

Recovering from *Rucho*: How States Can Create National Partisan Fairness

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Rucho v. Common Cause and the failure to pass H.R. 1 have left national gerrymandering reform on life support. At present, however, states committed to creating fair maps limit themselves to considering their own political makeup when doing so. This internal approach risks the possibility that states committed to fairness subvert that value, as their refusal to consider national political data and other states' maps may lock in an unfair map nationwide if other states gerrymander. This internal focus therefore also creates the possibility that reform-minded states fail to protect their voters' interests in Congress.

This Essay proposes a novel path forward: a new redistricting criterion that allows states to prioritize national partisan fairness, rather than statewide fairness. Federalisms new and old justify this new criterion on a theoretical basis, while the seeming impossibility of national reform in Congress or federal courts justifies it on a practical one. The Essay explains how the consideration of other states' maps would allow states to make the national Congressional map fair on net and walks through the mechanics necessary for this criterion's implementation.

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INTRODUCTION

In recent years, election law scholars and reformers have focused much energy on how to make redistricting fairer.² In practice, these efforts have taken two principal forms. The first removes partisanship from redistricting, including by handing the job to independent redistricting commissions or prohibiting the intentional favoring (or disfavoring) of political parties.³ The second requires map drawers to formally consider partisanship through a partisan fairness criterion and affirmatively seek fair maps.⁴

However, in the case of maps for the U.S. House of Representatives, the fact that states—rather than the federal government⁵—have adopted these reforms means that reforms intended to achieve fairness may, in fact, create the opposite. States that try to make their own processes, maps, and House delegations fairer (without regard to other states) risk making the national legislature as a whole less fair.⁶ This possibility exists because a state’s House map elects a delegation to a national legislature, one in which other states remain

² See, e.g., Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015) (focusing on the efficiency gap as a means of curing partisan gerrymandering).

³ See, e.g., Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012) (arguing that certain styles of redistricting commissions are the most effective way to prevent partisanship); see also Maeve Reston, *Independent Redistricting Panels Aim to Draw Fairer Maps but Still Invite Controversy*, CNN (Dec. 15, 2021), <https://www.cnn.com/2021/12/15/politics/independent-redistricting-commissions-2022-elections/index.html> [<https://perma.cc/5PE6-YFEP>] (describing the operations and controversies surrounding various independent commissions); FLA. CONST. art. III, §§ 20(a), 21(a) (forbidding map-drawers from intending to favor or disfavor one party over another).

⁴ See, e.g., John F. Nagle, *Measures of Partisan Bias for Legislating Fair Elections*, 14 ELECTION L.J. 346 (2015) (analyzing different proposed means for preventing partisan bias).

⁵ See For the People Act of 2021, H.R. 1, 117th Cong. § 1 (2021) [hereinafter For the People Act] (failing to pass the Senate); *Rucho v. Common Cause*, 588 U.S. 684, 721 (2019) (holding that gerrymandering claims are non-justiciable).

⁶ See NICHOLAS O. STEPHANOPOULOS, *ALIGNMENT: A THEORY OF THE LAW OF DEMOCRACY* 161–63 (2023).

committed to partisan gerrymandering.⁷ If some delegations are the product of fair maps, while others are the product of gerrymanders, the House may be significantly biased if the states that do and do not adopt reforms are not perfectly balanced against each other.

A simple example proves the point. If one state's gerrymander adds ten seats for its map-drawing party beyond that party's typical support in its electorate and all other states ensure their maps accurately reflect their respective states' typical partisan breakdown, the resulting U.S. House would likely have a bias in favor of that one gerrymandering state's governing party. In other words, states that constrain themselves without accounting for other states' actions risk causing an unrepresentative legislature, which is contrary to their aspiration.

This issue takes on increased importance because now only state governments are likely to address partisan gerrymandering. *Rucho v. Common Cause* officially shut the federal courthouse door to partisan gerrymandering claims.⁸ Meanwhile, the For the People Act—which would have created national consistency and greater fairness in redistricting processes and outcomes—fell to a Senate filibuster and seems unlikely to be resurrected.⁹ To be clear, not all Congressional elections are hopelessly unrepresentative, even in the face of federal inaction. The 2022 and 2024 elections, for example, by happenstance, ended with nearly representative results despite a lack of a coordinated solution (2022 had a Republican bias of about a seat,¹⁰ and 2024 appears to have had minimal bias in one direction or another).¹¹ But occasional

⁷ See, e.g., Michael Li & Julia Boland, *Anatomy of the Texas Gerrymander*, BRENNAN CTR. FOR JUSTICE (Dec. 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/anatomy-texas-gerrymander> [https://perma.cc/9D4V-MD4S].

⁸ *Rucho*, 588 U.S. at 721.

⁹ Barbara Sprunt, *Senate Republicans Block Democrats' Sweeping Voting Rights Legislation*, NPR, <https://www.npr.org/2021/06/22/1008737806/democrats-sweeping-voting-rights-legislation-is-headed-for-failure-in-the-senate> [https://perma.cc/84XG-ZZ9C]; see generally For the People Act, *supra* note 5.

¹⁰ Nathaniel Rakich & Elena Mejia, *Did Redistricting Cost Democrats the House?*, FIVETHIRTYEIGHT (Dec. 1, 2022), <https://fivethirtyeight.com/features/redistricting-house-2022/> [https://perma.cc/6YWM-65DX]

¹¹ Nicholas Stephanopoulos, Eric McGhee & Christopher Warshaw, *The House's Republican edge is gone. But the gerrymander lives*, THE WASHINGTON POST

luck does not change the fact that states committed to fair maps remain in a bind. Even as they wish to promote a fair and representative national legislature, their unilateral efforts at reform may in fact exacerbate the impact of other states' partisan gerrymandering.

The academic literature thus far has not provided an answer to this bind. Scholars have called for state constitutional litigation,¹² which has had some success but in practice has significant limits because it requires particular language in state constitutions as well as receptive courts.¹³ Other scholars have pushed for novel gerrymandering claims,¹⁴ while still others have pushed for abandoning districts in favor of multi-member elections or abandoning the traditional criteria of redistricting.¹⁵ But all of these ideas run into the same problems if they are not adopted nationwide: fairer maps to elect some House delegations do not necessarily improve the representativeness of the House altogether and can easily make it worse. *Rucho* and the failure of H.R. 1 have cast a long shadow over the literature on partisan fairness, as it is both relatively sparse and, more important, does not address the fundamental issue of how states can promote *nationwide* fairness, given Congress's and the courts' inability or unwillingness to do so.

This Essay takes up the challenge *Rucho* and the failure of H.R.1 create for redistricting reform for the U.S. House and proposes a way for

<https://www.washingtonpost.com/opinions/interactive/2025/house-gerrymandering-bias-republicans-democrats/> [https://perma.cc/ACH9-MD7S]

¹² See, e.g., Samuel S.-H. Wang, Richard F. Ober, Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 PENN. J. CONST. L. 203 (2019).

¹³ See, e.g., Ashley Lopez, *North Carolina Lawmakers Approve Maps Creating Gains for the GOP in Congress*, NPR (Oct. 25, 2023), <https://www.npr.org/2023/10/25/1208002456/north-carolina-redistricting-congressional-districts> [https://perma.cc/99XT-DEVJ] (explaining how North Carolina Republicans were creating new maps after the state supreme court reversed its previous opinion forbidding gerrymandering).

¹⁴ See Jacqueline Rosen, *Religious Gerrymandering: A New Avenue for Redistricting Challenges?*, 22 ELECTION L.J. 45 (2023) (examining the viability of religious gerrymandering claims).

¹⁵ See Paul A. Diller, *Toward Fairer Representation in State Legislatures*, 33 STAN. L. & POL'Y REV. 135 (2022) (arguing for multimember districts for state legislatures); James Piltch, *The Neutral Criteria Myth*, 2025 WIS. L. REV. 801 (arguing for the abandonment of the traditional redistricting criteria).

states to counteract *other states'* gerrymandering and partisan bias. Namely, it argues that states that wish to ensure nationwide partisan fairness and representativeness should adopt a national partisan fairness (NPF) redistricting criterion. This criterion would work similarly to partisan fairness criteria that already exist, with one critical difference. Rather than seek partisan fairness for a state's own map as a standalone, a state's map drawers would draw their state's map, trying to achieve partisan fairness in the national legislature as a whole. Such an approach would allow some states to act as a corrective against other states' gerrymandering (or against population distribution effects or redistricting criteria that may lead some states to have a quote-on-quote "natural" bias).¹⁶ Instead of unilaterally constraining themselves in the face of gerrymandering elsewhere, the NPF criterion would allow states to ensure their maps are fair cumulatively and are likely to elect a more representative Congress. In essence, NPF is a redistricting reform that addresses bias within the nation's legislature at the right scale of data. Indeed, Federalisms old and new justify this approach on theoretical grounds.¹⁷

Recognizing that effective implementation is essential for the NPF criterion's success, this Essay outlines how states could effectively implement it through strategic timing, administrative expertise, and coordination. To begin, all states that adopt the criterion would move their map drawing—and primaries—to the latest possible dates. Doing so would allow NPF states to gather the greatest amount of information possible about other states' maps. In turn, a state agency or independent commission would then use a model to identify what correction, if any, the NPF state would need to make to its own map to ensure that the cumulative national map is as fair as possible. Should multiple states adopt an NPF criterion, they could coordinate their map-drawing to prevent overcorrection.

¹⁶ See Moon Duchin et. al., *Locating the Representational Baseline: Republicans in Massachusetts*, 18 ELECTION L.J. 388, 388 (2019) ("The strength of the findings here, which show that in fenced-out elections the most Republican-favoring collection of precincts falls far short of ideal district size, all but guarantees that under actual current districting practices (contiguity, reasonable compactness, and under 1.5% of precincts split) the fence-out would remain in force."); Piltch, *supra* note 15, at 803-804 (arguing that the traditional criteria pack voters in such a way that Republicans benefit due to geographic sorting).

¹⁷ See *infra* Section III.C.

A representative Congress need not be the result of luck, nor the result of an arms race to the (gerrymandering) bottom. By optimizing for *national* partisan fairness, states that are interested in redistricting reform can use their maps to maximize the likelihood of a representative Congress.

This Essay proceeds in four parts. Part I begins with an analysis of the current state of reform efforts at the federal and state levels. Part II addresses the issues with states' current approaches. It captures how, in the absence of a national solution, reform efforts in the states, committed to an unbiased process or to within-delegation fairness, may only cement a systematically biased House. Part III then argues for the adoption of a national partisan fairness criterion. It explains how, from a theoretical point of view, this criterion allows states to protect a state's voters' interests while seeking partisan fairness nationwide. Part IV moves from the theoretical to the practical and outlines how states might make this new criterion work. It examines the implementation timing, coordination, and government bodies necessary for the criterion to be effective. The Essay concludes with a discussion of where reformers and reform-minded academics might go next in the run-up to the 2026 elections.

I. PAST AND CURRENT EFFORTS TO MAKE REDISTRICTING FAIR

Various reform efforts in recent years have focused on making redistricting fairer, both procedurally and substantively. These efforts to rein in gerrymandering have taken a variety of forms at various levels of government. This section briefly outlines these efforts and their effectiveness in producing a more representative legislature.

A. *The (Failed) National Push*

For decades, efforts at national reform focused on convincing the Supreme Court to recognize that there is a Fourteenth Amendment right against partisan gerrymandering. Following the one person, one vote revolution of the 1960s, reformers sued to try to constrain explicit, intentional partisan gerrymanders. In *Davis v. Bandemer*, the Court indicated such a claim might exist if discriminatory intent could be

deduced and discriminatory effect shown.¹⁸ However, articulating a legal standard that fulfilled *Bandemer*'s hope proved difficult. The dissent in the case offered the possibility of using the violation of political subdivision lines as a key indicator of an intent to gerrymander.¹⁹ But this approach did not prove successful, nor did any other. Two decades later, Justice Kennedy's controlling concurrence in *Vieth v. Jubelirer* declared that no workable standard had been found to date and that courts should not intervene until one emerged.²⁰

Fifteen years after *Vieth*, Chief Justice Roberts officially declared that political gerrymandering claims were non-justiciable in *Rucho v. Common Cause*. There, the majority opinion held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."²¹ Chief Justice Roberts explained that "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."²² He explained that "[d]eciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal."²³ And he stressed that only after determining the meaning of fairness could a Court begin to answer "[h]ow much is too much?"²⁴ In response to the appellee's argument that the Court adjudicates one person, one vote claims, he explained that "the one-person, one-vote rule is relatively easy to administer as a matter of math."²⁵ Justice Kagan in dissent noted, however, that states did (and

¹⁸ *Davis v. Bandemer*, 478 U.S. 109, 123, 129–30 (1986) (holding that the Court could reach the question of whether gerrymandering had occurred but that no sufficient basis or test was provided for doing so).

¹⁹ *Id.* at 173 (Powell, J., concurring in part and dissenting in part) ("The most important of these factors are the shapes of voting districts and adherence to established political subdivision boundaries.").

²⁰ *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring) (choosing not to "foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases").

²¹ *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019).

²² *Id.*

²³ *Id.* at 707.

²⁴ *Id.*

²⁵ *Id.* at 708.

do) possess standards to measure gerrymanders that would alleviate the majority's concerns:

The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process.²⁶

Despite decades of proposed standards using increasingly sophisticated mathematical tools,²⁷ the *Rucho* holding ended hope for a Constitutional and court-driven solution to partisan gerrymandering.

Amid the failure of these efforts, a federal legislative push for redistricting reform (together with other election reforms) emerged.²⁸ This culminated in the For the People Act of 2021.²⁹ The For the People Act would have required that all states adopt independent redistricting commissions and required the application of a partisan fairness requirement.³⁰ The legislation failed despite unified Democratic control of Congress and the Presidency due to the Senate filibuster. This failure indicated that federal redistricting reform will require a Democratic trifecta and Senate supermajority (or filibuster reform), which appears to be a political impossibility for the foreseeable future.³¹

²⁶ *Id.* at 722 (Kagan, J. dissenting).

²⁷ See Nagle, *supra* note 4.

²⁸ See, e.g., Ann Devroy, *Bush to Propose Outlawing Gerrymandering*, WASH. POST (June 28, 1989), <https://www.washingtonpost.com/archive/politics/1989/06/28/bush-to-propose-outlawing-gerrymandering/Off3b1bb-88f4-4947-8ea6-ac4835a54b21/> [<https://perma.cc/P8HU-Y989>].

²⁹ For the People Act, *supra* note 5.

³⁰ *Annotated Guide to the For the People Act of 2021*, BRENNAN CTR FOR JUSTICE. (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021#t2-se> [<https://perma.cc/557V-UGGN>].

³¹ See Li Zhou, *Democrats' Failure on Filibuster Reform Will Haunt Them*, VOX (Jan. 19, 2022), <https://www.vox.com/2022/1/19/22881837/senate-filibuster-vote-voting-rights-joe-manchin-kyrsten-sinema> [<https://perma.cc/5ZF6-A3SH>]; see also Nate

Due to *Rucho* and Congress’s inability to address gerrymandering, there are few nationwide constraints on redistricting. The only federal requirements states must use when drawing Congressional maps are the Voting Rights Act protection for minority voter dilution (which has been and may continue to be curtailed³²) and the one person, one vote principle.³³

B. States’ Approaches

Amid federal inaction, some states have unilaterally pursued redistricting reform. Table I shows *who* draws the lines in various states.

Table 1. Who Draws the Maps³⁴

Map Drawer	Number of States
Independent Commission	7
Hybrid Approach and/or Political Commission	3
Legislature Alone	40

Evidently, only a handful of states have removed the authority to redistrict from political actors. And there is meaningful partisan

Silver, *Are the Democrats Screwed in the Senate After 2024?*, FIVETHIRTYEIGHT (Dec. 8, 2022),

<https://fivethirtyeight.com/features/democrats-senate-chances-2024-and-beyond/> [<https://perma.cc/6PBZ-VWWT>] (explaining that Democrats’ face a difficult path to a majority in the Senate in future years, let alone a supermajority); *but see* Nicholas O. Stephanopoulos, *Election Law for the New Electorate* 2–3 (Harv. Pub. L. Working Paper, No. 24-02, 2024) (arguing that changing political demography may incentivize Republicans to have increased support for certain pro-democracy reforms), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871529 [<https://perma.cc/DUJ6-FGJ2>].

³² See *Allen v. Milligan*, 599 U.S. 1, 42-45 (2023) (Kavanaugh, J., concurring) (indicating that Justice Kavanaugh may vote in favor of certain challenges to Section II of the Voting Rights Act).

³³ 52 U.S.C § 10101(a)(2); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

³⁴ *Who Draws the Lines?*, All About Redistricting, <https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/> [<https://perma.cc/U3RR-YSN8>].

asymmetry. The two Republican-dominated states with independent commissions (Idaho and Montana) combine for four congressional seats. Meanwhile, the five Democrat-dominated or leaning states with independent commissions (California, New York, Washington, Michigan, and Colorado) account for 109 congressional seats.³⁵

The other major focus of reform academically and politically has been on redistricting criteria—the *how* of map drawing. Seventeen states have adopted criteria that “restrict[] undue partisanship.”³⁶ Twenty-six states use county preservation in congressional elections.³⁷ Twenty-six use compactness.³⁸ Twenty-one use municipal boundary preservation.³⁹ These criteria may or may not constrain intentional gerrymandering, and some of them may even contribute to unrepresentativeness (to the extent that subdivision lines or compactness criteria lead to one party’s voters disproportionately packed into certain districts).⁴⁰

Further, it has been difficult to give real and lasting power to criteria that require consideration of partisan outcomes. Some states only require that legislatures not create extreme bias in their maps—a low bar with negligible effect. Indeed, the meaninglessness of these requirements in Florida (home to the most extreme gerrymander in the

³⁵ BALLOTPEDIA, *United States House of Representatives*, [https://ballotpedia.org/United States House of Representatives](https://ballotpedia.org/United_States_House_of_Representatives), [https://perma.cc/W6GW-8KRH] The asymmetry may currently lead to the protection of certain safe seats rather than an effort to maximize potential gain. See Nick Corasaniti & Michael Wines, *How Redistricting Helped Republicans Win the House*, N.Y. TIMES (Jan. 26, 2025), <https://www.nytimes.com/2025/01/26/us/politics/2024-elections-congress-state-redistricting.html> [https://perma.cc/K3YK-98YS].

³⁶ *Where Are the Lines Drawn?*, ALL ABOUT REDISTRICTING, <https://redistricting.ills.edu/redistricting-101/where-are-the-lines-drawn/> [https://perma.cc/PTC5-FP3C].

³⁷ 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, 184.

³⁸ *Id.* at 183.

³⁹ *Id.* at 184–85.

⁴⁰ See, e.g., John F. Nagle, *What Criteria Should Be Used for Redistricting Reform?*, 18 ELECTION L.J. 63, 63 (2019) (“For fairer maps, it appears to be necessary to ‘anti-gerrymander’ by relaxing the traditional criteria in order to overcome the political geography in Pennsylvania which apparently makes a Democratic gerrymander practically impossible.”).

country’s last cycle)⁴¹ and Ohio (where the legislature and political commission ignored the state Supreme Court)⁴² highlights how hard it is to give these criteria power. Even where constitutional provisions or legislative reforms have, for a moment, constrained partisan gerrymanders, it has often proved fleeting. In New York, where the state’s highest court ruled the Congressional map was unfair, the following redraw may have overcorrected in favor of Republicans⁴³ and was subsequently abandoned in the next cycle.⁴⁴ North Carolina tells an even worse story. There, the State Supreme Court reversed its previous ruling that the state constitution requires partisan fairness after the court swung from Democrat-controlled to Republican-controlled in the 2022 election.⁴⁵

The substance of state approaches has also been wildly inconsistent. Some states require an explicit focus on partisanship, while others explicitly constrain the use of partisan data in drawing maps.⁴⁶ In Washington, the Independent Commission must draw districts that “provide fair and effective representation *and* [] encourage electoral competition,” two mandates that could work against each

⁴¹ Nathaniel Rakich, *The Extreme Bias of Florida’s New Congressional Map*, FIVETHIRTYEIGHT (Apr. 21, 2022), <https://fivethirtyeight.com/features/the-extreme-bias-of-floridas-new-congressional-map/> [https://perma.cc/7U4U-4H8T].

⁴² Andrew J. Tobias, *Republicans Ignore Redistricting Order from Ohio Supreme Court, Signaling They Intend to Run Out the Clock*, CLEVELAND (Jun. 3, 2022), <https://www.cleveland.com/news/2022/06/republicans-ignore-redistricting-order-from-ohio-supreme-court-signaling-they-intend-to-run-out-the-clock.html> [https://perma.cc/QNC7-WDKH].

⁴³ Keisha Clukey & Greg Giroux, *New York Court Expert Proposes More Republican-Friendly Map*, BLOOMBERG (May 16, 2022), <https://spectrumlocalnews.com/nys/central-ny/politics/2023/11/14/new-york-redistricting-case-heads-to-court-of-appeals> [https://perma.cc/MZE4-ZYMG].

⁴⁴ Luke Parsnow, *As New York Redistricting Maps Again Head to Court of Appeals, a Recap of How We Got Here*, SPECTRUM NEWS 1 (Nov. 14, 2023), <https://spectrumlocalnews.com/nys/central-ny/politics/2023/11/14/new-york-redistricting-case-heads-to-court-of-appeals> [https://perma.cc/9UJD-4DR7].

⁴⁵ Jane C. Timm, *N.C.’s New GOP-Controlled High Court Reverses Itself on Gerrymandering and Voter ID*, NBC NEWS (Apr. 28, 2023), (emphasis added) <https://redistricting.ills.edu/state/washington/#criteria?cycle=2020&level=Congress&startdate=2022-02-08> [https://perma.cc/2RUP-6677].

⁴⁶ *Id.*

other.⁴⁷ All told, there are close to as many approaches to try to fix redistricting as there are jurisdictions that have attempted.

Finally, there remains a partisan asymmetry in adoption and implementation. Only one Republican state, Idaho, has both an independent commission and a requirement that forbids favoring one party over another.⁴⁸ In contrast, five Democratic-controlled states have adopted both requirements.⁴⁹

II. THE SHORTCOMINGS OF CURRENT REFORMS

The review above establishes that federal litigation and legislative efforts have failed to create a nationwide solution to congressional gerrymandering and that states have responded to the issue in a variety of fashions. This Part addresses the challenges inherent in states' approaches. The first relates to the fact that states look solely within their boundaries to address a problem that exists at the level of a national legislature. The second is deeper: states' current reforms are undermining the values that motivated their reforms in the first place, and as a result, may undermine the interests of their voters and states.

A. *No National Solution*

The central problem for reformers is that there is no national solution to a national problem. The Court's ruling in *Rucho* closed the federal courthouse to this issue and has left redistricting largely in the hands of legislatures, with few constitutional constraints. And federal legislation appears hopeless. The For the People Act⁵⁰ was the latest in

⁴⁷ Washington, ALL ABOUT REDISTRICTING, <https://redistricting.lli.edu/state/washington/#criteria?cycle=2020&level=Congress&startdate=2022-02-08> [<https://perma.cc/2RUP-6677>].

⁴⁸ Idaho, ALL ABOUT REDISTRICTING, <https://redistricting.lli.edu/state/idaho/?cycle=2020&level=Congress&startdate=2021-11-12> [<https://perma.cc/UV8X-M49K>].

⁴⁹ See National Overview, ALL ABOUT REDISTRICTING, <https://redistricting.lli.edu/national-overview/?colorby=Institution&level=Congress&cycle=2020> [<https://perma.cc/Q8J8-6ZMU>].

⁵⁰ See For the People Act of 2021, H.R. 1, 117th Cong. § 1 (2021).

a long line of democracy and redistricting reform bills to have failed, and it did not pass despite a unified government. Fixing gerrymandering for House maps is, therefore, states' domain today and for the foreseeable future.

This simple fact raises two critical issues. The first is obvious: only a select number of states have addressed the issue. Just seven states have truly independent commissions, while few state courts have enforced a criterion relating to partisan bias or fairness.⁵¹ Today, if a Congress has a partisan breakdown in the U.S. House that is roughly reflective of national vote-share, it is likely because of happenstance.

For example, in 2024, an election with roughly net partisan fairness in the U.S. House, the number of variables that needed to align to create a fair map was significant. Some blue states such as Illinois gerrymandered,⁵² counteracting gerrymanders in North Carolina and Wisconsin among others, while California produced a meaningful blue bias despite its independent commission.⁵³ At present, either luck or a bad-faith race to the bottom is necessary for partisan fairness and representative outcomes at the national level. There is no mechanism that systematically seeks or incentivizes partisan fairness and representative outcomes nationally, and the country frequently ends up with a severely biased chamber as a result (at least in part).⁵⁴

The second, related issue for the states that have acted is that their lens focuses entirely within the boundaries of their own state. That would not be a problem if all states produced fair maps. But, if the goal is a representative Congress, not simply a limited set of representative

⁵¹ See tbl. 1; *supra* notes 34-40 and accompanying text.

⁵² See Rakich & Meija, *supra* note 10 (describing gerrymanders in Illinois).

⁵³ The gerrymander lives, *supra* note 11.

⁵⁴ See, e.g., Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), <https://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html> [https://perma.cc/GB8N-ASG4] (explaining how the maps in 2012 were remarkably skewed) (“Democrats would have had to win the popular vote by 7 percentage points to take control of the House the way that districts are now (assuming that votes shifted by a similar percentage across all districts). That’s an 8-point increase over what they would have had to do in 2010, and a margin that happens in only about one-third of Congressional elections.”).

state delegations within a heavily biased Congress, then states' current tools are insufficient.

B. Value Subversion

The latter point above—that some states are adopting reforms (to generate increased fairness at the level of the delegation) while others are not—indicates a deeper issue. In the name of achieving increased fairness (but looking only at the level of the state's congressional delegation), states may preclude partisan fairness at the level of the U.S. House and may undermine their own voters' political interests.

That policymakers' attempted solutions may exacerbate the very problem they are trying address is not unique to election law. Consider the prototypical example of state environmental quality review bills. California's CEQA might improve the local environment by limiting development, including housing projects.⁵⁵ However, people may then have to drive further to get to work, which may lead to a worse overall environment, both locally (air pollution) and globally (climate change).⁵⁶ An effort to address a significant issue can undermine the very value that motivated it in the first place.

Here, simple math demonstrates how states may help create unfairness at the national level when they seek fairness at the state level. Take a situation in which five states choose to pursue extreme gerrymanders that overrepresent one party by a total of thirty seats. If all forty-five other states follow a perfect commitment to fair representation, then the five states that gerrymandered will have

⁵⁵ See Rigel Robinson, *When a Statute Loses Its Way: Fulfilling the Original Intent of the California Environmental Quality Act*, 41 YALE L. & POL'Y. REV. 280, 282-84 (2022) (explaining how CEQA has been abused); see also M. Nolan Grey, *How Californians Are Weaponizing Environmental Law*, ATLANTIC (Mar. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/> [https://perma.cc/39C9-DCE2] (arguing that CEQA in particular curtails housing development).

⁵⁶ Joshua Karlin-Resnick & Nelson Nygaard, *Why California Accidentally Encouraged Driving, and How That's About to Change*, SPUR (June 30, 2016), <https://www.spur.org/news/2016-06-30/why-california-accidentally-encouraged-driving-and-how-thats-about-change> [https://perma.cc/K8WS-K5RJ] (explaining how various elements of CEQA have led Californians to drive more).

created an enormous bias in the House’s makeup. The result would reflect not the will of the country, but rather the partisan interests of five states’ legislatures. The good-actor states that reformed to reduce politicians’ ability to overrule voters will have instead helped ensure that the national election was *not* fair and that those five states’ legislatures were, in effect, able to overrule the voters of the entire country. The good-actor states will also have potentially undermined their own voters’ interests because the House elected would reflect the preferences of the party that gerrymandered elsewhere, rather than the majority party within the reform states (if different from the gerrymandering party). In turn, the voters’ preferences may not align with those represented in the country’s policy outcomes.⁵⁷ Since the House is meant to be the more representative legislative body in Congress, this failure to achieve fair representation and alignment between voter preferences and policy outcomes is particularly concerning.

Of course, the math of actual elections is far more complicated than this hypothetical. But the hypothetical’s simplicity highlights the core truth: in a world where some states gerrymander (and/or fail to address natural gerrymanders),⁵⁸ a commitment to state-level fairness in only a handful of states risks undermining national fairness and truly democratic policymaking.

⁵⁷ See generally NICHOLAS O. STEPHANOPOULOS, ALIGNING ELECTION LAW (2024) (arguing that the purpose of election law should be to create alignment between the preferences of voters and those of their officials and the policies they create).

⁵⁸ See e.g., Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 266 (2013) (“Third, our simulation results offer insight into the likely effect of various redistricting reforms, such as Amendments 5 and 6 in Florida, that attempt to mandate the seemingly objective districting criteria of compactness, contiguity, and respect for municipal boundaries. Our simulation method mimics the type of districting process mandated by such reforms. Our results suggest that in Florida, New York, Pennsylvania, and other urbanized states with substantial rural peripheries, such reforms are likely to lock in a powerful source of pro-Republican electoral bias”); see generally Piltch, *supra* note 15; but see Nicholas O. Stephanopoulos, *Election Law for the New Electorate* 4 (Harv. Pub. L. Working Paper, Paper No. 24-02, 2024) <https://ssrn.com/abstract=4871529> [<https://perma.cc/GAE7-5F3C>] (arguing that the most intense effects of geographic polarization for partisan fairness may have passed).

The recent setbacks for any hope of a national solution accentuate this value subversion. For years, reform-minded states could convince themselves that they were part of a movement toward a comprehensive national solution. No longer. *Rucho* and the failure of H.R. 1 mean that states bear the sole responsibility to address gerrymandering. Likewise, there is no hope that all fifty states will adopt reforms and thereby resolve the asymmetry. The number of states that have adopted anti-gerrymandering reforms have stalled. Worse, many of the state-level reforms or litigation wins have proven to be pyrrhic at best. As noted above, Florida's anti-gerrymandering amendment has proven meaningless⁵⁹; North Carolina's state supreme court declared gerrymandering unconstitutional, only for the court to reverse itself when its partisan makeup flipped⁶⁰; New York's map has swung back and forth, with significant implications for nationwide maps⁶¹; and Ohio's legislature openly defied its state supreme court when ordered to redraw its map.⁶² In their efforts to be representative internally, reform-minded states allow states acting in bad faith to dictate national politics. They are neither protecting their own narrow political interests (as states that gerrymander do), nor are they succeeding in promoting a fairer and more representative democracy. The commitment to fair maps and accurate representation locally risks undermining those same principals nationally.

Political reality makes this issue even starker, as this value subversion may grow over time. If more states were to adopt redistricting reforms that accentuate the current party discrepancy,⁶³ then the national asymmetry and unrepresentativeness might grow. The voters in all those states, then, may lose out on their fair share of national representation. These states would be failing to protect their own states' and voters' interests while they failed to accomplish the goal of a fair House.

⁵⁹ See Rakich, *supra* note 41.

⁶⁰ See Timm, *supra* note 45.

⁶¹ See Bill Mahoney, *New Congressional Maps Approved in New York*, POLITICO (Feb. 28, 2024), <https://www.politico.com/news/2024/02/28/new-york-house-maps-approved-00143922> [<https://perma.cc/DK74-QZQK>].

⁶² See Tobias, *supra* note 42.

⁶³ See *supra* Section I.B.

III. A NEW REDISTRICTING CRITERION

The challenges that the current approach to redistricting reform create are substantial. Substantively, states committed to fair maps through independent redistricting commissions, state-focused fairness criteria, or other reforms may enable one party's control of Congress even when the country's (not to mention the state's own) voters do not prefer that party. Procedurally, these states have unilaterally tied their hands, even when other states create extreme gerrymanders to maximize the partisan bias of the delegations they send to Washington.

States' inability to address gerrymandering on a net *national* basis creates these substantive and procedural issues. However, states can and should address a national net bias in redistricting. The adoption of a new redistricting criterion that addresses national-level partisan bias would be the best solution in the post-*Rucho*, post-H.R. 1 landscape. A national partisan fairness criterion (NPF) would allow states to create maps that account for net national bias and ensure that redistricting reform at the state level facilitates, rather than undermines, the fairness of the House.

A. *Defining the Criterion*

The NPF criterion is easiest to understand by example. New York, for example, in 2022, could have analyzed the expected net bias of all states' maps and subsequently created a map that would offset *that* bias, rather than concern itself primarily with internal fairness.⁶⁴ Or consider California and Texas, the largest states in the country and therefore those best positioned to correct for other states' gerrymanders. Toward the end of a redistricting cycle, either (or both) could examine the current partisan breakdowns of maps nationwide and then serve as a corrective. Texas could draw a less Republican map than its own partisan makeup would suggest should there be a nationwide Republican bias—or, inversely, it could over-represent Republican-leaning seats should there be a Democratic tilt nationwide. On the other

⁶⁴ See Aaron Goldzimer & Nicholas Stephanopoulos, *The Novel Strategy Blue States Can Use to Solve Partisan Gerrymandering by 2024*, SLATE (May 6, 2022), <https://slate.com/news-and-politics/2022/05/new-york-democrats-partisan-gerrymandering-2024.html> [<https://perma.cc/RV3D-YAB3>].

hand, California could draw a less Democrat-leaning map than its voting patterns warrant should there be a bias toward Democrats nationwide and could affirmatively gerrymander for Democrats should there be a bias towards Republicans nationwide. Larger states—California, Florida, New York, and Texas—would be able to use this national partisan fairness criterion to greatest effect, but given frequently close margins in the House, even smaller states could use their maps to help the U.S. House achieve partisan fairness.

This criterion would not be a blunt tool, but an exacting one. States that adopt it would not simply deem seats “R” and “D” but instead would do a comprehensive analysis of the competitiveness distribution of seats nationwide. Thus, if there were a net national bias toward the Democratic party, but that bias stemmed from an overabundance of Democratic districts that were still competitive (*i.e.*, leaning slightly Democratic), then the NFP map-drawer should try to match that with equally competitive Republican seats. Similarly, if there were a severe imbalance in safe seats, then the NFP map-drawer would try to offset the imbalance in safe seats.

B. The Criterion’s Benefit

This criterion would have significant normative and practical benefits. First, it would allow states committed to reform to ensure their efforts do not subvert the representation of their voters. States would no longer contribute to an unrepresentative House in the name of redistricting reform. These states would be solving a problem at the correct level of analysis for trying to create a representative House: the fairness of *all* states’ maps, cumulatively, rather than the fairness of only their own delegations.

The availability of the NPF criterion might also create new energy for redistricting reform in general. States that want to reform but are wary because of other states’ gerrymandering would no longer need to worry that redistricting reform would hurt their voters. NPF would allow them to use their maps to promote fairness nationally, even if it meant underrepresenting their own party. And, because states that adopt the NPF would counteract the gerrymandering of other states,

wide enough adoption could ultimately eliminate the incentive to gerrymander at all.

This dynamic contrasts significantly with the situation right now. Currently, every state that commits to redistricting reform increases the power (and incentive) of every state that does not. The more states that adopt independent commissions or a state-level partisan fairness commitment, the more effective and enticing it is for other states to gerrymander. In contrast, NPF undermines the incentive for states to conduct partisan gerrymandering.

C. The Normative Concerns

Such a significant change in the thinking about and approach to redistricting understandably raises normative concerns. Relative to current approaches to reform, the primary concern might be that an NPF might lead to some voters lacking adequate representation in their states' congressional delegations. Namely, a state that has adopted NPF may alter its map in such a way that leaves its Republicans or Democrats underrepresented in their own House delegation, in the name of partisan fairness nationwide.

This possibility indicates that the NPF in some circumstances pits national representativeness against state representativeness and, therefore, raises a question at the heart of redistricting. Does a state owe its voters a Congress that fairly represents the political interests of the entire country (NPF) or a congressional delegation that fairly represents that state's political makeup (most current redistricting reform)? The ideal would be a national solution that ensured fair representation at both the national and state levels. However, courts and Congress have precluded this possibility for the time being. Currently, some states undermine fair representation at the national and state levels, to pursue partisan advantage, while others instead try to improve the representativeness of their own states' delegations, blind to ways in which that may lead to an unfairly biased House.

Both old and new arguments for federalism justify the use of NPF. Under a traditional "laboratories of democracy" view, states that adopt NPF are experimenting with a model that other states can learn from.

Indeed, they would be adapting election law—which the constitution leaves primarily to the states—in new ways to solve an important problem, precisely the type of action that federalism scholars generally support.⁶⁵

Newer arguments for federalism only strengthen the NPF's legitimacy. As Professor Heather Gerken explains, the “new ‘new’” federalism sees states as tools to achieve “nationalist ends.”⁶⁶ States that adopt a national partisan fairness criterion would bolster democracy nationwide, going one step beyond the traditional conception of laboratories of democracy. States that adopt such a policy would be pursuing (and helping to achieve) *nationalist ends*—the bettering of the entire country.⁶⁷ Gerken argues that devolution to the states can be and is pivotal to the objective of a “well-functioning national democracy.”⁶⁸ In this instance, states have been left no option: Congress and the Supreme Court have declined to solve the problem and, therefore, have risked the possibility that the U.S. House of Representatives does not reflect the will of its voters. By omission and commission, respectively, they have devolved the task of fixing gerrymandering to the states.

The consequences of failing to ensure fair maps are significant for states' constituents and for the country. As Congress reaches new levels of dysfunction,⁶⁹ the fact that gerrymandering and other causes of partisan bias can create an unrepresentative House only exacerbates a loss of faith in democracy, especially when seen in addition to Senate malapportionment.⁷⁰ As noted above, the states that adopt reforms that

⁶⁵ See Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550, 1566 (2012) (discussing how some scholars of federalism see states as independent actors).

⁶⁶ Heather K. Gerken, *Federalism as the New Nationalism*, 123 YALE L.J. 1889, 1890 (2014).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1891.

⁶⁹ See e.g., Ivana Saric, *The Shortest Serving House Speakers in U.S. History*, AXIOS (Oct. 4, 2023), <https://www.axios.com/2023/10/04/kevin-mccarthy-shortest-serving-house-speaker-list> [<https://perma.cc/259Z-P2ED>] (explaining that Kevin McCarthy's speakership was the shortest in “well over a century”); Moira Warburton, *Why Congress Is Becoming Less Productive*, REUTERS (Mar. 12, 2024), <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/> [<https://perma.cc/WA6L-QL2G>].

⁷⁰ See, e.g., Richard Johnson & Lisa Miller, *The Conservative Policy Bias of US Senate Malapportionment*, 56 POL. SCI. & POL. 10, 10 (2023) (finding

only account for the fairness of their own congressional delegations cede their ability to promote fairness nationwide. NPF, however, would showcase federalism’s ability to “integrat[e] rather than divid[e] the national polity,” quite literally through promoting partisan fairness in the U.S. House.⁷¹ This policy would disincentivize gerrymandering and increase fair representation; increase the odds that policy reflects the will of the electorate; and help establish a norm that fairness matters.⁷²

These advantages of NPF do not, of course, alleviate the discomfort of some voters not having adequate representation in their states’ congressional delegations, or the possibility that a particular set of voters will lack a representative that reflects their local political demography. But some loss in state-level representativeness may be a necessary concession for national-level representativeness. A House composed of some gerrymandering states and some delegation-level reform states fails the voters in all states that are left underrepresented. And, indeed, the point of this criterion is *not* to seize and entrench political power. The criterion would serve as a corrective that encourages states that gerrymander aggressively to stop doing so—to accept that there is no longer any benefit to manipulating their maps. As that occurs, states that have committed to national partisan fairness as a criterion will have less need to alter their maps. States that commit to this criterion can help ensure a more representative Congress in the short term. In the long term, they may help eradicate partisan gerrymandering for the House, where Congress and the Supreme Court could not.

IV. IMPLEMENTING THE CRITERION

Like all redistricting criteria, the particulars of NPF implementation are important for its success. Because NPF would be the first redistricting criterion to consider national data and would be a “contingent” criterion, its implementation would be different from other redistricting criteria. Proper implementation of the criterion requires data accumulation, contingency planning, strategic timing,

“that state equality in the Senate systematically biases policy outcomes toward Republican preferences.”).

⁷¹ Gerken, *supra* note 66, at 1892.

⁷² *Id.*

administrative expertise, and potential coordination when necessary. Collectively, these tools would allow states committed to a representative House to act only when necessary, to correct only as much as is needed, and to minimize any effect the criterion would have on the representativeness of their own state delegations.

A. Pre-Map Drawing: Identifying an Accurate Baseline

The first step of NPF implementation is to have an accurate understanding of the country’s partisan makeup, projections for election results in different electoral environments given current maps, and, thus, a measure of net national bias. The best tool available for these tasks are election models like the ones employed by PlanScore.⁷³ States would use this model to predict the outcome in every congressional district. The aggregate of all those district-specific outcomes relative to the national electorate’s partisan makeup in different electoral environments would constitute the measure of national partisan fairness. States would then, upon considering these national data, evaluate how best to draw their congressional map to promote national partisan fairness.

An important part of determining net national bias may involve imputing outcomes in uncontested races, where actual results (nearly 100-0) would otherwise skew an estimate of the national popular House vote. The use of the model would allow states to project what the results in uncontested races would likely have been if there had been candidates from each party.

⁷³ The PlanScore model “use[s] the correlation between the presidential vote on the one hand and state legislative or congressional votes on the other to predict how new districts will likely vote and so how biased a plan will be.” These “correlations come from the last 10 years of elections and are estimated separately for state legislatures and Congress” and “factor in how much each state’s and election year’s results might differ from others and—where appropriate—any extra advantage incumbents might have.” The model also allows for “imperfect[ion] by quantifying how much [the] method missed the actual outcomes of past elections, including the degree to which partisan tides have changed party performance from one election to the next.” *Unified District Model*, PLANSCORE (May 2022), <https://planscore.org/models/data/2022F/> [<https://perma.cc/PE5Z-QF32>].

B. Timing and Contingency

States that have adopted NPF will, by definition, need to plan around and account for other states' actions. NPF states, therefore, need to change their map drawing and primary schedules.

In particular, NPF states would need to have the latest primary date in the country so that they can account for other states' maps when they draw their own.⁷⁴ This pegging of one state's dates to other states' dates is not unheard of in election law; for example, New Hampshire's first-in-the-nation presidential primary is codified in state law.⁷⁵ Here, NPF states would look to do something similar, both with their primary date and their map-release date. Instead of having these dates seven days earlier than other states like New Hampshire does, states would select a primary date in late September.⁷⁶ This late primary date would allow NPF states to release their maps as late as possible. In 2022, all fifty states had finished their maps in early June.⁷⁷ States that adopt the NPF would draw their maps as soon as possible after all other states are done. For states' internal calendars and work efforts, mid-June as a target date would be consistent with previous years.⁷⁸

This "pegged" timing is necessary because the NPF is a contingent criterion. The NPF is only as effective as the data states have when they use it. The single most important piece of data is other states' maps. If NPF states act too soon in the redistricting process, they might not "correct" properly. By waiting, NPF states would have all the maps from other states, ensuring that NPF states neither under-correct nor over-correct for net national bias. Because any one state's map can affect

⁷⁴ Louisiana being the only exception, as there is no congressional primary.

⁷⁵ Elaine Kamarck, *Why Is New Hampshire the First Primary in the Country?*, BROOKINGS INST. (Feb. 5, 2016), <https://www.brookings.edu/articles/why-is-new-hampshire-the-first-primary-in-the-nation/> [https://perma.cc/8N52-RQHB].

⁷⁶ *2022 Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access*, FED. ELECTION COMM'N (May 19, 2022), <https://www.fec.gov/resources/cms-content/documents/2022pdates.pdf> [https://perma.cc/49DJ-SV64].

⁷⁷ Aaron Navarro, *All 50 States Have Finished Their Congressional Maps – What Do They Say About the 2022 Election?*, CBS NEWS (June 3, 2022), <https://www.cbsnews.com/news/redistricting-congressional-maps-2022-election-takeaways/> [https://perma.cc/NLG4-R9SK].

⁷⁸ *Id.*

the representativeness of Congress, it is essential that NPF states wait as long as possible to act.⁷⁹

C. Administrative Expertise and Substantive Implementation

Who oversees NPF map-drawing is essential both for the perception and reality of the criterion's effectiveness. The analysis of significant sums of voting and redistricting data requires expertise, meaning that ideally an agency or independent commission would implement the NPF. In states with independent commissions that adopt the NPF, the commission would assign staff members to oversee the tracking and analyzing of national data. In states without an independent commission, the legislature should delegate this task to an expert agency, such as the Secretary of State or an even more independent agency focused on this issue. These administrative experts would draw the state's maps in consideration of NPF. Having independent commissions or experts, rather than political figures, decide when and how to use NPF will also help protect against any perception that political actors are using the criterion as an excuse to gerrymander. Commission or agency implementation also practically limits the possibility of a state legislature doing just that.

Those commissions and administrators will then need to consider several moving parts to ensure the effectiveness of implementation, beginning with analysis of maps nationwide. The goal of NPF is to achieve partisan fairness nationwide, while, if possible, minimizing the loss in representativeness of the state's own map when considered on its own. This requires analyzing all states' maps and using the NPF state's map to produce the correct "offset" to any projected net national bias. NPF states should ideally commit to using the same model for these analyses; although this Essay does not take a stance on which of the

⁷⁹ Of course, non-NPF states could act in bad faith. If they pushed their redistricting map deadlines to July, it might make NPF unworkable due to the time needed to draw NPF maps. States that adopt the NPF will need to plan for this possibility and try to discourage it. In the case that states try to wait out the NPF states, NPF states should assume that the late-drawing non-NPF states are drawing maximum partisan gerrymanders. NPF states would project what maximum gerrymanders in those states would look like and incorporate those projections into the data needed to draw their NPF maps. This should deter non-NPF states from drawing late maps to subvert NPF.

available models would be best, any two models might tell a slightly different story about projected net national bias and the nature and quantity of offsets required.

Administrators will further need to consider the interaction between the NPF criterion and other redistricting criteria. As noted above, states should identify the number of seats each party should receive nationwide and, therefore, in that state, with national partisan fairness in mind. NPF should be the top criterion in the order of operations (after constitutional and federal prerogatives such as one person, one vote and compliance with the Voting Rights Act). But, after the correct number of seats for each party and their level of competitiveness is determined, there may still be some room to pursue other, more traditional redistricting criteria. These other state criteria (e.g., preserving municipal boundaries) should be secondary to NPF. Put another way, all other state criteria should be respected “to the extent practicable,” an approach some states already use for certain criteria.⁸⁰ States should, of course, strive to ensure that the NPF districts remain consistent with their other commitments. But these state-created commitments should not procedurally or substantively stand in the way of a map that contributes to national fairness.

Finally, because results will depend on how the cumulative national House map will perform under a variety of electoral conditions (i.e., swings in either party’s direction), administrators will need to carefully calibrate how competitive the corrective seats should be. If the cumulative national map has an excess of safe seats or competitive seats for one party or the other, that too should be accounted for in the NPF map. The overall goal should be for the NPF state’s map to maximally contribute to partisan fairness under a variety of electoral conditions.

Although states have not historically undertaken this kind of cross-state tracking of other states’ maps, this sort of analysis is far from novel. PlanScore,⁸¹ the Princeton Gerrymandering Project,⁸² and many

⁸⁰ See *Where Are the Lines Drawn?*, *supra* note 37.

⁸¹ *Score Electoral District Maps*, PlanScore, <https://planscore.org/#!/2022-statehouse> [https://perma.cc/466F-6GCE].

⁸² GERRYMANDERING PROJECT, *Redistricting Report Card*, <https://gerrymander.princeton.edu/> [https://perma.cc/2Q9G-JSFG]

other models and analysts do track all fifty states' maps meticulously. States committed to the NPF will just begin doing the type of work modelers and data journalists have been doing for years.

D. Judicial Review

The role state courts would play looms over this process. This Essay proposes that legislatures that adopt this criterion give state courts a limited but essential role in implementing the criterion. The only questions state courts should be able to review is whether a state agency that chose to use or not to use the NPF did so properly and, if it did choose to do so, whether it succeeded in its task of making the national map fairer. This limited basis of review would ensure that state courts provide an essential stopgap should there be partisan capture of the map-drawing entity or some egregious technical failure. Administratively, this task would be manageable for the courts: they would simply need to ask questions about process and data. If a court determined that the map needed to be redrawn, the NPF criterion would be clear and actionable for the court's special master.

Indeed, preventing courts from reviewing the maps drawn using NPF based on other redistricting criteria is essential for normative and administrative reasons. State courts—which are not free from politics—that could use the NPF criterion to create their own maps would potentially dictate national legislative outcomes in explicit ways that might call into question their role in the federal system. It would also be a procedural nightmare. Because states that use the NPF would have the latest possible deadline to draw their maps, state courts would have remarkably limited time to oversee a meaningful review process of maps themselves, meaning the map may not take effect for the first election following redistricting. As such, the state court should simply ask whether national conditions had warranted action (or inaction) and whether the action succeeded in accomplishing the task of making the national map fairer.

E. Cross-State Coordination

Assuming more than one state adopts NPF, the states that have done so will face the challenge of how to coordinate such that they

cumulatively achieve nationwide fairness and do not cumulatively over-correct or under-correct. The governing principle in this scenario should be that the state that would experience the smallest proportional change to its delegation must alter its map first.

To show how this approach would work, imagine that California and Michigan are the two states that adopt NPF. Currently, California has fifty-two Congressional representatives whereas Michigan has thirteen. If the maps of the other forty-eight states create a three-seat bias toward one party, then California should alter its map by three seats and Michigan none since three seats makes up a smaller proportion of California's congressional delegation than even one would for Michigan. If there is a five-seat discrepancy, Michigan would alter its map by one seat while California would alter its map by four seats (roughly a 7.7% change in each state's partisan tilt).

However, as the number of states that adopt the NPF criterion grows, the complexity of coordination increases. If there is a six-seat partisan tilt across the country, and there are six NPF states that have an imperfect ratio of seats, then the divvying up of which state changes how many seats will be complex. As a starting point, larger states should always adapt their respective maps first because they can do so with the least impact on their maps.⁸³

This principle aside, shared timing and cross-state coordination would allow states to solve this issue together. The shared and late timing for NPF states would allow them to ensure that they do not work in isolation from one another and instead can minimize the effects on each state.⁸⁴ And indeed, by waiting, the states can try to “share” the change as effectively as possible. The administrative experts in each state can analyze how much the maps in their own states would need to be altered, not just for partisan representativeness but for other redistricting criteria. Although an NPF state cannot assume all other

⁸³ Helpfully, the adoption of the same model and same fairness metric will guarantee that states do not have wildly different baselines from one another.

⁸⁴ In other words, if California introduced its “corrective map” in March and altered its projected distribution of seats significantly, it may do so more than it needs should a few other states have planned to use NPF but waited until June to determine their maps.

NPF states would use the criterion properly, they can and should share their data with one another to ensure there are no miscommunications or analytical discrepancies. With the principle of minimizing the effect on each state's internal partisan fairness as the primary concern, the states can decide how many seats they will each alter.

Of course, there may ultimately be an abundance of riches problem. If so many states adopt the NPF that states have reason to worry about many other states' implementation of it, it is likely a sign that the reform is working. Such large-scale adoption may lead to complex decisions that will need new methods of analysis if that moment comes. However, should it occur, a complex coordination problem would be much preferable to the current problem, where reform-minded states are liable to unintentionally increase, rather than decrease, the partisan bias of the U.S. House. And, by that time, experience with NPF would likely have helped to identify other principles and decision matrices for NPF states to optimally share the burden of achieving national partisan fairness. By that time, too, NPF may have both helped reduce partisan gerrymandering nationally and/or given new life to federal redistricting reform.

F. Continued Adaption

Partisanship—and therefore national partisan fairness—is a moving target such that it is plausible that a mid-cycle redistricting is necessary for NPF states. For the sake of continuity for voters and representatives, the bar should be high: a substantial deviation from expected partisan fairness. Two types of changes might trigger this high bar. The first is a meaningful change in other states' maps. For example, this cycle, North Carolina's map had a 7-6 map that became a 10-4 or 11-3 map.⁸⁵ This change might warrant NPF states recalibrating depending on other states' redraws.

Second, even absent a meaningful change in a non-NPF state's map, national politics could change so significantly in a decennial cycle that NPF states would need to change maps to ensure national partisan fairness continues, at least roughly. This bar would need to be over-and-above any normal election variation (as candidates and trends matter).

⁸⁵ See Corasaniti & Wines, *supra* note 37.

However, should some substantial change occur such that Congress is at risk of being systematically unrepresentative for no reason other than the maps themselves, NPF states should correct maps mid-cycle.

CONCLUSION

This Essay has argued that states seeking to reform redistricting for congressional maps can and should adopt a new redistricting criterion that focuses on creating *national* partisan fairness. This criterion is necessary because a federal solution to redistricting is no longer feasible following *Rucho* and the failure of H.R. 1. Current state-of-the-art redistricting reforms available to states risk both subverting the political interests of a state's voters and exacerbating any bias in the U.S. House created by other states' gerrymandering. States are not powerless, however, to promote the representativeness of the House and improve U.S. democracy. The NPF criterion would allow states to consider how representative other states' maps are relative to the country's partisan breakdown and, thus, adjust their own maps to offset projected net national bias.

This Essay seeks to begin a conversation about how states might reform redistricting, if states were to adopt the correct unit of analysis—a solution that uses national analysis to address a problem at the level of a national legislative chamber. Other, similar ideas could and should be developed, such as legislatures delegating authority to agencies or commissions to negotiate “swapping” districts between red and blue states. Indeed, even within the NPF proposal, critical questions remain open for discussion. Determining the best redistricting model for this sort of nationwide analysis is essential, especially with an eye toward minimizing the impact this criterion will have on states' other redistricting values and goals. And there is room for variation on this proposal; for example, NPF states could choose to wait until the second cycle after a Census to draw their NPF maps with greater data, time, and precision, and without needing a super-late primary calendar. There are many options and possibilities within the overall framework of using state action to pursue and incentivize national partisan fairness.

Post-*Rucho* and post-H.R. 1, states need new tools to ensure that House maps are fair, when viewed correctly and cumulatively, and that Congress is representative. The NPF criterion does just that, while giving neither fear nor favor to any party except to the extent that it offsets bias coming out of other states.