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New Hurdles to Redistricting Reform: State Evasion, *Moore*, and Partisan Gerrymandering

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Proponents of fair districting reforms continue to face challenges in seeking to address the problem of partisan gerrymandering. Even in states that have successfully enacted redistricting reforms, state actors have been able to evade compliance, and state courts have been unable to guarantee fair districts. In addition, the Supreme Court's decision in Moore v. Harper *could also limit state court efforts to guarantee fair districts. This Article argues that state evasion and* Moore *threaten to undermine the efficacy of fair districting norms recognized by state courts or enacted through either state political processes.* Moore *could create a one-way ratchet by weakening state courts' role in policing partisan gerrymandering, while allowing state courts to dismantle fair districts and fail to address the problem of evasion.*

This Article analyzes these dynamics by examining recent examples of evasion of anti-partisan gerrymandering norms by legislatures, redistricting commissions, and other political actors in the post-2020 redistricting cycle in Ohio, New York, and Florida. The Article begins by situating Moore *and state evasion dynamics within theories of federalism, democracy, and election law. It then provides a descriptive account of state partisan gerrymandering regimes, by analyzing variation in the pathways through which states have entrenched norms against partisan gerrymandering, and variation in evasion strategies employed by political actors. Finally, the Article assesses the broader implications of* Moore *and state evasion dynamics for state court decision-making and the efficacy of state reforms.*

ARTICLE CONTENTS

INTRODUCTION 841

I. FEDERALISM AND PARTISAN GERRYMANDERING 849

A. FEDERALISM AND STATE RESPONSES TO PARTISAN GERRYMANDERING 851

B. MOORE AND JUDICIAL FEDERALISM 857

C. EVASION AND PARTISAN GERRYMANDERING 862

II. CONCEPTUALIZING STATE RESPONSES TO PARTISAN GERRYMANDERING 865

A. TYPOLOGIES OF ENTRENCHMENT 866

B. TYPOLOGIES OF EVASION 878

C. CASE STUDIES OF EVASION 879

III. *MOORE*, EVASION, AND STATE COURTS 893

A. MOORE, STATE COURTS, AND FEDERALISM 894

B. EVASION DYNAMICS AND STATE COURT RESPONSES 899

C. THE INSTITUTIONAL DESIGN OF REFORMS, JUDICIAL REMEDIES, AND JUDICIAL INDEPENDENCE 905

CONCLUSION 910

New Hurdles to Redistricting Reform: State Evasion, *Moore*, and Partisan Gerrymandering

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INTRODUCTION

American democracy faces an uncertain future. Partisan polarization has led to unprecedented division and distrust.[1] These dynamics have been traced to growing inequality, democratic apathy, and a drift toward noncompetitive elections.[2] This polarization has accelerated since the 2020 election, the COVID-19 pandemic, and the January 6, 2021 Capitol attack.[3]

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[1] *See* David Leonhardt, '*A Crisis Coming': The Twin Threats to American Democracy*, N.Y. TIMES (June 21, 2023), https://www.nytimes.com/2022/09/17/us/american-democracy-threats.html (discussing current threats to democracy and constitutionalism in the United States); Gabriel R. Sanchez & Keesha Middlemass, *Misinformation is Eroding the Public's Confidence in Democracy*, BROOKINGS (July 26, 2022), https:www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ (discussing the rampant spread of misinformation in elections and proposals to address it); RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY 10 (2020) (discussing how voter suppression, incompetence in election administration, misinformation, and inflammatory rhetoric are leading to distrust and polarization); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 2–3 (2018) (discussing how elected leaders gradually undermine and weaken democracy globally). *See generally* THE FEDERALIST NO. 10 (James Madison) (discussing the threats and dangers posed by factions).

[2] *See* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 3 (2022) (discussing threats posed by concentration of economic power to constitutionalism in the United States); JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 41 (2020) (discussing the Republican party's strategy of plutocratic populism and implications for polarization); DARON ACEMOGLU & JAMES A. ROBINSON, THE NARROW CORRIDOR: STATES, SOCIETIES, AND THE FATE OF LIBERTY xv (2019) (discussing how successful democracies depend on successful mobilization of society vis-à-vis effective state governance).

[3] *See* Philip Bump, *Six in 10 Republicans Still Think 2020 was Illegitimate*, WASH. POST (May 24, 2023, 4:34 PM), https://www.washingtonpost.com/politics/2023/05/24/6-10-republicans-still-think-2020-was-illegitimate/ (discussing results of a CNN poll). *See generally* SSRS, CNN POLL 46 (May 24, 2023), https://s3.documentcloud.org/documents/23823977/cnn-poll-trump-leads-2024-gop-primary-field-but-voters-are-open-to-supporting-other-candidates.pdf (the aforementioned CNN poll); Pew Research Center, *As Partisan Hostility Grows, Signs of Frustration with the Two-Party System*, August 9, 2022, https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/.

Recent trends highlight the increasingly counter-majoritarian direction of United States democracy, as electoral outcomes increasingly do not align with the popular vote.[4] Several factors have contributed to this trend, including geographic sorting by state, the urban-rural divide, and partisan gerrymandering.[5] Extreme partisan gerrymandering can cause democratic harm, distort electoral outcomes nationwide, and impact electoral competition and responsiveness.[6]

Over the past two decades, an increasingly permissive legal framework, political partisanship, and the nationalization of political parties have led parties to aggressively pursue partisan gerrymandering.[7] *Rucho v. Common Cause* fundamentally altered the existing legal framework governing redistricting, signaling the retreat of federal courts from judicial review of partisan gerrymandering.[8] At the same time, *Rucho* also suggested that the primary pathway to effectuating fair districting reforms was through the political process in the states. However, as this Article demonstrates, fair districting reforms continue to face significant obstacles, including evasion by state actors and the uncertain impact of the Supreme Court's recent decision in *Moore v. Harper*.

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[4] *See* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM L. REV. 283, 286–87 (2014) (discussing the problem of misalignment in elections and introducing the alignment approach to election law).

[5] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2525 (2019) (Kagan, J., dissenting) ("[P]artisan gerrymandering has 'sounded the death-knell of bipartisanship,' creating a legislative environment that is 'toxic' and 'tribal.'") (quoting Brief for Bipartisan Group of 65 Current and Former State Legislators as Amici Curiae in support of Appellees at 6, 25, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161)); Aaron Zitner, *Why Tribalism Took Over Our Politics*, WALL ST. J. (Aug. 28, 2023, 12:00 AM), https://www.wsj.com/politics/why-tribalism-took-over-our-politics-5936f48e?mod=hp_lead_pos7 (discussing group identity and polarization); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2332 (2021) (discussing the counter-majoritarian direction of United States democracy and the urban-rural divide); RODDEN, *infra* note 78.

[6] *See Rucho*, 139 S. Ct. at 2515–16, 2524–25 (Kagan, J., dissenting) (discussing harms caused by partisan gerrymandering to the political system); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 871–73 (2015) (discussing impacts of the 2010 redistricting cycle and how it produced distorted and biased maps); Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2120 (2018) (discussing the harm caused by gerrymandering); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1320 (2016) (discussing different approaches to assessing partisan gerrymanders); Christopher T. Kenny, Cory McCartan, Tyler Simko, Shiro Kuriwaki & Kosuke Imai, *Widespread Partisan Gerrymandering Mostly Cancels Nationally, But Reduces Electoral Competition*, 120 PNAS, June 20, 2023, at 1, 4 (discussing the effect of gerrymandering on the competitiveness of elections).

[7] *See generally* JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 15–16 (2022) (discussing antidemocratic, coordinated political party behavior). *See* Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1794 (2014) (discussing the distinction between political partisanship and partisan polarization, observing that "[p]olitical partisanship refers to the activity of public officeholders benefitting or harming adherents of particular political parties" while polarization describes "the degree to which adherents of particular political parties—whether public officials or private individuals—have contrasting or overlapping preferences.").

[8] *See Rucho*, 139 S. Ct. at 2506–07 (holding that a jurisdiction may engage in political gerrymandering and that "partisan gerrymandering claims present political questions beyond the reach of the federal courts").

This Article advances two main arguments. First, I argue that the federal and decentralized nature of electoral regulation in the United States contributes to significant obstacles to redistricting reform in the states, including the problem of state evasion. In the wake of *Rucho*, reformers have sought to advance fair districting norms through state constitutional amendments and litigation challenging partisan gerrymanders. However, even in states that have successfully enacted redistricting reforms, state actors have been able to evade established norms against partisan gerrymandering including those norms codified in constitutional provisions or established by court decisions.[9] In addition, state courts have also been unable to advance fair districting in many states. These obstacles can be directly traced to the weaknesses of state reforms, limited state court remedial powers in certain states, partisanship dynamics, and the relative lack of judicial independence in many states.

Second, I argue that the Court's decision in *Moore v. Harper* reinforces dynamics within federalism that favor sustaining partisan gerrymandering while limiting state courts' ability to advance fair districting norms and invalidate partisan gerrymanders. While it rejected the extreme version of the independent state legislature theory and reaffirmed state judicial review of redistricting, the Supreme Court in *Moore* suggested that federal courts could still review state court decisions to ensure that they do not transgress the ordinary bounds of judicial review. *Moore*'s framework creates an asymmetry in which federal courts can only police certain kinds of state court decisions involving federal elections. *Moore* thus arguably creates a one-way ratchet in which state courts can dismantle fair districting norms or rules, but face significant constraints in recognizing fair districting normal and invalidating partisan gerrymandering.

This Article analyzes these dynamics by examining recent examples of the evasion of anti-partisan gerrymandering norms by legislatures, redistricting commissions, and other political actors in the post-2020 redistricting cycle in Ohio, New York, and Florida. State legislatures and redistricting commissions have not only evaded anti-partisan gerrymandering standards but also have defied and resisted court decisions ordering the adoption of remedial maps. Evasion tactics can also be used to undermine political redistricting processes and force redistricting into the courts, as was the case in New York in the post-2020 redistricting cycle.[10]

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[9] Throughout this Article, I use the terms "fair districting norms," "norms against partisan gerrymandering," or "anti-partisan gerrymandering norms" to describe rules against partisan gerrymandering or rules restricting consideration of partisan factors that are either enacted through constitutional amendments or statutes, or rules against partisan gerrymandering recognized by courts based on constitutional principles and interpretation of state constitutions.

[10] *See* Nicholas Fandos, *Top Court Clears Path for Democrats to Redraw House Map in New York*, N.Y. TIMES (Dec. 12, 2023), https://www.nytimes.com/2023/12/12/nyregion/new-york-redistricting-democrats.html (reporting the judicial ruling that New York must redraw its congressional map).

State courts face significant constraints in addressing partisan gerrymandering because of state actors' outright evasion of state court decisions asserting and enforcing fair districting. The lack of state court remedial powers in some states further compounds this issue. Even where state courts have invalidated partisan gerrymanders, subsequent elections and partisan turnover in courts can lead state courts to overturn earlier decisions in cases like *Harper v. Hall* in North Carolina.[11] And after *Moore v. Harper*, state courts face a new, albeit uncertain, restraint on their ability to challenge or block partisan gerrymanders. *Moore* also fails to address key issues related to procedural *evasion* of anti-partisan gerrymandering norms, including concerns about transparency.[12]

Together, *Rucho* and *Moore* entrench a model of federalism that contributes to representation diminution by allowing federal courts to undermine state court checks on state partisan gerrymanders while not addressing the problem of evasion.[13] First, *Rucho* sets up a regime that suggests a preference for *politically* adopted and entrenched constitutional norms over *judicial* entrenchment of norms against partisan gerrymandering. Second, *Moore* builds on *Rucho* in holding that federal courts can review state court recognition of norms against partisan gerrymandering based on state constitutional interpretation. As a result, *Moore* could allow federal courts to overturn state courts when they go "too far" in entrenching norms against partisan gerrymandering. Third, after *Rucho* and *Moore*, federal courts cannot consider or address the problem of evasion of politically entrenched constitutional norms by state legislatures, redistricting commissions, and other political actors, leaving the domain entirely to state law. Because state courts may not be able to effectively

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[11] Harper v. Hall, 886 S.E.2d 393, 449 (N.C. 2023).

[12] A few scholars have directly addressed issues of transparency in the context of redistricting. *See* Rebecca Green, *Redistricting Transparency & Litigation,* 71 SYRACUSE L. REV. 1121, 1141 (2021) (discussing how state courts consider and weigh transparency concerns in redistricting litigation); Rebecca Green, *Redistricting Transparency*, 59 WM. & MARY L. REV. 1787, 1801 (2018) [hereinafter Green, *Redistricting Transparency*] (discussing state transparency rules in the redistricting context and the importance of enforcing transparency norms)*;* Michael Halberstam, *Process Failure and Transparency Reform in Local Redistricting*, 11 ELECTION L.J. 446, 447–48 (2012) (discussing reform proposals to address lack of transparency in state redistricting processes). In addition, other scholars have discussed the problem of legislative compliance with state initiatives. *See* Elisabeth R. Gerber, Arthur Lupia & Mathew D. McCubbins, *When Does Government Limit the Impact of Voter Initiatives? The Politics of Implementation and Enforcement*, 66 J. POL. 43, 45 (2004) (discussing the challenges of compliance with state initiatives); *cf.* Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1390–91 (2022) (discussing and conceptualizing the concept of compliance dependence).

[13] *Cf.* Martin S. Flaherty, *Constitutional Asymmetry*, 69 FORDHAM L. REV. 2073, 2075 (2001) ("Modern constitutional analysis excels at subjecting what courts do to withering critique, especially when what they do raises as many questions as *Bush v. Gore*. It provokes somewhat less awe, however, when applied to the democratic alternatives to judicial action. Call this phenomenon 'constitutional asymmetry.'"). In contrast to Flaherty's conception of constitutional asymmetry, I suggest that the term asymmetry can be used to examine how federal courts differentially assess and treat state court recognition of anti-partisan gerrymandering norms, and political entrenchment of norms against partisan gerrymandering.

address the problem of evasion in every state, this framework undercuts the effectiveness of state responses to partisan gerrymandering.

Moore builds on the logic of the Rehnquist concurrence in *Bush v. Gore* to entrench a conception of federalism in constitutional doctrine that contributes to the problem of representation diminution.[14] Rehnquist's concurrence suggested that federal courts could review and second-guess state court interpretations of state constitutions in cases involving state regulation of federal elections under the Elections Clause.[15] At the same time, the Rehnquist concurrence entrenches a structural governance bias favoring deference to state legislatures in electoral regulation, even where state legislatures restrict or curb voting rights and democratic principles through evasion of constitutional norms and processes.

This Article situates the study of state partisan gerrymandering regimes and redistricting reforms within existing conceptions of federalism. The Elections Clause nests the power to regulate federal elections within state legislative power as constrained by state constitutions and provides for federal judicial oversight of state court adjudication per *Moore*.[16] Consequently, the traditional dichotomy between dual federalism and process federalism does not neatly map onto the domain of partisan gerrymandering.[17] Instead, I suggest that state responses to partisan gerrymandering have followed judicial federalism and laboratory of democracy pathways of reform. *Moore* and *Rucho* have important implications for each of these models. *Moore* articulates a standard of federal review of state court decision-making that could undermine judicial federalism.[18] By contrast, *Rucho* embraces the logic of the laboratories of democracies model, in favorably discussing the enactment of state constitutional reforms to address partisan gerrymandering.[19]

Moore must be evaluated then by situating it within two significant developments and moments: (1) an abdication of federal court judicial

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[14] *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 71–73 (2009) (discussing how a conception of federalism coined "the democracy cannon" influenced Rehnquist's concurrence in *Bush v. Gore*); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 932 (2021) [hereinafter Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*] (discussing the role of state constitutions in addressing partisan gerrymandering); Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1365 [hereinafter Bulman-Pozen & Seifter, *Countering the New Election Subversion*] (discussing the tools of state courts that help safeguard democracy). Although the *Moore* majority states that it is declining to adopt a specific test, the broad language set forth in its standard does appear to mirror Rehnquist's concurrence in *Bush v. Gore*. Justice Kavanaugh's concurrence, in providing commentary and clarification on the majority's holding, suggests adopting the Rehnquist test, and it is possible that federal courts will construe both opinions to suggest application of the Rehnquist standard in the future.

[15] *See* Bush v. Gore, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring) (finding a state law claim was insufficient to defeat SCOTUS jurisdiction).

[16] U.S. CONST. art. I, § 4.

[17] *See infra* Section I.B.

[18] *See id.*

[19] *See infra* Section I.B.

review in *Rucho* and (2) the growing movement within states to restrict the use of partisanship in redistricting. *Rucho* and *Moore* require a reassessment of the role of federal courts in the regulation of democracy, signaling a new moment in which federal courts will *indirectly* review state court adjudication involving partisan gerrymandering. As such, these decisions require greater attention to state constitutionalism and state partisan gerrymandering regimes to fully assess *Moore*'s impact.

There are crucial differences between state constitutions and the federal constitution. For one, state constitutions entrench democratic principles and a vast array of rights, including the right to vote, in ways that the federal constitution does not.[20] Second, many state courts, unlike federal courts, are selected by popular election rather than appointment by the political branches.[21] Third, state constitutions also provide for greater diversity in democratic lawmaking mechanisms which includes both state legislatures and popular initiative.[22]

Methodologically, this Article draws on a descriptive analysis of different forms of entrenchment of norms against partisan gerrymandering, and patterns of evasion of those norms. First, it traces variation in how states have entrenched anti-partisan gerrymandering norms, by comparing judicial and political entrenchment pathways. State courts have also developed their own approaches for assessing partisan gerrymandering, recognizing anti-partisan gerrymandering norms based on the interpretation of rights and structural provisions as well as the application of traditional redistricting criteria as baselines to evaluate whether partisan criteria have been improperly used.[23] In addition, states have also enacted reforms prohibiting or curbing partisan gerrymandering through legislation and initiative constitutional amendments, and these reforms have also often included the creation of redistricting commissions.[24] Second, this Article traces variation

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[20] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 142 (2014) (discussing state constitutions as a source of the right to vote); Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, *supra* note 14, at 932 (discussing the unique qualities of state constitutions).

[21] *See* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2050 (2010) (discussing how three-quarters of states hold elections of judges); Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 30–31 (2011) (discussing popular constitutionalism). For studies assessing the effects of judicial elections, see JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 127 (2012) (discussing citizen feelings towards judicial elections); Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship Between Party Campaign Contributions and Judicial Decision Making,* 44 J. LEGAL STUD. S161, S181 (2015) (analyzing the influence of political contributions to judicial decision making).

[22] Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 998–1000 (2005).

[23] James A. Gardner, Foreword, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 889–90 (2006).

[24] *See infra* Section II.B. The U.S. House of Representatives passed H.R. 1 in 2019, and that bill includes provisions mandating that all states use independent redistricting commissions in redistricting

in forms of evasion of anti-partisan gerrymandering norms through a close study of recent redistricting processes during the 2020 cycle in three states: New York, Ohio, and Florida.

Moore could contribute to representation diminution by allowing federal courts to limit and constrain state courts' ability to vindicate democracy-enhancing principles in the context of partisan gerrymandering.[25] Scholars and commentators have highlighted how *Moore* could potentially impact state court adjudication reviewing partisan gerrymandering claims in a variety of ways, including mandating some version of textualist interpretation by state courts and limiting the judicial pathway to entrenchment of norms against partisan gerrymandering.[26] In addition, as Ned Foley has argued, *Moore* could have deterrent effects by leading some state courts to avoid broad interpretations of constitutional provisions to develop anti-partisan gerrymandering norms.[27]

However, this depiction of *Moore*'s impact is incomplete because it fails to examine the broader *procedural* dimension of partisan gerrymandering at the state level. Noncompliance with partisan gerrymandering norms and processes enacted through the political process undermine the rule of law by allowing state legislatures to evade constitutional norms.[28] This evasion can take several forms including substantive defiance of norms, procedural evasion, and temporal evasion.[29] The problem of evasion is central to the core dilemma of redistricting in election law—as well as the principal-agent

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and expressly prohibiting partisan gerrymandering nationally. *See* Michael Li, *Five Ways H.R. 1 Would Transform Redistricting*, BRENNAN CTR. FOR JUST. (June 19, 2019), https://www.brennancenter.org/our-work/analysis-opinion/five-ways-hr-1-would-transform-redistricting (discussing implications of the H.R. 1 bill that addresses gerrymandering).

[25] *See* Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory,* 2022 WIS. L. REV. 1235, 1236–37 (discussing the conflict between independent state legislature theory and federalism); Rick Hasen, *Breaking: Supreme Court Decides Moore v. Harper, Rejecting Maximalist Version of Independent State Legislature Theory But Giving Federal Courts a Chance to Second Guess Some State Rulings as "Transgressing the Ordinary Bounds of Judicial Review*," ELECTION L. BLOG (June 27, 2023, 7:18 AM), https://electionlawblog.org/?p=137093 (discussing the potential impact of *Moore v. Harper*); Richard Pildes, *The Court's Mixed Message on the Independent State Legislature Theory*, ELECTION L. BLOG (June 27, 2023, 7:40 AM), https://electionlaw blog.org/?p=137096 (reporting that *Moore* gives no clarity on how it may impact state court adjudication).

[26] Litman & Shaw, *supra* note 25, at 1243.

[27] Ned Foley, *Moore v. Harper & The Need for Clarity*, ELECTION L. BLOG (June 28, 2023, 4:19 AM), https://electionlawblog.org/?p=137143 (discussing the potential application of *Moore* to cases involving rules regarding deadlines for receiving ballots in elections). It still remains unclear how *Moore* will operate in practice. In his dissenting opinion, Justice Thomas suggested that most claims will fail because federal courts will be unable to find that state court decisions fail to meet the *Moore* standard. *See* Moore v. Harper*,* 143 S. Ct. 2065, 2106 (2023) (Thomas, J., dissenting) ("In most cases, it seems likely that the 'the bounds of ordinary judicial review' will be a forgiving standard in practice, and this federalization of state constitutions will serve mainly to swell federal-court dockets with state-constitutional questions to be quickly resolved with generic statements of deference to the state courts.").

[28] *See* Gerber et al., *supra* note 12, at 43–44 (explaining the issue of noncompliance with citizen initiatives); *infra* Section II.B.

[29] *See infra* Sections I.C, II.B & II.C.

problem of self-entrenchment that arises when state legislators draw legislative maps.[30]

The post-*Moore* constitutional framework thus fails to consider or address a serious and ongoing problem of evasion of state constitutional norms and processes aimed at curbing partisan gerrymandering. As this Article illustrates, legislatures and other state actors have used evasion strategies during the 2020 redistricting cycle to defy constitutional norms against partisan gerrymandering in several surprising and concerning ways.

This Article makes several contributions. First, it contributes to the public law literature on federalism and constitutional law by highlighting how shifts in federal constitutional doctrine can asymmetrically impact the entrenchment of constitutional norms through state courts and legislative processes at the state level with significant implications for representation and democracy. Second, it contributes to scholarship on election law and studies of partisanship by tracing how partisan dynamics at the state level can impact the efficacy of state reforms that seek to address and limit partisan gerrymandering. Third, it contributes to scholarship on compliance and enforcement by examining how the real-world operation of state politics and partisan dynamics in redistricting reveals significant variation in the degree to which state actors comply with constitutional norms against partisan gerrymandering.

Part I of this Article sets forth the argument and theoretical framework, contextualizing state partisan gerrymandering and *Moore* within broader theoretical conceptions of federalism and their implications for democracy. Part II of the Article provides a descriptive analysis of state partisan gerrymandering regimes including presenting a typology of entrenchment of norms against partisan gerrymandering and a typology of different forms of evasion, followed by case studies of evasion based on three recent case studies in New York, Ohio, and Florida. Part III analyzes the implications of this Article's findings for state constitutionalism by examining *Moore*'s potential impact on state court adjudication; analyzing how state courts respond to evasion; and the importance of the institutional design of state reforms, state courts' remedial powers, and judicial independence in the partisan gerrymandering context. Part IV concludes.

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[30] Heather K. Gerken & Michael S. Kang, *Déjà Vu All Over Again: Courts, Corporate Law, and Election Law*, 126 HARV. L. REV. F. 86, 86–88 (2013) (discussing the principal-agent problem and the problem of self-entrenchment in redistricting); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) ("But politics shares with all markets a vulnerability to anticompetitive behavior. In political markets, anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge."); Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (arguing for judicial acquiescence in gerrymandering cases and discussing benefits of bipartisan and incumbent-protecting gerrymanders).

I. FEDERALISM AND PARTISAN GERRYMANDERING

State responses to partisan gerrymandering, and the role of federal courts after *Moore*, must be understood within the broader context of the Supreme Court's prior jurisprudence and theoretical conceptions of federalism. After highlighting the shift in the Court's approach to partisan gerrymandering, this Part frames state responses to partisan gerrymandering within broader theoretical conceptions of federalism and democracy, including judicial federalism and laboratories of democracy models. It then analyzes *Moore*'s implications for judicial federalism and conceptualizes forms of state evasion of fair districting norms.

The Supreme Court's partisan gerrymandering jurisprudence has undergone significant changes over the last four decades. In its early voting rights and apportionment decisions, the Supreme Court advanced a representation reinforcement role that focused on addressing and correcting distortions in the electoral process.[31] Building on this approach, the Court in *Davis v. Bandemer* recognized for the first time that partisan gerrymandering claims were justiciable under the federal constitution.[32] In rejecting arguments that partisan gerrymandering claims presented nonjusticiable political questions, *Bandemer* drew on *Reynolds* in affirming that the goal of fair and effective representation for all citizens is the basic aim of legislative apportionment.[33] The Court affirmed the importance of guaranteeing that each political group should have the same chance to elect representatives of its choice and that the issue at stake in *Bandemer* was "one of representation."[34] These earlier cases appeared to recognize a norm of fair and effective representation as a constitutional value.[35]

In subsequent cases, the Court reaffirmed the harms caused by extreme partisan gerrymandering. For example, in his concurring opinion in *Vieth v. Jubelirer*, Justice Kennedy observed that extreme partisan gerrymandering amounts to "rigging elections."[36] And in her majority opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*),

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[31] RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 20–23 (2003). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (discussing SCOTUS judicial review).

[32] Davis v. Bandemer, 478 U.S. 109, 123–24 (1986), *abrogated by* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[33] *Id.* (referencing Reynolds v. Sims, 377 U.S. 533 (1964)).

[34] *Id.* at 124.

[35] *See generally* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 353–54 (2017) (discussing the entitlement to fair representation); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 708 (1980) (explaining that "democracy stresses equality and popular rule"); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478, 481 (2011) (discussing constitutional values); John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 163–64, 188 (1984) (discussing proportionality in representation); *cf.* ELY, *supra* note 31 (arguing for a more nuanced approach to judicial review).

[36] *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting) (citing Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring)).

Justice Ginsburg observed that the "core principle of republican government" is "that the voters should choose their representatives, not the other way around."[37] In *Rucho*, Chief Justice Roberts observed that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust"[38] and that such gerrymandering is "incompatible with democratic principles."[39] These decisions illustrate that the Supreme Court, even as it has refused to recognize the justiciability of partisan gerrymandering, has recognized that extreme partisan gerrymandering harms democracy and contributes to the problem of representation diminution.

At the same time, the Court has effectively sanctioned a constitutional regime in which states, not the federal courts, play a major role in addressing the harms caused by partisan gerrymandering. The Court's decisions in *AIRC*, *Rucho*, and *Moore* are building blocks in this new regime. *AIRC* signals that independent redistricting commissions are a constitutionally permissible pathway for redistricting reforms.[40] In *Rucho*, the Court cited and endorsed examples of states that had enacted reforms prohibiting the consideration of partisan factors in redistricting and created redistricting commissions.[41] Finally, in *Moore*, the Court reaffirmed the role of state constitutions and courts in constraining partisan gerrymandering but also held that federal courts can review state court decisions to ensure that they do not transgress the ordinary bounds of judicial review.[42] The Supreme Court's jurisprudence has thus shifted responsibility for addressing the problem of partisan gerrymandering to the states.

Consequently, *Rucho* and *Moore* have now entrenched a model of federalism that contributes to representation diminution by allowing federal courts to limit and undermine state court checks on state partisan gerrymanders, while also failing to address the problem of evasion of politically entrenched partisan gerrymandering norms and processes.[43] *Rucho* suggested a preference for *politically* adopted and entrenched constitutional norms over *judicial* entrenchment of norms against partisan gerrymandering. *Moore* has asserted a new framework in which federal courts can limit and undermine judicial entrenchment of norms against partisan gerrymandering, potentially undermining one potential check on state actors in states that lack politically entrenched norms against partisan gerrymandering. After *Rucho* and *Moore,* federal courts cannot consider or address the problem of evasion of politically entrenched constitutional norms by state legislatures, redistricting commissions, and other political

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[37] *Id.* (Kagan, J., dissenting) (citing Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015)).

[38] *Id.* at 2506.

[39] *Id.* (citing *AIRC*, 576 U.S. at 791).

[40] *AIRC*, 576 U.S. at 817.

[41] *Rucho*, 139 S. Ct. at 2507–08.

[42] Moore v. Harper, 143 S. Ct. 2065, 2089–90 (2023).

[43] *Cf.* Flaherty, *supra* note 13.

actors, leaving the domain entirely to state law. Because state courts may not be able to effectively address the problem of evasion in every state, this framework undercuts the effectiveness of state responses to partisan gerrymandering.

Moore thus exacerbates the problem of representation-diminution in two key ways. First, *Moore* establishes a new standard under which federal courts could potentially overturn state court decisions recognizing anti-partisan gerrymandering norms based on the interpretation of open-ended rights, equality, and structural principles in state constitutions. Second, *Moore* does *not* address the problem of evasion of anti-partisan gerrymandering norms and processes by legislatures and other political actors, leading to variable and often ineffective responses by state courts in addition to state and federal court decisions that reward and incentivize evasion tactics.

In this Section, I analyze state responses to partisan gerrymandering within broader conceptions of federalism and democracy. I then discuss *Moore*'s implications for judicial federalism and state court recognition of norms against partisan gerrymandering. Finally, this Section examines how the post-*Moore* framework does not address one key aspect of the procedural dimension of state partisan gerrymandering—the problem of *legislative evasion* of anti-partisan gerrymandering norms. This discussion provides the foundation for the Article's analysis of the substantive and procedural dimensions of state partisan gerrymandering regimes, as well as their implications for the role of federal and state courts after *Moore*.

A. *Federalism and State Responses to Partisan Gerrymandering*

Recent developments involving state partisan gerrymandering reforms and state court adjudication asserting anti-partisan gerrymandering norms highlight *Moore*'s significance from the perspective of federalism theories.[44] Within the fields of political science, public law, and economics, scholars have identified several models to describe the allocation of power in governance and policy-making.[45] These models include the decentralization model, the laboratories of democracy model, and the New Federalism Model.[46] In addition, public law and legal scholars have also identified a group of models to describe the operation of federalism including dual federalism, cooperative federalism, process federalism, and judicial

[44] This Section builds on insights from literature surveying a variety of models of federalism in public law, constitutional law, and political science scholarship.

[45] *See* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 20–29 (2011) (discussing the distinction between decentralization and federalism).

[46] *See* GRUMBACH, *supra* note 7, at 20–31 (discussing Madisonian decentralization, laboratories of democracy, and new federalism models).

federalism models.[47] Recent work on federalism, including process federalism and "new process federalism" scholarship, has sought to understand how federalism can serve national aims through integration and coordination.[48]

Moore and *Rucho* can be analyzed in terms of their relationship to and impacts on two models of federalism: judicial federalism and the laboratories of democracy model. *Moore* draws on the logic of Chief Justice Rehnquist's concurrence in *Bush v. Gore* to suggest a standard of federal review of state court decision-making that will directly impact and curtail judicial federalism.[49] By contrast, *Rucho* embraces the laboratories of democracy model in endorsing state reforms to address partisan gerrymandering as an alternative to federal judicial review of partisan gerrymandering claims.[50] In addition, state reforms addressing partisan gerrymandering have also aligned with these models.[51] Here, I analyze these dynamics and then examine how these conceptions of federalism have both democracy-enhancing and democracy-diminishing attributes.

1. *Judicial Federalism*

State court entrenchment of norms against partisan gerrymandering represents a form of judicial federalism. Judicial federalism refers to a model in which state courts rely on state constitutional provisions to recognize and protect rights that are not recognized or protected under the federal constitution.[52] During the late 1970s, jurists and scholars began to hail the possibility and promise of state constitutionalism and state courts as a

[47] *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 265 nn.82–83 (2005) (highlighting resources expanding on discussing scholarship on dual federalism, process federalism, cooperative federalism, and empowerment federalism); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (arguing that cooperative federalism "envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law"); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 503–04 (1995) (discussing the empowerment federalism model).

[48] *See* Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 44–72 (2010) (discussing process federalism); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L. J. 1889, 1917–18 (2014) (discussing federalism and nationalism). Gerken has also advanced "new process federalism" models that go beyond existing approaches by focusing on the integration of state and federal systems as part of state experimentation and developing rules that "protect state dissent and resistance within integrated federal-state regimes." Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2229 (2022) (arguing that the laboratories account fails to appreciate the importance of coordinated networks of third-party organizations that often fuel policy innovation).

[49] Moore v. Harper, 143 S. Ct. 2065, 2089–91 (2023) (Kavanaugh, J., concurring) ("I would adopt Chief Justice Rehnquist's straightforward standard.").

[50] Rucho v. Common Cause, 139 S. Ct. 2484, 2507–08 (2019).

[51] These models are distinct from other federalism models in that they describe state pathways for enacting policy reforms, as opposed to other models that directly address the allocation and divide between federal and state power.

[52] G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097–1100 (1997).

pathway for expanding rights protections.[53] In 1977, Justice William J. Brennan, Jr.'s article, *State Constitutions and The Protection of Individual Rights*, charted a pathway for state constitutions and state courts to expand rights within the United States constitutional order over and above the floor of federal constitutional protections.[54] Justice Brennan argued for a model of judicial federalism in which state courts should interpret state constitutional provisions independently of and distinct from federal constitutional provisions to recognize broader protections for rights and equality.[55] Brennan's article suggested an important distinction between federal constitutional floors and ceilings, suggesting state courts could interpret their constitutions to expand the scope of rights above the federal constitutional floor.[56]

Since the publication of Brennan's article, scholars and commentators have debated the efficacy of state constitutionalism as a vehicle for expanding rights and equality and advancing democratic principles. One line of scholarship has focused on how state constitutions and state courts can be a source of positive and social rights.[57] However, work by James Gardner and Lawrence Friedman highlights the failure of state constitutionalism to advance the goals suggested by Justice Brennan.[58] In addition, James Gardner has also written about the various approaches that states have taken to address gerrymandering and redistricting, illustrating the limitations of the application of neutral criteria to address redistricting.[59]

2. *The Laboratories Model*

States have also followed the laboratories model in advancing reforms to address partisan gerrymandering. The laboratories of democracy model is based on Justice Louis Brandeis's view that federalism can promote policy experimentation and innovation and even cross-state diffusion of successful

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[53] JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW XVI (2008); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW XIII (2018); ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 6 (2d ed. 2023); G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS: J. OF FEDERALISM 63, 72 (1994).

[54] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing a pathway for expanding individual rights in the states).

[55] *Id.* at 491.

[56] *Id.* at 503.

[57] *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 2–3 (2013) (discussing the role of state constitutions in protecting individual rights); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1195–96 (1999) (discussing rights that are unique to state constitutions).

[58] *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762–64 (1992) (proposing the notion that state courts have failed "to develop a coherent discourse of state constitutional law"); Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 836 (2011) (discussing what state courts can do to implement individual rights).

[59] Gardner, *supra* note 23, at 967–70.

policies.[60] A central feature of this model is its emphasis on experimentation and cross-state policy emulation.[61] The Supreme Court has directly referenced the laboratories model in numerous cases, including in the election law context. In *AIRC*, the Supreme Court discussed the model favorably. The Court noted that deference to state lawmaking can advance many goals that the laboratories model seeks to advance including innovation and experimentation, greater citizen involvement and participation in democratic processes, and higher levels of government responsiveness.[62] *AIRC* thus relied on the laboratories model to hold that states may use citizen initiatives as an alternative to the legislative process in lawmaking under the federal Elections Clause.[63]

In holding that partisan gerrymandering claims raise nonjusticiable political questions, the Supreme Court in *Rucho* also implicitly referenced the logic of the laboratories model. The majority observed that federalism offered an alternative political solution to addressing the harms of partisan gerrymandering.[64] Chief Justice Roberts's majority opinion in *Rucho* cited several examples of state policy reforms designed to restrict partisan considerations in redistricting, including the enactment of the Fair Districts Amendment in Florida as applied by the Florida Supreme Court in *League of Women Voters of Florida v. Detzner*.[65]

As discussed in Section II.A, several states have adopted reforms by enacting constitutional amendments or statutes restricting partisan considerations in redistricting, and some states have enacted redistricting commissions to reduce the influence of politics on redistricting.[66] At the same time, other states have chosen not to enact such reforms. And in most of these jurisdictions, state courts have refused to recognize norms and standards against partisan gerrymandering based on variants of the political question doctrine or standards of nonrecognition of partisan gerrymandering.

3. *Federalism, State Responses, and Impacts on Democracy*

While federalism can provide pathways for advancing democratic principles, state policies can also result in representation diminution and democratic backsliding.[67] The Elections Clause of the federal constitution

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[60] *See* GRUMBACH, *supra* note 7, at 27 (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states are laboratories for democracy and can advance optimal policies for state electorates through innovation and experimentation)).

[61] *See id.*

[62] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015) (citing Bond v. United States, 564 U.S. 211, 221 (2011)).

[63] *Id.* at 2673.

[64] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (discussing state reforms addressing partisan gerrymandering).

[65] *Id.* at 2507.

[66] *See infra* Section II.A.

[67] GRUMBACH, *supra* note 7, at 12–13.

codifies a unique conception of federal-state governance that does not fit neatly within existing theories of federalism.[68] The Clause confers significant power on state legislatures and state law-making processes to regulate federal elections, including election administration and redistricting.[69] The federalism dimension of the Elections Clause is distinct in that it implicates the exercise of federal judicial power, while the Commerce Clause deals with the exercise of federal legislative power vis-à-vis state power.[70]

In the context of state electoral regulation under the federal Elections Clause, federalism has both democracy-diminishing and democracy-enhancing attributes. State courts can enforce democratic norms and bolster protections for voting rights, but they can also interpret voting rights provisions narrowly and uphold restrictions on the right to vote. State legislatures and electorates can expand or restrict democracy in a variety of ways, including through partisan gerrymandering and restrictions on voting rights and access.[71]

i. Democracy-Enhancing Attributes of Federalism

In line with judicial federalism, state courts can play a vital role in advancing rights and democratic principles. State constitutions codify substantive principles that can be interpreted and applied by state courts to bolster democracy. Richard Hasen has argued that state courts have applied variants of the Democracy Canon in election law and voting rights.[72] Jessica Bulman-Pozen and Miriam Seifter have highlighted how state constitutions

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[68] *Cf.* Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV 747, 753, 775 (2016) (defining election law federalism as "the complex set of relationships implicated by federal election legislation" and arguing that "[e]lection law federalism is defined by two distinct features—expansive federal power to regulate and widespread state prerogative to delegate—that both partly explain the widespread noncompliance with the federal election statutes and raise unusual federalism and policy questions for election law").

[69] *See id.* at 776 (discussing Congress' expansive power to regulate elections under the Elections Clause in conjunction with the autonomy and power of state actors in electoral regulation).

[70] For this reason, the dual federalism-process federalism divide does not neatly map onto controversies arising under the Elections Clause, both because the Clause assigns electoral regulation to state legislative power, subject to state constitutional limits policed by courts, who are themselves subject to federal judicial oversight. States are not able to directly impact the exercise of federal judicial power in ways that they are able to in the context of legislation enacted by Congress pursuant to its Commerce Clause authority.

[71] *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021) (discussing how state legislatures and initiatives can distort democracy); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2325 (2021) ("[C]hanges in demography, attitudes, and geographic distribution have created the conditions for a countermajoritarian reaction in which a declining political bloc seeks to retain power."); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 159 (discussing state efforts to curb voting rights including partisan gerrymandering, voter suppression, and other tactics); Nicholas O. Stephanopoulos, *The New Pro-Majoritarian Powers*, 109 CALIF. L. REV. 2357, 2361 (2021) (explaining how the Electoral College, voter suppression, and gerrymandering obscure democracy).

[72] Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 77–81 (2009) (discussing history of state courts applying the Democracy Canon to interpret statutes so as to expand voting rights and access to the franchise and to foster democracy).

can be the source of a robust and broader set of democracy principles.[73] As discussed in Part II, state courts have adopted a variety of similar interpretive approaches in recognizing norms against partisan gerrymandering based on state constitutional provisions entrenching rights to free and fair elections, freedom of speech and association, equal protection, and structural principles of democracy.[74]

Second, progressives and reformers can enact legislation and popular initiatives to advance democratic reforms.[75] In the context of redistricting, reformers have used both the legislative and initiative process to enact amendments introducing prohibitions on partisan gerrymandering by state legislatures, and to create redistricting commissions that are more insulated from the political process.[76]

ii. Democracy-Diminishing Attributes of Federalism

At the same time, there are also certain structural attributes of federalism that contribute to democracy diminution in the United States. Miriam Seifter has identified the problem of countermajoritarian legislatures, highlighting the threats posed by state legislatures to the United States constitutional order resulting from the enactment of countermajoritarian policies including partisan gerrymandering and voter suppression policies.[77] Seifter cites to work by Jowei Chen and Jonathan Rodden to highlight how two key factors lead to this problem: geographic clustering and the manipulation of district lines.[78] Chen and Rodden's work explains how geographic concentration of certain groups impacts districting processes and legislative outcomes.[79] They highlight how urban parties' voters are packed into a smaller number of districts, while rural party voters are more spread out.[80] In the United States, Democratic voters tend to be concentrated more in urban metropolitan centers within a small number of districts, while Republican voters tend to be more spread out across suburban and rural areas.[81] Majority parties that control state legislatures seek to maximize their advantage

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[73] *See* Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, *supra* note 14, at 861 (noting that state constitutions can provide the foundation for protecting democracy); Bulman-Pozen & Seifter, *Countering the New Election Subversion, supra* note 14, at 1339 (explaining how state courts and constitutions can "mitigate several impending threats to elections").

[74] *See infra* Sections II.A & III.A (discussing the entrenchment of anti-partisan gerrymandering norms in different states).

[75] *See* Persily & Anderson, *supra* note 22, at 998 (discussing voters' ability to reform democracy through initiatives and voting on legislation).

[76] *Id.*

[77] Seifter, *supra* note 71, at 1758–66.

[78] *Id.* at 1761 n.179 (citing Jowei Chen & Jonathan Rodden, *The Loser's Bonus: Political Geography and Minority Party Representation* 1 (2016) (unpublished manuscript) (on file with *Columbia Law Review*)); JONATHAN A. RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 175–96 (2019).

[79] Seifter, *supra* note 71, at 1761.

[80] *Id.*

[81] *Id.*

through the drawing of district lines, and in particular these processes often work to the disadvantage of Democrats as an urban party.[82]

Legal and political science scholars have also highlighted the failures of federalism and the threats it poses to democratic principles, rights, and equality.[83] Scholars and commentators have highlighted how states have enacted restrictions on voting rights and other policies increasing voter suppression and gerrymandering that have undermined democracy and representation.[84] Grumbach argues that partisan polarization and the nationalization of political parties have fundamentally transformed federalism by facilitating democratic backsliding.[85] Indeed, a growing body of "critical federalism" scholarship has highlighted how federalism and state political dynamics have undermined minority rights and equality in a variety of areas ranging from the history of slavery and Jim Crow laws to contemporary health care and criminal justice policymaking.[86]

B. Moore *and Judicial Federalism*

As noted in Section I.A, state responses to partisan gerrymandering have either followed judicial entrenchment or political entrenchment of norms against partisan gerrymandering. *Moore* highlights tensions between judicial federalism and legislative autonomy that raise questions about the proper role of state courts in redistricting and partisan gerrymandering. The application of *Moore*'s standard could limit and constrain state court recognition of anti-partisan gerrymandering norms. As a result, *Moore* could undermine or weaken state court enforcement of democracy principles in state constitutions.

Moore threatens to challenge and destabilize existing understandings of federalism in the context of partisan gerrymandering and redistricting by undermining judicial federalism. Many of the recent state court decisions

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[82] *Id.*

[83] *See* GRUMBACH, *supra* note 7, at 11 (noting that the state level is influenced by national groups). *See also* Nathan J. Kelly & Christopher Witko, *Federalism and American Inequality*, 74 J. POL. 414, 415 (2012) (discussing how states can influence redistricting and inequality).

[84] *See* GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA 2–3 (2020) (discussing modern voting restrictions such as voter identification requirements and redistricting); CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 1–2 (2018) (explaining how legislatures "target the socioeconomic characteristics of a people" to disguise the discriminatory intent behind voting restrictions); Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633, 635–36 (2019) (noting the increase in laws created to suppress votes, such as voter identification laws); Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 214–15 (discussing federal court acquiescence to state voter suppression).

[85] *See* GRUMBACH, *supra* note 7, at 12 (discussing how "national parties can use the states that they control to rig the game in their favor by limiting the ability of their political enemies to participate").

[86] *See*, *e.g.*, JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 13 (2018) (using Medicaid to demonstrate "how federalism enables systematic disparities among economically and racially marginalized Americans").

entrenching anti-partisan gerrymandering standards draw on traditions of federalism in which state courts interpret state constitutional provisions to recognize principles of rights and equality over and above the federal constitutional floor.[87] By reviving the spirit of Rehnquist's *Bush v. Gore* standard for federal court review of state court decisions involving state regulation of federal elections, *Moore* could position federal courts to police the line between "lawmaking" and adjudication in the context of state legislation regulating federal elections under the Elections Clause.[88] As such, federal courts' application of the *Moore* standard might bolster the power of counter-majoritarian legislatures by checking the role of state courts in asserting limits on partisan gerrymandering by these legislatures.[89]

Moore entrenches a particular understanding of federalism under the Constitution's Elections Clause. The Court in *Moore* affirmed that the Election Clause does not divest state constitutions of the power to enforce checks against the exercise of legislative power in redistricting. But *Moore* held that federal courts could review state court interpretations of state constitutions and statutes in order to prevent state court circumvention of federal law.[90] *Moore* also stopped short of formally announcing a specific test for measuring and assessing state court interpretations of state law in cases that involve the Elections Clause.[91] However, the Court provided some general guidance to federal courts in holding that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[92]

The Court went further than this in observing that when interpreting state law, "state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by . . . the Federal Constitution."[93] According to the majority, this broad standard was animated by concerns that state courts could intrude on the lawmaking power of legislatures regulating federal elections under the Elections Clause and that state courts "might read state law in such a manner as to circumvent federal constitutional provisions."[94]

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[87] *See infra* Section II.A (discussing different types of entrenchment, including judicial entrenchment of anti-partisan gerrymandering norms).

[88] Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 695 (2001).

[89] *Cf.* Seifter, *supra* note 71, at 1735 (explaining how state legislatures are usually the least majoritarian branch).

[90] Moore v. Harper, 143 S. Ct. 2065, 2082 (2023) (citing Smiley v. Holm, 285 U.S. 355, 368 (1932)).

[91] *Id.*

[92] *Id.*

[93] *Id.* at 2090.

[94] *Id.* at 2088. It is worth highlighting a critical distinction between evasion of anti-partisan gerrymandering norms under state constitutional law discussed in this Article, and state court evasion of federal constitutional law. The Supreme Court decision in *Bush v. Gore* was concerned with the issue of

Still, the standard announced by the *Moore* majority was general and vague. The majority refused to adopt a specific test and also refused to review or assess the approach taken by the North Carolina Supreme Court in *Harper I*.[95] However, in his concurrence Justice Kavanaugh suggested adopting the specific test advanced by Chief Justice Rehnquist: "whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required.'"[96] Justice Kavanaugh suggested that the Rehnquist standard could "apply not only to state court interpretations of state statutes, but also to state court interpretations of state constitutions."[97] In addition, Kavanaugh further cited to Rehnquist and observed that "in reviewing state court interpretations of state law, 'we necessarily must examine the law of the State as it existed prior to the action of the [state] court.'"[98]

Moore could potentially recalibrate the federal judicial role in partisan gerrymandering cases from *Rucho*'s abdication to a new standard under which federal courts can review state court adjudication. This shift would position federal courts in a way that could limit attempts to rein in partisan gerrymandering in the states. The *Moore* standard could allow federal courts to overturn state court decisions that recognize anti-partisan gerrymandering norms and standards based on state court interpretation of open-ended rights, equality, and other state constitutional provisions.

At this point, it is unclear how the *Moore* standard will be applied in practice. In the aftermath of the decision, scholars have suggested that *Moore* could allow federal courts to scrutinize state court adjudication in several ways. Hasen suggested that the *Moore* standard could allow federal courts to second guess determinations made by a state court in interpreting state statutes, allowing federal courts to reject state court interpretations that go too far as "transgressing the ordinary boundaries of judicial review."[99] Richard Pildes also noted the vagueness of the new standard and the Court's failure to even decide whether *Harper I* violated the standard, and he argued that the Supreme Court needed to provide more concrete guidance on how the standard would operate in advance of the 2024 elections.[100]

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state court evasion of federal constitutional law. *See* Henry Paul Monaghan*, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1965 (2003); Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 85–86 n.22 (2002).

[95] *Moore*, 143 S. Ct. at 2089.

[96] *Id.* at 2090–91 (Kavanaugh, J., concurring) (discussing various tests for assessing a state court's interpretation of state law in a case involving the Elections Clause). Justice Kavanaugh suggested that Justice Souter's approach in *Bush v. Gore* and Solicitor General Prelogar's approach were similar in spirit to Rehnquist's test in *Bush v. Gore*. *Id.*

[97] *Id.* at 2091.

[98] *Id.* (citing Bush v. Gore, 531 U.S. 98, 114 (2000) (Rehnquist, C. J., concurring)).

[99] Hasen, *supra* note 25.

[100] Pildes, supra note 25.

Scholars and commentators have discussed how federal courts applying *Moore* could mandate forms of textualism and anti-novelty doctrines in state constitutional interpretation. For example, prior to the Court's decision in *Moore*, Professors Leah Litman and Kate Shaw argued that the adoption of different variants of the independent state legislature theory (ISLT) would result in federal courts mandating or requiring state courts to apply textualist analysis in interpreting state constitutional provisions.[101] Drawing on the concurrences of both Justice Gorsuch and Justice Kavanaugh in *Democratic National Committee v. Wisconsin State Legislature*,[102] Litman and Shaw suggested that adoption of the ISLT would allow federal courts to both override state court decisions based on interpretation of general or broad constitutional provisions and effectively mandate that state courts only apply textualist modes of interpretation.[103] Litman and Shaw argue that key structural differences between state courts and state constitutions and federal courts and the federal constitution undercuts the logic and argument in support of justifying textualism at the state court level.[104]

Pildes also previously argued that a weaker version of the ISLT would still impose limits on state courts in interpreting state constitutions.[105] Pildes suggests that under a weak version of ISLT, state courts could not interpret "general" state constitutional provisions, such as "free and equal" elections provisions, to invalidate state laws regulating federal elections, as this would violate the Elections Clause.[106] However, under this version, state courts would be permitted to enforce "specific" state constitutional provisions.[107] In addition, like Litman and Shaw, Pildes also has previously argued that a weaker version of ISLT could lead to federal imposition of textualism on state courts.[108]

Commentators have argued that Justice Kavanaugh's concurrence in *Moore* could lead the Supreme Court and federal courts to apply non-novelty and textualist standards to state court interpretations of state statutes and even state constitutions. Litman and Shaw suggest that federal courts

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[101] *See* Litman & Shaw, *supra* note 25, at 1236.

[102] Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020).

[103] Litman & Shaw, supra note 25, at 1241 (citing *Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring) ("[T]he Constitution provides that *state legislatures*—not federal judges, not state judges, not state governors, *not other state officials*—bear primary responsibility for setting election rules.)); *Democratic Nat'l Comm.*, 141 S. Ct. at 34–35, n.1 (Kavanaugh, J., concurring) (arguing that federal courts have authority to review state court interpretations of state election law to "ensure that state courts do not rewrite state election laws") (referring to Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring)).

[104] *See* Litman & Shaw, *supra* note 25, at 1249–50 (explaining the structural differences between the state and federal systems).

[105] *The Independent State Legislature Theory and its Potential to Disrupt our Democracy: Hearing Before the Comm. on House Admin.*, 117th Cong. 7 (2022) (statement of Richard Pildes, N.Y.U.).

[106] *Id.*

[107] *Id.*

[108] *Id.* at 9–10. *See also* Michael Weingartner, *Textualism and Anti-Novelty Under Moore v. Harper*, FORDHAM DEMOCRACY PROJECT (Aug. 9, 2023, 10:30 AM), https://fordhamdemocracyproject.com/2023/08/09/textualism-and-anti-novelty-under-moore-v-harper-2/.

applying the standard in *Moore* might use the standard to apply a "non-novelty" approach that would review whether a state court's decision is consistent with existing state court precedent.[109] Michael Weingartner also hypothesized a potential application of the *Moore* standard to require textualism and non-novelty approaches, and he suggested that these approaches would not necessarily guarantee that state courts would adhere to ordinary interpretation or foster greater respect for state legislatures.[110]

Other scholars have suggested that it is possible the Supreme Court and federal courts may apply *Moore* in a more deferential manner. Derek Muller has suggested that it is unclear whether the Supreme Court will be willing to give teeth to the new standard in enforcing it against state courts.[111] In addition, both Muller and Foley have suggested that *Moore* could actually have deterrent effects.[112]

Muller recently argued that after *Moore*, "state courts are on notice" and that if state courts recognize the need for providing an explanation as to why their interpretations of statutes or constitutional provisions do not go "too far," this will lessen the likelihood of federal court scrutiny under *Moore*.[113] In addition, Foley suggested that *Moore* will have deterrence effects on state courts, and that state courts should refrain from interpreting state statutes in ways that are likely to run afoul of *Moore*.[114] However, in response to Foley, Carolyn Shapiro suggested that while state courts should be careful in explaining the rationale for their decisions in light of existing doctrine and precedent, state courts should not refrain from interpreting statutes in alignment with state constitutional provisions.[115] In support of this argument, Shapiro discussed the Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Party v. Boockvar*, which held that the "statutory schedule for application and return of mail-in ballots would disenfranchise voters and was inconsistent with the . . . guarantee of free and fair elections" under the state constitution.[116] Thus, the Court ordered that the deadline for receipt of mail-in ballots be extended.[117]

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[109] Litman & Shaw, *supra* note 25, at 1247 (refuting the suggestion that "federal courts [should] have license to correct insufficiently textualist decisions by entities like state courts").

[110] Weingartner, *supra* note 108.

[111] Derek Muller, *Dissent Lock-Stepping in New Mexico*, ELECTION L. BLOG (July 6, 2023, 6:23 AM), https://electionlawblog.org/?p=137278.

[112] *Cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1264 (1978) (arguing that state courts should not "restrain themselves from the full enforcement of underenforced constitutional norms").

[113] Derek Muller, Moore v. Harper *Vindicates Rehnquist's Opinion in Bush v. Gore*, ELECTION L. BLOG (June 27, 2023, 8:46 AM), https://electionlawblog.org/?p=137104.

[114] Foley, *supra* note 27 (discussing potential application of *Moore* to cases involving rules regarding deadlines for receiving ballots in elections).

[115] Rick Hasen, *Carolyn Shapiro: "*Moore v. Harper *and State Courts*,*"* ELECTION L. BLOG (June 29, 2023, 2:30 PM), https://electionlawblog.org/?p=137192.

[116] Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 138 (2022).

[117] *Id.* (citing Pa. Democratic Party v. Boockvar (*Boockvar I*), 238 A.3d 345, 370–71 (Pa. 2020)).

At this moment, a great deal of uncertainty surrounding the standard articulated in *Moore* remains given its vague language and the Court's specific statement that it was not adopting a specific test for assessing state court decisions. However, lower federal courts could apply the standard in a variety of ways that constrain state court interpretation and undermine state court enforcement of democracy principles and voting rights. While *Rucho* arguably signaled the federal courts' retreat from application of a representation reinforcement approach to judicial review, *Moore* now positions federal courts in a role that will limit the enforcement of substantive democracy principles in state constitutions.

C. *Evasion and Partisan Gerrymandering*

Moore could potentially allow federal courts to check state court recognition of anti-partisan gerrymandering norms, undermining judicial federalism. By potentially constraining state courts' ability to interpret state constitutions, *Moore* threatens to undermine state courts' important role in advancing democracy-enhancing norms and narrow the range of mechanisms for entrenching partisan gerrymandering norms at the state level. *Moore* could thus tilt the balance toward and elevate the primacy of state legislatures and redistricting commissions in partisan gerrymandering and voting rights.

In *Rucho* and *Moore*, the Supreme Court put its thumb on the scale in favor of political entrenchment of anti-partisan gerrymandering norms as opposed to judicial entrenchment of these norms, embracing the logic of the laboratories of democracy model. However, neither *Rucho* nor *Moore* addressed or considered a key problem involving the enforcement of anti-partisan gerrymandering norms and redistricting processes—the problem of *evasion* by state legislatures, redistricting commissions, and other political actors.

Evasion and noncompliance with norms against partisan gerrymandering can be traced to one of the central dilemmas associated with legislative redistricting—the problem of self-entrenchment.[118] Evasion and noncompliance remain pervasive concerns at the state level. Scholars have examined the problem of legislative noncompliance with state initiatives.[119] In addition, scholars have examined the lack of transparency in redistricting by state legislatures, suggesting the need for mechanisms promoting greater

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[118] *See* Gerken & Kang, *supra* note 30, at 86 (discussing the "unavoidable problem of self-entrenchment"); Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002)

[119] *See* Gerber et al., *supra* note 12, at 43 (discussing the factors that contribute to legislative noncompliance with enacted initiatives); Levitt, *supra* note 7, at 1843 (discussing partisanship and issues of compliance).

transparency and accountability.[120] Rebecca Green has analyzed how states codify transparency rules for redistricting and how state courts analyze and assess whether legislative redistricting processes were conducted in a transparent manner in redistricting litigation.[121] The evasion of entrenched norms against partisan gerrymandering raises key transparency and accountability concerns.[122]

To fully assess *Rucho* and *Moore*'s impact on partisan gerrymandering, we must also pay attention to the procedural dimensions of evasion.[123] The problem of evasion presents a serious concern from the perspective of the constitutional framework's ability to effectively address partisan gerrymandering. By addressing the substantive dimension of state court decisions recognizing anti-partisan gerrymandering norms based on constitutional interpretation, but not addressing the problem of evasion, *Rucho* and *Moore* have entrenched a model of federalism that contributes to representation diminution.

Evasion by state legislatures reflects a different dimension of the threat posed by countermajoritarian legislatures, who may deliberately entrench redistricting reforms that appear to advance democracy and voting rights, but with structural flaws and weaknesses that allow for procedural and temporal evasion. Evasion can thus be deployed by state legislators and other actors to directly undermine key policy goals of redistricting reforms, including transparency, bipartisanship, and responsiveness.[124]

Prior scholarship has documented the strengths and shortcomings of redistricting commissions.[125] Non-partisan and other forms of independent redistricting commissions have numerous advantages over legislative redistricting. These advantages include that the members generally lack self-

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[120] *See* Halberstam, *supra* note 12, at 447 (2012) (discussing reform proposals to address lack of transparency in state redistricting processes); Green, *Redistricting Transparency*, *supra* note 12, at 1708–1801 (discussing evasion of open-meetings laws in the context of redistricting).

[121] *See* Green, *Redistricting Transparency*, *supra* note 12, at 1793. Green's work on redistricting transparency examines important issues related to legislative compliance with transparency and procedural requirements. However, I suggest that the problem of *evasion* discussed in this article is broader than and encompasses transparency rules and requirements. Evasion can consist of substantive defiance of constitutional and statutory norms, procedural evasion (which I suggest is related to and overlaps with the problem of a lack of transparency), and temporal evasion. In addition, as discussed below and in Sections II.B and II.C, temporal evasion also encompasses efforts by state legislatures and redistricting commissions to defy or evade state court decisions and orders.

[122] Green, *Redistricting Transparency*, *supra* note 12, at 1800–01.

[123] I suggest that the approach followed in this Article is consistent with the new institutionalist turn in election law scholarship. *See* Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 98 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) ("An institutional turn would move our attention away from the courts toward a new set of private and public institutions, away from big reform proposals toward the more modest institutional tweaks that will make bigger and better reform possible in the long run.").

[124] *See* Green, *Redistricting Transparency*, *supra* note 12, at 1800–01 (describing certain structural flaws relating to legislative action, including redistricting).

[125] Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 337 (2007).

interest, the process has higher degrees of public legitimacy, and the process allows for some degree of specialized focus and attention that lets legislatures focus on pressing public issues and concerns.[126] In addition, redistricting commissions mitigate the advantages enjoyed by majority parties in elections and are less likely to be challenged in court.[127]

However, redistricting commissions can be manipulated and be subject to evasion dynamics as illustrated by the case studies of Ohio and New York in this Article.[128] As Nicholas Stephanopoulos observes, in states in which a redistricting commission is controlled by one party, commissions may also produce maps that favor the majority party and disregard redistricting criteria mandated by constitutional or statutory provisions.[129] In addition, Bruce Cain has argued that some redistricting commissions may also be prone to the problem of deadlock.[130] Certain forms and structures of redistricting are arguably more prone to evasion, but, as Cain suggests, deadlock may be possible even in independent citizen redistricting commissions.[131]

In this Article, I analyze three key types of evasion apparent in current redistricting adjudication: substantive defiance, procedural evasion, and temporal evasion. I define substance defiance as direct contravention of substantive norms including norms against partisan gerrymandering.[132] I define procedural evasion as referring to efforts by state legislatures, redistricting commissions, governors, and other political actors to circumvent and defy redistricting procedures and processes codified in state constitutions and/or statutes. I define temporal evasion as actions or strategies employed by state politic actors to delay enforcement of norms and force adoption of maps that may be constitutionally suspect for upcoming elections.

While substantive defiance of anti-partisan gerrymandering norms is often at the core of redistricting disputes, procedural and temporal evasion raise separate and serious concerns given that they can undermine transparency and allow political actors to defy not only constitutional norms and processes, but even court decisions that seek to enforce these norms and processes.

I argue that the problem of evasion highlights a key dimension of the structural governance bias within federalism that leads to representation diminution. Built-in structural dynamics within the structure of anti-

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[126] *Id.* at 337–38.

[127] *Id.* at 339–40.

[128] *Id.*

[129] *Id.*

[130] *See* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1811 (2012) (discussing different types of redistricting commissions and implications of differences in design and composition).

[131] *Id.* at 1820.

[132] *See infra* Section II.C (analyzing differing "forms of evasion of anti-partisan gerrymandering norms").

gerrymandering regimes, the permissive structure of federal constitutional law including the *Purcell* principle,[133] the realities of the timing of election calendars, and state litigation processes allow state legislatures to exploit weaknesses in redistricting reform regimes.[134]

In Section II.C I analyze case studies of evasion of norms against partisan gerrymandering in New York, Ohio, and Florida to illustrate how substantive, procedural, and temporal evasion strategies allow legislatures, redistricting commissions, and other government officials to undermine norms against partisan gerrymandering. As illustrated by these case studies, state actors have used evasion strategies to defy state constitutional and statutory provisions, force institutional deadlock in order to force courts to take over map drawing process, conduct state elections under maps that courts have invalidated, and defy state court decisions ordering the adoption of remedial redistricting maps.[135] Indeed, these evasion tactics mirror similar strategies employed by state actors in the context of recent federal court litigation in Alabama in the *Merrill v. Milligan* case, in which the state legislature arguably defied a lower federal court decision ordering the state to draw a new congressional map containing a second majority-minority district.[136]

II. CONCEPTUALIZING STATE RESPONSES TO PARTISAN GERRYMANDERING

To fully assess *Moore*'s probable impact on partisan gerrymandering, this Article analyzes variation in state partisan gerrymandering regimes. An increasing number of states have taken action to address partisan gerrymandering in a variety of ways, ranging from enacting constitutional amendments or statutes that explicitly prohibit partisan gerrymandering, mandating traditional redistricting criteria via amendment or statute, and enacting redistricting commissions that play varying roles in the redistricting

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[133] The *Purcell* principle is a doctrine that advocates that courts should not change election rules close to the time of an election because it can cause voter confusion.

[134] *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428, 441 (2016) (arguing that the *Purcell* principle explains that changes to voting specifications made close to the election date can lead to "voter confusion" and "electoral chaos"). Rachel Brewster has highlighted analogous temporal evasion concerns in international trade law. *See* Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102 (2011) (discussing structural procedural issues with regard to trade law).

[135] *See infra* Section II.C (illustrating how evasion strategies lead to the erosion of norms against gerrymandering).

[136] *See* Ian Millhiser, *How Alabama Could Get Away with Defying the Supreme Court*, VOX (July 26, 2023, 6:00 AM), https://www.vox.com/scotus/2023/7/26/23806856/supreme-court-voting-rights-act-allen-milligan-defiance-brett-kavanaugh (explaining how the Alabama state legislature enacted maps that are not in compliance with court orders).

process.[137] In *Rucho*, the majority cited several examples of state efforts to confront and address partisan gerrymandering, including a decision by the Supreme Court of Florida*, League of Women Voters of Florida v. Detzner*, which invalidated Florida's congressional districting plan on the grounds that it violated the Fair Districts Amendment to the Florida Constitution.[138] It is worth noting that in *Rucho*, the Court chose to cite to *Detzner*, a case involving an application of a state constitutional amendment codifying an explicit prohibition on partisan gerrymandering, but it did not cite to *League of Women Voters of Pennsylvania v. Pennsylvania*, a case involving judicial entrenchment of partisan gerrymandering norms.[139]

In this Part, I propose a typology of the different types of entrenchment of anti-partisan gerrymandering norms in states, examining judicial entrenchment, political entrenchment, and non-entrenchment of anti-partisan gerrymander norms.[140] Next, I propose a typology of different forms of evasion of anti-partisan gerrymandering norms and process. Finally, I draw on case studies of partisan gerrymandering disputes in New York, Ohio, and Florida to examine different types of evasion strategies that political actors have pursued to defy and circumvent politically entrenched anti-partisan gerrymandering regimes. Finally, I analyze case studies of state court responses to this evasion strategy.

A. *Typologies of Entrenchment*

In this Section, I suggest a three-part typology for classifying the main approaches based on the nature of substantive entrenchment (or non-

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[137] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) (discussing various state approaches to addressing partisan gerrymandering); Jonathan Cervas, Bernard Grofman & Scott Matsuda, *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections*, 21 U.N.H. L. REV. 421, 423 (2023) (analyzing state court adjudication and the role of state courts in partisan gerrymandering disputes across all states in the recent redistricting cycle).

[138] *See Rucho*, 139 S. Ct. at 2507 (discussing League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015)) ("In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution.").

[139] League of Women Voters of Pa. v. Pennsylvania, 178 A.3d 737, 741 (Pa. 2018).

[140] The terms "entrench" and "entrenchment" have been used to describe how parties or incumbents are able to lock themselves into power or retain power or control. *See, e.g.*, Daryl Levinson and Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 406 (2015) (discussing political and legislative entrenchment and observing that "scholars have increasingly viewed the entrenchment of incumbent officeholders, political parties, and majority coalitions as the central problem that legal regulation of the political process should be designed to solve"). In this article, I use entrenchment to describe the ways in which courts, legislatures, and electorates codify constitutional norms against partisan gerrymandering norms through constitutional amendments or statutes. *See* Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631 (2017) (describing entrenched law as permitting change only through incremental steps); Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399 (2008) (detailing the Constitution's entrenchment of its institution-creating and rights-conferring functions against change); Jacob T. Levy, *The Constitutional Entrenchment of Federalism*, *in* FEDERALISM AND SUBSIDIARITY: NOMOS LV 332 (James E. Fleming & Jacob T. Levy eds., 2014) (arguing that the essence of constitutional entrenchment lies in safeguarding procedural and rule of law rights against executive actions).

entrenchment) of norms against partisan gerrymandering.[141] The first type of entrenchment is judicial entrenchment, wherein state courts interpret state constitutional provisions to recognize anti-gerrymandering standards or principles. The second type of entrenchment is the political entrenchment model, wherein anti-partisan gerrymandering norms are entrenched through the political process either by constitutional amendments or statutes. The third model is the judicial acquiescence model, wherein state courts entrench deference to legislatures and executives by holding that partisan gerrymandering claims cannot be brought or are not recognized under state constitutions, based on the political question doctrine or simple non-recognition or rejection of norms against partisan gerrymandering.

1. *Judicial Entrenchment of Anti-Partisan Gerrymandering Norms*

An increasing number of state courts have recognized anti-partisan gerrymandering principles based on interpretation of state constitutional principles. In a series of recent decisions dating back to 2018, state supreme courts in Pennsylvania, North Carolina, Maryland, and Alaska have invalidated partisan gerrymanders as violating constitutional standards based on interpretations of provisions of their state constitutions. The primary form that judicial entrenchment has taken is the recognition of substantive anti-partisan gerrymandering norms or standards based on interpretations of state constitutions' general rights and elections provisions, including those codifying rights to free and equal elections, equal protection, and other voting rights provisions. State courts have applied anti-partisan gerrymandering norms based on these clauses in conjunction with neutral redistricting principles and other provisions of state constitutions.

i. Pennsylvania: *League of Women Voters of Pennsylvania v. Pennsylvania* (2018)

In 2017, the League of Women Voters together with a group of eighteen Democratic voters brought suit to challenge Pennsylvania's 2011 congressional map as a partisan gerrymander under the state constitution.[142] The 2011 Republican gerrymander in Pennsylvania was viewed as one of the three most extreme partisan gerrymanders nationally following the 2010 census cycle.[143] Petitioners argued that the 2011 map was crafted to pack a large number of Democratic voters into five districts and to disperse

[141] For another method to sort different approaches to analyzing partisan gerrymandering norms based on district level versus statewide representation, 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, 225–26 (2019) (discussing and comparing Chief Justice Roberts's district level and Justice Kagan's statewide harms approaches for analyzing partisan gerrymandering claims in Gill v. Whitford, 138 S. Ct. 1916 (2018)).

[142] *League of Women Voters of Pa.*, 178 A.3d at 741.

[143] *Pennsylvania Redistricting Lawsuit*, PUB. INT. L. CTR., https://pubintlaw.org/cases-and-projects/pennsylvania-redistricting-lawsuit/ (last visited Feb. 26, 2024).

remaining Democratic voters across the remaining thirteen districts in order to prevent Democratic majorities in each of those districts.[144] In the 2012 elections, although Republicans received just under forty-nine percent of the statewide vote, Republicans increased their margin in the congressional delegation from 12:7 to 13:5 (the state lost one seat after the 2010 census).[145]

In *League of Women Voters of Pennsylvania v. Pennsylvania* (*League of Women Voters of Pennsylvania*), the Pennsylvania Supreme Court invalidated the 2011 congressional map, holding that it violated the Free and Equal Elections Clause contained in Article I, Section 5 of the state constitution.[146] Noting that Section 5 is contained with the "Declaration of Rights" in Article I, the *League of Women Voters of Pennsylvania* majority observed that the Declaration of Rights is "an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish."[147] The Pennsylvania Supreme Court did not address the free expression or equal protection arguments that had been advanced by the petitioners and based its decision solely on the Free and Equal Elections Clause.[148] Significantly, the Court held that it could apply separate standards to assess violations of the Free and Equal Elections Clause than those governing the federal Equal Protection Clause of the Fourteenth Amendment.[149]

In interpreting Article I, Section 5, the *League of Women Voters of Pennsylvania* majority relied on textual analysis, original and historical intent, and prior case law.[150] The *League of Women Voters of Pennsylvania* majority began by discussing how the Free Elections Clause had been enacted to address particular laws that had sought to manipulate elections to the colonial assembly, end dilution of votes, and codify protections of the right to fair and equal representation.[151] The Court held that the terms free and equal must be interpreted expansively and in light of the framers' intent that the electoral process "be kept open and unrestricted to the voters" and "conducted in a manner which guarantees . . . a voter's right to equal participation in the electoral process."[152] The majority thus concluded that the Free and Equal Elections Clause "mandates that all voters have an equal opportunity to translate their votes into representation."[153] Relying on case law interpreting the terms "free and equal" in Article I, Section 5, the Court

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[144] *League of Women Voters of Pa.*, 178 A.3d at 741.
[145] *Id.* at 763–65.
[146] *Id.* at 741. "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5.
[147] *League of Women Voters of Pa.*, 178 A.3d at 803.
[148] *Id.* at 802 n.63.
[149] *Id.* at 813.
[150] *Id.* at 814.
[151] *Id.* at 804, 808.
[152] *Id.* at 804.
[153] *Id.*

concluded that the provision had been interpreted as prohibiting the dilution of individual voting power.[154]

In measuring compliance with Article I, Section 5, the Pennsylvania Supreme Court held that traditional districting criteria such as compactness, contiguity, maintenance of political boundaries and subdivisions, and maintenance of population equality could be used as baseline measures to assess dilution claims under the Free and Equal Elections Clause.[155] The Court further analyzed statistical evidence and expert testimony by Dr. Jowei Chen. Dr. Chen's analysis was based on the creation of two sets of five hundred computer-simulated state redistricting plans, one of which employed traditional redistricting criteria.[156] Based on an analysis of this first set of plans, which were more compact and resulted in fewer splits of political subdivisions than the 2011 Plan, the Court concluded that a process that prioritized consideration of traditional redistricting criteria could not have resulted in the 2011 Plan's adoption.[157] The Pennsylvania Supreme Court thus concluded that the 2011 Plan subordinated traditional redistricting criteria "in the service of partisan advantage," depriving petitioners of their right to free and fair elections.[158]

The Pennsylvania Supreme Court invalidated the Republican gerrymander and ordered a court-drawn redistricting plan.[159] In the 2020 cycle, the legislature and Governor reached an impasse when the Democratic governor vetoed the General Assembly plan, forcing the Pennsylvania Supreme Court to order a court-drawn map in *Carter v. Chapman*.[160] *Carter v. Chapman* is discussed later in this Section on impasse.[161]

ii. North Carolina: *Harper v. Hall* (2022)

State court adjudication of partisan gerrymandering in North Carolina has rapidly evolved and shifted over the past two redistricting cycles. Following both the 2010 and 2020 redistricting cycles, litigants challenged Republican gerrymanders in North Carolina in state courts. In earlier litigation in federal court, litigants challenged the Republican congressional redistricting plan after 2010 as a racial gerrymander, and the congressional map was struck down in *Cooper v. Harris*.[162] In redrawing new districts, the

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[154] *Id.*; PA. CONST. art. I, § 5.

[155] *League of Women Voters of Pa.*, 178 A.3d at 816.

[156] *Id.* at 818–20.

[157] *Id.* at 819–20.

[158] *Id.* at 818.

[159] *Id.* at 825.

[160] Carter v. Chapman, 270 A.3d 444 (Pa. 2022), *cert. denied sub nom*. Costello v. Carter, 143 S. Ct. 102 (2022).

[161] *See infra* Section III.C.2.

[162] Cooper v. Harris, 137 S. Ct. 1455, 1481–82 (2017). *See* Cervas et al., *supra* note 137, at 462 (describing a federal court striking down North Carolina's redistricting plan in *Cooper v. Harris*).

Republicans replaced the earlier maps with a new plan that was later challenged as a partisan gerrymander in state court in *Harper v. Lewis*.[163]

In *Harper v. Lewis*, Democrats brought a challenge to the 2016 congressional map that had been enacted following the Supreme Court's decision in *Cooper v. Harris*.[164] Plaintiffs argued that the 2016 plan violated the Free Elections, Equal Protection, and Freedom of Speech and Assembly Clauses. The state court in *Harper v. Lewis* enjoined the enforcement of the 2016 plan and ordered the legislature to produce a new congressional map in which partisanship was not the predominant motive.[165] The General Assembly produced a new map that reduced the Republican advantage, resulting in Democrats winning five out of the thirteen congressional seats, an increase of two seats for the Democrats.[166]

Following the 2020 census, on August 5, 2021, the Republicans dominated the General Assembly's Senate Committee on Redistricting, and the House Redistricting Committee held a Joint Meeting to start discussion on the redistricting process.[167] On August 12, 2021, following public comment and debate, the Joint Redistricting Committee released its final redistricting criteria. One of the criteria was "Election Data," and this criterion stipulated that "[p]artisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans."[168]

In November 2021, two groups of plaintiffs filed suit against the legislative defendants alleging that the 2021 congressional and state Senate and House plans violated the state constitution by establishing severe partisan gerrymanders in violation of the Free Elections, Equal Protection, and Freedom of Speech and Assembly Clauses contained in the Declaration of Rights in Article I of the North Carolina Constitution.[169] After hearing from several experts and reviewing their analyses of the maps based on various measures and methodological approaches, a three judge panel of the Wake County Superior Court made extensive findings of fact confirming that all of the 2021 plans "were extreme partisan outliers and the product of intentional, pro-Republican partisan redistricting."[170] The trial court specifically held that the congressional districting map was "a partisan

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[163] Complaint at 1, Harper v. Lewis, No. 5:19-CV-452 (N.C. Super. Ct. 2019), 2019 WL 5405279.

[164] *Id.*

[165] *See* Cervas et al., *supra* note 137, at 462–63.

[166] *Id.*

[167] Harper v. Hall, 868 S.E.2d 499, 511 (N.C. 2022), *cert. granted sub nom*. Moore v. Harper, 142 S. Ct. 2901 (2022), and *overruled in later appeal*, 886 S.E.2d 393 (N.C. 2023), and *aff'd sub nom*., Moore v. Harper, 143 S. Ct. 2065 (2023).

[168] *Id.* at 512.

[169] *Id.* at 513. The first group of plaintiffs was led by the North Carolina League of Conservation Voters (LCV), while the lead named plaintiff for the second group was Rebecca Harper. The LCV plaintiffs also alleged that the 2021 plan constituted impermissible racial vote dilution in violation of the Free Elections Clause and Equal Protection Clause and that the plans violated the Whole County Provisions in Art. II, §§ 3(3), 5(3). *Id.*

[170] *Harper*, 868 S.E.2d at 515 (internal quotations omitted).

outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation."[171] However, the trial court ultimately concluded that the partisan gerrymandering claims presented nonjusticiable political questions and held that it could not deem the maps unconstitutional.[172] The trial court also held that the plaintiffs failed to prove racial vote dilution.[173]

On appeal, the North Carolina Supreme Court in *Harper v. Hall* (*Harper I*) reversed and held that the legislative defendants had violated state law by enacting maps that constituted partisan gerrymandering and also rejected the trial court's holding that partisan gerrymandering claims present nonjusticiable political questions.[174] The North Carolina Supreme Court acknowledged the Supreme Court's recent decision in *Rucho*, but affirmed that state courts could still adjudicate partisan gerrymanders under state constitutions in ruling that they did not present nonjusticiable political questions under the state constitution.[175] The state supreme court advanced three main reasons in support of this conclusion.

First, the state supreme court held that the state constitution was more detailed and specific than the federal constitution in articulating protections for the rights of its citizens.[176] Second, the state supreme court also noted that "state law provides more specific neutral criteria against which to evaluate alleged partisan gerrymanders . . . ."[177] Third, the state supreme court held that the *Rucho* majority recognized the "independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level" observing that the role of state courts is distinct from the role of federal courts.[178] In addition, the North Carolina Supreme Court also rejected arguments based on the independent state legislature theory that state legislatures possessed exclusive and independent authority to draw congressional maps under the Elections Clause of the federal constitution.[179] The North Carolina Supreme Court affirmed that North Carolina state courts did have jurisdiction to review the state legislatures enactment of congressional maps under the state constitution.[180]

The North Carolina Supreme Court in *Harper I* analyzed key provisions of the Declaration of Rights in Article I, including the Free Elections, Equal Protection, and Freedom of Speech and Assembly Clauses, based on the text,

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[171] *Id.* at 522.
[172] *Id.* at 524.
[173] *Id.*
[174] *Id.* at 559.
[175] *Id.* at 533.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* at 551.

structure, history, and original intent of these provisions.[181] The North Carolina Supreme Court analyzed the history of the drafting of the state constitution and discussed how the framers included the Declaration of Rights to entrench the supremacy of rights and as a check on the power of the state government.[182] The Court went on to discuss how the first two sections of the Declaration of Rights in Article I codified principles of equality and popular sovereignty, and that the remaining rights in the Declaration of Rights must be interpreted in light of these core commitments.[183]

Harper I adopted a structural approach to recognizing constitutional norms governing partisan gerrymandering based on interpretation of rights and equality principles with consideration of neutral redistricting criteria as baseline measures of partisan dilution. The *Harper I* majority relied on several key rights provisions in the "Declaration of Rights" Section in Article 1 of the state constitution in recognizing an anti-partisan gerrymandering standard, including Section 10 (Free Elections), Section 12 (Right of Assembly and Petition), Section 14 (Freedom of Speech and Press), and Section 19 (Equal Protection).[184] In addition, the *Harper I* court held that the state constitution's Equal Protection Clause prohibited the government from "burdening on the basis of partisan affiliation the fundamental right to equal voting power," and the Free Speech and Freedom of Assembly Clause prohibited "discriminating against certain voters by depriving them of substantially equal voting power, which is a form of impermissible viewpoint discrimination and retaliation for engaging in protected political activity."[185]

The *Harper I* majority applied these principles, in conjunction with the trial court's finding of facts based on expert analysis of the maps, to hold that the 2021 maps infringed upon plaintiffs' fundamental right to equal voting power.[186] The *Harper I* court also held that any future redistricting plans shall be required to comply with traditional neutral districting criteria codified in Article II, Section 3 of the state constitution and not subordinate them to partisan criteria.[187]

The state supreme court remanded to the trial court to oversee redrawing of the maps by the General Assembly or, if necessary, by the court.[188] After the General Assembly enacted a new remedial congressional map, the trial

[181] *Id.* at 535–47.
[182] *Id.* at 538–39.
[183] *Id.*
[184] *Id.* at 535–47.
[185] *Id.* at 546.
[186] *Id.* at 552–53, 556–59.
[187] *Id.* at 558, 559 n.17.
[188] *Id.* at 559–60.

court rejected that map, and adopted court-ordered maps that had been created by a group of special masters.[189]

On February 25, 2022, the legislative defendants filed an emergency application in the United States Supreme Court and requested a stay of the state supreme court's decision.[190] The Court declined to issue the stay but later granted certiorari.[191] In December 2022, the North Carolina Supreme Court issued a decision "affirming in part, reversing in part, and remanding the case" back to the trial court.[192] The North Carolina Supreme Court affirmed the trial court's holding that the General Assembly's remedial congressional plan failed to comply with the requirements the state supreme court had set forth in *Harper I*. Following judicial elections in 2022, Republicans regained control of the North Carolina Supreme Court.[193] Shortly thereafter, the North Carolina Supreme Court reversed its earlier decision and held that partisan gerrymandering claims are nonjusticiable political questions under the state constitution.[194]

iii. Maryland: *Szeliga v. Lamone* (2022)

Prior to the state court litigation in *Szeliga v. Lamone*, litigants challenged Maryland's 2011 redistricting plan in federal court as a partisan gerrymander based on the readjustment of voter composition in the Sixth District that changed the district from a Republican majority district to a "safe" Democratic majority district.[195] The federal district court in *Benisek v. Lamone* invalidated the plan as a partisan gerrymander based on its impact on First Amendment associational rights based on an approach suggested by Justice Kennedy's concurrence in the *Vieth* case. The district court held that the readjustment was intended by the Governor and General Assembly to increase the Democratic majority in the House delegation from a seven-to-one majority.[196] However, this decision was ultimately vacated by the Court's decision in *Rucho v. Common Cause*.[197]

Following the 2020 census, the Democratic-controlled legislature enacted new redistricting maps in 2021, overriding a veto by Republican Governor Larry Hogan.[198] The resulting congressional map consisted of

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[189] Cervas et al., *supra* note 137, at 463.

[190] Moore v. Harper, 143 S. Ct. 2065, 2075 (2023), *cert. granted*, 142 S. Ct. 2901 (2022).

[191] *Id.* at 2075–76.

[192] *Id.* at 2076.

[193] *North Carolina Election Results*, N.Y. TIMES (Nov. 30, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-north-carolina.html.

[194] *Moore,* 143 S. Ct. at 2076.

[195] Benisek v. Lamone, 348 F. Supp. 3d 493, 502 (D. Md. 2018), *vacated and remanded sub nom*., Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[196] *Id.*

[197] Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

[198] Zach Montellaro, *Maryland Court Strikes Down Congressional Map as Illegal Democratic Gerrymander*, POLITICO (Mar. 25, 2022, 1:31 PM), https://www.politico.com/news/2022/03/25/maryland-court-congressional-map-illegal-democratic-gerrymander-00020518.

eight congressional districts, and seven of the districts contained strong Democratic majorities, while the sole Republican-held district was changed from a safe Republican district to a competitive district that President Biden won by less than one percentage point in the 2020 elections.[199] Because *Rucho* ruled that federal courts could no longer hear partisan gerrymandering claims, Republicans challenged the 2021 plan in state court in *Szeliga v. Lamone*.[200] In *Szeliga*, plaintiffs brought partisan gerrymandering claims against the legislative maps drawn by the Democratic controlled Maryland legislature, alleging violations of the Free Elections Clause and Article 1, Section 1, and the Equal Protection Clause and Article 1, Section 2.[201]

The Maryland circuit court drew on the interpretation of Article 3, Section 4 of the state constitution, which codified requirements of contiguity, compactness, equal population and respect for natural boundaries and political subdivisions, as well as the nexus between the "standards" clause and Article 7 (Free Elections Clause) and Article 24 (Due Process and Equal Protection) of the Declaration of Rights.[202] In addition, the court held that the congressional plan could be evaluated as an unconstitutional partisan gerrymandering separately under the Free Elections Clause in Article 7, the Equal Protection Clause in Article 24, and the Free Speech Article in Article 40 of the Declaration of Rights.[203]

The court evaluated the 2021 congressional plan based on the standards set forth in Article 3, Section 4 of the Maryland Constitution.[204] The court heavily relied on the testimony of Sean Trende, a Republican expert who relied on methodologies and approaches applied and accepted in both North Carolina (*Harper I*) and Pennsylvania (*League of Women Voters*).[205] Based on an analysis of an ensemble of maps presented by Mr. Trende, the court held that the 2021 congressional plan was an outlier map and an extreme gerrymander that subordinated constitutional redistricting criteria to political considerations in violation of Article 3, Section 4 of the state constitution on its face, and alternatively in violation of Article 3, Section 4 through its nexus with the Free Elections Clause in Article 7 of the Declaration of Rights.[206]

The Court held that the 2021 congressional plan also failed to pass constitutional muster under each of the other Articles of Maryland's Declaration of Rights that plaintiffs had alleged violations in their

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[199] *Id.*

[200] Szeliga v. Lamone, No. 02-CV-21-001773, slip op. at 2–3 (Cir. Ct., Anne Arundel County, Md. Mar. 25, 2022).

[201] *Id.*

[202] *Id.*

[203] *Id.* at 24–28.

[204] *Id.* at 2–3.

[205] *Id.* at 59–68.

[206] *Id.* at 66, 88–90.

pleadings.[207] The court held that the right of all voters in congressional elections was violated under Article 7's Free Elections Clause because the plan was drawn with "partisanship as a predominant intent, to the exclusion of traditional redistricting criteria."[208] In addition, the court held in the alternative that the plan violated Article 24's Equal Protection Clause, holding that the plan failed strict scrutiny because of the adverse impact on Republican voters and candidates and the state's failure to provide a compelling state interest to justify this adverse impact.[209] Furthermore, the court held that the plan failed strict scrutiny under Article 40's Free Speech Article based on the dilution of the voice of Republican voters and failure to advance a compelling justification for such dilution. Finally, the court held that the plan violated the principle of popular sovereignty entrenched in the entire state constitution and Declaration of Rights.[210]

iv. Other States

State courts in other states have also recognized anti-partisan gerrymandering norms. The Alaska Supreme Court recently recognized that intentional partisan gerrymandering in legislative redistricting violates the state constitution, invalidating two state senate districts.[211] Recently, the New Mexico Supreme Court applied the framework set forth in Justice Kagan's dissent in *Rucho* and held that partisan gerrymandering claims are justiciable under the New Mexico Constitution in a case involving a challenge to a Democratic gerrymander.[212]

2. *Political Entrenchment*

Over the past two decades, an increasing number of states have entrenched norms against partisan gerrymandering through constitutional amendments or statutes. The following state constitutions contain language prohibiting favoring (and/or disfavoring) a political party in the text of the state constitution: Arizona, California, Colorado, Florida, Hawaii (constitution and statute), Michigan, Montana, New York, Ohio, and

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[207] *Id.* at 93.

[208] *Id.* (citation omitted).

[209] *Id.*

[210] *Id.* at 93–94.

[211] *In re* 2021 Redistricting Cases, 528 P.3d 40, 93–95, 101 (Alaska 2023); Yurij Rudensky, *Status of Partisan Gerrymandering Litigation in State Courts*, BRENNAN CTR. FOR JUST. (Dec. 18, 2023), https://statecourtreport.org/our-work/analysis-opinion/status-partisan-gerrymandering-litigation-state-courts. The Alaska Supreme Court cited to an earlier decision invalidating a state district, *Kenai Peninsula Borough v. State*, based on equal protection principles. In re *2021 Redistricting Cases*, 528 P.3d at 57. The *Kenani Peninsula Borough* majority held that "[w]e consider a voter's right to an equally geographically effective or powerful vote, while not a fundamental right, to represent a significant constitutional interest." Kenai Peninsula Borough v. State, 743 P.2d 1352, 1372 (Alaska 1987).

[212] Grisham v. Van Soelen, 539 P.3d 272, 289–290 (N.M. 2023).

Washington.[213] Other states have entrenched this norm via statute, including Delaware (state legislature), Nebraska, and Utah.[214]

This entrenchment has occurred often in tandem with the enactment of redistricting commissions. State legislatures play the primary role in redistricting in most states. Thirty-four state legislatures have primary control over drawing state legislative districts and thirty-nine state legislatures play a primary role in drawing congressional districts.[215] An increasing number of states have enacted reforms that delegate the power to draw district lines to redistricting commissions.[216] These states employ a variety of redistricting commission models including truly independent redistricting commissions (IRC) with the power to draw maps without any possible legislative override, to advisory commissions that play an advisory role to legislatures in the redistricting process, backup commissions, and politician commissions.[217]

Eight states currently use independent redistricting commissions to draw a combination of both state and federal maps: Arizona, California, Colorado, Idaho, Michigan, Montana, New York, and Washington.[218] Arizona enacted reforms to create an independent redistricting commission in 2000 and was soon followed by several other states.[219] Between 2008 and 2010, California enacted constitutional amendments through the initiative process, creating an IRC and adopting new criteria for redistricting.[220] In 2018, four more states enacted ballot measures that approved the creation of IRCs—Colorado, Michigan, Missouri, and Utah.[221] However, not all independent redistricting commissions are truly non-partisan. Some IRCs, including New York's commission, are actually bipartisan commissions in which an equal number of members from both parties serve on the commission.

Seven states currently use politician commissions, in which elected officials draw state legislative maps: Arkansas, Hawaii, Missouri, New Jersey, Ohio, Pennsylvania, and Virginia.[222] Three states use politician commissions to draw congressional maps: Hawaii, New Jersey, and Virginia.[223] There is significant variation in how these commissions operate.

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[213] *Redistricting Criteria*, NAT'L CONF. OF STATE LEGISLATURES (July 16, 2021), https://www.ncsl.org/redistricting-and-census/redistricting-criteria.

[214] *Id.*

[215] Justin Levitt & Doug Spencer, *Who Draws the Lines?*, ALL ABOUT REDISTRICTING (2020), https://redistricting.lls.edu/ redistricting-101/who-draws-the-lines/#advisory+commissions.

[216] *Id.*

[217] *See id.* (discussing different types of redistricting commissions).

[218] *Id.* Alaska also uses an IRC, but it does not draw federal maps because the state only has one congressional district. *Id.*

[219] *Independent Redistricting Commissions*, CAMPAIGN LEGAL CTR., https://campaignlegal.org/democracyu/accountability/independent-redistricting-commissions (last visited Feb. 26, 2024).

[220] ERIC MCGHEE, PUB. POL'Y INST. OF CAL., ASSESSING CALIFORNIA'S REDISTRICTING COMMISSION 5 (Mar. 2018).

[221] *Independent Redistricting Commissions*, *supra* note 219.

[222] Levitt & Spencer, *supra* note 215.

[223] *Id.*

In some of these states, like Ohio, politicians in the majority have significant power, while in other states, like Virginia, the system can effectively function as an independent commission.[224]

3. *Non-Entrenchment*

Finally, a third category of partisan gerrymandering regimes at the state level is what I refer to as the judicial acquiescence or non-entrenchment model. This category encompasses a range of judicial approaches in states that have not judicially or politically entrenched anti-partisan gerrymandering norms, ranging from courts' adoption of political question doctrines to non-recognition of partisan gerrymandering claims. Here I focus on two main types of acquiescence or non-entrenchment: the political question model and the non-recognition model.

State supreme courts in North Carolina and Kansas recently ruled that partisan gerrymandering claims present nonjusticiable political questions.[225] The North Carolina Supreme Court shifted from the judicial entrenchment to judicial acquiescence model in *Harper III*.[226] After the North Carolina Supreme Court in *Harper I* struck down the 2021 redistricting maps and remanded back to the trial court to oversee the drawing of the maps by the General Assembly, the General Assembly redrew new maps.[227] However, the trial court ultimately rejected these new maps and adopted interim maps that had been produced by special masters.[228] On appeal, the North Carolina Supreme Court in *Harper II* affirmed the trial court's ruling that the General Assembly's remedial congressional map failed to comply with the requirements set forth in *Harper I*.[229]

The legislative defendants then sought a rehearing and requested that the state supreme court withdraw its remedial opinion in *Harper II*, asking the Court to also overrule the earlier decision in *Harper I* while acknowledging that such a ruling would not "negate the force of its order striking down the 2021 plans."[230] By this point, the North Carolina Supreme Court's composition had changed as Republicans regained the majority in the

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[224] *Id.*

[225] Rudensky, *supra* note 211. In 2021, a Nevada state trial court held that partisan gerrymandering claims are nonjusticiable political questions under the Nevada Constitution, but the state's supreme court has never ruled on the issue. *See* Order Denying Plaintiffs' Motion for Preliminary Injunction at 5, Koenig v. Nevada, No. 21-OC-00166-1B (Nev. Dist. Ct. 2022) (concluding that the plaintiffs were unlikely to prevail on their claims as "partisan redistricting claims [are] non-cognizable under the United States Constitution").

[226] Hansi Lo Wang, *A North Carolina Court Overrules Itself in a Case Tied to a Disputed Election Theory*, NPR (Apr. 28, 2023, 12:25 PM), https://www.npr.org/2023/04/28/1164942998/moore-v-harper-north-carolina-supreme-court (discussing the court's rejection of its own precedent following a change in members' political makeup).

[227] Moore v. Harper, 143 S. Ct. 2065, 2075 (2023).

[228] *Id.*

[229] *Id.* at 2076.

[230] *Id.* (citation omitted).

November 2022 elections.[231] In *Harper III*, the North Carolina Supreme Court withdrew its *Harper II* opinion concerning remedial maps, and overruled its decision in *Harper I*.[232] Drawing on the United States Supreme Court's decision in *Rucho* and an analysis of the state constitution, the *Harper III* court repudiated *Harper I* and held that partisan gerrymandering claims are nonjusticiable political questions under the North Carolina Constitution.[233]

The Kansas Supreme Court recently held that partisan gerrymandering claims are nonjusticiable political questions under the Kansas Constitution. In *Rivera v. Schwab*, plaintiffs challenged a congressional districting plan enacted by the Republican legislature as a partisan gerrymander.[234] The plan had been vetoed by the Democratic governor, but the legislature was able to override the veto.[235] Although a lower court invalidated the map as an intentional partisan gerrymander, the Kansas Supreme Court reversed and upheld the map. The court ruled that partisan gerrymandering claims are nonjusticiable political questions under the Kansas Constitution because the state constitution does not provide judicially discoverable or manageable standards for assessing such claims.[236] In other states, including Kentucky and New Jersey, state courts have not ruled that partisan gerrymandering is a nonjusticiable political question, but they have also refused to recognize partisan gerrymandering claims under their respective state constitutions.[237]

B. *Typologies of Evasion*

As noted in Section II.A, many states have entrenched anti-partisan gerrymandering norms through a variety of mechanisms, including judicial entrenchment based on constitutional interpretation or political entrenchment via constitutional amendment or statutory enactment. However, one pattern that persists across states in both categories is the problem of noncompliance or constitutional evasion, wherein state legislatures or other political actors seek to evade the political entrenchment of these norms in a variety of ways. I suggest there are three types of evasion—substantive, procedural, and temporal.

The primary strategy or approach illustrated by the state case studies in this Article is substantive defiance of anti-partisan gerrymandering norms. I define substantive defiance as legislative non-compliance or defiance of constitutional or statutory norms that have been politically entrenched. In

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[231] Hansi Lo Wang, *What the Supreme Court's Rejection of a Controversial Theory Means for Elections*, NPR (June 30, 2023, 5:29 PM), https://www.npr.org/2023/06/28/1184631859/what-the-supreme-courts-rejection-of-a-controversial-theory-means-for-elections.

[232] *Moore*, 143 S. Ct. at 2076.

[233] *Id.*

[234] Rivera v. Schwab, 512 P.3d 168, 173 (Kan. 2022).

[235] *Id.*

[236] *Id.* at 187.

[237] Cervas et al., *supra* note 137, at 48–49, 53.

the partisan gerrymandering context, substantive evasion takes the form of state legislatures or other actors enacting redistricting plans for the purpose of favoring or disfavoring a political party even where there are politically entrenched constitutional or statutory prohibitions on consideration and use of partisanship in redistricting. As discussed in the next Section, New York, Ohio, and Florida illustrate recent examples of substantive defiance of constitutional prohibitions on partisan gerrymandering.

A second form of evasion is procedural evasion. Procedural evasion describes the process or dynamic in which political actors, including state legislatures, redistricting commissions, and governors, seek to circumvent the political process established by constitutional or statutory provisions for redistricting in a given state. Procedural evasion can take several forms, including deliberate legislative efforts to fail to enact redistricting plans, conducting or coordinating map drawing with external actors outside of the legislative process, and preventing redistricting commissions from playing a role in the map drawing process. As discussed in the next Section, New York and Ohio illustrate recent examples of procedural evasion of processes that had been entrenched via initiative constitutional amendments.

A third form of evasion is temporal evasion. Temporal evasion describes strategies in which state actors deliberately delay the enactment of redistricting plans to prevent or undermine litigation-based efforts from blocking the enforcement of plans, or alternatively force the use of "run out the clock" strategies that take advantage of election deadlines and force courts to adopt plans that may run afoul of anti-partisan gerrymandering norms. Redistricting processes in Ohio and Florida present examples of different forms of temporal evasion.

C. *Case Studies of Evasion*

In this Section, I analyze case studies of different forms of entrenchment to suggest implications for the future of federal court review of state court decisions involving partisan gerrymandering claims.

1. *New York: Bipartisan Commission + Legislature*

The *Harkenrider v. Hochul* litigation in New York provides an illustration of different forms of evasion of anti-partisan gerrymandering norms. New York enacted redistricting reform by approving the 2014 amendments that were adopted by two consecutive legislatures and by voters through popular initiative.[238] The amendments created an IRC, a new process for redistricting, and prohibitions against partisan and racial gerrymandering.[239] The amendments were designed to create a transparent

[238] Harkenrider v. Hochul, 197 N.E.3d 437, 440, 448 (N.Y. 2022).
[239] *Id.* at 440.

public redistricting process.[240] While the amendments labeled the new commission as an IRC, the commission was actually a bipartisan redistricting commission.[241]

The 2014 amendments were enacted in response to a recent history of partisan gerrymandering in New York, including the 2012 cycle. In 2012, the state legislature did not reach agreement on congressional maps, forcing a federal court to order the adoption of a congressional redistricting plan.[242] On the state legislative front, the legislature was able to enact state senate and assembly maps, but these maps were heavily criticized as extreme partisan gerrymanders, and then-Governor Andrew Cuomo threatened to veto the maps unless the legislature made a commitment to enacting redistricting reform legislation.[243] In response, the legislature demonstrated a commitment to redistricting reform by enacting the Redistricting Reform Act of 2012 and the first of two concurrent resolutions that proposed the constitutional amendments establishing the IRC process and norms against partisan gerrymandering.[244]

The 2014 amendments charged the IRC with developing and submitting a redistricting plan to the legislature for a vote without amendment.[245] In the event the first plan is rejected by the legislature, the IRC is required to prepare a second redistricting plan along with necessary implementing legislation.[246] Under Article III, Section 4(b), the legislature could only amend the IRC map if the legislature rejected the IRC's second plan, and legislative amendments are limited to those that would affect no more than two percent of the population in any district.[247]

After receiving the results of the 2020 federal census, New York state began its redistricting process in 2021.[248] This marked the first cycle in which New York followed the IRC process established under the 2014 constitutional amendments.[249] During this process, the IRC failed to garner sufficient votes for a single consensus map, and pursuant to Article II, Section 5-b(g), initially submitted two sets of proposed redistricting plans to the legislature, each reflecting maps produced by the Democratic and

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[240] *Id.* at 448.

[241] *See* Cain, *supra* note 130, at 1811 (discussing different types of redistricting commissions and implications of differences in design and composition).

[242] *Harkenrider*, 197 N.E.3d at 448 (discussing the 2012 redistricting cycle in New York).

[243] *Id.* (citing Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U. RICH. L. REV. 771, 829 (2013); Thomas Kaplan, *An Update on New York Redistricting*, N.Y. TIMES (Mar. 6, 2012), https://www.nytimes.com/2012/03/06/nyregion/unmapped-update-on-new-york-redistricting.html.

[244] *Harkenrider*, 197 N.E.3d at 448.

[245] *Id.* at 441.

[246] *Id.* (citing N.Y. CONST. art. III, § 4(b)).

[247] *Id.* (citing N.Y. CONST. art. III, § 4(b)).

[248] Samar Khurshid, *New York's New, Untested Redistricting Process Set to Unfold After 2020 Census*, GOTHAM GAZETTE (Apr. 12, 2019), https://www.gothamgazette.com/state/8445-new-york-s-new-untested-redistricting-process-set-to-unfold-after-2020-census.

[249] *Id.*

Republican delegations.[250] The legislature rejected both plans and notified the IRC, triggering a new obligation to produce a second redistricting plan pursuant to Article III, Section 4(b) within fifteen days.[251]

Shortly thereafter, members of the bipartisan commission engaged in procedural evasion in order to deadlock the process.[252] Both Republican and Democratic members of the commission accused each other of deadlocking and sabotaging the process for different reasons.[253] Democrats accused Republicans of deliberately deadlocking the process in order to shift the responsibility for map drawing to the courts.[254] In an official statement, the Democratic members of the commission stated that they had repeatedly attempted to schedule a meeting prior to the January 26th deadline to produce a second map and that the Republican members of the commission refused to meet, reflecting a repeated pattern of Republicans obstructing the commission's work.[255] Ultimately, each of the two independent non-partisan members of the Commission sided with the Republican and Democratic blocs on the commission to create a 5-5 deadlock.[256] On January 24, 2022, one day before the fifteen-day deadline, and one month prior to the February 28, 2022 deadline, the commission announced that it deadlocked and would be unable to present a second plan to the legislature.[257]

In order to bypass the deadlock, the legislature engaged in its own attempt at "counter-evasion." It enacted a new law that allowed the legislature to draw district maps if the commission failed to produce a map, in direct violation of the state constitutional provisions governing the redistricting process.[258] This law was ultimately invalidated in *Harkenrider*.[259] One week later, the Democratic-controlled assembly and senate enacted new congressional and state legislative maps, and the Governor signed into law the legislation enacting the new maps.[260]

Petitioners in *Harkenrider* sued the Governor, Senate Majority Leader, Speaker of the Assembly, and the New York State Board of Elections, challenging the congressional and state senate maps under Article III,

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[250] *Harkenrider*, 197 N.E.3d at 442 (citing N.Y. CONST. art. III, § 5-b(g)).

[251] *Id.* (citing N.Y. CONST. art. III, § 4(b)).

[252] Michael Li, *What Went Wrong with New York's Redistricting*, BRENNAN CTR. FOR JUST. (June 7, 2022), https://www.brennancenter.org/our-work/research-reports/what-went-wrong-new-yorks-redistricting (arguing that Republicans deliberately deadlocked the commission process to force state courts to take over the map drawing process).

[253] Kate Lisa, *Officials Prep for Redistricting Court Fight Amid Deadlock*, LIVINGSTON CNTY. NEWS (Jan. 26, 2022), https://www.thelcn.com/news/local/officials-prep-for-redistricting-court-fight-amid-deadlock/article_7b50cb53-e97d-5510-aaba-9d27febb4db8.html.

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] Harkenrider v. Hochul, 197 N.E.3d 437, 442 (N.Y. 2022).

[258] Li, *supra* note 252.

[259] *Id.*

[260] *Harkenrider*, 197 N.E.3d at 442.

Section 5's special proceedings provision. Petitioners argued that the maps were unconstitutional both on procedural and substantive grounds.[261]

In *Harkenrider*, the Court of Appeals of New York invalidated the state legislature's adoption of legislative and congressional maps on both procedural and substantive grounds.[262] The Court ruled that the legislature had violated the procedural requirements established by the 2014 amendments requiring that the legislature must adopt maps by either approving or making minor revisions to the maps produced by the independent redistricting commission. According to the Court, Article III, Section 4(b) only allowed the legislature to enact its own implementing legislation for redistricting after two plans produced and submitted by the commission had been duly considered and rejected by the legislature.[263] In this case, the legislature enacted its legislation one day prior to the fifteen-day deadline for the commission to produce a second map without waiting for the commission to produce a second map that could be rejected.[264]

In addition, the Court held that the legislature violated Article III, Section 4's requirement that any redistricting act adopted by the legislature must be based on a plan that had been submitted by the commission, and if the legislature rejects the commission's plan, it is only permitted to amend the Commission's plan and not draw entirely new maps.[265] Again, the state legislature violated this requirement by proceeding to enact redistricting plans.[266]

The Court also ruled that the state legislature violated the provisions enacted by the 2014 amendments on *substantive* grounds. Specifically the legislature violated Article III, Section 4(c)(5), which required that districts "shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."[267] The Court of Appeals then proceeded to appoint a special master who then prepared the court-ordered remedial plan.[268] On September 29,

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[261] In addition, "[p]etitioners alleged that the process by which the 2022 maps were enacted was constitutionally defective because the IRC failed to submit a second redistricting plan as required under the 2014 constitutional amendments and, as such, the legislature lacked authority to compose and enact its own plan. Petitioners also asserted that the congressional map is unconstitutionally gerrymandered in favor of the majority party because it both 'packed' minority-party voters into a select few districts and 'cracked' other pockets of those voters across multiple districts, thereby diluting the competitiveness of those districts." *Id.* at 443.

[262] *Id.* at 449 (discussing procedural and substantive parts of the 2014 amendments).

[263] *Id.* at 449–50 ("Contrary to the State respondents' contentions, the detailed amendments leave no room for legislative discretion regarding the particulars of implementation; this is not a scenario where the Constitution fails to provide 'specific guidance' or is 'silen[t] on the issue.'") (citation omitted).

[264] *Id.* at 442.

[265] *Id.* at 447 (citing N.Y. CONST. art III, § 4(b)).

[266] *Id.* at 442.

[267] *Id.* at 452 (citing N.Y. CONST. art III, § 4(c)(5)).

[268] *Id.* at 454–55.

2022, a state court also ordered the IRC to reconvene and pass new maps for the state assembly for consideration by the legislature by April 28, 2023.[269]

In just the last year, recent developments now signal the potential for a new congressional map to be drawn in New York. In *Hoffman v. New York State Independent Redistricting Commission*, a group of New York voters filed suit against the IRC, alleging that the IRC violated the state constitution's provisions governing the operation of the redistricting commission by failing to submit a second map to the state legislature.[270] The supreme court dismissed the complaint, finding that there was no available remedy under the state constitution's relevant redistricting provisions, and petitioners appealed to the Appellate Division.[271] In July 2023, the Appellate Division held that the court-ordered congressional map was only intended to be a temporary plan and ordered the IRC to restart the redistricting process, redraw the congressional and state legislative maps, and submit these maps to the legislature.[272] In December 2023, the New York State Court of Appeals affirmed that the court-ordered maps were intended to be temporary and ordered the state to draw new congressional maps.[273] It is worth noting that the Court of Appeals now has new leadership as Governor Hochul appointed Rowan D. Wilson as the new Chief Judge of the Court of Appeals, replacing former Chief Judge Janet DiFiore, who retired in the summer of 2023.[274] DiFiore wrote the majority opinion in *Harkenrider*, while Wilson dissented in the case, and Wilson has signaled support for a more expansive legislative role in redistricting.[275] The Court of Appeals decision is significant given that it will now potentially allow the legislature to play a major role in drawing a congressional map that is more favorable to Democrats with major implications for the 2024 congressional elections.[276] Recently, after the IRC approved a new congressional map by a 9-1 vote that only made minor changes to the 2022 state court map, the Legislature voted to reject the IRC plan and adopted a map that boosted Democrats' advantage in two districts, and boosted Republican prospects in one district.[277]

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[269] Nichols v. Hochul, 177 N.Y.S.3d 424, 431 (N.Y. Sup. Ct. 2022), *aff'd*, 181 N.Y.S.3d 559 (App. Div. 2023), *appeal dismissed*, 208 N.E.3d 743 (N.Y. 2023).

[270] Hoffman v. New York State Indep. Redistricting Comm'n, No. 904972-22, 2022 WL 13654170, at *6 (N.Y. Sup. Ct. Sept. 12, 2022).

[271] *Id.*

[272] Hoffman v. New York State Indep. Redistricting Comm'n, No. CV-22-2265, slip op. at 7–8 (N.Y. App. Div. July 13, 2023).

[273] Hoffman v. New York State Indep. Redistricting Comm'n, No. 90, slip op. at 1, 13, 33 (N.Y. Dec. 12, 2023); Nicholas Fandos, *Top Court Clears Path for Democrats to Redraw House Map in New York*, N.Y. TIMES (Dec. 12, 2023), https://www.nytimes.com/2023/12/12/nyregion/new-york-redistricting-democrats.html.

[274] Fandos, *supra* note 273.

[275] *Id.*

[276] *Id.*

[277] Madeleine Greenberg, *New York's Independent Redistricting Commission Releases New Congressional Map*, DEMOCRACY DOCKET (Feb. 15, 2024), https://www.democracydocket.com/news-

2. *Ohio: Partisan Commission + Legislature*

State and federal litigation involving Ohio's recent redistricting also highlights the complexity of evasion dynamics.[278] Ohio enacted redistricting reforms in 2015 and 2018. In 2015, the legislature proposed, and Ohio voters approved, an amendment to Article XI of the Ohio Constitution, prohibiting partisan gerrymandering in state legislative redistricting and creating a bipartisan politician-comprised redistricting commission.[279] In 2018, the legislature proposed, and the voters adopted Article XIX of the Ohio Constitution, prohibiting partisan gerrymandering in congressional redistricting.[280]

Ohio's amendments differed in crucial respects from those adopted in New York. First, Ohio's amendments created a seven-member political redistricting commission composed of government officials from both parties with a five to two Republican majority.[281] Second, unlike New York, Ohio state courts lacked the power to draw maps themselves in the case of the failure of the commission and legislature to produce a plan that met constitutional muster.[282]

Article XI conferred the power to draw state legislative maps to a seven-member bipartisan politician commission.[283] By contrast, the amendments provided that the state legislature would have the primary role in drawing congressional maps and that the legislature must attempt to enact congressional redistricting plans with bipartisan support.[284] However, if the legislature is unable to reach agreement and enact congressional redistricting plans, the politician commission functions as a "backup" commission and takes over the process.[285]

For the commission to produce a state legislative map, it must have bipartisan support of both Republicans and Democrats on the commission. If the commission fails to produce a map, the process reverts back to the

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alerts/new-yorks-independent-redistricting-commission-releases-new-congressional-map/; Fredreka Schouten and Gloria Pazmino, *New York Redistricting Commission Approves Modest Changes to Congressional Ma*p, CNN (Feb. 15, 2024, 8:18 PM), https://www.cnn.com/2024/02/15/politics/new-york-redistricting-house-map/index.html; Bill Mahoney, *New House Lines in New York Would Boost 2 Democrats and a Republican*, POLITICO (Feb. 14. 2024, 2:55 PM), https://www.politico.com/news/2024/02/14/house-redistricting-new-york-00141458.

[278] Although issues related to Ohio's state legislative redistricting process are not directly implicated by *Moore*, the Ohio Redistricting Commission also used procedural and temporal evasion tactics in state legislative redistricting. *See* League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 192 N.E.3d 379, 384 (Ohio 2022) (alleging that the plan failed to meet standards of partisan fairness and proportionality and violated guarantees of equal protection, assembly, and free speech).

[279] *Id*.; OHIO CONST. art. XI, § 1.

[280] Adams v. DeWine, 195 N.E.3d 74, 77 (Ohio 2022); OHIO CONST. art. XIX, § 1(C)(3)(a).

[281] *Adams*, 195 N.E.3d at 78; OHIO CONST. art. XI, § 1(A).

[282] *Adams*, 195 N.E.3d at 78.

[283] OHIO CONST. art. XI, § 1(A).

[284] *Adams*, 195 N.E.3d at 77; *Ohio*, GERRYMANDERING PROJECT, https://gerrymander.princeton.edu/reforms/OH (last visited Feb. 27, 2024).

[285] *Adams*, 195 N.E.3d at 78 (citing OHIO CONST. art. XIX, § 1(B)).

state legislature.[286] If the legislature enacts a plan lacking the support of sixty percent of all members and half of the members from both of the major parties, the plan goes into effect for only four years, after which the entire process starts again.[287] In addition, if the redistricting plan fails to gain sixty percent support of all members and half of the members from both parties, the legislature's plan is also subject to prohibitions on partisan gerrymandering.[288] The political commission has the primary role in drawing state legislative maps. If at least two commissioners from each party vote for the maps, the maps remain in effect for the decade, but if the maps are adopted on a party-line vote, they are only in effect for four years.[289]

Article XIX introduced a new bipartisanship requirement for congressional maps enacted by the state legislature, stipulating that the legislature can adopt a congressional map if three-fifths of the legislature's total membership votes to approve, including one-half of the membership of the minority party.[290] If the legislature meets these requirements and enacts a congressional map, the map would apply for ten years.[291] However, if the legislature is unable to adopt a new map, a backup redistricting commission consisting of the governor, state auditor, secretary of state, and four legislators, two of whom must be from the minority party, takes over the congressional map drawing process, and if the commission approves a map it would be in effect for ten years.[292] If the commission is unable to adopt a map, the state legislature is given another opportunity to adopt a map, which must be approved by three-fifths of the total membership of the legislature and one-third of the minority party's members, and the map would be in effect for ten years.[293] However, if the legislature fails on this second attempt, the majority party may enact a map without support from the minority party, but the map would only be in effect for four years.[294]

In addition, Article XIX, Section 2 also introduced new substantive requirements, including provisions relating to the shape of districts and the extent to which counties, townships, and municipal corporations can be split between districts, and providing that the Supreme Court shall have exclusive and original jurisdiction in all cases arising under Article XIX.[295]

The post-2021 Ohio congressional redistricting process and the litigation it generated highlight several examples of evasion approaches. In *Adams v. DeWine*, the Ohio Supreme Court invalidated the congressional

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[286] *Id*. (citing OHIO CONST. art. XIX, § 1(C)(1)).
[287] *Id*. (citing OHIO CONST. art. XIX, § 1(C)(2)).
[288] *Id*. at 78–79. (citing OHIO CONST. art. XIX, § 1(C)(3)).
[289] *Id*. at 78. (citing OHIO CONST. art. XIX, § 1(C)(3)).
[290] *Id.* (citing OHIO CONST. art. XIX, § 1(A)).
[291] *Id*. (citing OHIO CONST. art. XIX, § 1(A)).
[292] *Id*. (citing OHIO CONST. art. XIX, § 1(B)).
[293] *Id*. (citing OHIO CONST. art. XIX, § 1(A)).
[294] *Id*. (citing OHIO CONST. art. XIX, § 1(C)(3)).
[295] *Id*. at 79 (citing OHIO CONST. art. XIX, §§ 2, 3(A)).

map produced by the state legislature on the grounds that it violated Article XIX, Section 1(C)(3)(a) of the state constitution.[296] This provision prohibits the state legislature from enacting a congressional district plan "that unduly favors or disfavors a political party or its incumbents," and held that the plan unduly favored the Republican party and disfavored the Democratic party.[297] The *Adams* majority cited testimony by plaintiff's experts who found that under the enacted congressional map Republicans would win between seventy-five to eighty-five percent of the congressional seats in a state that is closely divided by partisanship.[298]

The Ohio Supreme Court also held that the congressional plan violated state constitutional provisions by unduly splitting urban counties in a manner not required by the state's political geography, equal population, or other constitutional redistricting requirements.[299] In its decision, the Ohio Supreme Court relied on expert analysis of data and testimony demonstrating a significant level of partisan bias, that the legislature had deliberately packed and cracked Democratic voters, and that the legislature produced districts that were non-compact and split communities of interest.[300] The Ohio Supreme Court ordered the General Assembly to enact a new congressional map that was not dictated by partisan considerations and that was in compliance with the state constitution's prohibition on partisan gerrymandering.[301]

Pursuant to Article XIX, Section 3(B)(1), the legislature had thirty days in which to enact a new map, but it failed to enact a plan in this time-period.[302] Accordingly, under Section 3(B)(2), the task of drawing maps shifted to the Ohio Redistricting Commission, and the commission adopted a new plan on March 2, 2022.[303]

Two groups of petitioners filed suit to challenge the congressional plan. In *Neiman v. LaRose*, the Ohio Supreme Court invalidated the plan on the grounds that it unduly favored the Republican Party and disfavored the Democratic Party, and ordered the General Assembly to enact a new congressional map that was compliant with the state constitution's prohibition on partisan gerrymandering in Article XIX, Section 1(C)(3)(A).[304]

The *Neiman* case illustrates procedural and temporal evasion in the congressional redistricting process in Ohio. The Republican majority in the General Assembly sought to circumvent the constitutional norms and

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[296] *Id.* at 77.
[297] *Id.* at 77–78 (citing OHIO CONST. art. XIX, § 1(C)(3)(a)).
[298] *Id.* at 86–87.
[299] *Id.* at 77 (citing OHIO CONST. art. XIX, § 1(C)(3)(b)).
[300] *Id.* at 91–92.
[301] *Id.* at 100 (citing OHIO CONST. art. XIX, § 3(B)(1)).
[302] Neiman v. LaRose, 207 N.E.3d 607, 609 (Ohio 2022), *vacated sub nom.*, Huffman v. Neiman, 143 S. Ct. 2687 (2023).
[303] *Id.*
[304] *Id.* at 609.

processes established by the 2018 amendments. First, the General Assembly adopted delay tactics in failing to meet the initial deadline to enact a congressional map, shifting responsibility to the commission on February 14.[305] The commission held its first meeting on February 22nd, and Republican House Speaker Bob Cupp and Democratic Senator Vernon Sykes directed their staffs to begin working together to draft a congressional map.[306] The commission held hearings on February 23rd and 24th to allow members of the public to testify about proposed plans submitted to the commission.[307]

Although the Republican caucus's map drawers met with the Democratic staff of the commission on February 27th, they did not present any drafts of a map to the Democratic staff.[308] At its next meeting on March 1st, one day before the deadline, Republican Senate President Matt Huffman introduced a proposed second congressional district plan produced by the Republican legislative caucus that was very similar to the first plan that had been rejected by the Ohio Supreme Court in *Adams*.[309] The Republican majority in the General Assembly ended up controlling the map drawing process and did not actually allow the commission to draw the congressional districting plan.[310]

The commission majority refused to accept any amendments to the plan from the Democratic members. In addition, when Senator Vernon Sykes made a motion to adopt the congressional district plan produced by the Senate Democratic caucus, the commission voted along party lines (5-2) to defeat that plan.[311] The commission then voted 5-2 to approve the Republican plan on March 2.[312]

In addition, the government defendants employed delay tactics to force elections to be run under the second congressional map approved by the Commission. In *Neiman*, the petitioners sought an expedited scheduling order so that the Court could resolve the case prior to the May 3 primary election.[313] However, Secretary of State Frank LaRose, Senate President Matt Huffman, and House Speaker Bob Cupp opposed the request to expedite the case, arguing that they required time to engage in discovery pertaining to the petitioners' experts.[314] Consequently, the Ohio Supreme Court issued a scheduling order that expedited matters but set briefing and evidentiary deadlines past May 3rd.[315] As a result, the Secretary of State

[305] *Id.* at 610.
[306] *Id.*
[307] *Id.* at 610.
[308] *Id.* at 611.
[309] *Id.* at 611–12.
[310] *Id.* at 612–13.
[311] *Id.* at 613.
[312] *Id.*
[313] *Id.* at 613.
[314] *Id.* at 614.
[315] *Id.*

ordered that the May 3rd primary be held using the congressional district plan approved by the Commission on March 2nd, even though this plan was later invalidated by the Court in *Neiman*.[316]

The Ohio Republicans took advantage of a loophole in Article XIX that allowed for continued procedural evasion of the anti-partisan gerrymandering norms in Article XIX. Article XIX provides that "[w]hen a congressional district plan ceases to be effective under this article, the district boundaries described in that plan shall continue in operation for the purpose of holding elections until a new congressional district plan takes effect in accordance with this article."[317] In their dissent from the majority's ruling on the petitioner's motion for a scheduling order in *Neiman*, Justices Kennedy, Fischer, and DeWine cited to Article XIX in observing that:

> even when a congressional-district plan expires or is invalidated by a court of competent jurisdiction, its district boundaries must be used for congressional elections until a new plan is either (1) enacted by the General Assembly and becomes law or (2) is adopted by the commission and filed with the secretary of state.[318]

Remarkably, these dissenting justices also cited to the United States Supreme Court's shadow docket decision in *Merrill v. Milligan* as support for Ohio conducting elections under maps that had been held unconstitutional by the courts.[319]

The *Neiman* majority set a thirty-day deadline for the Ohio Redistricting Commission to create a new redistricting map that remedied the defects in the map. However, the commission failed to comply with the thirty-day deadline and Ohio House Speaker Cupp stated that there was no need for the commission to meet the timeline.[320] Instead of complying with the Ohio Supreme Court's decision, Ohio Republicans appealed the decision to the

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[316] *Id.*

[317] Neiman v. LaRose, 184 N.E.3d 138, 142 (2022) (order denying motion for scheduling order) (Kennedy, Fischer, and DeWine, JJ., concurring in part and dissenting in part) (quoting OHIO CONST. art XIX, § 1(J)).

[318] *Id.* (Kennedy, Fischer & DeWine, JJ., concurring in part and dissenting in part) (citing OHIO CONST. art. XIX, §§ 1(D), 1(E)).

[319] *Id.* at 145 (Kennedy, Fischer & DeWine, JJ., concurring in part and dissenting in part) ("[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges. At this juncture, the primary election is upon us and it is not possible for this court to rule on petitioners' objections to the constitutionality of the plan prior to that election. We should therefore take guidance from what we did in Wilson I and what the United States Supreme Court did in *Merrill v. Milligan*: allow the congressional election to proceed under the duly adopted and presumptively constitutional plan and handle this litigation in a posture commensurate with the care and attention to detail a challenge of this magnitude requires.") (internal quotations omitted) (citations omitted).

[320] Julie Carr Smyth, *Ohio GOP Misses Disputed Deadline for New US House Map*, AP NEWS (Aug. 18, 2022, 5:43 PM), https://apnews.com/article/voting-rights-ohio-legislature-elections-redistricting-3f6da44f7d059515278f0fa0d8cf64cf ("Ohio House Speaker Bob Cupp, an influential Republican and former justice, rejected any need for lawmakers to meet a timeline set by the state's Supreme Court as based on a 'myth.'").

United States Supreme Court, arguing that the Ohio Supreme Court's decision was improper based on ISLT arguments. Consequently, Ohio's congressional elections were also held using the March 2nd maps that the Ohio Supreme Court had invalidated in *Neiman*. After the Supreme Court decided *Moore*, it granted the petition for writ of cert in *Huffman v. Neiman*, vacated the Ohio Supreme Court's decision, and remanded the case back to the Ohio Supreme Court for consideration in light of *Moore*.[321] Now that Republicans have gained the majority on the Ohio Supreme Court, it is possible that the newly constituted court will reverse its earlier decision and signal a more deferential approach toward review of partisan gerrymanders.[322]

3. *Florida: Legislative Redistricting*

Florida's recent experience with state court application of the Fair Districts Amendments illustrates how state courts in Florida have applied politically entrenched anti-partisan gerrymandering norms in two cycles: the post-2010 cycle and the post-2020 cycle. The voters of Florida enacted two amendments—Amendments 5 and 6 (the Fair Districts Amendments)—introducing provisions seeking to eliminate partisan gerrymandering and dilution of racial or language minorities' voting power. Amendment 5 applied to state legislative redistricting and was codified in Article III, Section 20.[323] Amendment 6 applied to congressional redistricting and was codified in Article III, Section 21.[324]

In *League of Women Voters of Florida v. Detzner*, two groups of litigants brought an action challenging the constitutionality of Florida's 2012 congressional redistricting plan.[325] The circuit court held that the plan was unconstitutional as to two districts, ordering the plan to be withdrawn.[326] After the legislature enacted a remedial plan, the circuit court ordered that the 2014 elections be held under the 2012 congressional map.[327]

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[321] Huffman v. Neiman, 143 S. Ct. 2687 (2023).

[322] Marty Schladen, *Republicans Take All Three Ohio Supreme Court Elections*, OHIO CAP. J. (November 9, 2022, 12:46 AM), https://ohiocapitaljournal.com/2022/11/09/republicans-headed-for-sweep-of-ohio-supreme-court-elections/.

[323] FLA. CONST. art. III, § 20 (codifying prohibitions on partisan gerrymandering in legislative districting).

[324] *Id.* art. III, § 21 (codifying prohibitions on partisan gerrymandering in congressional districting).

[325] League of Women Voters of Fla. v. Detzner, 172 So.3d 363, 391–93 (Fla. 2015) (affirming state circuit court's holding that the 2010 congressional map violated the Fair Districts Amendments; reversing the circuit court's decision for failing to analyze the map as a whole for partisan intent; ordering legislature to redraw the map for eight districts). Two groups of litigants brought the challenge to the congressional map: the "Coalition plaintiffs," consisting of the League of Women Voters of Florida, Common Cause, and four individually named parties, and the "Romo plaintiffs," consisting of lead plaintiff Rene Romo and six other individually named parties. *Id.* at 373, n.6 (discussing the composition of the groups of litigants).

[326] *Id.* at 371–72.

[327] *Id.* at 387.

On appeal, the Florida Supreme Court ultimately invalidated the 2012 map but found that the circuit court had committed legal error in failing to analyze the congressional map as a whole for impermissible partisan intent, and ordered the legislature to redraw the map for eight congressional districts.[328] In reaching its decision, the Florida Supreme Court observed that the circuit court had failed to properly analyze evidence supporting claims of "tier-one" violations (including improper partisan intent) in multiple districts while exclusively focusing on "tier-two" violations (violations of neutral redistricting criteria) and that the circuit court improperly applied deferential review of multiple districts with evidence of tier-one violations.[329]

It is worth noting that the Florida Supreme Court also based its decision on evidence of the legislature's evasion of the procedural requirements of the Fair Districts Amendment, citing that one of the goals of the Fair Districts Amendment was to minimize partisan favoritism.[330] In fact, the circuit court found that partisan political operatives "conspire[d] to manipulate and influence the redistricting process" and succeeded in "infiltrat[ing] and influenc[ing] the [l]egislature, to obtain the necessary cooperation and collaboration" to "taint the redistricting process and the resulting map with improper partisan intent."[331] These operatives did their work in parallel to public processes, and also made efforts to conceal their own participation in influencing the redistricting process.[332]

The Florida Supreme Court thus faulted the circuit court, in its analysis of improper intent, for failing to give legal weight to the existence of a "parallel" process outside of the legislature as evidence in support of the claim that the legislature thwarted the mandate of the Fair Districts Amendment.[333] The Florida Supreme Court in *Detzner* did invalidate the legislature's congressional map and ordered the legislature to redraw new districts for eight congressional districts, and significantly relied on evidence of procedural evasion of the Fair Districts Amendment in its decision.[334] However, in the 2020 redistricting cycle, litigation challenging Florida's congressional map has so far been unsuccessful.

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[328] *Id.* at 371–72. *See also* League of Women Voters of Fla. v. Detzner, No. 2012-ca-2842, slip op. at 73 (Fla. Cir. Ct., Dec. 30, 2015) (ordering the adoption of remedial senate plan).

[329] *Detzner*, 172 So. 3d at 399–400 (holding that the circuit court improperly analyzed evidence of tier-one violations under the Fair Districts Amendments).

[330] *Id.* at 394.

[331] *Id.* at 376–77 (emphasis omitted) (citing the circuit court's holding that partisan operatives *"made a mockery of the [l]egislature's proclaimed transparent and open process of redistricting* by doing all of this in the shadow of that process, utilizing the access it gave them to the decision makers, but going to great lengths to conceal from the public their plan and their participation in it. *They were successful in their efforts to influence the redistricting process and the congressional plan under review here.* And they might have successfully concealed their scheme and their actions from the public had it not been for the [challengers'] determined efforts to uncover it in this case.").

[332] *Id.*

[333] *Id.* at 394.

[334] *Id.* at 393–94.

In contrast to the 2010 cycle, the Governor played a major and aggressive role in the drawing of Florida's post-2020 congressional map. Following the 2020 census, the state legislature enacted a map that arguably complied with some of the Fair Districts Amendment's requirements but still adversely impacted minority representation by dismantling the Fifth Congressional District, which includes the city of Jacksonville and is home to the largest African American population in Florida.[335] The legislature's plan would have reduced the Black voter population in the Fifth District from forty-five percent to thirty-four percent, cracking Jacksonville into two districts.[336] Governor Ron DeSantis vetoed the Legislature's congressional map, arguing that the map was an unconstitutional racial gerrymander and violated federal law.[337] Governor DeSantis's veto delayed Florida's congressional districting process, and Florida was ultimately one of the last states to enact a congressional map in the 2020 cycle in April 2022 on a party-line vote.[338]

Governor DeSantis's push to draw the congressional map was unprecedented, and he arguably defied the procedural requirements of the Fair Districts Amendment in coordinating his own congressional map drawing with the help of national Republican operatives, lawyers, and other officials.[339] DeSantis also battled with Republican state legislators in pushing his own plan over the plan adopted by the state legislature, in large part because he believed the state legislature's plan was not aggressive enough.[340] According to a ProPublica report, DeSantis' aides organized a redistricting kick-off call with out-of-state operatives, and the Republican law firm that worked for DeSantis spent dozens of hours on this effort, billing the state of Florida more than $450,000 for its redistricting work.[341]

The DeSantis congressional plan went much further than the legislature's plan in undermining minority representation by cracking the Fifth Congressional District across four districts. The DeSantis plan also gerrymandered districts giving Republicans a much greater advantage statewide than the previous map in which Republicans held sixteen seats and Democrats eleven seats. Under the DeSantis map, although Republicans

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[335] Devon Hesano, *What Happened to Florida's 5th Congressional District?*, DEMOCRACY DOCKET (Aug. 16, 2023), https://www.democracydocket.com/analysis/what-happened-to-floridas-5th-congressional-district/.

[336] *Id.*

[337] *Id.*

[338] Gary Fineout, *Florida's Redistricting Mess Heads to Special Session After DeSantis Vetoes 'Defective' Map*, POLITICO (Mar. 29, 2022, 5:06 PM), https://www.politico.com/news/2022/03/29/florida-redistricting-map-special-session-desantis-00021424 (discussing Governor DeSantis's veto of the legislature's congressional map and his calls for a mid-April special legislative session to allow the legislature to enact new maps).

[339] Joshua Kaplan, *How Ron DeSantis Blew Up Black-Held Congressional Districts and May Have Broken Florida Law,* PROPUBLICA (Oct. 11, 2022, 6:00 AM), https://www.propublica.org/article/ron-desantis-florida-redistricting-map-scheme.

[340] *Id.*

[341] *Id.*

won roughly fifty-eight percent of the statewide vote, they won twenty out of twenty-eight seats (seventy-one percent of total seats) in the 2022 elections.

In *Black Voters Matter Capacity Building Institute, Inc. v. Lee*, plaintiffs filed a complaint challenging the DeSantis plan, arguing that the map violated the Fair Districts Amendment's prohibitions against partisan gerrymandering, minority vote dilution, and its requirements of compactness and respect for geographic and political subdivisions.[342] Plaintiffs also argued that the Governor had effectively "hijacked" the process in forcing the Legislature to adopt the Governor's own redistricting plan.[343]

However, the plaintiffs then appeared to make a tactical choice to bring a motion for a temporary injunction that only focused on the non-diminishment minority vote dilution claim, rather than to try to push to fast-track a trial on all the issues. The circuit court in *Black Voters Matter Capacity Building Institute* found that the DeSantis map would diminish the ability of Black voters to elect their candidate of choice in North Florida, by cracking the congressional district of Representative Al Lawson and redistributing Black voters in his district into four districts.[344] Consequently the circuit court held that the plaintiffs had shown a substantial likelihood of demonstrating that the congressional plan violated the non-diminishment standard of Article III, Section 20, granted plaintiffs' motion for preliminary injunction, and ordered the Secretary of State to redraw the congressional district based on plaintiffs' proposed map.[345] The circuit court vacated the stay that had been put in place automatically by the Secretary of State's notice of appeal.[346]

The Secretary of State appealed the decision to the District Court of Appeal.[347] The District Court of Appeal stayed the circuit court decision.[348] The District Court of Appeal held that the circuit court abused its discretion in ordering the Secretary to conduct the 2022 congressional elections under a new map modeled on the plaintiff's proposed map, even though no trial

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[342] Cervas et al., *supra* note 137, at 477 (citing Complaint for Injunctive and Declaratory Relief at 25–32, Black Voters Matter Capacity Bldg. Inst., Inc. v. Lee, No. 2022-CA-000666 (Fla. Cir. Ct. Apr. 22, 2022), 2022 WL 1198012.

[343] Cervas et al., *supra* note 137, at 477.

[344] *See* Gary Fineout, *Florida Supreme Court Locks in DeSantis-Backed Redistricting Map*, POLITICO (June 2, 2022, 6:33 PM), https://www.politico.com/news/2022/06/02/florida-redistricting-map-court-decision-00036740 (discussing *Black Voters Matter Capacity Building Institute*).

[345] Order Granting Emergency Motion Vacating Stay Pending Appeal at 3, Black Voters Matter Capacity Bldg. Inst., Inc. v. Lee, No. 2022-CA-000666, 2022 WL 1684951, at *2 (Fla. Cir. Ct. May 16, 2022) (granting emergency motion vacating stay pending appeal) (motion quashed by Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc., 339 So. 3d 1070 (Fla. Dist. Ct. App. 2022)).

[346] *Id.*

[347] Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc., 339 So. 3d 1070, 1072 (Fla. Dist. Ct. App. 2022).

[348] *Id.* at 1074.

had been held in the case, holding that the temporary injunction was unlawful.[349]

While this case was pending appeal, the plaintiffs requested a constitutional writ from the Florida Supreme Court based on the doctrine of all writs, but the Florida Supreme Court summarily denied this request, citing the ongoing appeal before the First District Court of Appeal.[350] The Florida Supreme Court observed that the doctrine of all writs "is restricted to preserving jurisdiction that has already been invoked or protecting jurisdiction that likely will be invoked in the future" and held that because of the ongoing appeal, the Court lacked jurisdiction over the matter.[351]

As of the writing of this Article, litigation against the DeSantis plan is continuing in state court. In addition, Common Cause Florida, Fair Districts Now, and a group of individual plaintiffs filed suit challenging the plan in federal district court in March 2022.[352] The suit alleged that Florida's congressional maps were the product of intentional racial discrimination in violation of the Fourteenth and Fifteenth Amendments and this federal case is ongoing.[353]

III. *MOORE*, EVASION, AND STATE COURTS

The Supreme Court in *Moore* articulated a vague standard of federal court review of state court decisions in the area of state regulation of federal elections. Although *Moore* affirmed state constitutional checks on state legislatures, the majority also imposed limits on state judicial review based on concerns about the problem of *state court evasion* of federal constitutional norms under the Elections Clause.[354] *Moore* could thus allow federal courts to police this concern by reviewing state court interpretations of constitutions or statutes that intrude upon the lawmaking function of state legislatures.

In doing so, *Moore* was decided based on a particular understanding of state separation of powers, delineating the proper role of state courts vis-à-vis state legislatures in the regulation of federal elections under the Elections Clause. *Moore*'s state-level separation of powers framework entrenches a particular structural governance bias—one that weakens representation by undermining democracy-enhancing norms and bolstering democracy-diminishing norms under federalism.[355] While imposing checks and

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[349] *Id.* at 1073–74.

[350] Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd, 340 So. 3d 475 (Fla. 2022).

[351] *Id*. (quoting Roberts v. Brown, 43 So. 3d 673, 677 (Fla. 2010)).

[352] Common Cause Fla. v. Lee, 22-CV-00059 (N.D. Fla. Mar. 11. 2022) (renamed Common Cause FL et al. v. Byrd).

[353] Common Cause FL et al. v. Byrd, *Common Cause Florida*, COMMON CAUSE, https://www.commoncause.org/florida/common-cause-florida-et-al-v-lee/.

[354] *See supra* Section II.B; Moore v. Harper, 143 S. Ct. 2065 (2023). *See also* Monaghan*, supra* note 94.

[355] *See supra* Section II.B.

limitations on state courts based on concerns about state court evasion, *Moore* does not address the problem of *legislative or political evasion* of anti-partisan gerrymandering norms analyzed in Sections II.B and II.C of this Article.

In this Part, I examine the potential application of *Moore* to state court decisions recognizing state constitutional standards prohibiting partisan gerrymandering; how case studies of evasion in Part II yield important insights about the role and approach of state courts in cases involving evasion; and finally, how the institutional design of reforms, the availability of judicial remedies, and the nature of judicial independence impact the efficacy of fair districting reforms.

A. Moore*, State Courts, and Federalism*

As noted earlier, the Supreme Court in *Moore* stopped short of formally announcing a specific test for measuring and assessing state court interpretations of state law in cases that involve the Elections Clause.[356] The Court provided some guidance to federal courts in holding that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[357] Still, the standard suggested by the *Moore* majority was general and vague, and the majority stated that it refused to adopt a specific test, and also refused to review or assess the approach taken by the North Carolina Supreme Court in *Harper I*.[358]

It is unclear how federal courts will apply the *Moore* standard. As Chief Justice Roberts' majority opinion contained vague and general language, lower federal courts could apply *Moore* in line with Justice Kavanaugh's concurrence, adopting Rehnquist's test from his *Bush v. Gore* concurrence. This could potentially lead to federal courts assessing whether state courts applied textualist approaches and assessing decisions using non-novelty analysis. Consequently, lower federal courts could apply *Moore* to overturn state court decisions that range beyond textualist interpretive approaches.

1. *State Court Approaches*

State courts have thus far applied a range of approaches in recognizing norms against partisan gerrymandering. Section II.A highlighted how state courts have adopted a variety of interpretive approaches in recognizing anti-partisan gerrymandering norms and standards.[359] These standards are based on interpretation of state structural principles of democracy, popular sovereignty, equality, and substantive rights provisions codifying rights to free and fair elections, speech and political association, and equal

[356] *Moore*, 143 S. Ct. at 2089.
[357] *Id.*
[358] *Id.*
[359] *See supra* Section I.A.

protection.[360] In addition, these state court decisions have adopted a variety of approaches in applying state constitutional or statutory provisions codifying neutral redistricting criteria as baseline measures for assessing whether redistricting maps constitute partisan gerrymanders.[361] State courts have utilized these criteria as baselines for assessing whether congressional redistricting was motivated and driven by partisan considerations, and these courts have relied on expert analysis and testimony including assessment of ensembles of maps to determine whether state congressional maps are outliers.[362]

i. Structural Approaches

As I discussed in Part II, state court decisions in Pennsylvania, North Carolina, and Maryland adopted several approaches to redistricting. These range from more expansive approaches that rely on interpretation of broad structural principles and multiple rights provisions, to the narrow constitutional foundations of the Pennsylvania Supreme Court's decision in *League of Women Voters of Pennsylvania* that only relied on one provision—the Free and Equal Elections Clause.[363] All of these decisions applied a variety of interpretive methods including original and historical intent, circumstances leading to adoption and enactment, legislative history, structuralism, and purposivism. All three decisions combined their analysis of rights provisions with either existing traditional norms (Pennsylvania) or constitutional or statutory provisions codifying neutral redistricting criteria (North Carolina and Maryland). In addition, all three decisions do rely on original and historical intent analysis of the various structural and rights provisions relied upon in recognizing anti-partisan gerrymandering norms, as well as prior precedents suggesting support for the recognition of partisan vote dilution claims.

The Pennsylvania Supreme Court's decision in *League of Women Voters of Pennsylvania* was based on a narrower constitutional foundation. In contrast to the decisions of the North Carolina Supreme Court in *Harper I* and the Maryland circuit court in *Szeliga*, the Pennsylvania Supreme Court relied on one provision as the basis for recognizing anti-partisan gerrymandering norms—the Free and Equal Elections Clause in Article I, Section 5 of the Pennsylvania Constitution. The Court declined to address free expression or equal protection arguments that had been advanced by the petitioners. The *League of Women Voters of Pennsylvania* Court relied on original intent analysis of this provision as supporting a cause of partisan

[360] *See supra* Section I.A.
[361] *See supra* Section I.A.
[362] *See supra* Section I.A.
[363] *See supra* Section II.A.

vote dilution.[364] In addition, the *League of Women Voters of Pennsylvania* Court relied on an existing precedent—*Patterson v. Barlow*—as providing doctrinal support for partisan vote dilution claims under the Pennsylvania Constitution.[365] Finally, the *League of Women Voters of Pennsylvania* Court also applied traditional redistricting criteria that were based on prior traditions and practice, in contrast to the other two cases in which these criteria were codified in constitutional provisions.

The North Carolina Supreme Court's decision in *Harper I* reflects a more expansive approach to recognizing anti-gerrymandering norms than the Pennsylvania Supreme Court. The *Harper I* court relied on broader structural principles and a broader array of rights provisions than *League of Women Voters*. *Harper I* applied two broad structural provisions located in the first two sections of the North Carolina Declaration of Rights in Article I—principles of equality and popular sovereignty, and then held that the remaining rights must be interpreted in light of these core structural principles.[366] In contrast to the Pennsylvania Supreme Court's decision in *League of Women Voters of Pennsylvania v. Pennsylvania*, which only relied on the Free and Fair Elections Clause, the *Harper I* majority relied on multiple rights provisions, including Section 10 (Free Elections), Section 12 (Right of Assembly and Petition), Section 14 (Freedom of Speech and Press), and Section 19 (Equal Protection), all within Article I.[367] In addition, *Harper I* held that the state constitution's Equal Protection Clause prohibited the government from "burdening on the basis of partisan affiliation the fundamental right to equal voting power" and the Free Speech and Freedom of Assembly Clauses prohibited "discriminating against certain voters by depriving them of substantially equal voting power, which is a form of impermissible viewpoint discrimination and retaliation for engaging in protected political activity."[368]

The Maryland circuit court in *Szeliga v. Lamone* also adopted an expansive approach to the interpretation of rights and structural provisions of the Maryland Constitution in recognizing anti-partisan gerrymandering norms. As discussed in Section II.A, the circuit court drew on the nexus between the standards clause of Article III, Section 4 of the state constitution and two rights provisions: Article VII (Free Elections Clause) and Article 24 (Due Process and Equal Protection) of the Declaration of Rights.[369] In

[364] League of Women Voters of Pa. v. Pennsylvania, 178 A.3d 737, 802 (Pa. 2018) ("If the words of a constitutional provision are not explicit, we may resort to considerations other than the plain language to discern intent, including, in this context, the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.") (citing 1 PA. CONS. STAT. §§ 1921, 1922).

[365] *Id.* at 793 (quoting Patterson v. Barlow, 60 Pa. 54, 75 (Pa. 1869)).

[366] Harper v. Hall, 868 S.E.2d 499, 538–39 (N.C. 2022).

[367] *Id.*

[368] *Id.* at 546.

[369] Szeliga v. Lamone, No. 02-CV-21-001816, slip op. at 18–23 (Cir. Ct., Anne Arundel County, Md. Mar. 25, 2022).

contrast to *Harper I*, the court in *Szeliga* also held that the congressional plan could be evaluated as unconstitutional partisan gerrymandering separately under each of the Free Elections Clause in Article 7, the Equal Protection Clause in Article 24, and the Free Speech Article in Article 40 of the Declaration of Rights.[370]

ii. Above the Floor versus Lock-Stepping Approaches

State courts have differed in the degree to which their interpretations of state constitutional provisions are in lockstep with federal standards for analogous constitutional provisions and principles.[371] As discussed above, state courts in Pennsylvania and Maryland have interpreted state constitutional provisions to recognize more robust protections for rights than the federal Constitution.

The Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania* interpreted the Free and Fair Elections Clause of the state constitution differently from federal equal protection, applying a distinct standard to recognize partisan gerrymandering claims under the state constitution.[372] In addition, in *Szeliga*, the Maryland circuit court interpreted its free elections, equal protection, and free speech provisions as conferring more robust rights protections than the federal constitution.[373] The Alaska Supreme Court also issued a decision last year that held that partisan gerrymandering of state legislative districts violates equal protection under the state constitution. Like these other decisions, the Alaska Supreme Court rejected the lock-stepping approach in holding that Alaska's Equal Protection Clause is stricter than the federal analog and requires a more demanding review than federal equal protection.[374]

By contrast, the New Mexico Supreme Court recently issued a decision suggesting the adoption of what Derek Muller has described as "[d]issent lock-stepping."[375] In *Grisham v. Van Soelen*, the New Mexico Supreme Court held that partisan gerrymandering claims were justiciable under the Due Process and Equal Protection Clauses of the New Mexico Constitution.[376] In its decision, the state supreme court held that partisan gerrymandering claims under the New Mexico Constitution were subject to the three-part test articulated by Justice Kagan in her dissent in *Rucho*.[377] As

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[370] *Id.* at 24–28.

[371] *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 193–232 (2009) (discussing lock-stepping state constitutional rights with federal constitutional standards).

[372] League of Women Voters of Pa. v. Pennsylvania, 178 A.3d 737, 809–13 (Pa. 2018).

[373] *Szeliga*, No. 02-CV-21-001816 at 30–31, 36–39.

[374] *In re* 2021 Redistricting Cases, 528 P.3d 40, 57–58, 101 (Alaska 2023).

[375] Muller, *supra* note 111.

[376] Grisham v. Van Soelen, 539 P.3d 272, 281–82 (N.M. 2023).

[377] *Id.* at 289–90 (referencing Justice Kagan's dissent in Rucho v. Common Cause, 139 S. Ct 2484, 2509–25 (2019)).

Richard Hasen suggested, it is possible that a federal court applying an anti-novelty standard based on *Moore* could overturn this decision.[378]

The *Grisham* decision suggests that other state courts might seek to adopt more robust "above the floor" interpretations of state constitutional provisions in recognizing norms against partisan gerrymandering based on Justice Kagan's dissent in *Rucho*. As law professor Chad Oldfather suggests, state courts have responded to *Rucho* in distinct ways, leading to different outcomes.[379] The Wisconsin Supreme Court recently responded to impasse in the redistricting process by ordering the adoption of a map that was based on an earlier map that was heavily gerrymandered in favor of Republicans.[380] In reaching its decision, the Wisconsin Supreme Court actually relied on *Rucho* in ruling it could not consider partisanship, and as such, needed to apply a least change approach in adopting congressional and legislative maps.[381]

2. *Implications for Federalism*

Federal court decisions applying *Moore*, so as to effectively mandate textualism and restrict state court interpretation, would create a federal constitutional "ceiling" on state constitutional law in cases involving state laws and regulations under the federal Elections Clause.[382] If federal courts follow such an approach in applying *Moore* (or if the Supreme Court explicitly adopts such an approach in a future decision), this would prevent state courts from interpreting their constitutions to find and articulate anti-partisan gerrymandering norms and standards.

In addition, if federal courts construe *Moore*'s standard in line with the test set forth by Rehnquist in *Bush v. Gore*, *Moore*'s effect will be an improper centralization of federal judicial authority over state courts in the realm of federal elections.[383] In an article critiquing the Rehnquist

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[378] Rick Hasen, *New Mexico Supreme Court Recognizes Partisan Gerrymandering Claim under State Constitution, Adopting the Standard in Justice Kagan's* Rucho Dissent, ELECTION L. BLOG (July 5, 2023, 2:31 PM), https://electionlawblog.org/?p=137268; Muller, *supra* note 111.

[379] Chad M. Oldfather, Rucho *in the States: Districting Cases and the Nature of State Judicial Power*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 111, 116–121 (2023).

[380] *Id.* at 116 (citing Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469 (Wis. 2021)). *See* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. 985, 998 (2022) (discussing the Wisconsin 2020 redistricting that culminated in the judiciary determining which maps to adopt).

[381] Yablon, *supra* note 380 (examining Baldus v. Members of Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012)).

[382] *See* Kermit L. Hall, *Of Floors and Ceilings: The New Federalism and State Bills of Rights*, 44 FLA. L. REV. 637, 638 (1992) ("In the architecture of New Federalism, the Supreme Court, interpreting the Bill of Rights, sets the minimum floor for rights, while state supreme courts, interpreting their state bills of rights, fix the ceiling.").

[383] *See* Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 676–77 (2001) (asserting that Rehnquist's concurrence in *Bush v. Gore* implicitly pronounced that Article II of the Constitution "authorized a federal common law governing presidential election procedures" and effectively transmuted state law into federal law); James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 626, 651–55 (2001) ("The Court's ruling in *Bush II* further invaded state

concurrence in *Bush v. Gore*, Robert Schapiro suggested that the Supreme Court departed from existing precedent and original and historical intent in recognizing a theory of plenary legislative power in state legislatures, and he suggested the Court improperly applied an assertive standard of review that second-guessed the Florida Supreme Court's interpretation of the Florida State Constitution. In addition, Schapiro argued that Rehnquist's concurrence appeared to rest on a rationale that viewed state election regulation akin to federal common law,[384] which entailed an improper and unsolicited intrusion by the Supreme Court into the realm of congressional regulation.[385] James Gardner also discussed how the Rehnquist concurrence set forth the earliest version of the ISLT in suggesting that legislatures were immune from state judicial review when enacting regulations of federal elections under the Elections Clause.[386] Gardner suggested that Rehnquist's approach in *Bush v. Gore* would fundamentally transform the United States' system of electoral governance by allowing federal courts to invade state autonomy over the internal structure of Florida's decentralized system of election administration.[387] In doing so, Gardner suggested that *Bush v. Gore* represents a fundamental departure from the principles of federalism that the Supreme Court has recognized in other doctrinal contexts.[388]

Moore's potential impact on constraining state court recognition of anti-partisan gerrymandering norms based on constitutional interpretation could exacerbate the problem of representation diminution, by preventing some state courts from reining in extreme partisan gerrymanders. In addition, as scholars including Schapiro and Gardner suggest, applying *Moore* in line with the Rehnquist test from *Bush v. Gore* could lead to a centralization of federal authority over state regulation of elections in ways that depart from the traditional understanding of federalism.[389]

B. *Evasion Dynamics and State Court Responses*

The case studies of evasion dynamics in Part II of this Article also have important implications for understanding state court responses and approaches to evasion. As illustrated in Section II.C, state legislatures and

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autonomy over the internal structure of state government by subjecting Florida's decision to decentralize the administration of statewide elections to what amount to a federal nondelegation doctrine for states.").

[384] *See* Pildes, *supra* note 88, at 694 (observing that "[t]his centralizing tendency is most dramatically displayed in the concurring opinion's dismissal of the Florida Supreme Court's reading of state law; that concurrence comes close to treating the meaning of state presidential-elector laws as itself directly a question of federal law") (discussing Schapiro, *supra* note 383, at 676–77 (suggesting that Rehnquist's concurrence in *Bush v. Gore* treated Florida state election law as a species of federal common law)).

[385] Schapiro, *supra* note 383, at 676–78.

[386] Gardner, *supra* note 383, at 626.

[387] *See* Gardner, *supra* note 383, at 626, 651–55 (arguing that *Bush v. Gore* effected an improper centralization of election regulation under the Elections and Electors Clauses).

[388] *Id.*

[389] Pildes, *supra* note 88, at 694.

redistricting commissions have sought to evade anti-partisan gerrymandering norms and processes. The case studies in Section II.C highlight various types of evasion dynamics across three states with politically entrenched anti-partisan gerrymandering norms featuring variation in redistricting institutions and processes: bipartisan commission + legislature (New York), partisan commission + legislature (Ohio), and legislative redistricting (Florida).

In addition, these states feature variation in the mode of selection of state supreme court and state court judges. Justices on the Court of Appeals (the highest court in New York) and the Appellate Division (intermediate appellate court) are selected by the Governor from a pool of candidates. This pool is selected and screened via a merit selection process by the bipartisan Commission on Judicial Nomination.[390] Lower court judges are selected through elections in New York. In Ohio, state supreme court justices and lower court judges are selected via popular election through partisan primaries and partisan general elections.[391] In Florida, state supreme court justices and district court judges are selected by the Governor, while county and circuit court judges are elected.[392]

As illustrated by the recent examples of redistricting disputes in New York and Ohio, different forms of substantive defiance and procedural and temporal evasion can be used to effectively co-opt or force courts into drawing maps in contexts that would benefit the political actors that engage in evasion. Evasion dynamics can be problematic in states that adopt "hybrid" versions of IRCs that are not independent nor non-partisan—so either bipartisan or partisan commissions can create perverse incentives for evasion. Florida presents another example of temporal evasion, one in which state courts may not always act aggressively to enforce constitutional provisions that codify anti-partisan gerrymandering norms.

1. *Substantive Defiance*

The case studies analyzed in Section II.C highlight several examples of substantive defiance of constitutional provisions and, in the case of Ohio, court decisions. In New York, Ohio, and Florida, state legislatures and/or redistricting commissions engaged in substantive defiance of politically entrenched partisan gerrymandering norms, and even court enforcement of those norms. In New York, the state legislature enacted a new law that directly circumvented the 2018 amendments and then proceeded to enact a

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[390] *Judicial Selection in the Courts of New York*, FUND FOR MOD. CTS., https://moderncourts.org/programs-advocacy/judicial-selection/judicial-selection-in-the-courts-of-new-york/ (last visited Feb. 28, 2024).

[391] *Judicial System Structure: Ohio Judicial Structure*, SUP. CT. OF OHIO & OHIO JUD. SYS., https://www.supremecourt.ohio.gov/courts/judicial-system/judicial-system-structure/ (last visited Feb. 28, 2024) (explaining the judicial selection process in Ohio courts, including a general election for certain seats).

[392] *Judicial Selection in Florida*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Florida (last visited Feb. 28, 2024) (explaining the judicial selection process in Florida courts).

congressional map that the state Court of Appeals held violated the anti-partisan gerrymandering norms that had been added to the state constitution. In Florida, the state legislature enacted congressional maps in both the post-2010 and post-2020 cycles that were in defiance of the Fair Districts Amendment's requirement that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."[393]

In Ohio, both the General Assembly and later the Republican-controlled Redistricting Commission also directly defied Article XIX's norms against partisan gerrymandering in enacting congressional maps.[394] After the Court in *Adams v. DeWine* invalidated the General Assembly's first congressional map for violating Article XIX, and the General Assembly did not enact a second map, the Redistricting Commission took over but effectively served as a rubber stamp for approving another map that had been produced by the Republican legislative caucus similar to the original map invalidated in *Adams*. The Ohio Supreme Court invalidated the second congressional map in *Neiman* and ordered the Redistricting Commission to draw a new map that complied with Article XIX within thirty days.[395] However, in an act of defiance, the Commission refused to comply with the Ohio Supreme Court's thirty-day deadline to draw new maps, and later appealed the decision to the Supreme Court in *Huffman v. Neiman*.[396]

2. *Procedural and Temporal Evasion*

The case studies of New York, Ohio, and Florida also highlight how partisan and temporal evasion is analyzed by state courts. New York's recent experience with redistricting highlights how procedural and temporal evasion dynamics operate in the context of a bipartisan redistricting commission. As noted in Section II.C, New York enacted reforms amending the state constitution in 2014 with both procedural and substantive components. The 2014 amendments created a new redistricting process in which the bipartisan IRC would play a central role in in map drawing and included a substantive prohibition on partisan gerrymandering.[397]

The Court of Appeals decision in *Harkenrider v. Hochul* illustrates how state courts may be unwilling to accept or acknowledge procedural evasion dynamics in the context of redistricting process. In *Harkenrider*, the Court of Appeals observed that under the 2014 amendments, "compliance with the IRC process enshrined in the Constitution is the *exclusive* method of redistricting, absent court intervention following a violation of the law,

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[393] FLA. CONST. art. III, § 20(a).

[394] *See* discussion *supra* Section II.C.2 (highlighting evasion dynamics through an exploration of the recent state and federal litigation regarding Ohio's redistricting plan).

[395] Neiman v. Larose, 207 N.E.3d 607, 623 (Ohio 2022).

[396] Huffman v. Neiman, 143 S. Ct. 2687 (2023).

[397] *See* discussion *supra* Section II.C.1 (discussing New York's 2014 redistricting reform).

incentivizing the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process."[398] However, the Court of Appeals incorrectly assessed how incentives actually operated, failing to recognize that the 2014 amendments actually encouraged the Republicans as the minority party in the legislature to try to force deadlock on the Commission in order to force map drawing into the state courts.[399] In fact, the *Harkenrider* majority ignored arguments that had been raised by critics of the 2014 amendments that they could be subject to procedural evasion.[400] The majority rejected arguments that the 2014 process had been hijacked by gamesmanship and had operated as intended.[401]

Indeed, the legislative defendants raised arguments about evasion, and Justice Jenny Rivera's dissenting opinion directly discussed how commission members engaged in "gamesmanship" to thwart the process.[402] In her dissent, Justice Rivera observed that the majority had incorrectly assigned fault to the legislature for violating the constitutional procedure established by the 2014 amendments, noting that the legislature had argued that the Commission was at fault.[403] Justice Rivera further observed that nothing in the 2014 amendments prevented the legislature from taking action to enact redistricting maps where the IRC chose not to submit a map in the second round, noting that the legislature had actually considered and rejected two maps during the first round of the process.[404] In a key passage, Justice

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[398] Harkenrider v. Hochul, 197 N.E.3d 437, 450 (N.Y. 2022).

[399] *See* Cain, *supra* note 130, at 1812.

[400] *Harkenrider*, 197 N.E.3d at 476 n.5 (Rivera, J., dissenting) ("The majority's discussion of the legislative history of the 2014 amendment is incomplete. Several legislators and commentators recognized, prior to adoption, that—contrary to the views of its sponsors—the amendment did not guarantee that the IRC would follow the constitutional process (*see e.g.*, NY Senate Debate on Assembly Bill A2086, Jan. 23, 2013 at 252 [warning that an evenly-divided IRC might 'foster gridlock']."") (internal citation omitted).

[401] *Id.* at 450 n.10 (majority opinion).

> The State respondents and Judge Rivera assert that giving force to the constitutional language risks gamesmanship by minority members of the IRC, claiming such members could potentially derail the redistricting process by refusing to participate. In giving effect to the constitutional reforms endorsed by the People of this state, our decision does not leave the legislature hostage to that body as Judge Rivera contends. Legislative leaders appoint a majority of the IRC members and, in the event those members fail either to appear at IRC meetings or to otherwise perform their constitutional duties, judicial intervention in the form of a mandamus proceeding, political pressure, more meaningful attempts at compromise, and possibly even replacement of members who fail to faithfully perform their duties, are among the many courses of action available to ensure the IRC process is completed as constitutionally intended. The IRC may not be a panacea, but to accept the crabbed description of that body proffered by the State respondents and Judge Rivera would be to render the body nothing more than 'window dressing' masquerading as meaningful reform.

Id.

[402] *Id.* at 473–74 (Rivera, J., dissenting).

[403] *Id.* at 473 n.2.

[404] *Id.* at 473.

Rivera observed that the majority decision "leaves the legislature hostage to the IRC, and thus incentivizes political gamesmanship by the IRC members—the exact scenario the majority claims it avoids by interpreting the second IRC submission as a mandatory predicate to legislative action."[405]

Harkenrider also illustrates temporal evasion. Republican members of the New York IRC refused to meet and participate in the process of producing another map as required under the constitutional framework, effectively forcing the state legislature's hand.[406] The state legislature responded by enacting a law that allowed it to enact redistricting maps where the IRC failed to produce a map, and the legislature enacted a congressional map favoring Democrats. The Court of Appeals ultimately invalidated the law that allowed the legislature to enact the plan as violating the procedure established by the 2014 amendments, and the plan itself for violating the state constitution's prohibition on partisan gerrymandering.[407] Again, the majority in *Harkenrider* failed to acknowledge that the Democrats' maneuvers were in response to the evasion strategies of Republican members of the Commission.

In Ohio, Republican majorities successfully evaded anti-partisan gerrymandering norms and processes in the *Adams* and *Nieman* cases, culminating in the appeal to the Supreme Court. As discussed in Section II.C, the *Neiman* case illustrates examples of procedural and temporal evasion at play in the congressional redistricting process in Ohio.

The first procedural evasion strategy in *Neiman* was the Republican General Assembly's use of delay tactics to avoid the bipartisan supermajority requirements of Article XIX.[408] The Republican majority in the Assembly circumvented these requirements by deliberately failing to

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> Nor does the constitutional framework command that the legislature remain idle in the face of an IRC decision not to submit a plan despite section 4 (b)'s mandatory language setting forth deadlines for submission. The Constitution requires the legislature approve redistricting legislation, upon consideration of one IRC plan and, if necessary, a second plan. The legislature did exactly that, reviewing two IRC plans and determining not to approve either, but instead adopting legislation which it maintains wholly comports with the Constitution.

Id.

[405] *Id.* at 473–74 (citing the majority opinion in *id.* at 449–50).

[406] *See* discussion *supra* Section II.C.1 (explaining the impasse in New York's mapping process caused by Republican's refusal to convene with the Commission).

[407] *Harkenrider*, 197 N.E.3d at 454 (majority opinion).

[408] *See supra* Section II.C.2

> The *Neiman* case illustrates procedural and temporal evasion in the congressional redistricting process in Ohio. The Republican majority in the General Assembly sought to circumvent the constitutional norms and processes established by the 2018 amendments. First, the General Assembly adopted delay tactics in failing to meet the initial deadline to enact a congressional map shifting responsibility to the Commission on February 14.

Id.

meet the deadline to enact a congressional map by February 14th.[409] The second procedural evasion tactic utilized by the Republican legislative leadership was to have legislative map drawers draw up a congressional map outside of the commission's proceedings, and then after a few days of meetings with the commission, introduce this map at the last minute and approve it by a 5-2 majority in the commission.[410] This tactic undermined Article XIX by denying the commission a meaningful substantive role in the map drawing process.

The Ohio Republicans also pursued temporal evasion strategies in *Neiman*, opposing requests to expedite the case, leading the Ohio Supreme Court to adopt a scheduling order that ran past May 3rd. As a result, the Secretary of State ordered that the May 3rd primary be held using the congressional district plan approved by the Commission on March 2nd even though this plan was later invalidated by the Court in *Neiman*. In addition, the Ohio Republican leaders also failed to comply with the thirty-day deadline imposed by the Court in *Neiman* for enacting a new congressional map, and eventually appealed the decision to the United States Supreme Court based on the ISLT. As a result, the general elections in Ohio were also held under the March 2 maps.

In Florida, state courts played distinct roles in partisan gerrymandering disputes in the post-2010 and post-2020 redistricting cycles. In the post-2010 cycle, the Florida Supreme Court in *Detzner* faulted the circuit court for failing to consider evidence of procedural evasion in its analysis of improper intent. The Florida Supreme Court highlighted the role partisan political operatives played in a secret process that ran in parallel to the public redistricting processes in the legislature.[411] The Florida Supreme Court cited this procedural evasion of the requirements of the Fair Districts Amendments as evidence of improper partisan intent to utilize partisan considerations in the redistricting process.[412]

The 2020 cycle featured very different evasion dynamics. Governor DeSantis's "hijacking" of the post-2020 redistricting process highlights how governors can also pursue substantive and procedural evasion strategies that also end up delaying the adoption of redistricting maps. DeSantis coordinated his map-drawing effort with national GOP operatives, arguably in direct contravention of the Fair Districts Amendment's provisions, and also battled with legislators in his own party to push his own more aggressive map.

As noted in Section II.C, the DeSantis congressional plan went much further than the legislature's plan in cracking the Fifth Congressional

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[409] *Id.*

[410] *Id.*

[411] *See supra* Section II.C.3; League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 374–376 (Fla. 2015).

[412] *Detzner*, 172 So. 3d at 378, 385–386.

District across four districts and giving Republicans a much greater advantage statewide. Under the DeSantis map, although Republicans won roughly fifty-eight percent of the statewide vote, they won twenty out of twenty-eight seats (seventy-one percent of total seats) in the 2022 elections.

However, in the 2020 cycle, plaintiffs have thus far been unsuccessful in challenging the DeSantis redistricting plan. The plaintiffs' lack of success in the *Black Voters Matter Capacity Building Institute* litigation can be traced to both strategic and tactical decisions made by the plaintiffs, and the operation of judicial procedure and processes at the state level.[413] In *Black Voters Matter Capacity Building Institute,* plaintiffs filed a complaint challenging the DeSantis plan, arguing that the map violated the Fair Districts Amendment's prohibitions against partisan gerrymandering, its non-diminishment standard (minority vote dilution), and its requirements of compactness and respect for geographic and political subdivisions, as codified in Article III, Section 20.[414] In addition, plaintiffs argued that the Governor had effectively "hijacked" the process.[415] However, plaintiffs chose to file a motion for a temporary injunction that only focused on the non-diminishment claim, rather than to try to push to fast-track a trial on all of the issues. This ultimately prevented the circuit court, District Court of Appeal, and Florida Supreme Court from ruling on the substantive merits of the partisan gerrymandering claim.[416]

C. *The Institutional Design of Reforms, Judicial Remedies, and Judicial Independence*

The United States Supreme Court has given constitutional sanction to political entrenchment of anti-partisan gerrymandering norms and standards and independent redistricting commissions. In *Rucho*, the Court favorably discussed the Florida Supreme Court's application of the Fair Districts Amendment in *Detzner* to invalidate a congressional redistricting plan and discussed how many states had enacted redistricting commissions as part of redistricting reforms. The Court's decision in *AIRC* affirmed the constitutionality of IRCs. In suggesting federal court limits on state court interpretation of state constitutions, *Moore* also suggests a preference for, and deference to, political entrenchment of anti-partisan gerrymandering norms.

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[413] *Black Voters Matter Capacity Building Institute v. Byrd (Formerly Black Voters Matter Capacity Building Inst. v. Lee)*, LEAGUE OF WOMEN VOTERS (Jan. 24, 2024), https://www.lwv.org/legal-center/black-voters-matter-capacity-building-institute-v-byrd-formerly-black-voters-matter (tracing the turbulent timeline of *Black Voters Matter Capacity Building Institute v. Lee*).

[414] Cervas et al., *supra* note 137, at 477 (citing Complaint for Injunctive and Declaratory Relief at 25–32, Black Voters Matter Capacity Building Inst., Inc. v. Lee, No. 2022-CA-000666 (Fla. Cir. Ct. 2022), 2022 WL 1198012).

[415] *Id.*

[416] *See* Gary Fineout, *supra* note 344 (analyzing the Florida Supreme Court's 4-1 ruling, which, through a procedural maneuver, sidestepped a definitive decision on the state congressional map).

Although *AIRC*, *Rucho*, and *Moore* all support the acceptability of political entrenchment of partisan gerrymandering norms and processes, constitutional doctrine and discourse fails to fully acknowledge both the structural weaknesses of redistricting reform models in terms of the potential for evasion, and how the nature and scope of courts' remedial powers in cases also has important implications for evasion strategy. This analysis seeks to understand how institutional design and structure shapes the incentives that drive evasion.[417] In addition, I argue that state courts' ability to enforce norms against partisan gerrymandering is undermined by their relative lack of independence from partisan politics as compared to the federal judiciary.

1. *Structural Design Issues and Weakness of Certain Reform Models*

Each of the reform models that were entrenched in state constitutions in New York, Ohio, and Florida sought to advance similar objectives—including advancing the goal of transparency in the redistricting process, promoting bipartisan cooperation, and restricting partisan gerrymandering. However, each of these state regimes were vulnerable to different types of evasion strategies and tactics and illustrate the importance of the structural design of reforms.[418] As Bruce Cain has observed, redistricting commissions can serve as effective "buffers" that allow courts to avoid intervention in all disputes.[419] However, a polarized political context can also lead to political deadlocks, weakening the buffer function of redistricting commissions.[420]

The major flaw in the design of New York's redistricting reforms contained in the 2015 amendments was that the New York IRC was a bipartisan commission split 5-5 between Democrats and Republicans, and the New York process required that the IRC present a redistricting plan to the legislature before the legislature could take action.[421] Consequently, the minority party in the state legislature (in this case, the Republicans) could deliberately pursue delay and obstruction tactics to deadlock the IRC to obstruct the process, and eventually force map drawing into the state courts. Predictably, the state legislature attempted to override the IRC's obstruction by enacting a new law that allowed it to enact its own congressional map,

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[417] *See* GERKEN & KANG, *supra* note 123, at 86, 91 (discussing new institutional approaches in election law).

[418] It should be noted that majority parties in legislatures may deliberately entrench structural weaknesses or flaws in redistricting reform policies to circumvent anti-partisan gerrymandering norms and commission processes.

[419] Cain, *supra* note 130, at 1812–13.

[420] *Id.* at 1812 ("If the trend toward greater partisan polarization continues, supermajority rules and bipartisan composition could ultimately lead independent citizen commissions to political deadlocks, particularly if dissatisfied groups and political parties think they can get a better deal from the courts or the initiative process.").

[421] *See* discussion *supra* Section II.C.1 (explaining the 5-5 deadlock that precluded New York's IRC from presenting its second plan to the legislature).

and then enacted a map that favored Democrats, but both the law and new map were invalidated by the Court of Appeals.[422]

Similarly, Ohio's redistricting reforms also contained numerous structural flaws. One of the major flaws in Ohio's redistricting reform regime was that it allowed the majority party in the state legislature to deliberately avoid enacting a plan in order to shift map drawing to a "backup" partisan commission that was under Republican party control.[423] The Republican legislative leadership could then force the commission to approve a legislatively drawn map that would go into effect for ten years, bypassing the bipartisan supermajority requirement for maps enacted by the legislature.[424] A second major flaw in Ohio's reforms was that it did not provide state courts with the power to order maps in the event of impasse. As a result, even after the state supreme court invalidated a congressional map, the state supreme court had no way of forcing the Redistricting Commission or legislature to enact a new map.[425] As a result, Ohio Republicans successfully ran both the 2022 primary and general elections under the map that had been invalidated in *Neiman*.[426] As the New York and Ohio cases illustrate, bipartisan or politician commissions can both engage in different types of evasion tactics in an attempt to circumvent norms against partisan gerrymandering and to force state or federal courts to order redistricting maps.

Florida's Fair Districts Amendment arguably has less structural flaws than the New York and Ohio reforms, but Governor DeSantis's takeover of the map drawing process in the post-2020 cycle illustrates how governors and other political actors can also engage in forms of procedural evasion. In *Detzner*, the Florida reforms arguably worked as anticipated, and the Florida Supreme Court was able to invalidate a redistricting plan and order the adoption of a remedial map that had been adopted by a state trial court.[427]

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[422] *Id.*

[423] *See* discussion *supra* Section II.C.2 (explaining Article XIX's bipartisan requirement that mandates a "backup" redistricting commission to overtake the congressional map drawing process if the legislature is unable to adopt a map); OH CONST. art. XIX, §§ 1(A)-(D).

[424] *See* discussion *supra* Section II.C.2 (discussing the procedure in which parties can bypass the bipartisan supermajority requirement); OH CONST. art. XIX, §§ 1(A)-(D).

[425] *See* discussion *supra* Section II.C.2; Neiman v. LaRose, 184 N.E.3d 138, 139 (Fischer & DeWine, JJ., concurring in part and dissenting in part)

> [I]f a plan enacted by the General Assembly or adopted by the Ohio Redistricting Commission expires or is invalidated by the court under Article XIX, the boundaries that the congressional-district plan created shall continue to be used for holding elections until a new plan is enacted or adopted. The prior district boundaries do not lapse until new ones are in place.

Id.

[426] *See* discussion *supra* Section II.C.2 (describing how the Ohio Redistricting Commission failed to meet a thirty-day deadline set by the *Neiman* majority to create a new redistricting map, resulting in Ohio Republicans running their elections under the March 2 map invalidated by *Neiman*).

[427] *See* discussion *supra* Section II.C.3 (explaining the Florida Supreme Court decision in *Detzner*); Complaint for Injunctive and Declaratory Relief at 3–4, Black Voters Matter Capacity Bldg. Inst., Inc. v. Lee, No. 2022-CA-000666 (Fla. Cir. Ct. 2022), 2022 WL 1198012.

However, in the post-2020 cycle, Governor DeSantis was able to effectively hijack the map drawing process in consultation with national Republican operatives, and plaintiffs were unable to successfully challenge the DeSantis map in part due to tactical choices, and in part due to inertia and procedural hurdles within Florida's judicial processes.[428]

2. *Courts' Remedial Powers and Incentives for Evasion*

The case studies of evasion of New York, Ohio, and Florida's redistricting reforms also illustrates the importance of variation in the nature and scope of the remedial powers of state courts. In New York, the state courts had strong remedial powers to direct court-ordered map drawing in the event of deadlock or impasse.[429] However, as highlighted by the dissenting justices in *Harkenrider*, the state courts' power to adopt court-ordered maps arguably created perverse incentives for Republican members of the IRC to force deadlock to secure a more favorable court-ordered map.[430]

By contrast, under Ohio's redistricting reforms, state courts do not have strong remedial powers and cannot order the adoption of court-ordered maps. As a result, Republicans in the General Assembly and Redistricting Commission could defy decisions and orders by the Ohio Supreme Court and implement and run elections under a congressional map that the Ohio Supreme Court had invalidated. Finally, like New York, Florida state courts possess strong remedial powers to order and adopt redistricting. The Florida Supreme Court in *Detzner* was able to take advantage of this remedial power in approving maps adopted by a trial court. While a lower court also ordered remedial maps in the *Black Lives Matter Capacity Building Institute* litigation, this decision was overturned on appeal because of procedural deficiencies stemming from the fact that the lower court had never conducted a trial and ruled on the merits of the claims in the case.[431]

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[428] Kaplan, *supra* note 339.

[429] In state regimes where state courts do have the power to draw maps, but there are no judicially or politically entrenched norms against partisan gerrymandering, state court orders can end up enforcing maps based on earlier partisan gerrymanders. In Wisconsin, when faced with impasse resulting from the Democratic Governor's veto of the Republican state legislature's redistricting map, the Wisconsin Supreme Court held that partisan gerrymandering is a political question but applied the "least change" option and adopted a map which itself was based on an earlier partisan gerrymander. *See* Yablon, *supra* note 380, at 1045 (citing Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 491 (Wis. 2021)). By contrast, in another recent case in Pennsylvania, the state supreme court adopted a different approach to responding to impasse between the Governor and legislature by reinstating an earlier map that the state court itself had drawn in *League of Women Voters of Pennsylvania* that was not a partisan gerrymander. Carter v. Chapman, 270 A.3d 444, 451 (Pa. 2022).

[430] Harkenrider v. Hochul, 197 N.E.3d 437, 473–74 (N.Y. 2022).

[431] *See supra* Section III.C.2 (explaining the plaintiff's strategic and tactical shortcomings in *Black Voters Matter Capacity Bldg. Inst.*).

3. *State Courts, Judicial Independence, and Partisan Backlash*

The case studies of judicial entrenchment of partisan gerrymandering norms, and of evasion of politically entrenched norms, highlight the significance of the lack of independence of most state courts from partisan politics. Because state court judges in most states are elected, they often are subject to political pressures and potential backlash from partisan majorities in the legislature.[432] Even in states in which federal courts upheld state court recognition of norms against partisan gerrymandering, partisan dynamics can still also constrain state judicial power. As noted in Part II, in several states in which state courts have invalidated redistricting plans as partisan gerrymanders, there has been significant backlash.

Democrats in New York have already sought to counter the New York Court of Appeals' decision in *Harkenrider* in order to draw new legislative maps for the 2024 elections and beyond. The June 2023 *Hoffman* decision held that the court-ordered congressional map in *Harkenrider* had only been intended to be a temporary plan and ordered the IRC to restart the redistricting process, redraw congressional and state legislative maps, and submit these maps to the legislature.[433]

In North Carolina, after Republicans regained control over the North Carolina Supreme Court in the November 2022 elections, the Court in *Harper III* reversed its earlier decision in *Harper I* and held that partisan gerrymandering claims are nonjusticiable political questions under the state constitution. In Ohio, the Republican state legislature and Republican-controlled redistricting commission refused to comply with the Ohio Supreme Court's decisions in *Adams* and *Neiman* ordering the drawing of new congressional maps. In the 2022 elections, Ohio Republicans won each of the three open seats on the Ohio Supreme Court to expand their majority on the Court, and the new court could reverse its earlier decision and adopt a more deferential approach toward review of partisan gerrymandering claims.[434]

Consequently, *Moore v. Harper* adds yet another limit or constraint on state efforts to address partisan gerrymandering through the courts or political entrenchment. State courts already face the possibility of backlash to decisions recognizing norms and standards against partisan gerrymandering. State legislatures, redistricting commissions, and other political actors can also take actions to defy or evade politically entrenched norms against partisan gerrymandering. And *Moore v. Harper* could allow

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[432] *See* Pozen, *supra* note 21, at 2070–71 ("[E]mpirical evidence shows that, as compared to state judges in appointive and merit selection jurisdictions, judges facing elections, particularly partisan elections, are more likely to decide cases in a manner consistent with majority opinion."); Mansker & Devins, *supra* note 21, at 28.

[433] *In re* Hoffman v. New York State Indep. Redistricting Comm'n, 217 A.D.3d 53, 56 (N.Y. App. Div. 2023).

[434] Schladen, *supra* note 322.

federal courts to limit or rein in state courts' ability to recognize norms against partisan gerrymandering through state constitutional interpretation, undermining judicial federalism.

CONCLUSION

This Article examined the impact and implications of *Moore v. Harper* on state partisan gerrymandering regimes by examining both its substantive impact on state court interpretation and its failure to address the procedural dimension of evasion of partisan gerrymandering norms and processes. Although the United States Supreme Court has oscillated between different standards and approaches in its partisan gerrymandering jurisprudence, the Court has consistently recognized the harms of extreme partisan gerrymandering to democracy and representation.[435] However, *Rucho v. Common Cause* and *Moore v. Harper* have entrenched a particular conception of federalism that reinforces a structural governance bias against protecting representation and voting rights. *Rucho* and *Moore* provide constitutional sanction to a new federal regime in which states play a major role in responding to and addressing partisan gerrymandering, but potentially allows federal courts to serve as a check on state court recognition of anti-partisan gerrymandering through the judicial entrenchment pathway. Although the Supreme Court rejected the extreme version of the ISLT, *Moore* still entrenches a conception of federalism that could undermine representation through unwarranted federal judicial intrusion into state constitutional frameworks governing state elections, and an expanded role for federal courts in federal election regulation that falls under the purview of Congress.

The Elections Clause and Electors Clause embrace a particular conception of federalism in which states enact laws and regulations governing federal elections subject to state constitutional requirements. The federal constitution lacks robust substantive protections for democracy principles and the right to vote, and most state constitutions entrench democratic principles and voting rights.[436] *Moore* threatens judicial federalism and the pluralism of state court approaches in constitutional interpretation and could prevent state courts from applying original and historical intent evidence, and structural principles related to democracy to recognize norms against partisan gerrymandering.

As such, *Moore*'s rejection of the ISLT, and recognition of the power of state court judicial review over state regulations of federal elections, was important in reaffirming state constitutions' central role in entrenching democracy and protections for the franchise. However, *Moore* also failed to

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[435] *See* discussion *supra* Part I (outlining the Supreme Court's gerrymandering jurisprudence).

[436] *See* Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, *supra* note 14, at 861 (comparing how state constitutions and the federal constitution confer voting rights).

specify the exact test that federal courts should apply in assessing whether state courts go too far in their interpretation of state constitutions and statutory provisions. Justice Kavanaugh's concurrence suggests that federal courts should apply the test set forth in Justice Rehnquist's concurrence in *Bush v. Gore*.[437] By reviving Rehnquist's test in *Bush v. Gore*, *Moore* could destabilize existing understandings of federalism and threaten over-centralization of election regulation at the expense of state constitutional principles of democracy.[438] This could limit pathways to reining in partisan gerrymandering in states in which judicial entrenchment is the most viable pathway to reform than political entrenchment.

At the same time, this Article highlights how *Rucho* and *Moore* do not address the core problem of political evasion of anti-partisan gerrymandering norms and processes. Through case studies of state constitutional adjudication, this Article traced how political actors seek to evade norms against partisan gerrymandering across different reform models, highlighting structural weaknesses and flaws in the institutional design of redistricting reform models.[439] In addition, variation in the nature of state courts' remedial powers can impact evasion by either creating perverse incentives for deadlock where state courts can order maps, or incentives for defiance and evasion where state courts lack the power to order maps.[440]

Indeed, one implication of the findings of this Article is that state courts may be less capable or effective in checking evasion of norms against partisan gerrymandering than federal courts under a federal constitutional standard against partisan gerrymandering. State courts in Ohio and Florida were either unable to check evasion or chose not to address evasion of partisan gerrymandering norms during the 2020 cycle. Under Ohio's constitution, the Ohio Supreme Court simply lacked the power to order court-drawn maps. And in Florida, state courts did not address partisan gerrymandering claims in part due to strategic choices made by plaintiffs, and in part due to the reluctance of the appellate courts to intervene. Consequently, the capacity of state courts to address evasion can be traced to both institutional structure and power. In addition, in some states, state courts' lack of effectiveness in enforcing norms against partisan gerrymandering may also be result of the unique partisan dimensions of state

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[437] Moore v. Harper, 143 S. Ct. 2065, 2090–91 (2023) (Kavanaugh, J., concurring) (discussing various tests for assessing a state court's interpretation of state law in a case involving the Elections Clause).

[438] *See* Pildes, *supra* note 88, at 692 (citing Gardner, *supra* note 383, at 651–58) (explaining that "electoral decentralization" operates as a "structural means of hindering a single set of partisan forces from gaining unified control over drafting and administering election rules"); Schapiro, *supra* note 383, at 677.

[439] *See supra* Sections II.C & III.B (exploring evasion dynamics through case studies in New York, Ohio, and Florida).

[440] *Id.*

politics, as well the relative power of majority parties in states with strong Republican or Democratic majorities. Because judges on many state courts are elected, state judges may be less willing to challenge evasion for fear of potential political backlash.

Consequently, the failure of *Rucho* and *Moore* to contemplate or address evasion further exacerbates representation-diminution by reinforcing the weaknesses and flaws of certain federalism-based reforms, suggesting the need for universal federal standards or federal legislation. In the absence of a federal standard for reviewing the constitutionality of partisan gerrymandering, the *Rucho-Moore* framework allows for a system in which enforcement of norms against partisan gerrymandering is uneven and variable, undermining the ability of some states to meaningfully address the harms of partisan gerrymandering to our political system.