

# GERRYLAUNDERING

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*As they carry out their decennial redistricting duties, those in power sometimes audaciously manipulate district lines to secure an electoral advantage. In other words, they gerrymander. Often, however, the existing map already gives those in power a significant edge, and they may see little need for an overhaul. For them, the name of the game during redistricting is continuity rather than change.*

*This Article introduces the concept of “gerrylaundersing” to describe mapmakers’ efforts to lock in their favorable position by preserving key elements of the existing map. Gerrylaundersing and gerrymandering both serve anti-competitive ends, but they do so through different means. Unlike gerrymandering, gerrylaundersing requires no conspicuous cracking and packing of disfavored voters. Instead, it involves what this Article dubs locking and stocking: Mapmakers lock in prior district configurations to the extent possible and stock each new district with one incumbent. Based on a review of redistricting practices in all fifty states, this Article concludes that gerrylaundersing is widespread and that self-serving mapmakers commonly combine gerrylaundersing and gerrymandering techniques in varying proportions to achieve their preferred results.*

*Recognizing gerrylaundersing as a phenomenon enriches existing redistricting discourse by spotlighting the insidious nature of continuity strategies: They serve to advantage those in power, yet, since they appear more restrained than radical redesigns, they come with a veneer of legitimacy. This Article concludes that the veneer is thin. As a legal matter, efforts to preserve district cores and protect incumbents do not stand on the same footing as efforts to comply with traditional geographic districting principles. As a policy matter, gerrylaundersing is more likely to subvert core democratic values than to foster them. At least two significant takeaways follow: First, courts should approach continuity criteria skeptically both when they review challenges to redistricting plans and when they draw maps themselves. Second, and more broadly, minimizing the legacy of prior maps has the potential to inject healthy dynamism into our system of district-based representation.*

INTRODUCTION .....	986
I. GERRYLAUNDERING IN THEORY AND PRACTICE.....	994
A. <i>The Basics</i> .....	994
B. <i>Techniques</i> .....	1003
C. <i>The Launder</i> .....	1010
II. GERRYLAUNDERING ASSESSED .....	1012

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A.	<i>The Legal Landscape</i> .....	1012
B.	<i>Normative and Policy Considerations</i> .....	1018
	1. <i>Stability Claims</i> .....	1019
	2. <i>Accountability Claims</i> .....	1026
	3. <i>Participation Claims</i> .....	1030
III.	IMPLICATIONS AND PRESCRIPTIONS .....	1034
A.	<i>Lessons for Courts</i> .....	1034
	1. <i>Reviewing Maps</i> .....	1034
	2. <i>Drawing Maps</i> .....	1043
B.	<i>Toward Dynamic Redistricting</i> .....	1058
	CONCLUSION .....	1061

## INTRODUCTION

In a quintessential gerrymander, political actors audaciously manipulate electoral district boundaries to secure a competitive advantage. Such gamesmanship may be “nothing new,”<sup>1</sup> but we have recently witnessed “some of the most extreme partisan gerrymanders in this country’s history.”<sup>2</sup> Thanks to new technologies, more comprehensive data, and a deeply polarized electorate, gerrymandering has “become more aggressive, precise, and durable” than ever before.<sup>3</sup> As Justice Elena Kagan put it in her withering dissent in *Rucho v. Common Cause*, “[t]hese are not your grandfather’s—let alone the Framers’—gerrymanders.”<sup>4</sup> It is no wonder that academics and the broader public appear to be more deeply engaged with the issue of gerrymandering now than at any other time in the nation’s history.<sup>5</sup>

Politically biased district overhauls are deeply troubling, and they deserve all the scrutiny they have received (and then some). Even as the majority in *Rucho* held that partisan gerrymandering claims are not justiciable in federal court, it accepted that “gerrymandering is ‘incompatible with democratic principles.’”<sup>6</sup> In dissent, Justice Kagan underscored the point. By reconfiguring their congressional maps to secure a maximal partisan advantage, lawmakers in Maryland and

<sup>1</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

<sup>2</sup> *Id.* at 2513 (Kagan, J., dissenting).

<sup>3</sup> Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1385 (2020).

<sup>4</sup> *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

<sup>5</sup> During the ten-year period from 2011 through the end of 2020, a Westlaw search reveals 139 law review publications with “gerrymander” or “gerrymandering” in the title, and 1,729 *Washington Post* articles that include one of those terms. During the decade prior, there were sixty-eight such law review publications and 170 *Washington Post* mentions. Similarly, a search of the *New York Times* online database returns 1,455 articles with those terms between 2011 and 2020, compared to 583 between 2001 and 2010.

<sup>6</sup> *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 791 (2015)).

North Carolina had “enabled politicians to entrench themselves in office,” “promoted partisanship above respect for the popular will,” and “encouraged a politics of polarization and dysfunction.”<sup>7</sup>

Mapmakers, however, can often secure a desired advantage during redistricting without pursuing the sort of eye-catching make-overs seen in *Rucho*. By definition, those in power have succeeded under the existing map, sometimes overwhelmingly. The existing map may even be one they gerrymandered during the last redistricting cycle. If the actors who will draw the new map conclude that the old one is still giving them (or their allies) an edge, they may see no need to reinvent the wheel. Continuity may well take priority over change.

This Article introduces the concept of “gerry laundering” to capture instances in which mapmakers seek to perpetuate their favorable position by carrying forward key elements of the existing map.<sup>8</sup> Like gerrymandering, gerry laundering is an anti-competitive device—a way for those in power to remain in power. But gerrymandering and gerry laundering proceed through different means. Although it is sometimes defined more broadly, gerrymandering classically connotes overt boundary manipulation.<sup>9</sup> This is clear from the most oft-cited techniques of gerrymandering: cracking and packing—that is, splitting some disfavored voters between districts to prevent them from constituting an electoral majority and concentrating others into a smaller number of districts than they might otherwise have controlled. A third manipulative technique, common in practice but mentioned less often in the literature, is shacking—that is, placing multiple incumbents from the disfavored party or group into a single district.<sup>10</sup>

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<sup>7</sup> *Id.* at 2509 (Kagan, J., dissenting); see also D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 692 (2013) (“What is most disturbing about political gerrymandering . . . is . . . that insiders capture and manipulate the very processes from which they draw their legitimacy. Even as the Court has struggled to identify standards, it has acknowledged that manipulation of the political process by insiders to entrench incumbents . . . works a democratic harm.”); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 83 (2004) (describing partisan gerrymandering as “one manifestation of the deeper structural problem of self-entrenchment that all democracies face”); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623 (2002) (“Allowing partisan actors to control redistricting so as to *diminish* competition runs solidly counter to the core concern of democratic accountability.”).

<sup>8</sup> For language aficionados, “gerry launder” is a double portmanteau: a mashup of two words (gerry mander + launder), one of which is already a portmanteau (Gerry + salamander). See *Double Portmanteaus and Stacked Acronyms*, LITERAL MINDED (Dec. 7, 2004), <https://literal-minded.wordpress.com/2004/12/07/double-portmanteaus-and-stacked-acronyms> [<https://perma.cc/C398-6J7G>].

<sup>9</sup> See *infra* notes 68–74 and accompanying text.

<sup>10</sup> See *infra* Section I.B.

Unlike gerrymandering, gerrylaunders entails no conspicuous cracking, packing, or shacking. Instead, it involves two other techniques, which (in keeping with the field's rhyming conventions) this Article dubs locking and stocking. Mapmakers lock in prior district configurations, seeking to populate each updated district with as many residents of its predecessor district as population equality requirements will allow. And they stock each updated district with an existing officeholder, keeping that incumbent with most of their constituents, but separate from *other* incumbents for the mutual advantage of all those in power.<sup>11</sup> In short, when mapmakers gerrymander, they try to tilt the playing field; when they gerrylaunders, they try to keep the field tilted.

This difference is important because it gives gerrylaunders a veneer of legitimacy that gerrymandering lacks. That is the launder. Mapmakers can portray their decision to stay the course as restrained and minimalist. They describe retaining the cores of prior districts (locking) and avoiding contests between incumbents (stocking) as straightforward ways to ensure stability and maintain representational links between current officeholders and their constituents. When lawmakers articulate their line-drawing criteria, including in formal legislative documents, they commonly suggest that continuity considerations and traditional geographic districting principles stand on similarly firm legal and conceptual footing.<sup>12</sup> For their part, courts often (but not always) take such professions of legitimacy at face value. The Supreme Court, with minimal analysis, has treated lawmakers' efforts to retain district cores and avoid incumbent pairings as "valid, neutral state polic[ies]."<sup>13</sup>

Even in this era of extreme gerrymandering, gerrylaunders remains commonplace.<sup>14</sup> It just tends to fly below the radar. Legal scholars were highly attentive to blatant gerrymanders during the post-2010 redistricting cycle, and to the headline-grabbing legal battles those gerrymanders spawned in states like Maryland, Michigan, North

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<sup>11</sup> *Id.*

<sup>12</sup> See *infra* note 113 and accompanying text.

<sup>13</sup> *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012) (per curiam).

<sup>14</sup> See Robert M. Yablon, *Fifty-State Survey of Gerrylaunders Activity—Post-2010 Redistricting Cycle* (unpublished survey) (on file with author) [hereinafter *Fifty-State Survey*]; cf. NAT'L CONF. OF STATE LEGISLATURES, *DISTRICTING PRINCIPLES FOR 2010 AND BEYOND* 1 (Apr. 26, 2021), <https://www.ncsl.org/Portals/1/Documents/Redistricting/DistrictingPrinciplesFor2010andBeyond-9.pdf> [<https://perma.cc/2LNC-7Y34>] (tallying a dozen states that have expressly articulated preserving district cores and avoiding incumbent pairings as districting criteria, mostly in legislative guidance documents).

Carolina, Ohio, Pennsylvania, and Wisconsin.<sup>15</sup> But in at least as many states as not, mapmaking during the post-2010 cycle was largely continuity-oriented.<sup>16</sup>

This Article's descriptive account rests on an original survey of post-2010 redistricting activity in all fifty states. It draws on legislative materials, litigation documents, and media reports to identify the extent to which mapmakers sought to carry forward the prior decade's maps. It also analyzes census data for all congressional and state legislative districts drawn during the post-2010 round to determine the rates at which new districts inherited the populations of predecessor districts. This information adds significant texture to our understanding of post-2010 mapmaking. As Part I details, in at least a dozen states with unitary partisan control, lawmakers substantially preserved the existing order instead of pursuing a more dramatic redesign. In some of these states, the prior maps had been affirmatively gerrymandered; in others, they simply produced outcomes advantageous enough to keep.<sup>17</sup> Meanwhile, in a half-dozen states with divided government, lawmakers compromised on bipartisan gerrylaunders that were favorable to incumbents from both parties.<sup>18</sup>

The experiences of states during the post-2010 cycle further indicate that gerrymanders and gerrylaunders are not mutually exclusive. Instead, they exist on a spectrum with even extreme gerrymanders typically having a gerrylaunders component.<sup>19</sup> Rather than drawing

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<sup>15</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (Maryland and North Carolina congressional maps); *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (Wisconsin state legislative maps); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich.), *vacated and remanded sub nom. Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429 (2019) (Michigan congressional and state legislative maps); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019) (North Carolina state legislative maps); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio), *vacated and remanded sub nom. Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019) (Ohio congressional map); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018) (Pennsylvania congressional map).

<sup>16</sup> See Fifty-State Survey, *supra* note 14.

<sup>17</sup> See *infra* notes 35–39 and accompanying text.

<sup>18</sup> See *infra* notes 40–45 and accompanying text.

<sup>19</sup> In Maryland, for example, lawmakers aimed to “maximize[] ‘incumbent protection’ for Democrats” while also “chang[ing] the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican.” *Benisek v. Lamone*, 348 F. Supp. 3d 493, 502–03 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). As a result, “the basic shape of some [congressional] districts [did] not change[] substantially” from the prior map. *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 903 (D. Md. 2011), *aff’d*, 133 S. Ct. 29 (2012); see also *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 886 (E.D. Mich. 2019) (noting that during Michigan’s post-2010 redistricting process, mapmakers selectively sought to protect Republican incumbents), *vacated and remanded sub nom. Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429 (2019).

a new map from scratch, the party in power often seeks to lock and stock its own incumbents while it aggressively cracks, packs, and shacks the opposition.<sup>20</sup> Conversely, even thoroughgoing gerrylaunders commonly have a gerrymandering component, with mapmakers pursuing small-scale manipulations to aid allies or weaken adversaries. For advantage-seeking mapmakers, redistricting is an exercise in tactically combining both continuity and change strategies to achieve a maximally favorable outcome.<sup>21</sup>

Significantly, gerrylaunders may well loom even larger in upcoming redistricting cycles than it has in the past. Initial indications are that this is indeed true of the post-2020 redistricting cycle, which is unfolding as this Article is being prepared for publication.<sup>22</sup> The reason, perhaps counterintuitively, is the growing potency of gerrymanders. If a gerrymander adopted during one decennial redistricting cycle proves to be durable, meaning that it continues to produce favorable results for its creators even at the end of the cycle, then why mess with success? Lawmakers are likely to stick with the status quo, perhaps tweaking here and there to shore up weak spots, but eschewing any radical reconfiguration. Today's gerrymanders may be tomorrow's gerrylaunders.

It is thus an especially opportune moment to add gerrylaunders to our redistricting vocabulary and, more than that, to assess the propriety of advantage-seeking through continuity rather than change. As noted, those who gerrylaunders can invoke nothing-to-see-here defenses that are not available to those who gerrymander. The question, then, is whether those defenses hold up despite the anti-competitive tendencies of locking and stocking. In other words, does the launder really cleanse?

Part II of this Article concludes that gerrylaunders cannot be justified either as a legal matter or on normative or policy grounds. Legally, mapmakers are hardly ever required, or even encouraged, to preserve district cores or protect incumbents. There is certainly no affirmative license in the U.S. Constitution. To the contrary, Article

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<sup>20</sup> See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 555–57, 565–66 (2004) (describing the use of these strategies in the context of redistricting in Pennsylvania and Georgia); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 157 (1985) (describing California's post-1980 congressional redistricting experience to illustrate that "differential treatment of Republican and Democratic" incumbents is "perhaps the single strongest indicator of probable partisan gerrymandering").

<sup>21</sup> See *infra* notes 102–10 and accompanying text.

<sup>22</sup> Part I offers examples of gerrylaunders that have already emerged during the post-2020 cycle.

It's requirement of decennial congressional reapportionment, as well as the need to maintain equally populated districts as a matter of equal protection, both allude to the dangers of excessive continuity.<sup>23</sup> Section 5 of the federal Voting Rights Act used to give some states reason to preserve existing majority-minority districts, but not anymore.<sup>24</sup> Redistricting is principally a matter of state law, and that law focuses overwhelmingly on geography, not continuity. The Article's fifty-state survey finds only three state constitutional or statutory provisions that even weakly endorse core retention, and none at all that endorse incumbency protection.<sup>25</sup> A greater number of states—more than a dozen—have laws that affirmatively restrict the use of locking and/or stocking.<sup>26</sup> By way of contrast, the vast majority of states have laws that instruct mapmakers to apply specified geographic redistricting principles, such as contiguity, compactness, and respect for political subdivision boundaries, and none have laws suggesting that these are *not* proper redistricting criteria.<sup>27</sup> As a legal matter, con-

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<sup>23</sup> See U.S. CONST. art. I, § 2, cl. 3; *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that apportionment of state legislative seats must assure equal representation for every person in the jurisdiction).

<sup>24</sup> See *Shelby County v. Holder*, 570 U.S. 529 (2013) (rendering section 5 inoperative by deeming its coverage formula unconstitutional); see also Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 *YALE L.J.* 862, 924–25 (2021); Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 *OHIO ST. L.J.* 867, 883–84 (2016) (anticipating that the decision in *Shelby County* “could have serious consequences for the 2020 redistricting cycle”). As a practical matter, mapmakers seeking to comply with section 2 of the Voting Rights Act may still choose to carry forward existing minority-opportunity districts, but those districts do not serve as the benchmark for analyzing vote dilution under section 2 in the same way they did for assessing retrogression under section 5. See *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 478–80 (1997) (describing the salient differences between sections 2 and 5 of the Voting Rights Act); see also Derek T. Muller, *The Democracy Ratchet*, 94 *IND. L.J.* 451, 469 (2019); Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 *GEO. WASH. L. REV.* 1131, 1141–45 (2005).

<sup>25</sup> See *Fifty-State Survey*, *supra* note 14 (these states are New Mexico, New York, and Utah); *NAT'L CONF. OF STATE LEGISLATURES*, *supra* note 14, at 41–42 (New Mexico), 42–43 (New York), 64–65 (Utah). Looking beyond constitutional and statutory provisions to legislative guidelines that generally lack the force of law, Yunsieg Kim and Jowei Chen identified six states that they say require core retention for state legislative and congressional redistricting, three that require avoiding incumbent pairings for state legislative redistricting, and two that require the same for congressional redistricting. See Yunsieg P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of “Traditional” Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 *WIS. L. REV.* 101, 149–50.

<sup>26</sup> See *Fifty-State Survey*, *supra* note 14; see also *infra* notes 141–46 and accompanying text.

<sup>27</sup> See Kim & Chen, *supra* note 25, at 149–50; *NAT'L CONF. OF STATE LEGISLATURES*, *supra* note 14, at 1–4; see also *infra* notes 129–30 and accompanying text.

tinuity criteria simply do not stand on the same footing as geographic criteria.<sup>28</sup>

Mapmakers also lack convincing normative or policy reasons for locking and stocking. Proponents of retaining district cores and protecting incumbents try to cast the practices as advancing the democratic values of stability, accountability, and participation.<sup>29</sup> On balance, however, locking and stocking almost certainly do more to subvert these values than to promote them.

This is most glaring when lawmakers seek to carry forward a map that they themselves gerrymandered.<sup>30</sup> Stability is not so intrinsically valuable that it demands locking in a biased political order. It also smacks of hypocrisy for lawmakers who previously chose to overhaul a map for their own gain to turn around and claim that existing district configurations are sacrosanct.<sup>31</sup> Similarly, accountability is not served by preserving districts that were drawn to insulate lawmakers from the very electoral competition on which accountability is premised. And if outcomes are essentially preordained under the gerrymandered map's districts, preserving those districts will do little to encourage public participation. Instead, those who have had little real voice under the existing map may become ever more marginalized.

While the case against gerrylaunders is especially strong when the existing map was gerrymandered, retaining district cores and protecting incumbents is problematic even when the existing map was more neutrally drawn. The trouble, in essence, is that no district map is perfect. The fair-minded application of sound redistricting principles can yield an array of reasonable possibilities. Each option, in turn, will produce different sets of winners and losers and distinctive representational outcomes, including some that may not reflect the

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<sup>28</sup> See Kim & Chen, *supra* note 25, at 104–05 (concluding, based on a national survey of state redistricting criteria, that “incumbent protection” and “preserving past district cores” are not “widely accepted as standard practice” and thus do not qualify as “‘traditional’ districting criteria”).

<sup>29</sup> See, e.g., *id.* at 175 (“For example, some state and local authorities claim that preserving past district cores is in service of maintaining ‘continuity of representation’; that is ‘preserv[ing] relationships between elected officials and their constituents over time.’”) (quoting *Luna v. County of Kern*, 291 F. Supp. 3d 1088, 1112 (E.D. Ca. 2018)).

<sup>30</sup> See Kim & Chen, *supra* note 25, at 173 (“Of course, preserving past district cores effectively perpetuates any biases that were present in the drawing of the previously enacted plan. If the previous plan was drawn to favor a political party, then preserving these districts’ cores would perpetuate the same partisan bias in the new plan.”).

<sup>31</sup> In Wisconsin, for example, Republican lawmakers overhauled the state’s legislative maps during the post-2010 redistricting cycle as part of an aggressive gerrymander. During the post-2020 cycle, in contrast, they extolled the virtues of continuity as they sought to perpetuate their advantage. See *infra* notes 55–60 and accompanying text.



majority will of the electorate as a whole.<sup>32</sup> Choosing to carry forward whatever map happened to be chosen in the past perpetuates that map's inevitable vagaries. And, worse still, it does so even though the context-specific rationales and conditions that prompted the original choice may have long since disappeared.

The upshot, as Part III of the Article explains, is that we should be wary of districting plans that seek to carry forward the peculiarities of the past. For courts, this conclusion has implications for two distinct types of cases: ones that challenge enacted maps and ones in which courts must establish new maps after political actors fail to redistrict. When reviewing maps, courts should be skeptical of attempts to invoke continuity considerations to excuse lines that disregard legally required districting principles. When adopting their own district plans, courts to date have been, well, all over the map in terms of the role they assign to continuity considerations.<sup>33</sup> This wide range of rulings—from decisions that prioritize continuity above nearly everything else to decisions that ignore continuity completely—underscores just how undertheorized these questions have been. The account developed in this Article suggests that courts should have a strong presumption against using core retention and incumbency protection criteria to perpetuate prior maps. Preserving cores and protecting incumbents are better viewed as inherently political redistricting strategies rather than as bona fide districting principles suitable for use by a court charged with exercising scrupulous neutrality.

More broadly, this Article's account suggests that we would do well to embrace a norm of dynamic redistricting—that is, an expectation that decennial mapmaking is an opportunity for a fresh start. Already, several states have taken steps in this direction, requiring politically insulated mapmakers to apply geographic and (sometimes) political fairness criteria from a blank slate, without reliance on the

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<sup>32</sup> See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area.”); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 *YALE L. & POL’Y REV.* 301, 310 (1991) (“[D]istricting criteria are inevitably ‘non-neutral’ in the sense that someone will always benefit . . . [E]very ‘neutral’ criterion overtly or covertly imports a view about who ought to exercise power.”).

<sup>33</sup> See, e.g., Persily, *supra* note 24, at 1157 (“[C]ourts will vary considerably in the degree of attention they will pay to maintaining the cores of districts or protecting incumbents.”); Larry Sandler, *Stability or “Gerrylaundersing”? Attorneys Clash over Using Current Maps as Redistricting Baseline*, *MARQUETTE UNIV. L. SCH. FAC. BLOG* (Nov. 7, 2021), <https://law.marquette.edu/facultyblog/2021/11/stability-or-gerrylaundersing-attorneys-clash-over-using-current-maps-as-redistricting-baseline> [<https://perma.cc/H7MZ-F4A7>].

prior map.<sup>34</sup> These states and others could build on these reforms. Rather than having mapmakers ignore prior maps completely, one possibility is to allow those maps to be consulted for purely remedial reasons. If the prior map disadvantages certain voters or communities, then mapmakers might endeavor to treat them more favorably under the new map. Mapmakers, in other words, could look to the old map not to relive the past, but rather to avoid repeating it.

## I

### GERRYLAUNDERING IN THEORY AND PRACTICE

#### A. *The Basics*

When it comes to designing electoral districts, political actors commonly seek to get their way not through ostentatious overhauls, but rather through the less eye-catching means of carrying forward advantageous prior maps. Although the post-2010 redistricting cycle was certainly notable for its high level of gerrymandering activity, the story in many states was one of continuity rather than change.<sup>35</sup> In at least a dozen states where the line-drawing process was under unitary partisan control, lawmakers adopted new congressional and/or state legislative maps that maintained preexisting district configurations to a substantial degree.<sup>36</sup> Some of those prior maps were themselves the

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<sup>34</sup> Arizona, California, and Iowa have taken especially notable steps to ensure that mapmakers proceed without privileging the status quo. See *infra* notes 339–42 and accompanying text.

<sup>35</sup> See Fifty-State Survey, *supra* note 14. This pattern holds for earlier decades as well. See, e.g., Anthony M. Bertelli & Jamie L. Carson, *Small Changes, Big Results: Legislative Voting Behavior in the Presence of New Voters*, 30 ELECTORAL STUD. 201, 203 (2011) (noting that after the 2000 census, many congressional districts “only experienced changes at the margins”); Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL. 653, 681 (1988) (noting that during the post-1970 redistricting cycle, some states used computer programs “designed to maximize incumbency advantage within the constraints imposed by [applicable districting requirements]”).

<sup>36</sup> See Robert M. Yablon, Summary Core Retention Chart for Post-2010 Redistricting Cycle (on file with author) [hereinafter Summary Core Retention Chart]. To assess the overlap between new districts and their predecessors, I calculated average population core retention rates using the Missouri Census Data Center’s Geocorr Engine, which identifies the proportion of its population that each congressional and state legislative district drawn during the post-2010 redistricting cycle inherited from its predecessor districts. In Louisiana, Massachusetts, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wyoming (all states where one political party controlled the redistricting process), the post-2010 maps for at least one house of the state legislature retained had an average core retention rate of at least eighty percent. *Id.* The congressional maps in Alabama, Arkansas, Nebraska, Oklahoma, Virginia, West Virginia, and Wisconsin (again, all states with unitary partisan control) also exceeded that eighty percent threshold. *Id.* In several other states, the average core retention was somewhat lower, but lawmakers were still quite attentive to preserving at

result of gerrymandering, and lawmakers simply chose to stay the course. In Florida, for instance, the state supreme court observed that “the admittedly gerrymandered 2002 [congressional] map . . . was used as a baseline for the current districts.”<sup>37</sup> Elsewhere, the prior maps had not been deliberately gerrymandered, but they nevertheless worked so well for the party in power that a major revamp would have achieved little. In Oklahoma, for instance, Republicans were extremely successful under the post-2000 congressional map, which was court drawn, and the post-2000 state legislative maps, which were the product of a bipartisan compromise.<sup>38</sup> As they redistricted after the 2010 census, they crafted what one political scientist described as “an incumbent-continuity map,” largely using the prior district configurations as their touchstone.<sup>39</sup>

During the post-2010 redistricting cycle, lawmakers in at least half a dozen states with divided government also adopted new maps that largely replicated the old ones.<sup>40</sup> With each party blocking the other

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least some aspects of the prior map. *See, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 413 (Fla. 2015) (denying a remedy for a gerrymandered map based on previously-gerrymandered maps); Aaron Gould Sheinin, *Maps Released as Lawmakers Learn Their Fate*, ATLANTA J.-CONST. (Aug. 12, 2011), <https://www.ajc.com/news/local/maps-released-lawmakers-learn-their-fate/1h1qUNEu3AjyDpA5Tj8rgM> [<https://perma.cc/FA9A-FZP6>] (noting that Georgia’s new state senate map kept fifty-five of fifty-six incumbents in their prior districts).

<sup>37</sup> *League of Women Voters of Fla.*, 172 So. 3d at 413. The same was true of the post-2010 state senate map. *See In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 654 (Fla. 2012) (writing that “the new districts on average are composed of 64.2% of their predecessor districts . . . . These percentages are of even greater concern given that the 2002 Senate plan was drawn at a time when intent to favor a political party or an incumbent was permissible”).

<sup>38</sup> *See Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002); Brian Ford, *Redrawn Districts Head to Governor*, TULSA WORLD, May 18, 2001, 2001 WLNR 11786300. At the time of the post-2010 redistricting cycle, Republicans held supermajorities in both houses of the state legislature and four of the state’s five congressional seats. *Oklahoma State Summary 2010 Cycle*, ALL ABOUT REDISTRICTING, <https://redistricting.lls.edu/state/oklahoma/?cycle=2010&level=Congress&startdate=2011-05-10> [<https://perma.cc/NY25-ZPU9>]; OKLAHOMA CONGRESSIONAL DISTRICTS, 2002-2010, GIS OFF, <https://www.okhouse.gov/Documents/Districts/CongressionalDistricts.pdf> [<https://perma.cc/7VNF-3MJX>].

<sup>39</sup> Michael McNutt, *Professor Says Redistricting Proposal Appears Primed to Protect Incumbents, House Posts Boundary Plan*, OKLAHOMAN, May 7, 2011, 2011 WLNR 9265493 [hereinafter McNutt, *Proposal Appears Primed to Protect Incumbents*]; *see also* Michael McNutt, *Redistricting Bills Approved*, OKLAHOMAN, May 4, 2011, 2011 WLNR 8749831 [hereinafter McNutt, *Redistricting Bills Approved*]. In Vermont, a similar story played out in reverse. Democrats won large majorities under the post-2000 state legislative map that had been crafted under divided government. When it came time to redistrict after the 2010 census, they chose to “use the existing electoral map as [their] main starting point.” Thatcher Moats, *New Electoral Maps Back to Square One*, MONTPELIER-BARRE TIMES ARGUS, Oct. 7, 2011, 2011 WLNR 20542163.

<sup>40</sup> *See* Summary Core Retention Chart, *supra* note 36. In Maine, New Hampshire, New York, Oregon, and Rhode Island (all states where partisan control over redistricting was

from tilting the playing field in its preferred partisan direction, lawmakers settled on the risk-averse strategy of preserving the status quo.<sup>41</sup> In Oregon, for example, lawmakers initially wrangled over dueling partisan proposals,<sup>42</sup> but ultimately compromised on “a minimalist approach” to both congressional and state legislative districts that “adjust[ed] existing political boundaries rather than drawing new ones from scratch.”<sup>43</sup> Similarly, lawmakers in Maine agreed upon new maps that largely preserved prior district configurations, with one legislative leader describing the plans as offering “the least disruption . . . possible under the law.”<sup>44</sup> Meanwhile, in New Hampshire, the legislature signed off on an agreement between the state’s two congressional incumbents to swap a few small towns but otherwise keep their prior districts intact.<sup>45</sup>

Similar examples of continuity-oriented redistricting have emerged during the post-2020 redistricting cycle that is unfolding as this Article is being prepared for publication.<sup>46</sup> Consider the situations

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split), the post-2010 maps for at least one house of the state legislature retained had an average population core retention rate of at least eighty percent. *Id.* The congressional maps in Kentucky, Maine, New Hampshire, Oregon, and Rhode Island (again, states with split partisan control) also exceeded that eighty percent threshold. *Id.*

<sup>41</sup> See, e.g., Ronnie Ellis, *Ky Senate Passes Congressional District Map*, TIMES-TRIBUNE (Feb. 13, 2012), [https://www.thetimestribune.com/news/local\\_news/ky-senate-passes-congressional-district-map/article\\_9ba07723-9e5e-5b0f-9e22-66da29cb4d54.html](https://www.thetimestribune.com/news/local_news/ky-senate-passes-congressional-district-map/article_9ba07723-9e5e-5b0f-9e22-66da29cb4d54.html) [<https://perma.cc/556V-KD49>] (noting that the state’s congressional incumbents all agreed on a plan in which “90 percent of voters continue to live in the district represented by their same congressman as under the previous map”); Eric Russell, *Redistricting Deal Keeps Boundaries Nearly Same*, BANGOR DAILY NEWS, Sept. 28, 2011, 2011 WLNR 19863757 (detailing the compromise reached in Maine’s 2010 congressional redistricting plan that “only affect[ed]” one county); *Redistricting Failure: Grand Bargain a Victory for Self-Serving Politics, Today and Tomorrow*, POST-STANDARD, Mar. 18, 2012, 2012 WLNR 5867660 (the contributor argued that New York’s 2010 redistricting compromise was “designed primarily to preserve incumbents and the dominance of Democrats in the Assembly and Republicans in the Senate”); cf. BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 116 (1984) (“[M]uch of what legislators do during reapportionment can be explained as risk aversion.”).

<sup>42</sup> See Kari Chisholm, *Redistricting: First Look at Proposed D & R Congressional Maps*, BLUEOREGON (May 12, 2011), <https://www.blueoregon.com/2011/05/redistricting-first-look-proposed-d-r-congressional-maps> [<https://perma.cc/7JZ5-ULPZ>] (characterizing the opposing plans as “opening bids in a negotiation, so expect them to represent their authors’ greatest dreams and desires (and probably not a few bluffs and misdirections)”).

<sup>43</sup> *Success in Redistricting*, EUGENE REGISTER-GUARD, July 3, 2011, at G48.

<sup>44</sup> Michael Shepherd, *Maine Redistricting Bill Awaits LePage Approval*, PORTLAND PRESS HERALD, June 5, 2013.

<sup>45</sup> See John DiStaso, *Bass, Guinta Resolve Dispute Over Redistricting Boundary*, N.H. UNION LEADER, Mar. 30, 2012, at A1.

<sup>46</sup> See, e.g., *Singleton v. Merrill*, No. 21-CV-1291, 2022 WL 265001, at \*12 (N.D. Ala. Jan. 24, 2022) (per curiam) (noting testimony from drafter of Alabama’s post-2020 congressional plan that “he was focused on the preservation of the cores of previous districts”), *cert. granted sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (Feb. 7, 2022) (mem.);

in Maryland and Wisconsin, two states that were aggressively gerrymandered during the post-2010 cycle.<sup>47</sup> The congressional map that Maryland's Democratic lawmakers adopted in 2011 gave Democrats an edge in seven of the state's eight districts.<sup>48</sup> Democratic legislators again controlled the redistricting process during the post-2020 cycle, and rather than pursue an overhaul, they sought to reinforce their existing advantage by taking the old map as their template.<sup>49</sup> Their draft concept maps were accompanied by a statement declaring that, "to the extent practicable, [the drafts] keep Marylanders in their existing districts."<sup>50</sup> Democratic lawmakers enacted their plan over the veto of the state's Republican governor.<sup>51</sup> Republicans proceeded to challenge the legislature's map in state court as a partisan gerrymander, describing it as "nothing more than a continuation of the extreme partisan gerrymandering enacted through the 2011 Plan."<sup>52</sup> A state court agreed, concluding that the map unlawfully "subordinate[d] [state] constitutional criteria to political considerations."<sup>53</sup> The legislature then passed a new map that improved district

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*SC Senate Passes New US House Districts with Minimal Changes*, ASSOCIATED PRESS (Jan. 20, 2022), <https://www.usnews.com/news/best-states/south-carolina/articles/2022-01-20/sc-senate-passes-new-us-house-districts-with-minimal-changes> [<https://perma.cc/3WQZ-F7GA>] ("With Republicans holding a 6-1 advantage in U.S. House seats, there was little desire among members to make significant changes beyond balancing out the 500,000 people South Carolina added in the past decade.").

<sup>47</sup> See *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

<sup>48</sup> *Benisek*, 348 F. Supp. at 503.

<sup>49</sup> Meagan Flynn & Ovetta Wiggins, *Maryland General Assembly Overrides Hogan's Veto of New Congressional Map*, WASH. POST (Dec. 9, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/09/hogan-contests-redistricting-maryland> [<https://perma.cc/2Y3L-QFL8>] (reporting that the new map would "solidify Democrats' advantage in the congressional delegation, retaining seven safe Democratic seats while putting the state's only Republican congressional district . . . in play for Democrats").

<sup>50</sup> *Maryland General Assembly Legislative Redistricting Advisory Commission Draft Congressional Concept Maps*, MD. GEN. ASSEMBLY, <https://mgaleg.maryland.gov/Other/Redistricting/webpage-110921-working.pdf> [<https://perma.cc/N89N-M7RG>].

<sup>51</sup> Flynn & Wiggins, *supra* note 49.

<sup>52</sup> Complaint at 19, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. Dec. 23, 2021), available at <https://redistricting.ills.edu/wp-content/uploads/MD-Szeliga-20211223-complaint.pdf> [<https://perma.cc/Z3JH-UTJE>].

<sup>53</sup> Memorandum Opinion and Order at 88, *Szeliga*, No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022) (unpublished interim order); see also Meagan Flynn, Ovetta Wiggins & Erin Cox, *Judge Throws Out Maryland Congressional Map over "Extreme" Gerrymandering*, WASH. POST, (Mar. 25, 2022, 5:12 PM), <https://www.washingtonpost.com/dc-md-va/2022/03/25/maryland-congressional-map-thrown-out-gerrymandering> [<https://perma.cc/BKB7-EFUU>].

compactness and gave Republicans better odds at winning a second congressional seat, and the governor signed it into law.<sup>54</sup>

In Wisconsin, Republicans controlled the redistricting process during the post-2010 cycle, and they used a “sharply partisan methodology” to tilt the state legislative map in their favor.<sup>55</sup> In a major reworking of the prior map, more than 2.3 million Wisconsinites—about forty-one percent of the state’s population—were shifted into new assembly districts.<sup>56</sup> When it came time to redistrict following the 2020 census, Republicans remained in control of the legislature and sought to lock in their existing advantage. In a joint resolution, they declared it “the public policy of this state” to “[r]etain as much as possible the core of existing districts” and “[p]romote [the] continuity of representation by avoiding incumbent pairing.”<sup>57</sup> They then proceeded to pass new maps that shifted only a fraction of the people who had been shuffled between districts a decade before.<sup>58</sup> Wisconsin’s Democratic governor vetoed those maps. The legislature was unable to override his veto, so the task of redistricting fell to the judiciary.<sup>59</sup> Ultimately, the Wisconsin Supreme Court chose to adopt the very maps that the governor had vetoed—a ruling that serves to maintain and reinforce the extreme partisan skews of the prior decade’s maps.<sup>60</sup>

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<sup>54</sup> Meagan Flynn & Ovetta Wiggins, *Hogan Signs New Md. Congressional Map into Law, Ending Legal Battles*, WASH. POST (Apr. 4, 2022, 5:13 PM), <https://www.washingtonpost.com/dc-md-va/2022/04/04/maryland-new-congressional-map> [<https://perma.cc/YYP6-MKU4>].

<sup>55</sup> *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012); see also *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018) (detailing the legislature’s partisan intent and the skewed electoral landscape that resulted).

<sup>56</sup> *Baldus*, 849 F. Supp. 2d at 849 (describing these as “striking numbers”).

<sup>57</sup> S.J. Res. 63, 2021–2022 Sess. (Wis. 2021), <https://docs.legis.wisconsin.gov/2021/related/enrolled/sjr63.pdf> [<https://perma.cc/BY6A-GFJP>].

<sup>58</sup> See Memorandum from the Legis. Reference Bureau to Majority Leader Devin LeMahieu & Speaker Robin Vos 2 (Oct. 20, 2021), [https://legis.wisconsin.gov/eupdates/sen09/Sen.%20LeMahieu%20and%20Speaker%20Vos\\_LRB.5017%20and%20LRB%205071\\_10.20.2021\\_3.pdf](https://legis.wisconsin.gov/eupdates/sen09/Sen.%20LeMahieu%20and%20Speaker%20Vos_LRB.5017%20and%20LRB%205071_10.20.2021_3.pdf) [<https://perma.cc/H3FR-438Q>] (reporting that the “average core retention rate for assembly districts is 84.16 percent and the average core retention rate for senate districts is 92.21 percent”).

<sup>59</sup> See Craig Gilbert, *A Gerrymandered Map and a New Court Decision Make the 2010 Election the Gift that Keeps Giving for GOP*, MILWAUKEE J. SENTINEL (Dec. 10, 2021), <https://www.jsonline.com/story/news/politics/analysis/2021/12/10/wisconsin-2010-gop-wave-likely-locks-republican-grip-for-10-more-years/6461070001> [<https://perma.cc/WF2Q-N7P2>] (“The Court’s 4-3 conservative majority said that in resolving [the] impasse . . . it would minimize changes to the current lines that were adopted 10 years ago.”).

<sup>60</sup> See *Johnson v. Wis. Elections Comm’n*, No. 2021AP1450-OA, 2022 WL 1125401, at \*1 (Wis. Apr. 15, 2022); see also *infra* at notes 316–17 and accompanying text.

This Article introduces the concept of gerrylaundersing to describe scenarios such as these. None of these decisions to ground new maps in old ones were “neutral.” Instead, lawmakers strategically embraced continuity as a way to help themselves and/or their parties come out ahead. Our existing redistricting vocabulary does not well capture such efforts to perpetuate the existing representational order, which may help explain why the phenomenon, though widespread, is often overlooked.

Although the term is new, the underlying idea has deep roots. Gerrylaundersing harkens back to a longstanding reality that modern gerrymandering discourse too often obscures—namely, that excessive continuity in electoral districting can be as problematic as opportunistic change. Recall that when the Supreme Court first confronted complaints about electoral districts, the issue was not active manipulation but rather inaction.<sup>61</sup> In the Court’s canonical reapportionment cases, *Baker v. Carr*<sup>62</sup> and *Reynolds v. Sims*,<sup>63</sup> states had gone decades without altering their electoral districts at all. The Tennessee and Alabama state legislative maps challenged in *Baker* and *Reynolds*, respectively, had remained in place for sixty years.<sup>64</sup> The result was not just extreme malapportionment, with some districts having many times the population of others, but also extreme entrenchment.<sup>65</sup> Lawmakers had long declined to revisit district lines precisely because those lines served to protect both their own job security and the out-sized political power of their constituents.<sup>66</sup> Through the one person,

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<sup>61</sup> See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 595 (2002) (noting the Court’s recognition in its landmark reapportionment cases that “the refusal to redistrict may be an invitation to mischief”); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 1997 (2018) (“The initial cases of this ‘reapportionment revolution’ confronted a particular form of political gerrymandering: the systematic refusal to adjust district lines as urban populations grew far faster than their rural counterparts . . . diluting the representation of urban voters in state legislatures and Congress.”).

<sup>62</sup> 369 U.S. 186 (1962).

<sup>63</sup> 377 U.S. 533 (1964).

<sup>64</sup> *Reynolds*, 377 U.S. at 540; *Baker*, 369 U.S. at 192; see also Micah Altman & Michael P. McDonald, *Redistricting Principles for the Twenty-First Century*, 62 CASE W. RESRV. L. REV. 1179, 1184 (2012) (observing that “[i]n practice, a state was forced to change its district lines only when a state’s [congressional] seat allocation changed,” and even then, “the addition of a seat might be addressed by adding an at-large district, while the subtraction of a seat could be addressed only by modifying a few districts”).

<sup>65</sup> See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 513–15 (1997) (discussing malapportionment as an entrenchment problem).

<sup>66</sup> Recognizing the political advantages lawmakers secured through their refusal to redistrict, commentators have referred to such inaction as a “‘silent gerrymander,’ or gerrymander by omission.” Kang, *supra* note 3, at 1395 (quoting V.O. KEY, JR., *AMERICAN STATE POLITICS: AN INTRODUCTION* 65 (1956)).

one vote doctrine, the Supreme Court did more than redress population disparities; it also necessitated decennial redistricting. The requirement that district boundaries be periodically redrawn to equalize populations now serves to limit the ability of those in power to cement their status through a no-change strategy.

In a world in which district boundaries must be decennially revisited, self-interested mapmakers face choices about how to advantage themselves and their allies. Sometimes they significantly reconfigure the lines to suit their ends—i.e., they gerrymander. Indeed, scholars have observed that an unintended consequence of the reapportionment revolution has been to give lawmakers regular occasion to solidify their grip on power.<sup>67</sup> Lawmakers have essentially turned lemons (the legal demand to redistrict) into lemonade (a convenient excuse to stack the deck). Often, however, mapmakers simply double down on the status quo—i.e., they gerrylaunders. The equal population rule may preclude them from simply adopting a carbon copy of the existing map, but they can seek to produce a modestly revised edition—one that tweaks boundaries to recalibrate district populations while leaving prior representational relationships largely undisturbed.

Gerrylaunders can be viewed either as a species of gerrymandering or as a close cousin. Despite being used ubiquitously (or perhaps for that very reason), gerrymandering is an imprecise term. It sometimes functions as a catchall for inequities associated with the configuration of electoral districts.<sup>68</sup> If a map is drawn with the intent

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<sup>67</sup> See, e.g., GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 127–205 (2002) (explaining that the Supreme Court's reapportionment decisions resulted in new maps that ultimately have increased incumbents' advantages); Ortiz, *supra* note 35, at 681 (pointing to studies indicating that "redistricting, far from necessarily harming incumbents, may present opportunities for them to increase their sway" and to raise "the barriers to entry facing potential opponents"); Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 631 (2011) ("Before the ink was dry on one-person, one-vote, equally-apportioned election districts were being redrawn everywhere to make sure the incumbent always won, and to maximize the partisan advantage of the political party controlling the apportionment process."); Polsby & Popper, *supra* note 32, at 303 ("Creative gerrymandering now has replaced the older strategy of malapportionment through legislative inaction.").

<sup>68</sup> See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015) (defining partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); Davis v. Bandemer, 478 U.S. 109, 164 (1986) ("The term 'gerrymandering' . . . is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls."); Issacharoff, *supra* note 61, at 612–13 ("[T]he conventional supposition [is] that, at bottom, the gerrymander is a willful attempt to advance one's own interests and harm one's rivals."); Polsby & Popper, *supra* note 32, at 305 ("Gerrymandering introduces a chronic, self-perpetuating skew into the business of popular representation, no matter how the term is defined."); *id.* at 315 ("Ordinary voters



to advantage some actors at the expense of others, or if its effect is to produce a representational imbalance, or both, commentators and courts may well label it a gerrymander, whether the map upends the status quo or preserves it.<sup>69</sup> In this broad sense, gerrymandering encompasses gerrylaundering.

In common parlance, however, gerrymandering tends to connote the active, overt manipulation of district boundaries.<sup>70</sup> Gerrymanderers do not sit tight. They pursue “the deliberate and arbitrary distortion of district boundaries.”<sup>71</sup> That gerrymandering would have such overtones is unsurprising given the origins of the term. In 1812, Republican lawmakers in Massachusetts revamped the state legislative map, abandoning their prior adherence to county boundaries in an effort to bolster their position and diminish the strength of their Federalist rivals.<sup>72</sup> Governor Elbridge Gerry signed off on the new map, with its notorious salamander-shaped district, and the rest is history. Contemporary cases and commentators tend to deemphasize visually bizarre districts as a signature feature of gerrymandering, but

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believe that gerrymandering is one of the ways that scheming politicians frustrate the popular will.”).

<sup>69</sup> Compare Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 832 n.2 (2015) (“[W]hen we refer to ‘gerrymandering,’ we mean district plans whose electoral consequences are sufficiently asymmetric. We do *not* mean plans that were devised with partisan *intent*. Our conception of gerrymandering is strictly effects-based and (unlike other common conceptions) does not relate to plans’ motivations or objectives.”), with Levitt, *supra* note 61, at 2027 (contending that maps adopted with the intent “to punish or subordinate voters based on their [partisan] affiliation” should be held unconstitutional). See also Gowri Ramachandran, *Math for the People: Reining In Gerrymandering While Protecting Minority Rights*, 98 N.C. L. REV. 273, 289 (2020) (observing that some definitions of partisan gerrymandering focus on the mapmakers’ intent, while others emphasize results, and still others stress the absence of electoral competition).

<sup>70</sup> See, e.g., Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1142 n.26 (2018) (“Gerrymandering refers broadly to any manipulation of electoral boundaries.”); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 681 (2013) (explaining that “the party in control manipulates district lines to maximize the number of legislative seats it will win,” using strategies such as cracking and packing); Grofman, *supra* note 20, at 100 n.94 (explaining that definitions of gerrymandering “all boil down to the idea that gerrymandering is the intentional manipulation of districting lines for political advantage”); Polsby & Popper, *supra* note 32, at 301 (“Gerrymandering, broadly speaking, is any manipulation of district lines for partisan purposes.”).

<sup>71</sup> *Karcher v. Daggett*, 462 U.S. 725, 786 (1983) (Powell, J., dissenting) (defining a political gerrymander as “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes” (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring))).

<sup>72</sup> See Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland*, 54 MD. L. REV. 242, 251 (1995) (citing GEORGE A. BILLIAS, ELBRIDGE GERRY, FOUNDING FATHER AND REPUBLICAN STATESMAN 316 (1976)).

gerrymandering remains strongly associated with needlessly reworked maps.<sup>73</sup> When we think of archetypal gerrymanders, we think of instances in which mapmakers were not shy about warping lines to advance their electoral goals.<sup>74</sup>

The closest that the existing redistricting literature has come to capturing the idea of gerrylaunders is in discussions of so-called “incumbent-protecting” gerrymanders.<sup>75</sup> Both concepts recognize that redistricting mischief can extend beyond efforts to maximize the number of seats that a particular party or group is likely to control. In particular, both appreciate that lawmakers may seek to adopt maps that serve to reinforce the status quo. Because such efforts sometimes involve collusion across party lines to limit competition from outsiders,<sup>76</sup> scholars sometimes speak of incumbent-protecting gerrymanders as “bipartisan” gerrymanders.<sup>77</sup> Incumbent-protecting

<sup>73</sup> See, e.g., *Gerrymandering*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”); Cover, *supra* note 70, at 1144 (“The term colorfully captures our intuitive sense—and visceral disgust—that manipulation of electoral districts subverts fundamental democratic norms.”). Ned Foley has argued that our understanding of the concept should remain tied to its original instantiation. See Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, 59 WM. & MARY L. REV. 1729, 1750 (2018) (“It is possible to take [the] original gerrymander as not merely an illustration of improper redistricting, but indeed the very definition of improper redistricting—at least in the American context.”); Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 712–13 (2017) (“[I]nsofar as the term ‘gerrymander’ is a portmanteau of ‘Gerry’ and ‘salamander,’ the visual image of its ugliness is built into the very definition of the objectionable practice.”).

<sup>74</sup> See Issacharoff, *supra* note 61, at 598–99 (observing that “the gerrymandering label may express an aesthetic objection to the contours of the districting lines, or it may hint at the stench of backroom politics improperly shielded from public scrutiny”).

<sup>75</sup> See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 662 (2002) (describing the principle behind the “incumbent-protecting gerrymander”); Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913, 915–16 (1995) (applying social choice theory to the “process of drawing electoral districts and conclud[ing] that districting schemes drawn to protect incumbency undermine the legitimacy of the voting process”).

<sup>76</sup> See, e.g., Issacharoff, *supra* note 61, at 598 (“[I]f a legislative plan were to provide the two major political parties with reasonable prospects of achieving what they believed to be their appropriate shares of representation, what could be objectionable in such a coalition effort?”); Persily, *supra* note 75, at 662.

<sup>77</sup> See, e.g., Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1321 (2002) (explaining that under “the so-called ‘bipartisan’ or incumbent-protecting gerrymander . . . , incumbent Democrats and Republicans divide up the electorate into safe Democratic and safe Republican districts”); Cover, *supra* note 70, at 1142 n.26 (defining “*bipartisan gerrymandering*” as “manipulation intended to preserve

gerrymanders, however, are not invariably bipartisan, and bipartisan gerrymanders are not invariably incumbent-protecting.<sup>78</sup>

Gerrylaunders and incumbent-protecting gerrymandering are likewise conceptually distinct. The notion of incumbent-protecting gerrymandering captures a particular redistricting objective (namely, protecting incumbents),<sup>79</sup> while the concept of gerrylaunders focuses on a particular redistricting method (namely, preserving key features of the prior map). The objective of protecting incumbents and the method of preserving existing lines frequently do go hand in hand. As Nathaniel Persily correctly observed in his work on incumbent-protecting gerrymanders, mapmakers often “operate under a ‘least-change’ principle,” keeping “districts as intact as possible, based on the theory that ‘if it ain’t broke, don’t fix it.’”<sup>80</sup> But incumbent-protecting gerrymanders do not invariably involve preserving prior district configurations, and gerrylaunders may advance objectives beyond incumbency protection. As the word “gerrymander” itself suggests, mapmakers may seek to protect incumbents by overhauling district lines rather than merely tweaking them.<sup>81</sup> Meanwhile, when mapmakers do choose to carry forward prior lines, they may aim not merely to cater to particular incumbents, but also to preserve a desired partisan balance regardless of whether existing officeholders continue to seek re-election.

### B. Techniques

As evidence of our tendency to equate gerrymandering with active manipulation, consider what commentators consistently identify as the chief techniques of the gerrymanderer: cracking (i.e., splitting members of a disfavored party or group between districts so they cannot constitute an electoral majority) and packing (i.e., concen-

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safe seats for incumbents”); see also CAIN, *supra* note 41, at 159–66 (introducing the term “bipartisan gerrymander”).

<sup>78</sup> For instance, lawmakers from one party could choose to protect incumbents over another party’s objections, or lawmakers could work across party lines to balance power without regard to the fate of existing officeholders. Cf. Persily, *supra* note 75, at 661–63 (comparing bipartisan and incumbent-protecting gerrymanders).

<sup>79</sup> See, e.g., Persily, *supra* note 75, at 662 (describing how incumbent-protecting gerrymandering operates “to keep the district safe for a particular person”).

<sup>80</sup> Persily, *supra* note 75, at 662.

<sup>81</sup> The Supreme Court addressed a vivid example in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006). When Texas lawmakers redrew the state’s congressional map in 2003, they confronted a district in which “an increasingly powerful Latino population . . . threatened to oust the incumbent Republican.” *Id.* at 423. They “acted to protect [his] incumbency by changing the lines” and significantly altering the district’s population composition. *Id.* at 424. The Court ultimately held that this revamp diluted Latino voting power in violation of section 2 of the Voting Rights Act. *Id.* at 447.

trating members of a disfavored party or group into fewer districts than they might otherwise have controlled).<sup>82</sup> Courts likewise treat cracking and packing as the *sine qua non* of gerrymandering.<sup>83</sup> In *Gill v. Whitford*, the Supreme Court held that the plaintiffs did not even have standing to assert that a gerrymander had unlawfully diluted their votes absent a showing that they had been subjected to cracking or packing in their home district.<sup>84</sup> Executing a cracking and packing strategy does not require mapmakers to reference prior district boundaries. Mapmakers simply need to find out where the favored and disfavored pockets of the electorate reside and then strategically draw lines around and through them. Gerrymandering through cracking and packing is an exercise in creative deck-stacking.

In addition to cracking and packing, commentators sometimes mention a third gerrymandering technique, which Samuel Issacharoff and Pamela Karlan have dubbed “shacking.”<sup>85</sup> The idea is to identify

<sup>82</sup> See, e.g., Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 562–63 (2011) (“The idea that the pack-and-crack strategy of partisan gerrymandering is optimal has been formalized by economists and political scientists, has been adopted by both courts and legal scholars, and dominates the literature on redistricting today.”); Ashira Pelman Ostrow, *The Next Reapportionment Revolution*, 93 IND. L.J. 1033, 1070 (2018) (“[S]elf-interested districting manifests through aggressive and often creative manipulation of district lines to entrench incumbents and weaken political opponents by ‘packing’ them into supermajority districts or ‘cracking’ them between several districts.”); Stephanopoulos & McGhee, *supra* note 69, at 851 (“Though the nuances vary, some kind of cracking and packing is how all partisan gerrymanders are constructed.”); Polsby & Popper, *supra* note 32, at 303–04. Cox and Holden contend that, contrary to the conventional wisdom, packing and cracking is not the optimal strategy for gerrymandering, but the alternative they identify as a more powerful technique—“match[ing] slices of voters from opposite tails of the signal distribution”—similarly entails active manipulation. Cox & Holden, *supra*, at 567.

<sup>83</sup> See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492 (2019) (describing the unconstitutional “cracking and packing” in *Gill v. Whitford*); *id.* at 2497 (describing *Davis v. Bandemer* as a case in which the Court “addressed a claim that Indiana Republicans had cracked and packed Democrats in violation of the Equal Protection Clause”); *id.* at 2513 (Kagan, J., dissenting) (“Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others. A mapmaker draws district lines to ‘pack’ and ‘crack’ voters likely to support the disfavored party.”); *Gill v. Whitford*, 138 S. Ct. 1916, 1936 (2018) (Kagan, J., concurring) (“[P]acking and cracking are the ways in which a partisan gerrymander dilutes votes.”).

<sup>84</sup> 138 S. Ct. 1916, 1930–31 (2018).

<sup>85</sup> Issacharoff & Karlan, *supra* note 20, at 552; see also Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 853 (2005) (discussing shacking); Richard L. Morrill, *Redistricting, Region and Representation*, 6 POL. GEOGRAPHY Q. 241, 254 (1987) (describing a “particularly effective form of discriminatory gerrymandering” as “manipulat[ing] territories in order to place representatives of the other party in the same district, plac[ing] the incumbents of two parties in opposition to each other, but remov[ing] most of the constituency of the other party, creat[ing] ‘open districts[.]’ favorable to the party doing the gerrymandering”); Grofman, *supra* note 20, at 157 (“I regard incumbent-centered partisan bias as one of the most pernicious forms of sophisticated partisan

where incumbent officeholders from a disfavored party or group reside (i.e., where they “shack”), and then place two or more of them into the same district in order to force at least one from office and potentially leave more seats available for the favored party or group.<sup>86</sup> Even more overtly than cracking and packing, shacking involves a departure from prior representational arrangements: Mapmakers take incumbents who were previously in separate districts and pair them together in a newly reconfigured district.<sup>87</sup>

Gerrylaunders proceed differently. Rather than rearranging district boundaries to secure an advantage, mapmakers retain existing district configurations to the extent possible. This less-is-more approach rests on the basic idea that, by definition, the prior map worked for those in power. And if they won before, they have a good chance of continuing to win unless conditions radically change. They do not need a wholesale redesign.

A gerrylaunders thus does not require the active cracking, packing, or shacking of adversaries. Instead, gerrylaunders involves two other techniques. For those who need a rhyme, this Article dubs them “locking” and “stocking.”

First, mapmakers lock in prior district configurations with the aim of populating each new district with the residents of its predecessor district, adjusting as needed to restore population equality. Courts and redistricting specialists sometimes refer to this approach as “core retention.”<sup>88</sup> As political scientists have observed, officeholders typically prefer to keep their districts intact as a way to maximize the advantages of incumbency, which derive in part from mutual familiarity.<sup>89</sup> When population shifts have been modest from one census to

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gerrymandering, and perhaps as the single strongest indicator of probable partisan gerrymandering.”).

<sup>86</sup> Issacharoff & Karlan, *supra* note 20, at 552–53.

<sup>87</sup> In addition to pairing incumbents from a disfavored party or group, mapmakers can use their knowledge of incumbents’ addresses to pair a disfavored incumbent with a strong incumbent from a favored party or group or to place the disfavored incumbent with a hostile voting bloc. *Id.* And quadrupling down on the rhymes, Karlan has identified “stacking” as yet another gerrymandering technique—the strategic adoption of multimember districts to submerge disfavored groups. See Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 250.

<sup>88</sup> See, e.g., *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 173, 173 n.53 (E.D. Va. 2018); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1334 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947 (2004).

<sup>89</sup> See, e.g., CAIN, *supra* note 41, at 116 (“Most members [of Congress] want the least amount of disruption possible to their districts and view departures from that rule with a great deal of suspicion.”); Seth C. McKee, *Political Conditions and the Electoral Effects of Redistricting*, 41 AM. POL. RSCH. 623, 626 (2013) (“Redrawn constituents are considerably less likely to be familiar with their representative vis-à-vis constituents who retain the same incumbent following a redistricting and this reduces the likelihood of voting for the

the next, changes to the old districts may be *de minimis*. When shifts have been more significant, or when a state has gained or lost congressional seats, more adjustments are necessary, but substantial core retention often remains possible.

The above discussion has already alluded to vivid examples of locking during the post-2010 and post-2020 redistricting cycles. Describing the post-2010 maps adopted in Oregon, one local commentator wrote that “Oregonians glancing at the new map of their state’s five congressional districts would be hard-pressed to spot many differences from the old one. With a few exceptions, the same goes for the new maps of the state’s legislative districts.”<sup>90</sup> On average, each of the state’s new congressional districts inherited nearly 95% of the residents of its predecessor district.<sup>91</sup> In Oklahoma, the mean congressional core retention rate during the post-2010 cycle was nearly 99%.<sup>92</sup> Overall, lawmakers in twelve states adopted new congressional districts during the post-2010 redistricting cycle that, on average, carried forward at least 80% of the population of their predecessor districts.<sup>93</sup> In eleven of those states, the average core retention rate was above 85%, and in eight states it exceeded 90%.<sup>94</sup> For state legislative districts, lawmakers in sixteen states produced maps for at least one

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incumbent.”) (citations omitted); M.V. Hood III & Seth C. McKee, *Stranger Danger: Redistricting, Incumbent Recognition, and Vote Choice*, 91 *SOC. SCI. Q.* 344, 346 (2010) (describing incumbents as “justifiably wary of the danger associated with the presence of a large number of resident strangers”); Antoine Yoshinaka & Chad Murphy, *The Paradox of Redistricting: How Partisan Mapmakers Foster Competition but Disrupt Representation*, 64 *POL. RSCH. Q.* 435, 437 (2011) (“[I]ncumbents generally prefer to keep their district lines intact between elections.”); Persily, *supra* note 24, at 1161 (“More than anything—perhaps even more than avoiding a pairing with another incumbent—incumbents want to keep the districts that elected them intact.”); Persily, *supra* note 75, at 662–63 (explaining that “[p]erhaps the greatest advantages of incumbency are name recognition and a history of constituent work and often favorable news coverage in a given area” and that incumbents “need to spend substantial resources” introducing themselves to new constituents who “have had less exposure to the[m]”).

<sup>90</sup> *Success in Redistricting*, *supra* note 43.

<sup>91</sup> See Summary Core Retention Chart, *supra* note 36.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* Those states are Alabama, Arkansas, Kentucky, Maine, Nebraska, New Hampshire, Oklahoma, Oregon, Rhode Island, Virginia, West Virginia, and Wisconsin. Bipartisan politician commissions, which, like legislatures, often have a status quo bias, produced maps with core retention rates above 90% in two more states—Hawaii and Idaho. *Id.*

<sup>94</sup> *Id.* Similar core retention numbers are emerging during the post-2020 cycle. See, e.g., *SC Senate Passes New US House Districts with Minimal Changes*, *supra* note 46 (reporting that five of South Carolina’s seven post-2020 congressional districts retained at least 94% of their previous voters, and the others retained at least 82%).

chamber with a mean core retention rate above 80%.<sup>95</sup> The rate exceeded 85% in ten of those states and 90% in four of them.<sup>96</sup>

In addition to locking, gerrylaunders typically seek to stock each updated district with an existing officeholder. The idea is to keep incumbents with the bulk of their prior constituents and, significantly, in separate districts from other incumbents. Stocking is essentially the flipside of shacking. Mapmakers attempt to minimize incumbent-versus-incumbent contests rather than strategically manufacturing them.

Again, the post-2010 and post-2020 redistricting cycles offer myriad vivid examples of stocking. When lawmakers draw the lines, the redistricting process tends to be incumbent-driven down to the district-level particulars, with individual officeholders often playing an active role in determining their placement relative to their existing constituents and colleagues.<sup>97</sup> In Florida, the state supreme court noted that the lawmakers who drew the post-2010 lines often gave themselves “large percentages of their prior constituencies” while stu-

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<sup>95</sup> See Summary Core Retention Chart, *supra* note 36. Those states are Louisiana, Maine, Massachusetts, Nebraska, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wyoming. In four more states (Connecticut, Washington, Maryland, and Pennsylvania), bipartisan commissions produced at least one map with a core retention rate above 80%. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., Ala. Legis. Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1293–94 (M.D. Ala. 2013) (noting that lawmakers sought “to preserve the core of existing districts; to avoid incumbent conflicts; . . . and to appease incumbents by accommodating their preferences whenever possible”), *vacated and remanded by* 575 U.S. 254 (2015); Baldus v. Members of Wis. Gov’t Accountability Bd., 849 F. Supp. 2d 840, 846 (E.D. Wis. 2012) (“In keeping with long-standing practice, the legislature in 2011 permitted the incumbent Wisconsin members of the House of Representatives to draft a map delineating the new congressional districts.”); Bill Barrow & Ed Anderson, *Political Lines Are Set, but Not Yet Solid*, NEW ORLEANS TIMES PICAYUNE, Apr. 15, 2011, 2011 WLNR 7357045 (“The end game [for Louisiana’s congressional redistricting], University of Louisiana-Lafayette political scientist Pearson Cross said, was to protect incumbents.”); Randal Edgar, *District Reshaping Called Chicanery*, PROVIDENCE J., Feb. 12, 2012, 2012 WLNR 30055184 (describing how Rhode Island’s post-2010 lines were crafted to benefit favored incumbents); Bryan McKenzie, *Va. Senate OKs Congressional District Plan; Some in Madison Would Move to 5th*, CHARLOTTESVILLE DAILY PROGRESS, Jan. 21, 2012, 2012 WLNR 1501226 (“‘The [post-2010 Virginia congressional] map is an incumbent-protection map to the fullest,’ said Geoffrey Skelley, political analyst at the University of Virginia Center for Politics. ‘It shores up the partisan backing of every sitting member in the House from Virginia, except [one], which stayed the same . . . .’”); *Our Views: A Better than Expected Redistricting Map: Splitting Up the 30th District Is a Start on Breaking It Up*, CHARLESTOWN DAILY MAIL, Aug. 9, 2011, 2011 WLNR 15757639 (“The [West Virginia] House leadership seemed to allow delegates to draw their own districts in many areas of the state. This turned the redistricting process into an incumbent protection bill.”).

diously avoiding incumbent pairings.<sup>98</sup> During the post-2010 mapmaking process in Oklahoma, the residences of incumbents were apparently “marked with stars on close-up maps” and efforts were made “to ensure that relatives and churches of certain senators were included in their districts.”<sup>99</sup> In some instances, lawmakers ended up residing near boundary lines, “hanging on just on to the edge of their districts,” in the words of a political scientist who reviewed the maps.<sup>100</sup> Redistricting played out similarly in a number of other states.<sup>101</sup>

It is important to note that although gerrymandering techniques—cracking, packing, and shacking—and gerrylaundersing techniques—locking and stocking—are in some tension with one another, they are not mutually exclusive. Lawmakers can, and most often do, mix and match them in various combinations to achieve their redistricting objectives. Indeed, a virtue of adding gerrylaundersing to our redistricting vocabulary is to highlight that redistricting abuses exist on a continuity-change spectrum.

Even maps generally regarded as classic gerrymanders typically have a gerrylaundersing component. When partisan actors draw lines, they do not singularly focus on maximizing their party’s advantage; they also aim to protect themselves. Rather than building a new map from scratch based exclusively on data about voters’ partisan leanings, lawmakers from the party in power commonly seek to lock and stock their own districts even as they crack, pack, and shack their adversaries.<sup>102</sup> Examples abound. During the post-2010 redistricting cycle, Maryland’s congressional Democrats sought to “maximize[] ‘incumbent protection’ for Democrats” while simultaneously “chang[ing] the congressional delegation from 6 Democrats and 2 Republicans to 7

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<sup>98</sup> *In re* Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 654 (Fla. 2012).

<sup>99</sup> McNutt, *Proposal Appears Primed to Protect Incumbents*, *supra* note 39; Barbara Hoberock, *Senate Votes 38-6 for Redistricting Plan*, TULSA WORLD, May 14, 2011.

<sup>100</sup> McNutt, *Proposal Appears Primed to Protect Incumbents*, *supra* note 39.

<sup>101</sup> *See, e.g., District Lines Set for Kentucky*, LOUISVILLE COURIER-J., Aug. 24, 2013, 2013 WLNR 21271953 (“A key issue for both parties was limiting the number of incumbents who would have to defend their seats against other incumbents.”); Moats, *supra* note 39 (noting efforts to minimize incumbent pairings).

<sup>102</sup> *See, e.g., Yoshinaka & Murphy*, *supra* note 89, at 444 (explaining that, through selective changes to existing districts, “partisan plans can affect incumbents differently based on the party to which they belong”); McKee, *supra* note 89, at 630 (describing how Democratic lawmakers in the South who controlled the redistricting process after the 1990 census strategically assigned more new constituents to Republican incumbents than to Democratic ones); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 864 (W.D. Wis. 1992) (“[A] partisan redistricting plan will seek to ‘pair’ (place in the same district) . . . as many opposing (and as few of one’s own) legislators who plan not to retire, or to move their legal residence to another district, as possible.”).



Democrats and 1 Republican.”<sup>103</sup> The resulting map maintained “the basic shape of some districts” even as it overhauled others.<sup>104</sup> In Illinois, where Democrats similarly crafted the congressional map, a federal court observed a “discrepancy in incumbency protection between Democrats and Republicans.”<sup>105</sup> The map preserved substantial fractions of “Democratic incumbents’ constituent populations,” while “altering the districts of incumbent Republicans to complicate their paths back to Washington.”<sup>106</sup> The process played out in reverse in states where Republicans drew the lines after the 2010 census. In Michigan, for example, a court observed that “[p]rotecting incumbents generally meant protecting Republicans.”<sup>107</sup> In North Carolina, a court found that lawmakers “did not seek to protect Democratic and Republican incumbents alike in a neutral manner.”<sup>108</sup>

Meanwhile, redistricting plans that largely carry forward prior district configurations and avoid incumbent pairings may include at least some cracking, packing, and shacking. As they rebalance populations, mapmakers sometimes strategically shift voters to strengthen the position of some or all incumbents. Virginia’s post-2010 congressional map, for instance, “preserve[d] the core of each of the state’s existing districts,” while making every Republican-held district “more Republican” and every Democratic-held seat “more Democratic.”<sup>109</sup> And lawmakers commonly engage in at least some strategic shacking. In Oklahoma, for example, the post-2010 Republican-drawn state

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<sup>103</sup> *Benisek v. Lamone*, 348 F. Supp. 3d 493, 502–03 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

<sup>104</sup> *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 903 (D. Md. 2011), *aff’d*, 567 U.S. 930 (2012).

<sup>105</sup> *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 579 (N.D. Ill. 2011).

<sup>106</sup> *Id.* at 577, 579.

<sup>107</sup> *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 886 (E.D. Mich.), *vacated sub nom. Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429 (2019).

<sup>108</sup> *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at \*23 (N.C. Super. Sept. 3, 2019); *see also* *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 999 (S.D. Ohio) (finding Ohio’s redistricting plan unconstitutional due to Republicans’ partisan “tweak[ing] the map”), *vacated and remanded*, 140 S. Ct. 101 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 849 n.34 (W.D. Wis. 2016) (noting mapmakers in Wisconsin attended to the placement of Republican incumbents since they were “the people being asked to vote for this”), *vacated and remanded*, 138 S. Ct. 1916 (2018); Gary Weckselblatt, *Redistricting*, BUCKS CNTY. COURIER TIMES, Dec. 18, 2011 (explaining that Pennsylvania Republicans sought “to protect the re-election chances of the [state’s] current GOP U.S. House members,” while “eliminat[ing] a Democratic-held seat . . . and forc[ing] two Democratic incumbents . . . into the same district”).

<sup>109</sup> Michael Sluss, *BLOG: Blue Ridge Caucus: McDonnell Signs Congressional Redistricting Bill*, ROANOKE TIMES, Jan. 25, 2012, 2012 WLNR 1687970; Bryan McKenzie, *Va. Senate OKs Congressional District Plan; Some in Madison Would Move to 5th*, CHARLOTTESVILLE DAILY PROGRESS, Jan. 21, 2012, 2012 WLNR 1501226.

house map avoided pairing any incumbents at all, but the state senate map shifted two Democratic incumbents into Republican-leaning districts.<sup>110</sup> This discussion suggests that gerrymanders and gerrylaunders may be best thought of as archetypes that rarely exist in their purest forms. As political actors seek to advance their interests during the redistricting process, they strategically blend change through cracking, packing, and shacking, with continuity through locking and stocking.

### C. *The Launder*

Focusing attention on continuity strategies is important because those strategies purport to be self-legitimizing in a way that change strategies are not. As the examples offered above indicate, political actors generally choose to lock and stock for entrenchment-oriented reasons. But precisely because those techniques involve no overt rigging of the lines, mapmakers can offer a nothing-to-see-here defense. More than that, they can—and do—seek to cast the retention of prior district cores (locking) and the avoidance of contests between incumbents (stocking) as perfectly innocent reasons for limiting changes to the prior map.<sup>111</sup> On their telling, preserving existing district configurations reflects admirable self-restraint in the service of stability and accountability.<sup>112</sup> During the post-2010 redistricting cycle, for example, lawmakers in at least nine states issued guidance documents that listed retaining district cores and/or aiding incumbents among the ostensibly neutral criteria that were used to draw maps.<sup>113</sup>

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<sup>110</sup> Michael McNutt, *Oklahoma Gov. Mary Fallin Signs Redistricting Bills*, DAILY OKLAHOMAN, May 21, 2011, 2011 WLNR 10149892 (“[T]he Senate plan forces two incumbent Democrats into districts with two incumbent Republicans.”); see also Bob Mercer, *Redistricting Session Will Test Cohesiveness of GOP Majority*, PIERRE CAPITAL J., Oct. 24, 2011, 2011 WLNR 23432200 (noting that South Dakota Republicans paired several Democratic incumbents); *Editorial: Redistricting Benefits GOP*, CHATTANOOGA TIMES, Jan. 21, 2012, 2012 WLNR 1388772 (explaining that “Republican strategists [in Tennessee] shifted a little here, moved a little there and produced district lines that diminish the chance of Democratic victories even as they enhance the likelihood of GOP triumphs across the state”).

<sup>111</sup> See, e.g., *Holt v. 2011 Legis. Reapportionment Comm’n*, 67 A.3d 1211, 1225 (2013) (noting that mapmakers in Pennsylvania defended their core retention efforts by stating that “upheaval or uncertainty in the electoral process must be avoided”).

<sup>112</sup> See, e.g., *Testimony on Senate Bill 621 and Assembly Bill 624: Hearing on S.B. SB621 and A.B. 624 Before the S. Comm. on Gov’t Operations, Legal Rev. & Consumer Prot. & Assembly Comm. on State Affs.*, 2021 Leg., 105th Sess. 3 (Wis. 2021) (statement of Robin J. Vos, Speaker, Wis. State Assembly), [https://docs.legis.wisconsin.gov/misc/lc/hearing\\_testimony\\_and\\_materials/2021/sb622/sb0622\\_2021\\_10\\_28.pdf](https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2021/sb622/sb0622_2021_10_28.pdf) [<https://perma.cc/F674-5TVX>] (explaining that “prioritizing [core retention] maintain[s] existing relationships between incumbents and constituents,” and that “[l]imiting incumbent pairings ensures accountability and continuity of representation”).

<sup>113</sup> See, e.g., GA. H. COMM., 2011-2012 GUIDELINES FOR THE HOUSE LEGISLATIVE AND CONGRESSIONAL REAPPORTIONMENT COMMITTEE, at 2, <https://www.dropbox.com/s/>

For the most part, courts have been complicit in mapmakers' efforts to give their locking and stocking activities an air of legitimacy, acquiescing in the use of these practices without meaningful scrutiny. Consider *Tennant v. Jefferson County Commission*,<sup>114</sup> where the U.S. Supreme Court summarily reversed a lower court's ruling that West Virginia's post-2010 congressional map violated the one person, one vote doctrine. The map's population deviations were quite small—less than one percent between the largest and smallest district—but the plaintiffs contended that lawmakers lacked a valid reason for rejecting alternatives that had even smaller variances. Defending their choice, lawmakers touted the map as one that did not “redistrict incumbents into the same district, or require dramatic shifts in the population of the current districts.”<sup>115</sup> Upholding the map, the Supreme Court accepted, with little discussion, that “avoiding contests between incumbents” and “minimiz[ing] population shifts between districts” are indeed “valid, neutral state polic[ies]” that can justify “minor” population disparities.<sup>116</sup> Along similar lines, when courts identify “traditional redistricting principles,” they most often list geographic criteria—contiguity, compactness, and so on.<sup>117</sup> But it is not uncommon for courts to mention core retention and even incumbent

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2egd5vpo0djzqt5/GeorgiaHouseCommitteeGuidelines2011-12.pdf [https://perma.cc/PW5S-TJBU] (avoiding incumbent pairings); H.R. 385, 97th Gen. Assemb., at 3 (Ill. 2011) (core retention and “maintenance of incumbent-constituent relations”); KAN. LEGIS. RSCH. DEPT., GUIDELINES AND CRITERIA FOR 2012 KANSAS CONGRESSIONAL AND LEGISLATIVE REDISTRICTING (Jan. 9, 2012) (core retention and avoiding incumbent pairings); N.M. LEGIS. COUNCIL, GUIDELINES FOR THE DEVELOPMENT OF STATE AND CONGRESSIONAL REDISTRICTING PLANS (Jan. 17, 2011) (core preservation and “the residence of incumbents”); OKLA. H.R., 2011 REDISTRICTING COMMITTEE GUIDELINES FOR REDISTRICTING (Feb. 14, 2011) (core preservation and “the residence of incumbents”); VA. H. COMM. ON PRIVILEGES & ELECTIONS, COMM. RES. NO. 1, HOUSE OF DELEGATES DISTRICT CRITERIA, at 2 (Mar. 25, 2011) (“incumbency considerations”).

<sup>114</sup> 567 U.S. 758 (2012).

<sup>115</sup> *Id.* at 761.

<sup>116</sup> *Id.* at 764; *see also* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440–41 (2006) (accepting that “incumbency protection can be a legitimate factor in redistricting” in at least some circumstances); White v. Weiser, 412 U.S. 783, 791 (1973) (declining to “disparage” a state’s stated interest in incumbency protection).

<sup>117</sup> *See, e.g.*, Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 795 (2017) (noting the state’s invocation of “traditional redistricting factors such as compactness, contiguity of territory, and respect for communities of interest”); Miller v. Johnson, 515 U.S. 900, 916 (1995) (describing traditional districting principles as “including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests”); Shaw v. Reno, 509 U.S. 630, 647 (1993) (referring to “traditional districting principles such as compactness, contiguity, and respect for political subdivisions”); *see generally* Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 SOC. SCI. HIST. 159 (1998).

protection as well, which can imply that continuity considerations stand on the same footing as geographic ones.<sup>118</sup>

To put it another way, the techniques of gerrylaundersing can double as justifications. The techniques of gerrymandering, in contrast, do not come with this convenient feature. Mapmakers who crack, pack, and shack can try, of course, to rationalize their actions as something other than an attempt to tilt the playing field in their favor, but they will be hard-pressed to claim that cracking, packing, and shacking are valuable in their own right. It is the built-in ability to cloak self-serving redistricting objectives in the guise of legitimate continuity-promotion efforts that puts the “launder” in gerrylaundersing.

## II

### GERRYLAUNDERSING ASSESSED

This Part considers whether the decisions of political actors to prioritize continuity during redistricting—decisions generally made to secure a political advantage—indeed have a persuasive claim to legitimacy. Are the practices of locking and stocking so strongly grounded in law or policy that we should forgive their predictable tendency to benefit those in power? Section II.A assesses the extent to which the law requires or at least encourages mapmakers to pursue continuity. Section II.B assesses the value of retaining district cores and protecting incumbents as a policy and normative matter. This Part concludes that neither legal nor policy considerations can justify efforts to maximize the resemblance between new maps and old ones.

#### A. *The Legal Landscape*

As a formal matter, continuity practices turn out to have minimal legal grounding. Federal law has little to say on the subject. Nothing in the U.S. Constitution requires mapmakers to preserve prior districts or protect incumbents. To the contrary, Article I and the Equal Protection Clause, as construed in the Supreme Court’s one person,

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<sup>118</sup> See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019) (listing “‘traditional’ districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents”); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 259 (2015) (observing that the state “sought to achieve numerous traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents”); see also Kim & Chen, *supra* note 25, at 110–17 (criticizing courts and advocates for treating core retention and incumbency protection as traditional redistricting principles).

one vote cases, constrain continuity by requiring periodic redistricting to ensure population equality.<sup>119</sup>

At one time, mapmakers might have had reason under the Voting Rights Act to preserve districts that provided electoral opportunities to protected minorities. Under the Act's section 5 preclearance requirement, covered jurisdictions (primarily in the South) were required to avoid "retrogression in respect to racial minorities' 'ability . . . to elect their preferred candidates of choice.'"<sup>120</sup> To the extent an existing map included effective majority-minority districts, lawmakers often sought to carry those districts forward in an effort to ensure non-retrogression.<sup>121</sup> But the Supreme Court rendered section 5 inoperative in its 2013 ruling in *Shelby County v. Holder*,<sup>122</sup> which means such districts need not be carried forward for the sake of obtaining preclearance.<sup>123</sup> Additionally, it bears noting that mapmakers who wish to assure fair opportunities to minority groups are able to do so without preserving preexisting majority-minority districts. Even when section 5 was in effect, maintaining such districts was largely just a shortcut to achieve compliance.

Lawmakers in the past sometimes similarly sought to preserve existing majority-majority districts pursuant to section 2 of the Act, which bars districting arrangements that dilute the votes of politically cohesive minority communities.<sup>124</sup> The Court, however, has stressed in recent years that mapmakers must undertake a "functional analysis" of minority voters' electoral opportunities to determine whether a majority-minority district is indeed required.<sup>125</sup> If lawmakers merely attempt to replicate the past, they may find themselves on the wrong side of either a section 2 claim or a racial gerrymandering claim. Lawmakers, for instance, may violate section 2 if they carry forward existing district configurations despite demographic changes that call

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<sup>119</sup> See *supra* notes 61–64 and accompanying text.

<sup>120</sup> *Ala. Legis. Black Caucus*, 575 U.S. at 259 (quoting 52 U.S.C. § 10304(b)).

<sup>121</sup> See, e.g., *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 478 (1997) (explaining that, under section 5, "the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured").

<sup>122</sup> 570 U.S. 529 (2013).

<sup>123</sup> See Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1922 (2018) ("Mapmakers in the South and Southwest are free from the preclearance requirement and prohibition on racial retrogression that governed the last five redistricting cycles.").

<sup>124</sup> See 52 U.S.C. § 10301; see also *Cooper v. Harris*, 137 S. Ct. 1455, 1464, 1470 (2017) (discussing 52 U.S.C. § 10301 and *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

<sup>125</sup> *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (discussing the need for "functional analysis" in the section 5 context); see also *Cooper*, 137 S. Ct. at 1471 ("[A] legislature undertaking a redistricting must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements.").

for giving covered communities greater electoral opportunities.<sup>126</sup> Alternatively, if they mechanically seek to maintain the demographic balance of existing districts, they may violate Fourteenth Amendment precedents barring overreliance on race.<sup>127</sup>

Beyond the federal safeguards that constrain population disparities and racial discrimination, redistricting processes and principles derive from state law. The applicable constitutional and statutory provisions commonly delineate mandatory geographic districting criteria.<sup>128</sup> Virtually every state requires state legislative districts to be contiguous; about two-thirds of states expressly call for compactness and for the preservation of political subdivision boundaries; and about one-third expressly instruct line drawers to respect communities of interest.<sup>129</sup> The law in many states applies these requirements to congressional districts as well.<sup>130</sup> States also routinely impose population equality requirements that echo and amplify the federal constitutional standard.<sup>131</sup> And a growing number of states have established political

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<sup>126</sup> See, e.g., *Singleton v. Merrill*, No. 21-CV-1291, 2022 WL 265001, at \*66 (N.D. Ala. Jan. 24, 2022) (explaining that it “would turn the law upside-down” to allow states to immunize themselves “from liability under Section Two so long as they have a longstanding, well-established map, even in the face of a significant demographic shift”), *cert. granted sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (Feb. 7, 2022) (mem.).

<sup>127</sup> See Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 277–78 (2015) (faulting Alabama for drawing majority-minority state legislative districts that maintained the same Black population percentages as their predecessor districts); *Cooper*, 137 S. Ct. at 1469–72 (holding that North Carolina’s effort to preserve a majority-minority district amounted to a racial gerrymander).

<sup>128</sup> See, e.g., Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 808 (2013) (explaining that states “impose many of their own criteria on how districts are drawn” through “constitutions, statutes, and even nonbinding guidelines”).

<sup>129</sup> See, e.g., *Criteria for State Legislative Districts*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/redistricting-101/where-are-the-lines-drawn/criteria-for-state-legislative-districts> [<https://perma.cc/TDU2-498G>]; Stephen Ansolabehere & Maxwell Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741 (2016) (observing that “[m]ost states today have some form of compactness criterion, down to legislation of the use of specific formulas for assessing compactness”); Kim & Chen, *supra* note 25, at 181–85 (discussing the prevalence of state laws addressing contiguity, compactness, and preservation of political subdivision boundaries); Stephanopoulos, *supra* note 128, at 808 (“In rough order of popularity, [redistricting criteria set out in state constitutions, statutes, and nonbinding guidelines] include contiguity, respect for political subdivisions, compactness, respect for communities of interest, preservation of prior district cores, prohibitions on incumbent protection, prohibitions on partisan intent, and competitiveness.”).

<sup>130</sup> See *Criteria for State Legislative Districts*, *supra* note 129; Kim & Chen, *supra* note 25, at 181–85.

<sup>131</sup> See *Criteria for State Legislative Districts*, *supra* note 129 (identifying constitutional or statutory provisions in thirty-five states that require population equality among districts); Kim & Chen, *supra* note 25, at 180–81.

fairness criteria for districting, such as promoting competitive elections and avoiding partisan bias.<sup>132</sup>

In contrast, state law hardly ever instructs mapmakers to retain prior district cores or protect incumbents—or even affirmatively identifies those continuity practices as permissible options. Until 2020, the Ohio Constitution did require mapmakers to carry forward prior congressional district boundaries, but the state’s voters repealed that provision as part of a broader redistricting-related overhaul.<sup>133</sup> Similarly, a Colorado statute formerly listed “[t]he minimization of disruption of prior district lines” among the factors that courts were permitted (but not required) to consider when reviewing and revising the state’s congressional map, but that provision was likewise repealed in 2020.<sup>134</sup>

Today, only three states—New Mexico, New York, and Utah—have constitutional or statutory provisions that even weakly endorse core retention, and no state redistricting law affirmatively licenses incumbency protection. In New Mexico, a state law adopted in early 2021 established an advisory citizen redistricting committee that is charged with developing districting plans in accordance with ten statutory criteria.<sup>135</sup> The first nine criteria are all mandatory. The final criteria adds that, “to the extent feasible, the committee *may* seek to preserve the core of existing districts.”<sup>136</sup> This means, of course, that the committee may choose *not* to preserve district cores and, indeed, adherence to the first nine criteria might well preclude it from doing so. In similar fashion, the New York Constitution requires the state’s redistricting commission to comply with federal law, apply several geographic criteria, and avoid incumbent or partisan bias, and then

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<sup>132</sup> See, e.g., ARIZ. CONST. art. 4, pt. 2, § 1(14)(F) (“To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.”); CAL. CONST. art. XXI, § 2(e) (“Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”); COLO. CONST. art. V, § 48.1(3)(a) (providing that, after complying with federal law and applying geographic criteria, “the commission shall, to the extent possible, maximize the number of politically competitive districts”); *id.* §§ 48.1(4)–(a) (“No map may be approved by the commission or given effect by the supreme court if: (a) it has been drawn for the purpose of protecting one or more incumbent members, or one or more declared candidates, . . . or any political party[.]”); cf. Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 756 (2004) (distinguishing between process-based, outcome-based, and institution-selecting redistricting regulations).

<sup>133</sup> See OHIO CONST. art. XI, § 7(D) (2020) (“In making a new [congressional] apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with [population equality requirements].”), *repealed by* 2014 Ohio Laws 12.

<sup>134</sup> COLO. REV. STAT. ANN. § 2-1-102 (West 2010), *repealed by* S.B. 20-186 (July 11, 2020).

<sup>135</sup> See N.M. STAT. ANN. § 1-3A-7(A) (2021).

<sup>136</sup> *Id.* § 1-3A-7(A)(10) (emphasis added).

instructs the commission to “*consider* the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest.”<sup>137</sup> This procedural requirement leaves the commission free, upon consideration, not to preserve district cores. Finally, after Utah citizens passed a ballot initiative in 2018 that stripped redistricting authority from the legislature, the legislature adopted a statute in 2020 to restore some of its power.<sup>138</sup> The statute creates an advisory commission and requires that, “to the extent practicable,” the commission create maps that comply with six enumerated criteria, one of which is “preserving cores of prior districts.”<sup>139</sup> Unlike the language in New Mexico and New York, this language is mandatory, but it still gives the commission substantial flexibility to determine how much core retention is indeed practicable given the need to respect other criteria as well.<sup>140</sup>

These few weak nods toward continuity stand alongside a larger number of state laws that explicitly or implicitly limit the ability of mapmakers to lock and stock. Such provisions have proliferated in recent years, with states commonly adopting them in conjunction with broader reforms that shift redistricting authority away from state legislatures. Arizona offers one of the clearest examples. Its constitution establishes a line-drawing protocol for the state’s independent redistricting

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<sup>137</sup> N.Y. CONST. art. 3, § 4(c)(5) (emphasis added).

<sup>138</sup> See Lee Davidson, *Anti-Gerrymandering Compromise Headed to Utah Governor*, SALT LAKE TRIBUNE (Mar. 11, 2020, 3:30 PM), <https://www.sltrib.com/news/politics/2020/03/11/anti-gerrymandering> [<https://perma.cc/R3GM-PT4N>].

<sup>139</sup> UTAH STAT. ANN. § 20A-20-302(5)(c) (West 2020). The other criteria are “preserving communities of interest”; “following natural, geographic, or man-made features, boundaries, or barriers”; “minimizing the division of municipalities and counties across multiple districts”; “achieving boundary agreement among different types of districts”; and “prohibiting the purposeful or undue favoring or disfavoring of: (i) an incumbent elected official; (ii) a candidate or prospective candidate for elected office; or (iii) a political party.” *Id.* § 20A-20-302(5)(a)–(f). The commission is also allowed to “adopt a standard that prohibits [it] from using . . . residential addresses of incumbents, candidates, or prospective candidates.” *Id.* § 20A-20-302(6)(e).

<sup>140</sup> In a few more states, arguments could conceivably be made that state constitutional language invites mapmakers merely to adjust existing lines when they redistrict, although no court has ever interpreted such language to preclude line-drawers from making a fresh start. Georgia, for example, states that “[t]he apportionment of the Senate and of the House of Representatives shall be changed by the General Assembly *as necessary* after each United States decennial census.” GA. CONST. art. III, § 2, para. II (emphasis added); see also W. VA. CONST. art. VI, § 4 (providing that, after each census, “the Legislature shall alter the senatorial districts, so far as may be necessary”). Meanwhile, North Carolina requires the General Assembly to “revise” state legislative districts after each census, which could conceivably be taken as an implicit suggestion to use the existing map as the starting point. N.C. CONST. art. II, §§ 3, 5; see also VT. CONST. ch. 2, § 73 (similarly instructing the General Assembly to “revise the boundaries of the legislative districts”). And the Oklahoma Constitution lists “historical precedents” among the criteria to be considered in apportioning the state senate. OKLA. CONST. art. V, § 9A.



tricting commission that seems to preclude efforts to preserve district cores.<sup>141</sup> Rather than starting with the existing map, the commission must “commence[] . . . the mapping process” by creating “districts of equal population in a grid-like pattern across the state,” which it can then adjust to comply with specified geographical and federal-law requirements.<sup>142</sup>

Arizona is also one of several states to bar mapmakers from considering where incumbents reside.<sup>143</sup> Without that information, mapmakers are largely unable to engage in stocking. At least eight more states have laws that prohibit mapmakers from drawing lines to favor incumbents.<sup>144</sup> Such anti-favoritism provisions could well be understood to preclude locking as well as stocking given that preserving district cores so predictably advantages existing officeholders. At a minimum, these laws almost certainly prohibit mapmakers from selectively retaining cores in an effort to advantage some incumbents over others.

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<sup>141</sup> See ARIZ. CONST. art. IV, pt. 2, § 1(14).

<sup>142</sup> *Id.*; see also Motion to Dismiss or Affirm at 7, *Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253 (2016) (No. 14-232) (explaining that, “[t]o create legislative districts, the Commission must start from a blank slate”).

<sup>143</sup> See ARIZ. CONST. art. IV, pt. 2, § 1(15) (“The places of residence of incumbents or candidates shall not be identified or considered.”); CAL. CONST. art. XXI, § 2(e) (“The place of residence of any incumbent or political candidate shall not be considered in the creation of a map.”); IOWA CODE § 42.4(5) (2021) (“In establishing districts, no use shall be made of . . . [a]ddresses of incumbent legislators or members of Congress.”); MONT. CODE ANN. § 5-1-115(3) (West 2021) (providing that “[a] district may not be drawn for the purposes of favoring a political party or an incumbent” and that the “addresses of incumbent legislators or members of congress” “may not be considered in the development of a plan”).

<sup>144</sup> See COLO. CONST. art. V, § 44.3(4) (“No map may be approved by the commission or given effect by the supreme court if: (a) It has been drawn for the purpose of protecting one or more incumbent members, or one or more declared candidates, of the United States house of representatives . . . .”); *id.* § 48.1(4)(a) (same for state legislative districts); FLA. CONST. art. III, § 20(a) (“No [congressional] apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . .”); *id.* § 21(a) (same for state legislative districts); HAW. CONST. art. IV, § 6 (“No [state legislative] district shall be so drawn as to unduly favor a person or political faction.”); MICH. CONST. art. IV, § 6(13)(e) (“Districts shall not favor or disfavor an incumbent elected official or a candidate.”); N.Y. CONST. art. 3, § 4(c)(5) (“Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.”); OHIO CONST. art. XIX, § 1(C)(3)(a) (prohibiting the legislature, at least when it acts with only a simple majority vote, from “pass[ing] a plan that unduly favors or disfavors a political party or its incumbents”); DEL. CODE ANN. tit. 29, § 804 (West 2022) (providing that districts shall “[n]ot be created so as to unduly favor any person or political party”); IOWA CODE § 42.4(5) (2021) (“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress . . . .”); OR. REV. STAT. ANN. § 188.010 (West 2021) (“No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.”).

Finally, laws in several other states provide lists of districting criteria that are phrased in exclusive terms. Because those lists do not include core retention or incumbency protection among the permissible considerations, these factors would appear to be off limits. Michigan, for example, requires its redistricting commission to “abide by [specified] criteria in proposing and adopting each plan,” applying a particular “order of priority.”<sup>145</sup> The Ohio Constitution likewise delineates an “order of priority” for creating state legislative districts.<sup>146</sup>

In all, more than a dozen states have laws that, in one form or another, affirmatively limit mapmakers’ efforts to privilege and perpetuate the status quo.<sup>147</sup> Given that the law more often aims to curb continuity considerations rather than encourage them, it can hardly be claimed that core retention and incumbency protection stand on the same footing as geographic or political fairness criteria. No state seeks to prevent mapmakers from drawing districts that are contiguous or compact or mindful of political subdivision boundaries.<sup>148</sup> These are uniformly accepted as legitimate considerations. The law is much more skeptical toward retaining cores and protecting incumbents. In short, when mapmakers lock and stock, they rarely have any legal justification for doing so; it is, at most, a discretionary choice.

### B. *Normative and Policy Considerations*

As the previous Section confirms, locking and stocking cannot be defended on grounds of legal necessity. They are extra-legal strategies that mapmakers opt to use, often in conjunction with gerrymandering techniques, to secure their hold on power. The next question, then, is whether these continuity practices nevertheless have normative or policy virtues that outweigh their vices. Should gerrylaunders be tolerated, or perhaps even encouraged, despite the inequities it can create? Efforts have been made to ground core retention and incumbency protection in the values of stability, accountability, and participation. This Section canvasses these arguments and finds them

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<sup>145</sup> MICH. CONST. art. IV, § 6(13).

<sup>146</sup> OHIO CONST. art. XI, § 3; art. XIX, § 2(B); *see also* IDAHO CODE ANN. § 72-1506 (West 2022) (providing that the state redistricting commission’s consideration of plans “shall be governed” by a list of specified criteria).

<sup>147</sup> Those states are Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Michigan, Montana, New York, Ohio, and Oregon. *See supra* notes 141–46; *see also* Kim & Chen, *supra* note 25, at 179 (tallying fifteen states that “prohibit incumbency protection as a criterion” in state legislative redistricting and fourteen that prohibit it in congressional redistricting).

<sup>148</sup> *See* Kim & Chen, *supra* note 25, at 149–50.

wanting. On balance, gerrylaunders, like gerrymanders, is difficult to defend as a democratic good.

### 1. *Stability Claims*

One cluster of arguments offered in defense of gerrylaunders rests on the supposed virtues of stability.<sup>149</sup> Some of these claims center on the stability that comes when district configurations persist over time, while others focus more on officeholder tenure. As to the former, observers have sometimes pointed out that boundary changes disrupt relationships people have with their representatives and potentially confuse voters who might not even realize that they have been shifted.<sup>150</sup> A redrawn map can also interfere with the reliance interests that can develop around districts. One qualified defense of “district stability,” for instance, suggested that district residents can “develop over time a sense of loyalty and cohesion” and noted that investments in “district organizations, meetings, newsletters and the like” can be disrupted when lines are revamped.<sup>151</sup>

As for officeholder tenure, commentators sometimes find a silver lining in continuity practices that make it easier for incumbents to keep their jobs. Experienced representatives who develop long-term relationships with people and places might be especially knowledge-

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<sup>149</sup> See, e.g., Jon M. Anderson, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After Davis v. Bandemer*, 136 U. PA. L. REV. 183, 234 (1987) (“Also known as ‘least change redistricting,’ the incremental change approach comports with the ‘virtues in having some continuity in office for the sake of experience, stability, and relations with constituents.’” (quoting Robert G. Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES 7, 17 (Bernard Grofman, Arend Lijphart, Robert B. McKay & Howard A. Scarrow eds., 1982))).

<sup>150</sup> See, e.g., *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012) (“One benefit of a least-change strategy is that it minimizes voter confusion.”); *Pearson v. Koster*, 367 S.W.3d 36, 50 n.12 (Mo. 2012) (en banc) (“Consideration of historical district boundaries allows residents of a district to continue any relationships such residents may have established with their elected representatives and to avoid the detriment to residents of having to reestablish relationships when district boundaries change.”); *Egolf v. Duran*, No. D-101-CV-2011-02942, slip op. at 5 (N.M. Dist. Ct., Santa Fe Cnty. Dec. 29, 2011) (concluding that “[t]here is significant value in maintaining . . . present district lines” because changes can “disrupt the smooth and efficient administration” of the electoral process, “cause voter confusion,” and require building relationships with “new constituencies”); STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION, FINAL REPORT AND REAPPORTIONMENT PLAN 13 (2011), [https://elections.hawaii.gov/wp-content/uploads/2015/03/2011-ReapportionmentPlan\\_ExecutiveSummaryandReport\\_2011-12-29.pdf](https://elections.hawaii.gov/wp-content/uploads/2015/03/2011-ReapportionmentPlan_ExecutiveSummaryandReport_2011-12-29.pdf) [<https://perma.cc/W66W-Z6GF>] (asserting that “maintaining existing districts would create less confusion for voters who had grown used to their current districts”).

<sup>151</sup> See Morrill, *supra* note 85, at 253.

able and effective advocates for their constituents.<sup>152</sup> Seniority rules, moreover, mean that lawmakers tend to gain influence in legislative bodies as their time in office lengthens, and they can then wield that authority on behalf of their districts.<sup>153</sup> As Nathaniel Persily once put it with respect to congressional elections, “a state that threatens its incumbents threatens its own interests.”<sup>154</sup> Of course, the notion that the seniority system justifies incumbent-preserving districting practices involves some highly questionable bootstrapping. In essence, it suggests that, since incumbents have themselves chosen to place a premium on long-term service, we ought to stack the electoral deck in favor of long-term service. It is hardly appropriate, however, to reward incumbents for creating rules that reward incumbency.

That said, the stability-oriented arguments for locking and stocking are not nothing. They may help to explain why it would be a bad idea to redistrict between every election, and why decennial redistricting has long been the legal standard.<sup>155</sup> Even as it acted to rein in malapportionment through inaction and required states to redistrict as a matter of federal constitutional law, the Supreme Court did not insist upon “daily, monthly, annual or biennial reapportionment.”<sup>156</sup> Instead, the Court observed that “[I]mitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system.”<sup>157</sup> Redistricting at ten-year intervals, the Court concluded, struck the constitutionally appropriate balance.<sup>158</sup> Most state constitutions similarly embrace decennial redistricting, and some expressly prohibit further mid-decade remapping.<sup>159</sup>

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<sup>152</sup> See Persily, *supra* note 75, at 671 (asserting that “novice representatives are likely to be systematically inferior to ‘entrenched’ representatives when it comes to the effective representation of their constituents’ views”).

<sup>153</sup> See, e.g., Richard D. McKelvey & Raymond Riezman, *Seniority in Legislatures*, 86 AM. POL. SCI. REV. 951 (1992) (highlighting the connection between seniority systems and the incumbency advantage); Ortiz, *supra* note 35, at 682 (“[I]f the legislature allocates power among its members according to seniority, continued incumbency can bring distinct benefits to the representative’s individual district.”); Persily, *supra* note 75, at 671 (“[A]t least where congressional elections are concerned, a state has a truly compelling interest in sending the most senior delegation to Washington that it can” given that power “falls largely along lines of seniority.”).

<sup>154</sup> Persily, *supra* note 75, at 671.

<sup>155</sup> See Cox, *supra* note 132, at 776–79 (describing the virtues of limiting the frequency of redistricting to the decennial cycle).

<sup>156</sup> Reynolds v. Sims, 377 U.S. 533, 583 (1964).

<sup>157</sup> *Id.*

<sup>158</sup> See *id.*

<sup>159</sup> See Justin Levitt & Michael P. McDonald, *Taking the “Re” Out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1270–71 (2007).

The relevant question, however, is whether, beyond justifying limits on the frequency of redistricting, stability concerns further suggest that, when the time for redistricting does arrive, change minimization should be a priority. And here, the arguments for stability fall short for two overarching reasons. First, they have no logical stopping point. Instead, they rest on what we might call the fallacy of maximal stability—the idea that more continuity is necessarily better than less. Taken to the extreme, such arguments suggest that it would be better to never redistrict at all. Then voters would never be confused; reliance interests in districts would never be disturbed; and officeholders would be able to acquire expertise and experience with minimal disruption.<sup>160</sup>

Stability is a value to be optimized, not maximized. It serves important purposes in an electoral system, but it is not an unalloyed good. Dynamism is also vital, and it is necessary to strike a healthy balance. Excessive stability can “stifle new voices” and “trade[] away the possibility of a new diversity.”<sup>161</sup> More than that, it threatens the responsiveness that lies “at the heart of the democratic process” and “is key to the very concept of self-governance through elected officials.”<sup>162</sup>

It thus does not suffice for proponents of gerrylaunders to praise locking and stocking as a source of stability unless the system would otherwise give incumbents too few advantages and provide too little representational continuity. That is likely a difficult case to make. A premise that animates the entire field of election law is that those in power are naturally inclined to write rules—and design maps—that help them retain power.<sup>163</sup> Lawmakers are quick to offer up the need for stability as an ostensibly neutral reason for their anticompetitive conduct.<sup>164</sup> The system thus skews toward entrench-

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<sup>160</sup> Samuel Issacharoff made a similar point two decades ago in a widely cited exchange with Nathaniel Persily concerning incumbent-protecting gerrymanders. To Persily’s defense of legislative entrenchment, Issacharoff retorted, “Why then hold legislative elections at all?” Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 686 (2002).

<sup>161</sup> Ortiz, *supra* note 35, at 684.

<sup>162</sup> *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014) (plurality).

<sup>163</sup> See, e.g., Issacharoff, *supra* note 61, at 595 (identifying “the ability of insiders to gain unfair advantage over the disorganized mass of the electorate” as an enduring concern in election law); cf. *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part) (“Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country.”).

<sup>164</sup> See Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1610 (1999) (“States with one dominant party have often adopted rules—justified in public-regarding terms, of course, like avoiding the dreaded prospect of political instability—that in purpose and effect enshrine or accentuate that party’s dominance.”).

ment. At the same time, measures to promote dynamism and responsiveness tend to be in short supply.<sup>165</sup>

The notion that gerrylaandering is needed to strike the right balance is especially dubious given that, in practice, there tends to be a fair degree of continuity between new maps and old ones even when mapmakers ignore prior district boundaries or incumbent residences. A natural byproduct of applying standard geographic districting criteria is that most individuals will still find themselves in the same districts as their neighbors, many neighborhoods and political subdivisions will also remain together, and many incumbents will remain with the bulk of their existing constituents.<sup>166</sup> Data from the post-2010 redistricting cycle confirm that, even in states like Iowa and California, where district lines were drawn from scratch, new districts inherited substantial blocs of voters from prior districts.<sup>167</sup>

Consequently, locking and stocking almost certainly offer us more of something we simply do not need. Incumbent officeholders enjoy a panoply of advantages: experience, name recognition, campaign war chests and infrastructure, ready access to influential elites, the ability to claim credit for delivering legislative accomplishments and constituent services, and more. It is farfetched to think that, for the system to achieve optimal stability, it is also necessary to coddle them during the decennial redistricting process. Instead, optimal stability seems more likely to be achieved if, once every decade, incumbents face the prospect of persuading some new constituents that they deserve to remain in office, maybe even in a head-to-head contest with another incumbent (which simultaneously opens the door in another district for a fresh face to emerge).<sup>168</sup>

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<sup>165</sup> See AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 52 (1984) (remarking that “one of the best-known generalizations about electoral systems is that they tend to be very stable and to resist change”); Pildes, *supra* note 164, at 1618 (“It is precisely because certain longstanding structural features of electoral politics are likely to be taken as settled, at least by courts, that it becomes all the more important to be concerned about the anticompetitive practices that are piled upon those fixed structures.”).

<sup>166</sup> See, e.g., *In re Apportionment of State Legis.* 1982, 321 N.W.2d 585, 606 (Mich. 1982) (Levin & Fitzgerald, J., concurring) (explaining that “continuity of representation . . . finds expression in the concept of preserving the autonomy of local political subdivisions” rather than in an independent commitment to preserving district cores).

<sup>167</sup> See Summary Core Retention Chart, *supra* note 36. During the post-2010 redistricting cycle, the state legislative and congressional maps adopted in every state had an average core retention rate of at least fifty percent. *Id.*

<sup>168</sup> Cf. Ortiz, *supra* note 35, at 683 (“The legislature needs a varying mixture of old hands and new blood to strike the right balance between change and continuity. There is no reason to believe that favoring incumbents strikes this balance better than not considering incumbency at all.”).

The second big-picture shortcoming of the stability-oriented arguments for gerrylaunders is that they fail to grapple with the contingent value of stability. The appeal of stability depends in large part on what is being held stable. By way of illustration, consider two redistricting scenarios. In the first, the existing map was created a decade ago by partisan actors who, after narrowly winning control of a swing state, painstakingly reconfigured the state's legislative districts to maximize their party's advantage and succeeded spectacularly. In recent elections, their party has maintained a solid grip on the state's legislature despite consistently receiving a smaller overall vote share than the opposition.<sup>169</sup> In other words, they have gerrymandered their way into durable minoritarian rule.<sup>170</sup> It is now time to redistrict, and they conclude that this time there is no need for an overhaul. They choose instead to lock and stock, adjusting populations to restore equality but generally preserving the key features of the prior map, which they expect will allow them to perpetuate their dominance. This is gerrylaunders at its most egregious.<sup>171</sup> These lawmakers might try to defend their map on stability grounds, but they would be hard pressed to argue that this anti-democratic status quo is really one that ought to be preserved.<sup>172</sup>

In contrast, imagine a small state that consists of two equally sized cities and a sparsely populated rural area in between. The state has two congressional districts, each containing one city. It is now time to redistrict, and lawmakers reject a proposal to reconfigure the two districts so that each city is divided between the two districts. Instead, they opt to shift some rural residents from one district to the other to restore population equality while otherwise retaining the existing district configurations. This decision may well work to the advantage of the incumbent representatives, but the mapmakers in this case have a

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<sup>169</sup> The situation in Wisconsin closely resembles this scenario. After adopting highly skewed maps in 2011, Republican lawmakers maintained their legislative majorities for the rest of the decade even as their Democratic opponents often received more votes on a statewide basis. See, e.g., Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1784 (2021); Mitchell Schmidt, *2020 Election Again Shows Lopsided Republican Legislative Maps*, WIS. STATE J. (Nov. 12, 2020), [https://madison.com/wsj/news/local/govt-and-politics/2020-election-again-shows-lopsided-republican-legislative-maps/article\\_d0c11425-df16-5d0b-a3e8-4954e7897652.html](https://madison.com/wsj/news/local/govt-and-politics/2020-election-again-shows-lopsided-republican-legislative-maps/article_d0c11425-df16-5d0b-a3e8-4954e7897652.html) [<https://perma.cc/6U5K-HJAD>].

<sup>170</sup> Cf. Seifter, *supra* note 169 (discussing the phenomenon of state legislatures controlled by a party that lacks majority support).

<sup>171</sup> Again, the situation in Wisconsin offers an apt illustration. During the post-2020 cycle, lawmakers sought to carry forward the districts they had gerrymandered into existence in 2011. See *supra* notes 55–60 and accompanying text.

<sup>172</sup> Cf. Issacharoff, *supra* note 61, at 645 (“Even the claim of stability cannot dispel the lingering notion that a deep corruption threatens the core democratic enterprise when elections are formally channeled to yield predetermined outcomes.”).

reasonable claim that they are preserving something of value. The old districts honored a well-established districting principle (respect for political subdivision boundaries) in perhaps the only way possible given the state's geography. It makes sense for the new districts to do the same. It is important to note, however, that the value of stability is not doing the real work here. What justifies the continuation of the prior districts in this example is the propriety of respecting political subdivision boundaries, not the pursuit of stability for its own sake.

What about situations that fall between these two extremes? Suppose that the existing map is neither a blatant gerrymander, as in the first scenario, nor a singularly correct application of traditional districting principles, as in the second scenario. In the real world, the second scenario is uncommon (probably more uncommon, unfortunately, than the first scenario) because traditional districting principles rarely point decisively to one "ideal" map. Different mapmakers, all applying the same set of districting criteria and acting with the utmost good faith, may produce very different maps depending on the nuances of their process and the particular balances they strike.<sup>173</sup> They may choose to divide different political subdivisions, or join different communities of interest, or prioritize district compactness in different areas. Even the mapmakers' decisions about where to begin their line-drawing work will have an impact, since districts formed near the end of the process tend to be "less compact and have a less regular appearance than the others"—a phenomenon dubbed the "final districts" effect.<sup>174</sup> Most of these judgments will not be definitively right or wrong, and the map ultimately adopted will typically be just one of many reasonable options.

The upshot is that most district maps are not uniquely worth preserving, and extending their lifespan in the name of stability may unfairly lock in idiosyncrasies and biases that have no good claim to longevity. Bear in mind that even the most scrupulously evenhanded districting plan inevitably produces winners and losers.<sup>175</sup> Political scientists have shown, for example, that voters are materially disadvantaged when their political subdivisions are divided between electoral districts.<sup>176</sup> The same goes for residing in noncompact districts—

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<sup>173</sup> See Persily, *supra* note 75, at 1157 (explaining that, generally speaking, "a mapmaker can draw a near-infinite number of plans that comply with [traditional districting] principles").

<sup>174</sup> See *LaComb v. Growe*, 541 F. Supp. 160, 165 (D. Minn. 1982).

<sup>175</sup> Cf. *Hall v. Moreno*, 270 P.3d 961, 966 (Colo. 2012) ("[R]edrawing any district lines necessarily means disappointing citizens and interest groups, no matter how the lines are drawn.").

<sup>176</sup> See, e.g., Daniel C. Bowen, *Boundaries, Redistricting Criteria, and Representation in the U.S. House of Representatives*, 42 AM. POL. RSCH. 856, 867 (2014).



that is, districts that are irregularly or bizarrely shaped.<sup>177</sup> When mapmakers retain existing subdivision splits or meandering boundaries just because the map happened to be drawn that way in a prior decade, they can leave some voters and communities perpetually and unjustifiably burdened (and others perpetually and unjustifiably benefited). Along similar lines, political scientists have shown that maps randomly generated with equal attention to prescribed traditional redistricting criteria can produce a range of electoral outcomes.<sup>178</sup> Some maps will favor one party, and some will favor the other.<sup>179</sup> In a closely divided state, the choice between two apparently neutral maps can (sometimes quite unintentionally) make a decisive difference in determining which party will control the legislature for the coming decade. Carrying forward a map from one decade to the next may thus operate to entrench an arbitrary political skew. This is not a democratically healthy form of stability.

One caveat is in order: In choosing between continuity and change, it is necessary to consider not only the value of the existing arrangement, but also the nature of the potential alternative. The above discussion suggests that most maps—even ones that were drawn as evenhandedly as possible—are not worth preserving. If the choice is between a map that largely replicates its predecessor and a map drawn from a blank slate in accordance with traditional, non-invidious districting principles, then there is good reason to prefer the latter. But if the choice is between a map that carries forward an evenhandedly drawn prior map and a map that disregards existing boundaries to effectuate a blatant gerrymander, then the former is plainly the

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<sup>177</sup> See, e.g., Richard N. Engstrom, *Electoral District Compactness and Voters*, 21 AM. REV. POL. 383 (2000) (concluding that noncompact districts are associated with a lower voter turnout than compact districts); Richard G. Niemi, Lynda W. Powell & Patricia L. Bicknell, *The Effects of Congruity Between Community and District on Salience of U.S. House Candidates*, 11 LEG. STUD. Q. 187 (1986); Jonathan Winburn & Michael W. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout, and Voting Behavior*, 63 POL. RSCH. Q. 373 (2010).

<sup>178</sup> See, e.g., Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 252–54 (2013) (identifying the range of outcomes produced by simulated maps relying on neutral geographic criteria).

<sup>179</sup> See, e.g., *League of Women Voters v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018) (discussing a computer simulation that generated a range of Pennsylvania redistricting plans based on traditional redistricting criteria and concluding that state mapmakers had subordinated such criteria “in the service of partisan advantage”); Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES 7, 7–8 (Bernard Grofman, Arend Lijphart, Robert B. McKay & Howard A. Scarrow eds., 1982) (“[T]here are no neutral lines for legislative districts. . . . [E]very line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.”).

lesser evil.<sup>180</sup> Just as we should not reflexively embrace the past for the sake of stability, we also should not reflexively embrace change above all else.

## 2. *Accountability Claims*

Gerrylaundersing is no more defensible on accountability grounds than it is on stability grounds. The claim that locking and stocking foster electoral accountability is straightforward enough: Because efforts to preserve district cores and avoid incumbent pairings help to keep representatives together with their original constituents, they are said to ensure that those representatives remain answerable to the people who elected them.<sup>181</sup> Conversely, when mapmakers overhaul the prior map, they “sever representational ties,” which “hinders retrospective voting as an accountability tool.”<sup>182</sup> On balance, however, gerrylaundersing is more likely to threaten accountability than to enhance it.

The central problem is that meaningful electoral accountability requires meaningful competition, and gerrylaundersing, like gerryman-

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<sup>180</sup> Cf. Brandon L. Boese, Note, *The Controversy of Redistricting in Minnesota*, 39 WM. MITCHELL L. REV. 1333, 1357–58 (2013) (observing that a “least-change strategy” can make it more difficult “to redraw district boundaries for a specific benefit,” whereas “[s]tarting from scratch places no limits on how legislators can draw a new map and opens the door to be able to politically gerrymander the state to a particular party’s advantage”).

<sup>181</sup> See, e.g., Levitt, *supra* note 61, at 2026 (“Maintaining the cores of existing districts and avoiding unnecessary contests between incumbents may allow a more consistent base of constituents to appraise their representative’s performance over time . . . .”); Barry Edwards, Michael Crespín, Ryan D. Williamson & Maxwell Palmer, *Institutional Control of Redistricting and the Geography of Representation*, 79 J. POL. 722, 723 n.3 (2017) (“Preserving the population cores of old districts is a way to honor the results of prior elections and to preserve the relationships cultivated between representatives and their constituents.”); Persily, *supra* note 75, at 1161 (“By respecting the current district cores or configurations, a [redistricting] plan maintains the identity of the district and usually preserves continuity of representation for voters and their representatives.”). As a federal district court in South Carolina put it, “[i]ncumbents know their constituents in the old districts, and many of those constituents will know their congressman as ‘my congressman.’ Many of the constituents would have been served by the congressman in ways calculated to obtain and enhance loyal support.” *S.C. State Conf. of Branches of NAACP, Inc. v. Riley*, 533 F. Supp. 1178, 1181 (D.S.C. 1982), *aff’d sub nom. Stevenson v. S.C. State Conf. of Branches of NAACP, Inc.*, 459 U.S. 1025 (1982). According to the court, “[s]uch voters ought not to be deprived of the opportunity to vote for a candidate that has served them well in the past and to enjoy his continued representation of them. Supporters and opponents, alike, have a basis for judging him.” *Id.*

<sup>182</sup> Yoshinaka & Murphy, *supra* note 89, at 435, 436; see also *Stenger v. Kellett*, No. 11CV2230, 2012 WL 601017, at \*3–4 (E.D. Mo. Feb. 23, 2012) (explaining that, “because it maintains the continuity in representation for each district,” a “‘least-change’ model . . . allow[s] the voters to decide whether they desire[] to keep the same representative or reject him or her by electing someone else”).

dering, is typically anti-competitive.<sup>183</sup> Those who encourage locking and stocking for the sake of stability essentially concede this point.<sup>184</sup> Indeed, the stability and accountability arguments made in support of gerrylaunders are difficult to reconcile. To the extent gerrylaunders promotes stability by insulating incumbents or candidates from a favored party from competition, it renders those individuals less accountable to voters. Lawmakers understand this. When they choose to lock and stock, they are not trying to hold their own feet to the fire; they are trying to give themselves and their allies an electoral edge.

The political science evidence bears this out. Researchers have found that higher levels of district continuity are “negatively related to competitiveness: the more continuous a district, the less likely it is that the election will be competitive.”<sup>185</sup> Maintaining existing boundaries allows the advantages of incumbency to operate in full force. And competition may be scarce in gerrylaundersed districts even when no incumbent is on the ballot. To the extent mapmakers preserved prior district configurations in an effort to perpetuate a partisan advantage, those districts are unlikely to be closely contested, at least at the general election stage.

In contrast, when districts are more substantially reconfigured, the advantages of incumbency are somewhat blunted in ways that foster competition. Precisely because some voters in the redrawn district will not yet be acquainted with the incumbent, the incumbent will stand on more equal footing with potential challengers.<sup>186</sup> This can encourage higher quality challengers to take on the incumbent and trigger closer scrutiny of the incumbent’s record.<sup>187</sup> When multiple incumbents are redrawn into the same district and face off against one another, each candidate is especially likely to have the wherewithal to

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<sup>183</sup> See Issacharoff, *supra* note 61, at 623 (“Allowing partisan actors to control redistricting so as to diminish competition runs solidly counter to the core concern of accountability.”) (emphasis omitted).

<sup>184</sup> See *supra* notes 152–54 and accompanying text.

<sup>185</sup> Yoshinaka & Murphy, *supra* note 89, at 443; see Morrill, *supra* note 85, at 253 (observing that minimizing district change “has the effect of protecting incumbents” and potentially “decreasing the number of competitive seats”).

<sup>186</sup> See, e.g., McKee, *supra* note 89, at 624 (discussing how the incumbency advantage is discounted in redrawn districts where incumbents have not yet worked for new constituents); Scott W. Desposato & John R. Petrocik, *Redistricting and Incumbency: The New Voter Effect*, in *REDISTRICTING IN THE NEW MILLENNIUM* 36 (Peter F. Galderisi ed., 2005).

<sup>187</sup> See Marc J. Hetherington, Bruce Larson & Suzanne Globetti, *The Redistricting Cycle and Strategic Candidate Decisions in U.S. House Races*, 65 J. POL. 1221 (2003) (observing that stronger challengers sometimes emerge immediately after redistricting when the presence of redrawn voters diminishes the advantages of incumbency).

put the other to the test. And when seats in overhauled districts are open, there is at least the potential for spirited general election competition.

Meanwhile, the mere fact that boundary changes separate some fraction of voters from their existing representatives does not somehow incentivize those representatives to run amok. Even if incumbents know that an overhaul is coming, they won't know how the map will change and which subset of constituents they will lose until the lines are actually drawn. It therefore remains in their interest to serve all of their existing constituents faithfully. Once the new map is adopted, it is true that representatives may begin to turn their attention to their new constituents, even as they formally continue to represent their old districts until the next election.<sup>188</sup> And to the extent the new map pairs incumbents, it will create some open districts in which no incumbent will be running for reelection. But the situation facing the residents of those new open districts is neither unusual nor particularly troubling. It is commonplace for incumbents to represent individuals whose electoral approval they will no longer need, whether because they are retiring, pursuing another office, or facing a term limit.<sup>189</sup> Neither citizens nor commentators generally regard such occurrences as serious threats to accountability (although term limits are no doubt controversial). Instead, turnover can generate new and healthy opportunities for voters to elect like-minded representatives.<sup>190</sup>

Gerrylaundrying also detracts from a valuable form of system-level accountability that mapmakers can foster when they redistrict from scratch. District-based electoral systems allow voters to select geographically proximate representatives who are sensitive to local interests. These representatives, however, have jurisdiction-wide gov-

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<sup>188</sup> Sometimes, however, representatives who are separated from the bulk of their existing constituents can choose to relocate or (depending on state law) simply run in a district in which they do not reside. See Magistrate Judge's Report & Recommendation, *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928216, at \*18 (Mar. 12, 2012), *adopted as modified*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012) ("The only residency requirement for [New York] congressional candidates is that they reside [in] state . . . . Consequently, when, as a result of redistricting, an incumbent finds herself outside her old district and 'paired' with another incumbent . . . [she] may nevertheless run for re-election in her former district.").

<sup>189</sup> During the nineteenth century, a substantial fraction of congressional incumbents—sometimes forty percent or more—did not seek reelection, and the rate today remains above ten percent. See CONG. RSCH. SERV., R41545, CONGRESSIONAL CAREERS: SERVICE TENURE AND PATTERNS OF MEMBER SERVICE, 1789-2021, at 5 (updated Jan. 5, 2021).

<sup>190</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649 (1998) (discussing the need to "destabilize political lockups in order to protect the competitive vitality of the electoral process and facilitate more responsive representation").

ernance responsibilities. When their orientation becomes too parochial, it can hamper the ability of the legislative body to respond appropriately to the views and needs of the polity as a whole.<sup>191</sup> By perpetuating district configurations from one decade to the next, gerrylaunders can contribute to discordant parochialism. The prospect of a reshuffle, in contrast, creates a form of constructive uncertainty.<sup>192</sup> It encourages representatives to think beyond the bounds of their districts even as they seek to serve their current constituents. Lawmakers in highly conservative or highly liberal districts, for example, have at least some incentive to moderate their views if they know they might be redrawn into a less ideologically extreme district in the years ahead. There is evidence that representatives are indeed sensitive to such redistricting effects.<sup>193</sup> Compared to gerrylaunders, blank-slate redistricting may thus have a moderating influence that better balances representational responsiveness at the district and jurisdiction levels.

Blank-slate redistricting is likely to have especially pronounced accountability advantages over gerrylaunders when the existing map departs from traditional geographic redistricting principles. Political science research indicates that representational responsiveness can suffer when districts are noncompact, needlessly divide political subdivisions, or disregard communities of interest.<sup>194</sup> Conversely, districting in accordance with geographic criteria “enhances the connection between citizens and their elected representatives” and can help constituents “hold their representatives accountable for representing

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<sup>191</sup> See, e.g., Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 836 (2021) (“If legislators are encouraged to take an overly constituency-centered approach to legislation, bills that are national in scope may be jeopardized by parochial demands.”); Eric M. Patashnik & Justin Peck, *Can Congress Do Policy Analysis?: The Politics of Problem Solving on Capitol Hill*, in DOES POLICY ANALYSIS MATTER?: EXPLORING ITS EFFECTIVENESS IN THEORY AND PRACTICE 85, 86 (Lee S. Friedman ed., 2017) (“Members of Congress are parochial; geographical representation and single-member districts compel lawmakers to respond to local pressures and undermine incentives to legislate in the national interest.” (citation omitted)).

<sup>192</sup> See Bertelli & Carson, *supra* note 35, at 202 (noting that redistricting “can create uncertainty for an incumbent legislator”).

<sup>193</sup> See *id.* at 203 (discussing studies indicating “that politicians adapt their voting behavior in response to changes in their district” and “that legislators are responsive to constituency changes stemming from redistricting”); see also Thomas Stratmann, *Congressional Voting Over Legislative Careers: Shifting Positions and Changing Constraints*, 94 AM. POL. SCI. REV. 665 (2000) (conducting analysis indicating that legislators subject to redistricting adjust voting behavior to align with new constituency preferences); Amihai Glazer & Marc Robbins, *Congressional Responsiveness to Constituency Change*, 29 AM. J. POL. SCI. 259 (1985) (indicating members of Congress are appreciably responsive when the prevailing opinion in their districts changes).

<sup>194</sup> See, e.g., Bowen, *supra* note 176 (demonstrating that traditional geographic districting principles can improve legislative responsiveness).

[their] shared interests.”<sup>195</sup> To carry forward a map that prioritized political advantage over geographic cogency, or one that simply reflects outdated geographic judgments, is thus to lock in districts that produce suboptimal levels of democratic accountability.

### 3. *Participation Claims*

Assertions that locking and stocking can facilitate political participation suffer from some of the same shortcomings as the stability- and accountability-oriented arguments addressed above. The participation-oriented case for gerrylaunders is that district overhauls increase the informational costs associated with voting and other forms of political association in ways that could deter individuals from participating.<sup>196</sup> Residents who are paired with a new incumbent or who find themselves in a district with an open seat may need to spend more time and energy in educating themselves about their options and may be more likely to sit out an election if they cannot make that investment.<sup>197</sup> Such concerns, however, lose sight of the big picture. People have little reason to engage in the political process if elections are not competitive and they do not have real choices.<sup>198</sup> Because ger-

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<sup>195</sup> *Id.* at 867, 883; see also Altman & McDonald, *supra* note 64, at 1189 (noting that traditional redistricting criteria “are claimed to foster better constituent-representative linkages by aligning community and district boundaries”).

<sup>196</sup> As James Gardner has written, “an individual’s political participation is more likely to be effective when he or she has the opportunity to learn from experience and thereby develop sound political judgment and strong political skills,” which happens more readily “when the local political community is also stable and relatively permanent.” James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1248 (2002). Conversely, he contends, where a “community’s boundaries or populace change too often or too dramatically, not only will the relevant cast of political characters change, but its problems will change as well. These kinds of changes, at least when they are significant, impair citizens’ political learning and complicate their acquisition of political judgment.” *Id.*

<sup>197</sup> See McKee, *supra* note 89, at 626 (discussing the reduced likelihood that redrawn constituents will vote for the incumbent); see Danny Hayes & Seth C. McKee, *The Participatory Effects of Redistricting*, 53 AM. J. POL. SCI. 1006 (2009) (explaining that redrawn voters tend to abstain at higher levels than non-redrawn voters in the wake of redistricting).

<sup>198</sup> See, e.g., Lee Drutman, *Elections, Political Parties, and Multiracial, Multiethnic Democracy: How the United States Gets It Wrong*, 96 N.Y.U. L. REV. 985, 1009 (2021) (“When elections are not competitive, citizens, especially lower-income citizens, frequently do not vote. More competitive elections lead to more participation and higher levels of citizen engagement and policy efficacy. . . . Citizens who live in competitive electoral areas are also more likely to volunteer and be involved in community activity.”); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 260 (2006) (“[I]t is well documented that competitive elections encourage the appearance of strong challengers to incumbents and increase voter turnout and party mobilization.”); Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187, 2214–15 (2018) (explaining that “competition contributes to higher

rylauding serves to entrench incumbents and calcify existing partisan power balances, it gives people fewer participatory incentives and opportunities, not more, especially at the general election stage.

The notion that a gerrylauder would inhibit rather than enhance participation should hardly be surprising. In the closely related context of gerrymandering, scholars have long observed that participatory harms arise when a districting plan operates to entrench certain favored actors.<sup>199</sup> Placing such concerns in doctrinal terms, scholars and advocates have described gerrymandering as a threat to associational rights.<sup>200</sup> This was, in fact, one of the central claims made in the most recent round of federal partisan gerrymandering litigation. The plaintiffs in those cases contended, among other things, that districts designed for one party's benefit precluded the other party and its supporters from effectively participating in the electoral process.<sup>201</sup> The plaintiffs offered evidence—accepted by federal district courts—that these gerrymanders had a “chilling effect on speech and associational activities” in multiple ways: With districts drawn to give one party a decisive edge, supporters of the disadvantaged party saw less reason to vote or participate in campaigns; the disadvantaged party had more difficulty recruiting candidates to run; civic organizations had greater difficulty engaging and educating the public; and favored candidates made less effort to interact with their constituents.<sup>202</sup> Concurring in *Gill v. Whitford*,<sup>203</sup> Justice Kagan recognized this reality. Members of the party disfavored by a partisan gerrymander, she explained, “may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office . . . . And what is true for party members may be doubly

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turnout,” in part because “candidates tend to expend more money and effort,” including on “mobilization activities,” when “electoral contests . . . are anticipated to be close”).

<sup>199</sup> See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 85 (1994) (explaining that incumbents' efforts at “self-perpetuation through gerrymandering . . . often promote noncompetitive election contests, which further reduce voter participation and interest”).

<sup>200</sup> See, e.g., Ross, *supra* note 198 (stressing the participation harms experienced by political outsiders); Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159 (2018) (arguing that the First Amendment expressive right of association prohibits excessive partisan gerrymanders).

<sup>201</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019) (describing plaintiffs' claims that challenged districting plans made it difficult to raise money or enthusiasm and caused a sense of disenfranchisement).

<sup>202</sup> *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 931–32 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); see also *Benisek v. Lamone*, 348 F. Supp. 3d 493, 523 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (“[T]estimony provided by several of the plaintiffs revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters . . . .”).

<sup>203</sup> 138 S. Ct. 1916 (2018).

true for party officials and triply true for the party itself (or for related organizations).”<sup>204</sup> Although the Supreme Court later deemed partisan gerrymandering claims nonjusticiable, it did not deny that gerrymandering can cause participation-related harms.<sup>205</sup> Gerrylaunders can equally discourage participation.

In contrast, redistricting from a blank slate can encourage participation in multiple ways. First, by making incumbents more vulnerable and creating more open seats, it will tend to produce a greater number of meaningfully contested elections both at the primary and general election stages.<sup>206</sup> Candidates in these races have every reason to persuade and mobilize as many voters as they can. Second, and at least as significant, boundary reconfigurations create new participatory possibilities for individuals and groups who might otherwise be marginalized.<sup>207</sup> The reason is that district configurations inevitably place some individuals and groups in a better position than others. People may find themselves, for instance, in a district in which their political party (or their wing of the party) is at a clear numerical disadvantage. For a decade, those individuals are likely to lose again and again. If their district is largely preserved during redistricting, they may find themselves perpetually sidelined, leaving them disenchanted and disengaged. If new districts are instead drawn from scratch, such individuals may have opportunities to find new allies and potentially build winning coalitions. Over time, such an approach to redistricting is likely to give more people more chances to participate more actively than they would have under a gerrylaunched map.<sup>208</sup>

One specific participation-related issue does warrant a brief mention. In many states, elections to the upper house of the state legislature are staggered.<sup>209</sup> Lawmakers serve four-year terms, with half of

<sup>204</sup> *Id.* at 1938 (2018) (Kagan, J., concurring).

<sup>205</sup> The Supreme Court did downplay the plaintiffs’ specific evidence as “anecdotal.” *Rucho*, 139 S. Ct. at 2504–05.

<sup>206</sup> *See, e.g.*, RONALD KEITH GADDIE & CHARLES S. BULLOCK, III, *ELECTIONS TO OPEN SEATS IN THE U.S. HOUSE: WHERE THE ACTION IS* (2000) (arguing that open seats provide the most promising path for a candidate seeking House election); Stephanopoulos, *supra* note 128, at 823–25 (discussing the participation-related benefits associated with crafting districts in accordance with traditional geographic principles rather than for political advantage).

<sup>207</sup> *See* Ross, *supra* note 198, at 2192 (discussing how individuals, and in particular political outsiders, are unable “to participate effectively in gerrymandered districts”).

<sup>208</sup> *Cf.* Richard H. Pildes & Elizabeth S. Anderson, *Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2204 (1990) (explaining that democratic legitimacy suffers when electoral practices “systematically deprive groups of the power to participate meaningfully in deliberative politics”).

<sup>209</sup> *See* Margaret B. Weston, Comment, *One Person, No Vote: Staggered Elections, Redistricting, and Disenfranchisement*, 121 YALE L.J. 2013, 2014 & n.4 (2012) (identifying



the seats on the ballot every two years (e.g., odd-numbered districts may be up during one biennial election and even-numbered districts the next).<sup>210</sup> When district boundaries change, some residents may end up having an opportunity to participate in an upper house election two years sooner than expected while other residents may have to wait two years more than expected.<sup>211</sup> To illustrate concretely, suppose an individual lives in a state senate district that held an election in 2018. Absent redistricting, the next election would be in 2022. But redistricting could shift that person to a district where the next election is not scheduled until 2024, resulting in a six-year gap. Retaining existing district configurations can minimize the number of individuals who experience such a delay. But this fairly minor quirk scarcely seems like a sufficient justification to lock and stock given the serious downsides of those practices. Courts have not held that such delays pose constitutional problems, nor indicated that minimizing delays should trump other districting principles.<sup>212</sup> Perhaps this is because mitigating strategies are available that do not require the tail to wag the dog. Mapmakers, for instance, can redistrict without locking and stocking but then, at the end of the process, number the new districts in the manner most consistent with the numbering convention of the old map.<sup>213</sup> States also can establish correctives outside of the mapmaking process if they so choose, such as truncating the terms of

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“twenty-eight states [that] elect one or both houses of their legislature by staggered terms”).

<sup>210</sup> See *id.* at 2013–14.

<sup>211</sup> See, e.g., *Baumgart v. Wendelberger*, Nos. 01–C–0121, 02–C–0366, 2002 WL 34127471, at \*3 (E.D. Wis. May 30, 2002) (discussing how in midterm legislative election years, Wisconsin voters, if they are shifted from odd-numbered to even-numbered senate districts, may face a two-year delay in voting for state senators); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 864 (W.D. Wis. 1992) (discussing the effect of redistricting a legislative body whose members have staggered terms on voters’ ability to vote); see also *Weston*, *supra* note 209, at 2013–14.

<sup>212</sup> See *Prosser*, 793 F. Supp. at 866 (quoting *Republican Party of Or. v. Keisling*, 959 F.2d 144, 145–46 (9th Cir. 1992) (per curiam)). The *Prosser* court described such delays as “an inevitable concomitant of redistricting,” though “not something to be encouraged.” *Id.*; see also *Baldus v. Members of the Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 850 (E.D. Wis. 2012) (explaining that “[s]ome degree of temporary disenfranchisement in the wake of redistricting is seen as inevitable, and thus as presumptively constitutional, so long as no particular group is uniquely burdened”).

<sup>213</sup> See, e.g., *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 638 (E.D. Wis. 1982) (“To minimize the number of people affected by our plan as it relates to Senate districts, we have tried . . . to use even numbers for the Senate districts in our plan that roughly correspond to areas assigned to even numbered districts in the 1972 act.”); see also *Weston*, *supra* note 209, at 2015 (noting that, while redistricting after the 2010 census, California’s redistricting commission “worked to minimize the number of deferred (odd-to-even) voters by determining which districts had the greatest proportion of formerly-odd voters and assigning those districts odd numbers”). Alternatively, depending on the nuances of state law, mapmakers could potentially renumber the districts such that no

state senators elected at the end of the decade and holding contests in all newly drawn state senate districts during the first election following redistricting.<sup>214</sup>

### III IMPLICATIONS AND PRESCRIPTIONS

#### A. *Lessons for Courts*

By and large, courts have addressed the phenomenon of gerrylaunders only sporadically and obliquely. They have yet to grapple fully with how the realities of gerrylaunders—its prevalence, its tenuous legal basis, and its ill effects—ought to affect redistricting doctrine. This Section identifies two overarching contexts in which gerrylaunders can rear its head and suggests lessons for courts (and litigants) in each type of case. First, there are cases in which courts are called upon to review the legality of redistricting plans adopted by legislators and other mapmakers. Litigants in such cases may raise a variety of challenges under federal and state law, from one person, one vote claims, to racial vote dilution or racial gerrymandering claims, to claims involving state-specific districting criteria. Second, there are cases in which courts are called upon to step in and establish a map themselves because legislators or other primary mapmakers failed to fulfill their duty to adopt a new district plan following a decennial census.<sup>215</sup>

#### 1. *Reviewing Maps*

Every redistricting cycle brings a wave of legal challenges to the newly drawn maps. To date, these challenges have not included direct attacks on gerrylaunders,<sup>216</sup> and the Supreme Court has indicated that the use of continuity criteria “does not in and of itself” pose con-

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district continues to have an incumbent senator, which would prompt special elections and thus avoid any electoral delay.

<sup>214</sup> See, e.g., ARK. CONST. art. 5, § 3 (implementing truncated term for first Senate class); FLA. CONST. art. III, § 15(a) (similar); ILL. CONST. art. 4, § 2(a) (staggering truncated terms among three groups of senators over three years following each decennial redistricting); IOWA CONST. art. 3, § 35 (providing for truncating terms “where necessary”); TEX. CONST. art. 3, § 3 (requiring one of two classes of senators to have a truncated term following apportionment); IOWA CODE § 42.4(8) (providing for truncated terms); see also Weston, *supra* note 209, at 2014 (endorsing the truncation approach).

<sup>215</sup> See, e.g., *Connor v. Finch*, 431 U.S. 407, 414 (1977) (acknowledging that courts are sometimes “confronted with the need to devise a legislative reapportionment plan when the state legislature” or other state actor has failed).

<sup>216</sup> See Grofman, *supra* note 20, at 106 (“It is permissible [under existing case law] for legislatures to seek to minimize contests between incumbents, and it is also permissible for districting plans to follow existing district lines to the extent practicable.”).

stitutional problems.<sup>217</sup> Given the Court's refusal to rein in even blatant partisan gerrymanders,<sup>218</sup> the Court is unlikely to constrain gerrylaunders as a matter of federal constitutional law anytime soon. More realistically, courts and litigants can refine how they handle gerrylaunders when addressing two other recurring federal causes of action—one person, one vote claims and racial gerrymandering claims. Perhaps more significantly, state constitutions and state courts might offer their own pathways for curbing gerrylaunders.

Instead of condemning gerrylaunders, current federal doctrine at least modestly contributes to the practice's veneer of legitimacy. In both one person, one vote and racial gerrymandering cases, courts have allowed litigants to invoke gerrylaunders as a potential defense to claims that newly drawn districts contain impermissibly large population deviations or that lines were unlawfully drawn with a predominant focus on race. This Article suggests that courts should approach such defenses with a skeptical eye.

Consider first the role of gerrylaunders in one person, one vote cases. The doctrine allows mapmakers to deviate at least slightly from perfect population equality among districts in order to advance legitimate redistricting objectives.<sup>219</sup> When identifying these permissible objectives, the Supreme Court has most often focused on geographic districting principles: promoting compactness, preserving political subdivision boundaries, and respecting geographic communities of interest.<sup>220</sup> But the Court also has indicated, without meaningful discussion, that a state's interests in maintaining the cores of prior dis-

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<sup>217</sup> See *White v. Weiser*, 412 U.S. 783, 791 (1973) (quoting *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)); see also *LULAC v. Perry*, 548 U.S. 399, 440–41 (2006) (accepting that “incumbency protection can be a legitimate factor in districting” if “the justification . . . is to keep the constituency intact so the officeholder is accountable for promises made or broken”).

<sup>218</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims are political questions beyond the reach of the federal courts).

<sup>219</sup> Courts have generally regarded deviations of up to ten percent as presumptively permissible when mapmakers construct state legislative districts (or districts for local government units). See, e.g., *Brown v. Thomson*, 462 U.S. 835, 842 (1983); Stephanie Cirkovich, Note, *Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote*, 31 *CARDOZO L. REV.* 1823, 1833–37 (2010) (discussing and critiquing the ten percent rule). For congressional districts, more precision is demanded. See, e.g., *Karcher v. Daggett*, 462 U.S. 725 (1983) (holding that even small population deviations among congressional districts may be unconstitutional if they are not the result of a good-faith effort to achieve population equality).

<sup>220</sup> See, e.g., *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) (“[W]hen drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness.”).

tricts and in avoiding matchups between multiple incumbents might likewise justify minor population disparities.<sup>221</sup> Mapmakers, in other words, can attempt to invoke their efforts to lock and stock to defend against alleged one person, one vote violations.<sup>222</sup>

The propriety of such a locking and stocking defense is questionable.<sup>223</sup> Given that locking and stocking lack the same legal and normative grounding as traditional geographic districting criteria,<sup>224</sup> it is a mistake to treat them as having the same legitimating force.<sup>225</sup> Instead, they are more akin to suspect practices like cracking and packing.<sup>226</sup> Mapmakers, of course, would not get very far defending population disparities as part of an effort to crack and pack disfavored voters.<sup>227</sup> They should do no better when they disregard the equal population principle while seeking to perpetuate an advantage through locking and stocking.

The good news is that the Court's language in these one person, one vote cases need not—and should not—be understood to create a broad safe harbor whenever mapmakers defend population disparities

<sup>221</sup> See, e.g., *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012) (“The desire to minimize population shifts between districts is clearly a valid, neutral state policy.”); *Karcher*, 462 U.S. at 740 (“Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.”).

<sup>222</sup> See, e.g., *White*, 412 U.S. at 791 (describing Texas's claim that population variances in its congressional districts “represent[ed] good-faith efforts by the State to promote ‘constituency-representative relations,’” and asserting that its policy is “frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's [congressional] delegation have achieved”). The Court in *White* “d[id] not disparage” the state's purported interest in incumbency protection, but it concluded that the population disparities in the state's plan “were not necessary to achieve the asserted state goal.” *Id.* at 791–92.

<sup>223</sup> See *Kim & Chen*, *supra* note 25, at 175 (suggesting that to allow core preservation as a justification for population deviations “would defeat the very purpose of redistricting: to redraw electoral districts in response to population changes”).

<sup>224</sup> See *supra* Part II.

<sup>225</sup> Vividly illustrating the unfortunate tendency to lump together continuity criteria and traditional geographic criteria, the Supreme Court in *Tennant v. Jefferson County Commission* declared that “our cases leave little doubt that avoiding contests between incumbents and not splitting political subdivisions are valid, neutral state districting policies.” *Tennant*, 567 U.S. at 764.

<sup>226</sup> Writing in a different context, the Pennsylvania Supreme Court properly considered “the preservation of prior district lines [and] protection of incumbents . . . to be wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018).

<sup>227</sup> Cf. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004) (holding that a reapportionment plan that deviated from population equality by almost ten percent violated one person, one vote principles since no legitimate state interest justified the deviation).

as the byproduct of locking and stocking. In *Karcher v. Daggett*,<sup>228</sup> the Court indicated mapmakers do not have carte blanche to subordinate population equality to other redistricting objectives. Instead, mapmakers must make two showings about the objectives they are purporting to advance at the expense of the equality principle. First, the objectives must reflect “consistently applied legislative policies.”<sup>229</sup> And second, they must be “nondiscriminatory.”<sup>230</sup> Mapmakers will often have difficulty meeting these requirements when they claim to have prioritized core retention and the avoidance of incumbent pairings over population equality.

Partly because continuity criteria (unlike geographic criteria) are hardly ever mandatory, mapmakers often apply them inconsistently and discriminatorily across redistricting cycles and across any given map depending upon the mapmakers’ underlying political goals.<sup>231</sup> A state’s purported desire to maintain continuity should carry little weight as a “legitimate objective[]” capable of justifying population disparities if, a decade prior, the state adopted a continuity-flouting gerrymander.<sup>232</sup> The same should be true when a map selectively preserves district cores and avoids incumbent pairings to benefit one party over another or certain officeholders over others.<sup>233</sup> *Larios v. Cox*,<sup>234</sup> a district court ruling summarily affirmed by the Supreme Court, well illustrates that mapmakers cannot opportunistically use continuity criteria to bypass population equality requirements.<sup>235</sup> Rejecting Georgia’s effort to justify population variances on continuity grounds, the district court observed that “the policy of pro-

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<sup>228</sup> 462 U.S. 725 (1983).

<sup>229</sup> *Id.* at 740.

<sup>230</sup> *Id.*

<sup>231</sup> See *supra* notes 47–60 and accompanying text (describing the differential treatment of continuity in Maryland and Wisconsin during the post-2010 and post-2020 redistricting cycles).

<sup>232</sup> *Karcher*, 462 U.S. at 740.

<sup>233</sup> Of course, many state constitutions have their own population equality protections, and state courts remain free to hold more categorically that the desire to preserve district cores and avoid contests between incumbents cannot justify population disparities between districts. For a broad survey of the “democracy principles” embedded in state constitutions, see generally Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

<sup>234</sup> 300 F. Supp. 2d 1320, 1347 (N.D. Ga.), *aff’d*, 542 U.S. 947 (2004) (finding that incumbency protection was not a legitimate state policy justifying population deviations in this instance, in part because the policy of protecting incumbents was not consistently and neutrally applied).

<sup>235</sup> See Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 408–09 (2017) (discussing the *Larios* court’s conclusion that the state’s supposed interests in incumbency protection and core retention were “pretextual” since they had been applied “inconsistently, to the exclusive advantage of only one party”).

tecting incumbents was not applied in a consistent and neutral way,” but rather “in a blatantly partisan and discriminatory manner.”<sup>236</sup>

Gerrylaunders has similarly cropped up as a defense to claims of racial gerrymandering. Courts in such cases must assess whether racial considerations improperly predominated over other factors as mapmakers configured districts.<sup>237</sup> To avoid liability, defendants typically try to offer race-neutral reasons for the disputed line-drawing decisions. These reasons sometimes include the desire to preserve district cores or to avoid incumbent pairings.<sup>238</sup> To some extent, the defensive use of core retention and incumbent protection here is less objectionable than in the one person, one vote context. In one person, one vote cases, courts are making implicit normative judgments about which reasons are good enough to justify population deviations.<sup>239</sup> In racial gerrymandering cases, courts are making a purely descriptive determination about whether racial or nonracial motives drove mapmakers’ decisions.<sup>240</sup> Thus, even blatantly partisan rationales can serve as valid defenses to a racial gerrymandering claim.<sup>241</sup> But courts

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<sup>236</sup> *Larios*, 300 F. Supp. 2d at 1347. The court explained that the plans under review “pitted numerous Republican incumbents against one another, while generally protecting their Democratic colleagues.” *Id.* The court also explained that, although the Supreme Court had accepted that “an interest in avoiding contests between incumbents may justify deviations from exact population equality,” it had not endorsed the idea “that general protection of incumbents may also justify deviations.” *Id.* at 1348; *see id.* (“In general, the lower courts have similarly listed *only* the prevention of contests between incumbents, rather than some broader notion of incumbency protection, as a legitimate state goal supporting population deviations.”).

<sup>237</sup> *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017).

<sup>238</sup> *See, e.g.*, *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (listing “incumbency protection” as one of the traditional districting principles that can weigh against a finding of racial predominance); *Easley v. Cromartie*, 532 U.S. 234, 240 (2001) (describing legislature’s policies of incumbency protection and district core preservation); Persily, *supra* note 75, at 653 (explaining that, “when confronted with the charge that race motivated the creation of a district, a jurisdiction can defend itself by saying that zealous attention to partisanship and incumbent protection, rather than race, was the real cause of the district’s shape”).

<sup>239</sup> *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253, 258–59 (2016) (explaining that, for state legislative districts, some deviation from perfect population equality is permissible “when it is justified by ‘legitimate considerations incident to the effectuation of a rational state policy,’” and that when deviations are less than ten percent, challengers “must show that it is more probable than not that a deviation . . . reflects the predominance of illegitimate reapportionment factors rather than . . . ‘legitimate considerations’” (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964))); *Larios*, 300 F. Supp. 2d at 1352–53 (concluding that population deviations in the challenged plans were “not supported by *any* legitimate, consistently-applied state interests”).

<sup>240</sup> *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 968 (1996) (indicating that race does not predominate in the drawing of district lines when a state primarily pursues “otherwise constitutional political gerrymandering”).

<sup>241</sup> *See Cooper*, 137 S. Ct. at 1464 (describing how race-based mapmaking must withstand strict scrutiny).

should still be wary of efforts to portray line-drawing decisions as being driven by continuity rather than race. Just as lawmakers commonly speak of retaining district cores and avoiding incumbent pairings to mask their political goals, they can similarly use those concepts to disguise racial motives. If mapmakers know of a prior district's racial composition and choose to preserve it because of its demography, that would seem to be a predominantly race-based decision even if cast in the more neutral language of continuity.<sup>242</sup> A federal district court in North Carolina recently made a point along these lines, explaining that “efforts to protect incumbents by seeking to preserve the ‘cores’ of unconstitutional districts . . . have the potential to embed, rather than remedy, the effects of an unconstitutional racial gerrymander.”<sup>243</sup>

It would be a welcome development for courts to approach gerrymandering defenses more skeptically when assessing federal one person, one vote and racial gerrymandering claims. State law, however, probably offers more fruitful avenues for curbing gerrymandering. Litigants and state courts have several possible paths forward.

First, it bears noting that most state constitutions contain their own population equality requirements.<sup>244</sup> To the extent federal courts do dilute the federal equal population guarantee by allowing mapmakers to use core retention and incumbency protection to justify population variances, state courts remain free to apply their own constitutional standards more vigorously.<sup>245</sup> And, in fact, some state courts have already done so.<sup>246</sup>

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<sup>242</sup> Cf. *Easley*, 532 U.S. at 262 n.3 (Thomas, J., dissenting) (asserting that the notion that incumbents may legitimately be protected “even where, as here, individuals are incumbents by virtue of their election in an unconstitutional racially gerrymandered district . . . is a questionable proposition”).

<sup>243</sup> *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C.), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018).

<sup>244</sup> See Kim & Chen, *supra* note 25, at 180–81 (noting that forty-nine states require population equality in state redistricting and twenty-nine states require population equality in federal redistricting).

<sup>245</sup> Cf. Bulman-Pozen & Seifter, *supra* note 233 (surveying the democratic guarantees embedded in state constitutions).

<sup>246</sup> See, e.g., *In re Legis. Districting of Gen. Assembly*, 175 N.W.2d 20, 26 (Iowa 1970) (“[T]here are instances of districts being created to facilitate keeping present members in office and . . . avoid[ing] having present members contest with each other . . . . When such factors enter into reapportionment it cannot be said that ‘a good-faith effort to establish districts substantially equal in population has been made’. [sic]” (quoting *League of Neb. Municipalities v. Marsh*, 232 F. Supp. 357, 360–61 (1964))); *Jackman v. Bodine*, 231 A.2d 193, 200 (N.J. 1967) (stating that “residence of incumbents . . . cannot support [population] deviations of any kind”).

Second, as noted in Section II.A, most states have constitutional or statutory provisions that require mapmakers to apply particular geographic districting criteria, such as assuring compactness and preserving political subdivision boundaries.<sup>247</sup> Conversely, most states do not have laws that require mapmakers to attempt to preserve prior districts or avoid contests between incumbents. When mapmakers prioritize those discretionary criteria over legally delineated geographic criteria, that would appear to invite a claim that the geographic criteria have been impermissibly neglected.<sup>248</sup> Take Wisconsin as an example. Its constitution requires the legislature to “apportion and district anew” after a census, requiring the use of contiguous single-member districts that are “bounded by county, precinct, town or ward lines” and are “in as compact form as practical.”<sup>249</sup> Nothing in these provisions licenses the legislature to adopt a map that subordinates these criteria to an extra-legal preference for core retention or the avoidance of incumbent pairings. If lawmakers had practical options for splitting fewer subdivisions and improving compactness, they were presumably obliged to take them.

Some state courts have been reluctant to enforce their legally announced geographic criteria on the ground that mapmakers must have discretion to balance competing objectives.<sup>250</sup> Such reticence may be warranted when the dispute is about whether mapmakers should have given more weight to one legally required criterion (such as compactness) instead of another (such as keeping political subdivisions intact). But when the law mandates the application of one set of criteria and mapmakers instead focus on a different set of extra-legal criteria, the case for deference largely evaporates. As a simple matter of interpretation, it would be strange to allow unwritten preferences to trump plain text. The Florida Supreme Court recognized as much in

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<sup>247</sup> *Supra* Section II.A.

<sup>248</sup> *Cf. In re Legis. Districting of State*, 805 A.2d 292, 297 (Md. 2002) (explaining lawmakers may consider factors that the law does not expressly delineate but that such “non-constitutional criteria cannot override the constitutional ones”).

<sup>249</sup> WIS. CONST. art. IV, §§ 3–4.

<sup>250</sup> *See, e.g., Pearson v. Koster*, 367 S.W.3d 36, 50 (Mo. 2012) (en banc) (indicating, in response to a claim that the state’s congressional districts were not sufficiently compact, that the state constitution “implicitly permit[ted] consideration” of such factors as “the historical boundary lines of prior redistricting maps”); *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002) (“[T]he General Assembly must balance a number of competing constitutional and statutory factors when designing electoral districts. In addition, traditional redistricting elements not contained in the statute, such as preservation of existing districts, incumbency, voting behavior, and communities of interest, are also legitimate legislative considerations.”).



an instructive ruling following the 2010 redistricting cycle.<sup>251</sup> The court faulted the state legislature for prioritizing fidelity to the “admittedly gerrymandered” prior state legislative map over compliance with the state’s constitutionally articulated requirements of compactness and subdivision intactness.<sup>252</sup> Similarly, the Pennsylvania Supreme Court has explained that state constitutional requirements “regarding population equality, contiguity, compactness, and respect for the integrity of political subdivisions . . . necessarily trump mere political factors”—including preserving district cores and protecting incumbents—“that might color or corrupt the constitutional reapportionment process.”<sup>253</sup>

Third, an additional type of state-law challenge to gerrylaunders is available in those states that have adopted political fairness criteria for districting. Florida, for instance, prohibits drawing districts “with the intent to favor or disfavor a political party or an incumbent,”<sup>254</sup> while Hawaii provides that districts “shall [not] be so drawn as to unduly favor a person or political faction,”<sup>255</sup> and Michigan bars districts that “favor or disfavor an incumbent elected official or candidate.”<sup>256</sup> Some of the states with laws like these are the same ones that have placed redistricting in the hands of politically insulated commissions, so they may be less likely to adopt gerrylaunders in the first place. But if mapmakers in these states do engage in locking and stocking, these laws appear to provide a ready response. Preserving district cores reliably serves to advantage incumbents, and mapmakers know it. Avoiding contests between incumbents is an even more blatant form of favoritism. Courts in these states might justifiably declare locking and stocking to be categorically off limits.

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<sup>251</sup> *In re* Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 654 (Fla. 2012).

<sup>252</sup> *Id.* at 654, 678 (“[T]he Senate violated the compactness requirement by simply keeping the cores of the previously existing districts without performing a functional analysis and endeavoring to draw compact districts that also adhere to Florida’s minority voting protection provision.”).

<sup>253</sup> *Holt v. 2011 Legis. Reapportionment Comm’n*, 67 A.3d 1211, 1235 (Pa. 2013); *id.* at 1234 (“[T]he notion that the [Pennsylvania] Constitution independently, and tacitly, commands special respect for prior districting plans or incumbencies can be a mischievous one.”). The Pennsylvania Supreme Court invalidated the state legislative plan adopted by the state’s Legislative Reapportionment Commission following the 2010 census, concluding that it did not comply with the geographic redistricting principles set forth in the Pennsylvania Constitution. *Holt v. 2011 Legis. Redistricting Comm’n*, 38 A.2d 711 (Pa. 2011). The Commission then drew a new map, which the court upheld. *See Holt*, 67 A.3d at 1242–43 (finding the revised redistricting plan compliant with the Pennsylvania Constitution).

<sup>254</sup> FLA. CONST. art. III, §§ 20(a), 21(a).

<sup>255</sup> HAW. CONST. art. IV, § 6.

<sup>256</sup> MICH. CONST. art. IV, § 6(13).

Finally, unlike their federal counterparts, some state courts have recognized causes of action for partisan gerrymandering.<sup>257</sup> The legal provisions and reasoning that underlie these rulings would seem to encompass gerrylaunders as well. The Pennsylvania Supreme Court, for instance, grounded its decision to invalidate Pennsylvania's post-2010 congressional map in a constitutional provision guaranteeing that "[e]lections shall be free and equal."<sup>258</sup> This clause, the court explained, embodies a "commitment to neutralizing factors which unfairly impede or dilute individuals' rights to select their representatives . . . ." <sup>259</sup> It thus "guards against the risk of . . . artificially entrenching representative power, and discouraging voters from participating in the electoral process because they have come to believe that the power of their individual vote has been diminished to the point that it 'does not count.'"<sup>260</sup> Given that gerrylaunders, like active gerrymandering, operates to give those in power "a lasting electoral advantage," it would seem to come squarely within the clause's "broad and wide sweep."<sup>261</sup> The North Carolina Supreme Court embraced an analogous reading of the North Carolina Constitution's Declaration of Rights, which includes a guarantee that "[a]ll elections shall be free."<sup>262</sup> According to the court, mapmakers engage in unconstitutional partisan gerrymandering when they "choke[] off the channels of political change on an unequal basis" or "systematically make[] it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size."<sup>263</sup> Again, if these are the constitutionally proscribed harms, gerrylaunders would seem to be a prime offender.<sup>264</sup>

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<sup>257</sup> See, e.g., *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022); *Adams v. DeWine*, No. 2021-1428, 2022 WL 129092 (Ohio Jan. 14, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, No. 2021-1193, 2022 WL 110261 (Ohio Jan. 12, 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019); Memorandum Opinion and Order at 88, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022); see also *Bulman-Pozen & Seifter*, *supra* note 233 (discussing recent state-court partisan gerrymandering rulings).

<sup>258</sup> PA. CONST. art. I, § 5; see also *League of Women Voters*, 178 A.3d at 808–09.

<sup>259</sup> *League of Women Voters*, 178 A.3d at 814.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 809, 814.

<sup>262</sup> N.C. CONST. art. I, § 10; *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at \*9 (N.C. Super. Ct. Sept. 3, 2019).

<sup>263</sup> *Harper v. Hall*, 868 S.E.2d 449, 546 (N.C. 2022).

<sup>264</sup> Indeed, the North Carolina Supreme Court concluded that "incumbency protection is not a compelling governmental interest that justifies the denial to a voter of the fundamental right to substantially equal voting power under the North Carolina Constitution." *Id.* at 550.

## 2. *Drawing Maps*

Perhaps the clearest takeaways for courts and litigants involve judicial mapmaking. When lawmakers or others with primary authority to redistrict fail to act (usually in the wake of a census), responsibility for devising a new plan falls to courts. Mapmaking litigation tends to be a complex and contentious whirlwind, and courts do not relish the task.<sup>265</sup> But it is a job courts perform with regularity. Following the 2010 census, state and federal courts around the country crafted about a dozen congressional and state legislative maps.<sup>266</sup> During the unfolding post-2020 redistricting cycle, courts have again stepped in to produce maps in several states where ordinary mapmaking processes failed.<sup>267</sup>

As courts proceed, they must identify the guiding principles they will use to evaluate competing litigant-proposed maps or to instruct court-appointed drafting specialists.<sup>268</sup> Among other things, this means making highly consequential decisions about what weight, if any, to give to the prior map. Should the new map seek to preserve existing district cores and/or minimize incumbent pairings? Or should it instead embody a forward-looking effort to implement redistricting criteria set forth in federal and state law (perhaps supplemented by prudential considerations and equitable precepts)? Although questions about whether and how to use the prior map indelibly impact the configuration of the new one, litigants often give them short shrift,

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<sup>265</sup> See, e.g., *Wise v. Lipscomb*, 437 U.S. 535, 540–41 (1978) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)) (describing judicial mapmaking as an “unwelcome obligation”).

<sup>266</sup> See *National Summary, Who Draws the Lines?*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/national-overview/?colorby=COurt%20Action&level=State%20Lower&cycle=2010> [<https://perma.cc/DYY6-XZCA>] (providing a state-by-state breakdown on who draws legislative maps).

<sup>267</sup> Connecticut, Minnesota, Pennsylvania, Virginia, and Wisconsin are among the states where courts have adopted new state legislative and/or congressional maps. See *In re Petition of Reapportionment Comm’n*, 268 A.3d 1185 (Conn. 2022) (mem.) (per curiam) (congressional districts); *Wattson v. Simon*, 970 N.W.2d 42 (Minn. Spec. Redistricting Panel 2022) (state legislative districts); *Wattson v. Simon*, 970 N.W.2d 56 (Minn. Spec. Redistricting Panel 2022) (congressional districts); *Carter v. Chapman*, 270 A.3d 444 (Pa. 2022) (congressional districts); Final Order Establishing Voting Districts for the Senate of Virginia, the House of Delegates of Virginia, and Virginia’s Representatives to the United States House of Representatives, *In re Decennial Redistricting Pursuant to the Const. of Va.*, art. II, §§ 6 to 6-A, and Va. Code § 30-399 (Va. Dec. 28, 2021), [https://www.vacourts.gov/courts/scv/districting/redistricting\\_final.pdf](https://www.vacourts.gov/courts/scv/districting/redistricting_final.pdf) [<https://perma.cc/JZH7-9XVS>]; *Johnson v. Wis. Elections Comm’n*, No. 2021AP1450-OA, 2022 WL 1125401 (Wis. Apr. 15, 2022) (state legislative districts); *Johnson v. Wis. Elections Comm’n*, 400 Wis. 2d 626 (2022), *rev’d in part*, 142 S. Ct. 1245 (2022) (congressional districts).

<sup>268</sup> See Persily, *supra* note 24, at 1148 (describing how courts often appoint special masters to supervise court-drawn plans).

and courts commonly gloss over them with surprisingly little discussion.

Existing decisions run the gamut. As Nathaniel Persily has written, “courts will vary considerably in the degree of attention they will pay to maintaining the cores of districts or protecting incumbents.”<sup>269</sup> This dissensus likely derives not only from inattention, but also from the vagaries of litigation and from a lack of binding precedent, since the relevant rulings are often made in trial courts, are unpublished, and/or do not purport to establish generally applicable rules.<sup>270</sup>

At one end of the spectrum, courts have sometimes embraced so-called “least-change” plans.<sup>271</sup> During the post-2010 redistricting cycle, for example, it fell to the Connecticut Supreme Court to remap the state’s five congressional districts.<sup>272</sup> The court instructed its special master to “modify the existing congressional districts only to the extent reasonably required to” equalize their populations and comply with the Voting Rights Act.<sup>273</sup> Congressional redistricting again fell to the Connecticut Supreme Court during the post-2020 cycle, and the court proceeded similarly.<sup>274</sup> Along similar lines, a specially consti-

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<sup>269</sup> *Id.* at 1157; *see also* Ortiz, *supra* note 35, at 668–69 (noting that courts “sometimes” sought to “preserve . . . the core of existing districts,” but that the practice was not “uniform[]”).

<sup>270</sup> Following the 2010 census, for example, a Mississippi federal court largely carried forward prior congressional district boundaries after all parties in the litigation apparently consented to that approach. *See* Smith v. Hosemann, 852 F. Supp. 2d 757, 764 (S.D. Miss. 2011).

<sup>271</sup> Persily, *supra* note 24, at 1135; *see, e.g.*, Below v. Gardner, 963 A.2d 785, 795 (N.H. 2002) (“[T]he court’s [state senate] plan imposes the least change for New Hampshire citizens[.]”); Colleton Cnty. Council v. McConnell, 201 F. Supp. 2d 618, 647–49 (D.S.C. 2002) (describing core retention and incumbency protection as “traditional redistricting principles in South Carolina” and adopting a plan that “maintain[s] the core of those districts present in the malapportioned plan”).

<sup>272</sup> Order Directing Special Master, *In re* Petition of Reapportionment Comm’n *ex rel.*, No. SC 18907 (Conn. Jan. 3, 2012), [https://cga.ct.gov/red2011/documents/final/SC18907\\_010312.pdf](https://cga.ct.gov/red2011/documents/final/SC18907_010312.pdf) [<https://perma.cc/FU4R-8SBS>].

<sup>273</sup> *Id.* Nathaniel Persily happened to serve as the court’s special master. He reported that he “set out to construct a ‘least-change’ plan within the constraints described [by the court].” Draft Report & Plan of the Special Master, *In re* Petition of Reapportionment Comm’n *ex rel.*, No. SC 18907, at 19 (Conn. Jan. 13, 2012), [https://cga.ct.gov/red2011/documents/special\\_master/Merged%20Draft%20Report%20with%20Exhibits.pdf](https://cga.ct.gov/red2011/documents/special_master/Merged%20Draft%20Report%20with%20Exhibits.pdf) [<https://perma.cc/L68Z-WGX9>].

<sup>274</sup> *See* Order Appointing & Directing Special Master, *In re* Petition of Reapportionment Comm’n *ex rel.*, No. SC 20661, (Conn. Dec. 23, 2021), <https://redistricting.ils.edu/wp-content/uploads/CT-apportionment-comm.-20211223-order-appointing-special-master.pdf> [<https://perma.cc/D8TQ-NWPT>] (instructing the special master to “modify the existing congressional districts only to the extent reasonably required to comply with” specified legal requirements). The court again appointed Nathaniel Persily as its special master. *Id.*

tuted Minnesota state-court redistricting panel adopted what it described as “a least-change congressional plan” during the post-2010 cycle that “made minimal adjustments to the [state’s eight] congressional district boundaries rather than completely reconfiguring them.”<sup>275</sup>

In a recent ruling during the post-2020 cycle, a divided Wisconsin Supreme Court endorsed a “least change” approach and offered a relatively lengthy explanation for its decision.<sup>276</sup> In particular, the court portrayed the approach as a way to “confine[] [the court’s] role to its proper adjudicative function,” respect the “constitutional prerogatives of the political branches,” and “safeguard[] [the court’s] long-term institutional legitimacy.”<sup>277</sup> On the court’s telling, remedying the malapportionment of Wisconsin’s congressional and state legislative districts while preserving to the extent possible the design choices of the lawmakers who created those districts a decade earlier served to minimize judicial policymaking.<sup>278</sup> The court expressed concern that “opt[ing] to draw maps from scratch” would require it to “act as a ‘super-legislature’” and potentially “alter[] Wisconsin’s political landscape” in a manner “profoundly incompatible with Wisconsin’s commitment to a nonpartisan judiciary.”<sup>279</sup>

Meanwhile, at the other end of the spectrum, other courts have declined to consider prior district configurations or incumbency information at all. In Michigan, for example, a three-judge federal district court panel and the state supreme court both avoided continuity criteria when constructing congressional and state legislative maps, respectively, following the 1990 census.<sup>280</sup> The federal panel directed its appointed expert to proceed without regard to “the preservation of

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<sup>275</sup> *Hippert v. Ritchie*, 813 N.W.2d 391, 397–98 (Minn. 2012). For state legislative districts, the panel used “a least-change strategy” for a subset of districts, but it concluded that substantial population shifts in certain regions required more dramatic reconfigurations. *Id.* at 392.

<sup>276</sup> *Johnson v. Wis. Elections Comm’n*, 967 N.W.2d 469, 491 (Wis. 2021).

<sup>277</sup> *Id.* at 488, 490, 492.

<sup>278</sup> *See id.* at 490 (“A least-change approach is nothing more than a convenient way to describe the judiciary’s properly limited role in redistricting.”).

<sup>279</sup> *Id.* at 489, 491; *see also id.* at 489 n.7 (asserting that “[t]he judiciary lacks the institutional competency to make the kind of factual determinations necessary to properly consider various extra-legal factors”). The court added that the least-change approach had achieved “general acceptance among reasonable jurists,” *id.* at 490, but as the discussion below indicates, that is incorrect.

<sup>280</sup> *Good v. Austin*, 800 F. Supp. 557, 560–61 (E.D. & W.D. Mich. 1992); *In re Apportionment of State Legislature 1992*, 486 N.W.2d 639, 656 n.73 (Mich. 1992). A decade earlier, the Michigan Supreme Court similarly focused on the state constitution’s “dominant commitments” to contiguity and preserving political subdivision lines. *In re Apportionment of State Legislature 1982*, 321 N.W.2d 565, 583 (Mich. 1982). The court rejected calls to amend its criteria to include “preservation of existing legislative districts.”

‘population and geographic core areas’” of prior districts.<sup>281</sup> Drawing state legislative district lines after the 2000 census, the Maryland Supreme Court likewise had its consultants focus exclusively on federal and state constitutional and statutory requirements and directed them to “remove even from view where any incumbents lived.”<sup>282</sup> According to the court, to “use an existing plan as a constraint, especially if that constraint were allowed to override constitutional requirements, is to dictate a continuation of the deficiencies in the old plan.”<sup>283</sup>

More recently, courts in Minnesota and Virginia eschewed continuity considerations during the post-2020 redistricting cycle. In a shift from the state’s approach a decade earlier, Minnesota’s special redistricting panel adopted nine “redistricting principles” to guide its decision-making process, none of which involved preserving prior district configurations.<sup>284</sup> To the contrary, one of the court’s principles was that “[d]istricts must not be drawn with the purpose of protecting, promoting, or defeating any incumbent, candidate, or political party,” and the court declared that it would “not draw districts based on the residence of incumbent officeholders.”<sup>285</sup>

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*In re Apportionment of State Legislature 1982*, 321 N.W.2d 585, 605 (Mich. 1982) (Levin & Fitzgerald, J., concurring).

<sup>281</sup> *Good*, 800 F. Supp. at 564.

<sup>282</sup> *In re Legis. Districting of State*, 805 A.2d 292, 298 (Md. 2002); *id.* at 328 (holding “that the goals of avoiding the loss of experienced legislators and reducing incumbent contests, though rational, do not override the constitutional requirement that due regard be given the subdivision boundaries”); *id.* at 323–24 (faulting the special master for seeking to preserve district cores at the expense of constitutionally mandated criteria).

<sup>283</sup> *Id.* at 328; *id.* (“By incorporating this goal in a districting plan, subdivision crossings already in existence will likely continue, or in the case of compactness, non-compactness may be inevitable.”). Embracing similar reasoning, the Indiana Supreme Court established city-county council districts for Indianapolis and Marion County based only on “factors required by applicable federal and State law,” using a computer program that relied “solely on the identified criteria,” with no consideration of “party affiliation or incumbency.” *Peterson v. Borst*, 786 N.E.2d 668, 669, 677 (Ind. 2003).

<sup>284</sup> Order Stating Preliminary Conclusions, Redistricting Principles & Requirements for Plan Submissions, *Watson v. Simon*, Nos. A21-0243, A21-0546, at 5–8 (Nov. 18, 2021), <https://redistricting.ils.edu/wp-content/uploads/MN-watson-20211118-Order.pdf> [<https://perma.cc/K75X-GAE6>]. The court invited parties to propose plans and directed them to include data on such matters as population deviations, compactness, and political subdivision splits, but it did not seek core retention data or other continuity-related information. *Id.* at 10–11.

<sup>285</sup> *Id.* at 8; *see also* *Watson v. Simon*, 970 N.W.2d 42, 46, 51 (Minn. Special Redistricting Panel 2022) (reiterating these criteria with respect to state legislative districts and noting that “election districts do not exist for the benefit of any particular legislator or political party”); *Watson v. Simon*, 970 N.W.2d 56, 59–60 (Minn. Special Redistricting Panel 2022) (same for congressional districts).

In Virginia, the state supreme court had to step in after the state's newly created bipartisan redistricting commission deadlocked.<sup>286</sup> By law, the court was required to appoint two special masters (one chosen from nominees of each major party) to develop plans for the court's consideration.<sup>287</sup> The court instructed them to propose maps that complied with an enumerated list of federal and state legal requirements in a specific "order of precedence" and to act "in an apolitical and nonpartisan manner."<sup>288</sup> The court made no mention of core retention or incumbency protection, and the special masters declined to preserve the status quo despite calls from some "speakers and commentators . . . for a 'minimal changes' map."<sup>289</sup> They explained that "a minimal changes map based upon districts drawn with heavy political considerations would, in our view, bless those districts and contravene the intent of the voters when they passed the Virginia Redistricting Amendment [which established the state's bipartisan redistricting commission]."<sup>290</sup> Instead, the special masters prioritized legally enunciated districting criteria, which resulted in substantial "geographic consolidation" compared to the prior "convoluted" lines.<sup>291</sup> Noting that the law "make[s] no mention of protecting incumbents," they also "maintained ignorance" about incumbent residences.<sup>292</sup> Their maps ended up pairing a substantial number of incumbents, which they regarded not as a shortcoming, but rather as "an example of the redistricting process working as intended."<sup>293</sup>

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<sup>286</sup> See Meagan Flynn, *Virginia's Redistricting Commission's Failure to Transcend Partisanship Has Lessons for Other States, Critics Say*, WASH. POST, Oct. 25, 2021; VA. CONST. art. II, § 6-A (establishing the Virginia Redistricting Commission).

<sup>287</sup> VA. CODE § 30-399(F) (2020).

<sup>288</sup> Redistricting Appointment Order, *In re* Decennial Redistricting Pursuant to the Const. of Va., art. II, §§ 6 to 6-A, and Virginia Code § 30-399, at 2–3 (Va. Nov. 19, 2021).

<sup>289</sup> Memorandum from Bernard Grofman and Sean Trende to the Chief Justice and Justices of the Supreme Court of Virginia re: Redistricting Maps, at 5 (Dec. 27, 2021), [https://www.vacourts.gov/courts/scv/districting/2021\\_virginia\\_redistricting\\_memo.pdf](https://www.vacourts.gov/courts/scv/districting/2021_virginia_redistricting_memo.pdf) [<https://perma.cc/YH88-92DN>] [hereinafter Dec. 27 Grofman & Trende Memo].

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 3.

<sup>292</sup> Memorandum from Bernard Grofman and Sean Trende to the Chief Justice and Justices of the Supreme Court of Virginia re: Redistricting Maps, at 10 (Dec. 7, 2021), [https://www.vacourts.gov/courts/scv/districting/memorandum\\_re\\_va\\_redistricting\\_2021.pdf](https://www.vacourts.gov/courts/scv/districting/memorandum_re_va_redistricting_2021.pdf) [<https://perma.cc/WM3E-2T97>].

<sup>293</sup> Dec. 27 Grofman & Trende Memo, *supra* note 289, at 3. The special masters did note that, because their maps eliminated many glaring geographic peculiarities of the prior plans, "future remaps should not involve the same amount of disruption." *Id.* at 5; see also Final Order Establishing Voting Districts for the Senate of Virginia, the House of Delegates of Virginia, and Virginia's Representatives to the United States House of Representatives, *In re* Decennial Redistricting Pursuant to the Const. of Va., art. II, §§ 6 to 6-A, and Va. Code § 30-399 (Va. Dec. 28, 2021), [https://www.vacourts.gov/courts/scv/districting/redistricting\\_final.pdf](https://www.vacourts.gov/courts/scv/districting/redistricting_final.pdf) [<https://perma.cc/JZH7-9XVS>]; Editorial Board, *New*

Still other courts have adopted a range of intermediate positions. Gesturing toward the least-change approach, a few courts have invoked higher core retention levels and fewer incumbent pairings as important reasons to choose one litigant-proposed plan over another.<sup>294</sup> Other courts have folded continuity considerations into their broader analysis, weighing them alongside geographic criteria and other factors but without giving them any special weight.<sup>295</sup> The plans these courts have adopted often make substantial changes from the status quo.<sup>296</sup> Finally, gesturing toward an entirely forward-

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*Voting Maps, and a New Day, for Virginia*, WASH. POST (Jan. 2, 2022), <https://www.washingtonpost.com/opinions/2022/01/02/virginia-redistricting-voting-maps-gerrymander> [<https://perma.cc/B72A-MD59>] (noting that the new maps “doubled or tripled up” “[n]early half of sitting state senators and delegates” and drew three congressional incumbents out of their current districts while subjecting others to more “electorally perilous configurations”).

<sup>294</sup> Presented with three party-submitted congressional district plans following the 2010 census, a New Mexico court chose the one that shifted the fewest people between districts, explaining that “[p]reserving the core of existing districts is an important consideration in redistricting.” *Egolf v. Duran*, No. D-101-CV-2011-02942, at 4 (N.M. Dist. Dec. 29, 2011); *see also* *Wesch v. Hunt*, 785 F. Supp. 1491, 1496–97 (S.D. Ala. 1992) (choosing a plan that “maintain[ed] the cores of existing districts to a much greater extent than” the chief alternative option), *aff’d mem. sub nom.* *Camp v. Wesch*, 504 U.S. 902 (1992) and *aff’d mem. sub nom.* *Figures v. Hunt*, 507 U.S. 901 (1993); *Wells v. White*, 623 S.W.2d 187, 189 (Ark. 1981) (“[I]t is proper [for a court-ordered redistricting plan] to consider existing legislative districts, communities of interest, natural boundaries, incumbency and geographic interests.”); *In re* 2003 Apportionment of the State Senate & U.S. Cong. Dists., 827 A.2d 844, 849 (Me. 2003) (noting that its preferred plan “move[d] fewer communities into different districts” than the alternatives).

<sup>295</sup> *See, e.g.,* *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1094 (D. Kan. 2012) (accepting core preservation as a valid policy but declining to adopt least-change congressional and state legislative maps and explaining that it instead “push[ed] a re-set button” by attempting “to restore compact contiguous districts where possible”); *LaComb v. Grove*, 541 F. Supp. 145, 151 (D. Minn. 1982), *aff’d sub nom.* *Orwoll v. LaComb*, 456 U.S. 966 (1982) (taking the prior congressional map “as the starting point” but applying “the enduring, articulated policies of the State . . . affirmatively and positively”). The new Texas congressional plan adopted by a federal district court after the 2000 census, and discussed by the U.S. Supreme Court in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), may fall into this category. The district court did not purport to adopt a least-change plan. It did seek to preserve the state’s existing majority-minority districts and to “avoid[] the pairing of incumbents,” which it regarded as one of the state’s established redistricting principles. *Id.* at 412. Together, these choices preserved significant features of the prior map. But the court also created two new congressional districts because Texas had gained two seats in the census, and it sought to apply the state’s rules for following county lines and avoiding splits of voting precincts. *Id.*; *see also* *Henderson v. Perry*, 399 F. Supp. 2d 756, 768 (E.D. Tex. 2005), *aff’d in part, vacated in part, rev’d in part sub nom.* *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

<sup>296</sup> *See, e.g.,* *Essex*, 874 F. Supp. 2d at 1094 (observing that the court ultimately produced maps that “look different from those now in place”).



looking approach, some courts have considered continuity factors but explicitly subordinated them to other redistricting criteria.<sup>297</sup>

*Favors v. Cuomo*, a federal case from New York during the post-2010 redistricting cycle, falls into this last category, and the court's unusually detailed decision to give only minimal weight to continuity considerations is instructive.<sup>298</sup> As part of its effort to establish a new congressional map for the state, the three-judge district court panel in *Favors* instructed a magistrate judge to apply "four traditional redistricting factors"—"(1) district compactness, (2) contiguity, (3) respect for political subdivisions, and (4) preservation of communities of interest."<sup>299</sup> The panel also gave the magistrate judge discretion to consider other factors that parties might offer, and some litigants, in turn, urged the magistrate judge and the panel to protect incumbents and retain district cores.<sup>300</sup> In an effort to "insulate [the plan] from any complaint of actual or apparent partisan bias," the magistrate judge and panel "assign[ed] no weight to incumbency protection."<sup>301</sup> The magistrate judge described incumbency protection as a factor that may be "permissible" for lawmakers to consider when redistricting, but one that "ha[d] no place in a plan formulated by the courts."<sup>302</sup>

As for core retention, the magistrate judge and the panel observed that New York law did not "mandate that new districts maintain the cores of prior districts," and they were "not persuaded

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<sup>297</sup> See, e.g., *Carter v. Chapman*, 270 A.3d 444, 457 (Pa. 2022) (accepting core retention as a factor that had "historically played a role in the creation of legislative districts" in Pennsylvania, but describing it as "wholly subordinate" to traditional redistricting criteria, such as compactness and minimizing political subdivision splits); *Smith v. Clark*, 189 F. Supp. 2d 512, 526 (S.D. Miss.), *aff'd sub nom.* *Branch v. Smith*, 538 U.S. 254 (2003) (ranking prior boundaries and incumbency among the court's lowest priority factors when drawing congressional districts in Mississippi).

<sup>298</sup> *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); see also Magistrate Judge's Report & Recommendation, *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928216 (E.D.N.Y. Mar. 12, 2012).

<sup>299</sup> *Favors*, 2012 WL 928223, at \*4-5; see also Magistrate Judge's Report & Recommendation, *Favors*, 2012 WL 928216, at \*10 (noting the district court's instruction "to create districts that, to the extent possible, are compact, contiguous, respect political subdivisions, and preserve communities of interest") (internal quotation marks omitted). The magistrate judge acted "with the assistance of its redistricting consultant, Dr. Nathaniel Persily." *Id.* at \*1.

<sup>300</sup> *Favors*, 2012 WL 928223, at \*4-5; see also Magistrate Judge's Report & Recommendation, *Favors*, 2012 WL 928216, at \*13.

<sup>301</sup> *Favors*, 2012 WL 928223, at \*7; see also Magistrate Judge's Report & Recommendation, *Favors*, 2012 WL 928216, at \*16 (noting that the court "did not obtain . . . the addresses of any incumbents' residences" and that the plan was "created without regard to incumbency"). The plan ultimately paired several incumbents and made no effort to accommodate incumbents who resided "near the fringes" of their prior district. *Id.* at \*16 n.18.

<sup>302</sup> Magistrate Judge's Report & Recommendation, *Favors*, 2012 WL 928216, at \*17 (quoting *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985)).

that there is in fact a consistent state legislative policy of maintaining district cores.”<sup>303</sup> As the magistrate judge saw it, to the extent district cores had been preserved in the past, it was “more likely the product of political deal-making—an activity for which courts are ill[-]suited—than a conscious attempt to advance ‘core preservation’ as a legislative policy.”<sup>304</sup> The panel added that, as a practical matter, it was “not easy to distinguish core preservation from incumbent protection in this case”; the parties advocating core retention were doing so largely to advance their incumbent-protecting aims.<sup>305</sup> Ultimately, the magistrate judge and panel did not categorically reject the relevance of core retention, but they accounted for it only “to the extent that doing so did not conflict with the [geographic] factors specifically enumerated by the [court] and afforded greater weight in the caselaw.”<sup>306</sup>

This Article’s bottom-line conclusion is that mapmaking courts should generally give core retention and incumbency protection less weight rather than more. Decisions like *Favors* are on the right track, as are the approaches taken in Minnesota and Virginia during the post-2020 cycle. If anything, the *Favors* court should have gone slightly further and fully aligned itself with the courts that have eschewed core retention entirely.<sup>307</sup> In contrast, a least-change approach misses the mark. Courts that have embraced least-change plans tend to rely in part on assumptions about the legal status of continuity criteria and on claims about stability and accountability

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<sup>303</sup> *Id.* at \*15; see also *Favors*, 2012 WL 928223, at \*5.

<sup>304</sup> Magistrate Judge’s Report & Recommendation, *Favors*, 2012 WL 928216, at \*15.

<sup>305</sup> *Favors*, 2012 WL 928223, at \*8 n.21.

<sup>306</sup> Magistrate Judge’s Report & Recommendation, *Favors*, 2012 WL 928216, at \*16 n.18; see also *Favors*, 2012 WL 928223, at \*8 (declining to “give core preservation greater weight” than the magistrate judge had). The panel observed that, in the end, “nearly half (13) of the new districts contain[ed] at least 70% of a prior district’s population.” *Id.* at \*8 n.19. The Pennsylvania Supreme Court articulated a somewhat similar view when it imposed a new congressional map during the post-2020 redistricting cycle. After reviewing litigant-proposed maps, the court selected one that largely carried forward the existing map—a map that the court itself had adopted in 2018 after holding that the post-2010 legislatively enacted map was an unlawful partisan gerrymander. *Carter v. Chapman*, 270 A.3d 444, 463 (Pa. 2022). The court regarded the prior map as “a reasonable starting point” given that it “was adopted only four years ago and in strict conformity with the traditional [redistricting] criteria.” *Id.* at 464. The court clarified, however, that its decision did not rest on the proposed map’s “starting point, but rather its end point.” *Id.* In other words, the court did not embrace continuity for its own sake; instead, it concluded that “the least change approach worked in this case to produce a map” that excelled on both traditional geographic criteria and partisan fairness. *Id.* Two concurring justices placed somewhat more weight on continuity as a virtue of the court’s chosen map. See *id.* at 477–78 (Dougherty, J., concurring); 486–90 (Wecht, J., concurring).

<sup>307</sup> The court may have felt constrained by precedents in the Second Circuit that had “recognized core preservation as a traditional redistricting principle.” Magistrate Judge’s Report & Recommendation, *Favors*, 2012 WL 928216, at \*15.

that Part II of this Article calls into doubt.<sup>308</sup> Given that locking and stocking have little legal grounding and weak policy justifications, courts should be extremely wary of adopting maps that may operate as judicially created gerrylaunders.

Institutional concerns about the judiciary's proper role do not shift the calculus in favor of a least-change approach. Contrary to the suggestion of some courts, including the Wisconsin Supreme Court, embracing continuity does not enable adjudicators to avoid making politically consequential policy judgments.<sup>309</sup> For starters, because change minimization is hardly ever required under federal or state law,<sup>310</sup> a court's very decision to prioritize it is itself a policy choice that can have significant political ramifications.<sup>311</sup> Moreover, any attempt to operationalize a least-change approach requires a court to make an array of subjective follow-on judgments about how to measure conformity with the prior map and how to balance the pursuit of continuity with other legally required and prudential redistricting criteria.<sup>312</sup>

A least-change approach also makes little sense as a way to respect the intent of the lawmakers who drafted the prior decade's now-unusable maps (assuming those prior maps were indeed legislatively adopted). The judgments embodied in those maps were invariably context-specific, rooted in the previous decade's particular

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<sup>308</sup> See, e.g., S.C. State Conf. of Branches of NAACP v. Riley, 533 F. Supp. 1178, 1180–81 (D.S.C. 1982), *aff'd sub nom.* Stevenson v. S.C. State Conf. of Branches of NAACP, 459 U.S. 1025 (1982) (contending that the value of “continued representation” meant that “great alterations of the old districts should not be undertaken if lesser change will achieve the desired result”).

<sup>309</sup> See *supra* notes 276–79 and accompanying text; see also Hippert v. Ritchie, 813 N.W.2d 374, 380 (Minn. 2012) (“Because courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible.”); Below v. Gardner, 963 A.2d 785, 794 (N.H. 2002) (taking the existing state senate map as its “benchmark” because that map “is the last validly enacted plan and is the ‘clearest expression of the legislature’s intent’” (quoting Colleton Cnty. Council v. McConnell, 201 F. Supp. 2d 618, 649 (D.S.C. 2002))).

<sup>310</sup> See *supra* Section II.A.

<sup>311</sup> See *Favors*, 2012 WL 928223, at \*6 (explaining that efforts to preserve district cores and protect incumbents “risk drawing the courts into political disputes” and “frequently require[] political tradeoffs”).

<sup>312</sup> See, e.g., *id.* at \*8 (“[D]eciding how much of a ‘core’ to preserve, as against other redistricting considerations, is itself a highly subjective—and potentially partisan—endeavor. As with protecting incumbents, . . . judicial competence and neutrality signal caution in assigning considerable weight to factors best resolved by the political branches.”); Brief of Legal Scholars in Support of No Party as Amici Curiae, Johnson v. Wis. Elections Comm’n, No. 2021AP1450-OA, at 7–12 (Wis. Jan. 5, 2022), <https://acefiling.wicourts.gov/document/uploaded/2021AP001450/470570> [<https://perma.cc/R7HS-X5PZ>] (describing the array of textually unmoored judgments that implementation of a least-change approach requires).

population distributions, demographics, and circumstances. It is pure speculation to suppose that those lawmakers would have drafted similarly configured maps had they been presented with the new decade's distinct population distributions, demographics, and circumstances. Under a different set of conditions, they may well have produced very different districts. A court that extends the shelf life of old legislative maps thus makes a choice that the creators of those maps likely did not intend. The U.S. Supreme Court has at least implicitly recognized this reality. It has held that, when a federal court must draft a remedial map because a state's "recently enacted plan" has a legal defect that renders it partly or wholly unusable, the court must "take guidance" from that recent plan in an effort to honor lawful state policy choices.<sup>313</sup> In contrast, when there is no recently enacted plan because lawmakers failed to fulfill their decennial responsibility to redistrict, the Court has not called for fidelity to the prior decade's stale maps. The deference owed to recent plans simply does not extend "to the outdated policy judgments of a now unconstitutional plan."<sup>314</sup> To fixate on continuity in such circumstances "is fundamentally at odds with the multidimensional task confronting the court."<sup>315</sup>

It is especially problematic for courts to pursue a least-change approach when doing so would perpetuate a previous gerrymander. This is precisely what the Wisconsin Supreme Court did during the post-2020 cycle when it chose to carry forward the flagrantly skewed

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<sup>313</sup> *Perry v. Perez*, 565 U.S. 388, 393 (2012); *see also Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam) (holding that, absent violations of the Constitution or the Voting Rights Act, the District Court should take into account the Legislature's political goals); *White v. Weiser*, 412 U.S. 783, 795 (1973) (same).

<sup>314</sup> *Favors*, 2012 WL 928223, at \*6; *see also Prosser v. Elections Bd.*, 793 F. Supp. 859, 865 (W.D. Wis. 1992) (explaining that when lawmakers fail to adopt a map, the relevant question is "not, Is some enacted plan constitutional? But, What plan shall we as a court of equity promulgate in order to rectify the admitted constitutional violation? What is the best plan?"); *LaComb v. Growe*, 541 F. Supp. 145, 150–51 (D. Minn. 1982), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982) (observing that the court did "not have a current expression of the State's political preferences regarding the complicated redistricting process" and thus faced a situation unlike one where "a contemporaneous decision by the State . . . resolves the competing political demands of incumbents and political parties").

<sup>315</sup> *Hall v. Moreno*, 270 P.3d 961, 966 (Colo. 2012) (internal quotation marks omitted). When the Colorado Supreme Court drew a new congressional map for the state after the 2010 census, Colorado was among the few states to affirmatively authorize consideration of prior lines. *See COLO. REV. STAT. ANN.* § 2-1-102 (West 2010) (repealed 2020). Even so, the court understood that it should not simply adopt a "minimum disruption" map, but instead seek "to ensure that the present needs and demands of Coloradoans are met by representatives that are responsive and accountable." *Moreno*, 270 P.3d at 966, 972; *see also id.* ("[T]he preservation of existing districts should not be weighed so heavily as to subsume the General Assembly's recognition of the importance of unified communities of interest, other than those that have solidified around historic districts, to representative democracy.").

maps that the state's Republican-controlled legislature enacted in 2011.<sup>316</sup> Encouragingly, the Wisconsin Supreme Court's ruling is an outlier.<sup>317</sup> It is highly unusual for courts to prioritize continuity in the face of credible claims that the existing map is politically biased. For the most part, the courts that have adopted least-change plans have done so only after assuring themselves that their updated map will not create or perpetuate a partisan inequity. For example, the Minnesota redistricting panel that adopted a least-change congressional plan during the post-2010 cycle took pains to emphasize the importance of adopting a "politically neutral" map that would "advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process."<sup>318</sup> Significantly, the map that the court carried forward was itself a court-drawn plan rather than one established by political actors. Similarly, a three-judge federal district court in Wisconsin chose to use the existing state legislative map "as a template" when it redistricted during the post-2000 cycle, but only after rejecting all litigant-submitted proposals as "unredeemable," in part because their "partisan origins . . . [we]re evident."<sup>319</sup> The court stressed its obligation to "avoid[] the creation of partisan advantage," and its comfort with the prior map appeared to hinge on that map's neutral origins, having been created by a federal court a decade earlier.<sup>320</sup> Indeed, when courts prioritize continuity, they are commonly carrying forward court-drawn maps rather than legislatively-drawn ones.<sup>321</sup>

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<sup>316</sup> See *supra* notes 55–60, 276–79.

<sup>317</sup> Based on standard partisan fairness metrics, the Wisconsin Supreme Court's chosen Assembly and Senate maps appear to be by far the most politically skewed state legislative maps adopted by a court anywhere in the country over at least the past three decennial redistricting cycles. See Rob Yablon, *Explainer: Wisconsin's New State Legislative Maps Compare Unfavorably to Other Court-Adopted Maps on Partisan Equity*, STATE DEMOCRACY RSCH. INITIATIVE (Apr. 18, 2022), <https://statedemocracy.law.wisc.edu/featured/2022/explainer-wisconsins-new-state-legislative-maps-compare-unfavorably-to-other-court-adopted-maps-on-partisan-equity> [<https://perma.cc/ZZ8H-6DPW>].

<sup>318</sup> *Hippert v. Ritchie*, 813 N.W.2d 374, 379 (Minn. 2012).

<sup>319</sup> *Baumgart v. Wendelberger*, Nos. 01–C–0121, 02–C–0366, 2002 WL 34127471, at \*4, \*6, \*7 (E.D. Wis. May 30, 2002).

<sup>320</sup> *Id.* at \*3; see also *Prosser v. Elections Bd.*, 793 F. Supp. 859, 865 (W.D. Wis. 1992) (establishing a state legislative plan that the court believed "combines the best features of the two best plans" submitted by the litigants).

<sup>321</sup> The post-2000 New Mexico congressional map that the state court partly carried forward during the 2010 cycle was court drawn. *Maestas v. Hall*, 274 P.3d 66, 71 (N.M. 2012). In Connecticut, the map carried forward during the 2010 cycle was drawn after the 2000 census by a bipartisan backup commission rather than the legislature. See generally *All About Redistricting: Connecticut*, LOYOLA L. SCH., <https://redistricting.lls.edu/state/connecticut> [<https://perma.cc/NA72-B4UP>].

The prevailing refusal of courts to adopt politically tainted maps as their own accords with the judiciary's distinctive institutional role. The notion that "the role of judges differs from the role of politicians" is not limited to the redistricting context; nor is the foundational tenet that judges are duty-bound to exercise "strict neutrality and independence."<sup>322</sup> But these ideas have special purchase when it comes to judicial mapmaking given that the enterprise is so politically fraught. The Wisconsin Supreme Court essentially took the position that the best way to be "apolitical and neutral" was simply to ignore the partisan implications of preserving the prior decade's maps.<sup>323</sup> The reality, however, is that a court cannot credibly claim to be acting apolitically and neutrally when it knowingly "carr[ies] forward maps with highly political origins that have produced egregiously non-neutral results."<sup>324</sup> In contrast to the Wisconsin Supreme Court, courts generally have been clear-eyed about the partisan nature of many litigant-proposed maps, which is one reason they often end up drafting their own. Time and again, courts have stressed that they must avoid the appearance or reality of political favoritism when they draw lines.<sup>325</sup> Judges, they have written, "are forbidden to be partisan politicians" and "should not select a plan that seeks partisan advantage."<sup>326</sup>

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<sup>322</sup> *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445, 446 (2015).

<sup>323</sup> *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 490 (Wis. 2021). The court explained that "[b]ecause partisan fairness presents a purely political question, we will not consider it." *Id.* at 482. The court relied heavily on the U.S. Supreme Court's holding in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), that partisan gerrymandering claims are nonjusticiable in federal court, but that decision provides little basis for ignoring partisan bias when adopting a judicially drawn plan. As other courts have recognized, even if they "pay little heed to cries of gerrymandering" when reviewing legislatively drawn maps, courts are duty-bound to guard against political bias when they produce their own remedial maps. *Prosser*, 793 F. Supp. at 867 (W.D. Wis. 1992).

<sup>324</sup> Robert Yablon, Opinion, *Wisconsin Supreme Court Is Wrong to Preserve Gerrymandered Electoral Maps*, MILWAUKEE J.-SENTINEL (Dec. 20, 2021), <https://www.jsonline.com/story/opinion/2021/12/20/wisconsin-supreme-court-wrong-preserve-gerrymandered-electoral-maps/8895483002> [<https://perma.cc/RT4D-Q9AP>].

<sup>325</sup> See, e.g., *In re Legis. Districting of State*, 805 A.2d 292, 298 (Md. 2002) ("When the Court drafts the plan, it may not take into account the same political considerations as the Governor and the Legislature."); *Burling v. Chandler*, 804 A.2d 471, 483 (N.H. 2002) ("While political considerations are tolerated in legislatively-implemented redistricting plans, they have no place in a court-ordered plan."); *Maestas*, 274 P.3d at 76 ("Because the redistricting process is embroiled in partisan politics, when called upon to draw a redistricting map, a court must do so with both the appearance and fact of scrupulous neutrality." (internal quotation marks omitted)); *id.* ("A court's adoption of a plan that represents one political party's idea of how district boundaries should be drawn does not conform to the principle of judicial independence and neutrality.").

<sup>326</sup> *In re Legis. Districting of State*, 805 A.2d at 298; *Prosser*, 793 F. Supp. at 867; see also *Peterson v. Borst*, 786 N.E.2d 668, 672–73 (Ind. 2003) ("Based on the unchallenged principle of judicial independence and neutrality, we hold that in resolving partisan redistricting disputes, Indiana judges must consider only the factors required by applicable

These courts correctly sense that putting their imprimatur on a map that creates or perpetuates a partisan advantage would flout their obligation to redistrict “in a manner free from any taint of arbitrariness or discrimination.”<sup>327</sup> It would also threaten “public confidence in the integrity of [the] judiciary”—“a state interest of the highest order.”<sup>328</sup>

Along similar lines, it is notable that most courts to have adopted what they describe as “least-change” maps (and, again, that is a minority of courts) have focused on retaining district cores and not on protecting incumbents. In other words, unlike legislative mapmakers, who are often preoccupied with how redistricting will affect existing officeholders, courts tend to do more locking than stocking.<sup>329</sup> For example, when the Connecticut and Minnesota courts adopted least-change congressional maps during the post-2010 cycle (and in Connecticut’s case, during the post-2020 cycle as well), they both declined to design districts around existing officeholders. The Connecticut court directed the special master not to consider “the residency of incumbents or potential candidates.”<sup>330</sup> The Minnesota court declared that “election districts do not exist for the benefit of

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federal and State law . . . [and] not the partisan political consequences of redistricting plans . . .”).

<sup>327</sup> *Wise v. Lipscomb*, 437 U.S. 535, 541 (1982) (internal quotations omitted). This is not to say that courts always manage to extirpate the effects of a prior gerrymander. In *League of United Latin American Citizens v. Perry*, the district court created a new congressional plan for Texas based on what it regarded as the applicable districting principles, including maintaining existing majority-minority districts and avoiding incumbent pairings. 548 U.S. 399, 412 (2006). Texas’s prior map had been a Democratic gerrymander, and although the “court’s plan did ameliorate the gerrymander,” it also “perpetuated much of [it].” *Henderson v. Perry*, 399 F. Supp. 2d 756, 768 (E.D. Tex. 2005), *aff’d in part, vacated in part, rev’d in part sub nom.* *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006). Having produced a map that “followed neutral principles typically used in Texas” without “partisan motive,” the court concluded that it was unable to do more to achieve partisan fairness. *See Henderson*, 399 F. Supp. 2d at 768.

<sup>328</sup> *Williams-Yulee v. Fla. Bar*, 575 U.S. 443, 446 (2015) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

<sup>329</sup> Writing in the late 1980s, Daniel Ortiz identified only “a very few cases” in which courts had “tried to avoid pitting incumbents against one another.” Ortiz, *supra* note 35, at 669. An older New Jersey case, for instance, sought to minimize contests between incumbents and declared that “protection of incumbents serves a valid purpose and is a relevant factor to be taken into account in creating a legislative district plan.” *Davenport v. Apportionment Comm’n*, 319 A.2d 718, 722–23 (N.J. 1974).

<sup>330</sup> Order Directing Special Master, *In re* Petition of Reapportionment Comm’n *ex rel.*, No. SC 18907, at 1 (Conn. Jan. 3, 2012), [https://cga.ct.gov/red2011/documents/final/SC18907\\_010312.pdf](https://cga.ct.gov/red2011/documents/final/SC18907_010312.pdf) [<https://perma.cc/HFZ3-K9QQ>]; *see also* Order Appointing and Directing Special Master, *In re* Petition of Reapportionment Comm’n *ex rel.*, No. SC 20661, at 1 (Dec. 23, 2021), <https://redistricting.ils.edu/wp-content/uploads/CT-apportionment-comm.-20211223-order-appointing-special-master.pdf> [<https://perma.cc/VY5Y-UP82>].

any particular legislator” and treated the interests of incumbents as “a factor subordinate to all [other] redistricting criteria.”<sup>331</sup> Other courts have similarly refused to tailor boundaries “to promote the reelection of incumbents.”<sup>332</sup>

Even least-change courts thus appear to accept the premise that judicially created maps should not stack the deck in favor of the representational status quo. They simply have not taken that insight far enough. They appear to assume—mistakenly—that core retention and incumbency protection can be neatly separated, allowing them to create a map that delivers the benefits of continuity without the drawbacks of entrenchment. It is true that a map that preserves district cores without any reference to incumbent residency may not advantage incumbents quite as systematically as a map that both locks and stocks. A few more incumbents might find themselves paired. But as the courts that have deemphasized core retention have correctly understood, preserving cores is inherently “a criterion designed primarily to protect incumbents” or, more broadly, to preserve the advantage of whatever individuals and groups happen to do well under the status quo.<sup>333</sup> Core retention, like incumbency protection, is a factor “so laden with political considerations” that it cannot properly drive judicial mapmaking.<sup>334</sup> Rather than building on outdated

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<sup>331</sup> *Hippert v. Ritchie*, 813 N.W.2d 374, 386 (Minn. 2012). Following the 2000 census, a Minnesota state-court panel similarly “declined to consider . . . the extent to which an incumbent retains his or her prior territory” when drawing state legislative districts, although it did make “some minor changes” at the end of its process to avoid what it considered to be excessive incumbent conflicts. Final Order, *Zachman v. Kiffmeyer*, No. C0-01-160, at \*5 (Minn. Spec. Redistricting Panel Mar. 19, 2002).

<sup>332</sup> *Wilson v. Eu*, 823 P.2d 545, 598 (Cal. 1992) (quoting *Legislature v. Reinecke*, 516 P.2d 6, 10 (Cal. 1973)); *see also* *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1091 (D. Kan. 2012) (describing the U.S. Supreme Court as having “implicitly approved” of decisions “to subordinate protection of incumbents to other state policy factors, because [incumbent protection] was inherently more political” (quoting *Abrams v. Johnson*, 521 U.S. 74, 84 (1997))); *Burton v. Sheheen*, 793 F. Supp. 1329, 1361 (D.S.C. 1992) (“Although protecting constituent-representative relations may be a legitimate concern for a legislative body fashioning a plan, this court must act circumspectly and without taint of arbitrariness.” (citation omitted)); *Baumgart v. Wendelberger*, Nos. 01–C–0121, 02–C–0366, 2002 WL 34127471, at \*3 (E.D. Wis. May 30, 2002) (refusing to treat “[a]voiding unnecessary pairing of incumbents” as a proper criterion); *League of Neb. Muns. v. Marsh*, 242 F. Supp. 357, 360 (D. Neb. 1965) (“The goal of reapportionment . . . is just representation of the people, not the protection of incumbents in a legislative body.”).

<sup>333</sup> *Good v. Austin*, 800 F. Supp. 557, 564 (E.D. & W.D. Mich. 1992).

<sup>334</sup> *Id.*; *see also* *Apportionment of State Legislature-1992 v. Sec’y of State*, 486 N.W.2d 639, 656 n.73 (Mich. 1992) (recognizing that accounting for incumbent residence is a “political consideration[]” for the legislature and not a proper criteria for a court); *Magistrate Judge’s Report & Recommendation, Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928216, at \*18 (E.D.N.Y. Mar. 12, 2012) (asserting that “courts need not and should not enter the political thicket in the service of preserving incumbent-constituent relationships and congressional seniority”).



and politically tinged foundations, courts should generate maps by evenhandedly applying the redistricting principles set forth in federal and state law, perhaps supplemented by well-established prudential considerations, in light of present-day data and circumstances.<sup>335</sup>

From the judiciary's perspective, a final downside of the least-change approach is that it can discourage political compromise and potentially result in more judicial mapmaking. Given that continuity tends to favor existing officeholders, legislators who expect a court to retain district cores (and perhaps even directly protect incumbents) may have little incentive to fulfill their redistricting duties. A judicially drawn map may serve their interests nearly as well as a map they would create themselves. In contrast, if lawmakers do not know whether a court will prioritize continuity criteria—or, better yet, if lawmakers know that a court will not—then they will be more reluctant to leave the mapmaking process in the court's hands. They may ultimately conclude that a deal hashed out with political adversaries is a lower risk proposition.<sup>336</sup>

Consider, for instance, a state with divided government. Imagine that the party in control of the legislature likes the existing legislative map reasonably well. Perhaps it was even a map that the party gerrymandered a decade earlier. The governor is unlikely to sign off on a new plan that continues to tilt the playing field in favor of his political opponents. But if the legislature knows that a court is likely to draw a new map from scratch—one that may not only wipe out its existing partisan advantage, but also potentially jeopardize the careers of many incumbents—it may see a compromise map as a better option. After all, such a political compromise may include at least some incumbency protection. The governor, meanwhile, will also have reason to strike a deal because the governor's legislative allies, though in the minority, will similarly want to avoid a court-drawn plan that could unfavorably overhaul their districts. Courts, in other words, can use the prospect of a map crafted from scratch as a sort of penalty

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<sup>335</sup> A question beyond the scope of this Article concerns the extent to which judicial mapmakers should affirmatively seek partisan balance, rather than merely applying legally enunciated redistricting criteria from a blank slate without consideration of political consequences.

<sup>336</sup> For a prior argument along these lines, see Ortiz, *supra* note 35, at 688–89 (explaining that, if lawmakers “[r]ealiz[e] that courts will not protect incumbency,” and that they will pay “with their own incumbency advantage” if they fail to reapportion properly, then they will be more likely “to work hard to keep redistricting out of the judges’ hands”).

default that will encourage political actors to fulfill their line-drawing responsibilities.<sup>337</sup>

### B. *Toward Dynamic Redistricting*

The above discussion suggests that courts can and should seek to ensure that redistricting is not merely an occasion to prop up the status quo. In states where politicians hold the power to redistrict and where voters lack the ability to act through direct democracy, gerrymandering—like gerrymandering—may be a practice that only the judiciary can realistically address. In many states, however, action beyond the courts is possible. Over the past decade, a number of states have made strides against gerrymandering, and some of their efforts may help to constrain gerrymandering as well.<sup>338</sup> Politically insulated redistricting commissions, for instance, are less likely than legislatures to have self-interested attachments to existing maps. As reformers continue to work to improve the fairness of the redistricting process, they would do well to focus more directly on the pathologies of continuity.

States like Arizona, California, and Iowa already have at least some anti-gerrymandering laws that may serve as models. The laws in these states go beyond laws elsewhere that prohibit incumbent-favoring maps in general terms.<sup>339</sup> They specifically bar mapmakers from identifying and considering the residences of incumbents, thus precluding efforts to build districts around incumbents or to avoid incumbent pairings.<sup>340</sup> As noted earlier, Arizona law also sets out spe-

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<sup>337</sup> In a related context, Justin Levitt and Michael McDonald have suggested that courts should bar political actors from redrawing plans that courts create following an initial deadlock. Such a rule, they contend, “would better force compromise because participants with the incentive to deadlock the process would know that they will not get a second opportunity to draw the district lines.” Levitt & McDonald, *supra* note 159, at 1273.

<sup>338</sup> Colorado, Michigan, Ohio, and Virginia are among the states that have recently made notable strides in making redistricting more independent and neutral, in particular by shifting responsibility from lawmakers to redistricting commissions. *See, e.g.*, COLO. CONST. art. V, §§ 44–44.6, 46–48.3; MICH. CONST. art. IV, § 6; OHIO CONST. art. XI, § 1; VA. CONST. art. II, § 6-A; Benjamin Plener Cover, *Two-Party Structural Countermandering*, 107 IOWA L. REV. 63, 68–69 (2020) (discussing the proliferation of redistricting commissions).

<sup>339</sup> *See supra* notes 143–44 and accompanying text.

<sup>340</sup> *Id.*; *see also* Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n, 121 P.3d 843, 862 (Ariz. Ct. App. 2005) (explaining that the constitutional provision barring consideration of incumbent and candidate residences aims “to prevent the Commission from drawing new districts to either aid or hinder the interests of candidates or incumbent legislators in future elections”); Glenn Dickinson, *First Redistricting Plan*, LEGIS. SERVS. AGENCY 4 (Mar. 31, 2011), [https://www.legis.iowa.gov/DOCS/Resources/Redist/2011/2011-03-31/Plan1\\_Report.pdf](https://www.legis.iowa.gov/DOCS/Resources/Redist/2011/2011-03-31/Plan1_Report.pdf) [<https://perma.cc/NV8F-YSAJ>] (explaining that “[p]lan selection [during the post-2010 cycle] was based solely on population, the number of counties and cities kept whole for legislative districts, the

cific mapmaking protocols that effectively require the state's redistricting commission to begin its work from a blank slate rather than from the existing map.<sup>341</sup> California's redistricting commission is similarly constrained.<sup>342</sup> It would not be difficult for states to go just slightly further and expressly require mapmakers to construct districts without reference to the existing map.

By taking steps such as these, states can ensure that the decennial redistricting process provides an opportunity not just to rebalance district populations, but also to rebalance representational arrangements more broadly. In the states that most directly constrain locking and stocking, the maps adopted after the 2010 census produced a notable number of competitive electoral contests and new representatives.<sup>343</sup> These results indicate, at least anecdotally, that redistricting from scratch can indeed help open doors for new voices, ideas, and alliances to emerge.

Such dynamism is welcome. One need not go as far as Thomas Jefferson, who famously argued that every generation should establish its constitutional order anew,<sup>344</sup> to see value in periodically refreshing the governing institutions established by a particular set of actors under the particular conditions of a particular time. This is especially true when it comes to electoral districts. The issue is not merely that growing populations, evolving communities, and shifting political landscapes inevitably render maps outdated. It is that, even at birth, no map is perfect. Innumerable other district configurations may have had their merits and may have produced very different results.<sup>345</sup> None of these maps can ever lay claim to being *the* singular right way to translate individual preferences into polity-level representation and

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presence of a conveniently contiguous territory within each district, and the compactness of each district).

<sup>341</sup> See *supra* note 142 and accompanying text.

<sup>342</sup> See RALPH J. SONENSHEIN, *WHEN THE PEOPLE DRAW THE LINES: AN EXAMINATION OF THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION* 26 (2013), <https://cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf> [<https://perma.cc/V7BN-AUJH>] (explaining that during the post-2010 redistricting cycle commissioners “could not easily rely on the previous district lines as their main foundation and template” due to the other criteria they were required to apply).

<sup>343</sup> See, e.g., *id.* at 3 (“In the 2012 elections, many incumbents faced significant challenges, in part due to redistricting, and some chose not to run for reelection. Turnover was high, and the new legislature had a large share of new members.”).

<sup>344</sup> See 15 *THE PAPERS OF THOMAS JEFFERSON* 392–98 (1958) (discussing the concept that “the earth belongs to the living, and not to the dead”).

<sup>345</sup> See, e.g., McKee, *supra* note 89, at 624 (“The simple act of relocating a district boundary alters the representational relationship for numerous voters and this can have considerable electoral consequences.”).

governance.<sup>346</sup> To allow the old map to dictate the shape of the new one is thus to give the old map more weight than it deserves. Recognizing this, the political theorist Jon Elster once suggested “random redesigning of electoral districts,” an approach he called “renewal through reshuffling.”<sup>347</sup>

Ignoring old maps when adopting new ones may be the most obvious way to promote dynamism. Mathematicians and computer scientists have developed tools capable of generating large numbers of maps that satisfy agreed-upon geographic and/or political fairness parameters and that are not anchored to a predecessor map.<sup>348</sup> One could imagine simply choosing at random among such algorithmically generated maps—a process that would lay bare the inherent vagaries of mapmaking rather than concealing that reality. But there is also much to be said for a more deliberative process in which politically insulated actors—perhaps aided by algorithms—make a good-faith effort to weigh competing criteria and perspectives and draw lines that, in their judgment, strike a particularly appropriate balance.<sup>349</sup> This Article leaves it to others to decide among these possibilities.

One important question, however, is whether the old map should indeed be set aside completely when drawing the new one. A case can be made for consulting the prior map to help facilitate dynamism and promote representational fairness over time. Rather than using the prior map as an anchor, mapmakers might instead use it to avoid repeating past decisions that favored or disfavored some individuals or communities for no good reason.<sup>350</sup> They might deliberately seek to ensure that, from one redistricting cycle to the next, the deck really is shuffled to ensure that advantages and disadvantages are equitably shared. To illustrate, consider the congressional districting plan that the Connecticut Supreme Court adopted after the 2010 census. Under

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<sup>346</sup> As social choice theorists have long understood, “collective preferences are inevitably the product of the manner in which the choice may be expressed.” Issacharoff, *supra* note 61, at 615 n.79; *see also* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (Martino Publ’g 2012) (1951) (engaging in social choice analysis); Pildes & Anderson, *supra* note 208 (same).

<sup>347</sup> JON ELSTER, *SOLOMONIC JUDGEMENTS* 92 (1989).

<sup>348</sup> *See, e.g.*, Chen & Stephanopoulos, *supra* note 24, at 882–87 (describing techniques for algorithmically generating district maps); Emily Rong Zhang, *Bolstering Faith with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms*, 109 CALIF. L. REV. 987, 993 (2021) (discussing “the recent flourishing of redistricting algorithms”).

<sup>349</sup> *See, e.g.*, Zhang, *supra* note 348, at 988 (arguing that redistricting algorithms should be joined with independent redistricting commissions).

<sup>350</sup> *Cf.* Issacharoff, *supra* note 61, at 601 (“To the extent that political insiders should be given latitude to engage in any ends-oriented redistricting, it should be only to promote political access for those on the outs politically, not to reward incumbent powers.”).

the prior map, six towns were split between districts.<sup>351</sup> The special master, acting pursuant to the court's instruction to minimize change, drew a map that continued to split five of those same six towns.<sup>352</sup> If it is indeed the case that communities divided between districts and situated at the periphery of each are disadvantaged relative to intact communities near a district's geographic core, then it seems problematic to relegate the same communities to that fate across multiple decades. A dynamic redistricting process would have taken the past decision to split those communities not as a reason to continue to split them, but rather as a reason to do the opposite. In short, a purely forward-looking approach to redistricting can helpfully prevent deliberate entrenchment. But with a remedial look-back, mapmakers can potentially design new maps that affirmatively promote dynamism and aim to mitigate the idiosyncrasies and biases of the status quo.

### CONCLUSION

The problem of entrenchment has long loomed large in election law discourse.<sup>353</sup> Through aggressive gerrymanders, rollbacks of voting rights, restrictions on ballot access, and more, those in power sometimes brazenly change the rules of the game in an effort to bolster their electoral position.<sup>354</sup> For understandable reasons, commentary on entrenchment tends to focus on overt machinations like these.<sup>355</sup> This Article offers a reminder that entrenchment often comes in a more subtle form. In many instances, those in power seek to retain power not by changing the rules, but by clinging to the status

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<sup>351</sup> Draft Report and Plan of Special Master, *In re* Petition of Reapportionment Comm'n, No. SC 18907, at 18 (Jan. 13, 2012), [https://cga.ct.gov/red2011/documents/special\\_master/Merged%20Draft%20Report%20with%20Exhibits.pdf](https://cga.ct.gov/red2011/documents/special_master/Merged%20Draft%20Report%20with%20Exhibits.pdf) [<https://perma.cc/UQ73-S56G>].

<sup>352</sup> *Id.* at 18–19.

<sup>353</sup> See, e.g., Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1451–52 (2016) (identifying “political entrenchment” as “the fundamental problem . . . that defines the field of election law”); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 406 (2015) (observing that scholars of election law “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”); Klarman, *supra* note 65, at 552 (surveying “entrenchment problems in constitutional law” and developing an “anti-entrenchment theory” of judicial review); Issacharoff & Pildes, *supra* note 190, at 709 (analogizing “[t]he problem of political lockups” to “the problem of monopoly economic power”).

<sup>354</sup> See, e.g., Levinson & Sachs, *supra* note 353, at 414 (observing that “[e]lectoral entrenchment strategies take many different forms”); Klarman, *supra* note 65, at 509–28 (analyzing an array of contexts in which lawmakers have sought to entrench themselves).

<sup>355</sup> See, e.g., Klarman, *supra* note 65, at 509 (“For the most part, anti-entrenchment theory counsels suspicion of legislative *action* that entrenches incumbency.”).

quo and resisting reforms that threaten their dominant position.<sup>356</sup> With respect to redistricting, lawmakers who wish to secure an advantage for themselves and their allies might decide to overhaul the existing lines, or they might decide to preserve them to the extent possible. The latter option may appear more modest and restrained than a shameless gerrymander, but the democratic harms are similar either way, which is why gerrylaundry is an apt moniker. Indeed, carrying forward district configurations from one decade to the next has such a strong tendency to lock in existing winners and losers that maximizing continuity can rarely, if ever, be regarded as a politically neutral redistricting criteria. For this reason, courts generally should not be in the business of prioritizing core retention or incumbency protection when they are called upon to produce maps. And anyone who seeks to improve redistricting should aim to make the process more dynamic, so that new maps do not simply recreate the inequities of old ones.

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<sup>356</sup> *Id.* at 510 (identifying the refusal of lawmakers to (1) draw new electoral maps in the era before the U.S. Supreme Court's one person, one vote cases and (2) enact publicly popular term limits as two examples of entrenchment through the failure to act).