Justifications	128
1. Exorcising the Specter of Judicial Activism from Redistricting Law	128
2. A (More) Uniform Level of Constitutional Protection	131
B. The Political Justifications	134
1. A Check Upon the Excesses of a Rogue Majority	134
2. The Inevitability of Judicial Challenges to Redistricting Plans in Modern Politics	136
C. Two Judicial Uses of the Empirical Definition	137
1. Supplemental Application: Apply Only If State Law Is Silent	137
2. Universal Application: Apply Regardless of What State Law Says	143
III. The Empirical Definition’s Theoretical Justifications	145
A. The Empirical Definition Is Not Judicial Legislation	151
1. Against Illusory Quantitative Authority	151
2. The Status Quo Represents Judicial Legislation	154
B. The Empirical Definition Advances Constitutionally Required Equitable Redistricting	162
C. Interpretations of Various Districting Criteria	169
1. Nontraditional Districting Criteria	169
2. Traditional Districting Criteria	180
Conclusion	185

INTRODUCTION

What are “traditional” redistricting criteria? Although the question may seem to be mostly in service of scholarly curiosity, its answer has immediate practical consequences because adherence to these traditional

criteria gives districting plans a prima facie impression of constitutionality and serves as a strong defense to racial gerrymandering claims.¹ Put differently, in the context of redistricting criteria, the word “traditional” is synonymous with “legal.” Due to the redistricting set to follow the 2020 Census and the decennial reapportionment,² the meaning of “traditional redistricting criteria” has rarely been more pertinent than it is now.

However, this consequential term remains surprisingly ill-defined. The Supreme Court has never explicitly stated the qualities that make a districting criterion “traditional” or given a full list of the traditional criteria themselves, stating only that “traditional” redistricting criteria “includ[e] but [are] not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests”³ This definition was apparently left open-ended deliberately to incorporate what states consider to be traditional districting rules, because “[w]here these or other [traditional criteria] are the basis for redistricting . . . a State can ‘defeat a claim that a district has been gerrymandered on racial lines.’”⁴ At the same time, the Court has been reluctant to expand that list, often mentioning that a state has used a particular redistricting criterion without explicitly clarifying whether it is “traditional.”⁵

Although flexible guidelines are more easily adapted to changing circumstances than rigid bright-line rules, that same flexibility also makes guidelines easier to abuse.⁶ Unfortunately, in redistricting, flexibility often contributes more to abuse than to good-faith adaptation. Exploiting the

1. See *Bush v. Vera*, 517 U.S. 952, 962 (1996) (“[T]he neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be subordinated to race.”).

2. *Redistricting Law 2020*, NAT’L CONF. STATE LEGISLATURES xii (2019), https://www.ncsl.org/Portals/1/Documents/Redistricting/Exec_Summary_2020.pdf [<https://perma.cc/J92S-QEA2>].

3. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

4. *Id.* at 916 (quoting *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 647 (1993)).

5. See, e.g., *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 907 (1996) (noting that the North Carolina Legislature had used incumbency protection as a districting criterion, without determining whether that criterion was “traditional”); *Easley v. Cromartie*, 532 U.S. 234, 240 (2001) (commenting that the North Carolina Legislature had used incumbency protection as the stated justification for its redistricting plan, without stating whether incumbency protection is traditional, defining the term “traditional principles,” or giving any examples of traditional principles).

6. Cf. David Olson & Stefania Fusco, *Rules Versus Standards: Competing Notions of Inconsistency Robustness in Patent Law*, 64 ALA. L. REV. 647, 664 (2013) (“The Supreme Court has consistently replaced the Federal Circuit’s bright-line rules with standards that . . . promot[e] flexible decision-making, but, simultaneously, allow more inconsistency to persist in the system.”); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 407–09 (1959) (arguing that 18 U.S.C. § 371 (1952), which criminalizes any conspiracies to “defraud the United States . . . in any manner or for any purpose,” approximates a standard that is so vague as to permit manipulation); Gideon Parchomovsky & Alex Stein, Essay, *Catalogs*, 115 COLUM. L. REV. 165, 194 n.185 (2015) (arguing that 18 U.S.C. § 371 may be excessively vague).

lack of an intelligible definition of “traditional criteria,” legislators and electoral candidates are distorting this term in service of their interests at the expense of the public’s. Specifically, if the Supreme Court has ever said that a state used a particular districting rule even once and that rule happens to be expedient, interested parties claim that the Court has endorsed it as a “traditional” criterion. For example, expert witnesses retained by state legislatures have claimed that *Shaw v. Hunt (Shaw II)*⁷ recognizes incumbency protection as “traditional,”⁸ even though that case does nothing of the sort—it only says that North Carolina has used it as a criterion.⁹ Such reasoning is about as persuasive as a pharmaceutical company claiming that heroin should be legalized as a flu treatment because it once sold heroin legally for that purpose in the past.¹⁰

To curb such abuses of law and logic, this Article advances a definition of “traditional” districting criteria that adheres to a commonly understood meaning of tradition: widely accepted as standard practice.¹¹ We propose that a districting criterion be considered traditional only if a majority of states require or allow it in constitutions, statutes, or legislative guidelines *and* if fewer than a quarter prohibit it. We also submit that a criterion considered to be traditional in either state or congressional districting should be treated as such in both. According to our database of state redistricting laws and our definition of “traditional”—permitted by twenty-six or more states and prohibited by twelve or fewer—equal population, compactness, contiguity, and preserving city and county boundaries are traditional criteria. Partisan advantage, incumbent protection, preserving past district cores, and preserving communities of interest, among others, are not traditional.

We propose our definition of traditional districting criteria—which we call the empirical definition—because it would distinguish traditional criteria from nontraditional criteria in an objective fashion. An objective definition is necessary because its absence in the status quo is inviting conflicted parties to claim that any expedient rule that a state has ever used is traditional. Even if it is assumed that judges—many of whom are

7. 517 U.S. 899 (1996).

8. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 779 (Pa. 2018) (stating that Dr. Wendy K. Tam Cho was retained by the Commonwealth of Pennsylvania); Expert Report of Wendy K. Tam Cho at 10, *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (“Incumbent protection has been mentioned by the Court as one of the traditional districting principles” (citing *Shaw II*, 517 U.S. 899)), https://www.brennancenter.org/sites/default/files/audio/LWV_v_PA_Expert_Report_WendyTamCho.pdf [<https://perma.cc/396B-F7UF>].

9. See *Shaw II*, 517 U.S. at 907.

10. See ERIC C. SCHNEIDER, SMACK: HEROIN AND THE AMERICAN CITY 6 (2008).

11. *Tradition*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tradition> [<https://perma.cc/MD7P-RBEZ>] (last visited Feb. 15, 2021) (defining tradition as “an inherited, established, or customary pattern of thought, action, or behavior”).

elected¹²—tend to be unaffected by partisan bias, our definition is still needed to enhance the legitimacy of court-ordered redistricting plans. Even when courts rule impartially on whether a criterion is traditional, the fact that judges drawing up redistricting plans in the status quo must effectively create their own definitions of “traditional criteria” risks inviting claims that judicial activism is hijacking the democratic process.¹³ Our empirical definition would enhance the substantive legitimacy of redistricting by reducing the ability of conflicted parties to manipulate it, as well as its political legitimacy by forcing court rulings to reflect precisely what most states consider to be “traditional” criteria.

Of course, the majority’s collective decisions may not always be correct or just; theoretically, the legislatures of twenty-six states could conspire to recognize as traditional those criteria that advance political expediency at the expense of the public interest. We maintain that voters care enough about gerrymandering that a conspiracy among states to circumvent the empirical definition, if it materialized, is unlikely to succeed. For example, the recent successful ballot initiatives that transferred districting authority from legislators to independent redistricting commissions were caused by voters’ perception that politicians “choose their own districts” and their frustration “with dysfunctional governance and unresponsive legislators”¹⁴ Nevertheless, recognizing the possibility of this worst-case scenario, the empirical definition requires traditional districting criteria to be endorsed by a majority of states *and* prohibited by fewer than a quarter. A quarter, the same amount needed to defeat proposed amendments to the U.S. Constitution,¹⁵ was chosen to meaningfully check a majority’s excesses while also minimizing frivolous obstruction.

This Article proceeds as follows. Part I elaborates on how conflicted parties and even the Supreme Court abuse the term “traditional” redistricting criteria, while scholars fail to provide satisfactory alternatives to the status quo. Part II presents the legal and political justifications for

12. See Scott W. Gaylord, *Section 2 Challenges to Appellate Court Elections: Federalism, Linkage, and Judicial Independence*, 69 CASE W. RESV. L. REV. 117, 147 (2018) (noting that twenty-two states select judges by popular vote).

13. See, e.g., *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 n.72 (N.D. Fla. 1996) (“[W]e cannot deny the Florida Legislature the first opportunity to adopt a new redistricting plan. . . . [T]o do otherwise would encourage the very type of judicial activism in the political process that this Court has a duty to avoid.”); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1328 (1987) (stating that “a traditional objection to judicial activism” in partisan gerrymandering cases is “that the remedy for the evil should be sought in the legislature, not in the courts”).

14. David Gartner, *Arizona State Legislature v. Arizona Independent Redistricting Commission and the Future of Redistricting Reform*, 51 ARIZ. STATE L.J. 551, 551 (2019).

15. U.S. CONST. art. V.

our empirical definition of traditional districting criteria, as well as ways for courts to employ it. In the status quo, if state law is silent on whether a redistricting criterion is traditional, the decision falls to the discretion of the presiding court. For example, a court might mandate equal population in congressional districting because state law requires it for state legislative districting,¹⁶ while another court might let the state legislature advantage a particular party in districting because state law does not prohibit it.¹⁷ However, if courts uniformly applied the empirical definition to determine whether a criterion is “traditional” when their own state law fails to give guidance, voters would become less beholden to the whims of their courts or their resident states for protection from gerrymandering.

Whereas Part II justifies the empirical definition with the practical gains it would present, Part III validates it using constitutional theory. This theoretical persuasion is necessary because judicial acceptance is vital to the empirical definition’s success and because judges “are more likely to be interested in the logic and symmetry of the law than in the objects and policies to be attained through the law.”¹⁸ Some scholars are also wary of what they see as the excessive quantification of districting law. The argument goes that some quantitative metrics would determine the legality of a districting plan according to whether it has certain properties they deem relevant, instead of merely helping courts identify whether a clearly defined illegal element exists.¹⁹ For a simplified comparison, imagine that an automated system identifies “speeding” according to a car’s color, not

16. See *League of Women Voters v. Commonwealth*, 178 A.3d 737, 815 (“[T]he focus on these neutral factors [equal population, compactness, contiguity, and preserving boundaries of political subdivisions] must be viewed . . . as part of a broader effort . . . to establish ‘the best methods of representation to secure a just expression of the popular will.’ Consequently, these factors have broader applicability beyond setting standards for the drawing of electoral districts for state legislative office.” (citation omitted) (quoting ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 59 (1960))).

17. See *Wilson v. Kasich*, 981 N.E.2d 814, 820 (Ohio 2012) (“[T]he Ohio Constitution does not mandate political neutrality in . . . reapportionment. . . . [The legislature was] not precluded from considering political factors . . .”).

18. Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 YALE L.J. 816, 841–42 (1936).

19. See Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 983–84 (2019) (“Government conduct might be lawful or unlawful depending upon (non)conformity to metrical tests. This would distort the role and nature of constitutional law. Rights are best understood as creating zones of protection that provide non-conditional weight to certain characteristics or activities. . . . The invocation of such right . . . only requires that the government action intersects a protected characteristic.”).

its speed.²⁰ Relying on such metrics would turn judges into legislators²¹ because they would be imposing a new definition of “speeding” on society. Overreliance on quantitative metrics may also incentivize litigants to produce increasingly abstruse ones, which could mislead judges.²²

Part III.A argues that the empirical definition would not turn judges into legislators. Instead of imposing newfangled policy on a reluctant society, the empirical definition defines a central element of districting law according to both the public will and the Supreme Court’s requirement of traditionality. To return to the speeding analogy, the empirical definition is akin to asking courts to define speeding as going over, say, 65 miles per hour because that is how most states define it²³ and because the Supreme Court has so far failed to define speeding in an objectively discernible way, even as it claims to want a traditional definition. Indeed, judicial legislation is better represented by the status quo, in which each court applies its own definition of traditional criteria to districting disputes on a case-by-case basis, an application often influenced by conflicted, partisan interests.²⁴ Moreover, the empirical definition’s simple numerical formula merely represents a belief that a majority of the states are more likely to define traditional criteria in the public interest than litigants hidden from societal scrutiny, pushing redistricting plans meant to get themselves reelected in perpetuity.

Part III.B then shows that the empirical definition advances a constitutional principle that courts purport to, but often do not, follow: that redistricting cannot unduly discriminate against any candidate. Although the Supreme Court ostensibly requires districting proposals to be based on

20. See Todd L. Cherry & Pablo Andrade, *Bright Cars and Outsiders: Evidence of Asymmetric Estimates in Vehicular Speeds*, 31 J. APPLIED SOC. PSYCH. 2538, 2538 (2001) (“An analysis of speeding records indicates that brightly colored vehicles systematically receive citations for relatively lower speeds.”).

21. See Eisler, *supra* note 19, at 1015 (“[W]ithout a principled framework that contextualizes why the metrical qualities of a gerrymander comprise a constitutional wrong, such judgments would comprise a . . . form of judicial legislation.”).

22. Cf. Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695, 695 (2015).

23. See JOHN McCORMICK, *ACID EARTH: THE GLOBAL THREAT OF ACID POLLUTION* 63 (2d ed. 1989) (stating that, following a change in the federal speed limit in 1987, the limit was “raised to 105 kph/65 mph on most interstate highways”). In reality, unlike redistricting criteria, it is difficult to say which limit most states use because it depends on many factors, including the type of road in question. See Allen M. Brabender, *The Misapplication of Minnesota’s Speeding Statute and the Need to Raise the Posted Limit or Expand Use of the Dimler Amendment*, 27 HAMLINE L. REV. 1, 2 (2004).

24. See, e.g., *Smith v. Hosemann*, 852 F. Supp. 2d 757, 766–67 (S.D. Miss. 2011) (implementing by court order a judicially created redistricting plan, which would not force any incumbent to move despite there being no requirement to “consider incumbent residences”); *Hippert v. Ritchie*, 813 N.W.2d 374, 379 (Minn. 2012) (adopting a districting plan that reflected “certain elements” from plans proposed by each of the litigants).

“consistent and nondiscriminatory application of a legitimate state policy,”²⁵ courts would, in fact, condone certain discriminatory criteria if applied consistently to all eligible districts in a state. For example, *Larios v. Cox*²⁶ held that a districting map advantaging Democratic incumbents may have been upheld had it similarly protected Republican incumbents,²⁷ and the Supreme Court recently commented that incumbent protection is traditional,²⁸ albeit without good reason.²⁹ We submit that incumbent protection, by definition, discriminates by advantaging certain candidates for this election on the basis of the votes they won in the last one—whether that cartel includes one or both sides of the aisle is irrelevant. Moreover, the courts’ consistent application approach would incorrectly deem certain widely accepted criteria, such as contiguity, to be nontraditional.

Part III relies on two types of corroboration. We first show that abusive districting criteria such as incumbent and partisan advantage do, in fact, lack majority state support, using our dataset indicating if a state requires, allows, prohibits, or is silent (as far as is known) on eleven criteria. Although the full dataset is posted online instead of as an appendix due to its size (28 columns by 103 rows), we present summary statistics as to how many states took what position as of April 2020 on each districting criterion.³⁰ Our data set improves on existing data sets, which tend to be inaccurate,³¹ outdated,³² or not specific as to which districting criteria a

25. *Brown v. Thomson*, 462 U.S. 835, 844 (1983).

26. *Larios v. Cox (Larios I)*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff’d*, 542 U.S. 947 (2004).

27. *Id.* at 1338.

28. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019).

29. The Supreme Court’s comment that incumbent protection is a “traditional” criterion relies on two amici. However, the first amicus is silent as to whether incumbent protection is traditional, and the second amicus relies on a scholarly source that explicitly rejects incumbent protection as a traditional criterion. *See infra* Part I.A.

30. *See* Yunsieg Paik Kim, STATE REDISTRICTING CRITERIA DATABASE (FULL), <https://sites.lsa.umich.edu/yunsieg/research/> [<https://perma.cc/EA9C-KT7E>] (last visited Feb. 15, 2021) (follow “full dataset” hyperlink) [hereinafter COMPLETE DATABASE]; *see also* Yunsieg Paik Kim, SUMMARY DATABASE – STATE LEGISLATIVE AND CONGRESSIONAL REDISTRICTING STANDARDS (FINAL), <https://sites.lsa.umich.edu/yunsieg/research/> [<https://perma.cc/EA9C-KT7E>] (last visited Feb. 15, 2021) (follow “summary statistics dataset” hyperlink) [hereinafter SUMMARY DATABASE].

31. A database maintained by the National Conference of State Legislatures omits that Kentucky requires preserving district cores in congressional districting, that Maine requires communities of interest to be preserved in state districting, and that Ohio requires the same in congressional districting, among other examples. This database lists the correct criteria for Missouri and Utah but cites the wrong provisions. *See Redistricting Criteria*, NAT’L CONF. STATE LEGISLATURES, (Apr. 23, 2019), <https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> [<https://perma.cc/GT2M-WJJ9>]; *see* COMPLETE DATABASE, *supra* note 30 and accompanying text.

32. For example, a dataset provided by the Minnesota Senate is current only up to 2010. *See* Minnesota State Senate, DISTRICTING PRINCIPLES FOR 2000S PLANS,

state requires.³³ We then present our interpretation of various districting criteria and how they are used in reality to show that the districting criteria we deem abusive not only lack the support of a majority of the states but would also make elections inherently inequitable. For example, we argue that preserving communities of interest is likely to be abused to justify partisan or incumbent advantage after the fact because the term *communities of interest* is so open-ended as to be effectively meaningless.

Before proceeding, we emphasize that this Article uses “abusive districting practices” as a term of art that refers specifically to two things. First, abusive districting criteria are those that have falsely or baselessly been presented to courts as traditional. Second, abusive districting criteria are practices privately expedient to certain groups of voters or candidates at the expense of the public interest. Hence, not all nontraditional criteria are abusive. For example, preserving precinct lines is not traditional under the empirical definition because it lacks support among the states, but it is not abusive because, as far as we know, it has not been challenged in scholarship or courts as meaningfully distorting elections or districting. In contrast, incumbent protection and partisan advantage are nontraditional *and* abusive because they lack requisite support and would unduly favor certain interests, as discussed below. Plainly, this definition of “abusive” excludes constitutional districting practices that protect disadvantaged voting blocs. Such measures do benefit certain groups, such as racial minorities, but that benefit is not against the public interest.

I. THE CURRENT DEFINITION OF “TRADITIONAL” DISTRICTING CRITERIA AND ITS ABUSE

A. A Definition Built on Logical Fallacies and Conflicts of Interest

As briefly discussed in the Introduction, the Supreme Court does not intelligibly define the qualities of “traditional” districting criteria or give an exhaustive list, instead identifying only a few criteria that it considers to be traditional and leaving the list open-ended. For example, *Bethune-Hill v. Virginia State Board of Elections*³⁴ lists “compactness, contiguity of territory, and respect for communities of interest” as examples of traditional criteria.³⁵ *Miller v. Johnson*³⁶ rules that traditional criteria

https://www.senate.mn/departments/scr/REDIST/Red2010/appx_principles.htm
[<https://perma.cc/8JX4-58AB>].

33. Databases provided by Professor Justin Levitt appear to be current for at least some districting criteria but provide information with respect to only five districting principles. See Justin Levitt, *Where the Lines are Drawn – State Legislative Districts*, ALL ABOUT REDISTRICTING, <https://perma.cc/XME5-MKC9> (last visited Feb. 15, 2021).

34. 137 S. Ct. 788 (2017).

35. *Id.* at 795.

36. 515 U.S. 900 (1995).

“includ[e] but [are] not limited to compactness, contiguity, and respect for political subdivisions”³⁷ The Court’s longstanding refusal to define traditional redistricting criteria is perhaps best epitomized by *Vieth v. Jubelirer*,³⁸ whose plurality opinion acknowledges that one Justice labeled incumbent protection as traditional in a past dissent but never clarifies whether incumbent protection is in fact traditional.³⁹

When a rule is vaguely defined, there are no clear restrictions as to who defines it or how, and a profit can be made from defining it in a certain way, interested parties will attempt to define that rule to their liking. As such, legislators and major party operatives have been frank about wanting to manipulate election rules for their own gain. For example, Mike Turzai, then-Majority Leader of the Pennsylvania House of Representatives, said in 2012 that a law requiring voters to present ID would “allow Governor Romney to win the state of Pennsylvania, done.”⁴⁰ Thomas Hofeller, then-Redistricting Director for the Republican National Committee, told the National Conference of State Legislatures in 2001—without any hint of irony—that redistricting is a “great event” that “is like an election in reverse” because “the politicians get to pick the voters.”⁴¹ Interested parties manipulate the central rule governing districting—the definition of “traditional”—by marketing the fallacy that any expedient rule that a state has used even once is traditional, which plainly contravenes a dictionary definition of that word: widely considered to be standard practice.⁴²

For a recent example of this fallacy at work, take the testimony of Dr. Wendy K. Tam Cho on behalf of the legislative defendants in *League of Women Voters v. Pennsylvania*.⁴³

Incumbent protection has been mentioned by the Court as one of the traditional districting principles (See, e.g., [.] *Shaw v. Hunt*, *Easley v. Cromartie*, or *Karcher v. Daggett*) and discussed in the political science literature as a common consideration in the redistricting process (Mann and Cain, 2005; Bullock, 2010). . . . [Dr. Jowei Chen, an expert testifying on behalf of the plaintiffs]

37. *Id.* at 916.

38. 541 U.S. 267 (2004).

39. *Id.* at 298 (stating that Justice Souter has previously recognized incumbency protection as a traditional districting criterion in the dissent to *Bush v. Vera*, 517 U.S. 952, 1061 (1996), but not stating whether it is a traditional districting criterion).

40. Mackenzie Weinger, *Pa. Pol: Voter ID Helps GOP Win State*, POLITICO (June 25, 2012), <https://www.politico.com/story/2012/06/pa-pol-voter-id-helps-gop-win-state-077811> [https://perma.cc/V6KY-4TWU].

41. National Conference of State Legislatures, *2000 Redistricting Review*, C-SPAN, at 34:01 (Aug. 13, 2001), <https://www.c-span.org/video/?165594-3/2000-redistricting-review> [https://perma.cc/T8WV-5HH4].

42. *Traditional*, THE OXFORD DICTIONARY OF DIFFICULT WORDS 441 (2004) (defining “traditional” as “habitually done, used, or found”).

43. 178 A.3d 737, 779 (Pa. 2018).

unambiguously states . . . that incumbent protection is not a traditional districting principle. In my opinion, this statement is in error. . . . [I]t is unclear how [Dr. Chen] would reconcile this position with . . . *Karcher v. Daggett* . . . *Shaw v. Reno* . . . [or] *Burns v. Richardson* . . .⁴⁴

However, none of the sources that Dr. Cho cites corroborate her claim that incumbency protection is a “traditional” districting criterion endorsed by the Supreme Court. Most show only that the Court is aware that some states have attempted to protect incumbents in redistricting plans, and one source appears to contradict her claim. For example, the following excerpt is the only part of *Shaw II* that mentions incumbency protection in the vicinity of traditional districting principles:

[S]trict scrutiny applies when race is the “predominant” consideration in drawing the district lines such that “the legislature subordinate[s] traditional race-neutral districting principles . . . to racial considerations.” . . . We do not quarrel with the dissent’s claims that . . . partisan politicking was actively at work in the districting process. That the legislature addressed these interests does not in any way refute the fact that race was the legislature’s predominant consideration. Race was the criterion that, in the State’s view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made.⁴⁵

As the excerpt shows, *Shaw II* is only saying that the Supreme Court is aware of North Carolina having used incumbency protection as a districting rule. Taking *Shaw II* as an endorsement of incumbency protection as a “traditional” districting principle is like reading a New York Times article saying that it is theoretically possible to swim in the East River and taking that as an endorsement of swimming in potentially toxic waste that presents a nontrivial risk of drowning.⁴⁶

44. Expert Report of Wendy K. Tam Cho, *supra* note 8, at 10–11, 21–22. See *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966).

45. *Shaw II*, 517 U.S. at 907.

46. Jonathan Wolfe, *New York Today: A Beach in Manhattan*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/nyregion/new-york-today-beach-manhattan.html> [<https://perma.cc/F4NC-TX9S>] (stating that New York City police officers advise against swimming in the East River due to strong currents); Adrienne Jeffries, *Into the Murky Waters: Hundreds Brave New York City’s East River for Annual Swim*, THE VERGE (July 8, 2013), <https://www.theverge.com/2013/7/8/4503362/brooklyn-bridge-swim-nyc-swim> [<https://perma.cc/T9UX-A7W2>] (describing a swim event in the East

Like *Shaw II*, the other cases Cho cites also fail to support her claim that incumbency protection is a traditional districting criterion. *Easley v. Cromartie*⁴⁷ states only that the *trial* court called protecting incumbents a “legitimate political goal” without ever indicating whether the Supreme Court regards it as a “traditional districting principle.”⁴⁸ Justice Thomas’s opinion further undermines Dr. Cho’s claim regarding incumbency protection because he states explicitly that *Cromartie* does not address the issue as to whether incumbency protection is actually a legitimate political goal.⁴⁹ *Shaw v. Reno (Shaw I)*,⁵⁰ like *Shaw II*, discusses incumbency protection only as a consideration made by the North Carolina state legislature.⁵¹ *Burns v. Richardson*⁵² says only that incumbency protection does not, in itself, establish intent of invidious racial discrimination;⁵³ *Karcher v. Daggett*⁵⁴ does not mention “traditional” districting criteria, while invoking incumbent protection only in the same context as *Burns*.⁵⁵

As for the scholarly sources Dr. Cho cites, the first one makes the same error that she does: it says that the “[Supreme] Court has sanctioned the protection of incumbency as a legitimate redistricting objective” by relying on *Burns* and *White v. Weiser*,⁵⁶ both of which state only that incumbency protection, in itself, is not evidence of invidious racial discrimination,⁵⁷ not that it is a “traditional” criterion. The second source apparently contradicts Dr. Cho’s claim that the Supreme Court endorses incumbency protection as a “traditional” districting principle:

Especially when it comes to drawing the lines for state legislative districts and local legislative bodies, protecting incumbents often gets high priority because it is incumbents who create the new districts. . . . While there is no obligation to protect incumbents, neither must a jurisdiction go out of its way

River despite its reputation as a “stinky, polluted canal where the city pumps sewage and the mob dumps bodies”).

47. 532 U.S. 234 (2001).

48. *Id.* at 248.

49. *Id.* at 262–63 n.3 (“I assume, because the District Court did, that the goal of protecting incumbents is legitimate No doubt this assumption is a questionable proposition. Because the issue was not presented in this action, however, I do not read the Court’s opinion as addressing it.”).

50. 509 U.S. 630 (1993).

51. *Id.* at 655–56.

52. 384 U.S. 73 (1966).

53. *Id.* at 89 n.16.

54. 462 U.S. 725 (1983).

55. *Id.* at 740–41.

56. 412 U.S. 783 (1973); Thomas E. Mann, *Redistricting Reform: What Is Desirable? Possible?*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 92, 98 (Thomas E. Mann & Bruce E. Cain eds., 2005).

57. *See supra* notes 52–53 and accompanying text; *White*, 412 U.S. at 791.

to imperil them or to make their districts more competitive. Protecting incumbents cannot justify deviations from the equal population standards, nor would it withstand a challenge under the Voting Rights Act. One scholar estimates that the congressional plans drawn following the 2000 Census sought to protect 231 of the House incumbents.⁵⁸

Although Dr. Cho’s assertions regarding traditional criteria are particularly fallacious, she is only one of many witnesses to have muddled the definition of traditional criteria in prominent redistricting litigation in the guise of expertise. In *Common Cause v. Lewis*,⁵⁹ Dr. Thomas Brunell claims that “preserving the cores of districts . . . incumbency protection, and permissible levels of partisanship” are traditional districting criteria because the North Carolina General Assembly treated them as such.⁶⁰ Dr. M.V. Hood also claims that incumbency protection is traditional for the same reason,⁶¹ while Dr. Douglas Johnson makes the same assumption with no basis.⁶² In *Rucho v. Common Cause*,⁶³ Drs. Hood and James Gimpel claim traditional status for incumbency protection and preserving district cores without evidence.⁶⁴ Regardless of the intent behind them, these fallacious claims would enable legislators to write the rules of the game to their advantage if courts accept them. In contrast, the empirical definition would make such schemes by states and legislators less likely by requiring traditional criteria to be endorsed by a majority of the states.

58. CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 100 (2010).

59. No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019).

60. Expert Report of Thomas Brunell at 3–4, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019), <https://www.nccourts.gov/assets/inline-files/LDTX291.pdf> [<https://perma.cc/L6ME-RTZS>].

61. Expert Record of Dr. M.V. Hood III at 8–10, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019), <https://www.nccourts.gov/assets/inline-files/LDTX284.pdf> [<https://perma.cc/6H2Q-SUJJ>].

62. Expert Report of Douglas Johnson, Ph.D. at 24, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019), <https://www.nccourts.gov/assets/inline-files/LDTX287.pdf> [<https://perma.cc/LVF8-YHQ9>].

63. 318 F. Supp. 3d 777 (M.D.N.C. 2018).

64. Rebuttal Declaration of M.V. Hood III at 20–24, *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. Apr. 3, 2017) (No. 1:16-CV-1026-WO-JEP), <http://s10294.pcdn.co/wp-content/uploads/2016/05/Expert-First-Rebuttal-Declaration-of-M-V-Hood-III.pdf> [<https://perma.cc/C8EF-TQXX>]; Expert Report of James G. Gimpel, Ph.D. at 13, *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. Apr. 3, 2017) (No. 1:16-CV-1026-WO-JEP), <http://s10294.pcdn.co/wp-content/uploads/2016/05/Expert-Report-of-James-G-Gimpel.pdf> [<https://perma.cc/4B8N-E49P>].

Not only expert witnesses but also state legislatures and redistricting bodies engage in the fallacy of presenting a statement of fact—that a state has used a particular districting rule—as an endorsement of that same practice by the Supreme Court. For example, the National Conference of State Legislatures (NCSL) claims that Michigan is required to preserve, as far as is possible, the shapes of existing districts in any state legislative redistricting plan.⁶⁵ However, nothing in the relevant provision requires the preservation of past districts.⁶⁶ The only discernible reason for the NCSL interpreting this law as requiring the preservation of past districts is that it requires the state to follow *Miller*.⁶⁷ Yet, the majority in that case says only that the Georgia state legislature’s own rules allow preserving the cores of existing districts,⁶⁸ which is neither an endorsement nor an imposition as a requirement. Meanwhile, the Arkansas Board of Apportionment fails to cite any state or federal court case whatsoever to corroborate its claim that maintaining “continuity of representation” and “existing districts” are “redistricting criteria approved by the courts[.]”⁶⁹

When conflicting interpretations of case law muddle up the doctrinal landscape, it has historically been the Supreme Court’s function to clear up the confusion by issuing a definitive statement of the law. The Court typically intervenes by way of a circuit split,⁷⁰ but a split is not always required. For example, in *League of Women Voters v. Pennsylvania*, the parties disputed whether Pennsylvania’s proposed redistricting plan violated traditional districting criteria.⁷¹ When the state supreme court’s order invalidating that plan came to the Supreme Court,⁷² the Court could have taken the case and stated definitively the law on traditional districting criteria. Even when no doctrinal confusion exists, the Court has intervened when existing law is clearly undesirable: for example, *Erie Railroad Co.*

65. See NAT’L CONF. STATE LEGISLATURES, *supra* note 31.

66. MICH. COMP. LAWS § 4.261(l) (2020).

67. *Id.*; 515 U.S. 900 (1995).

68. *Miller*, 515 U.S. at 906 (“Both the House and the Senate adopted redistricting guidelines which, among other things, required single-member districts of equal population, contiguous geography. . . . Only after these requirements were met did the guidelines permit drafters to consider other ends, such as maintaining the integrity of political subdivisions, preserving the core of existing districts, and avoiding contests between incumbents.”).

69. *Redistricting Criteria Approved by the Courts*, ARK. BD. APPORTIONMENT, <https://perma.cc/7VFA-YKD5?type=image> (last visited Nov. 10, 2020).

70. See *Braxton v. United States*, 500 U.S. 344, 347 (1991) (“A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among . . . courts . . . concerning the meaning of provisions of federal law.”).

71. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 797 (Pa. 2018).

72. *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282, 284 (Pa. 2018), *cert. denied sub nom. Turzai v. Brandt*, 139 S. Ct. 445 (2018).

*v. Tompkins*⁷³ famously overturned longstanding doctrine that created a federal common law because it had enabled rampant forum shopping.⁷⁴

In redistricting law, however, the Supreme Court has served only to somehow further obfuscate the effectively nonexistent definition of traditional criteria. We have already discussed how the Court has so far failed to rule intelligibly on what constitutes traditional criteria, even as individual Justices commented on, for example, whether protecting incumbents is a traditional criterion.⁷⁵ In *Rucho*,⁷⁶ the Court added to this morass of confusion in justifying its refusal to intervene in cases that present nonjusticiable political questions:

[P]erhaps fairness should be measured by adherence to “*traditional*” *districting criteria*, such as maintaining political subdivisions, keeping communities of interest together, and *protecting incumbents*. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as *Amici Curiae*; Brief for Professor Wesley Pegden et al. as *Amici Curiae* in No. 18-422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the “natural political geography” of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts [italics added for emphasis].⁷⁷

The Court’s designation of incumbency protection as “traditional” may seem to bring a much-needed end to a frustrating squabble. However, this statement only obfuscates further what exactly distinguishes a traditional rule from the rest, because nothing in the cited briefs supports the claim that incumbency protection is a traditional districting rule. The brief filed by Members of Congress, for example, cites only “compactness, regularity, and maintenance of communities of interest” as traditional,⁷⁸

73. 304 U.S. 64 (1938).

74. *Id.* at 74–75 (“Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects . . . and the benefits expected to flow from the rule did not accrue. . . . *Swift v. Tyson* . . . made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.”).

75. See *infra* note 101 and accompanying text (describing Justice Souter’s position that incumbency protection is a traditional criterion and Justice Thomas’s position that it is a “questionable proposition”).

76. 139 S. Ct. 2484 (2019).

77. *Id.* at 2500 (emphasis added).

78. Brief for Bipartisan Group of Current and Former Members of the House of Representatives as *Amici Curiae* in Support of Appellees at 7, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422), 2019 WL 1125764, at *7.

whereas Dr. Pegden and colleagues list “population equality . . . preservation of [political] boundaries, any Voting Rights Act requirements, and . . . compactness[.]”⁷⁹ and rely on literature that explicitly disregards incumbency protection.⁸⁰ If history is any indication, the Court’s labeling of a districting practice as “traditional” in *Rucho* with no apparent basis will likely be interpreted as an imprimatur for the abuse that we criticize: if a court ever mentions an expedient districting rule and “traditional” in the same breath—even if it cites to a cookbook—interested parties would claim that the expedient practice is traditional.

At this point, a reader may still wonder why it is so important to have a firm definition of “traditional” districting criteria, or why it is so disastrous that *Rucho* named certain practices as “traditional” for no apparent reason. For example, before *Rucho*, the Supreme Court had neither endorsed incumbency protection nor outlawed it,⁸¹ so one may think that it is permissible for states to claim that it is “traditional” in the absence of a concrete definition of that term. As for *Rucho*, one may care only about the fact that the Court finally stated whether incumbency protection is traditional or not, and not about its reason for doing so—just as a typical motorist is unlikely to care whether she must drive on the left or right side of the road, as long as everyone drives on the same side.

Who defines traditional districting criteria and how they do so must be normatively justified because both influence districting outcomes. For the driving orientation or traffic light colors, who decides them and how are unimportant because what matters here is that a rule exists, not its content. Whether motorists drive on the left or right, whether “go” is indicated by green or blue,⁸² or who selects the final rule⁸³ does not disrupt

79. Brief of Amici Curiae Professors Wesley Pegden, Jonathan Rodden & Samuel S.-H. Wang in Support of Appellees at 12, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422), 2019 WL 1125802, at *12.

80. *Id.* at *24 n.3 (citing Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 ELECTION L.J. 331, 332 (2015) (“applying only the traditional redistricting criteria that have been emphasized in virtually all recent court decisions including *LULAC v. Perry*, 548 U.S. 399 (2006): compactness, contiguity, and population equality”).

81. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440–41 (2006) (“The Court has noted that incumbency protection can be a legitimate factor in districting”); *Bush v. Vera*, 517 U.S. 952, 964 (1996) (“And we have recognized incumbency protection, at least in the limited form of ‘avoiding contests between incumbent[s],’ as a legitimate state goal.” (quoting *Karcher v. Daggett*, 462 U.S. 725 (1983))).

82. FRANK SCHIPPER, *DRIVING EUROPE: BUILDING EUROPE ON ROADS IN THE TWENTIETH CENTURY* 135 & n.56 (2008); HARU YAMADA, ORLANDO R. KELM & DAVID A. VICTOR, *THE 7 KEYS TO COMMUNICATING IN JAPAN: AN INTERCULTURAL APPROACH* 177 (2017).

83. *Cf.* 1001 IDEAS THAT CHANGED THE WAY WE THINK 530 (Robert Arp ed., 2013) (attributing the origin of the red-yellow-green traffic light color scheme to a British railway engineer and an American police officer).

traffic, as long as everyone drives on the same side and recognizes the same color to mean “go.” In contrast, certain districting criteria and who chooses them, such as incumbent protection urged by legislators, can lead to normatively and materially different outcomes from other districting rules chosen by less conflicted entities, such as voters. As such, a proper iteration of traditional districting criteria needs not only an uncontroversial definition of that term but also an objectively discernible and normatively defensible process for creating that definition. Unfortunately, the status quo satisfies neither condition, as indicated by the Supreme Court’s nebulous position on what traditional criteria are and how they are defined.

Although justifying the need for reform is straightforward, doing so prompts the question of which alternative to choose. Despite our opposition to the free-for-all represented by the status quo, we are not claiming that our empirical definition of traditional districting criteria, at least 26 states in favor and no more than 12 against, is the *only* conceivable solution. Those who support reducing conflicted interests’ influence on districting may nevertheless oppose a simple majority count of the states, as opposed to a count of the states that comprise a majority of the population, as the means of gauging the national consensus. Others may argue that traditional criteria should include not only districting practices that prevail now but also some rules that states have legally used in the past; federal courts have indeed interpreted the word “traditional” to encompass both connotations absent qualifications in many other contexts.⁸⁴ Still others may oppose traditional criteria altogether because neither popularity nor longevity guarantees sound law or policy.⁸⁵

We nevertheless advance the empirical definition due to the compelling need to curb self-dealing in redistricting and for the sake of feasibility. If traditional criteria included practices that states have used legally in the past, that definition would legitimize the behavior that this Article criticizes: conflicted interests cherry-picking and presenting as “traditional” any expedient criteria that a state has ever used. By limiting the definition of traditional criteria to practices prevailing in the present, the empirical definition would reduce self-dealing in redistricting. For illustration, consider another term that is defined by tradition but only

84. See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (defining traditional public fora as property “devoted to assembly and debate” whether “by long tradition or by government fiat”); *Peabody Twentymile Mining, LLC v. Sec’y of Labor*, 931 F.3d 992, 998 (10th Cir. 2019) (“[A] method could be accepted by MHSA inspections over a considerable period of time . . . or by regulations that limit or define such methods. The broad language of the regulation would permit all of these methods to qualify as ‘traditionally accepted.’” (citation omitted)).

85. See, e.g., John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 72 (1991) (explaining that the ethnocentrism of Western culture perpetuates courts’ historical denial of American Indians’ religious freedom).

includes behavior seen as current and widespread. Federal courts have defined customary international law as “a general and consistent practice of states”⁸⁶ or “rules that States universally abide by”⁸⁷ out of a sense of legal obligation. These definitions unmistakably refer only to conduct widely observed in the present, not the past.

As for determining “traditional” status by a head count of the states, we use this measure because it is an objectively discernible metric of support that, like many judicial tests favored by the Supreme Court, would be “simplicity itself to apply.”⁸⁸ While a count of the states may be a shorthand, a more complex metric may entail “high litigation costs and unpredictable results.”⁸⁹ Moreover, this shorthand is largely in keeping with how the rest of our constitutional and legal systems are designed: the Constitution can be amended with the support of 38 or more states,⁹⁰ and many federal statutes allow state law to define their scope or their operative words, such as “property.”⁹¹ We consider our definition of traditional criteria to be preferable to alternatives that may seem superior in theory but are infeasible in reality, such as scrapping traditional districting criteria altogether. Even though many aspects of existing election law and even our constitutional system are antiquated,⁹² we believe that an incremental reform of that law and system are a more constructive attempt at change than unrealistic demands for an immediate and comprehensive overhaul.⁹³

86. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307–08 (2d Cir. 2000).

87. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1019 (9th Cir. 2014).

88. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 459 (2015) (“*Brulotte* . . . is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. . . . *Brulotte*’s ease of use appears in still sharper relief when compared to Kimble’s proposed alternative. . . . [W]hatever its merits may be . . . that ‘elaborate inquiry’ produces notoriously high litigation costs and unpredictable results.”).

89. *Id.*

90. U.S. CONST. art. V.

91. See Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 142 (2020).

92. See, e.g., Anthony J. Gaughan, *Ramshackle Federalism: America’s Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1022 (2016) (“The outdated nature of the Electoral College only scratches the surface of the election system’s problems.”).

93. See, e.g., Richard H. Fallon, Jr., *Constitution Day Lecture: American Constitutionalism, Almost (but Not Quite) Version 2.0*, 65 ME. L. REV. 77, 92 (2012) (“Even under the best of circumstances, the requirement that three-fourths of the states must ratify constitutional amendments makes it nearly impossible to achieve significant change in our written Constitution through the Article V process.”); *The Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, U.S. Senate*, 103rd Cong. 122 (1993) (“Generally, change in our society is incremental Real change, enduring change, happens one step at a time.”),

Indeed, the empirical definition of traditional districting criteria is a particularly fitting reform for the status quo, given the objectively discernible nature of our proposed definition, the unintelligibility of the existing definition, and *Rucho*'s stated justification for refusing to adjudicate partisan gerrymandering cases. In *Rucho*, the Supreme Court justified abstention on the grounds that there exists no discoverable and manageable judicial standard with which to determine how much partisan gerrymandering is unconstitutionally excessive and, even if that standard existed, federal courts lack the authority to impose certain districting criteria on the states or the people. Chief Justice Roberts explains how potentially reasonable visions of "fair" electoral rules may be mutually exclusive and that choosing one of them will inevitably be a political, not legal, task:

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in [redistricting] Fairness may mean a greater number of competitive districts. . . . But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. . . . On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by . . . cracking and packing, to ensure each party its "appropriate" share of "safe" seats. . . . Such an approach, however, comes at the expense of competitive districts. . . . Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as . . . keeping communities of interest together, and protecting incumbents. . . . But protecting incumbents, for example, enshrines a particular partisan distribution. . . . Deciding among just these different visions of fairness . . . poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments⁹⁴

Although Chief Justice Roberts is understandably reluctant to wade into the deepest of modern political quagmires, the empirical definition would not require him or any other judge to impose as law their personal opinions regarding traditional criteria. Instead, the empirical definition would ask courts only to enforce what most states already consider to be traditional criteria, which would broadly make redistricting challenges legal, not political, disputes. The empirical definition is all the more necessary given

<https://www.loc.gov/law/find/nominations/ginsburg/hearing.pdf> [<https://perma.cc/7VT9-M8Y6>].

94. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019).

that the Court's refusal to police the development of redistricting law is resulting not in the political process giving gerrymandering disputes a fair hearing, but in conflicted parties manipulating the definition of "traditional" criteria in litigation to make said manipulation easier with every lawsuit. Accordingly, we propose that districting criteria gain traditional status only if 26 or more states require or allow them in constitutions, statutes, or legislative guidelines *and* 12 or fewer states explicitly prohibit the use of those same criteria in redistricting.

Part I.A having established the necessity of a new, empirical definition of traditional districting criteria, Part I.B proceeds to examine existing scholarship on the status quo definition of traditional redistricting criteria, its proposals of alternative solutions, and their ramifications.

B. Existing Scholarship on the Status Quo Definition of Traditional Districting Criteria

Existing legal scholarship fails to offer satisfactory alternatives to the current definition of traditional districting criteria or otherwise neglects the need for such an alternative. Broadly categorized, existing scholarship takes two positions on the definition of traditional districting criteria. The first group says that there is nothing to be done because the existing definition is not sufficiently problematic or because it cannot be changed.⁹⁵ The second group appears to acknowledge that the status-quo definition is problematic but focuses excessively on creating a quantifiable measure of partisan gerrymandering or an easily implementable solution to it—to the point of appearing to neglect whether that quantitative measure is accurate or that intuitive solution is useful.⁹⁶

1. RESIGNATION OR DENIAL

This camp of scholars seems to assume that the status-quo definition is either a *fait accompli* or sufficiently tolerable, both of which lead to questionable implications. For example, consider Professor J. Gerald Hebert's description of traditional redistricting principles:

Traditional, race-neutral districting principles often vary from one state to the next. Consequently, it is not possible to provide a detailed and complete list of such principles, especially because the Supreme Court itself has been reluctant to designate any such list as comprehensive. . . . Decisions from the Supreme Court over the course of the last decade in the *Shaw* line of cases, however, do yield some guidance as to the districting principles

95. See *infra* Section I.B.1.

96. See *infra* Section I.B.2.

that can be used to defeat a racial gerrymandering claim. . . . [T]here are at least five such traditional redistricting principles in particular that have been acknowledged by the Court: compactness; contiguity; respect for political subdivisions; respect for communities of interest; and protection of incumbents and other political factors.⁹⁷

Professor Hebert’s claim that “[t]raditional . . . districting principles often vary from one state to the next” and that “it is not possible” to precisely define that term is yet another example of the fallacy identified in Part I.A. That is, Professor Hebert is assuming that whatever redistricting practice a state has ever legally employed is a “traditional districting principle,” even though this kind of loose definition enables conflicted interests to cherry-pick expedient districting criteria.

A corollary of this fallacious understanding is that the same districting plan may survive a gerrymandering challenge in one state but not in another, meaning that voters may get materially different levels of protection from abusive districting depending on where they live. For illustration, assume that Connecticut and Kansas both pass a hypothetical districting plan that would prevent incumbent state legislators from competing against one another for reelection. Connecticut law is silent on whether incumbent protection is traditional,⁹⁸ while Kansas requires that “[c]ontests between incumbent members of the [state] Legislature . . . be avoided whenever possible.”⁹⁹ Pursuant to Professor Hebert’s understanding of traditional criteria, courts may rule that the plan is constitutional in Kansas but not in Connecticut because Kansas explicitly allows incumbent protection while Connecticut does not. Because compliance with traditional districting criteria grants a redistricting plan *prima facie* constitutional status,¹⁰⁰ conflicting definitions of traditional criteria may give voters in various states different levels of constitutional protection.

Another strain of this type of research apparently believes in the existence of a consensus on the meaning of “traditional” districting

97. J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 450 (2000).

98. As far as we are aware, the only specific redistricting requirement stipulated in Connecticut law is contiguity in state legislative districts. *See* CONN. CONST. art. III, §§ 3–4. Otherwise, Connecticut law requires redistricting to “be consistent with federal constitutional standards.” *See id.* § 5.

99. KAN. LEGIS. RSCH. DEP’T, GUIDELINES AND CRITERIA FOR 2012 KANSAS CONGRESSIONAL AND LEGISLATIVE REDISTRICTING, at 4(e) (2012), http://www.kslegislature.org/li_2012/b2011_12/committees/misc/ctte_h_redist_1_20120109_01_other.pdf [<https://perma.cc/MVB3-RZWF>].

100. *See Shaw v. Reno (Shaw I)*, 509 U.S. 630, 647 (1993) (“[Traditional] criteria are important . . . because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.”).

requirements, despite decades of litigation disputing whether a single districting criterion—such as incumbency protection—qualifies as “traditional.”¹⁰¹ For example, take Professor Katharine Inglis Butler’s recommended strategy for minimizing judicial challenges to redistricting plans in the wake of the *Shaw* line of cases:

Avoid fragmenting concentrations of minority population, but do not subjugate traditional districting criteria to race. . . . [T]he federal courts should adhere strictly to traditional districting criteria The best protection against future challenges to a districting plan is to follow traditional districting standards interpreted in a manner likely to produce sensible, fair election districts that are consistent with identified representational goals. Only rarely, and perhaps never, does federal law require that jurisdictions violate these standards. Even constitutionally permissible accommodations for minorities generally can be made within the confines of these standards.¹⁰²

Although her categorical statements about the apparent consequences of traditional redistricting criteria may indicate otherwise, Professor Butler’s article never defines that term or confronts its opacity. Not knowing what Professor Butler considers to be traditional criteria, it is impossible to evaluate her claim that “following traditional districting criteria increases the likelihood that legislators will be able to effectively represent their constituents.”¹⁰³ Butler’s apparent assumption that a consensus exists on the definition of “traditional” is fallacious for the same reason that Justice Potter Stewart’s definition of pornography is: “I know it when I see it”¹⁰⁴ works only when a consensus definition exists but that definition is hard to describe intelligibly, not when such a consensus does not exist to begin with.¹⁰⁵ In the latter case, “I know it when I see it” amounts to no more than resignation to, or denial of, an unsatisfactory status quo.

101. See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 262 n.3 (2001) (Thomas, J., dissenting) (stating that the goal of protecting incumbents is a “questionable proposition”); *Bush v. Vera*, 517 U.S. 952, 1047–48 (1996) (Souter, J., dissenting) (listing incumbency protection as a “traditional districting principle[] widely accepted among States”).

102. Katharine Inglis Butler, *Redistricting in a Post-Shaw Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 221, 270 (2002).

103. *Id.* at 253.

104. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the . . . material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

105. See Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1025 (1996) (“[F]rom the perspective of the traditional model of judging, ‘I know it when I see it’ is disturbing. . . . The decision seems to be based on a nonrational, intuitive gut reaction,

2. QUANTIFIABLE MEASURES AND INTUITIVE IDEAS AT THE EXPENSE OF USEFUL SOLUTIONS

Unlike the first group of scholars, this second group recognizes the defects of the status-quo definition of traditional redistricting criteria and attempts to remedy them. However, these scholars appear to be concerned more about whether their proposals are “judicially discoverable and manageable”¹⁰⁶ than about whether they improve upon the existing definition of traditional redistricting criteria. Specifically, these scholars advance quantitative and seemingly intuitive measures of how well a state has complied with a districting criterion but fail to show that those quantitative measures actually measure the things they are intended to measure or whether those measures are useful in curbing racial gerrymandering or other undesirable redistricting practices.

For example, take Professor Melissa Saunders’s proposed method of determining whether a district is acceptably compact. Professor Saunders states that, even as the Supreme Court prohibited states from subordinating “traditional . . . districting principles . . . to racial considerations[,]”¹⁰⁷ the Court failed to elaborate on what those principles are or how states would know if said principles were subordinated to racial considerations.¹⁰⁸ Professor Saunders then argues that the Court must adopt precise, quantitative measures that would show “exactly what state actors must do in order to avoid triggering” its rule against racial gerrymandering:

[T]he Court needs to explain exactly what state actors must do in order to avoid triggering [*Shaw I*’s prohibition against race-conscious districting]. The best, and perhaps only, way for the Court to do this is to replace *Miller*’s vague “predominant factor” test with a rigid rule that the strict scrutiny of *Shaw* applies . . . to districts that not only are the product of a

instead of reasoned analysis; it seems to be utterly subjective and personal. . . . Instead of explaining himself with reasons, [Stewart] seems just to assert his conclusion with self-referential confidence.”); see also *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) (“One need not use . . . ‘I know it when I see it’ . . . as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation.”).

106. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating that an indication of a case presenting a nonjusticiable political question is “a lack of judicially discoverable and manageable standards for resolving” said question).

107. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

108. See Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1633 (2000) (“What are the traditional districting principles to which the Court refers? How is compliance with those districting principles to be measured? And how much compliance with them is necessary to establish that they have not been “subordinated” to race? Absent these specifics, the rule that the Court has promulgated is much like one that says the police should give suspects warnings before interrogating them, but fails to specify the precise content of those warnings.”).

districting process in which race was intentionally considered, but that also fail to comply with certain clearly identified districting principles. This would mean replacing the amorphous and potentially open-ended term “traditional districting principles” with a finite list of districting criteria that have specific and objective content. *For example, the Court might say that the districts must . . . have a dispersion-compactness score of at least 0.24 and a perimeter-compactness score of at least 0.12. Compliance . . . would not be constitutionally required Rather, it would be a safe harbor of sorts for states . . . a way to deny those who would mount equal protection challenges*¹⁰⁹

Part II discusses the legal and political problems inherent in the Supreme Court imposing a set of redistricting criteria by fiat and why the empirical definition would instead have courts utilize criteria that are already used by most states.¹¹⁰ The point here is that, even if such problems did not exist, Professor Saunders’s measure of compactness with “specific and objective content” would not accurately measure whether a district is *constitutionally permissible*. To see why a numerical measure is not necessarily an accurate measure, consider the intuitively comparable example of the intelligence quotient (IQ). Many consider the IQ to be an objective, quantitative measure of human intelligence, with groups such as Mensa accepting members on the basis of IQ tests and the media calling them “high intelligence” societies.¹¹¹ However, experts have shown that IQ tests may not accurately measure intelligence as a whole—the most widely used IQ tests returned similar results when they were used to measure mathematical skill but were wildly inconsistent in domains of intelligence less amenable to quantification, such as artistic and linguistic ability.¹¹²

Just as quantitative measures do not necessarily measure intelligence accurately, Professor Saunders’s measure of compactness would not accurately measure whether a district is constitutionally permissible. Assuming *arguendo* that dispersion- and perimeter-compactness scores accurately measure compactness,¹¹³ using a threshold value to measure the

109. *Id.* at 1634–35 (emphasis added) (footnotes omitted).

110. *See infra* Part II.

111. *See* Mola Lenghi, *Are You Smart Enough—Mensa Smart?*, NBC DALL-FORT WORTH (Oct. 13, 2011, 10:53 AM), <https://www.nbcdfw.com/news/local/are-you-smart-enough-mensa-smart/1904713/> [<https://perma.cc/EUH7-FJV3>].

112. *See, e.g.*, Howard Gardner & Thomas Hatch, *Multiple Intelligences Go to School: Educational Implications of the Theory of Multiple Intelligences*, 18 *EDUC. RESEARCHER* 4, 8 (1989).

113. *Contra* Aaron Kaufman, Gary King & Mayya Komisarchik, *How to Measure Legislative District Compactness If You Only Know It When You See It*, *AM. J.*

constitutional permissibility of a district is problematic for two reasons. First, cutoff values are often arbitrary. To see why, recall that *Lewis* struck down districting plans proposed by the North Carolina house and senate,¹¹⁴ even though both plans had dispersion- and perimeter-compactness scores that were twice to thrice as high as the suggested values of 0.24 and 0.12.¹¹⁵ Second, even if that threshold were higher, saying that states would be in a safe harbor if they met the test for only one or some of the many contributing factors to gerrymandering is inviting abuse. State districting plans with less than 10% population deviation are presumptively constitutional, but that rule is far from a safe harbor because population deviation is only one of many possible indications of abusive districting.¹¹⁶

A recent variation of this type of research seems to recognize the arbitrary nature of using a single cutoff value to determine compliance with a districting criterion. However, in attempting to avoid an arbitrarily strict threshold, this scholarship appears to have dragged that bar down so low that the judicial test has become toothless. Take Professor Michael McDonald's "predominance test," a proposed measure of whether a district's compactness is constitutionally permissible:

[T]he proposed Predominance Test works in the following manner: first, create a maximally compact comparison plan by (1) drawing any mandatory districts and freezing them into place; and (2) drawing the most compact plan possible for the remaining districts, while respecting equal population and contiguity. Then, compare districts in the target plan (the plan being analyzed) to their maximally compact district equivalents. *If the compactness of a target district is less than fifty percent of*

POL. SCI. (forthcoming Dec. 2020), <https://gking.harvard.edu/files/gking/files/compact.pdf> [<https://perma.cc/HD32-KN2T>] (“[D]o different measures generate different conclusions in practice? . . . For any two measures, it is easy to draw a districting plan where the measures change the rankings of compactness in *any* arbitrary way. . . . [O]ur measure correlates quite low with most measures but at about 0.9 for convex hull and Polsby-Popper, and similarly high correlations for the naive average of all measures.”).

114. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *3 (N.C. Super. Ct. Sept. 3, 2019).

115. Expert Report of Jowei Chen, Ph.D. at 27, 58, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019) (showing that the invalidated plans have dispersion-compactness scores of 0.412 and 0.427, and perimeter-compactness scores of 0.321 and 0.348), <https://www.nccourts.gov/assets/inline-files/EX0001.pdf> [<https://perma.cc/4UGU-LEUA>].

116. *See Brown v. Thomson*, 462 U.S. 835, 842, 844–45 (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. . . . [However,] [t]his does not mean that population deviations of any magnitude necessarily are acceptable. Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate . . . fair and effective representation if the population disparities are excessively high.”).

*the maximally compact district, then discretionary factors have predominated over compactness and a violation has occurred. . . . [The] Predominance Test . . . provides a judicially manageable standard to identify when a compactness violation occurs [T]he test does not establish a [standard] that must be applied uniformly to all districts; rather, compactness is evaluated with respect to what is possible in the district's geographic region.*¹¹⁷

In short, Professor McDonald would require states to draw the most compact districts as feasible while accounting for other districting criteria such as equal population and contiguity. Then, he would accept as constitutional any plan that achieves half of the compactness achieved by the original plan. Setting aside the arbitrariness of the 50% minimum, we fail to see the point in drawing up a plan that would minimize gerrymandering and then permitting states to perform only half as well. This plan is akin to devising the most feasibly stringent limit for pollutants in tap water, carefully balancing the effects to public health and the utility services' ability to stay in business while complying with costly regulations, and then informing the utilities that they are allowed to pollute twice as much as that limit. The 50% slack was presumably intended to account for "what is possible" in a particular region, but Professor McDonald's plan already took that into account when it first asked the states to "draw[] the most compact plan possible[.]"¹¹⁸ In such a case, the 50% slack would amount only to inviting abusive districting practices.

Part I having established the inadequacy of the status quo definition of traditional districting criteria and of the improvements proposed by existing scholarship, Part II proceeds to elaborate on our proposed empirical definition of traditional districting criteria, its legal and political justifications, and two alternative avenues for the empirical definition's application.

II. THE EMPIRICAL DEFINITION'S PRACTICAL JUSTIFICATIONS

Part I demonstrated that there exists a dire, and so far unmet, need to replace the existing definition of traditional redistricting criteria; Part II will show that this Article advances a worthy replacement. Our empirical definition would have the Supreme Court brand as "traditional" only those districting criteria that are required or permitted by 26 or more states and are prohibited by 12 or fewer, in state constitutions, statutes, or legislative

117. Michael McDonald, *The Predominance Test: A Judicially Manageable Compactness Standard for Redistricting*, 129 YALE L.J.F. 18, 20–21 (2019) (emphasis added).

118. *Id.* at 20.

guidelines.¹¹⁹ By relying only on sources and qualifications that are objectively determinable, the empirical definition of traditional redistricting criteria would end the abuse in the status quo that has resulted from a subjectively stated standard that conflicted parties can easily manipulate in service of their private interests.

In addition to mending a defect in constitutional doctrine, the empirical definition would present other practical gains that would make redistricting more legally equitable and politically legitimate. Part II.A discusses two advantages of the empirical definition for the legal system. First, unlike other judicial tools such as balancing tests, the empirical definition would not rely on judges' personal normative preferences for enforcement,¹²⁰ thereby reducing risks of undesirable judicial activism. Second, compared to the status quo, the empirical definition would make redistricting litigation more predictable, which would make protection from gerrymandering less reliant on happenstance. Part II.B gives the empirical definition's political benefits, such as better reflecting public sentiment and checking potential excesses of the majority. Finally, Part II.C presents two alternative ways for judges to apply the empirical definition and their consequences. Enhancing the equity and legitimacy of elections is inherently valuable, but it is even more so at a time when undermining confidence in elections is an increasingly popular election strategy.¹²¹

119. "Legislative guidelines" includes guidelines created by legislative committees and by arms of the state government conducting redistricting in the legislature's place. For example, a legislative committee publishes districting guidelines in Alabama, whereas a Board of Apportionment including the Governor conducts redistricting in Arkansas pursuant to its own guidelines. *See supra* note 69 and accompanying text; REAPPORTIONMENT COMMITTEE GUIDELINES FOR CONGRESSIONAL, LEGISLATIVE, AND STATE BOARD OF EDUCATION REDISTRICTING, Permanent J. Legis. Comm. on Reapportionment, at IV.7.b (Ala. 2011), <http://www.legislature.state.al.us/aliswww/reapportionment/Reapportionment%20Guidelines%20for%20Redistricting.pdf> [<https://perma.cc/Z76Z-LQEH>].

120. *See, e.g.*, James L. Huffman, *Retroactivity, the Rule of Law, and the Constitution*, 51 ALA. L. REV. 1095, 1103 (2000) ("Reliance on balancing tests assures that judicial determinations of constitutionality are ad hoc. Courts . . . undertake fact intensive inquiries . . . [to] determin[e] the weight of the relevant variables which tip the . . . balance. Such inquiries are not the traditional judicial activity of applying the law to the facts of the case. Rather they are more like the traditional legislative function of determining which among competing values will carry the day.")

121. *See, e.g.*, Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1587–88 (2019).

A. *The Legal Justifications*

1. EXORCISING THE SPECTER OF JUDICIAL ACTIVISM FROM REDISTRICTING LAW

The status quo in redistricting law is the result of the Supreme Court attempting to choose what it sees as the better of two undesirable options: trudge into the deeply politicized swamp of partisan districting and be branded as activist judges bent on subverting democracy, or refuse to intervene for fear of judicial activism and be accused of incompetence instead. The Court chose the latter by declaring in *Rucho* that partisan gerrymandering, for all of its known defects, was off-limits from judicial intervention.¹²² The Court was indeed accused of incompetence, with the dissent declaring that the majority wrongly sees the duty to “remedy a constitutional violation . . . [to be] beyond judicial capabilities[.]”¹²³ scholars arguing that the Court showed a “conservative-over-constitutionalist tendency,”¹²⁴ and the media saying that “the Supreme Court just said federal courts can’t stop partisan gerrymandering[.]”¹²⁵

Yet, even though some scholars accuse the Court of “subvert[ing] core judicial functions required by Article III . . . to extraconstitutional considerations[.]”¹²⁶ there exists a facially valid reason for wanting to stop judges from singlehandedly controlling the fate of redistricting plans. Assume that the Supreme Court authorizes judges to conjure up and impose their own ideas of traditional—and therefore constitutionally permitted—redistricting criteria, as many scholars apparently want the Court to do.¹²⁷ Further assume that a districting plan drafted by a

122. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (“What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited . . .”).

123. *Id.* at 2509 (Kagan, J., dissenting).

124. Gary Lawson, “*I’m Leavin’ It (All) Up to You*”: *Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2018–19 CATO SUP. CT. REV. 31, 64 (2019).

125. Andrew Prokop, *The Supreme Court Just Said Federal Courts Can’t Stop Partisan Gerrymandering*, VOX (June 27, 2019, 11:40 AM), <https://www.vox.com/policy-and-politics/2019/6/27/18681923/supreme-court-gerrymandering-partisan-rucho-common-cause> [<https://perma.cc/KY5K-AW88>].

126. G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1345 (2020).

127. See, e.g., Saunders, *supra* note 108, at 1634 (proposing that the Supreme Court impose a “finite list of districting criteria that have specific and objective content” without stating what would authorize the Court to do so).

legislature controlled by one party is presented to an elected judge who identifies with that same party, which has happened¹²⁸ and could happen again, since “most state judges are elected.”¹²⁹ Under these assumptions, judges could reject a politically inconvenient districting rule by claiming that it contradicts their sincerely-held beliefs regarding traditional redistricting criteria.

Lest the reader believe this hypothetical to be cynical or ludicrous, some elected judges have done worse for more bald-faced reasons of self-interest. For example, elected judges in Texas¹³⁰ and Alabama¹³¹ can solicit campaign donations from attorneys with cases before them. This apparently enabled a state judge to ask a lawyer for “an amount reflective of the \$2,000 contribution you made towards my defeat” while threatening to add an “up-charge” for “tardiness.”¹³² Such behavior is hardly anecdotal because a long line of empirical research shows that elected judges tend to rule differently for paying customers.¹³³ Even without such conflicts of interest, judicial redistricting may increase uncertainty over the meaning of “traditional” districting criteria because of its ad hoc nature: without more, judicially imposed criteria on one particular plan valid only for the current redistricting cycle are unlikely to reflect prevailing practices in the

128. See *Common Cause v. Lewis*, Case No. 18 CVS 014001, 2019 WL 4569584, at *137 (N.C. Super. Ct. Sept. 3, 2019) (showing Judge Joseph N. Crosswhite as a presiding judge); Christina Zhao, *After North Carolina Judges Toss Out Maps in Gerrymandering Lawsuit, Top GOP Lawmaker Says He Won't Appeal Decision*, NEWSWEEK (Sept. 3, 2019, 11:55 PM), <https://www.newsweek.com/after-north-carolina-judges-toss-out-maps-gerrymandering-lawsuit-top-gop-lawmaker-says-he-wont-1457549> [<https://perma.cc/Q3W6-G8B4>] (identifying Judge Crosswhite as a Republican); *Judicial Performance Evaluation Survey – Phase I*, N.C. BAR ASS'N 1, 8 (2015), <https://www.ncbar.org/wp-content/uploads/2016/03/ncba-jpe-report-phase-i-pdf.pdf> [<https://perma.cc/7BSH-CJ5R>] (identifying Judge Crosswhite as a candidate for election).

129. M. Ryan Harmanis, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 740 (2015).

130. See TEX. GOV'T CODE ANN. § 33.051(a)(1) (West 2003); TEX. GOV'T CODE ANN. tit. 2 subtitle G app. C. Canon 4(D)(1) (West 2019); Gilbert Garcia, *Appeals Court Judge Accepts \$11,000 from Lawyers in Pending Cases*, SAN ANTONIO EXPRESS-NEWS (Oct. 11, 2016, 6:15 PM), https://www.expressnews.com/news/news_columnists/gilbert_garcia/article/Appeals-court-judge-accepts-11-000-from-lawyers-9964880.php [<https://perma.cc/8CTS-QDR3>].

131. See Brief of Amici Curiae Thomas R. Phillips et al. in Support of Respondent at 1, 15, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015) (No. 13-1499).

132. *Id.*

133. See, e.g., Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 25 J.L. & POL. 645, 661 (1999) (finding a correlation between arbitral rulings from the Supreme Court of Alabama and the sitting justices' sources of campaign funding); Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 SE. POL. REV. 241, 241–42 (2000) (finding a significant relationship between campaign contributions and judicial rulings in the courts of last resort in Alabama, Kentucky, and Ohio).

states.¹³⁴ Due mainly to these considerations, the empirical definition relies on constitutions and legislative sources but not on court-ordered districting plans to determine the “traditional” status of various criteria.

Nevertheless, as compared to the prospect of relying on unfettered judicial discretion, the idea of abstaining completely from enforcing proper conceptions of traditional districting criteria is no more appealing. This is because, as shown in Part I.A, the partisan forces with the loudest voices would simply present their own interests as law—complete judicial abstinence would be akin to letting the largest vigilante mob impose its own idea of criminal law.¹³⁵ Our empirical definition of traditional districting criteria would eliminate this dilemma by presenting a third option: have the courts enforce proper notions of traditional districting criteria but derive those notions from objectively identifiable evidence of what most states deem them to be. For example, 7 states require or allow advantaging incumbents in congressional districting, while 14 prohibit it.¹³⁶ In those states whose law is silent on incumbency protection, judges could rely on the empirical definition to rule that it is not traditional. Because courts would rely on what most states have already determined, they would become more resistant to accusations of judicial activism.

Because the empirical definition would rely on what a majority of states consider to be traditional districting criteria, a reader may think that 26 states could conspire to circumvent it by codifying politically expedient districting criteria such as incumbency protection. Section II.B.1 will discuss how the combination of a safety device—that a districting criterion must be prohibited by no more than 12 states in order to be considered traditional—and the increasing public scrutiny over abusive districting practices would foil such a conspiracy if it were ever to materialize.¹³⁷ For now, Section II.A.2 proceeds to discuss the second legal justification for the empirical definition: that it would, compared to the status quo, make voters less beholden to the happenstance of who their judges are and the states of their residence for protection from abusive districting.

134. When a court orders that a districting plan be drawn pursuant to particular criteria, those criteria often apply only to that specific redistricting plan and the court is not claiming to be primarily responsible for conducting redistricting for that state in the future. *See, e.g., Smith v. Hosemann*, 852 F. Supp. 2d 757, 765 (S.D. Miss. 2011).

135. *See supra* Part I.A.

136. *See* COMPLETE DATABASE, *supra* note 30. Specifically, for congressional redistricting, 9 states are silent (as far as is known) on whether incumbency protection is a permitted districting criterion, 13 states do not stipulate any required, allowed, or prohibited districting criterion in their laws, and 7 states elect only one member each to the House of Representatives. *Id.*

137. *See supra* Section II.B.1.

2. A (MORE) UNIFORM LEVEL OF CONSTITUTIONAL PROTECTION

In the status quo, the accident of where a voter lives and which judge happens to adjudicate plans to redraw her electoral district can determine her level of protection from abusive districting. For example, districting intended to advantage a particular party is decidedly not a traditional criterion pursuant to the empirical definition because 17 and 14 states prohibit it in state legislative and congressional redistricting, respectively.¹³⁸ In North Carolina, however, “[p]olitical considerations and election results data may be used” to draw state legislative districts,¹³⁹ whereas congressional redistricting must make “reasonable efforts . . . to maintain the current partisan makeup of North Carolina’s congressional delegation,” which consisted of ten Republicans and three Democrats at the time the state’s districting guidelines were published.¹⁴⁰

As for the rest of the states, whether a voter is protected from partisan districting is up to the discretion of the court that adjudicates a districting plan. For example, consider the judgments of the courts of last resort in three states, whose constitutions or statutes are silent on the legality of partisan districting,¹⁴¹ on proposed redistricting plans that would allegedly advantage a particular political party. The Supreme Court of West Virginia refused to “intrude upon the province of the legislative policy determinations to overturn the Legislature’s redistricting plan[.]” citing the lack of “discern[i]ble standards for assessing partisan gerrymandering[.]”¹⁴² In contrast, the Supreme Court of Ohio did not consider partisan gerrymandering claims to be nonjusticiable but upheld an allegedly partisan redistricting plan because “the Ohio Constitution does not mandate political neutrality in the reapportionment of house and senate districts[.]”¹⁴³ Finally, the Supreme Court of Pennsylvania invalidated an allegedly partisan congressional districting plan by

138. See COMPLETE DATABASE, *supra* note 30.

139. N.C. H. & S. REDISTRICTING COMMS., 2017 HOUSE & SENATE PLANS CRITERIA, ADOPTED BY NORTH CAROLINA HOUSE AND SENATE REDISTRICTING COMMITTEES, 2017 Leg., 152nd Sess. (N.C. 2017), https://www.dropbox.com/s/79092edav03alh3/NC_2017-08-10_2017HouseSenatePlanCriteria.pdf?dl=0 [<https://perma.cc/QM5X-J4XG>].

140. J. SELECT COMM. ON CONG. REDISTRICTING, 2016 CONTINGENT CONGRESSIONAL PLAN COMMITTEE ADOPTED CRITERIA, 2016 Leg., 151st Sess. (N.C. 2016), https://www.ncleg.gov/Files/GIS/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf [<https://perma.cc/E5WD-QAWF>].

141. See COMPLETE DATABASE, *supra* note 30.

142. *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 389–90 (W. Va. 2012).

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

interpreting a state constitutional guarantee of “free and equal elections” as banning partisan redistricting.¹⁴⁴

At this point, a reader may accept that the status quo gives voters living in different states different degrees of protection from certain districting practices, but still question why the status quo must be changed. That is, why must there be less variation in what courts consider to be traditional districting criteria, as opposed to letting each judge choose whichever districting criteria that would not result in racial gerrymandering? The first argument for having a uniform set of traditional districting criteria, as discussed in Part I.A, is that state-by-state variation has enabled conflicted interests to claim that any expedient rule is traditional.¹⁴⁵ However, an even more important reason is that excessive state-by-state variation would undermine the constitutional guarantee of one-person, one-vote. To see why partisan advantage in redistricting, for example, undermines that guarantee, consider the fallacies in the Supreme Court’s refusal to intervene in partisan gerrymandering in *Rucho*:

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But . . . [i]t hardly follows from [one-person, one-vote] that . . . a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support. . . . [O]ne-person, one-vote . . . refers to the idea that each vote must carry equal weight. . . . [E]ach representative must be accountable to (approximately) the same number of constituents. That requirement does not . . . mean that each party must be influential in proportion to its number of supporters. . . . Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. . . . Unlike partisan gerrymandering claims, a racial gerrymandering claim . . . asks . . . for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.¹⁴⁶

Contrary to the Supreme Court’s claim, however, partisan gerrymandering plainly contravenes one-person, one-vote. Assume, for example, that a state has 50 voters, 30 of whom vote for Party A and 20 for Party B.¹⁴⁷

144. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018).

145. *See supra* Part I.A.

146. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501–02 (2019).

147. *See* Christopher Ingraham, *This Is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST (Mar. 1, 2015, 8:06 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/> [https://perma.cc/US5H-TYPH].

Further assume that each district elects one representative and consists of ten voters. Under proportional representation, this state would elect three representatives from Party A and two from Party B. However, assume that each district is drawn to include six voters who support Party A and four who support Party B. Then, because Party A's candidates would win in every district by two votes, this state would elect five, not three, candidates from Party A. According to *Rucho*, the Supreme Court would uphold this districting plan because there is no constitutional guarantee of proportional representation and partisanship cannot be eliminated from politics.¹⁴⁸

The Supreme Court's presentation of partisan gerrymandering claims as being simply about proportional representation is a red herring. The aforementioned partisan gerrymandering example violates one-person, one-vote because the redistricting eliminates 20 voters' influence on government by guaranteeing that their votes will be wasted, not because the plan fails to create partisan quotas. The Court's claim that, under partisan gerrymandering, each representative would still be accountable to the same number of voters is specious: if the electoral map is drawn to change in every district the six votes for Party A into ten votes and the four votes for Party B into zero, rational representatives would ignore voters who support Party B. For an even simpler comparison, imagine that the NBA announces that any team based in Philadelphia will hereafter qualify for the playoffs only if it wins every single game during the regular season. The Court's argument is tantamount to claiming that the Philadelphia 76ers cannot complain about being shut out of the playoffs, because they are still theoretically eligible and because no city or team has a right to be represented there.

Because redistricting, when intended to advantage certain parties, contravenes one-person, one-vote, there exists a constitutional imperative to reduce the ability of states or judges to legitimize partisan gerrymandering in the guise of traditional districting criteria. The same applies to other abusive districting practices, such as protecting incumbents from competition, because such a practice would dilute or waste the votes of those who support a nonincumbent. In the status quo, states and judges are given excessive leeway to justify abusive districting practices because the Supreme Court effectively refuses to define or enforce the term "traditional districting criteria."

Establishing the necessity of the empirical definition prompts the following question of how broadly to apply it. Should judges consult the empirical definition only when their own state's law is silent on what traditional districting criteria are, or should the empirical definition bind a judge in, say, North Carolina to ban partisan gerrymandering, despite the state legislature requiring partisan advantage in redistricting plans? Before

148. *Rucho*, 139 S. Ct. at 2499.

discussing those options and their consequences, Part II.B. advances two political justifications for the empirical definition.

B. The Political Justifications

1. A CHECK UPON THE EXCESSES OF A ROGUE MAJORITY

Part II.A cited the practical gains expected from the empirical definition in the legal realm: it would reduce the courts' vulnerability to accusations of judicial activism and remedy a doctrinal defect. These gains may be enough of a reason to propose the empirical definition if all we were interested in was making sound law. However, the empirical definition's goal is not just to fix a technical flaw but also to rectify a very substantive harm in the realm of public policy—the existing definition of traditional districting criteria distorts elections.¹⁴⁹ Therefore, the empirical definition must be not only legally sound but also politically viable, in the sense that it must be able to survive the legislative process and public scrutiny to be implemented as policy. In that respect, an obstacle to the empirical definition's success as policy may appear to be that the legislatures of 26 states could rig that definition to their advantage by legislatively labeling as “traditional” any expedient districting rule, such as partisan advantage or incumbent protection.

Such a conspiracy may seem plausible to some because the empirical definition examines a state's own laws to determine which criteria that state considers to be traditional, but many American voters have been either inattentive to who their legislators are or too forgiving of what they do in office. To those familiar with state politics, the reelection of legislators convicted of crimes such as bribery,¹⁵⁰ sex with a minor,¹⁵¹ or

149. See, e.g., Gary D. Allison, *Democracy DeLayed: The High Court Distorts Voting Rights Principles to Thwart Partially the Texas Republican Gerrymander*, 42 TULSA L. REV. 605, 665 (2006) (arguing that *LULAC v. Perry*, 548 U.S. 399 (2006) “distort[ed] the concept of compactness”).

150. Michael D’Onofrio, *Convicted State Rep. Brown Mum on Resignation as Sentencing Nears*, PHILA. TRIB. (Nov. 8, 2018), https://www.phillytrib.com/news/elections/convicted-state-rep-brown-mum-on-resignation-as-sentencing-nears/article_d1fcb8b6-57fc-5c7b-b068-1d15938389e9.html [https://perma.cc/S6A6-TF34].

151. Jeremy Diamond, *Virginia Lawmaker Wins Re-Election Despite Jail Term for Relationship with 17-Year-Old*, CNN (Jan. 14, 2015, 3:59 PM), <https://www.cnn.com/2015/01/14/politics/lawmaker-jailed-wins-reelection/index.html> [https://perma.cc/L8TS-YVLW].

even eight felonies,¹⁵² with some candidates running unopposed,¹⁵³ is something of a running joke. Unsurprisingly, political science research shows that representatives have taken “unpopular roll-call positions . . . [with] few implications for most legislators’ re-election prospects.”¹⁵⁴ Given this state of affairs, readers may believe that, once the empirical definition is implemented, the legislatures of 26 states might simply circumvent it by writing expedient redistricting criteria into state law.

However, we believe that such a conspiracy, if it occurred, is unlikely to succeed. Despite many voters’ admittedly low level of interest in state legislators, the public attention paid to state legislative acts on districting is much more intense and persistent compared to, say, the attention paid to a legislator’s position on a bill defining what a bank is.¹⁵⁵ Such a bill, to our knowledge, has not yet provoked the kinds of protests inspired by gerrymandering.¹⁵⁶ As such, we argue that legislators would find it harder to act in brazenly self-serving ways in redistricting: the political science research cited in the previous paragraph states that “[i]nstead of evaluating how their representatives act on a broad ideological spectrum, voters may care about their representatives’ votes on key issues.”¹⁵⁷ In cases where widespread calls for reform were met by “unresponsive legislators”¹⁵⁸ in many states, voters passed redistricting reforms by constitutional amendment.¹⁵⁹ The fact that constitutional amendments cannot be undone

152. Niraj Warikoo, *State Rep. Banks Re-Elected Despite Scandal, 8 Felonies*, DETROIT FREE PRESS (Nov. 5, 2014, 12:18 AM), <https://www.freep.com/story/news/local/michigan/2014/11/04/michigan-legislature-voting/18505617/> [https://perma.cc/T4VV-E4VP].

153. See, e.g., Debra Cassens Weiss, *State Lawmaker Imprisoned for Barratry Is Re-Elected in Jail, Released in Time for Legislative Session*, AM. BAR ASS’N J. (Jan. 10, 2019, 2:23 PM), <http://www.abajournal.com/news/article/lawmaker-imprisoned-for-barratry-is-re-elected-in-jail-and-released-in-time-for-legislative-session> [https://perma.cc/L9V2-DLW6]; see also Steve Brown, *Two-Thirds of State Legislators Are Unopposed in the General Election*, WBUR (Nov. 1, 2018), <https://www.wbur.org/news/2018/11/01/massachusetts-state-house-election-preview> [https://perma.cc/Z5QZ-GQAD].

154. Steven Rogers, *Electoral Accountability for State Legislative Roll Calls and Ideological Representation*, 111 AM. POL. SCI. REV. 555, 567 (2017).

155. H.B. 1147, 83rd Gen. Assemb., Reg. Sess. § 4-9-102(a)(8) (Ark. 2001).

156. Amy Gardner, Ted Mellnik & Adrian Blanco, *Redistricting Activists Brace for Wall of Inaction as Battle Moves to States*, WASH. POST (Nov. 13, 2019, 5:29 AM), <https://www.washingtonpost.com/politics/2019/11/12/redistricting-activists-brace-wall-inaction-battle-moves-states/> [https://perma.cc/HR7Z-UB3Q].

157. See Rogers, *supra* note 154, at 563–64. Rogers cites specific examples of salient issues in which representatives “face electoral punishment for unpopular roll calls[.]” such as gay marriage. *Id.* at 568.

158. See Gartner, *supra* note 14.

159. In 2018, 15 states voted on 20 ballot initiatives regarding electoral reforms including, Colorado, Michigan, Missouri, and Utah, which specifically passed initiatives implementing new redistricting systems for state or federal legislative elections. See Erin McCarthy Holliday, *15 States Vote on Election, Voting and Redistricting Questions in*

by statute¹⁶⁰ would make attempts to circumvent the empirical definition by legislating expedient districting criteria even less feasible.

Despite the low likelihood of a successful conspiracy among state legislatures to legislate expedient districting criteria, the empirical definition accounts for that unlikely event by requiring that a districting criterion must be prohibited by twelve or fewer states to be considered “traditional.” For example, as of April 2020, ten states require or allow advantaging incumbents in state legislative districting.¹⁶¹ Assume, for the sake of argument, that 16 of the 25 states whose law is silent on the issue suddenly passed incumbency protection requirements in state legislative districting, to bring the total number of states permitting incumbent protection to 26. Even if those 16 states did so, incumbent protection would still not be traditional under the empirical definition because more than a quarter of the fifty states prohibit it.¹⁶² The bar of a quarter of the states, which is the same number of states needed to defeat proposed amendments to the U.S. Constitution,¹⁶³ was chosen to meaningfully check the excesses of a rogue majority, while minimizing frivolous obstruction to legislators’ and judges’ ability to reflect legitimate changes in what states consider to be “traditional” districting criteria.

2. THE INEVITABILITY OF JUDICIAL CHALLENGES TO REDISTRICTING PLANS IN MODERN POLITICS

The second political obstacle to the empirical definition we consider has to do with its very necessity as a proposed doctrinal change. That is, why do we need to equip the courts with the empirical definition to better evaluate the constitutionality of proposed redistricting plans, if many elected judges apparently cannot be trusted to rule in favor of the public interest on this issue and voters might simply circumvent state legislatures by constitutional referenda to create independent redistricting bodies? The idea that redistricting should be conducted partly or wholly by nonpartisan, independent commissions, which is gaining in popularity among both scholars and the public,¹⁶⁴ frequently ends up arguing that courts should be removed from redistricting:

Midterms, JURIST (Nov. 7, 2018, 10:33 AM), <https://www.jurist.org/news/2018/11/15-states-vote-on-election-voting-and-redistricting-questions-in-midterms/> [https://perma.cc/22SA-HY28].

160. See, e.g., U.S. CONST. art. V; WIS. CONST. art. XII.

161. See SUMMARY DATABASE, *supra* note 30 and accompanying text.

162. See *id.*

163. U.S. CONST. art. V.

164. See, e.g., Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL F. 477, 477 (“The Supreme Court is on the cusp of rejecting one of the best ideas for reforming American elections: independent commissions for congressional redistricting.”); Alan S. Lowenthal, *The Ills of Gerrymandering and Independent*

In partisan gerrymandering cases, “a lack of judicially discoverable and manageable standards” is the primary reason[] the Supreme Court has never declared a district plan to be an unconstitutional partisan gerrymander. . . . *Independent redistricting commissions*—enacted through state voter initiatives—*should replace the federal court[]s[’] authority to develop redistricting plans . . . legislators can partake in choosing commissioners and can provide them with political authority that the judiciary lacks. . . . [C]ommission[s] prohibit[] legislators and candidates from drawing district lines. Independent-commission membership also prohibits commissioners from running for office in districts they drew for one year after redistricting*¹⁶⁵

We argue that, even if independent redistricting commissions became the norm among the states, the empirical definition would still be central to curbing abusive districting. First, in the current political climate, judicial challenges of redistricting plans are effectively inevitable.¹⁶⁶ When such judicial challenges occur, the presiding court will need discoverable and manageable standards with which to adjudicate the claim—standards that have been lacking in the status quo but that the empirical definition would provide. Second, as shown in Section II.A.1, the empirical definition would improve the courts’ democratic legitimacy by directing judges to apply precisely what most state legislatures consider to be traditional districting criteria.

C. Two Judicial Uses of the Empirical Definition

1. SUPPLEMENTAL APPLICATION: APPLY ONLY IF STATE LAW IS SILENT

The first proposed avenue for applying the empirical definition is for judges to use it to determine whether a criterion is “traditional” when their own states’ laws are silent on the issue. Assume, for instance, that a state legislative redistricting plan in Massachusetts is challenged for failing to

Redistricting Commissions as the Solution, 56 HARV. J. ON LEGIS. 1, 4 (2019) (“The best alternative [to the status quo] . . . has proven to be independent redistricting commissions”); see Lee Drutman, *One Big Winner Last Night: Political Reform*, VOX (Nov. 7, 2018, 4:57 PM), <https://www.vox.com/polyarchy/2018/11/7/18072204/2018-midterms-political-reform-winner> [<https://perma.cc/UD8J-PT9R>] (stating that voters approved independent redistricting commissions by a 42% margin in Colorado and in Michigan by 22%).

165. Sara N. Nordstrand, Note, *The “Unwelcome Obligation”: Why Neither State nor Federal Courts Should Draw District Lines*, 86 FORDHAM L. REV. 1997, 2007, 2026 (2018) (emphasis added).

166. Cf. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390 (Fla. 2015) (stating that litigation over a proposed districting plan in Florida was “inevitable”).

draw compact districts.¹⁶⁷ Although the state's law does not require compactness, the presiding judge could order compact districts to be drawn by citing the fact that 38 states require compactness and none prohibit it in state legislative redistricting.¹⁶⁸ The upside of this proposal, which we call supplemental application, is its feasibility: there exists no constitutional obstacle to it, and it is only a slight variation on what courts already do. The downside of supplemental application is that it would not eliminate state-by-state variation in districting practices because it would operate only when a state's own laws are silent. However, complete elimination of that variation appears to be infeasible, as discussed further in Section II.C.2.

To emphasize, supplemental application of the empirical definition is only a slight variation on what courts already do. When a state's laws are silent on whether a districting criterion is mandatory in, say, congressional redistricting, some courts have justified applying that criterion by relying on the fact that the same criterion is mandatory in state legislative districting. For example, in *League of Women Voters v. Pennsylvania*, the plaintiffs relied on a state constitutional provision requiring equally populated districts in state legislative districting to argue that a proposed congressional redistricting plan should also consist of equally populated districts.¹⁶⁹ The legislative defendants responded that the Pennsylvania Supreme Court "should not adopt legal criteria for redistricting beyond those in Pennsylvania's Constitution" because to do so "would infringe on . . . legislative function[s]."¹⁷⁰ The court held for the plaintiffs, ruling that a constitutional provision guaranteeing "free and equal elections" permits applying requirements for state districting to congressional districting:

The utility of these requirements [e.g., equal population] to prevent . . . gerrymandering retains continuing vitality, as evidenced by our present Constitution In that charter, these basic requirements for the creation of senatorial districts were not only retained, but, indeed, were expanded by the voters to govern . . . the selection of their [state] representatives. . . . [W]e

167. Cf. *McClure v. Sec'y of Commc'n*, 766 N.E.2d 847, 853 n.8 (Mass. 2002) (discussing "the task of building districts that are both compact and equal in population" in the course of adjudicating challenges based on alleged partisan gerrymandering and a constitutional requirement to preserve municipal boundaries).

168. See SUMMARY DATABASE, *supra* note 30 and accompanying text.

169. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 794 (Pa. 2018) ("Common Cause stresses that, because these criteria are specifically written into the Pennsylvania Constitution . . . and have provided the basis for invalidating state legislative district maps in the past . . . they are sufficiently precise as to present a feasible standard for evaluating the constitutionality of a congressional district map under the Free and Equal Elections Clause.").

170. *Id.* at 800.

find these neutral benchmarks to be particularly suitable as a measure in assessing whether a congressional districting plan dilutes the potency of an individual's ability to select the congressional representative of his or her choice, and thereby violates the Free and Equal Elections Clause.¹⁷¹

Granted, the Pennsylvania Supreme Court relied on that state's constitutional guarantee of free and equal elections to apply a state legislative districting requirement to congressional districting. This may indicate to some that, in states without a similar guarantee, courts may find it difficult to justify such an application or to rely on what other states consider to be traditional districting criteria by consulting the empirical definition. However, lacking such a device, some courts simply interpreted the federal one-person, one-vote guarantee to achieve the same result. In *Raleigh Wake Citizens Association v. Wake County Board of Elections (Raleigh II)*,¹⁷² a redistricting plan for school board and county elections was challenged for allegedly subordinating traditional districting criteria to "illegitimate redistricting factors": for example, the plan allowed population deviations among districts of 7%.¹⁷³ Although the trial court upheld the plan by ruling that neither state law nor the U.S. Constitution requires equal population or partisan neutrality in districting for school board or county elections,¹⁷⁴ the Fourth Circuit reversed by citing one-person, one-vote:

This requirement that all citizens' votes be weighted equally, known as the one person, one vote principle, applies not just to the federal government but also to state and local governments—including school boards and county governing bodies. . . . Dr. [Jowei] Chen testified that he could conclude . . . from his simulations that the deviations at issue here are the result of using partisanship in apportioning the districts. In critiquing Dr. Chen's analysis, the district court seized on the fact that certain criteria accounted for in the computer simulations—such as setting maximum population deviation at 2% or less or "completely . . . ignor[ing] partisanship," . . . are required by neither state nor federal law. This critique misses the point: The point is not that the simulated plans are legally required, but rather that they help demonstrate what might explain the

171. *Id.* at 815–16.

172. 827 F.3d 333 (4th Cir. 2016).

173. *Id.* at 338.

174. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections (Raleigh I)*, 166 F. Supp. 3d 553, 602–03 (E.D.N.C.), *aff'd in part, rev'd in part and remanded*, 827 F.3d 333 (4th Cir. 2016).

population deviations in the enacted plan. . . . The district court clearly and reversibly erred¹⁷⁵

In short, the court interpreted one-person, one-vote to justify not only applying a state legislative districting requirement of equal population to school board and county elections but also to rule that excessive partisan advantage contravenes traditional districting requirements—despite its recognition that “the Supreme Court ha[d] not yet clarified when exactly partisan considerations cross the line from legitimate to unlawful” at the time of the ruling.¹⁷⁶ Given these precedents and the lack of constitutional obstacles, courts could easily rely on the empirical definition to determine whether a criterion is traditional absent specific instructions in their own states’ law.

Supplemental application of the empirical definition would also elucidate the Supreme Court’s muddled justification for using traditional districting criteria in the first place. Case law justifies the use of traditional criteria by equating them with rational state policy and claiming to apply a test similar to rational basis review. Specifically, even though population deviations among state legislative districts generally must not exceed 10%,¹⁷⁷ the Court allowed in *Reynolds v. Sims*¹⁷⁸ “deviations from the equal-population principle . . . based on legitimate considerations incident to the effectuation of a rational state policy[.]”¹⁷⁹ As such, courts have, since the 1970s at the latest, upheld deviations in excess of 10% when in service of permissible districting goals such as preserving county boundaries, but not partisan or racial motivations.¹⁸⁰ In effect, then, courts have been purporting to apply a kind of rational basis test to distinguish legitimate districting criteria from the illegitimate ones, albeit not always invoking that exact label.¹⁸¹

175. *Raleigh II*, 827 F.3d at 340, 344.

176. *Id.* at 348.

177. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also Avery v. Midland Cnty.*, 390 U.S. 474, 484–85 (1968) (“[T]he Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.”).

178. 377 U.S. 533 (1964).

179. *Id.* at 579.

180. *See Mahan v. Howell*, 410 U.S. 315, 318–19, 325–27, *modified*, 411 U.S. 922 (1973) (upholding a Virginia apportionment plan causing a maximum population deviation of 16.4% because of other objectives such as preserving the boundaries of political subdivisions); *Cox v. Larios (Larios II)*, 542 U.S. 947 (2004) (invalidating a reapportionment plan presenting deviations of less than 5% because of, *inter alia*, partisan advantage); *Perez v. Abbott*, 250 F. Supp. 3d 123, 155–57, 218–19 (W.D. Tex. 2017) (ruling that a Texas apportionment plan presenting overall deviations of less than 10% engaged in racial gerrymandering by intentionally diluting the Latino vote).

181. *See Bush v. Vera*, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting) (stating that “all equal protection jurisprudence might be described as a form of rational basis scrutiny” despite the majority opinion not invoking the term rational basis review in the

Indeed, if it were actually carried out as *Reynolds* describes, equating traditional criteria with rational state policy through rational basis review would be a more intuitive and simpler way to resolve districting cases compared to the status quo. With the exception of public policy entailing “prejudice against discrete and insular minorities,” rational basis review tends to uphold the state act at issue if it is rationally related to a legitimate government interest—even if the state act has only a “debatable” likelihood of furthering that interest.¹⁸² Just as rational basis review tends to be indifferent to the wisdom of challenged state acts unless they involve a suspect class, courts do not generally question the intent underlying a districting plan unless it subordinates traditional criteria to impermissible considerations such as race.¹⁸³ If courts actually employed rational basis review and the empirical definition, the practice would clarify and streamline districting litigation: much of the dispute over what “traditional districting criteria” precisely are would be preempted because “rational state policy” under the empirical definition would simply mean “how a majority of the states define it.”

Despite reference to “rational state policy,” however, the practice of determining traditional criteria is nothing like that of rational basis review. Whereas the definitions of state policy and interests in the context of rational basis review are fairly clear, the meaning of “rational state policy” in any districting case is often unpredictable because traditional criteria seem to be defined by a mass of ad hoc exceptions presented as a rule. For example, *Mahan v. Howell*¹⁸⁴ held that preserving county borders can justify deviations from equal population, while *Shaw I* ruled that compactness may excuse heavily racially packed districts.¹⁸⁵ However, the Court has never upheld deviations exceeding 10% specifically for compactness or clarified whether preserving county lines can excuse racial packing. *Rucho* upheld a districting map intended to elect “ten Republicans and three Democrats” (because “a map with 11 Republicans and 2 Democrats” was infeasible) on the grounds that judicial intervention *against it* would create partisan quotas fit only for proportional representation.¹⁸⁶ The current state of redistricting law is ironic to a degree that it satirizes itself.

As these mixed messages are not of much guidance as to what “rational state policy” or traditional districting criteria mean, complying

course of ruling on equal protection challenges against a proposed redistricting plan in Texas).

182. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54 n.4 (1938).

183. *Miller v. Johnson*, 515 U.S. 900, 919 (1995) (Compliance with traditional districting criteria cannot be a defense to a racial gerrymandering claim because “those factors were subordinated to racial objectives.”).

184. 410 U.S. at 315.

185. *Shaw I*, 509 U.S. 630, 655–56 (1993).

186. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2499–500 (2019).

with them is rarely enough to dispose of the many challenges to districting plans. As such, districting litigation often gets to the intent underlying a proposal. For example, if a districting plan advantages a certain party, is that advantage a mere byproduct of a good-faith attempt to honor legitimate districting criteria like compactness?¹⁸⁷ Defendants, usually the state legislature pushing the challenged plan, argue in the affirmative¹⁸⁸ or that partisan advantage is an independently legitimate districting goal.¹⁸⁹ Plaintiffs deny that it is a legitimate goal and allege intentional bias by showing, via computer simulations, that the legislature could have created a less biased plan that advances legitimate districting goals just as well as the proposal being challenged.¹⁹⁰ Unsurprisingly, adjudicating districting plans by trying to divine illicit motives that partisans would never admit to would, at best, return inconsistent rulings or, at worst, enable those partisans to define traditional criteria by lawsuit.¹⁹¹

The empirical definition, in contrast, would resolve this chaos by defining “rational state policy” and “traditional districting criteria” in an objectively discernible way: districting criteria that at least twenty-six states require or permit and no more than twelve states prohibit. Because the empirical definition would simply clarify the meaning of two operative terms, it would fit seamlessly into existing doctrine, thereby minimizing any disruption that may result from adopting this reform. Moreover, supplemental application of the empirical definition has an intuitive justification for judicial adoption. If a state’s laws explicitly say whether a districting criterion is traditional, that state’s judges may justifiably think that the empirical definition is not necessary because they are bound by those laws—unless there are grounds to overturn those laws. However, if state law is silent, it would be wholly reasonable for courts to consult the empirical definition regarding what qualifies as “rational state policy,” and the fact that a majority of the states consider something to be rational state policy is a compelling reason to treat it as a traditional districting criterion.

187. See, e.g., *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 818–21 (Pa. 2018); see also *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *100–03, *117–18 (N.C. Super. Ct. Sept. 3, 2019).

188. *Lewis*, 2019 WL 4569584, at *80 (“Defendants presented unpersuasive evidence to rebut evidence that the Hofeller files show that Dr. Hofeller primarily focused on maximizing partisan advantage.”).

189. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d at 798.

190. *Id.* at 770–75.

191. See, e.g., Frederick McBride & Meredith Bell-Platts, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 STAN. J. C.R. & C.L. 327, 330–31 (2005) (“Blurry distinctions and inconsistent application of redistricting criteria mark the latest round of redistricting in ways that call into question the sanctity of ‘traditional redistricting principles.’”); Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 572 (2013) (“A redistricting plaintiff . . . may be associated with any number of groups, including political parties . . . or other interest groups.”).

Although supplemental application is easily applicable and would address the defects in the status quo once applied, it may seem incomplete. Because supplemental application would kick in only when a state's law is silent on the criteria at issue, the empirical definition would not stop states from, say, protecting incumbents if their law requires it; to some readers, supplemental application may seem analogous to promising a national, single-payer health insurance scheme with the caveat that individual states may legally refuse to accept it. Such a dissatisfaction would prompt a second avenue to implement the empirical definition: applying "traditional districting criteria" in *all* states as most states define them, regardless of what a state's own laws say. Under this option, which we call universal application, a judge in North Carolina would have to reject districting plans that protect incumbents, even though its legislature requires that "reasonable efforts shall be made to ensure that incumbent members of Congress are not paired with another incumbent[.]"¹⁹² We now proceed to discuss that option and its potential adverse consequences.

2. UNIVERSAL APPLICATION: APPLY REGARDLESS OF WHAT STATE LAW SAYS

Universal application would require courts to define traditional districting criteria as the majority of states define them, regardless of what a state's own relevant law says on the subject. The advantage to universal application is that it would grant all voters precisely the same level of protection from abusive districting, assuming successful implementation. As for the disadvantages, the first would be the difficulty of successful implementation. Under the prevailing interpretation of constitutional law, the Supreme Court imposing districting criteria by fiat, notwithstanding the fact that those criteria would be based on the laws of a majority of the states, may infringe upon the right granted to the states by Article I, Section 4 of the Constitution to choose their own rules for electing Members of Congress,¹⁹³ as well as the power to elect their own state governments. Second, even assuming success, universally applying the empirical definition may end the development of the law on traditional districting criteria because individual states could think that improving their districting laws would be futile if most states will not amend theirs.

Universal application of the empirical definition would require creating a constitutional right to the traditional districting criteria

192. J. SELECT COMM. ON CONG. REDISTRICTING, 2016 CONTINGENT CONGRESSIONAL PLAN COMMITTEE ADOPTED CRITERIA, 2016 Leg., 151st Sess. 2 (N.C. 2016), https://www.ncleg.gov/Files/GIS/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf [<https://perma.cc/E5WD-QAWF>].

193. U.S. CONST. art. I, § 4.

themselves, distinct from the already existing right to elections uncontaminated by racial considerations, so that the Supreme Court has a justification to enforce that right notwithstanding state laws to the contrary. Although legal scholarship has hinted at the possibility of creating a right to traditional districting criteria,¹⁹⁴ it appears infeasible under current law—the Court has held that traditional criteria “are important not because they are constitutionally required . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.”¹⁹⁵ Even if the Court were to reverse decades of case law to create a right to traditional criteria, states might not be so easily persuaded to enforce it. Even when it comes to duly passed federal laws that do not have such constitutional obstacles, states have often attempted to nullify them¹⁹⁶ or to repeal them through litigation.¹⁹⁷

Even assuming that states will let the Supreme Court impose upon them a uniform definition of traditional districting criteria and that states will enforce that definition exactly as imposed, there is still another problem: individual states may lose any meaningful incentive to develop districting law to adapt to changing times because updating their own laws may seem futile if a majority of the states do not amend theirs. Recall that universal application would force courts to enforce “traditional districting criteria” as defined by at least twenty-six states, even if the law of the state at issue contradicts that definition. Therefore, even if the circumstances warrant an amendment, a state that wishes to, for example, preserve precinct boundaries in redistricting may not bother to legislate that requirement.¹⁹⁸ This means that, if universal application survives for a sufficiently long time, the empirical definition may no longer reflect what most states actually think about traditional districting criteria, which would defeat its claim to democratic legitimacy.

However, the numerous constitutional difficulties to universal application do not mean that the empirical definition would be wholly

194. See, e.g., Gertrude C. K. Leighton, Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 YALE L.J. 127, 133–36, 138–39 (1946).

195. *Shaw I*, 509 U.S. 630, 647 (1993).

196. James H. Read, *Changing the Rules? Leaving the Game? Nullification, Secession, and the American Future*, 67 ARK. L. REV. 103, 104 (2014) (listing two examples of nullification bills advanced in two states).

197. See Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS: J. FEDERALISM 451, 451 (2014) (“Since President Obama took office in 2009, state attorneys general (AGs) have been among the administration’s most persistent foes. Most famously, several AGs initiated legal challenges to the Patient Protection and Affordable Care Act (ACA) only minutes after the president signed it into law . . .”).

198. As of April 2020, only nine states require or allow the preservation of precinct boundaries in either state legislative or congressional redistricting. See SUMMARY DATABASE, *supra* note 30 and accompanying text.

useless to a court considering invalidating a state's legislated districting criterion that is undesirable or unconstitutional. Imagine that a court in North Carolina has independent constitutional grounds to invalidate the state's requirement that its districting plan put ten Republicans and three Democrats in the House of Representatives: for instance, the Supreme Court might reverse *Rucho* to rule that partisan gerrymandering is justiciable. Although it would still be infeasible in this hypothetical world for the Supreme Court to order the courts of all states to invalidate any state law that contradicts the empirical definition, plaintiffs could still use the empirical definition to demonstrate why partisan advantage is not a traditional districting criterion—because only North Carolina explicitly requires or allows it—and the presiding court could endorse that argument to bolster its ruling invalidating the state's partisan districting plan.

III. THE EMPIRICAL DEFINITION'S THEORETICAL JUSTIFICATIONS

Part II has justified the empirical definition using its anticipated practical gains. However, although the substantive benefits may interest voters, legislators, and scholars, the benefits might not persuade the one constituency most important to the empirical definition's success—judges. By the nature of their mandate, judges must often disregard the substantive gains to be made from a doctrinal change if the proposed change is procedurally flawed.¹⁹⁹ One such procedural defect discussed increasingly often, as law becomes ever more intertwined with politics in the United States,²⁰⁰ is judicial legislation: that judges must not play legislators imposing policy on behalf of those who “do not want to engage the democratic process[] or . . . have already lost out in the legislative

199. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (“[W]hen the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights . . . there is reason for concern lest the only limits to such judicial intervention become the predilections of . . . this Court.”); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“[T]he Court has always been reluctant to expand . . . substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.”).

200. See, e.g., Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 568–69 (2007) (“[T]he debate over the proper role of our judicial branch . . . is a war being fought on overlapping political and academic fronts.” (footnotes omitted)); Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 2 (2011) (discussing allegations that Justice Sotomayor is an “activist judge that threatens the traditional foundation of the U.S. legal system” (quoting William Mears & Peter Hamby, *Sotomayor Pledges “Fidelity to the Law,”* CNN (July 13, 2009, 5:57 PM), <https://www.cnn.com/2009/POLITICS/07/13/sotomayor.hearing/index.html> [<https://perma.cc/JL7W-KH9C>] (describing remarks made by Sen. Jeff Sessions))).

arena.”²⁰¹ Perhaps no field better deserves this concern than districting law, given the antics that motivated this Article: conflicted interests attempting to legislate privately expedient districting criteria such as partisan or incumbent advantage by baselessly calling them traditional in court.

However, those wary of judicial legislation might also direct that same suspicion toward the empirical definition because, technically, it too is a proposed doctrinal change intended to reap policy benefits. For example, Professor Jacob Eisler argues that many quantitative metrics deployed in redistricting litigation to detect gerrymandering determine the legality of a districting plan according to whether it has certain properties the metrics deem relevant—as opposed to identifying objectively defined illegal elements.²⁰² This, in turn, would allow the creators or users of those quantitative metrics to impose upon society the kind of districting proposals they prefer.²⁰³ Other quantitative metrics, according to Professor Eisler, simply lack the requisite link to constitutional doctrine:

[Anti-gerrymandering] [r]eformers . . . argu[e] that quantitative tools can provide courts with dispositive indications of when illicit gerrymandering occurs. . . . [However,] even where reformers have used statistical indicia to convince courts that a gerrymander is illegal, neither the courts nor the reformers have clearly linked the metrics to constitutional doctrine. . . . Judicial adoption of a radically new definition of rights as quantitative outcomes would be . . . problematic. It would transform the role of statistical analysis from providing evidence of rights violations to defining the content of rights. Government conduct might be lawful or unlawful depending upon (non)conformity to metrical tests. This would distort the role and nature of constitutional law. . . . [R]ights defined by quantitative outcomes would turn courts into enforcers of policy outcomes. If courts identify constitutional wrongs whenever certain metrical thresholds are breached, they act as regulators who have concluded that certain outcomes are desirable. . . . That the current litigation has invoked more complex quantitative indicia does not make the use of metrics to define constitutional rights any less a form of judicial policy enforcement.²⁰⁴

201. Hon. Diarmuid F. O’Scannlain, Lecture, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 32 (2015).

202. See Eisler, *supra* note 19, at 981–85.

203. See *id.* at 983–84.

204. *Id.* at 982–84 (footnotes omitted).

Part III reinforces the doctrinal basis of the empirical definition. Part III.A argues that the empirical definition does not constitute judicial legislation by establishing that it merely defines in an objectively discernible fashion a central element of redistricting law, according to both the preferences of a majority of the states and the Supreme Court’s requirement of “traditionality.”²⁰⁵ If anything, the status quo is symptomatic of judicial legislation because judges now often define “traditional criteria” influenced by partisan interests, not by any intelligible standards, and apply those definitions to redistricting disputes.²⁰⁶ Part III.B argues that the empirical definition would advance constitutionally required equitable redistricting more effectively than the existing doctrine would.²⁰⁷ Current case law would condone certain abusive redistricting criteria, such as incumbent protection, as long as they are applied consistently throughout the whole of a redistricting plan. Moreover, this “consistent application” approach would contradict existing federal precedent by incorrectly deeming some widely accepted districting criteria, such as contiguity, nontraditional.

205. *See infra* Section III.A.1.

206. *See supra* notes 6–9 and accompanying text.

207. *See infra* Part III.B.

Part III.C provides further corroboration with qualitative analyses of various redistricting criteria, both traditional and not.²⁰⁸ These analyses establish that the criteria we deem nontraditional and abusive not only lack majority state support but also systematically distort elections. For example, although scholars routinely lump in preserving communities of interest with traditional districting criteria,²⁰⁹ we do not. Even states imposing that criterion rarely define “communities of interest” themselves, instead requiring districting authorities to solicit feedback from locals as to what they might be. This is unlike traditional criteria, which impose substantively unambiguous requirements: for example, the equal population criterion plainly requires minimizing population deviations among electoral districts.²¹⁰ The effectively meaningless nature of “communities of interest,” with the lack of discernible limitations on how that term can be defined, would enable conflicted interests to abuse it to justify districting intended to aid certain parties or incumbents.

208. See *infra* Part III.C.

209. See, e.g., Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1580 (2005) (discussing preservation of county and municipal boundaries and preservation of communities of interest as the same type of criterion); Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 806 (2013) (mentioning preservation of communities of interest—along with equal protection, preservation of county and municipal boundaries, and compactness—as being among potential redistricting criteria); Abigail Aguilera, *Drawing the Line: Whitford v. Gill and the Search for Manageable Partisan Gerrymandering Standards*, 86 U. CIN. L. REV. 775, 778 (2018) (describing preservation of communities of interest, as well as contiguity, compactness, and nesting, as being among “permissible traditional redistricting criteria”).

210. See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (“[T]he Equal Protection Clause requires that a state make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.”); *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (indicating that state districting plans that have population deviations of 10% or more establish a prima facie case of discrimination under the Fourteenth Amendment).

TABLE 1. Traditional Status of Districting Criteria, State Legislative Redistricting													
State Legislative	Number of States with Redistricting Requirement												State Legislative
	SUBSTANTIVE REQUIREMENTS										PROCEDURAL REQUIREMENTS		
Requirement / Category	Equal Population	Compactness	Contiguity	County Boundaries	Municipal Boundaries	Precinct / VTD Boundaries	Partisan Advantage/Data Usage	Incumbency Protection	Competitiveness	Preserve Past District Cores	Communities of Interest	Entity Primarily Responsible for Districting	Entity Type ²¹¹
Required	49	38	49	39	33	9	0	3	5	6	23	30	Legislature
Allowed	0	0	0	1	2	0	1	7	0	2	0	6	Advisory Commission
Prohibited	0	0	0	0	0	0	17	15	0	0	0	4	Independent Commission
Silent / Unknown	1	12	1	10	15	41	32	25	45	42	27	9	Political Appointee Commission
Required + Allowed	49	38	49	40	35	9	1	10	5	8	23	1	Politician Commission
Silent / Unknown + Prohibited	1	12	1	10	15	41	49	40	45	42	27		
Traditional?	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	

211. An advisory commission prepares a districting plan to be approved by elected officeholders. A politician commission consists of the elected officeholders themselves (for example, the governor and the attorney general).

Congressional	Number of States with Redistricting Requirement											Congressional	
	Substantive Requirements										Procedural Requirements		
Requirement / Category	Equal Population	Compactness	Contiguity	County Boundaries	Municipal Boundaries	Precinct / VTD Boundaries	Partisan Advantage / Data Usage	Incumbency Protection	Competitiveness	Preserve Past District Cores	Communities of Interest	Entity Primarily Responsible for Districting	Entity Type / At-Large District
Required	29	26	29	27	21	9	1	2	4	6	18	31	Legislature
Allowed	0	0	0	0	0	0	0	5	0	2	1	4	Advisory Commission
Prohibited	0	0	0	0	0	0	14	14	0	0	0	4	Independent Commission
Silent / Unknown	1	4	1	3	9	21	15	9	26	22	11	4	Political Appointee Commission
Required + Allowed	29	26	29	27	21	9	1	7	4	8	19	0	Politician Commission
Silent / Unknown + Prohibited	1	4	1	3	9	21	29	23	26	22	11	7	At-large district
No known state constitutional or statutory requirement	13	13	13	13	13	13	13	13	13	13	13		
At-large district	7	7	7	7	7	7	7	7	7	7	7		
Traditional?	Yes	Yes	Yes	Yes	Yes ²¹²	No	No	No	No	No	No	No	

212. Even though fewer than twenty-six states require the preservation of municipal boundaries in congressional redistricting, we still deem this criterion to be traditional because we assume that, if a criterion is traditional in either state legislative or congressional redistricting, that criterion is traditional in both. *See supra* p. 104.

A. The Empirical Definition Is Not Judicial Legislation

1. AGAINST ILLUSORY QUANTITATIVE AUTHORITY

Scholars are correct to be concerned about judicial legislation. For one thing, this Article was motivated by a particularly malignant strain of that exact phenomenon: conflicted interests attempting to legislate expedient districting criteria through court rulings.²¹³ Moreover, scholars like Professor Eisler are correct to be concerned about quantitative metrics making judicial legislation even harder to detect,²¹⁴ because judges are not usually trained to know when expert witnesses are trying to sneak legislation past them hidden underneath a heap of numbers, Greek letters, and coding jargon.²¹⁵ Scholars have already documented how academics, politicians, and even entire nations have suffered from blindly accepting ideas presented with illusory quantitative authority:

There is no need [to] put[] a thumb on the scales simply because a model is expressed quantitatively. That is the legal equivalent of putting a white lab coat on an attorney. . . . All too often . . . quantification has no attraction other than . . . to lure in unsuspecting onlookers with equations and formulae. . . . A disastrous example of this phenomenon occurred in China in the late 1950s, where the person responsible for misleading quantification had *seemingly* impeccable qualifications. . . . That person was Dr. Xuesen Qian, an aerospace engineer who received his doctorate from Caltech Qian published “scientific calculations” showing that planting crops more densely and applying more fertilizer would increase the grain yield . . . *twentyfold* [I]n 1958, the [Chinese Communist] Party implemented a widespread campaign of close planting: farmers would plant anywhere between twenty and seventy-eight percent more seeds per plot of land than they had in the past. However, . . . “few clear-thinking people dared to point out that deep-plowing and close-planting schemes were at best a waste of energy and at worst a destruction of fertile land.” A

213. See O’Scannlain, *supra* note 201, at 32.

214. See Eisler, *supra* note 19, at 982–84.

215. See *In re Perry Cnty. Foods, Inc.*, 313 B.R. 875, 879 n.2 (Bankr. N.D. Ala. 2004) (“Given the lack of training . . . in the ever expanding areas requiring technical, scientific, and quantitative capabilities, it is no longer unexpected that lawyers and judges are unable to bring to bear that which such technical, scientific, and quantitative training and background would accord them.”); see also WILLIAM A. STAHL, *GOD AND THE CHIP: RELIGION AND THE CULTURE OF TECHNOLOGY* 97 (1999) (“Any sufficiently advanced technology is indistinguishable from magic.” (quoting ARTHUR C. CLARKE, *PROFILES OF THE FUTURE: AN INQUIRY INTO THE LIMITS OF THE POSSIBLE* 21 (1973))).

blind acceptance of Qian’s pseudoscientific claims[] . . . resulted in a “severe nationwide famine . . . claiming an estimated twenty-seven million lives.”²¹⁶

Our opposition to specious numerical metrics of redistricting is precisely why this Article already criticized some of them. For example, Professor Melissa Saunders proposes determining whether a district is constitutionally compact using two specific metrics of compactness,²¹⁷ even though those two metrics can return wildly different evaluations of the same district.²¹⁸ Professor Michael McDonald submits an entirely new numerical measure of compactness which, stripped of the jargon, would merely permit districts to be half as compact as they can feasibly be.²¹⁹ The fact that these specious metrics were published in some of the most frequently cited law journals²²⁰ is an undeniable indication of their allure.

The empirical definition, in contrast, lacks any resemblance to such specious quantitative metrics. The empirical definition’s determination of traditional districting criteria through a basic numerical formula—at least twenty-six states in favor and no more than twelve against—merely represents a belief that a majority of states are more likely to define traditional criteria in the public interest than conflicted parties attempting to implement by lawsuit redistricting plans intended to get themselves reelected in perpetuity. The empirical definition counts the number of states that have legislative instructions on various districting criteria because we believe that this method would be both objectively discernible and easily replicated by courts—as opposed to, say, adding up the states that collectively compose a majority of the U.S. population. Population

216. Lea Brilmayer & Yunsieg P. Kim, *Model or Muddle? Quantitative Modeling and the Façade of “Modernization” in Law*, 56 WASHBURN L.J. 1, 10, 32–33 (2017) (footnotes omitted) (first quoting Qian Xuesen, *What Will Be the Grain Yield per Mu of Land?*, CHINA YOUTH NEWS, June 16, 1958, at 4; then quoting Judith Shapiro, *The Political Roots of China’s Environmental Degradation*, in CHINA’S TRANSFORMATIONS: THE STORIES BEYOND THE HEADLINES 50, 60 (Lionel M. Jensen & Timothy B. Weston eds., 2007); and then quoting Human Rights Watch/Asia, DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA’S STATE OF ORPHANAGES 31 (1996)).

217. See Saunders, *supra* note 108, at 1634.

218. See Kaufman, King & Komisarchik, *supra* note 113, at 5–6, 17–22.

219. See McDonald, *supra* note 117, at 20; see also *supra* Section I.B.2.

220. See Most Frequently Cited Print Journals for 2019, WASH. & LEE L.J. RANKINGS, <https://managementtools4.wlu.edu/LawJournals/> [https://perma.cc/QB5Z-9VQC] (last visited Feb. 17, 2021) (select “Print,” deselect “Combined Score,” select “Journal Cites” and “Case Cites,” then click “Submit”) (listing the *Yale Law Journal* as the second most frequently cited among print journals); *Id.* (select “Online Only,” deselect “Combined Score,” select “Journal Cites” and “Case Cites,” then click “Submit”) (listing the *Yale Law Journal Forum* as the most frequently cited among online journals).

counts are always estimates,²²¹ whereas counts of states and citations to state law are not. Moreover, the formula we propose is akin to that used to pass or defeat proposed constitutional amendments.²²² In sum, the empirical definition is unlikely to be a misleading quantitative metric to anyone who can count to 26.

The empirical definition also does not perpetrate judicial legislation with nonquantitative methods. Recall that judicial legislation refers to judges doing more than merely interpreting or applying law—that phenomenon requires writing law by imposing new public policy on society through court rulings. First, the empirical definition does not invent newfangled law. It merely defines, according to the Supreme Court’s requirement of traditionality, a central element of redistricting law that the Court has failed to intelligibly define. We define “traditional” to mean criteria endorsed by a majority of states because, as explained already, counting the number of states is an objectively discernible way to identify the prevailing practice.²²³ Clearly defining traditional criteria so as to reduce their abuse would not suddenly change what each criterion means or its legal function, unlike some metrics that are designed to impose their particular definition of gerrymandering.²²⁴ Under the empirical definition, equal population still means reducing population variation among electoral districts, and contravening traditional redistricting criteria will still only trigger strict scrutiny.²²⁵

Second, the empirical definition does not impose policy against the public will. Using the empirical definition does not require courts to make policy because they would only be applying the policy judgments already made by the states as to which redistricting criteria are allowed and which are not. Assuming *arguendo* that the empirical definition does impose policy, it would not be against the public will because the empirical definition reflects the practices of a majority of the states. The empirical definition may be an unwanted imposition only under universal application because that method would apply all traditional criteria as defined by the empirical definition, notwithstanding individual state laws to the contrary.²²⁶ For example, North Carolina requires partisan and incumbent advantage in congressional districting, whereas the empirical definition considers both to be nontraditional.²²⁷ However, as explained in

221. See *United States v. Johnson*, 122 F. Supp. 3d 272, 315 (M.D.N.C. 2015) (“Census adjustments are changes to the U.S. Census’ population estimates meant to improve the U.S. Census’ estimates’ accuracy.”).

222. A proposed amendment opposed by more than twelve state legislatures would not be ratified. See U.S. CONST. art. V.

223. See *supra* pp. 117–20.

224. See Eisler, *supra* note 19, at 982–84.

225. See *Bush v. Vera*, 517 U.S. 952, 958 (1996).

226. See *supra* Section II.C.2.

227. See COMPLETE DATABASE, *supra* note 30.

Part II.C, we consider universal application to be infeasible.²²⁸ Under its alternative, supplemental application, judges would use the empirical definition only if their own state's law is silent as to whether a districting criterion is permitted or required.²²⁹

2. THE STATUS QUO REPRESENTS JUDICIAL LEGISLATION

Although this Article mostly advances the empirical definition on its independent merits, an equally useful means of evaluating a proposed change is to compare it with the status quo—just as some elections pick an outstanding candidate while others merely dispose of the worst one. A comparative merit of the empirical definition is that the status quo in districting doctrine already represents the kind of judicial legislation that both judges and scholars claim to fear. This Section shows how rulings on districting cases impose subjective notions of traditional criteria on behalf of judges or the conflicted interests that “do not want to engage the democratic process.”²³⁰ Applying the empirical definition would curb the judicial legislation that defines the status quo.

As a preliminary matter, Section II.A.2 has already shown how the lack of intelligible limits on judicial discretion gives voters wildly inconsistent levels of protection from abusive redistricting. For example, in three states whose law is silent on the legality of districting intended to advantage a certain party, the courts of last resort ruled, respectively, that partisan gerrymandering is legal,²³¹ illegal,²³² or not for courts to say whether it is legal or not.²³³ However, those cases at least have something of a legal basis. The Pennsylvania case interpreted a state constitutional guarantee of fair elections to prohibit partisan advantage;²³⁴ the Ohio case allowed partisan advantage because the state constitution does not mandate politically neutral redistricting,²³⁵ and the West Virginia case declined to take a position on the legality of partisan gerrymandering at all, citing the lack of clear doctrinal guidelines and the Supreme Court's reluctance to take an active regulatory role.²³⁶

To find examples of judicial legislation lacking *any* meaningful legal justification, one must examine court-ordered districting cases in which judges—or the litigants who influence them—apparently define and apply

228. See *supra* Section II.C.2.

229. See *supra* Section II.C.1.

230. O'Scannlain, *supra* note 201, at 32.

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

232. See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018).

233. See *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 389–90 (W. Va. 2012).

234. See *League of Women Voters of Pa.*, 178 A.3d at 821.

235. See *Wilson*, 981 N.E.2d at 820.

236. See *Cooper*, 730 S.E.2d at 389–90.

“traditional” criteria as they see fit or, worse, expedient. We know that litigants effectively write parts of districting plans in the United States beyond merely expressing their opinions as to how districting should proceed, because courts admit to it. For example, a judicially convened Minnesota districting panel adopted a plan that reflects “certain elements” of the plans proposed by each of the litigants.²³⁷ Where judges do not admit to such things, court-proposed redistricting plans often rely on districting criteria with no justification. For example, a North Carolina court order requires preserving communities of interest without explanation,²³⁸ and a Nevada order cites no source whatsoever to justify eight out of its nine criteria for state legislative redistricting.²³⁹

The fact that litigants write parts of districting plans may be harmless error if the litigants have no conflicts of interest or if the districting process appropriately restrains the conflicted ones. However, any examination of the status quo reveals that it hands conflicted parties undue control over districting. Take, for example, the court-ordered redistricting in Nevada following the 2010 U.S. Census. The previously cited ruling that imposed nine criteria for state legislative districting also required two public hearings to solicit opinions on how the state’s electoral districts should be drawn.²⁴⁰ Despite this Article’s criticism of the *content* of inaccurate testimony given by conflicted interests in districting disputes,²⁴¹ we do not oppose, in principle, soliciting the opinion of interested parties—as long as the presiding officers entrusted to rule in favor of the public interest are willing and able to filter out the bias from the testimony. The fact that representatives of the two major parties promoted their preferred redistricting plans in the Nevada hearings²⁴² is not the indication of judicial legislation in the status quo to which we object.

237. See *Hippert v. Ritchie*, 813 N.W.2d 374, 376, 379 (Minn. 2012).

238. See *Stephenson v. Bartlett*, 562 S.E.2d 377, 397 (N.C. 2002) (“[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.”).

239. Order Re: Redistricting at 5–9, *Guy v. Miller*, No. 11-OC-42-1B, 2011 Nev. Dist. LEXIS 32 (D. Nev. Oct. 14, 2011), <https://www.leg.state.nv.us/Division/Research/Districts/Reapp/2011/Proposals/Masters/Minutes/Oct10/E101011C.pdf> [<https://perma.cc/4AE5-DG2G>] [hereinafter Order Re: Redistricting] (requiring equally populated districts, contiguous districts, preservations of political subdivisions and communities of interest, compactness, incumbent protection, nesting, compliance with Voting Rights Act requirements, and representative fairness).

240. *Id.* at 8.

241. See *supra* Part I.A.

242. *Summary Minutes of the Public Hearing by Special Masters to Receive Testimony Concerning Redistricting of Legislative and Congressional Districts*, 2011 Leg., 76th Sess. 12 (Nev. Oct. 10, 2011), <https://www.leg.state.nv.us/Division/Research/Districts/Reapp/2011/Proposals/Masters/Minutes/Oct10/M01RedistrictingPublicHearing-10-10-11-LV.pdf> [<https://perma.cc/E6BS-ERAW>] [hereinafter *Nevada Hearing I*] (Fernando Romero, State Director for Democrats USA “noted strong opposition to the Republican map . . . Mr. Romero supports a map . . .

Instead, the objectionable phenomenon was that the court-appointed special masters presiding over the hearings²⁴³ apparently failed to separate biased opinions from statements of fact.²⁴⁴ Granted, the special masters may not have been at fault entirely because some partisan representatives seemingly had technical training that the special masters did not,²⁴⁵ and others failed to disclose their various conflicts of interest.²⁴⁶ However, regardless of the exact distribution of blame, the fact remains that such a system defines judicial legislation: exploiting courts' relative lack of expertise in the more technical side of districting,²⁴⁷ conflicted interests are misleading judges into looking favorably on, or outright incorporating, their preferred districting plans by presenting their interests as fact.²⁴⁸

Consider the example of Ron Steslow, a witness in the Nevada hearings identified at the time as the "Redistricting Director [for] Fund for Nevada's Future."²⁴⁹ Even as other participants declare their partisan affiliations or their relationships to the litigants in the redistricting case that caused the hearings to be held,²⁵⁰ Steslow discloses no conflicts of interest in his self-description:

submitted by the Nevada Latino Redistricting Coalition."); *Summary Minutes of the Public Hearing by Special Masters to Receive Testimony Concerning Redistricting of Legislative and Congressional Districts*, 2011 Leg., 76th Sess. 11 (Nev. Oct. 11, 2011), <https://www.leg.state.nv.us/Division/Research/Districts/Reapp/2011/Proposals/Masters/Minutes/Oct11/M02RedistrictingPublicHearing-10-11-11-CC.pdf> [<https://perma.cc/7VNY-LDEN>] [hereinafter *Nevada Hearing II*] ("Mr. Hutchison [counsel retained by the Nevada Republican Party] stated that the Democrats fracture that community of interest He noted that the Republican maps attempt to preserve communities of interest.").

243. Order Re: Redistricting, *supra* note 239, at 2, 8.

244. See *infra* pp. 158–59 (discussing Ron Steslow's ties to the Republican Party).

245. See *Nevada Hearing I*, *supra* note 242, at 4 (referencing Thomas L. Brunell, Ph.D., Professor of Political Science, Senior Associate Dean, School of Economic, Political and Policy Sciences, University of Texas at Dallas, an expert witness for the Republican Party, as an example of such partisan representatives). The minutes do not indicate that the special masters have similar training or credentials. See *id.*

246. See, e.g., *Nevada Hearing I*, *supra* note 242, at 7 (describing Ron Steslow's credentials and districting maps but failing to disclose Steslow's connections to the Republican Party); see also *infra* p. 158 and notes 252–255 (discussing the Republican Party's donation to Steslow's group, Fund for Nevada's Future).

247. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503–04 (2019) ("[A]sking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise."); Micah Altman, *The Computational Complexity of Automated Redistricting: Is Automation the Answer?*, 23 RUTGERS COMPUT. & TECH. L.J. 81, 127 (1997) ("[I]t is unrealistic to expect a judge to possess the technical competence to determine if a redistricting goal, such as the creation of minority opportunity districts, has been properly weighted by the redistricting algorithm.").

248. See O'Scannlain, *supra* note 201, at 34.

249. See *Nevada Hearing II*, *supra* note 242, at 9.

250. *Id.* at 2.

Ron Steslow . . . stated he attended the National Conference of State Legislature’s seminar in Washington, D.C., redistricting principles and law, and received training from the Caliper Corporation on the Maptitude Mapping Software. He explained the process he used in preparing and collecting data and the application of the data into *maps utilizing traditional districting principles*. Mr. Steslow . . . explained that when preparing the maps he focused on preserving communities of interest, population numbers and total population, voting age population (VAP) and CVAP [citizen voting age population], voter registration, and *representational fairness*. . . . Discussion ensued between Special Master Erickson and Mr. Steslow regarding whether the information provided in maps G-1, G-2, and G-3, is representative of the total population or VAP. Mr. Steslow . . . explained that VAP and the use of communities of interest for all districts would be the best population criteria to determine the final maps.²⁵¹

Steslow’s alleged training, reference to “representational fairness,” and outward lack of partisan affiliation may make his group appear to be a grassroots organization advocating for equitable redistricting. However, Fund for Nevada’s Future was a political action committee that had, in 2011, received money from newly elected Republican governor Brian Sandoval’s campaign,²⁵² the Senate Republican Leadership Conference,²⁵³ and the Republican Governors Public Policy Committee for “efforts to secure fair representation[.]”²⁵⁴ Although the other witnesses accused one another of pushing districting maps drawn to help their political party,²⁵⁵ neither the special masters nor the other witnesses ever state that they object to, or know of, Steslow representing an organization paid to “secure

251. *See Nevada Hearing I, supra* note 242, at 7 (emphasis added).

252. SEC’Y OF STATE OF NEV., CAMPAIGN CONTRIBUTIONS AND EXPENSES REPORT (2012), <https://www.nvsos.gov/SOSCandidateServices/AnonymousAccess/ViewCCEReport.aspx?syn=SnPdYKQxC9x%252bCMSvrdEZFg%253d%253d> [<https://perma.cc/F6FZ-CKQ9>].

253. *Id.*

254. *Grants to Politically Active Nonprofits and Donor Organizations: Fund for Nevada’s Future*, OPENSECRETS 17 (2011), <https://www.opensecrets.org/outside-spending/political-nonprofits/grants?cycle=2011&id=200309803> [<https://perma.cc/6V97-VMZF>] (enter the first URL and follow the hyperlink next to “Fund for Nevada’s Future.” Alternatively, use the permalink to access Form 990) [hereinafter OPENSECRETS].

255. *See Nevada Hearing I, supra* note 242, at 7 (describing how a witness retained by the Republican Party argued that two redistricting plans “systematically favored the Democratic Party”); *see id.* at 12 (noting that a State Director for Democrats USA exhibited “strong opposition to the Republican map[,] . . . which . . . groups the Latino community into one district”).

fair representation”²⁵⁶ on behalf of the Republican Party.²⁵⁷ Perhaps this apparent ignorance was unavoidable, given that Fund for Nevada’s Future publicly disclosed its receipts and expenses only in 2012, the year after the Nevada redistricting hearings were held.²⁵⁸

Of course, agents doing the bidding of the principals who paid them should shock no one. For example, counsel retained by the Republican Party²⁵⁹ and a litigant backing the Republican Party’s positions in the hearings²⁶⁰ made fallacious claims about traditional redistricting criteria that are expedient to the Republican Party as if they were experts giving unbiased testimony on incontrovertible issues of fact, like a physicist informing skeptical members of the U.S. House Committee on Science, Space, and Technology that melting ice caps cause sea levels to rise²⁶¹:

Daniel H. Stewart [counsel for Alex Garza, plaintiff-intervenor] . . . stated that his client supports the use of traditional districting criteria: preservation of municipal boundaries, compact lines, contiguous lines, and protecting incumbents. . . . Mr. Stewart stated that the Special Masters should consider where there is agreement on the communities of interest in the maps that have been presented. He opined that . . . influence districts help[] elect more Democrats, and noted that influence districts are not supported as a means to maximize minority voting strength. . . . Mark A. Hutchison [counsel for the Republican Party] . . . commented that nesting is not a traditional redistricting criterion.

256. OPENSECRETS, *supra* note 254, at 17.

257. *See Nevada Hearing I*, *supra* note 242; *see also Nevada Hearing II*, *supra* note 242.

258. *See SEC’Y OF STATE OF NEV.*, *supra* note 252, at 1 (indicating the date of the annual contributions and expenses filing as January 17, 2012).

259. *See Nevada Hearing I*, *supra* note 242, at 3 (“Mark A. Hutchison . . . representing the Nevada Republican Party . . .”).

260. *See id.* (“Daniel H. Stewart . . . representing Alex Garza . . .”); *see also id.* at 12 (describing a witness noting “strong opposition to the Republican map presented by Mr. Garza”); NEV. LEGIS., SUMMARY MINUTES OF THE PUBLIC HEARING BY SPECIAL MASTERS TO RECEIVE TESTIMONY CONCERNING REDISTRICTING OF LEGISLATIVE AND CONGRESSIONAL DISTRICTS, EXHIBIT Q, 2011 Leg., 76th Sess., at 1–2 (2011), leg.state.nv.us/Division/Research/Districts/Reapp/2011/Proposals/Masters/Minutes/Oct11/E101111Q.pdf [<https://perma.cc/GAN9-VNKS>] [hereinafter SECOND REDISTRICTING HEARING EXHIBIT Q] (Stewart backing Hutchison).

261. *See The Administration’s Climate Plan: Failure by Design: Hearing Before the H. Comm. on Sci., Space, and Tech.*, 113th Cong. (2014) (statement of Rep. Steve Stockman), <https://www.govinfo.gov/content/pkg/CHRG-113hrg92327/html/CHRG-113hrg92327.htm> [<https://perma.cc/TRV4-HKKU>] (A Committee member asked Dr. John P. Holdren, “how long will it take for the sea level to rise 2 feet?” Then in answer to its own question, a Committee member asserted that “if your ice cube melts in your glass, it doesn’t overflow. It is displacement. . . . [S]ome of the things that they are talking about that mathematically and scientifically don’t make sense.”).

. . . Mr. Hutchison stated that the Democrats fracture that community of interest unnecessarily He noted that the Republican maps attempt to preserve communities of interest.²⁶²

Again, it should shock no one that many of these claims are unsubstantiated, misleading, or false. For example, as of 2011, no controlling Supreme Court opinion ever called incumbency protection a “traditional” districting criterion,²⁶³ not even the state court that required Nevada’s redistricting plan to, “to the extent practicable, . . . avoid contests between incumbents”²⁶⁴ stated that protecting incumbents is “traditional.” The claim that any plan proposed in the hearings preserves “communities of interest” is specious at best because there is nothing nearing agreement on what that term means.²⁶⁵ As Section III.C.1 shows in more detail, states disagree, academics disagree, and courts are reluctant to define that term themselves, but, more pertinently, the witnesses in the proceedings disagreed.²⁶⁶ Finally, as a semantic matter, let alone empirical, the categorical statement that “influence districts” get more Democrats elected is false: scholarship available at the time of the Nevada redistricting hearings in 2011 was divided over whether influence districts increase the aggregate number of minorities or Democrats elected.²⁶⁷

262. See *Nevada Hearing II*, *supra* note 242, at 10–11.

263. See *supra* notes 38–39 and accompanying text (describing the plurality opinion’s declination to definitively state whether incumbency protection is a traditional redistricting criterion, while noting that a dissenting opinion to a past case did).

264. Order Re: Redistricting, *supra* note 239, at 6.

265. Grayson Keith Sieg, *A Citizen’s Guide to Redistricting Reform Through Referendum*, 63 CLEV. ST. L. REV. 901, 913–14 (2015) (“The Supreme Court . . . has not answered” the question of whether “communities of interest [are] defined by ideology, demographic traits, economic concerns, policy priorities, or some combination thereof[.]”).

266. See *Nevada Hearing I*, *supra* note 242, at 11 (“Richard F. Boulware . . . Vice President, National Association for the Advancement of Colored People . . . expressed concern regarding combining the Latino community and the African American community in the same district.”); *id.* (“Marco Rauda . . . testified . . . that many community groups of interest exist within the Latino community from northeast Las Vegas to Henderson and should not be combined as one group or defined by race. He is opposed to creating a redistricting plan that will divide the Latino community among racial lines.”); *id.* at 12 (“Fernando Romero . . . testified regarding the disparity between the Hispanic communities and his disagreement with the idea of nesting all minority communities together. He noted strong opposition to the Republican map . . . which he noted groups the Latino community into one district.”).

267. See, e.g., Alvaro Bedoya, Note, *The Unforeseen Effects of Georgia v. Ashcroft on the Latino Community*, 115 YALE L.J. 2112, 2123 (2006) (“By definition, an influence district is highly unlikely to elect a minority community’s chosen candidate.”); Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2613 (2004) (“[A]lthough minority influence is highly correlated with the Democratic Party today, as it has been for the past several decades, it may not always be so.”); David J. Becker, *Saving Section 5: Reflections on Georgia v. Ashcroft, and Its Impact on the Reauthorization of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER

What should raise some of the more jaded eyebrows, however, is that the special masters may have perceived some of the partisan agents as disinterested experts, thereby giving privately expedient claims a false impression of impartial credibility. For example, following the hearings, counsel for a litigant backing the Republican Party’s proposals informed the special masters that Steslow was a “redistricting technician” whom both he and the counsel for the Republican Party²⁶⁸ “used to draw maps and interpret data during this litigation[.]”²⁶⁹ In the hearings, Steslow failed to disclose donations from the Republican Party to “secure fair representation[.]”²⁷⁰ claimed to have gotten training from outwardly nonpartisan entities, and claimed to have designed plans for “representational fairness”²⁷¹—plans that happened to coincide with the ones pushed by counsel representing the Republican Party.²⁷² If Steslow was perceived as a nonpartisan expert, he likely would have perverted the special masters’ mandate to “hear all the positions and . . . do what is fair in terms of the whole, applying [the witnesses’] professional backgrounds and rationale”²⁷³

Although we use Nevada’s districting process following the 2010 Census to illustrate our point that the status quo already represents egregious judicial legislation, that example is hardly anecdotal. Even if partisans only rarely pass themselves off as concerned citizens—Section III.C.1 presents more indications of such misrepresentation occurring in reality—the fact remains that conflicted interests in the status quo also *openly* make partisan claims²⁷⁴ and court-ordered districting plans are influenced by them.²⁷⁵ If nothing else, the empirical definition would at least make it harder for litigants like those in the Nevada case to falsely present as traditional whichever rule that is expedient. For example, if the

223, 224 (Ana Henderson ed., 2007) (“However, the *Ashcroft* decision . . . suggested that a covered jurisdiction could comply with Section 5, even if it reduced the ability of minority voters to elect candidates of their choice, if the jurisdiction otherwise increased the number of ‘influence districts,’ or districts which might elect candidates ‘sympathetic to the interests of minority voters.’ . . . Understandably, this decision resulted in a lot of serious concern It was (and is) unclear what this decision would mean for the advances minority voters had made in the last forty years. Had minority voters really come so far that such a radical departure from established [VRA] jurisprudence (particularly the consideration of influence districts) was warranted?”).

268. See *supra* note 260 (describing Alex Garza’s and Daniel Stewart’s support of the Republican position); *Nevada Hearing I*, *supra* note 242, at 3 (noting that “Mark A. Hutchison . . . represent[s] the Nevada Republican Party”).

269. SECOND REDISTRICTING HEARING EXHIBIT Q, *supra* note 260, at 1.

270. See OPENSECRETS, *supra* note 254, at 17.

271. See *Nevada Hearing I*, *supra* note 242, at 7.

272. *Id.* at 6 (“Ron Steslow . . . has translated the Republican Party plan into traditional districting principles . . .”).

273. See *Nevada Hearing II*, *supra* note 242, at 5.

274. See *supra* Part I.A.

275. See, e.g., *Hippert v. Ritchie*, 813 N.W.2d 374, 379 (Minn. 2012).

empirical definition were law, a partisan counsel's claim that incumbent protection is traditional²⁷⁶ would be easily contradicted because only seven states require or allow it but fourteen prohibit it in congressional districting.²⁷⁷ In contrast, without the empirical definition, rebutting that same false claim in the 2011 Nevada hearings would require scouring the entire modern history of districting doctrine to show that the Supreme Court had never yet actually called incumbent protection traditional.²⁷⁸

Separate from our arguments on the merits of the empirical definition, some readers may dismiss our opposition to partisanship in redistricting as naiveté because the adversary system clearly rewards counsel who live by the saying “[l]et justice be done—that is, for my client let justice be done—though the heavens fall.”²⁷⁹ We know that hired guns often cannot help but fire where pointed and that many genuinely believe that the adversary system's “open and relatively unrestrained competition among individuals produces the maximum collective good.”²⁸⁰ Yet, the adversary system's assumption of “two biased and interested parties each arguing in front of an impartial referee”²⁸¹ plainly does not fit redistricting litigation, because its result affects not only the two biased parties but also the entire electorate—the latter of whom are rarely, if ever, in the courtroom.²⁸² Hence, unless the public interest can be represented in every single districting case, it is only natural that we ask to rein in the partisan ones. Although winning is important, some things are even more important: the sky collapsing is bad for everyone, including the winners.²⁸³

276. See *Nevada Hearing II*, *supra* note 242, at 10.

277. See SUMMARY DATABASE, *supra* note 30.

278. See *supra* notes 34–39 and accompanying text.

279. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975).

280. Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 172, 173 (David Luban ed., 1983).

281. Jens H. Hillen, Note, *The Court of Appeals for the Federal Circuit: Independent Review of Patent Decisions and the Constitutional Facts Doctrine*, 67 S. CAL. L. REV. 187, 187 (1993).

282. See Manheim, *supra* note 191, at 599–600 (“[R]edistricting litigants . . . not the electorate at large – are able to set the courts’ agendas Voters across an entire jurisdiction are affected . . . when a court requires . . . an altered electoral map. . . . Yet redistricting litigation fails to trigger protections analogous to those provided in the class-action context.”).

283. Cf. DAVID HUME, *OF PASSIVE OBEDIENCE* (1748), reprinted in HUME: *POLITICAL ESSAYS* 202, 202 (Knud Haakonssen ed., 1994) (“[L]et justice be performed, though the universe be destroyed, is apparently false, and by sacrificing the end to the means, shews a preposterous idea of the subordination of duties. . . . [T]he duty of allegiance . . . must always, in extraordinary cases, when public ruin would evidently attend obedience, yield to the primary and original obligation. . . . [T]he safety of the people is the supreme law.”).

*B. The Empirical Definition Advances Constitutionally Required
Equitable Redistricting*

Part III.A has shown that the empirical definition would outperform the status quo in an issue area without meaningful doctrinal guidance—judges’ choice of criteria governing court-ordered districting—because the status quo frequently results in judicial legislation, whereas the empirical definition would tie judicial discretion to an objectively discernible standard. Part III.B establishes that the empirical definition would also outperform the status quo in a domain where the Supreme Court has stipulated longstanding guidelines: determining whether a criterion was applied constitutionally to a districting plan, apart from the issue of whether that criterion is traditional. Specifically, some courts would condone abusive districting rules such as incumbent protection, as long as they are applied consistently throughout a districting plan. The empirical definition, in contrast, would not allow practices such as incumbent protection regardless of how symmetrically they are applied,²⁸⁴ thereby advancing a constitutional principle that courts purport to, but often do not, follow in the status quo: redistricting must not unduly discriminate against any candidate.

Since the 1960s at the latest, the Supreme Court has held that districting plans constitute “invidious discrimination” if they violate certain “individual and personal” rights.²⁸⁵ The Court specified how this principle would apply to districting criteria by ruling that such criteria must be “consistent and nondiscriminatory application of a legitimate state policy,”²⁸⁶ indicating that constitutionally acceptable uses of districting criteria require both consistency of application *and* normatively justifiable content. As for what that normatively justifiable content in a redistricting criterion might look like, the Court has held that redistricting plans must eschew not only racial discrimination but also political discrimination.²⁸⁷ Even *Rucho*, the 2019 case in which the Court drastically weakened its own authority to regulate abusive districting, explicitly named one-person, one-vote in addition to racial gerrymandering as areas where “there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.”²⁸⁸

284. See SUMMARY DATABASE, *supra* note 30.

285. *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

286. *Brown v. Thomson*, 462 U.S. 835, 844 (1983).

287. *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (“A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed ‘to minimize or cancel out the voting strength of racial or political elements of the voting population.’” (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))).

288. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495–96 (2019).

However, some federal rulings have prioritized consistency of application over normative content, thereby condoning districting criteria that would violate one-person, one-vote. Moreover, condoning abusive redistricting criteria if they are applied consistently allows for the possibility that, if applied inconsistently, beneficial redistricting criteria may not be permitted. Hence, this “consistency of application” rule can be abused to allow discriminatory districting criteria on condition that everyone suffer from it, or reject legitimate districting criteria on condition that no one benefit from it. For example, the trial court judgment in *Larios v. Cox*, later affirmed by the Supreme Court,²⁸⁹ held that a redistricting plan disproportionately advantaging Democratic incumbents could have been upheld had it protected Republican incumbents to a similar degree:

While Democratic incumbents who supported the plans were generally protected, Republican incumbents were regularly pitted against one another . . . to unseat as many of them as possible. . . . The population deviations in the Georgia House and Senate Plans [do not] further any legitimate, consistently applied state policy. . . . [T]he deviations were . . . intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to protect Democratic incumbents. Neither of these explanations withstands Equal Protection scrutiny. . . . [T]he creation of deviations [to] allow[] . . . certain geographic regions of a state to hold legislative power to a degree disproportionate to their population is plainly unconstitutional. Moreover, the protection of incumbents is . . . permissible . . . *only* when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner. The incumbency protection in the Georgia state legislative plans meets neither criterion.²⁹⁰

To establish that this ruling would condone abusive districting practices that are applied consistently, it must first be shown that protection of incumbents is such a practice. Incumbent protection, whether merely preventing incumbents from running against one another or giving them further advantages,²⁹¹ makes elections discriminatory by favoring a

289. See *Larios I*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004) (invalidating a reapportionment plan presenting an overall deviation range of less than 10% because of, *inter alia*, partisan advantage).

290. *Larios I*, 300 F. Supp. 2d at 1329, 1338.

291. With some exceptions, state redistricting authorities and courts do not specifically list all the advantages afforded to incumbents. As far as we are aware, one such exception is incumbents being exempted from running against one another in the same

particular group of candidates for this election on the basis of the votes they won in the last one. Whether that cartel includes only one or both sides of the aisle does not change the fact that it discriminates against challengers and the voters who support them. By giving some candidates a better chance to win, whether by devaluing some citizens' votes or by removing their preferred candidate, incumbent protection violates one-person, one-vote, which the Supreme Court is obligated to protect.²⁹²

To see why incumbent protection is discriminatory regardless of partisanship, consider a species of incumbent protection occurring in an environment that effectively eliminates partisan manipulation: primary elections. In 2000, future Democratic Representative Hakeem Jeffries challenged Roger Green, an incumbent New York Assemblyman of 19 years, for Green's seat in District 57.²⁹³ Although Jeffries lost, he won 41% of the vote in an "unusually impressive showing for a political novice,"²⁹⁴ causing him to run again.²⁹⁵ However, the redistricting that occurred before the 2002 election, among other changes, removed Jeffries' home from District 57, which, according to Jeffries, left him "in disbelief" and his supporters "surprised to find that they no longer lived in the assembly district that they had been living in for years, if not decades."²⁹⁶

We argue that incumbent protection, regardless of the degree of partisanship or protection given to incumbents, violates one-person, one-vote by discriminating against certain candidates and voters. However, some may not believe that incumbent protection violates one-person, one-vote, even if they agree that it is discriminatory. Assume that a strong challenger announces her intent to run against an incumbent. The incumbent causes his district to be redrawn so that the strong challenger is removed from his district. If another challenger runs, one might argue that one-person, one-vote would not be violated despite the incumbent rigging the districting process, because anyone can still cast a ballot against the incumbent that weighs just as much as one cast by another voter. Some might go further and say that incumbent protection, regardless of variety, does not violate one-person, one-vote as long as it does not directly devalue a voter's ballot—even if redistricting allows incumbents to run

districts. *See infra* Section III.C.1. However, in practice, incumbents also seem to benefit by evading competitive challengers. *See infra* notes 293–296 and accompanying text.

292. *Rucho*, 139 S. Ct. at 2495–96.

293. Jonathan P. Hicks, *Rematch Produces Spirited Primary Race for Assembly Seat in Brooklyn*, N.Y. TIMES, July 22, 2002, at B3.

294. *Id.*

295. Jonathan P. Hicks, *In District Lines, Critics See Albany Protecting Its Own*, N.Y. TIMES (Nov. 2, 2004), <https://www.nytimes.com/2004/11/02/nyregion/in-district-lines-critics-see-albany-protecting-its-own.html> [<https://perma.cc/E8ZX-ZUUS>] (stating that districting barred Jeffries from running in District 57 in 2004, resulting in Green running unopposed in the primary).

296. GERRYMANDERING (Green Film Co. Oct. 15, 2010), at 13:20.

unopposed.²⁹⁷ The Supreme Court used the same reasoning in *Rucho* to rule that partisan gerrymandering does not violate one-person, one-vote.²⁹⁸

However, such an argument is a red herring, just like the Court’s claim in *Rucho* regarding partisan gerrymandering.²⁹⁹ Superficially satisfying individual quantitative tests of redistricting proposals, such as one-person, one-vote or equally populated districts, does not guarantee that a plan is constitutionally legitimate because those measures test for only a few of many signs that some ballots may be worth less than others; coughing is a common symptom of COVID-19, but not coughing is far from a guarantee that one is virus-free.³⁰⁰ This lesson, which seems to be lost on the *Rucho* majority, was one that the Supreme Court used to recognize—*Gaffney v. Cummings*³⁰¹ held in 1973 that “[a] districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed ‘to minimize or cancel out the voting strength of racial or political elements of the voting population.’”³⁰² In the same way, superficially giving each ballot the same value does not ensure one-person, one-vote if incumbent protection robs voters of the candidates they would have voted for.

Perhaps the strangest part of this reasoning is that, outside the context of redistricting law, circumventing one rule by breaking another is usually called cheating. Imagine that an unscrupulous Formula One racer attempts to illegally equip his car with a jet engine instead of a piston engine so as to easily outstrip his competitors.³⁰³ Upon being exposed and forced to

297. See, e.g., Hicks, *supra* note 295.

298. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501–02 (2019).

299. See *supra* Section II.A.2.

300. Melissa M. Arons, Kelly M. Hatfield, Sujan C. Reddy, Anne Kimball, Allison James, Jessica R. Jacobs, Joanne Taylor, Kevin Spicer, Ana C. Bardossy, Lisa P. Oakley, Sukarma Tanwar, Jonathan W. Dyal, Josh Hamey, Zeshan Chisty, Jeneita M. Bell, Mark Methner, Prabasaj Paul, Christina M. Carlson, Heather P. McLaughlin, Natalie Thornburg, Suxiang Tong, Azaibi Tamin, Ying Tao, Anna Uehara, Jennifer Harcourt, Shauna Clark, Claire Brostrom-Smith, Libby C. Page, Meagan Kay, James Lewis, Patty Montgomery, Nimalie D. Stone, Thomas A. Clark, Margaret A. Honein, Jeffrey S. Duchin & John A. Jernigan, *Presymptomatic SARS-CoV-2 Infections and Transmission in a Skilled Nursing Facility*, 382 NEW ENG. J. MED. 2081, 2082 (2020) (“Nursing staff assessed residents twice daily for possible . . . symptoms of Covid-19, including . . . cough A total of 6 residents tested positive; of these . . . 2 had been asymptomatic during the preceding 14 days.”).

301. 412 U.S. 735 (1973).

302. *Id.* at 751 (citations omitted).

303. See FED. AVIATION ADMIN., AIRPLANE FLYING HANDBOOK 15-2 (2016) (“One of the advantages of the jet engine over the piston engine is the jet engine’s capability of . . . greater . . . horsepower[.]”), https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/airplane_handbook/media/airplane_flying_handbook.pdf [<https://perma.cc/R637-9E9S>]. Of course, attaching a turbofan jet engine to a car is an exaggerated example for illustrative purposes.

revert to a piston engine, the racer finishes first, but by destroying his competitors' cars.³⁰⁴ In this example, ensuring a fair competition requires that all cars be built according to the same regulations *and* that no racers sabotage their competitors; having only one requirement is insufficient. If the unscrupulous racer is not punished, Formula One could not seriously claim to be a racing competition because the winners would no longer be the best racers, but instead the best saboteurs.³⁰⁵ In the real-world analogue of this hypothetical, seven-time world champion Michael Schumacher's former teams have been accused of using illegal parts in their cars,³⁰⁶ and Schumacher himself was stripped of his second-place standing in the 1997 Formula One season for willfully crashing into the car of a close competitor for the championship.³⁰⁷

As shown, *Larios* places excessive value on whether a districting criterion was applied consistently at the expense of evaluating whether that criterion is normatively valid, thereby condoning discriminatory criteria such as incumbent protection as long as both major parties profit more or less equally. However, the existing doctrine still has room to get worse. This so-called "consistency of application" approach, taken to its logical end, would allow courts not only to condone abusive districting criteria that are applied consistently but also to obstruct the use of valid criteria if applied inconsistently. Moreover, *Larios*'s choice of the word "consistent" makes coherent enforcement of this standard impractical because the ruling fails to specify just what degree of consistency is consistent enough.

The consistency of application approach logically requires judicial intervention against the usage of districting criteria that states consider to

304. Cf. Brad Spurgeon, *A Lingering Controversy Since 1994*, N.Y. TIMES (Mar. 13, 2015), <https://www.nytimes.com/2015/03/14/sports/autoracing/a-lingering-controversy-since-1994.html> [<https://perma.cc/5SG9-7LVZ>] (describing allegations of Michael Schumacher attempting to defeat competitors by deliberately crashing into their cars during races).

305. Cf. Tom Phillips, *Felipe Massa Believes Renault Cheats Cost Him Title*, GUARDIAN (Oct. 1, 2009, 17:57 EDT), <https://www.theguardian.com/sport/2009/oct/01/formula-one-felipe-massa-nelson-piquet-junior> [<https://perma.cc/FC3H-KFFQ>] (discussing a Formula One racer that contends that a deliberately caused crash, that was not punished at the time, cost him the 2008 championship).

306. Maurice Hamilton, *Motor Racing: United Dolours of Benetton Maurice Hamilton on the Cheating Storm Still Hovering over Michael Schumacher's Team*, GUARDIAN, July 31, 1994 (describing allegations of Benetton Formula using illegal launch control); Alan Baldwin, *Motor Racing: Seven F1 Teams Challenge Secret Ferrari Settlement*, REUTERS (Mar. 4, 2020, 5:34 AM), <https://www.reuters.com/article/us-motor-f1-ferrari/motor-racing-seven-f1-teams-challenge-secret-ferrari-settlement-idUSKBN20R1NE> [<https://perma.cc/5XXR-Q4Z7>] (describing a settlement reached by Scuderia Ferrari not disclosed to any other team following investigations into Ferrari's allegedly illegal engine used in 2019).

307. *Schumacher Loses Championship Runner-Up Crown*, BBC (Nov. 11, 1997, 13:36), <http://news.bbc.co.uk/2/hi/europe/29895.stm> [<https://perma.cc/P7CH-JHH6>].

be traditional by an overwhelming margin because many states apply them in an inconsistent, but not necessarily invalid, fashion. Consider the requirement that districts must consist of contiguous territory, which is required by 49 states and prohibited by none in state legislative districting.³⁰⁸ According to our database of districting law, states apply this criterion in at least three ways. Most states require only contiguity without more;³⁰⁹ some accept contiguity by water;³¹⁰ others say that “contiguity by water is acceptable to link territory within a district provided that there is a reasonable opportunity to access all parts of the district”³¹¹ Contiguity by water allows inconsistent application to districts depending on their adjacency to bodies of water,³¹² whereas contiguity by water depending on ease of access invites even more inconsistency at the districting authority’s discretion. If the existing doctrine is to avoid being a double standard, it must reject both incumbent protection and contiguity if applied inconsistently.

Some readers may not be concerned about the *Larios* ruling being used against legitimate redistricting criteria because, unlike incumbent protection, courts have not yet invalidated widely accepted criteria such as contiguity due to inconsistent application. However, this is not cause for absolution because it indicates two possibilities. First, this consistent application approach itself is not consistently applied.³¹³ Second, the consistent application approach tolerates a certain amount of inconsistency, so that contiguity is allowed but partisan incumbent protection is not, but courts have never articulated how much inconsistency is tolerable.³¹⁴ The first possibility would indicate that courts can enforce *Larios* selectively, depending on how palatable a particular redistricting criterion appears to a judge. The second possibility would indicate that litigants would not know if *Larios* was selectively enforced, if it ever were. Either way, *Larios*’ consistency of application approach

308. See SUMMARY DATABASE, *supra* note 30.

309. See, e.g., CAL. CONST. art. XXI, § 2(d)(3); N.Y. CONST. art. III, § 4(c)(3); TEX. CONST. art. III, § 25.

310. See, e.g., COMMITTEE RESOLUTION: 3RD CONGRESSIONAL DISTRICT CRITERIA, J. Reapportionment Comm., at III (Va. 2015), http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_congress_criteria_8-17-15.pdf [<https://perma.cc/9MZR-EK3Q>].

311. 2011 REDISTRICTING GUIDELINES, S. Judiciary Comm., at II, (S.C. 2011), <http://redistricting.scsenate.gov/Documents/RedistrictingGuidelinesAdopted041311.pdf> [<https://perma.cc/J4WG-XJH8>].

312. See *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002) (“[M]asses separated by water may nevertheless satisfy the contiguity requirement in certain circumstances. . . . [I]n today’s world of mass media and technology, [contiguous land access] is not necessary for communication . . . between such residents and their elected representative.”).

313. See *supra* Section II.C.1.

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

would undermine the “logic and symmetry of the law” that judges claim to value.³¹⁵

In fact, *Larios* would be not only harmful if enforced as intended but also be hard to enforce as intended, given the partisan nature of redistricting in the status quo. Recall that *Larios* would allow incumbent protection if it does not excessively favor a party.³¹⁶ However, bipartisan incumbent protection is effectively an oxymoron because most states redistrict through their legislatures,³¹⁷ and legislatures are designed to serve the majority party’s interests.³¹⁸ Although some scholars speak of cartels ostensibly meant to protect incumbents of both major parties,³¹⁹ the reality is that legislative districting is more likely to prefer copartisan to opposition incumbents³²⁰—especially because the Supreme Court recently refused to police partisan gerrymandering in *Rucho*.³²¹ For example, North Carolina requires “reasonable efforts” to ensure that its congressional delegation consists of ten Republicans and three Democrats.³²² In addition to locking in a discriminatory partisan ratio of incumbents, if any election returned, say, nine Republicans and four Democrats, this rule would guarantee that at least one Democratic incumbent gets less protection than Republicans do.

In sum, existing doctrinal guidance on the application of districting criteria represented by *Larios* and *Rucho* lacks a coherent logical basis, condones abusive criteria such as incumbent protection, and is also difficult to enforce as intended given the partisan nature of redistricting. The empirical definition, in contrast, neither condones discriminatory practices on the condition that everyone suffer from it nor depends on unpersuasive caveats to establish its constitutional basis. Part III.C presents this Article’s last category of corroboration by describing how we

315. Haines, *supra* note 18, at 842.

316. *Larios I*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga. 2004), *aff’d* 542 U.S. 947 (2004).

317. See SUMMARY DATABASE, *supra* note 30.

318. See GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 2 (1st ed. 1993) (“[T]he legislative process in general . . . is stacked in favor of majority party interests.”).

319. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 598 (2002) (“[I]f a legislative plan were to provide the two major political parties with reasonable prospects of achieving what they believed to be their appropriate shares of representation, what could be objectionable in such a coalition effort?”).

320. Cf. FRANCES E. LEE, INSECURE MAJORITIES 143, 158 (2016) (examining the causes of “more party-line voting” and “the growth in partisan conflict” in both chambers of Congress).

321. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019).

322. See 2016 CONTINGENT CONGRESSIONAL PLAN COMMITTEE ADOPTED CRITERIA, J. Select Comm. on Cong. Redistricting, at 1 (N.C. 2016), https://www.ncleg.gov/Files/GIS/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf [<https://perma.cc/E5WD-QAWF>].

interpreted various redistricting criteria and how they are used in practice by the states. The main purpose of these analyses is to show that the districting practices that the empirical definition deems abusive and nontraditional—such as partisan advantage, incumbent protection, preserving communities of interest, and preserving past district cores—would render elections systematically inequitable.

C. Interpretations of Various Districting Criteria

1. NONTRADITIONAL DISTRICTING CRITERIA

Preservation of communities of interest. We do not consider preserving communities of interest to be a traditional districting criterion pursuant to the empirical definition. The first and obvious reason for disqualification is that, in state legislative and congressional districting, fewer than twenty-six states require or allow it via constitutions, statutes, or legislative guidelines.³²³ However, we advance additional reasons that preserving communities of interest is not traditional. First, the requirement to preserve communities of interest often imposes a procedure instead of a substantively unambiguous districting principle. Second, the term is so open-ended that it can be used to justify abusive practices, such as partisan advantage or incumbent protection, just under a different label. For these reasons, we classify the communities of interest criterion as a procedural requirement, falling in the same category as rules deciding which part of a state government conducts redistricting.³²⁴ In contrast, what we call traditional criteria impose substantive requirements on districting, such as equally populated districts.

First, preserving communities of interest is not a traditional districting criterion because it frequently adds a procedural requirement to the redistricting process instead of a substantively unambiguous redistricting principle. Specifically, because of the indefinite nature of the term “communities of interest” and courts’ reluctance to define that term themselves,³²⁵ many states require redistricting authorities to obtain input from local residents as to what they consider their communities of interest to be. In contrast, every other districting criterion in our dataset imposes substantively unambiguous requirements on redistricting: for instance, that “no representative district shall have a population which exceeds that

323. See SUMMARY DATABASE, *supra* note 30.

324. See *id.*

325. See, e.g., *In re Legis. Districting of State*, 805 A.2d 292, 298 (Md. 2002) (“[I]t is not for the Court to define what a community of interest is and where its boundaries are, and it is not for the Court to determine which regions deserve special consideration and which do not.”).

of any other representative district by more than five percent.”³²⁶ Yet, scholars and judges routinely lump in preserving communities of interest with other more substantive criteria in the same “traditional” category.³²⁷ For illustration, consider the relevant legislative guidelines in the states of Alabama, Kansas, and Virginia, respectively:

The integrity of communities of interest shall be respected. . . . [A] community of interest is defined as an area with recognized similarities of interests, including but not limited to racial, ethnic, geographic, governmental, regional, social, cultural, partisan, or historic interests Public comment will be received by the Reapportionment Committee regarding the existence and importance of various communities of interest. The Reapportionment Committee will attempt to accommodate communities of interest identified by people in a specific location. . . . The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.³²⁸

Subject to the requirement of [equal population among districts] . . . [t]here should be recognition of similarities of interest. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation (generally termed “communities of interest”), should be considered. While some communities of interest lend themselves more readily than others to being embodied in legislative districts, the Committee will attempt to accommodate interests articulated by residents. . . . If possible, preserving the core of the existing districts should be undertaken when considering the “community of interests” in establishing districts.³²⁹

326. IOWA CODE § 42.4(1)(a) (2021).

327. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019); *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002); Fromer, *supra* note 209, at 1580; Stephanopoulos, *supra* note 209, at 806.

328. REAPPORTIONMENT COMMITTEE GUIDELINES FOR CONGRESSIONAL, LEGISLATIVE, AND STATE BOARD OF EDUCATION REDISTRICTING, Permanent J. Legis. Comm. on Reapportionment, at IV.7.b (Ala. 2011), <http://www.legislature.state.al.us/aliswww/reapportionment/Reapportionment%20Guidelines%20for%20Redistricting.pdf> [<https://perma.cc/Z76Z-LQEH>].

329. KAN. LEGIS. RSCH. DEP’T, GUIDELINES AND CRITERIA FOR 2012 KANSAS CONGRESSIONAL AND LEGISLATIVE REDISTRICTING (2012),

Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. Public comment has been invited, has been and continues to be received, and will be considered. . . . The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.³³⁰

All three states require redistricting authorities to consult residents on what their communities of interest are, but no state requires specific, substantive consequences upon redistricting as a result of such consultation. This is in contrast to any substantive criteria, both traditional and not, which do require particular results from districting. Consider incumbent protection. One may debate the level of protection (for example, putting incumbents in safe districts or prohibiting them from competing against one another), but no one can dispute what an incumbent is. As for preserving communities of interest, the only objectively discernible mandate in that criterion, as given above, is to solicit input. Hence, we consider this procedural criterion to be neither traditional nor the same as substantive criteria. If the empirical definition considered the communities of interest criterion to be traditional, it would have to put the same label on other procedural elements, such as the entity mainly responsible for districting. Most states redistrict through their legislatures,³³¹ but it would be plainly unreasonable to make all other states follow suit because of that reason.

Second, preserving communities of interest is neither substantive nor traditional because the term is so open-ended that it can justify abusive districting practices after the fact. Although scholars have long recognized

http://www.kslegislature.org/li_2012/b2011_12/committees/misc/ctte_h_redist_1_20120109_01_other.pdf [<https://perma.cc/MVB3-RZWF>].

330. H. COMM. ON PRIVILEGES & ELECTIONS, COMMITTEE RESOLUTION No. 1: HOUSE OF DELEGATES DISTRICT CRITERIA, at V (Va. 2011), http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_House_criteria_3-25-11.pdf [<https://perma.cc/8SET-6XPT>].

331. See SUMMARY DATABASE, *supra* note 30 and accompanying text.

the “vague,”³³² “diversely defined,”³³³ and even “meaningless”³³⁴ nature of that term, they have been notably quiet on its potential for abuse. Virginia, for example, allows communities of interest to be defined by “political beliefs” or “voting trends,”³³⁵ which could allow legislators to justify partisan redistricting under a different name. The fact that some states claim to exclude partisanship in determining communities of interest³³⁶ may not reduce the likelihood of abuse because what is, in fact, a community of interest held together by partisanship could easily be presented as being based on any of the many other justifying factors, such as “social, economic, historic, transportation, and cultural ties.”³³⁷ Although we are not aware of litigation alleging such abuse as of the publication of this Article, the risk of such abuse is more than speculative. Consider testimony given in a public proceeding in Arizona convened to solicit residents’ input on what the local communities of interest look like:

It is a false dichotomy to say that competition and communities of interest undermine each other. The origins of the concept of community of interest come from 20 or 30 years ago when commissions and legislatures all over the country and the Department of Justice were trying to say people of like interests should be able to vote together. Farmers with farmers, students with students. Unfortunately[,] it’s misused, communities of interest, now as a front. People will create astroturf groups to come forward and tell you this is our community of interest. And I’ve already seen it tonight. You’ll see more of it when the maps come out. *They’ll say this is our community of interest when what is really happening behind the scenes is some legislator or*

332. Andrew J. Clarkowski, *Shaw v. Reno and Formal Districting Criteria: A Short History of a Jurisprudence That Failed in Wisconsin*, 1995 WIS. L. REV. 271, 296.

333. Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 32 (1985).

334. Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 663 (1993).

335. See *supra* note 330 and accompanying text; see also Sarah J. Eckman, *Apportionment and Redistricting Process for the U.S. House of Representatives*, CONG. RSCH. SERV., R45951, at 14 (Oct. 10, 2019), <https://fas.org/sgp/crs/misc/R45951.pdf> [<https://perma.cc/T5F3-BGFV>] (“People within a community of interest generally have . . . common interests These recognized similarities may be due to shared social, cultural . . . partisan, or economic factors.”).

336. See, e.g., CAL. CONST. art. XXI, § 2(d)(4); MICH. CONST. art. 4, § 6(13)(c).

337. IDAHO’S CITIZEN COMMISSION FOR REAPPORTIONMENT, COEUR D’ALENE PUBLIC MEETING, 2 (2011), https://legislature.idaho.gov/wp-content/uploads/redistricting/2011/redistricting_0622_cdamin.pdf [<https://perma.cc/8WJ6-PMLM>].

*congressman is trying to protect their own power base, protect their own seat.*³³⁸

Clearly, this testimony alone is insufficient evidence as to whether party operatives or legislative aides masqueraded as unbiased locals to unduly influence states' determination of "communities of interest." However, it is sufficient evidence to show that partisans or incumbents *could* easily engage in such abuse. For the foregoing reasons, we consider preserving communities of interest to be neither substantive nor traditional regardless of the number of states endorsing the criterion, even though fewer than 26 states legislatively require or allow it in redistricting.

Preservation of past district cores. Preserving past district cores refers to keeping each of the previously enacted plan's districts intact as much as possible in a new districting plan. Each new district would be as similar as possible to its geographically corresponding district under the previously enacted plan, thus minimizing any boundary changes.³³⁹ Of course, preserving past district cores effectively perpetuates any biases that were present in the drawing of the previously enacted plan. If the previous plan was drawn to favor a political party, then preserving these districts' cores would perpetuate the same partisan bias in the new plan.

Only six states require preserving past district cores, and two additional states allow the practice. For example, Nebraska's legislature passed a legislative resolution in 2011 requiring "the preservation of the cores of prior districts" in the drawing of congressional districts.³⁴⁰ Oklahoma's state house adopted similar guidelines, stating that the state's restricting authority may "preserve the core of existing districts" in the drawing of state legislative and congressional districts.³⁴¹ However, the other 42 states are silent on the permissibility of preserving past district cores. Because fewer than 26 states allow or require this criterion, preserving past district cores is not traditional pursuant to the empirical definition.

Although the fact that fewer than ten states require or allow the preserving of past district cores alone is enough to not treat that criterion as traditional, there is yet another, qualitative reason: preserving past

338. ARIZ. INDEP. REDISTRICTING COMM'N, PROCEEDINGS, 98–99 (2011), <https://azredistricting.org/docs/Meeting-Info/Transcript-080511.pdf> [<https://perma.cc/L2YP-HPRA>] (emphasis added).

339. See *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 457 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004).

340. Legis. Res. 102, 102nd Leg., 1st Sess., at 3 (Neb. 2011), <https://nebraskalegislature.gov/FloorDocs/102/PDF/Intro/LR102.pdf> [<https://perma.cc/2GEH-N7WC>].

341. HOUSE REDISTRICTING COMM., 2011 REDISTRICTING COMMITTEE GUIDELINES FOR REDISTRICTING, H.R. 53, § 5 (Okla. 2011), <https://www.okhouse.gov/research/2011RedistrictingGuidelines-FINAL.pdf> [<https://perma.cc/AV3Z-7EKH>].

district cores is defined so as to not be a rational state policy. Recall that the Supreme Court presents traditional districting criteria as rational policy goals that may justify minor deviations from equal population,³⁴² and that we use the same framework to reinforce the theoretical basis of the empirical definition.³⁴³ However, the plain text of that requirement alone may seem insufficient to determine whether it may be a legitimate state policy, because seven of the eight states that allow or require the preserving of past district cores say nothing about what that should look like in practice.³⁴⁴ As for the eighth, Arkansas states that “the map makers can take into account the existing districts, their geographic location, and the current population.”³⁴⁵ Indeed, even when preserving district cores is an explicit consideration, actual redistricting plans have preserved anywhere from less than 18% to more than 90% of past districts.³⁴⁶

However, determining whether the preservation of past district cores can be a legitimate state policy objective becomes an easier task when one interprets that requirement as to simply “minimize changes” to the current districting plan.³⁴⁷ According to this interpretation, preserving past district cores can mean at least two things, depending on how highly it is prioritized in the redistricting process. First, a redistricting authority might prioritize district preservation enough to unduly subordinate it to traditional criteria, such as equal population. Second, the authority might preserve past district cores only if doing so would not sacrifice traditional criteria to any degree. If the first interpretation is correct, preservation of past district cores should not be deemed traditional because creating population deviations to preserve past districts would defeat the very purpose of redistricting: to redraw electoral districts in response to population changes. If the second interpretation is correct, preserving districts would be a tautological or toothless requirement that means “make any necessary changes, but don’t make any unnecessary ones.”

Reality seems to reflect parts of both interpretations. Redistricting authorities do not baldly admit to prioritizing past district preservation

342. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

343. *See supra* Section II.C.1 and Part III.A.

344. *See, e.g.*, OHIO CONST. art. XI, § 7; N.Y. CONST. art. III, § 4(c)(5); *see also supra* note 30 and accompanying text.

345. *See* ARKANSAS BOARD OF APPORTIONMENT, *supra* note 69.

346. *Larios I*, 300 F. Supp. 2d 1320, 1334 (N.D. Ga. 2004); *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928216, at *15 (E.D.N.Y. Mar. 12, 2012), *adopted as modified*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012).

347. *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1112 (E.D. Cal. 2018) (“Defendants . . . argue that Kern County has for decades adhered to a broader principle that new district maps should maintain the core of existing districts and minimize changes.”).

over all other objectives,³⁴⁸ but they also do not plausibly defend the practice of preserving past district cores while ostensibly engaged in the process of redrawing those districts to accurately reflect population changes. For example, some state and local authorities claim that preserving past district cores is in service of maintaining “continuity of representation”;³⁴⁹ that is, “preserv[ing] relationships between elected officials and their constituents over time.”³⁵⁰ We submit that the only legitimate indicator of how long a relationship between elected officials and voters should last is the length of their term, not districts drawn to extend the careers of politicians who would otherwise have been thrown out.

As for the second interpretation, preserving past district cores appears neither completely toothless nor meaningful because that criterion seems to affect redistricting outcomes³⁵¹ but also appears to be used as a front to justify a different objective. Many scholars have noted that preserving past district cores often protects incumbents by preserving their power base.³⁵² At any rate, we consider neither the preservation of past district cores for its own sake, nor doing so for the ulterior motive of protecting incumbents, to be a rational state policy.³⁵³ As such, we do not consider that criterion to be a traditional districting principle.

Partisan advantage. In legislative and congressional districting, partisan advantage refers to drawing district lines with the intent to achieve a certain political or partisan outcome, either within a single district or across multiple districts in a districting plan.³⁵⁴ Colloquially, this practice is called partisan gerrymandering.³⁵⁵ Although allegations of partisan gerrymandering abound throughout the history of legislative and

348. See, e.g., Brief of Appellees Miller, Howard, and Massey at *36–37, *Abrams v. Johnson*, 521 U.S. 74 (1997) (Nos. 95-1425, 95-1460), 1996 WL 528369 (defending the challenged districting plan as presenting only “slight” deviations from “absolute population equality” and stating that it presented the lowest deviation among any of the constitutionally viable alternative districting plans).

349. See *supra* note 69 and accompanying text.

350. *Luna*, 291 F. Supp. 3d at 1112 (“These principles, defendants contend, help preserve relationships between elected officials and their constituents over time.”).

351. See, e.g., *Stone v. Hechler*, 782 F. Supp. 1116, 1126–27 (N.D. W. Va. 1992) (ruling that the eventually adopted districting plan “better preserves the cores of prior districts than any of the sixteen viable [p]lans”).

352. See, e.g., Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1161 (2005) (“[P]reserving district cores or configurations inadvertently is often a decision in favor of preserving safe seats for incumbents.”).

353. See *supra* Part III.B.

354. See Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantages Is Unconstitutional*, 24 WM. & MARY BILL OF RTS. J. 1107, 1108, 1138 (2016).

355. See *id.* at 1137, 1151.

congressional districting in the United States,³⁵⁶ state constitutions and redistricting statutes rarely, if ever, openly endorse the practice.

In fact, the most common mentions of partisan considerations in districting laws are explicit prohibitions against the practice of partisan gerrymandering. For example, Article III, Section 21 of Florida's Constitution, as approved by ballot initiative in November 2010, states that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent[.]"³⁵⁷ California's Voters First Act, approved by ballot initiative in November 2008, amended California's Constitution to include a similar prohibition on partisan gerrymandering: "[d]istricts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party."³⁵⁸ In state legislative districting, 17 states prohibit the pursuit of partisan advantage, and 14 prohibit it in congressional districting.

In contrast, only a single state has adopted an endorsement of partisan gerrymandering in its districting practices. North Carolina's General Assembly conducted a mid-decade redrawing of both its congressional districts in 2016 and its state legislative districts in 2017, after the previous plans were struck down in *Harris v. McCrory*³⁵⁹ and *Covington v. North Carolina*.³⁶⁰ Prior to redrawing the congressional plan in 2016, the General Assembly's Joint Select Committee on Congressional Redistricting passed the "2016 Contingent Congressional Plan Committee Adopted Criteria" to outline the set of criteria the General Assembly would use, which requires maintaining the "current partisan makeup of North Carolina's congressional delegation[.]"³⁶¹ In state legislative districting, "[p]olitical considerations and election results data may be used."³⁶²

The unusual nature of North Carolina's explicit approval of partisanship in its districting criteria underscores the non-traditional nature

356. See *Vieth v. Jubelirer*, 541 U.S. 267, 274–75 (2004) (tracing political gerrymandering back to the beginning of the 18th century).

357. FLA. CONST. art. III, § 21(a).

358. CAL. CONST. art. XXI, § 2(e).

359. *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

360. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

361. See J. SELECT COMM. ON CONG. REDISTRICTING, 2016 CONTINGENT CONGRESSIONAL PLAN COMMITTEE ADOPTED CRITERIA, 2016 Leg., 151st Sess. (N.C. 2016), https://www.ncleg.gov/Files/GIS/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf [<https://perma.cc/E5WD-QAWF>].

362. N.C. H. & S. REDISTRICTING COMMS., 2017 HOUSE & SENATE PLANS CRITERIA, ADOPTED BY NORTH CAROLINA HOUSE AND SENATE REDISTRICTING COMMITTEES, 2017 Leg., 152nd Sess. 1 (N.C. 2017), https://www.dropbox.com/s/79092edav03alh3/NC_2017-08-10_2017HouseSenatePlanCriteria.pdf?dl=0 [<https://perma.cc/QM5X-J4XG>].

of partisan criteria in redistricting laws. The fact that the North Carolina State Legislature attempted to mandate a partisan Republican advantage in its districting does not make partisanship a traditional principle. Instead, North Carolina's use of partisan criteria is far outweighed by the 14 other states that explicitly prohibit partisan goals in districting, leading us to conclude that partisan advantage is not a traditional districting criterion.

Incumbent protection. Incumbent protection refers to the drawing of district boundaries so as to advantage incumbent legislators electorally. In general, the very few states that mandate incumbent protection as a districting criterion simply require the redistricting authority to avoid placing multiple incumbent legislators into the same electoral district when drawing new district lines. For example, Georgia's "Guidelines for the House Legislative and Congressional Reapportionment Committee" stipulate that "[e]fforts should be made to avoid the unnecessary pairing of incumbents."³⁶³ Alabama's reapportionment guidelines similarly require the protection of incumbents by avoiding incumbent pairings: "[c]ontests between incumbent members of the Legislature . . . or of the Congress will be avoided whenever possible."³⁶⁴

Notably, states that require incumbent protection in state legislative or congressional districting—Alabama, Kansas, North Carolina, and Vermont—do not specify any requirements beyond avoiding pairing incumbents.³⁶⁵ These states do not, for example, require incumbents' districts to be drawn with a partisan composition that heavily favors the incumbent's party. Instead, the only specific requirement articulated by these states relates to incumbent pairings.³⁶⁶ In a related context, seven

363. GA. H. COMM., 2011–2012 GUIDELINES FOR THE HOUSE LEGISLATIVE AND CONGRESSIONAL REAPPORTIONMENT COMMITTEE, 2011 Leg., 151st Sess. III.A.8 (Ga. 2011), <https://www.dropbox.com/s/2egd5vpo0djzqt5/GeorgiaHouseCommitteeGuidelines2011-12.pdf> [<https://perma.cc/J8XB-QGYB>].

364. REAPPORTIONMENT COMMITTEE GUIDELINES FOR CONGRESSIONAL, LEGISLATIVE, AND STATE BOARD OF EDUCATION REDISTRICTING, Permanent J. Legis. Comm. on Reapportionment, at IV.7.A (Ala. 2011), <http://www.legislature.state.al.us/aliswww/reapportionment/Reapportionment%20Guidelines%20for%20Redistricting.pdf> [<https://perma.cc/Z76Z-LQEH>].

365. The fact that a state specifies how incumbent protection is to be granted—for example, by avoiding incumbent pairings—does not mean that only that type of incumbent protection will occur in practice: a hypothetical incumbent who intentionally redrew a district to remove a challenger might ostensibly cite a different purpose. *Cf.* Hicks, *supra* note 293 (discussing state representative Roger L. Green's response to accusations of redistricting a challenger out of his district, claiming that the redistricting was intended to make room for more public housing).

366. *See* REAPPORTIONMENT COMMITTEE GUIDELINES FOR CONGRESSIONAL, LEGISLATIVE, AND STATE BOARD OF EDUCATION REDISTRICTING, Permanent J. Legis. Comm. on Reapportionment, at IV.7.A (Ala. 2011), <http://www.legislature.state.al.us/aliswww/reapportionment/Reapportionment%20Guidelines%20for%20Redistricting.pdf> [<https://perma.cc/Z76Z-LQEH>]; KAN. LEGIS. RSCH.

states allow, without requiring, the protection of incumbents in state legislative redistricting.³⁶⁷ Five states allow the consideration in congressional redistricting.³⁶⁸ Overall, a total of ten states either require or allow incumbency protection in state legislative redistricting, and seven states either require or allow it in congressional redistricting.³⁶⁹ Because the number of states that require or allow incumbent protection constitutes only a fifth of the states at most, we do not consider the protection of incumbents to be a traditional districting principle.

Moreover, these few states that allow or require incumbent protection are outweighed by the larger number of states that explicitly prohibit the protection of incumbents in districting. For example, Arizona's Constitution states that "[t]he places of residence of incumbents or candidates shall not be identified or considered."³⁷⁰ Montana also prohibits the consideration of incumbency in redistricting: "A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress."³⁷¹ In state legislative redistricting, 15 states in total prohibit incumbent protection as a criterion,³⁷² while 14 prohibit it in congressional redistricting.³⁷³ Over a quarter of the states explicitly prohibit incumbency protection, thus supporting our conclusion that incumbent protection is not a traditional districting principle.

Competitiveness. A small number of states require districting plans to promote electoral competitiveness without always consistently and clearly defining competitiveness. For example, Arizona requires that "[t]o the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals[,]"³⁷⁴ but does not define how competitiveness is to be measured. In contrast, Missouri not only requires competitiveness but also defines a competitive district as one in which "parties' legislative representation shall be substantially and

DEP'T, GUIDELINES AND CRITERIA FOR 2012 KANSAS CONGRESSIONAL AND LEGISLATIVE REDISTRICTING, at 4(e) (2012), http://www.kslegislature.org/li_2012/b2011_12/committees/misc/ctte_h_redist_1_20120109_01_other.pdf [<https://perma.cc/MVB3-RZWF>]; see also N.C. H. & S. REDISTRICTING COMMS., 2017 HOUSE & SENATE PLANS CRITERIA, ADOPTED BY NORTH CAROLINA HOUSE AND SENATE REDISTRICTING COMMITTEES, 2017 Leg., 152nd Sess. 1 (N.C. 2017), https://www.dropbox.com/s/79092edav03alh3/NC_2017-08-10_2017HouseSenatePlanCriteria.pdf?dl=0 [<https://perma.cc/QM5X-J4XG>]; VT. STAT. ANN. tit. 17, §§ 1906b(c)(4), 1906c(c)(4).

367. See SUMMARY DATABASE, *supra* note 30.

368. *Id.*

369. *Id.*

370. ARIZ. CONST. art. IV, pt. II § 1 (15).

371. MONT. CODE ANN. § 5-1-115(3) (West 2019).

372. See SUMMARY DATABASE, *supra* note 30.

373. *Id.*

374. ARIZ. CONST. art. IV, pt. II § 1 (14) (f).

similarly responsive to shifts in the electorate's preferences."³⁷⁵ Furthermore, the Missouri Constitution even outlines a specific formula and a set of past elections to be used for measuring competitiveness, and it defines a competitive districting plan as one in which both of the two major political parties have a similar ratio of wasted votes.³⁷⁶

However, these constitutional mandates in Arizona and Missouri are the exception to the norm. Only five states mandate competitiveness in state legislative redistricting,³⁷⁷ and four states mandate it in congressional redistricting.³⁷⁸ All others are silent on this criterion. Because only a tenth of the states require or permit consideration of district competitiveness at most, we conclude that it is not a traditional districting principle.

Preservation of precinct boundaries. Precincts, sometimes also referred to as voting districts or election districts,³⁷⁹ are generally the "smallest geographic unit" at which elections are administered and election results are reported.³⁸⁰ The fundamental difference between precincts and other political subdivisions, such as counties and municipalities, is that precincts are generally drawn by election commissions purely for purposes of election administration.³⁸¹ In contrast to counties and municipalities, precincts usually do not perform any other governmental function besides their use in election administration, nor do they have their own governing bodies.³⁸² Moreover, because precincts are used primarily for election administration, precinct lines tend to change more frequently and significantly than county or city borders do.³⁸³

As a result, it is not surprising that state laws and constitutions do not treat precincts in the same way that they treat county, city, or other

375. MO. CONST. art. III, § 3(b)(5).

376. *Id.*

377. See SUMMARY DATABASE, *supra* note 30.

378. *Id.*

379. *Covington v. North Carolina*, 316 F.R.D. 117, 135–36 n.18 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (ruling that voter tabulation districts and precincts are "essentially synonymous" for the purposes of adjudicating challenges to redistricting plans).

380. See *Benisek v. Lamone*, 266 F. Supp. 3d 799, 824 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942 (2018).

381. See Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 133, 140 (2006) ("[p]recincts were . . . created to make voting easier for voters . . .").

382. See, e.g., Lauren Watts, *Reexamining Crawford: Poll Worker Error as a Burden on Voters*, 89 WASH. L. REV. 175, 200 n.213 (2014) (In Indiana, a "precinct election official is a type of poll worker. . . . [A] precinct election official is appointed for the sole purpose of serving voters on Election Day.").

383. See Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 222 (2019) ("Voting precinct boundaries . . . are frequently changed by state legislatures, by local election administrators, or by both.").

administrative boundaries. Specifically, in both congressional and state legislative districting, only nine of the 50 states require the preservation of precinct boundaries.³⁸⁴ No states prohibit the practice, but the vast majority of states are silent regarding the importance of following precinct boundaries. For this reason, we do not find strong evidence that the consideration of precinct boundaries is a traditional districting criterion.

2. TRADITIONAL DISTRICTING CRITERIA

Equal population. Congress first mandated the principle of equal population in redistricting in 1872, calling for Members of the U.S. House of Representatives to be elected from single-member districts “containing as nearly as practicable an equal number of inhabitants[.]”³⁸⁵ Currently, state requirements for equal population require either that single-member districts be equally populated or that multi-member districting plans consist of districts with equal ratios of population to legislators.

In addition to states’ own equal population requirements, federal courts have enforced this redistricting criterion since *Baker v. Carr*,³⁸⁶ in which the Supreme Court ruled that Equal Protection Clause challenges against malapportioned legislative districting are justiciable.³⁸⁷ The Court subsequently held that congressional districts³⁸⁸ and state legislative districts³⁸⁹ must comply with equal population requirements. As to the precise level of population equality required in districting plans, the Court has articulated that congressional districts must be drawn “as nearly as practicable to population equality,”³⁹⁰ while state legislative districting plans may have maximum population deviations of up to 10% without creating a “prima facie case of invidious discrimination under the Fourteenth Amendment[.]”³⁹¹

States’ own requirements regarding population equality are in some instances more stringent than the 10% standard articulated in *Brown v. Thomson*.³⁹² For example, Iowa requires by statute that “no representative district shall have a population which exceeds that of any other representative district by more than five percent.”³⁹³ Montana imposes an

384. See SUMMARY DATABASE, *supra* note 30.

385. Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28 (current version at 2 U.S.C. § 2c (1994)), <https://www.loc.gov/law/help/statutes-at-large/42nd-congress/session-2/c42s2ch11.pdf> [<https://perma.cc/FE6A-85JH>].

386. 369 U.S. 186 (1962).

387. *Id.* at 228.

388. *Wesberry v. Sanders*, 376 U.S. 1, 19 (1964).

389. *Reynolds v. Sims*, 377 U.S. 533, 569, 579 (1964).

390. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

391. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

392. *Id.* at 836.

393. IOWA CODE ANN. § 42.4(1)(a) (West 2020).

even more stringent standard, requiring that state legislative districts be “within a plus or minus 1% relative deviation from the ideal population of a district[.]”³⁹⁴ Likewise, the vast majority of states have articulated a population equality requirement of some sort in their constitutions, statutes, or legislative guidelines. Specifically, 49 states have mandated population equality in the drawing of state legislative districts, and 29 require population equality in congressional redistricting.³⁹⁵ Because most states require population equality and none prohibits the criterion, we characterize population equality as a traditional districting criterion.

Contiguity. The criterion of geographic contiguity in redistricting was first mandated by Congress in the Apportionment Act of June 25, 1842, which directed that Members of the U.S. House of Representatives be elected from single-member congressional districts “composed of contiguous territory[.]”³⁹⁶ Today, almost all states require contiguity in redistricting. Specifically, 49 states mandate contiguity in the drawing of state legislative districts,³⁹⁷ and 29 states similarly require contiguity in congressional districting.³⁹⁸ Because most states require contiguity and none prohibits it, we treat contiguity as a traditional districting criterion.

Though there is little variation in how states define contiguity, a small minority of states specify the conditions under which contiguity across water is sufficient to satisfy the contiguity requirement. Tennessee and Virginia, for example, specify that “contiguity by water is sufficient,”³⁹⁹ and South Carolina states that “[c]ontiguity by water is acceptable to link territory within a district provided that there is a reasonable opportunity to access all parts of the district and the linkage is designed to meet the other criteria stated herein.”⁴⁰⁰ This last variety, like the preservation of communities of requirement, may be abused to achieve other districting goals. It is difficult to see why contiguity by water should be granted to some districts but not to others, if not for an ulterior motive: water is unlikely to obstruct election officials’ access to any part of South Carolina

394. MONT. CODE ANN. § 5-1-115(2)(a) (West 2019).

395. See SUMMARY DATABASE, *supra* note 30 and accompanying text.

396. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, 491 (current version at 2 U.S.C. § 2c (1994)), <https://www.loc.gov/law/help/statutes-at-large/27th-congress/session-2/c27s2ch47.pdf> [<https://perma.cc/BN87-MU5T>].

397. See SUMMARY DATABASE, *supra* note 30.

398. *Id.*

399. TENN. CODE ANN. §§ 3-1-102(e), 3-1-103(b)(4) (West 2020); see also JOINT REAPPORTIONMENT COMMITTEE, COMMITTEE RESOLUTION: 3D CONGRESSIONAL DISTRICT CRITERIA, 2015 Leg., 114th Sess. 1 (Aug. 17, 2015), http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_congress_criteria_8-17-15.pdf [<https://perma.cc/9MZR-EK3Q>].

400. See 2011 REDISTRICTING GUIDELINES, S. Judiciary Comm., at III.F, (S.C. 2011), <http://redistricting.scsenate.gov/Documents/RedistrictingGuidelinesAdopted041311.pdf> [<https://perma.cc/J4WG-XJH8>]

absent a natural disaster, given that the state's largest body of water is Lake Marion and that even its "most seaward" island is connected to the rest of the state by bridge.⁴⁰¹

Compactness. The principle of geographic compactness in redistricting was articulated in the Apportionment Act of 1901, which required Members of the U.S. House of Representatives to be elected from single-member districts consisting of "compact territory."⁴⁰² More recently, the Supreme Court has employed compactness as a test to determine whether a districting plan violates the Fourteenth Amendment or the Voting Rights Act. *Thornburg v. Gingles*⁴⁰³ held that plaintiffs alleging that a multimember districting plan dilutes the votes of racial minorities must first prove that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district."⁴⁰⁴ *Shaw I* applied strict scrutiny to North Carolina's 12th congressional district because the district was so "unusually shaped" and "bizarre" that it was "unexplainable on grounds other than race."⁴⁰⁵ Although the Court did not suggest that a non-compact district is inherently unlawful, it still used geographic compactness as a tool to identify unlawful districts because compactness is a "traditional districting principle[.]" as *Shaw* noted.⁴⁰⁶

The precise quantitative metric to be used in measuring district compactness is generally not specified in state constitutions or redistricting statutes. The vast majority of states have articulated geographic compactness as a districting criterion,⁴⁰⁷ but most of these states simply have a broad pronouncement about the importance of prioritizing compactness in the drawing of districts. Articles VII and VIII of Rhode Island's Constitution, for example, mandate that state house and senate districts be drawn "as compact in territory as possible."⁴⁰⁸ Most other states also have similar broadly worded pronouncements regarding compactness. Only a handful of states have prescribed a specific

401. See ROBERT C. CLARK & TOM POLAND, 2 REFLECTIONS OF SOUTH CAROLINA 224 (2014); PAGE PUTNAM MILLER, FRIPP ISLAND: A HISTORY 33 (2006); MELISSA WATSON, CAMPING SOUTH CAROLINA: A COMPREHENSIVE GUIDE TO PUBLIC TENT AND RV CAMPGROUNDS 72 (2014); see also *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002) (ruling that bodies of water do not make communication or elections meaningfully difficult in the contemporary world).

402. Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734 (current version at 2 U.S.C. § 2c (1994)), <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/31/STATUTE-31-Pg733a.pdf> [<https://perma.cc/N5NJ-GYF9>].

403. 478 U.S. 30 (1986).

404. *Id.* at 38.

405. *Shaw v. Reno*, 509 U.S. 630, 631, 635 (1993).

406. *Id.* at 647.

407. *Thornburg*, 478 U.S. at 38.

408. R.I. CONST. art. VII, § 1; R.I. CONST. art. VIII, § 1.

quantitative measurement of district compactness. For example, Iowa and Montana require that “the compactness of a district is greatest when the length of the district and the width of a district are equal.”⁴⁰⁹

Overall, 38 states require compactness in the drawing of state legislative districts, and 26 states require it in the drawing of congressional districts. No state prohibits the consideration of compactness. Contrary to the specific nature of population equality requirements, these state mandates generally do not identify a minimum threshold level that satisfies the compactness requirement. Instead, states generally require compactness to be prioritized as much as possible. While most states do not specify the precise metric or method to be used to measure geographic compactness, a few states do require specific quantitative measurements of compactness to be used in evaluating districts.⁴¹⁰ Because most states require geographic compactness in redistricting and no states prohibit it, we characterize compactness as a traditional redistricting criterion.

Preservation of county and municipal boundaries. The Supreme Court has long recognized that traditional districting criteria include “respect for political subdivisions.”⁴¹¹ Specifically, the Court noted in *Davis v. Mann*⁴¹² that there is “a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines[.]”⁴¹³ In *Mahan v. Howell*, the Court held that the Virginia General Assembly’s goal of avoiding the fragmentation of political subdivisions, including counties, cities, and towns, was a “rational” objective justifying the minor population deviations in the state’s legislative districts.⁴¹⁴ Similarly, *Gaffney v. Cummings* held that the Connecticut Constitution’s requirement of preserving town boundaries was a rational state policy that justified minor population deviations in state house and senate districts.⁴¹⁵

Moreover, prior to the Court’s reapportionment revolution in the 1960s, many states had historically apportioned state legislative districts primarily on the basis of counties. Under the reapportionment scheme challenged in *Baker*, for example, the Tennessee Constitution allocated a variable number of state representative and senate seats to each county, and no county could be split up into multiple legislative districts.⁴¹⁶ Similarly, under the system struck down in *Reynolds v. Sims*,⁴¹⁷ Alabama’s Constitution arranged for each county to elect one senator each; thus,

409. IOWA CODE ANN. § 42.4(4)(a) (West 2020); MONT. CODE ANN. § 5-1-115(2)(d) (West 2019).

410. *Thornburg*, 478 U.S. at 38.

411. *Shaw I*, 509 U.S. at 647.

412. 377 U.S. 678 (1964).

413. *Id.* at 686.

414. 410 U.S. 315, 328, *modified*, 411 U.S. 922 (1973).

415. 412 U.S. 735, 742 (1973).

416. *Baker v. Carr*, 369 U.S. 186, 189 (1962).

417. 377 U.S. 533 (1964).

counties were the sole basis for legislative districts, regardless of its population.⁴¹⁸ Hence, not only have states historically used political subdivisions in drawing legislative districts, but the Court has also explicitly acknowledged that traditional districting criteria include avoiding the splitting of these political subdivisions.

Currently, many states require following county and city boundaries without specifying when exceptions are permitted. For example, West Virginia simply requires state senate districts to be “bounded by county lines[.]”⁴¹⁹ However, some states that require preserving county and city boundaries allow exceptions only if necessary for complying with other traditional criteria. For example, New Jersey law states that “[u]nless necessary to meet the foregoing requirements [population equality, compactness, and contiguity], no county or municipality shall be divided among Assembly districts”⁴²⁰ Pennsylvania’s Constitution specifies that “[u]nless absolutely necessary, no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.”⁴²¹ These examples illustrate the pattern that states sometimes allow districts to deviate from county and city boundaries when necessary to comply with another traditional districting criterion.

Overall, our analysis of redistricting laws across the 50 states confirms that traditional districting criteria include adherence both to county and city boundaries. First, we find that 39 states have an explicit requirement to follow county boundaries when drawing state legislative districts.⁴²² Meanwhile, 27 states require following county boundaries in drawing congressional districts.⁴²³ No state prohibits the consideration of county boundaries. Because a majority of states explicitly require the preservation of county boundaries in districting, we characterize the consideration of county boundaries as a traditional redistricting criterion.

With respect to municipal boundaries, we find a similar pattern among the states. For state legislative districts, 33 states require the preservation of municipal boundaries, two additional states allow for the consideration of municipal boundaries, and no states prohibit the practice.⁴²⁴ As a majority of the states require the criterion in state legislative districting⁴²⁵ and no states prohibit it, we characterize the consideration of municipalities as a traditional districting criterion. In

418. *Id.* at 539.

419. W. VA. CONST. art. VI, § 4.

420. N.J. CONST. art. IV, § 2, ¶ 3.

421. PA. CONST. art. II, § 16.

422. *See* SUMMARY DATABASE, *supra* note 30; *see, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1 (14)(e).

423. *See* SUMMARY DATABASE, *supra* note 30.

424. *See* SUMMARY DATABASE, *supra* note 30; *see, e.g.*, N.Y. CONST. art. III, § 4(c)(5).

425. *See, e.g.*, N.Y. CONST. art. III, § 4(c)(5).

congressional districting, 21 states require the preservation of municipal boundaries.⁴²⁶ Even though these 21 states constitute less than a majority of the 50 states, we nevertheless consider preserving municipal borders to be a traditional districting criterion because, as stated at the beginning of this Article, a majority of states require it in state legislative districting.⁴²⁷

CONCLUSION

Devising judicial solutions to abusive districting practices has long been considered an intractable problem. As discussed in Part I, scholars apparently resigned themselves to the notion that the term “traditional redistricting criteria” was too amorphous and subjective to be intelligibly defined. As for judges tasked with solving that problem, there existed a plausible justification to pawn that burden off to, ironically, those who bear much of the responsibility for causing that problem in the first place: ending gerrymandering was a job for partisans (or their disgruntled constituents) because districting was a political problem, not a legal one. This excuse became law with the help of those with a vested interest in eliminating judicial supervision from redistricting, leaving only those conflicted interests to write the list of traditional districting criteria to their liking.

However, the empirical definition would make “traditional redistricting criteria” tangible and objective by defining that term as those criteria that a majority of states use. By making the courts merely a vessel and enforcer of what states already endorse, the empirical definition would make gerrymandering a legal problem, not a political one: enforcing traditional redistricting criteria would no longer constitute judges subverting democracy by imposing their subjective notions of proper districting practices. We also showed that the risk of state legislatures circumventing the empirical definition is minimal and that the empirical definition would curb undesirable districting practices if implemented. For example, advantaging a certain party and protecting incumbents are not “traditional” criteria because fourteen to seventeen states prohibit those practices, but only one to ten states require or allow them.⁴²⁸ In contrast, the status quo legitimizes too brazen a conflict of interest for any sober mind to condone. Surely, someone is drunk at the wheel when the people writing the laws are simultaneously profiting off of them.

Although we believe that the empirical definition would cure the defects in the status quo definition of traditional districting criteria, every reform risks creating unintended consequences of its own. This prompts a

426. See SUMMARY DATABASE, *supra* note 30; see, e.g., Legis. Reg. 102, 102d Leg., 1st Sess. (Nev. 2011).

427. See *supra* INTRODUCTION.

428. See SUMMARY DATABASE, *supra* note 30 and accompanying text.

question: if redistricting is done according to traditional criteria as we define them through the empirical definition, would that reduce partisan districting? We show evidence in the affirmative in the next article in this research agenda by simulating election results in districts drawn pursuant to the empirical definition. In doing so, we aim to dispel the illusion that just because elections will likely be partisan, election laws must also.