

gal voters. The direct evidence rule will mean that some challengers who actually won will not be able to prevail in court. And proportional deduction will give some challengers who did not actually win an unfair shot at another election. In choosing which approach to adopt, courts not only have to weigh the public perceptions and practical consequences of each one, but also have to ask how often each method will achieve the wrong result.

Courts have long understood why the elimination of uncertainty and direct evidence approaches might achieve the wrong result. In contrast, although courts have often objected to proportional deduction, they are just beginning to understand that group voting behavior may cause proportional deduction to get the wrong result more often than they had realized.

How will and should courts respond to this new development? One possibility is that courts will try to modify proportional deduction by incorporating demographic data. This would be difficult for courts though, because parties would likely present conflicting evidence about which characteristics could best estimate how a person voted. Given the paucity of these cases, judges would have little experience to guide them in applying such data. Furthermore, judges would and should be wary of developing ad hoc formulas for allocating illegal votes, because doing so could give voters the impression that courts are crafting systems to help their favored candidates win.

The more likely result of this new development is that courts will be less willing to apply proportional deduction when there is reason to believe that group voting behavior played a significant role in an election — for example, if women and men had substantially different voting patterns and the illegal voters were heavily male or female. In such cases, courts may demand direct evidence, or impose a higher burden of proof, overturning an election only if taking demographic data into account would not change the outcome of proportional deduction. None of these solutions is perfect, which highlights that the best way to ensure that elections accurately reflect the will of the voters is to strengthen and modernize state election systems so that illegal voting does not occur in the first place.

V. TRENDS IN STATE SELF-REGULATION OF THE REDISTRICTING PROCESS

Every ten years, the release of the national census results stimulates a flurry of state political activity as governments redraw congressional and legislative district lines. This political activity is typically followed by an equally hectic cycle of legal and regulatory activity, as state and federal courts and federal agencies review challenges to redistricting plans under the Equal Protection Clause, the Voting Rights

Act of 1965,¹ and state constitutional provisions. Over the past five years, however, federal regulation of redistricting has shown signs of weakening, leading to calls for enhanced state self-regulation. Independent redistricting commissions, designed to be relatively insulated from political influence, have attracted the most attention. This Part, however, highlights a promising trend that has largely escaped scholarly notice: state supreme courts have become increasingly aggressive regulators of redistricting. Since state courts may have greater potential than independent redistricting commissions to prevent or remedy redistricting abuses such as malapportionment and racial discrimination — and perhaps even partisan gerrymandering — this trend deserves attention.

A. *The Ebb and Flow of Federal Regulation*

Until the mid-twentieth century, state governments had virtually unchecked authority to design both congressional and local legislative districts. Congress rarely and ineffectually exercised its power to “make or alter” state districting plans,² and the Supreme Court consistently avoided entry into the “political thicket” of redistricting regulation.³ This freedom vanished in the 1960s as the Warren Court and the Great Society Congress assumed more aggressive roles in the policing of redistricting, mainly to enfranchise African American voters. *Baker v. Carr*⁴ held that legislative malapportionment claims were justiciable in federal court,⁵ for example, and it was followed closely by *Wesberry v. Sanders*⁶ and *Reynolds v. Sims*,⁷ which provided the one-person-one-vote standard for adjudicating such claims in the congressional and legislative districting contexts, respectively.⁸ In addition,

¹ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 42 U.S.C.).

² See U.S. CONST. art. I, § 4, cl. 1. The Constitution grants state legislatures the power to set the “[m]anner” of congressional elections but permits Congress to “make or alter” these plans. *Id.* Congress first exercised the “make or alter” power in 1842, when it passed an act requiring single-member districts for the election of House members. See Act of 1842, ch. 47, 5 Stat. 491 (codified as amended at 2 U.S.C. § 2a (2000)). Other statutes followed, but to little effect. See DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 24–26 (1992).

³ See, e.g., *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (holding that “the remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress”).

⁴ 369 U.S. 186 (1962).

⁵ See *id.* at 237.

⁶ 376 U.S. 1 (1964).

⁷ 377 U.S. 533 (1964).

⁸ See *id.* at 568; *Wesberry*, 376 U.S. at 17–18. The one-person-one-vote principle requires that districts within a state have near-equal populations. See *id.* at 7–8.

the Voting Rights Act of 1965 (VRA) vested authority in the federal courts and the U.S. Attorney General to review state-made changes in election law for evidence of racial bias.⁹ By 1986, when the Supreme Court held in *Davis v. Bandemer*¹⁰ that political gerrymandering claims were justiciable as violative of the Equal Protection Clause,¹¹ federal regulation appeared to occupy the field.

The tide turned, however, beginning in the early 1990s: a string of political events and Supreme Court decisions has since weakened federal oversight of congressional and legislative redistricting. This trend began with the 1993 decision in *Grove v. Emison*,¹² in which the Supreme Court held that “federal judges [must] defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.”¹³ In the past five years, the diminishment of the federal role has accelerated substantially.¹⁴ In *Georgia v. Ashcroft*,¹⁵ the Court allowed “covered” states — states that have been required to have the Attorney General or the District Court for the District of Columbia “preclear” all voting law changes¹⁶ — more flexibility in satisfying section 5 of the VRA.¹⁷ In *Vieth v. Jubelirer*,¹⁸ five Justices concluded that political gerrymandering claims were justiciable,¹⁹ but a different five-Justice majority held that there were at the time no manageable stan-

⁹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

¹⁰ 478 U.S. 109 (1986).

¹¹ *Id.* at 143 (holding gerrymandering claims justiciable while dismissing the plaintiff’s claim for failure to make a threshold showing of vote dilution).

¹² 507 U.S. 25 (1993).

¹³ *Id.* at 33.

¹⁴ Although a thorough examination of the reasons for the apparent diminishment of federal regulation is beyond the scope of this Part, some scholars assert that it reflects an effort to adapt the law to changing circumstances, *see, e.g.*, Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 94–95 (2004), while others trace it to a Supreme Court retreat from political issues, *see* Grant M. Hayden, *The Supreme Court and Voting Rights: A More Complete Exit Strategy*, 83 N.C. L. REV. 949, 979 (2005).

¹⁵ 539 U.S. 461 (2003).

¹⁶ *Id.* at 461–62; *see also* 42 U.S.C. § 1973c (2000).

¹⁷ *See Georgia*, 539 U.S. at 480–83 (permitting states to satisfy the prohibition on retrogression in minority voting strength through the establishment of a few “safe” districts in which minorities constitute a majority of voters, or through the establishment of many districts in which it is “likely . . . that minority voters will be able to elect candidates of their choice”).

¹⁸ 124 S. Ct. 1769 (2004).

¹⁹ *See id.* at 1793 (Kennedy, J., concurring in the judgment) (“I would not 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.”); *id.* at 1812–13 (Stevens, J., dissenting); *id.* at 1821 (Souter, J., dissenting); *id.* at 1825–27 (Breyer, J., dissenting). Justice Ginsburg joined Justice Souter’s dissent.

dards to guide adjudication of such claims.²⁰ Enforcement of the VRA also appears to be increasingly politicized — there is evidence of politically motivated processing of preclearance applications by the Department of Justice under President George W. Bush.²¹ Further weakening of federal regulation may loom on the horizon, as section 5 of the VRA is set to expire in 2007;²² although Congress likely will reauthorize it, some commentators suggest that it should be substantially scaled back.²³

There is little chance that the federal judiciary and Congress will cease to regulate redistricting entirely, particularly in cases involving race and malapportionment,²⁴ but it does seem that the federal government is backing away from active oversight. Federal judicial monitoring of partisan gerrymandering is likely to be minimal after *Vieth*, and even in the core areas of race and malapportionment, the federal government is shortening its regulatory reach. The federal government, however, is not the sole source of redistricting regulation: states have regulated themselves for some time, although such regulation generally has been viewed as ineffective.²⁵ As the federal role diminishes, state self-policing will assume greater importance as a defense against illicit redistricting. Indeed, there already is a substantial demand for states to take action, and many have begun to mobilize in this area.²⁶

²⁰ See *id.* at 1792 (plurality opinion) (“Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application.”). Justice Scalia wrote the plurality opinion and was joined by Chief Justice Rehnquist and Justices O’Connor and Thomas. See also *id.* at 1793 (Kennedy, J., concurring in the judgment) (“Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.”).

²¹ See Meghann E. Donahue, Note, “*The Reports of My Death Are Greatly Exaggerated*”: Administering Section 5 of the Voting Rights Act After *Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651, 1683–84 & nn.195–96 (2004) (reporting accusations of politicization in the Department of Justice’s review of the Mississippi and Texas redistricting plans following the 2000 census).

²² See 42 U.S.C. § 1973b(a)(8) (2000).

²³ See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004).

²⁴ See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 569 (2004) (“There is no realistic possibility that courts will abandon adjudication of Voting Rights Act . . . and one person, one vote claims.”); see also H.R. 2642, 109th Cong. (2005) (“A bill to prohibit States from carrying out more than one Congressional redistricting after a decennial census and apportionment, to require States to conduct such redistricting through independent commissions, and for other purposes . . .”).

²⁵ See BUTLER & CAIN, *supra* note 2, at 25–26.

²⁶ See, e.g., Adam Nagourney, *States See Growing Campaign for New Redistricting Laws*, N.Y. TIMES, Feb. 7, 2005, at A19 (“Largely uncoordinated campaigns stretching from California to Massachusetts are pushing to end, or at least minimize, a time-honored staple of American politics: lawmakers drawing Congressional and legislative district maps in geographically convoluted ways to ensure the re-election of an incumbent or the dominance of a party.”).

B. Independent Redistricting Commissions

In recent years, an increasing number of state legislatures have delegated some or all aspects of the redistricting process to constitutionally created commissions.²⁷ These independent commissions are popular among both scholars and the general public,²⁸ but there is good reason to doubt their effectiveness: such commissions are rarely as independent as claimed, largely as a result of their appointment procedures. Indeed, some commentators argue that redistricting commissions may be more dangerous than legislatures because the former can mask partisan motives that are easily visible in the latter.²⁹

Seven states currently make commissions responsible for congressional and legislative redistricting.³⁰ In six other states, independent commissions draw the legislative redistricting maps, but the state legislatures retain control of congressional redistricting.³¹ There is a great deal of variance in how these commissions are composed — in fact, no two states have the same membership formula.³² But with the exception of Iowa, in which the Legislative Services Agency, a nonpartisan agency, creates the plan,³³ elected members of the state government comprise or choose the membership of the commissions.

Some participants in the process have expressed serious doubt about independent districting committees' ability to restrain partisan

²⁷ See Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2320 & nn.37–39 (2005) (noting that, as of May 2005, thirteen states had congressional or legislative redistricting commissions).

²⁸ See, e.g., Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115, 116 (2004); Robinson O. Everett, *Lessons from North Carolina's Redistricting Litigation*, 6 TEX. REV. L. & POL. 205, 221 (2001); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997); Nagourney, *supra* note 26, at A19. *But see* John M. Broder, *Not on Ballot, Schwarzenegger Is Still Rebuked*, N.Y. TIMES, Nov. 10, 2005, at A1 (noting that referenda to place redistricting in the hands of independent commissions failed in California and Ohio).

²⁹ See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 674–77 (2002).

³⁰ These states are Arizona, Hawaii, Idaho, Iowa, Montana, New Jersey, and Washington. See ARIZ. CONST. art. IV, pt. 2, § 1; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2; WASH. CONST. art. II, § 43; IOWA CODE ANN. § 42 (West 1999 & Supp. 2005).

³¹ These states are Alaska, Arkansas, Colorado, Missouri, Ohio, and Pennsylvania. See ALASKA CONST. art. VI; ARK. CONST. art. VIII, § 1; COLO. CONST. art. V, § 48; MO. CONST. art. III, § 2; OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17.

³² See REDISTRICTING TASK FORCE, NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2000 app. E (2004), <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/apcomsn.htm>.

³³ IOWA CODE ANN. § 42.6 (West Supp. 2005).

impulses. For example, a member of the Colorado commission noted that while “the process in the Colorado legislature . . . was 100 percent political, . . . the process in the Colorado Reapportionment Commission was about 98 percent political.”³⁴ The member highlighted the fact that the commission’s administrative staff, although highly capable, was culled from the staffs of prominent state legislators.³⁵

Even in Arizona and Iowa, where the commissions are prohibited from considering political data in their redistricting decisions,³⁶ there have been problems. In Iowa, for example, every U.S. House incumbent was reelected in 2004, and the average margin of victory was eighteen percent.³⁷ Since the state adopted independent redistricting, ninety-eight percent of U.S. House incumbents have won reelection.³⁸ Independent commissions may have particular trouble dealing with racial apportionment: the Department of Justice rejected Arizona’s initial 2000 census redistricting plan during preclearance, and the final plan produced fewer minority legislators than in the previous election, despite a substantial increase in the state’s Latino population.³⁹ Indeed, among the thirteen states that employed independent commissions during the 2000 census redistricting cycle, five had challenges to their redistricting plans reach their state supreme courts; three of the challenged plans were struck down.⁴⁰

C. State Court Review of Redistricting

The attention received by independent commissions stands in sharp contrast to the relative silence among commentators on the emerging role of state courts in regulating redistricting.⁴¹ State courts reviewed the merits of sixteen redistricting plans from the 2000 census cycle,

³⁴ Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029, 1030 (2001).

³⁵ *See id.*

³⁶ *See* ARIZ. CONST. art. IV, pt. 2, § 1(15); IOWA CODE ANN. § 42.4(5) (West 1999).

³⁷ FairVote, Reforms To Enhance Independent Redistricting Proposals, <http://www.fairvote.org/?page=1587> (last visited Jan. 15, 2006).

³⁸ *Id.*

³⁹ *See* Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 ARIZ. ST. L.J. 575, 582–86, 596–97 (2003).

⁴⁰ Plans in Alaska, Colorado, and Idaho were struck down. *See In re 2001 Redistricting Cases*, 44 P.3d 141, 143 (Alaska 2002); *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d 1237, 1246 (Colo. 2002); *Bingham County v. Idaho Comm’n for Reapportionment*, 55 P.3d 863, 870–71 (Idaho 2002). Plans in New Jersey and Pennsylvania were upheld. *See McNeil v. Legislative Apportionment Comm’n*, 828 A.2d 840, 845 (N.J. 2003); *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 993 (Pa. 2002).

⁴¹ *But see* Seth Warren Whitaker, Note, *State Redistricting Law: Stephenson v. Bartlett and the Judicial Promotion of Electoral Competition*, 91 VA. L. REV. 203 (2005); *cf.* James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 645–47, 650 (2004) (suggesting that state courts could stimulate federal courts to combat partisan gerrymandering).

struck down six plans, and adopted their own plans twice.⁴² By way of comparison, between 1990 and 1995, state supreme courts considered the validity of redistricting plans on the merits in seventeen cases, but struck down redistricting plans in only four of these cases and enacted their own redistricting plans in only one.⁴³ This admittedly

⁴² The states in which high courts reviewed challenges to redistricting plans on the merits were Alaska, Colorado, Florida, Idaho, Illinois, Kansas, Maryland, Massachusetts (two cases), New Hampshire (two cases), New Jersey, North Carolina, Oregon, Pennsylvania, and Virginia. The high courts of Alaska, Colorado, Idaho, Maryland, North Carolina, and Oregon struck down plans on a variety of state law grounds. See *2001 Redistricting Cases*, 44 P.3d at 143–46 (striking down a plan for lack of compactness, lack of socioeconomic integration, and malapportionment); *Reapportionment of the Colo. Gen. Assembly*, 45 P.3d at 1241 (striking down a plan for failure to respect county boundaries and for violating state constitutional equal protection provisions); *Bingham County*, 55 P.3d at 866 (striking down a plan because efforts to respect city and county boundaries were inconsistent and, therefore, insufficient to justify population deviation over the federal equal protection limit); *In re Legislative Districting*, 805 A.2d 292, 328–29 (Md. 2002) (striking down a plan for failure to respect city and county boundaries); *Stephenson v. Bartlett*, 562 S.E.2d 377, 388–92 (N.C. 2002) (striking down a plan for violating the state equal protection requirement to maintain “traditional political subdivisions”); *Hartung v. Bradbury*, 33 P.3d 972, 987 (Or. 2001) (striking down a plan for malapportionment). The New Hampshire Supreme Court twice enacted its own plan when the state legislature failed to produce a redistricting map. See *Burling v. Chandler*, 804 A.2d 471, 483–84 (N.H. 2002) (per curiam) (state house of representatives); *Below v. Gardner*, 148 N.H. 1, 3 (2002) (per curiam) (state senate). The remaining decisions upheld redistricting plans against a variety of state and federal law challenges. See *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 832 (Fla. 2002) (rejecting state contiguity and political gerrymandering challenges); *Beaubien v. Ryan*, 762 N.E.2d 501, 506–07 (Ill. 2001) (rejecting a challenge based on the state requirement of compactness); *In re Stovall*, 44 P.3d 1266, 1274 (Kan. 2002) (rejecting a federal Equal Protection Clause malapportionment challenge); *McClure v. Sec’y of the Commonwealth*, 766 N.E.2d 847, 854–57 (Mass. 2002) (rejecting challenges based on the state requirement of maintaining city, town, and county boundaries and the federal prohibition against political gerrymandering); *Mayor of Cambridge v. Sec’y of the Commonwealth*, 765 N.E.2d 749, 754–55 (Mass. 2002) (rejecting a challenge based on the state requirement of maintaining city boundaries); *McNeil*, 828 A.2d at 845 (rejecting a challenge based on the state requirement of maintaining county boundaries); *Albert*, 790 A.2d at 999–1000 (same); *Wilkins v. West*, 571 S.E.2d 100, 104, 110 (Va. 2002) (rejecting state due process and equal protection claims that a plan favored minorities, women, and Democrats); see also *Whitaker*, *supra* note 41, at 206 nn.17–18 (collecting cases).

⁴³ The states in which high courts reviewed challenges to redistricting plans on the merits were Alaska, Arkansas, California, Colorado, Florida, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Nebraska (two cases), New York, Oregon, Pennsylvania, Vermont, and Virginia. The high courts in Alaska, Colorado, Kentucky, and Nebraska struck down plans. See *Hickel v. Se. Conference*, 846 P.2d 38, 57 (Alaska 1992) (striking down a plan for lacking socioeconomic integration and contiguity and for diluting a minority group’s representation); *In re Colo. Gen. Assembly*, 828 P.2d 185, 194–96 (Colo. 1992) (striking down a plan for failing to maintain city and county boundaries); *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 475, 478–79, 481 (Ky. 1994) (striking down a plan for failing to maintain county boundaries); *Day v. Nelson*, 485 N.W.2d 583, 586 (Neb. 1992) (same). The Supreme Court of California enacted its own plan when the state legislature was unable to produce a redistricting plan. See *Wilson v. Eu*, 823 P.2d 545, 547, 559–60 (Cal. 1992). The remaining decisions upheld redistricting plans. See *Riley v. Baxter County Election Comm’n*, 843 S.W.2d 831, 833–34 (Ark. 1992) (rejecting a malapportionment challenge); *In re Senate Joint Resolution 2G*, 597 So. 2d 276, 285–86 (Fla. 1992) (rejecting a racial dilution challenge); *Kawamoto v. Okata*, 868 P.2d 1183, 1186–90 (Haw. 1994) (rejecting challenges based

crude comparison, coupled with an analysis of three other measures — the standard of review employed, whether the court based its decision on state or federal law, and a comparison of state and federal court responses to similar issues — indicates an increase in state courts' vigilance and confidence in regulating redistricting.⁴⁴

1. *Standard of Review.* — One measure of the aggressiveness of judicial review of redistricting is the level of deference a court affords the plans of the redistricting body. In this Part, a nondeferential standard means that the court purported or appeared to conduct a de novo review of the redistricting plan's legitimacy. In eight of the sixteen cases in which a 2000 census redistricting cycle plan was reviewed, the court appeared to use a nondeferential standard of review.⁴⁵ More-

on state requirements of contiguity and compactness, equal protection, political gerrymandering, and voter confusion); *In re* Petition of Stephan, 836 P.2d 574, 579–84 (Kan. 1992) (per curiam) (rejecting malapportionment, political gerrymandering, and racial dilution challenges); Legislative Redistricting Cases, 629 A.2d 646, 655–67 (Md. 1993) (rejecting challenges based on malapportionment, political gerrymandering, and the state requirement of maintaining subdivision boundaries); *Town of Brookline v. Sec'y of the Commonwealth*, 631 N.E.2d 968, 970 (Mass. 1994) (rejecting a challenge based on the state requirement of maintaining political subdivisions); *Pick v. Nelson*, 528 N.W.2d 309, 315, 318–19 (Neb. 1995) (rejecting a challenge based, in part, on the state requirement of maintaining county boundaries and equal protection); *Wolpoff v. Cuomo*, 600 N.E.2d 191, 195 (N.Y. 1992) (rejecting a challenge based on the state requirements of compactness and contiguity); *Ater v. Keisling*, 819 P.2d 296, 302–06 (Or. 1991) (rejecting a malapportionment challenge); *Mellow v. Mitchell*, 607 A.2d 204, 207–10 (Pa. 1992) (rejecting malapportionment and VRA challenges); *In re* Reapportionment of Towns of Hartland, Windsor & W. Windsor, 624 A.2d 323, 325, 334–46 (Vt. 1993) (rejecting challenges based on equal protection and on the state requirements of contiguity, compactness, and maintaining city boundaries); *Jamerson v. Womack*, 423 S.E.2d 180, 186 (Va. 1992) (rejecting a challenge based on the state compactness requirement). In *People ex rel. Burris v. Ryan*, 588 N.E.2d 1033 (Ill. 1992), the Illinois Supreme Court upheld a redistricting map as valid and articulated the substantive standards of acceptable population deviation, racial dilution, compactness, and political fairness under which it made its decision, but did not explain how the map satisfied these standards. *See id.* at 1035–36; *see also* REDISTRICTING TASK FORCE, NAT'L CONFERENCE OF STATE LEGISLATURES, OUTLINE OF REDISTRICTING LITIGATION: THE 1990S (1999), <http://www.senate.mn/departments/scr/redist/redout.htm>.

⁴⁴ *But see* Gardner, *supra* note 41, at 650 (noting that “state courts have not thus far taken a particularly active role in using state constitutions to police state political processes in general, or partisan gerrymandering in particular”).

⁴⁵ These cases were in Alaska, Colorado, Idaho, Kansas, Maryland, New Hampshire (two cases), and North Carolina. *See 2001 Redistricting Cases*, 44 P.3d at 147 (noting that the court has a “duty to independently measure each district against constitutional standards”); *Reapportionment of the Colo. Gen. Assembly*, 45 P.3d at 1247 (defining the standard of review as the determination of whether the plan meets six broad criteria of federal and Colorado law); *Stovall*, 44 P.3d at 1273–74 (conducting a detailed review of the “substantive validity” of the redistricting plan); *Legislative Districting*, 805 A.2d at 296 (“[O]n petition of any registered voter, this Court must review [the redistricting] plan to insure that it conforms with constitutional requirements . . .”); *Burling*, 804 A.2d at 474 (rejecting the legislature’s plan and enacting the court’s own redistricting plan); *Below*, 148 N.H. at 3 (same); *cf. Bingham County*, 55 P.3d at 875 (Walters, J., dissenting) (noting that the majority did not apply a deferential standard); *Stephenson*, 562 S.E.2d at 419 (Butterfield, J., dissenting) (same).

over, although some courts purported to use a deferential standard, the level of detail with which they reviewed the redistricting plans suggests a higher level of scrutiny than acknowledged.⁴⁶ By contrast, only five of the seventeen 1990 cycle cases appeared to use a nondeferential standard of review.⁴⁷ Trends in individual courts are somewhat more ambiguous: the standard of review applied by the Maryland and Colorado high courts became noticeably less deferential between the two cycles,⁴⁸ while Florida's courts became more deferential.⁴⁹

2. *Law Applied.* — The primary way in which a state court's application of state law vis-à-vis federal law can demonstrate a willingness to regulate redistricting aggressively is an explicit comparison of the state standard to the federal. In perhaps the most ambitious comparison of this type,⁵⁰ the Supreme Court of North Carolina opened its analysis in *Stephenson v. Bartlett*⁵¹ by identifying the primary question as one of state constitutional construction⁵² and went on to define the state constitution's equal protection clause as requiring stricter scrutiny of redistricting plans than the federal Equal Protection Clause.⁵³ North Carolina is not alone: after noting in its 1990 cycle case that state and federal equal protection standards both required less than a ten percent deviation in the populations of districts, Maryland's Court of Appeals appeared to hold in its 2000 cycle case that meeting the federal baseline was not sufficient to satisfy the Maryland Constitution.⁵⁴ Moreover, even when there is no explicit comparison between

⁴⁶ New Jersey is a prime example of this phenomenon. Compare *McNeil*, 828 A.2d at 852 (noting a presumption of validity), with *id.* at 852–57 (critically evaluating the substantive and legal merits of the state constitutional challenge).

⁴⁷ The cases were in Alaska, California, Florida, Kansas, and Kentucky. See *Hickel*, 846 P.2d at 50; *Eu*, 823 P.2d at 547 (adopting a plan); *Senate Joint Resolution 2G*, 597 So. 2d at 282, 286; *Stephan*, 836 P.2d at 578; *Fischer*, 879 S.W.2d at 475–76.

⁴⁸ See *Colo. Gen. Assembly*, 828 P.2d at 189 (noting that the “choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the Court” (quoting *In re* Reapportionment of the Colo. Gen. Assembly, 647 P.2d 191, 194 n.6 (Colo. 1982)) (internal quotation mark omitted)); *Legislative Redistricting Cases*, 629 A.2d at 667 (noting the “presumption of validity of the Governor's plan”).

⁴⁹ Compare *In re* Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 825 (Fla. 2002) (noting that a joint resolution on apportionment is presumptively valid), with *Senate Joint Resolution 2G*, 597 So. 2d at 282 (rejecting the “narrow view” that the court should not consider the Voting Rights Act in its review).

⁵⁰ See Whitaker, *supra* note 41, at 207.

⁵¹ 562 S.E.2d 377 (N.C. 2002).

⁵² *Id.* at 383–84.

⁵³ See *id.* at 395–96 & n.6; see also *id.* at 388 (noting that state redistricting law has full force unless explicitly superseded by federal law).

⁵⁴ Compare *In re* Legislative Districting, 805 A.2d 292, 324–25 (Md. 2002) (holding that a redistricting plan violated Article III, § 4 of the Maryland Constitution because it gave insufficient consideration to natural boundaries and political subdivisions, even though the plan adhered to the federal population equality rule), with *Legislative Redistricting Cases*, 629 A.2d 646, 659 (Md.

state and federal law, focusing on state law instead of federal law might indicate a court's intent to depart from federal standards in the only way it can: with more rigorous regulation.⁵⁵

3. *Federal-State Comparison: Mid-Decade Redistricting.* — As the last point suggests, when presented with similar redistricting issues, state courts have the potential to regulate more aggressively than federal courts by drawing upon state law when federal law lacks regulatory bite. Consider, for example, the new and contentious issue of mid-decade redistricting.⁵⁶ In both Texas and Colorado the normal redistricting processes failed to produce suitable plans for the 2002 election, so courts put their own plans into effect.⁵⁷ After the 2002 elections, the Republican-controlled state legislature in each state enacted a new redistricting plan favorable to Republican candidates.⁵⁸ In Texas, a variety of plaintiffs filed suit in federal court alleging that the mid-decade redistricting violated the Elections, Census, and Equal Protection Clauses of the U.S. Constitution;⁵⁹ in Colorado, the attorney general filed for an injunction in state court alleging violations of the redistricting provisions of the state constitution.⁶⁰ In the Texas case, a three-judge panel of the District Court for the Eastern District of Texas determined that there was no federal constitutional or statutory claim against mid-decade redistricting.⁶¹ The Supreme Court remanded the case in the wake of *Vieth*,⁶² and the same three-judge panel, ruling only on the question of whether the mid-decade redistricting was a partisan gerrymander, reaffirmed its original holding.⁶³

1993) ("Article III, § 4 [of the Maryland Constitution] does not impose a stricter standard for population equality than the 10% rule imposed by the [Supreme Court under the] Fourteenth Amendment.")

⁵⁵ See, e.g., *In re 2001 Redistricting Cases*, 44 P.3d 141, 143–47 (Alaska 2002) (noting federal supremacy but applying mostly Alaskan law). In fact, the New Jersey Supreme Court appears to be alone in observing explicitly that the federal Constitution imposes a stricter standard than its state constitution. See *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 850 (N.J. 2003) ("[T]he literal language in our State Constitution with respect to political boundaries for counties and the two largest municipalities has to be breached based on the Supremacy Clause in order to comply with the federal law.")

⁵⁶ See Nagourney, *supra* note 26 (noting recent battles over Texas and Colorado efforts at mid-decade redistricting).

⁵⁷ See *Session v. Perry*, 298 F. Supp. 2d 451, 458 (E.D. Tex. 2004); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1227 (Colo. 2003).

⁵⁸ See *Session*, 298 F. Supp. 2d at 458; *Davidson*, 79 P.3d at 1227; Nagourney, *supra* note 26.

⁵⁹ See *Session*, 298 F. Supp. 2d at 457–58, 462.

⁶⁰ See *Davidson*, 79 P.3d at 1225, 1227.

⁶¹ See *Session*, 298 F. Supp. 2d at 458–59.

⁶² *Henderson v. Perry*, 125 S. Ct. 351, 351 (2004) (mem.).

⁶³ See *Henderson v. Perry*, No. 2:03-CV-354, slip op. at 5, 45 (E.D. Tex. June 9, 2005), available at <http://www.campaignlegalcenter.org/attachments/1396.pdf>. The panel also rejected the argument that the one-person-one-vote standard prohibits mid-decade redistricting. See *id.* at 36–37,

By contrast, the Colorado Supreme Court, after reviewing the restrictions that the federal Constitution and federal statutes place on state legislatures' discretion in redistricting,⁶⁴ decided that the mid-decade redistricting violated the Colorado Constitution.⁶⁵ Although this is an isolated example, it is suggestive: the weakening of federal redistricting law creates an opportunity for state courts to append state regulatory requirements to the federal baseline, and in the vivid case of mid-decade redistricting, at least, the Colorado court was willing to seize that opportunity.

*D. A Comparison of State Court Regulation and
Independent Commissions*

State courts appear to be taking a more assertive role in policing redistricting, but are they doing so effectively? A full evaluation is beyond the scope of this Part, but some preliminary issues merit consideration. Commentators have raised two major concerns about state court intervention. First, state judges, who are often elected, might not be politically neutral.⁶⁶ Second, state court regulation of congressional districting is not uniform.⁶⁷ These are important concerns, and the review of state court decisions presented in this Part does not alleviate either one.

Relative to independent commissions, however, state courts stack up well. Elected state judges are susceptible to significant political pressure, but such pressure is at least as great for the members of most independent commissions. In fact, state judges may be more insulated in the redistricting context than independent commission members because judges typically are not beholden to a particular state legislator.⁶⁸ Likewise, although state courts clearly do not adopt uniform redistricting standards, neither do the statutes and constitutional provisions creating redistricting commissions. Indeed, courts may be preferable in this regard because they take a broad view when review-

44. At publication, the Supreme Court had noted probable jurisdiction to consider the Texas redistricting and had scheduled oral argument. See *Jackson v. Perry*, 126 S. Ct. 827 (2005) (mem.).

⁶⁴ See *Davidson*, 79 P.3d at 1232–35.

⁶⁵ See *id.* at 1237–40.

⁶⁶ See Gardner, *supra* note 41, at 651. With the weakening of limitations on campaigning for state judicial seats, there is some concern that state judges will become more political. See *supra* Part II, pp. 1133–34.

⁶⁷ See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Districting*, 2004 SUP. CT. REV. 409, 450–51 (2005).

⁶⁸ See Nichol, *supra* note 35, at 1029–31. But see *supra* p. 1143.

ing plans, and in doing so are able to consider nonbinding authority, such as the laws of other states.⁶⁹

Also important to consider are the misuses of redistricting power that regulation is meant to address. With regard to political gerrymandering, a comparison of court and commission effectiveness — given the partisan nature of judicial elections and the highly political commission membership selection process — may result in a wash. With regard to race and population malapportionment, however, Arizona's experience indicates that independent commissions may have some difficulty. Courts, on the other hand, deal with issues of racial discrimination regularly and may have some expertise in rooting it out.

In short, state courts are not perfect regulators of redistricting, but the evidence suggests that they have the potential to be better regulators than independent commissions, or at least to check abuses against which commissions are ineffective.

E. Conclusion

Without attracting much attention, state courts have, in the wake of diminished federal involvement, become more aggressive in their regulation of redistricting. Their role is likely only to expand: state courts seem keen to review the decisions of increasingly widely used independent redistricting commissions. Such expansion should be viewed favorably. State court regulation has the potential to provide a significant layer of defense against misuse of redistricting power⁷⁰ and thus deserves greater consideration as a complement or alternative to independent commissions.

VI. VOTING IN TIMES OF CRISIS

Over the past five years, Americans have witnessed two tragedies of epic proportions — one at the hand of man, the other at the whim of nature. The attacks of September 11, 2001, renewed a fear — not seen since the end of the Cold War — of losing government leaders in a targeted attack.¹ In the years since, congressional leaders and legal scholars have expended much energy discussing the best ways to ensure the continuity of legitimate government in the face of crippling

⁶⁹ See, e.g., *Stephenson v. Bartlett*, 562 S.E.2d 377, 390 n.3 (N.C. 2002) (finding persuasive authority in similar holdings by the courts of other states).

⁷⁰ Indeed, the effect of aggressive state court oversight of redistricting might extend beyond the bounds of individual states. For example, at least one scholar has argued that state court efforts could instigate and inform the reemergence of federal judicial regulation of political gerrymandering. See Gardner, *supra* note 41, at 645–47.

¹ Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 281–82 (2003).