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| **State** | **Traditional Criteria Cited** | **Statistical Measures Cited** | **Party/Commission in Control of Mapmaking** |
| **Florida (2015)**  *League of Women Voters of Fla. V. Detzner*, 172 So. 3d 363 (Fla. 2015) | | | |
| * Justice Pariente (D) issued the 5-2 opinion, in which Chief Justice Labarga (R), and Justices Quince (D) and Perry (R), concurred; Justice Lewis (D) concurred in the result. | * Prohibiting partisan intent (a tier 1 criteria in FL) (F)[[1]](#footnote-1) * Compactness and utilization of political/geographical boundaries. (tier 2 criteria in FL ) (F)[[2]](#footnote-2) | * Reock Score and Convex Hull Score (F)[[3]](#footnote-3) | * Republican-controlled legislature passed new maps as legislation; * Republican governor (Rick Scott). |
| * Justice Canady (R) dissented with an opinion, in which Justice Polston (R) concurred | * Prohibiting partisan intent (F)[[4]](#footnote-4) * Compactness (F)[[5]](#footnote-5) * Retrogression (U)[[6]](#footnote-6) | * Change in Length/Perimeter/Area. (F)[[7]](#footnote-7) |  |
| **Kansas (2022)**  *Rivera v. Schwab*, 512 P.2d 168 (Kan. 2022) | | | |
| * Justice Stegall (R) wrote the 4-3 opinion, joined by Chief Justice Luckert (R), and Justices Wall (D), and Wilson (D) | * Avoiding partisan intent (U)[[8]](#footnote-8) * Novel: state equal protection/first amendment (U)[[9]](#footnote-9) * General traditional districting principles: KS Legislature’s Bipartisan Redistricting Advisory Group’s precatory guidelines (U)[[10]](#footnote-10) | * N/a. | * Republican-controlled legislature; * Democratic governor (Laura Kelly) |
| * Justice Rosen (D) filed a concurrence in part, and dissent in part. | * Novel: state equal protection/first amendment (F)[[11]](#footnote-11) * Avoiding partisan intent (F)[[12]](#footnote-12) | * N/a. |  |
| * Justice Biles (D) filed a concurrence in part, and dissent in part, joined by Justices Rosen and Standridge (D). | * Novel: state equal protection/first amendment (F)[[13]](#footnote-13) * Avoiding partisan intent (F)[[14]](#footnote-14) | * Computer algorithm models (F)[[15]](#footnote-15) * Efficiency gap (F)[[16]](#footnote-16) * “Least-change” model (F) * Qualitative testimony (F) |  |
| **New Jersey (2022)**  *Matter of Congressional Districts by New Jersey Redistricting Comm’n*, 268 A.3d 299 (N.J. 2022) | | | |
| * Rabner, C.J. (D), issued the 5-0 opinion, joined by Justices Albin (D), Patterson (Federalist Party), and Solomon (R); temporarily assigned, Judge Fuentes (D), also joined the order. * Justices Fernandez-Vina (R) and Pierre-Louis (D) did not participate. | * N/a [[17]](#footnote-17) | * N/A. | * NJ Redistricting Commission (6 Democrat individuals; 6 Republican individuals; and a tiebreaking thirteenth member chair (selected by NJ court as members failed to agree). * The tiebreaker was Hon. John E. Wallace, Jr. (ret.) (D). * Democratic governor (Phil Murphy) |
| **New York (2022)**  *Matter of Harkenrider v. Hochul*, No. 60, 2022 N.Y. LEXIS 874, at \*1 (N.Y. Apr. 27, 2022) | | | |
| * Di Fiore, C.J. (D), issued the 4-3 opinion; Judges Garcia (R), Singas (D) and Cannataro (D) concur. | * N/a.[[18]](#footnote-18) * Secondarily only:   + Partisan intent / ensuring competitive districts (F)[[19]](#footnote-19) | * N/a. * Secondarily only:   + simulation algorithm developed by Dr. Kosuke Imai (F)[[20]](#footnote-20) | * Independent Redistricting Commission (failed to present a second plan to the legislature) * Democratic-controlled legislature; * Democratic governor (Kathy Hochul) |
| * Judge Troutman (D) dissenting in part | * N/a.[[21]](#footnote-21) | * N/a. |  |
| * Judge Wilson (D) dissenting | * Partisan intent (F)[[22]](#footnote-22) * Protection of racial and language minority voting rights; communities of interest (F)[[23]](#footnote-23) * Compactness/contiguity (X)[[24]](#footnote-24) | * Novel simulation algorithm used by Dr. Kosuke Imai (U)[[25]](#footnote-25) |  |
| * Judge Rivera (D) dissenting | * Partisan intent (F)[[26]](#footnote-26) | * N/a. |  |
| **North Carolina (2022)**  *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) | | | |
| * Hudson, J. (D), issued the 4-3 opinion; joined by Justices Morgan (D), Ervin (D), and Earls (D). | * Novel: State equal protection/first amendment (F)[[27]](#footnote-27) * Partisan intent (F)[[28]](#footnote-28) * Joint Redistricting Committee’s adopted redistricting criteria (F)[[29]](#footnote-29) | * “Mean-median difference,” “efficiency gap,” “the lopsided margins test,” and “partisan symmetry” analyses (F)[[30]](#footnote-30) | * Joint Redistricting Committee. Republican-controlled legislature; democratic governor (Roy Cooper) |
| * Justice Morgan, filed a concurring in opinion, joined by Justice Earls. | * Novel: State equal protection/first amendment (F)[[31]](#footnote-31) | * N/a. |  |
| * Chief Justice Newby (R), filed a dissenting opinion, joined by Justices Berger (R) and Barringer (R). | * Novel: State equal protection/first amendment (U)[[32]](#footnote-32) * Partisan intent (U)[[33]](#footnote-33) | * N/a. |  |
| **Pennsylvania (2018)**  *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018). | | | |
| * Justice Todd (D) issued the 5-2 opinion, joined by Justices Donohue (D), Dougherty (D), and Wecht (D). | * Novel: State equal protection/first amendment (F)[[34]](#footnote-34) * PA’s historical neutral traditional redistricting criteria (F)[[35]](#footnote-35) * Partisan intent (F)[[36]](#footnote-36) | * Computer algorithm models (Reock; Popper Polsby) (F)[[37]](#footnote-37) * Lay examination (F)[[38]](#footnote-38) | * Republican-controlled legislature; Democratic governor (Tom Corbett) |
| * Justice Baer (D) filed a concurring and dissenting opinion. | * Novel: State equal protection/first amendment and partisan intent (F)[[39]](#footnote-39) * PA’s historical neutral traditional redistricting criteria (U)[[40]](#footnote-40) | * N/a. |  |
| * Chief Justice Saylor (R) filed a dissenting opinion, joined by Justice Mundy (R). | * Novel: State equal protection/first amendment and partisan intent (U)[[41]](#footnote-41) * PA’s historical neutral traditional redistricting criteria (U)[[42]](#footnote-42) | * N/a. |  |
| * Justice Mundy filed a dissenting opinion. | * Novel: State equal protection/first amendment and partisan intent (U)[[43]](#footnote-43) * PA’s historical neutral traditional redistricting criteria (U)[[44]](#footnote-44) | * N/a. |  |
| **Pennsylvania (2022)**  *Carter v. Chapman*, 270 A.3d 444 (Pa. 2022) (per curiam). | | | |
| * Baer, C.J. (D), issued the 4–3 opinion; Justices Donohue (D), Dougherty (D), and Wecht (D) joined the opinion | * Partisan intent (F)[[45]](#footnote-45) * PA’s historical neutral traditional redistricting criteria (F)[[46]](#footnote-46) | * “Least-change” approach (X)[[47]](#footnote-47) * Mean-Median, Efficiency Gap, Declination, Partisan Bias analyses (F)[[48]](#footnote-48) | * Republican-controlled legislature; Democratic governor (Tom Wolf) |
| * Justice Dougherty filed a concurring opinion | * Partisan intent (X)[[49]](#footnote-49) * PA’s historical neutral traditional redistricting criteria (F)[[50]](#footnote-50) | * “Least-change” approach (F)[[51]](#footnote-51) |  |
| * Justice Donohue filed a concurring opinion | * Partisan intent (F)[[52]](#footnote-52) * PA’s historical neutral traditional redistricting criteria (F)[[53]](#footnote-53) | * Mean-Median, Efficiency Gap, Declination, Partisan Bias analyses (F)[[54]](#footnote-54) |  |
| * Justice Wecht filed a concurring opinion | * Partisan intent (X)[[55]](#footnote-55) * PA’s historical neutral traditional redistricting criteria (F)[[56]](#footnote-56) | * “Least-change” approach (F)[[57]](#footnote-57) |  |
| * Justice Todd (D) filed a dissenting opinion. | * PA’s historical neutral traditional redistricting criteria (F) [[58]](#footnote-58) * Partisan intent (X)[[59]](#footnote-59) | * Gressman Math/Science petitioners approach (Polsby-Popper, Reock, Convex Hull, and Cut Edges).[[60]](#footnote-60) |  |
| * Justice Brobson (R) filed a dissenting opinion. | * One-person, one-vote (F)[[61]](#footnote-61) * Partisan intent (U)[[62]](#footnote-62) * PA’s historical neutral traditional redistricting criteria (F)[[63]](#footnote-63) | * “Least-change” approach (F)[[64]](#footnote-64) |  |
| * Justice Mundy (R) filed a dissenting opinion. | * Partisan intent (U)[[65]](#footnote-65) * PA’s historical neutral traditional redistricting criteria (F)[[66]](#footnote-66) | * Rank and score method / “Borda count” system[[67]](#footnote-67) |  |

1. “Once the trial court found unconstitutional [partisan] intent, there was no longer any basis to apply a deferential standard of review; instead, the trial court should have shifted the burden to the Legislature to justify its decisions in drawing the congressional district lines.” *LWVF*, 172 So. 3d at 396-97. “The trial court clearly found that the Legislature's intent in drawing the congressional redistricting plan generally, and District 5 specifically, was to benefit the Republican Party.” *Id.* at 403. The *Detzner* court also found the spoliation of evidence as an adverse inference of partisan intent. *Id.* at 391. [↑](#footnote-ref-1)
2. “Even as redrawn by the Legislature and approved by the trial court, District 5 clearly does not strictly adhere to the Florida Constitution's tier-two requirements of compactness and the utilization of political or geographical boundaries where feasible. It splits seven counties and has numerical compactness scores of .127 on the Reock measure and .417 on the Convex Hull measure, where 1 is the best score.” *Id.* at 402-03. [↑](#footnote-ref-2)
3. “The compactness review should also utilize ‘quantitative geometric measures of compactness’ derived from ‘commonly used redistricting software.’ . . . For example, the Florida Supreme Court has relied on the Reock method and the Area/Convex Hull method to assess compactness of voting districts.” *Id.* at 435. “The Reock, or circle-dispersion, method of quantifying compactness ‘measures the ratio between the area of the district and the area of the smallest circle that can fit around the district.’ . . . This measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale.” *Id.* at 408 n. 17. “The Area/Convex Hull method, which ‘measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district,’ also ranges from 0 to 1, ‘with a score of 1 representing the highest level of compactness.’ . . . ‘A circle, square, or any other shape with only convex angles has a score of 1’ under this measure.” *Id.* at 408 n. 18. [↑](#footnote-ref-3)
4. “The trial court refused to draw an inference from the evidence that an improper partisan intent affected the redistricting plan in its entirety. But the majority effectively steps into the role of the trier of fact, independently reweighs the evidence, finds that the evidence supports the inference that the whole plan was affected by an improper partisan intent, imputes that broad finding of unconstitutional intent to the trial court, and then faults the trial court for not acting in accord with that fabricated finding.” *Id.* at 417. “Second, the consultants' conspiracy was not successful in affecting the entire map drawing process. The ‘taint’ of ‘improper partisan intent’ attributable to the activities of the Republican consultants was limited in scope and effect.” *Id.* at 418. [↑](#footnote-ref-4)
5. “The majority fails to consider critical aspects of the alternative suggested by the challengers for Remedial District 5. Most strikingly, the majority ignores the reality that the mandated east-west configuration will result in a district that is significantly less compact than Remedial District 5. In addition, no attention is given to the fact that the creation of the East-West District will cause adjoining District 2 to become significantly less compact.” *Id.* at 420. [↑](#footnote-ref-5)
6. “The majority's imposition of the East-West District is also predicated on a disregard of the evidence of the potential for retrogression in the East-West District, and the failure to establish any objective standard for prohibited retrogression. On the issue of retrogression, the majority dismisses the expert testimony presented by the Legislature and acts on the basis of a very simple and totally subjective rule: we know retrogression when we see it.” *Id.* at 421. [↑](#footnote-ref-6)
7. *Id.* at 421-22. [↑](#footnote-ref-7)
8. “Here we are concerned exclusively with the *Rucho* question—is there a judicially discoverable and manageable standard in Kansas law that will guide a court in resolving any claim of excessive partisan gerrymandering? And unlike in Florida and other of our sister states that have codified limits on partisan gerrymandering, in Kansas the answer (for now) must be no.” *Rivera*, 512 P.2d at 185. Citing *Harper v. Hall*, 868 S.E.2d 499, (N.C. 2022) (“[P]artisan gerrymandering has no significant impact upon the right to vote on equal terms under the one-person, one-vote standard. . . . Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint.”). *Id.* at 179. [↑](#footnote-ref-8)
9. “Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment of the federal Constitution when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights.” *Id.* at 180. [↑](#footnote-ref-9)
10. The “guidelines” were a set of principles that set forth "traditional redistricting criteria" substantively the same as those used in the 2012 redistricting cycle. Its priorities included: (1) basing districts on data from the 2020 Census; (2) crafting districts as numerically as equal in population as practical; (3) the plan should have neither the purpose nor effect of diluting minority voting strength; (4) the districts should be as compact and contiguous as possible; (5) the integrity of existing political subdivisions should be preserved when possible; (6) the plan should recognize communities of interest; (7) the plan should avoid contests between incumbents when possible; and (8) the districts should be easily identifiable and understandable by voters. However, the House and Senate as a whole did not adopt the “guidelines.” *Id.* at 174. Thus, the court noted that “plaintiffs here have also proposed a variety of different metrics for measuring ‘fairness’ and answering the ‘how much is too much’ question. But none of these metrics have a foundation in Kansas law—either statutory enactment or constitutional text.” *Id.* at 185. [↑](#footnote-ref-10)
11. “I would have given it the full examination and analysis the people of Kansas deserve and concluded that it is a rich and generous declaration that guarantees the people of Kansas protections that are broader than those found in the federal Equal Protection Clause. This reflection would support the legal framework and conclusion my dissenting colleagues present today: Ad Astra 2's invidious discrimination against people based on past political speech and race certainly presents a justiciable question and clearly violates the protections enshrined in the Kansas Constitution.” *Id.* at 199. [↑](#footnote-ref-11)
12. “In turning a blind eye to this full-scale assault on democracy in Kansas, the majority blithely ignores the plain language of this state's Constitution. The majority upholds a legislative [\*\*75] decision that does nothing to benefit the people or provide equal protection to the citizens of this state, considerations our Constitution expressly demands. Furthermore, the majority opinion undermines the very basis of legislative districting, apportioning voting districts in a blatant attempt to homogenize the state.” *Id.* at 194. [↑](#footnote-ref-12)
13. “My point is simply that the district court did not go rogue. It adopted a traditional equal protection framework firmly founded in our caselaw—triggered by its initial determination that the questioned state action, i.e., Ad Astra 2's enactment, resulted from the intentional targeting of constitutionally protected activities.” *Id.* at 205. [↑](#footnote-ref-13)
14. “It is important to appreciate the judicial bait-and-switch that has happened. First, the United States Supreme Court held in a recent 5-4 decision that federal courts must avoid partisan gerrymandering claims from the various states. . . . Plaintiffs here dutifully followed *Rucho*'s prompt and brought their case against Ad Astra 2 to state court, even though federal court is where these issues had been heard in our state over the past several decades. . . . But the Rivera majority slams the courthouse door shut by declaring: ‘[W]e can discern no judicially manageable standards by which to judge a claim that the Legislature relied too heavily on the otherwise lawful factor of partisanship when drawing [congressional] district lines.’ ” *Id.* at 203. “[T]he answer to the majority's question of how much is too much is straightforward: partisan gerrymandering is ‘too much’ when partisanship motivated the state action in question when there is no other legitimate rationale driving the outcome.” *Id.* at 208. [↑](#footnote-ref-14)
15. “Based on his analysis, Dr. Chen concluded that partisan intent predominated over the Guidelines and traditional redistricting criteria in the drawing of Ad Astra 2 and is responsible for the Republican advantage in the enacted plan.” *Rivera v. Schwab*, No. 2022-CV-000089 at \*35 (Wyandotte County Dist. Ct. Apr. 25, 2022). [↑](#footnote-ref-15)
16. *Id.* at \*53-55, 77-92. [↑](#footnote-ref-16)
17. The *N.J. Redistricting Comm’n* court held that the Republican plaintiffs’ allegations were insufficient to support a claim upon which relief could be granted, because they did not assert any constitutional violation. Thus, the court did not address any partisan gerrymandering claims on the merits. Although plaintiffs asserted that there were “significant differences between the [two] maps” and described ways in which the Republican delegation's map better met the standards the Chair had applied, the plaintiffs did not, however, “assert that the map the Commission adopted . . . was itself ‘unlawful.’” *N.J. Redistricting Comm’n*, 268 A.3d at 303. [↑](#footnote-ref-17)
18. The *Harkenrider* court primarily based its ruling that found the congressional maps unconstitutional on the basis that the NY IRC failed to comply with state’s constitutionally mandated redistricting procedure under art. III, § 4. *Harkenrider*, No. 60, 2022 N.Y. LEXIS 874, at \*16. [↑](#footnote-ref-18)
19. “We reject respondents' assertion that the evidence was legally insufficient to establish an unconstitutional partisan purpose. Viewing the evidence in the light most favorable to petitioners and drawing every inference in their favor, there is a ‘valid line of reasoning and permissible inferences’ which could possibly lead [a] rational [factfinder] to the conclusion reached by the [factfinder] on the basis of the evidence presented at trial.” *Id.* at \*31-32. The *Harkenrider* court cited the factual findings made by the lower court, which “found that petitioners had proven that the congressional map violated the constitutional prohibition on partisan gerrymandering by packing republican voters into four districts while ensuring there were ‘virtually zero competitive districts.’” *Id.* at \*10-11. [↑](#footnote-ref-19)
20. “Trende testified that a comparison of the enacted congressional map to ensembles of 5,000 or 10,000 maps created by computer simulation revealed that the enacted map was an "extreme outlier" that likely reduced the number of Republican congressional seats from eight to four by ‘packing’ Republican voters into four discrete districts and ‘cracking’ Republican voter blocks across the remaining districts in such manner as to dilute the strength of their vote and render such districts noncompetitive.” *Id.* at \*9-10. [↑](#footnote-ref-20)
21. “Given the procedural violation flowing from the breakdown in the constitutional process, we must fashion a remedy that matches the error. . . . [T]his Court should order the legislature to adopt either of the two plans that the IRC has already approved pursuant to section 5-b (g).” *Id.* at \*39. [↑](#footnote-ref-21)
22. “[I]f a given map ends up discouraging competition or favoring a political party, that map does not necessarily run afoul of the Constitution's prohibition. Instead, an intent to discourage competition or to favor that political party must be shown for the map to violate the Constitution.” *Id.* at \*50. In other words, Mr. Trende’s analysis may show the what, but it cannot show the why (i.e., the intent). *See id.* at \*51-52. Also, Judge Wilson noted that the contention that Republicans were excluded from the process, without more, “does not meet the high bar” to invalidate the 2022 plan. *Id.* at \*74-75. While that may be “partisan” in one sense, it is not in the sense that would be necessary to show an intent to violate the Constitution. *Id.* at \*75-76. • Also, the adoption of the 2021 Legislation and the failed constitutional amendment are not “particularly probative as to intent.” *Id.* at 76. “It is equally possible that the Legislature, seeing the possibility of electoral chaos in the event that the IRC failed to act as required, clarified that the outcome would be the same as if the IRC produced plans that the Legislature rejected.” *Id.*  [↑](#footnote-ref-22)
23. “Mr. Trende admittedly did not attempt to have his simulations account for several of the constitutionally required factors listed above. For that reason alone, his simulations do not provide evidence of the Legislature's intent to disfavor Republicans or reduce competition.” *Id.* at \*54-55. [↑](#footnote-ref-23)
24. While noting that compactness and contiguity are indeed important, Judge Wilson noted that Mr. Trende’s use of them was “overweighted” while failing to consider other traditional districting principles. See *id.* at \*58-67. [↑](#footnote-ref-24)
25. “Finally, the novelty of Dr. Imai's algorithm and the opacity of Mr. Trende's implementation of it create very substantial doubt as to his conclusions. The method is novel and not peer reviewed. Mr. Trende did not attempt the established Markov Chain Monte Carlo simulation to compare it to his results, nor did he provide the model, inputs, data sets, or output maps that formed the basis for his analysis. Indeed, neither he nor anyone has seen the algorithm-produced maps underlying his analysis. We are being asked to determine unconstitutionality based on shadows.” *Id.* at \*52-53. [↑](#footnote-ref-25)
26. “Petitioners' claim of a substantive violation based on gerrymandering is also without merit as their evidence fell far short of proving that the legislature's congressional map was unconstitutional beyond a reasonable doubt.” *Id.* at \*80. “For reasons discussed at length in Judge Wilson’s thorough and compelling analysis of petitioner’s evidence and gerrymandering claim, which I fully join, petitioners failed to carry their burden.” *Id.* at \*92. [↑](#footnote-ref-26)
27. “Partisan gerrymandering claims do not require the making of ‘policy choices and value determinations’. . . . As we have discussed, such claims are discernable under the North Carolina Constitution and precedent. Moreover, we have described several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation. Accordingly, we hold partisan gerrymandering claims are justiciable in North Carolina courts under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the Declaration of Rights.” *Harper*, 868 S.E.2d at 551. [↑](#footnote-ref-27)
28. “Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 congressional map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs’ fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. The General Assembly has substantially diminished the voting power of voters affiliated with one party on the basis of partisanship—indeed, in this case, the General Assembly has done so intentionally.” *Id.* at 554. [↑](#footnote-ref-28)
29. On August 12, 2021, the Joint Redistricting Committee adopted its final redistricting criteria which were as follows: equal population; contiguity; counties, groupings and traversals; racial data; voting districts; compactness; municipal boundaries; election data; member residence; and community consideration. *Id.* at 512. [↑](#footnote-ref-29)
30. “[T]he court noted four types of analyses in particular that confirm the ‘extreme partisan outcome’ of the congressional map that ‘cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria’: (1) ‘mean-median difference’ analysis ; (2) ‘efficiency gap’ analysis (‘measur[ing] . . . the degree to which more Democratic or Republican votes are wasted across an entire districting plan’); (3) ‘the lopsided margins test’; and (4) ‘partisan symmetry’ analysis. Based on these methods, the trial court found ‘that the enacted congressional plan subordinates the Adopted Criteria and traditional redistricting criteria for partisan advantage.’” *Id.* at 523. [↑](#footnote-ref-30)
31. “While I fully join my learned colleagues in my agreement with the majority opinion in this case, in my view the dispositive strength of the Free Elections Clause warrants additional observations in light of the manner in which it has been postured and addressed. . . . In my view, a free election is uninhibited and unconstrained in its ability to have the prevailing candidate to be chosen in a legislative contest without the stain of the outcome's predetermination.” *Id.* at 562-63. [↑](#footnote-ref-31)
32. “The majority inserts a requirement of ‘partisan fairness’ into our constitution. Under the majority's newly created policy, any redistricting that diminishes or dilutes an individual's vote on the basis of partisanship is unconstitutional.” *Id.* at 571. “The individual right to participate in a ‘free election’ does not include the right to have one’s preferred candidate elected or a political group's right to proportional representation.” *Id.* at 581-82. [↑](#footnote-ref-32)
33. “Moreover, partisan gerrymandering—and public disdain for the practice—has been ubiquitous throughout our state's history.” *Id.* at 588. “As discussed at length in *Rucho*, the Supreme Court of the United States found no manageable standards for assessing partisan considerations in redistricting despite having the similar express protections of speech and assembly rights. *Rucho*, 139 S. Ct. at 2505-07. Therefore, when interpreted in harmony with Article II, Sections 3 and 5, it is clear that Article I, Sections 12 and 14 do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. As with the prior Declaration of Rights clauses, there is nothing in the history of the clauses nor the applicable case law that supports the majority's expanded use of them.” *Id.* [↑](#footnote-ref-33)
34. “Common Cause also suggests that Pennsylvania case law supports giving the Free and Equal Elections Clause independent effect, noting that this Court has interpreted the clause since as early as the 1860s, when the Court explained that elections are made equal by ‘laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth.’” *League*, 178 A.3d at 793. “While it is true that our Court has not heretofore held that a redistricting plan violates the Free and Equal Elections Clause—for example, because it is the product of politically-motivated gerrymandering—we have never precluded such a claim in our jurisprudence.” *Id.* at 811. [↑](#footnote-ref-34)
35. “Consequently, for all of these reasons, and as expressly set forth in our Order of January 22, 2018, we adopt these measures as appropriate in determining whether a congressional redistricting plan violates the Free and Equal Elections Clause of the Pennsylvania Constitution. Therefore, an essential part of such an inquiry is an examination of whether the congressional districts created under a redistricting plan are: composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.” *Id.* at 816-17. [↑](#footnote-ref-35)
36. “[C]ompelling expert statistical evidence presented before the Commonwealth Court, in combination with and illustrated by an examination of the Plan itself and the remainder of the evidence presented below, demonstrates that the Plan cannot plausibly be directed at drawing equally populous, compact, and contiguous districts which divide political subdivisions only as necessary to ensure equal population.” *Id.* at 818. [↑](#footnote-ref-36)
37. “Perhaps the most compelling evidence concerning the 2011 Plan derives from Dr. Chen's expert testimony. As detailed above, Dr. Chen created two sets of 500 computer-simulated Pennsylvania redistricting plans, the first of which—Simulated Set 1—employed the traditional redistricting criteria of population equality, compactness, contiguousness, and political-subdivision integrity. . . .” *Id.* at 818. [↑](#footnote-ref-37)
38. “Dr. Chen's testimony in this regard comports with a lay examination of the Plan, which reveals tortuously drawn districts that cause plainly unnecessary political-subdivision splits. In terms of compactness, a rudimentary review reveals a map comprised of oddly shaped, sprawling districts which wander seemingly arbitrarily across Pennsylvania, leaving 28 counties, 68 political subdivisions, and numerous wards, divided among as many as five congressional districts, in their wakes.” *Id.* at 819. [↑](#footnote-ref-38)
39. “I concur with the Majority's erudite explication of Article I, Section 5 of the Pennsylvania Constitution (the Free and Equal Election Clause), PA. CONST. art. I, § 5,1 and the Court's ultimate conclusion that the 2011 Plan violates the rights protected by that provision.” *Id.* at 825. [↑](#footnote-ref-39)
40. “For the reasons explained below and similar to concerns expressed by Chief Justice Saylor and Justice Mundy, I diverge from the Majority, which I read to impose court-designated districting criteria on the Legislature. In contrast to the state legislative and municipal districts, the Constitution is silent in regard to the criteria to be applied by the Legislature in establishing congressional districts for Representatives to the United States Congress.” *Id.* at 825-26. “To evaluate a challenge to a congressional districting plan, I would hold that a challenger has the burden to prove that the plan clearly, plainly, and palpably violates the Free and Equal Election Clause by demonstrating that the plan resulted from extreme partisan gerrymandering. . . . I propose that extreme partisan gerrymandering can, in turn, be proven by evidence that partisan considerations predominated over all other valid districting criteria relevant to the voting community and resulted in the dilution of a particular group's vote.” *Id.* at 828. [↑](#footnote-ref-40)
41. “The Supreme Court of the United States has also emphasized, however, that redistricting is committed to the political branch and is inherently political.” *Id.* at 831. “Since these considerations are not constitutional commands applicable to congressional redistricting, the majority's approach amounts to a non-textual, judicial imposition of a prophylactic rule.” *Id.* at 832. “I would abide by the Court's previous determination, in the redistricting setting, that the Free and Equal Elections Clause provides no greater protection than the state charter's Equal Protection Clauses, which have been deemed coterminous with the protection provided by the United States Constitution.” *Id.* at 834. [↑](#footnote-ref-41)
42. “I find that the majority's focus on a limited range of traditional districting factors allocates too much discretion to the judiciary to discern violations in the absence of proof of intentional discrimination. Instead, I believe that, under the state and federal charters, the discretion belongs to the Legislature, which should be accorded appropriate deference and comity, as reflected in the majority's initial articulation of the presumption of constitutionality and the heavy burden borne by challengers.” *Id.* at 834. [↑](#footnote-ref-42)
43. “Despite the fact that *Erfer* established the Free and Equal Elections Clause did not provide any heightened protections to Pennsylvania voters, the Majority fails to provide legal justification for its disapproval of *Erfer*, other than citing to *Shankey* . . . which pre-dates *Erfer* by 33 years. In my view, stare decisis principles require us to give *Erfer* full effect.” *Id.* at 834-35. [↑](#footnote-ref-43)
44. “[T]he Majority admits that it is possible for the General Assembly to draw a map that fully complies with the Majority's ‘neutral criteria’ but still ‘operate[s] to unfairly dilute the power of a particular group's vote for a congressional representative.’ . . . This undermines the conclusion that there is a clear, plain, and palpable constitutional violation in this case.” *Id.* at 835. [↑](#footnote-ref-44)
45. “Indeed, we conclude that consideration of partisan fairness, when selecting a plan among several that meet the traditional core criteria, is necessary to ensure that a congressional plan is reflective of and responsive to the partisan preferences of the Commonwealth's voters.” *Id.* at 459. [↑](#footnote-ref-45)
46. *Supra* note 69. The *Carter* court discussed the PA historical traditional neutral redistricting criteria in seriatim at 464- 471. [↑](#footnote-ref-46)
47. “Our decision to adopt the Carter Plan, however, is not based upon its starting point but rather its end point. State another way, we do not select the Carter Plan because it utilized the least change approach but because the least change approach worked in this case to produce a map that satisfies the requisite traditional core criteria while balancing the subordinate historical considerations and resulted in a plan that is reflective of and responsive to the partisan preferences of the Commonwealth's voters, as set forth below.” *Id.* at 464 [↑](#footnote-ref-47)
48. “We initially observe that the parties and their experts generally agree on the metrics to be used in judging a plan’s performance on the traditional core criteria, the subordinate historical considerations, and the evaluations of partisan fairness. However, through no fault of the experts, the results of these metrics vary based on differences in their application of the metrics and divergences in the data sets. . . . Given these variations, we rely upon the analyses performed by Dr. Daryl DeFord, which evaluate all of the submitted plans using the same methods and data sets. . . . We appreciate Dr. DeFord's efforts in this regard as it allows the Court to engage in an apples-to-apples comparison of the plans on each metric.” *Id.* at 462-63. [↑](#footnote-ref-48)
49. “I fully agree with the majority's recognition that partisan fairness should be considered in our analysis. . . . However, I also recognize that the metrics for this criterion remain somewhat in flux when compared to the more standardized measures of the traditional core criteria.” *Id.* at 478 note 1 (citing *Vieth*). [↑](#footnote-ref-49)
50. *Id.* [↑](#footnote-ref-50)
51. “I join the majority opinion, but distance myself from certain aspects of part VI.B. Most significantly, I agree completely with the Court's selection of the Carter Plan for the primary and general elections for seats in the United States House of Representatives commencing May 17, 2022. In my view, the Carter Plan is the correct choice because it effects the least change from the 2018 Plan, while also satisfying the various criteria we have established as the constitutional standard.” *Id.* at 476-77. “In my view, the critical factor that sets the Carter Plan apart—the ‘tie-breaker,’ so to speak—is that the Carter Plan yields the least change from the Court’s 2018 congressional redistricting plan. *See* Majority Opinion at 35 (acknowledging Carter Plan ‘laps the field’ in terms of maintaining district lines). The least changed map is also the best choice where, as here, no one has demonstrated which subordinate historical considerations should outweigh the others, all maps are generally in the same acceptable range, and we lack enough information about partisan fairness metrics to focus on those as the deciding factor.” *Id.* at 477-78. [↑](#footnote-ref-51)
52. “I do not find that the lack of one perfect test for measuring partisan fairness precludes us from considering that factor. It simply means that we should look for the most comprehensive review available.” *Id* at 473-74. [↑](#footnote-ref-52)
53. *Id.* [↑](#footnote-ref-53)
54. “Dr. DeFord then compared all plans to each other on these two metrics, plus four other measures generated by the PlanScore.org website. The following table, which is copied from the Gressman's Brief in Support of Exceptions at page 59 with slight alterations to the headings, reflects the results of that comparison. (In his report, Dr. DeFord indicates that a negative score indicates a Republican lean.)”. *Id.* at 474-75. [↑](#footnote-ref-54)
55. “I join the Court’s adoption of the Carter Plan as the Commonwealth's 2022 Congressional Redistricting Plan, as well as its opinion in support thereof. I write separately to further explain why I found a number of exceptions to the Special Master's Report and Recommendation to be meritorious, and also to offer a more detailed discussion regarding the ‘least-change’ approach, the ‘subordinate historical consideration’ that tipped the scales in favor of the Carter Plan.” *Id.* at 479. [↑](#footnote-ref-55)
56. *Id.* [↑](#footnote-ref-56)
57. “Although I would not declare that least-change should be the ‘tie-breaker’ for all court-selected plans, my views on this subject align more closely with Justice Dougherty's. . . . Nonetheless, we should endeavor to resolve redistricting disputes by elevating as many ‘objective’ criteria above ‘subjective’ considerations as possible. To that end, I consider a plan's least-change score to be a weighty plus-factor that parties to future impasse litigation would be wise to keep in mind when submitting plans for selection by a court.” *Id.* at 490. [↑](#footnote-ref-57)
58. “Most critically, in selecting the optimal redistricting plan from those before us, I disagree that, in this instance, we need to look beyond the constitutionally-specified neutral criteria, and examine subordinate considerations. As the majority properly acknowledges, we recognized in *LWV II* that the four neutral criteria - contiguity, compactness, equal population, and splitting of political subdivisions - are the irreducible minimum requirements of Article I, Section 5 every redistricting plan must meet. . . . Indeed, as the majority aptly terms them, they are ‘core’ requirements, and the other considerations our Court enumerated in *LWV II* such as preservation of communities of interest, preservation of prior districts, protection of incumbents, and partisan fairness are ‘subordinate historical considerations.’” *Id.* at 492. “In my view, assessment of subordinate or secondary considerations such as partisan fairness, or whether a plan represents the least change from a prior congressional districting plan, is necessary only when a court must choose among various plans that are equal with respect to their compliance with the core criteria. Where, however, one plan is superior to all others, as measured by the closeness of its adherence to these criteria, I find it unnecessary for a court to consider the subordinate considerations.” *Id.* [↑](#footnote-ref-58)
59. *Id.* [↑](#footnote-ref-59)
60. “As the Gressman Petitioners have described in their brief to our Court, they utilized a process known as computational redistricting, which, as a general matter, relies on raw population data and mathematical and statistical algorithms to generate maps based solely on neutral redistricting criteria.” *Id.* at 493. [↑](#footnote-ref-60)
61. “The Carter Plan, as it is called, fails the Karcher test. It proposes 17 congressional districts—four with the ideal population of 764,865, four with a population of 764,866 (plus one), and nine with a population of 764,864 (minus one). The Carter Plan, therefore, provides for a two-person population deviation between the largest and smallest congressional districts. While I acknowledge that it is mathematically impossible to create 17 districts of precisely equal population, it is possible, with good faith, to craft a plan with less than a two-person deviation. Indeed, of the 13 proposed reapportionment plans provided to this Court for its consideration, only two proposed a deviation of more than one person. The Carter Plan is one of those two.” *Id.* at 508. [↑](#footnote-ref-61)
62. “The current matter before this Court, however, is not a partisan gerrymandering case. Indeed, no one in this litigation has challenged any of the proposed plans as an unconstitutional partisan gerrymander under *LWV II*.” *Id.* at 510. “In my judgment, where the judiciary is forced to adopt a legislative reapportionment plan, the court should hew closely to nonpartisan standards (e.g., compactness, contiguity, minimizing splits, etc.) or nonpartisan methods (e.g., the ‘least-change’ approach), eschewing partisan considerations or partisan approaches.” *Id.* at 512. [↑](#footnote-ref-62)
63. *Supra* note 86. [↑](#footnote-ref-63)
64. “While the ‘least-change’ approach—a neutral tool that in its purest form only makes minor revisions to existing legislative districts to account for population changes—purportedly used to create the Carter Plan may be [\*512] imperfect, it would have been preferable, in my view, for the majority to have full-throatedly adopted it instead of using unquestionably partisan constructs to justify its selection of the Carter Plan.” *Id.* at 511-12. [↑](#footnote-ref-64)
65. “It is my position, then, that our mission should be carried out solely in reference to the politically neutral criteria appearing in the text of the state charter, namely: contiguity, compactness, population equality, and respect for political boundaries. See Pa. Const. art. II, § 16 (requiring districts which are ‘composed of compact and contiguous territory as nearly equal in population as practicable,’ and specifying further that, ‘[u]nless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming’ such districts). Limiting our consideration to these express constitutional criteria has multiple benefits. In addition to maintaining the appearance of neutrality, it helps avoid any subtle, unconscious influence that political considerations might otherwise bring to bear upon our decision-making.” *Id.* at 495. [↑](#footnote-ref-65)
66. *Supra* note 89. [↑](#footnote-ref-66)
67. As to the question of how to determine which of the proffered maps best complies with the Constitution’s neutral factors after eliminating any maps that fail to meet the constitutional floor, he suggests considering two observations: (1) the maps can be analogized to candidates in an election where each criterion by which they are judged is the equivalent of an individual voter taking part in a ranked-choice voting exercise; and (2) ranked-choice voting can be accomplished through pairwise comparisons of the candidates, in this case, the candidate maps. He would hold that this Court should rank and score all proposed maps according to each of the individual quality metrics and select the map with the highest total weighted score. The process entails five steps: (1) eliminate any map which fails to meet the constitutional “floor” or which violates federal law; then as to each of the remaining maps; (2) compute raw scores for each map for each individual quality metric using pairwise comparisons and Borda count; (3) compute weighted scores for each map for each individual quality metric by multiplying the raw scores by the weight for that individual quality metric; (4) compute the total weighted score for each map by summing all weighted scores for that map; and (5) select the map with the highest overall weighted score. *See id.* at 496-506. [↑](#footnote-ref-67)