When Federal Courts Remediate Intrastate Redistricting Stalemates: Parsing What Is Owed Deference When State Policies Conflict

Erin Yonchak†

When partisan politics completely frustrate the efforts of a state to redistrict after a census, federal district courts are tasked with the "unwelcome obligation" of imposing court-ordered electoral maps that meet the federal constitutional one-person, one-vote requirement. This Comment terms these cases "intrastate redistricting stalemates," novelly distinguishing them from other Equal Protection one-person, one-vote cases. In the wake of Moore v. Harper*, federal courts may be remediating more intrastate redistricting stalemates than ever if state courts are stripped of their power to impose remedial congressional maps as outside the scope of "ordinary judicial review" permitted under the Elections Clause.*

Remediating intrastate redistricting stalemates is trickier for federal courts than remediating other Equal Protection one-person, one-vote cases. In crafting or selecting remedial maps, the U.S. Supreme Court has instructed federal courts that they must defer to states' policies and plans. To inadequately do so is reversible error. But when is a state policy or plan owed deference? The answer is clear in cases where a state has recently redistricted but a federal court has struck down the state's new maps for failure to meet federal constitutional or statutory requirements: the state's policies as expressed in its recently enacted, post-census reapportionment plan are owed deference to the extent they do not violate federal requirements.

But when a state fails to redistrict post-census due to an intrastate stalemate, this Comment argues that there is no recently enacted reapportionment plan owed deference. This Comment argues this holds true whether the intrastate stalemate presents as (1) an intralegislative conflict, due to one or both legislative branches failing to agree on a map or to garner sufficient votes to pass a map; (2) a conflict between the state's legislative branch and the executive branch via the governor vetoing a legislatively passed map; or (3) a conflict between the state judiciary and the mapmaking body over the state constitutionality of the reapportionment plan.

Instead, this Comment argues that the controlling source of state policy owed deference when remediating an intrastate redistricting stalemate must be the state's constitution over other conflicting sources of state policy. This is particularly critical

† B.A. 2016, The Ohio State University; J.D. Candidate 2024, The University of Chicago Law School. Special thanks to Professor Bridget Fahey and the wonderful editors and staff of the *University of Chicago Law Review* for their thoughtful input on this work. I would also like to express my gratitude to my spouse and family for their endless support—and my former colleagues at BerlinRosen, especially Alex Navarro-McKay, Isaac Goldberg, and Emily Robinson, for teaching me everything that I know about electoral maps.

because often state government parties advocate for their own rejected or stalled reapportionment plans—which do not have the force of law—as proposed remedies in these intrastate stalemate cases. To blindly select a proposed map solely because it was prepared by the branch delegated with state mapmaking power puts the federal court in the position of selecting a winner in a bitter, hyperpartisan dispute that could not exist under the state constitution's checks and balances—which remain critical after Moore*. Instead, a federal court must select or craft a remedial map that (1) comports with all state constitutional commands and controls for electoral map outcomes; and (2) best embodies state redistricting policies as expressed in other valid state statutes.*

INTRODUCTION

There is perhaps no greater federal judicial headache than remediating a state's redistricting failure. And it may become an even bigger and more frequent headache for federal courts in the wake of *Moore v. Harper*.[1] When a state's electoral maps fail to

[1] 600 U.S. 1 (2023). Although *Moore* held that state courts may continue exercising "ordinary judicial review" in congressional redistricting cases, some scholars suggest that

meet federal requirements, a federal court is forced to perform the "unwelcome obligation" of imposing court-ordered maps for the state if the state is unable or unwilling to cure its maps itself before an election.[2] Often, this remediation occurs after a federal court has struck down a state's redistricted maps on federal constitutional or statutory grounds.[3] Other times, a federal court must impose "a court-ordered plan . . . because partisan politics frustrate the efforts of a state legislature to enact a new plan after a recent census."[4] In the latter scenario, the federal court has the unenviable task of breaking an intrastate stalemate in a high-stakes, hyperpartisan dispute and attempting to reconcile or select among state policies that directly conflict.[5] The manner in which a federal court goes about doing so can "change the identity, allegiance, and political priorities of . . . the [legislature] as a whole."[6] This Comment will analyze the federal courts' unique remedial role in these intrastate stalemate-derived redistricting cases, proposing a novel distinction between intrastate redistricting stalemate cases and other redistricting cases.

The U.S. Supreme Court has made clear that federal courts must defer to state policies and state plans in crafting or selecting remedial maps.[7] But what is a state policy or plan that is owed deference? This is a particularly thorny question in intrastate redistricting stalemate cases which are fueled by partisan gridlock.[8] By the very nature of the intrastate conflict, state policies are dissonant—since an irreconcilable conflict between or within state

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when state courts remediate states' redistricting failures by imposing court-ordered congressional maps, they exceed the scope of "ordinary judicial review." *See infra* notes 45–60 and accompanying text. Thus, federal courts could be remediating more intrastate redistricting stalemates than ever before.

2 Connor v. Finch, 431 U.S. 407, 415 (1977); *see, e.g.*, Growe v. Emison, 507 U.S. 25, 36 (1993).

3 *E.g.*, Abrams v. Johnson, 521 U.S. 74, 77 (1997).

4 Karcher v. Daggett, 462 U.S. 725, 734 n.6 (1983).

5 *See generally, e.g.*, Colleton Cnty. Council v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002); Essex v. Kobach, 874 F. Supp. 2d 1069 (D. Kan. 2012) (per curiam); Gonidakis v. LaRose, 599 F. Supp. 3d 642 (S.D. Ohio 2022) (per curiam).

6 Doug Spencer, *Why Should We Care?*, ALL ABOUT REDISTRICTING, https://perma.cc/UTW6-CY5A.

7 *E.g.*, White v. Weiser, 412 U.S. 783, 795 (1973):

> [A] federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.

8 *See, e.g.*, *supra* note 4 and accompanying text.

governmental branches is afoot. For example, a divided state legislature may be unable to reach consensus on new maps that endanger their own members' seats and set the legislative power balance for years to come.[9] Or a split-party state executive and legislative branch may fall into an endless cycle of map drawing rejected by veto.[10] Or a strongly partisan-united state legislative and executive branch may act heedless of state constitutional controls, resulting in state courts repeatedly striking down reapportioned maps as unconstitutional.[11]

As such, in the remedial phase of an intrastate stalemate, a federal court may juggle several competing proposed maps or redistricting policies from each branch of the state government. How should a court treat a map approved by the legislature but vetoed by the governor? Does the mapmaking body's rejected plan get special deference even though it failed to clear state constitutional checks and balances?

The stakes to these answers are incredibly high: a court's choice can directly impact the makeup of the legislature, and, thereby, the legislative priorities of the legislative body for years to come.[12] Moreover, all efforts to reform partisan gerrymandering must come from the states and be enforced by state courts, because the U.S. Supreme Court has found it to be a nonjusticiable political question.[13] So what a federal court chooses to recognize as a state policy or plan that is owed deference, if done thoughtlessly, not only amounts to picking a winner in the bitter hyperpartisan dispute, but also has the potential to gut redistricting reform efforts. Therefore, it is important for a court to thoughtfully consider what qualifies as a state plan or policy owed deference in an intrastate redistricting stalemate.

In this Comment, I map each of the common intrastate redistricting stalemate scenarios and synthesize federal precedent in an attempt to expound the most faithful interpretation of what, if any, state electoral plans or policies are owed deference in each intrastate conflict. I conclude that there is no recently enacted reapportionment plan owed deference by a federal court in an intrastate stalemate. Instead, the state constitution, as the supreme source of state law, must be the origin of a state's policy owed

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9 *See infra* Section IV.A.

10 *See infra* Section IV.B.

11 *See infra* Section IV.C.

12 *See, e.g.*, *supra* note 6 and accompanying text.

13 Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

deference over conflicting sources of state policy or plans. Since the state constitution's mapmaking delegation and legislative process are effectively mooted by the state's failure to enact a map within that process, I argue that, at the remedial stage, a federal court should focus on the substantive constitutional provisions that specify commands and controls for electoral map outcomes[14]—using the delegatory provisions for the limited purpose of assessing if any map is properly enacted and, if not, what might be the next controlling source of state policy after the state constitution. I also discuss how federal court remediation of intrastate congressional redistricting stalemates may become more common, and perhaps even required, after *Moore*, which raises the stakes of this Comment.

I. BACKGROUND

The organization of state elections is a power reserved to the states.[15] Unlike federal congressional elections, which receive an explicit mention in the Federal Constitution's Elections Clause[16] and can be directly regulated by the U.S. Congress,[17] state elections have no federal controls beyond the protections afforded under the Voting Rights Act[18] (VRA) and other general protections available under the Federal Constitution. These general constitutional protections include, in the realm of state electoral redistricting, the

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[14] *See supra* Section IV.D.2. For example, these constitutional provisions include those that require a certain number of state legislative districts; balanced partisan outcomes, compactness, and contiguity; or districts to follow political boundaries.

[15] *See, e.g.*, Growe v. Emison, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.").

[16] U.S. CONST. art I, § 4, cl. 1.

[17] *See, e.g.*, 2 U.S.C. §§ 2a, 2c; *see also* Michael T. Morley & Franita Tolson, *Elections Clause: Common Interpretation*, NAT'L CONST. CTR., https://perma.cc/GS8K-FU2M:

> [Congress] has established a single national Election Day for congressional elections . . . . Congress also has enacted statutes limiting the amount of money that people may contribute to candidates for Congress, requiring that people publicly disclose most election-related spending, mandating that voter registration forms be made available at various public offices, and requiring states to ensure the accuracy of their voter registration rolls.

[18] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. But the protections afforded under the VRA are increasingly limited. *See generally* Shelby County v. Holder, 570 U.S. 529 (2013) (gutting the VRA's § 5 preclearance protections explained i*nfra* in Section III.C).

right to vote[19] and, under the Equal Protection Clause of the Fourteenth Amendment, the right to one-person, one-vote.[20] The one-person, one-vote principle effectively mandates that states must reapportion after a census to account for population changes.[21] And if state mapmaking bodies and state courts fail to put in place reapportioned maps, federal courts are "left with the unwelcome obligation" to impose maps that meet the federal constitutional one-person, one-vote criterion to protect the right to vote.[22]

In practice, this works as follows. First, the Supreme Court has made clear that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."[23] But states can—and do—unilaterally fail to enact new maps because of intrastate stalemates. As a result, the stakes of redistricting are extraordinarily high, and divided stakeholders are primed to fall into a bitter partisan breakdown. For example, after the 2000 census, South Carolina was left without reapportioned electoral maps when the Democratic governor repeatedly vetoed the Republican-controlled legislature's redistricting plans.[24] Similarly, the Kansas legislature failed to redistrict after the 2010 census when an "impasse resulted from a bitter ideological feud[,] . . . pitt[ing] GOP moderates against their more conservative GOP colleagues."[25] And, after the 2020 census, Ohio was left without state-drawn maps when the Republican-dominated mapmaking body refused to follow the state constitution's partisanship control provision, causing the

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19 Reynolds v. Sims, 377 U.S. 533, 554, 561–62 (1964) (holding that "the Constitution . . . protects the right of all qualified citizens to vote, in state as well as in federal elections").

20 *Id.* at 566–68 ("[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. . . . [And it] requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

21 *Id.* at 584 (noting that if state "reapportionment w[as] accomplished with less frequency [than decennially], it would assuredly be constitutionally suspect").

22 Connor v. Finch, 431 U.S. 407, 415 (1977); *see also, e.g.*, Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 195 (1972) (per curiam) ("[T]he three-judge federal court possesses the power to reapportion the State's legislature when the applicable state statutes fall short of constitutional requirements."); Branch v. Smith, 538 U.S. 254, 270, 273 (2003) (discussing the like for congressional maps, and finding that "§ 2c requires courts, when they are remedying a failure to redistrict constitutionally, to draw single-member districts whenever possible").

23 Chapman v. Meier, 420 U.S. 1, 27 (1975).

24 *E.g.*, Colleton Cnty. Council v. McConnell, 201 F. Supp. 2d 618, 623 (D.S.C. 2002).

25 *E.g.*, Essex v. Kobach, 874 F. Supp. 2d 1069, 1073–74 (D. Kan. 2012) (per curiam).

Ohio Supreme Court to repeatedly strike down the adopted maps as flagrant gerrymanders.[26]

Federal courts must defer intervention to give a state every opportunity to draw its own electoral maps, "neither affirmatively obstruct[ing] state reapportionment nor permit[ting] federal litigation to be used to impede it."[27] This deferral principle applies when there are parallel state court remedial proceedings.[28] But where a state court "will fail timely to perform [its] duty"[29] before an election,[30] a state court is unable to impose remedial maps due to constitutional or statutory design,[31] or where there is no parallel state court litigation in process,[32] a federal court may proceed. So, when a federal court finally intervenes, effectively as a last resort, imposing a remedy is an inherently rushed process[33] conducted by a three-judge district court[34] with immediate election deadlines looming.[35]

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[26] *E.g.*, Gonidakis v. LaRose, 599 F. Supp. 3d 642, 681–82, 684 (S.D. Ohio 2022) (per curium) (Marbley, C.J., concurring in part and dissenting from the remedy).

[27] *Growe*, 507 U.S. at 34.

[28] *Growe* makes clear that federal courts must also defer to state court redistricting proceedings, but that deference is "limited [to] deferral in favor of state court remedial proceedings, and only to the extent that the state court has shown that it will adopt a plan in time for the next round of elections." Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 893 (2001); *see also Branch*, 538 U.S. at 262.

[29] *Growe*, 507 U.S. at 34.

[30] *See, e.g.*, Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 604 (2013); *Federal Court Involvement in Redistricting Litigation*, *supra* note 28, at 891–96 (discussing the bounds of *Growe* deferral and how federal courts may navigate when intervention is timely).

[31] *See, e.g.*, *Gonidakis*, 599 F. Supp. 3d at 646, 650.

[32] *See, e.g.*, *Branch*, 538 U.S. at 262 (holding that federal court intervention is proper where "there is no suggestion that the District Court failed to allow the state court adequate opportunity to develop a redistricting plan"); *Federal Court Involvement in Redistricting Litigation*, *supra* note 28, at 892 ("*Growe* has [ ] not been understood to require federal courts to defer to state courts when state proceedings have not yet begun."); Brown v. Kentucky, 2013 WL 3280003, at *4 (E.D. Ky. June 27, 2013). *But see* Archuleta v. City of Albuquerque, 2011 WL 13285433, at *2 (D.N.M. June 21, 2011) (holding that where the proceeding is removed from state to federal court, *Growe* deferral is still owed).

[33] *See, e.g.*, Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1146–47 (2005) (lamenting the "frenzied" process that accompanies court-drawn redistricting plans).

[34] 28 U.S.C. § 2284 (requiring a three-judge district court be convened for apportionment challenges).

[35] In addition to simply meeting election dates, a court has a decidedly short window to impose its remedy before it becomes impracticable to implement because substantial election and campaign infrastructure must be built prior to the election—all of which hinges on the remedy. *See* Persily, *supra* note 33, at 1147. Federal courts are also guided by the *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), principle "that federal district courts ordinarily should not enjoin state election laws in the period close to an election" to prevent chaos and confusion. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh,

The Supreme Court has recognized that in statewide malapportionment cases—as these post-census cases necessarily are—"the only way to vindicate an individual plaintiff's right to an equally weighted vote [is] through a wholesale 'restructuring of the geographical distribution of seats in a state legislature.'"[36] Thus, a federal court's remedy in a case where a state fails to redistrict after a census is not limited solely to the plaintiff's county or district lines, but instead involves imposing statewide maps that cure the one-person, one-vote constitutional violation.

A federal court has equitable power in selecting and imposing a redistricting remedy.[37] The remedial options available to a court include: fashioning court-drawn maps, enlisting the help of an independent mapmaker to craft a map, or selecting one of the party's proposed maps (which the court may choose to modify). But the court is not totally free to pick or draw maps at its own whim.[38] The Supreme Court has imposed clear limits and expectations on available equitable remedies.[39] Perhaps the most ambiguous rule (yet the most frequently reiterated) by the Supreme Court is that a federal court must defer to state policies and state plans in crafting or selecting the remedial maps.[40] Failure to adequately defer to state policies and plans is reversible error.[41]

Despite the additional federal hook for congressional elections, congressional redistricting operates functionally the same as state electoral redistricting under federal law. If a state fails to reapportion its congressional districts after a census to account for population changes, the Equal Protection one-person, one-vote principle is violated, and a court must intervene to protect the right to vote. Section 2c of title 2 of the U.S. Code "requires courts, when they are remedying a failure to redistrict [congressional

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J., concurring). But intrastate redistricting stalemate cases present "the rare moment when the logic underpinning *Purcell* actually calls for intervention. Why? Because without judicial relief in some form," states, with no post-census-reapportioned map available, "may not have an election at all—and certainly not one compliant with state [and federal] election laws." *Gonidakis*, 599 F. Supp. 3d at 667 (emphasis omitted).

36 Gill v. Whitford, 138 S. Ct. 1916, 1930 (2018) (quoting *Reynolds*, 377 U.S. at 561).

37 *Reynolds*, 377 U.S. at 585 (citing Baker v. Carr, 369 U.S. 186, 250 (1962)).

38 *See* Whitcomb v. Chavis, 403 U.S. 124, 161 (1971) (holding in a legislative apportionment case that "[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited"); *see also Beens*, 406 U.S. at 200.

39 *See, e.g.*, *Chapman*, 420 U.S. at 26–27 (holding that "a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation").

40 *See infra* Part III.

41 *See, e.g.*, White v. Weiser, 412 U.S. 783, 797 (1973); *Beens*, 406 U.S. at 200.

maps] [ ], to draw single-member districts whenever possible."[42] State legislative and federal congressional maps are regularly considered in tandem by federal courts[43] and are governed by the same state policy deference standard in state apportionment as in congressional apportionment.[44] *Moore* did nothing to uproot this.

But there is a possibility that *Moore* may exponentially grow the number of intrastate congressional redistricting stalemates remediated by federal courts. In *Moore*, the U.S. Supreme Court reviewed decisions by North Carolina state courts overturning the state's legislatively enacted congressional maps as an impermissible partisan gerrymander under the state constitution,[45] and imposing court-drawn maps in their place.[46] The petitioners in the case argued the Federal Constitution's explicit grant of election lawmaking authority to the state "Legislature" in the Elections Clause meant that the state legislature could not be limited by the state constitution's anti-gerrymandering provision in shaping congressional maps.[47]

The Court rejected this contention, holding that "state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause."[48] But, because the parties had not adequately presented the issue, the Court left open the question of whether the state court's novel interpretation of the state constitution and subsequent remedial action of drawing and imposing its own congressional map were in violation of the Elections Clause.[49] The Court warned: "[S]tate courts do not have free rein. . . . [T]he Elections Clause expressly vests

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[42] *Branch*, 538 U.S. at 270 (citing 2 U.S.C. § 2c).

[43] *See, e.g.*, *Growe*, 507 U.S. at 27 (state legislative and federal congressional reapportionment challenge); *Perry*, 565 U.S. at 390 (same).

[44] *White*, 412 U.S. at 795. The only notable difference is a lower bar for equality of population in state legislative maps than in congressional maps. *See Reynolds*, 377 U.S. at 578 (noting that "[s]omewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting"). But court-imposed maps are held to a higher standard than state-drawn maps, so this cognizable difference is lessened at the remedial phase. *See, e.g.*, *Finch*, 431 U.S. at 417–20 (explaining the difference permitted in deviations from population equality in court-ordered maps versus legislatively adopted apportionments).

[45] *Moore*, 600 U.S. at 3–4.

[46] *Id. See generally* N.C. League v. Representative Destin Hall, 2022 WL 2610499 (N.C. Super. Ct. Feb. 23, 2022).

[47] *Moore*, 600 U.S. at 1, 18–19.

[48] *Id.* at 24.

[49] *Id.* at 29.

power to carry out its provisions in 'the Legislature' of each State, a deliberate choice that" must not be evaded by state courts.[50]

Without adopting a specific test, the Court held that

> federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution.[51]

Until the Court interprets this holding in subsequent redistricting caselaw, discussing what *Moore* means for state court intervention in intrastate congressional redistricting stalemates is effectively reading tea leaves. But some scholars have suggested that when state courts impose remedial maps, they usurp the state legislatures' mapmaking powers and act outside the bounds of "ordinary judicial review."[52] If the Court adopts this understanding, it would mean that state courts cannot remediate intrastate congressional redistricting stalemates.

But federal courts' remedial role in intrastate congressional redistricting stalemates remains the same. When states fail to reapportion congressional maps after a census, federal courts must act (1) "to effect the redistricting mandated by § 2c,"[53] and (2) to protect the constitutional one-person, one-vote requirement. The Elections Clause "reserves to Congress [ ] the power 'at any time by Law [to] make or alter such Regulations, except as to the Places of chusing Senators.'"[54] Thus, the Court has made clear that § 2c is controlling over federal courts and "directs federal courts to redistrict"[55] to establish "a number of districts equal to the number of Representatives to which such State is so entitled . . . [that] elect [no] more than one Representative [per district]."[56] No power granted by the Elections Clause permits states to proceed with maps that do not meet federal constitutional one-person,

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50 *Id.* at 26–27.

51 *Id.* at 29–30.

52 William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, THE ATLANTIC (Oct. 11, 2022), https://perma.cc/RWL9-M9RT; Dan Epps & Will Baude, *Peak SG*, DIVIDED ARGUMENT (July 24, 2023), https://perma.cc/P4BH-9SDE.

53 *Branch*, 538 U.S. at 275 (citing 2 U.S.C. § 2c).

54 *Id.* at 266.

55 *Id.* at 272, 276.

56 2 U.S.C. § 2c.

one-vote requirements.[57] Thus, federal courts are expected to cure congressional maps when a state fails to do so after a census—"[t]he unlikely exception is the situation in which the decennial census makes no districting change constitutionally necessary."[58]

If *Moore* stripped state courts of their congressional redistricting remedial powers, it would upend the current deferral principle that requires federal courts to allow state courts the first bite at the remedial apple.[59] Instead, federal courts would serve as the only remedial backstop for intrastate congressional redistricting stalemates as the only courts who may break these stalemates by imposing congressional remedial maps. Further, while "state courts retain the authority" to review and overturn maps that do not comply with "state constitutional restraints,"[60] state courts would be unable to cure the state constitutional violations themselves—potentially causing many more stalemates between the state judiciary and the state mapmaking body, a unique scenario that I discuss *infra* in Part IV.C. Thus, federal courts could have not only a much more dominant presence in imposing remedial congressional electoral maps, but also could be routinely confronted by parties proposing remedial maps that have been struck down by the state court as unconstitutional under the state constitution.

II. STATE CONSTITUTIONS, STATE GOVERNMENT, AND REDISTRICTING

Before parsing what constitutes a state plan or policy that is owed deference when an intrastate conflict arises, one must first understand the role of the state constitution in the organization of a state. State constitutions—the supreme law of each state—originate the bodies of state government, vest the lawmaking power and process, including the power to redistrict, and place

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[57] *See Branch*, 538 U.S. at 272 (discussing how one interpretation of § 2c, made pursuant to congressional Elections Clause authority, would mean that federal courts would "be congressionally forbidden to act when the state legislature has not redistricted . . . [which would be] an unconstitutional result"); *id.* at 278 (quoting Abrams v. Johnson, 521 U.S. 74, 101 (1997)):

> While it certainly remains preferable for the State's legislature to complete its constitutionally required redistricting pursuant to the requirements of § 2c . . . [w]hen the State, through its legislature or other authorized body, cannot produce the needed decision, then federal courts are "left to embark on [the] delicate task" of redistricting.

[58] *Id.* at 273.

[59] *See supra* notes 27–28 and accompanying text.

[60] *Moore*, 600 U.S. at 29.

substantive controls on such lawmaking power. As this Section demonstrates, any act of a state government repugnant to its state constitution is void.[61] Reapportionment plans are no exception. State constitutions delegate who has the power to redistrict, the legislative process for redistricting, and the substantive commands and controls that electoral maps must meet. And reapportionment plans that either fail the state constitutional mapmaking process or fail to comport with the substantive commands and controls provided in state constitution must be void—and cannot be a valid state policy.

Much like the federal government, state governments are organized by and creatures of their state constitutions. The origins of this understanding date back to the United States' founding.[62] State constitutions preceded the Federal Constitution by more than a decade and provided the building blocks used by the framers for the Federal Constitution.[63] One such building block was the understanding of the role of a constitution as the supreme law of the state, a fundamental product of the American Revolution.[64] The supremacy of state constitutions in state law was readily apparent to the founding generation.[65]

Early state constitutions made clear that all power comes from the people, establishing that the "fundamental constituent power of the people[ ] [is] needed to legitimate the ground rules for legislation in the form of a written constitution."[66] Thus, a state constitution's supremacy in state law is derived from its manifestation as the explicit grant of the people's power to the state government. A constitution's constraints, rights, and rules are what that grant of power is conditioned upon.

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61 *See id.* at 19 ("'[A]ll [the state legislature's] [ ] acts must be conformable to [the state constitution], or else they will be void.'" (quoting Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795))).

62 *See* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993).

63 *Id.*

64 *See id.* at 920–21.

65 *See, e.g.*, *id.* at 918 ("A constitution was a written document distinct from, and superior to, all the operations of government."); *see also* THOMAS PAINE, RIGHTS OF MAN (1791), *reprinted in* 1 THE COMPLETE WRITINGS OF THOMAS PAINE 243, 278–79 (Philip S. Forner ed., 1945) ("A constitution [ ] is to a government what the laws made afterwards by that government are to a court of judicature. The court of judicature . . . acts in conformity to the laws made: and the government is in like manner governed by the constitution.").

66 WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 297, 133–34 (2001) (quotation marks omitted).

Thus, while states have plenary powers rather than enumerated powers under the Federal Constitution,[67] state constitutions both originate the structure and bodies of a state's government and can place "significant substantive and procedural limits" on those bodies' plenary powers.[68] Early state jurisprudence reinforces this understanding. Over a decade before *Marbury v. Madison*[69] famously established on the federal level that "[a]n act of congress repugnant to the constitution cannot become a law,"[70] state courts had already determined such on the state level.[71] Explained clearly in one early state opinion parsing a state constitution:

> The Constitution is . . . the supreme law of the land; it is paramount to the power of the Legislature . . . . The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move . . . . [T]here can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.[72]

Thus, it is well established that any act of a state body that contravenes a state constitution's substantive and procedural limits is void, and not a valid state policy.

In the realm of redistricting, this means that the state constitution assigns which body has the power to draw maps, the process through which those maps must be approved, and the substantive qualities that the map drawing body must incorporate into those maps. Since every act of the state government repugnant to the state constitution is absolutely void, a state redistricting plan or policy repugnant to the state constitution must necessarily be void. *Moore* confirmed that this settled principle remains in force

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67 *See* U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States."); *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018) ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms.").

68 Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 102 (1998); *see also* Giozza v. Tiernan, 148 U.S. 657, 661 (1893) ("[T]here are no limitations upon the legislative power of the legislature of a state, except those imposed by its written constitution."); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. CT. REV. 1, 20–21.

69 5 U.S. (1 Cranch.) 137 (1803).

70 *Id.* at 138.

71 *See* CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 46–47 (1914).

72 *VanHorne's Lessee*, 2 U.S. (2 Dall.) at 308.

for congressional electoral maps as well, invoking much of this same analysis about the authoritative role of state constitutions in the state legal system and noting that "[a] state legislature may not 'create congressional districts independently of' requirements imposed 'by the state constitution.'"[73]

Most often, state constitutions delegate electoral redistricting powers to the state legislature.[74] Typical legislative checks and balances apply to both state and congressional electoral maps,[75] as was reconfirmed by *Moore*.[76] *Moore* also embraced precedent that allows congressional mapmaking authority under the Elections Clause to be vested by the state "in a body other than the elected group of officials who ordinarily exercise lawmaking power."[77] Thus, in some states, constitutions lawfully delegate both congressional and state electoral redistricting to redistricting commissions, which vary state by state in their degree of independence from elected officials.[78] Legislatures in some states are able to override these commission-drawn maps in specific scenarios.[79] Several states provide for backup commissions in the event of legislative failure.[80]

Beyond delegating and setting out the electoral redistricting process, many state constitutions provide rules that regulate the substance of the maps and must be incorporated by the mapmakers. For example, some state constitutions prescribe the number

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73 *Moore*, 600 U.S. at 18 (quoting Smiley v. Holm, 285 U.S. 355, 373 (1932)); *see id.* at 19 ("The Framers' [understood] that when legislatures make laws, they are bound by the provisions of the very documents that give them life . . . 'therefore, all their acts must be conformable to it, or else they will be void.'" (quoting *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 308)).

74 *See, e.g.*, Doug Spencer, *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, https://perma.cc/JE8D-LWRH [hereinafter Spencer, *Who Draws*] ("34 state legislatures have primary control of their own district lines, and 39 legislatures have primary control over the congressional lines in their state.").

75 Electoral maps often must pass a bicameral legislature. *See, e.g.*, Spencer, *Who Draws*, *supra* note 74. Electoral maps are subject to a gubernatorial veto and judicial review. *E.g.*, *id.*; Manheim, *supra* note 30, at 594. Some electoral maps are also subject to a referendum vote. *E.g.*, Chapman v. Meier, 420 U.S. 1, 3 (1975).

76 *See id.*; *Moore*, 600 U.S. at 18–19 (invoking *Smiley*, 285 U.S. 355 (finding gubernatorial veto part of the lawmaking process and, therefore, a valid check on a state legislature's congressional redistricting)); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 538 (1916) (same with maps subject to a citizen referendum vote).

77 *Moore*, 600 U.S. at 17–18 (citing Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 816 (2015)).

78 *See, e.g.*, Spencer, *Who Draws*, *supra* note 74.

79 *Id.*

80 *Id.*

of state legislative districts that each redistricting plan must include.[81] Forty state constitutions require state legislative districts be contiguous[82] while eleven state constitutions require that federal congressional districts be contiguous.[83] Thirty state constitutions require state legislative districts to follow political boundaries[84] such as county, city or town lines,[85] and nine require federal congressional districts to follow political boundaries.[86] Twenty-eight state constitutions require their state legislative districts to be reasonably compact,[87] and eleven state constitutions require compactness for federal congressional districts.[88] Thirteen state constitutions require that state assembly districts be nested within state senate districts.[89] State constitutions regulate partisan outcomes in the redistricting process for state legislative maps: twelve state constitutions have a partisanship control in place for state legislative maps,[90] while nine state constitutions control partisanship for federal congressional maps.[91] State constitutions also specify to "keep[ ] 'communities of interest' whole"[92] in state legislative districts in eight states,[93] and in federal congressional districts in five states.[94]

State courts generally have original jurisdiction over matters concerning state redistricting, and can hear constitutional challenges to reapportionment plans like any other state legislation.[95] State courts can and do overturn legislatively enacted state electoral maps that do not meet the commands and controls set out

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81 *See, e.g.*, PA. CONST. art. II, § 16; TEX. CONST. art. III, § 2.

82 Doug Spencer, *Criteria for State Legislative Districts*, ALL ABOUT REDISTRICTING, https://perma.cc/PCU8-LRJE [hereinafter Spencer, *State Legislative Criteria*] (providing a state-by-state count for state constitutional controls over state legislative redistricting); *see also* Doug Spencer, *Where Are the Lines Drawn?*, ALL ABOUT REDISTRICTING, https://perma.cc/KGB6-Q69K (describing contiguity controls).

83 Doug Spencer, *Criteria for Congressional Districts*, ALL ABOUT REDISTRICTING, https://perma.cc/W8PB-U5PR [hereinafter Spencer, *Congressional Criteria*] (providing a state-by-state count for state constitutional controls over congressional redistricting).

84 Spencer, *State Legislative Criteria*, *supra* note 82.

85 Spencer, *Where Are the Lines Drawn?*, *supra* note 82.

86 Spencer, *Congressional Criteria*, *supra* note 83.

87 *See* Spencer, *State Legislative Criteria*, *supra* note 82.

88 Spencer, *Congressional Criteria*, *supra* note 83.

89 *See* Spencer, *State Legislative Criteria*, *supra* note 82.

90 *See id.*

91 Spencer, *Congressional Criteria*, *supra* note 83.

92 Spencer, *Where Are the Lines Drawn?*, *supra* note 82.

93 Spencer, *State Legislative Criteria*, *supra* note 82.

94 Spencer, *Congressional Criteria*, *supra* note 83.

95 *See, e.g.*, ILL. CONST. art. VI, § 9.

by the state constitution.[96] *Moore* ensures that state courts will continue to be able to do so for congressional electoral maps as well, holding that "state courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause" with the vague caveat that state courts must act within the bounds of "ordinary judicial review" when they do so.[97]

III. SUPREME COURT GUIDANCE REGARDING DEFERENCE TO STATE POLICY

The Supreme Court has distilled a general theme to guide federal courts in crafting redistricting remedies: deference to the state. But the collective body of guidance regarding the state policy deference requirement is less than clear. In this Part, I expound upon the Supreme Court precedent outlining this standard that continues to be used by lower courts when shaping redistricting remedies today. I argue that, read together, these cases agree that the controlling state policies owed deference are: (1) the state constitution, and (2) valid state statutes.

A. Foundational Cases

After the Supreme Court first declared redistricting cases justiciable and established that the Equal Protection Clause protects one-person, one-vote,[98] an onslaught of cases followed. Within nine months, litigants challenged nearly three-fourths of states' legislative apportionment schemes.[99] Many of these early cases, though foundational and controlling law today, are procedurally distinct from later Equal Protection one-person, one-vote cases arising from intrastate redistricting stalemates post-census. In these early cases, many states' preexisting plans simply did not satisfy the newly established one-person, one-vote standard—and, since the Court was still actively defining the parameters of

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96 *See, e.g.*, *Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST. (Mar. 28, 2023), https://perma.cc/ER2T-5CHK (following 2020-census-related redistricting, Alaska, Maryland, New York, North Carolina, and Ohio courts struck down electoral maps based on state constitutional violations).

97 *Moore*, 600 U.S. at 29–30.

98 *See* Baker v. Carr, 369 U.S. 186, 209–10 (1962).

99 *See* Reynolds v. Sims, 377 U.S. 533, 556 n.30 (1964).

the one-person, one-vote standard, states in these early years routinely enacted maps that failed to meet the evolving standard.[100]

Below, I highlight two foundational cases in this vein that shape the state policy deference standard today. Neither of these cases adequately clarify what should be considered controlling state policy in an intrastate stalemate scenario because in each instance there was not a true intrastate conflict; there was a conflict only between an existing state map and the Federal Constitution. However, these cases are useful in establishing that, even in these distinct circumstances, the Supreme Court looked to the state constitution and valid state statutes when evaluating if the lower court had adequately deferred to state policy.

1. *Reynolds v. Sims*.

The first U.S. Supreme Court case to evaluate a federal court redistricting remedy, *Reynolds v. Sims*,[101] came just two years after the Supreme Court first declared redistricting cases justiciable.[102] The district court found that Alabama's state electoral maps violated the Equal Protection Clause, as the maps had not been redrawn in sixty years and were significantly malapportioned.[103] The district court gave the state a cure period, during which the state devised two revised plans for maps.[104] The district court found that both of these plans also violated the Equal Protection Clause, and accordingly imposed its own maps by combining the better features of the two revised plans.[105] In shaping this remedy, the district court explicitly grappled with Alabama's constitutional apportionment requirements noting that "an earnest effort must be made to meet all such [state constitutional] requirements, and it is only in the event that proves impossible that the Supremacy Clause of the Federal Constitution would cause any irreconcilable and conflicting requirement of the State

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[100] *See, e.g.*, White v. Weiser, 412 U.S. 783, 790 (1973) (holding that even though the percentage of population deviations in the state's electoral map was less than 5%, substantially smaller than those invalidated in past cases, the deviations "were not 'unavoidable,' and . . . not as mathematically equal as reasonably possible" (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969))).

[101] 377 U.S. 533 (1964).

[102] *See Baker*, 369 U.S. at 209–10.

[103] *Reynolds*, 377 U.S. at 545.

[104] *Id.* at 543–44.

[105] *Id.* at 552.

Constitution to give way."[106] The Supreme Court affirmed the district court's remedial action as "proper," and agreed that "[c]learly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."[107]

As noted above, Alabama enacted two redistricting plans during the cure period,[108] thus making this case distinct from an intrastate stalemate case—where no recently reapportioned plan is in place at all. Noticeably absent from the Court's discussion was the standard requiring deference to state policies and plans that come in its later opinions. Since there were recently enacted plans—no intrastate stalemate—there was little quarrel about what constituted contemporary state policy (the two cure-period state-enacted plans). The lower federal court grafted those two plans together in shaping its remedy, deviating from some of the specific Alabama constitutional requirements only after determining that they could not possibly be met while protecting Equal Protection one-person, one-vote requirements.

2. *White v. Weiser*.

A couple years after the Supreme Court first hinted at the state policy deference standard,[109] it expounded and solidified the requirement in *White v. Weiser*[110]—making clear that federal courts must observe deference to state policy when remediating both state electoral maps and federal electoral maps. In *White*, the Supreme Court agreed with the three-judge federal district court's finding that Texas's enacted post-1970-census bill—redistricting its congressional electoral map—violated the Equal Protection one-person, one-vote principle.[111] But the Supreme Court reversed on the grounds that the district court had not adequately

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106 Sims v. Frink, 208 F. Supp. 431, 439 (M.D. Ala. 1962), *aff'd sub nom. Reynolds*, 377 U.S. 533.

107 *Reynolds*, 377 U.S. at 584, 586.

108 *Id.* at 543. One of these two plans was a legislatively enacted constitutional amendment to "be submitted to the voters for ratification." *Id.* at 544. The opinion did not turn heavily on this plan or discuss if, at this preratification stage, it was owed legislative deference.

109 Whitcomb v. Chavis, 403 U.S. 124, 160 (1971) (holding that a federal court should not "intrude upon state policy any more than necessary" to cure the federal constitutional violation when crafting a state electoral redistricting remedy).

110 412 U.S. 783 (1973).

111 *Id.* at 784–85, 792–93. There is no question that the maps were properly enacted as the Court even noted that "the Governor of the State of Texas signed [the redistricting bill] into law." *Id.* at 784.

deferred to state policy in imposing its remedy.[112] The district court, when choosing between two remedial maps presented by the parties, had selected the map that "substantially disregarded the configuration of the districts" in the enacted—but unconstitutional—Texas bill.[113] The Supreme Court announced:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor "intrude upon state policy any more than necessary."[114]

The Supreme Court held that the lower court should have instead selected the map that "generally followed the redistricting pattern of [the Texas bill] . . . [but] adjusted where necessary so as to achieve smaller population variances among districts."[115] Fundamental to the Supreme Court's analysis was the assertion that Texas's existing congressional electoral map was owed deference as state policy because it maps was "a duly enacted statute of the State of Texas."[116] Thus, while *White v. Weiser* announces a standard that binds courts today, its holding and reasoning are inapposite to intrastate redistricting stalemate cases, as it stands for the proposition that a properly and recently enacted map is a clear pronouncement of state policy.

B. Intrastate Conflict Cases

The Supreme Court has twice meaningfully reviewed a federal-court-imposed remedy in an Equal Protection one-person, one-vote case that resulted from a pure post-census intrastate redistricting stalemate. Below I outline those two cases in depth, as they best illustrate what qualifies as a state policy that is owed

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[112] *Id.* at 797.
[113] *Id.* at 787, 794.
[114] *White*, 412 U.S. at 795 (quoting *Whitcomb*, 403 U.S. at 160).
[115] *Id.* at 786, 796–97.
[116] *Id.* at 795.

deference—and how a federal court ought to make that determination in an intrastate conflict scenario. I draw from these cases that when state policies conflict, the starting point should be the state constitution. Additionally, the only legitimate redistricting policies owed deference in an intrastate conflict are those expressed in the state constitution or a properly enacted statute.

1. *Sixty-Seventh Minnesota State Senate v. Beens*.

In *Sixty-Seventh Minnesota State Senate v. Beens*,[117] the Minnesota legislature failed to reapportion after the 1970 census, as its plan was rejected by gubernatorial veto.[118] The three-judge federal court was forced to remedy the Equal Protection one-person, one-vote violation, and attempted to reconcile conflicting state policies by crafting remedial maps that "slash[ed] [the] state senate's size almost in half and [the] state house's size by nearly one-fourth."[119] The U.S. Supreme Court reversed the three-judge court's imposed remedial plan because it "so drastically chang[ed] the number of legislative districts and the size of the respective houses of the Minnesota Legislature [in a way] not required by the Federal Constitution and [was] not justified as an exercise of federal judicial power."[120]

The Court reached this conclusion by first looking to the Minnesota Constitution, because "courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."[121] The Court reasoned that, because the Minnesota Constitution vests the legislature with the power to reapportion, it follows "that a federal reapportionment court should accommodate the relief ordered to the appropriate provisions of state statutes relating to the legislature's size."[122] The Court noted that the specific number of legislative districts had been in effect in Minnesota since 1913, lasting through two succeeding reapportionments and restated six years ago in a valid

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117 406 U.S. 187 (1972) (per curiam).

118 *Id.* at 189–90. *Beens* was handed down before the *Growe* deferral principle was established, so the Court does not spend any time discussing whether federal court intervention was proper. *See supra* notes 27–32 and accompanying text.

119 *Beens*, 406 U.S. at 199.

120 *Id.* at 200.

121 *Id.* at 196 (quoting *Reynolds*, 377 U.S. at 584).

122 *See id.* at 196–97.

statute "determined by the legislature and approved by the Governor of the State."[123]

The dissent, on the other hand, remarked that the three-judge court "perceived conflict among legitimate state policies."[124] It continued:

> [The lower court] clearly recognized that the size of the houses of the Minnesota Legislature set by state statute was a state policy deserving respect. But it also recognized that there were several other legitimate state policies at stake—for one, the conformance of legislative district boundaries to political jurisdictional boundaries.[125]

The majority dealt with parsing these multiple sources of "legitimate state policies"[126] by starting at the state constitution. And where that state constitution granted reapportionment power to the legislature, the Court found properly enacted state statutes were the policies next afforded deference over other conflicting sources of policies that were not derived from the state constitution.

2. *Chapman v. Meier*.

After the 1970 census, North Dakota found itself in an intrastate redistricting stalemate due to its maps being rejected by referendum vote, a power reserved to the people under the North Dakota Constitution.[127] This led to an Equal Protection one-person, one-vote challenge in federal court. In *Chapman v. Meier*,[128] the U.S. Supreme Court reviewed the remedial state electoral maps that the three-judge federal district court had imposed, which included multimember state senate districts.[129]

Prior to federal court involvement, the state legislature passed a state electoral reapportionment plan which included

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[123] *Id.* at 197–98. The Court noted that though these numbers were housed in the prior Apportionment Act, MINN. STAT. ANN. §§ 2.021–2.712 (1966), that contained the old maps, they should have been severed by the district court and not unnecessarily nullified. *See Beens*, 406 U.S. at 198. For good measure, the Court also qualified that changes in a state legislature's size effectuated by judicial reapportionment can be justified by state constitutional demand. *Id.* at 198–99, 198 n.10.

[124] *Id.* at 202 (Stewart, J., dissenting).

[125] *Id.*

[126] *Id.*

[127] Chapman v. Meier, 420 U.S. 1, 3, 12 (1975).

[128] 420 U.S. 1 (1975).

[129] *Id.* at 13.

multimember state senate districts—but this plan was subsequently rejected by referendum vote.[130] The Court held that because "the Legislative Assembly['s] [reapportionment plan that] provided for multimember senate representation . . . was promptly aborted [via the referendum vote]. . . . [It], therefore, obviously does not qualify as established state policy."[131] Thus, the Court did not accord this legislatively-passed-yet-referendum-rejected plan any deference. Looking to the "North Dakota constitutional and statutory provisions," the Court found no evidence that requiring multimember state senate districts was a "policy" of the state beyond (1) previous federal court–ordered remedial redistricting plans, which are plainly not sources of *state* policy, and (2) the reapportionment plan nullified by referendum.[132] Thus, the Court remanded the case to the three-judge district court to redraw the remedial map, eliminating the multimember state senate districts—which were not the result of any valid state policy.[133]

The Court's analysis in *Chapman* shows that a legitimate redistricting policy owed deference in an intrastate conflict is one that is expressed in the state constitution or a properly enacted statute, as the Court explicitly looked to those two sources in determining what constituted state policy.[134] And when a statute fails a state constitutional check on legislative power—like a referendum—it is not owed deference.[135] Perhaps tellingly, in parsing what was considered "state policy" in this intrastate redistricting stalemate, the Supreme Court immediately began its opinion by laying out the relevant North Dakota state constitutional provisions.[136]

C. Cases Resulting from a VRA-Created Stalemate

There is another line of Equal Protection one-person, one-vote cases that derive from state reapportionment failure under the VRA. In each of these cases, a state submitted a reapportionment plan for VRA preclearance,[137] and that state-submitted plan

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130 *Id.* at 12.

131 *Id.* at 15.

132 *Id.* at 14–15.

133 *See Chapman*, 420 U.S. at 21.

134 *Id.* at 14.

135 *Id.* at 12.

136 *See id.* at 3–4.

137 The VRA required the U.S. Department of Justice or the U.S. District Court of the District of Columbia to preclear, prior to implementation, any new voting law, including

either failed VRA preclearance or did not receive timely VRA preclearance, leaving the state without reapportioned maps for an upcoming election.[138] Although the VRA's preclearance protections were largely gutted by *Shelby County v. Holder*,[139] these pre–*Shelby County* cases continue to be referenced by courts in intrastate stalemate cases today as Equal Protection one-person, one-vote authority.[140] But these VRA-derived Equal Protection cases are sufficiently distinct from intrastate stalemate Equal Protection cases that the remedial guidance laid out in these VRA cases is not squarely pertinent to an intrastate conflict scenario.

What perhaps can be deceptive about the VRA Equal Protection cases is that, at first glance, they are stalemates. But the nature of a VRA-derived stalemate is fundamentally different from an intrastate stalemate. Plans submitted for VRA preclearance must be final and enacted.[141] This contemplates that the state reapportionment plan has passed via the proper state legislative process, including gubernatorial signature, before being submitted under the VRA.[142] Therefore, a plan submitted for VRA preclearance is a properly enacted plan, and a valid pronouncement of state policy owed deference.[143] Supreme Court precedent recognizes this—and it is in these cases that the Supreme Court has established some of its firmest guidance regarding federal court remedial deference to state policy.

For example, in *Perry v. Perez*,[144] after Texas failed to obtain preclearance on its submitted maps in time for the 2012 election,

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reapportionment plans, in states with a history of voting discrimination. *See* CONG. RSCH. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 16 (2015).

138 *See generally, e.g.*, Upham v. Seamon, 456 U.S. 37 (1982) (per curiam); Perry v. Perez, 565 U.S. 388 (2012) (per curiam); Connor v. Finch, 431 U.S. 407 (1977); Abrams v. Johnson, 521 U.S. 74 (1997).

139 570 U.S. 529 (2013) (overturning the coverage formula which determined the jurisdictions subject to § 5 preclearance requirements, rendering § 5 functionally inoperative). Section 3, the VRA provision authorizing courts to impose preclearance requirements on jurisdictions as equitable relief, is still in effect but rarely used. 52 U.S.C. § 103029(c); David Herman, *Reviving the Prophylactic VRA: Section 3, Purcell, and the New Vote Denial*, 132 YALE L.J. 1462, 1483 (2023).

140 *See, e.g.*, Gonidakis v. LaRose, 599 F. Supp. 3d 642, 673 (S.D. Ohio 2022) (per curiam) (citing *Perry*, 565 U.S. at 393).

141 28 C.F.R. § 51.22(a)(1) (2023).

142 But it can be heard prior to referendum or other judicial review by state courts. 28 C.F.R. § 51.22(b) (2023).

143 *Perry*, 565 U.S. at 393 ("[A]lthough the [*Upham*] state plan as a whole had been denied § 5 preclearance, this Court directed a District Court to 'defer to the legislative judgments the [state] plans reflect,' insofar as they involved districts found to meet the preclearance standard." (quoting *Upham*, 456 U.S. at 40–41)).

144 565 U.S. 388 (2012).

the Court vacated the three-judge district court's order imposing remedial maps on the basis that the lower court had "unnecessarily ignored the State's [submitted] plans in drawing" the remedial maps.[145] The Court held:

> To avoid being compelled to make such otherwise standardless decisions [in selecting and imposing a redistricting remedy post-census], a district court should take guidance from the State's recently enacted plan in drafting an interim plan. That plan reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth. This Court has observed before that "faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying" a state plan—even one that was itself unenforceable—"to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."[146]

Thus, the Court made clear that an important starting place for any court imposing a redistricting remedy is the state's "recently enacted plan." In any VRA-derived Equal Protection case, a recently enacted plan plainly exists because it was properly enacted by the state to be submitted for VRA preclearance. But, as I will discuss in Section IV, there is inherently not a "recently enacted plan" in an intrastate conflict case.

IV. WHEN STATE POLICIES CONFLICT: WHAT IS OWED DEFERENCE?

At the remedial stage, a federal court is tasked with imposing court-ordered electoral maps that meet the one-person, one-vote requirement when an intrastate conflict has derailed the mapmaking process post-census.[147] Mirroring the federal government's checks and balances, state government conflicts usually occur in one of the following scenarios: (1) an intralegislative conflict, due to one or both legislative branches[148] failing to agree on

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[145] *Id.* at 398.

[146] *Id.* at 393 (quoting *Abrams*, 521 U.S. at 79).

[147] *See supra* note 22.

[148] I use "legislative branch" here for brevity and because most states vest redistricting power in their legislative branch. But this term is used interchangeably with "mapmaking body" which includes whatever body in which a state vests its mapmaking power.

a map or garner sufficient votes to pass a map;[149] (2) a conflict between the state's legislative branch and the executive branch via the governor vetoing a legislatively passed map;[150] and (3) a conflict between the state judiciary and the mapmaking body over the state constitutionality of the reapportionment plan.[151]

The Supreme Court has pronounced that a federal court "should take guidance from the State's *recently enacted plan* in drafting an interim plan [as] [t]hat plan reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to [post-census] population growth."[152] The Supreme Court has not explicitly defined what constitutes a "recently enacted plan." But drawing from *Perry* (the case that solidified the emphasis on recently enacted plans), it is clear that the Court viewed a "recently enacted plan" as one enacted post-census—not the outdated reapportionment plan from the previous decennial census.[153] Thus, several questions remain: In an intrastate stalemate case, is there ever a "recently enacted plan" that is owed deference? When does a plan put forth by the state mapmaking body count as "recently enacted"? What is the effect, if any, of a rejection of such a plan by checks and balances, such as through a veto, a referendum, or the state court?

In this Part, I will explore each intrastate stalemate scenario, examining whether there are any "recently enacted" state plans owed deference. I argue that, in any intrastate redistricting stalemate case, there will never be a "recently enacted" state plan owed deference. Instead, I propose that a federal court should look to the state constitution and valid state statutes as the sources of state policy owed deference. I further argue that a federal court should differentiate between delegatory state constitutional provisions—which are essentially mooted by the failure of the expressly delegated mapmaking body to properly enact reapportioned maps—and state constitutional provisions that provide substantive commands and controls for electoral map outcomes.

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149 *See infra* Section IV.A.

150 *See infra* Section IV.B.

151 *See infra* Section IV.C.

152 *Perry*, 565 U.S. at 393 (emphasis added).

153 *Id.* at 396 (explicitly stating that in a post-census intrastate legislative stalemate case "there was no recently enacted state plan to which the District Court could turn" (citing Balderas v. Texas, 2001 WL 36403750 (E.D. Tex. Nov. 14, 2001) (per curiam), *aff'd*, 536 U.S. 919 (2002))).

A. Maps That Never Make It to Adoption

Perhaps it seems obvious that a reapportionment plan that dies in either branch of a state legislature and is never fully adopted by the legislature is not a "recently enacted plan" owed deference. The Supreme Court, speaking on a separate statutory issue, seemed to hint that such a conclusion would indeed be obvious: "*Of course* the State has not been redistricted if districts have been drawn by someone without authority to redistrict. Should an ambitious county clerk or individual legislator sit down and draw up a districting map, no one would think that the State has . . . been 'redistricted.'"[154]

Further, in *Perry*, the Court suggested there is no "recently enacted state plan" in an intralegislative stalemate case.[155] The Court expressly distinguished the 2012 VRA-derived stalemate at issue in *Perry* from a previous case where an intralegislative stalemate left Texas without a redistricted map following the 2000 census, *Balderas v. Texas*.[156] The *Perry* court noted that, unlike the controversy it faced, "there was *no recently enacted state plan* to which the District Court could turn" in *Balderas*.[157]

Though discussion of the facts underlying *Balderas* was sparse, this conclusory statement made by the *Perry* Court seems to foreclose that the 2001 Texas redistricting bill, which had passed the Texas House committee but failed to be adopted by the full Texas legislature, was a "recently enacted plan" owed deference under the standard laid down in *Perry*.[158] The *Balderas* three-judge district court, which was summarily affirmed by the Supreme Court, did not so much as mention the stalled Texas bill when crafting its remedial map[159]—and neither did *Perry* in revisiting the case.[160]

The *Perry* Court apparently endorsed the *Balderas* district court's approach, surmising:

> Without the benefit of legislative guidance in making distinctly legislative policy judgments, the *Balderas* court was perhaps compelled to design an interim map based on its own

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154 Branch v. Smith, 538 U.S. 254, 277–78 (2003) (emphasis in original) (discussing the meaning of "redistricted" in 2 U.S.C. § 2a(c)).

155 *Perry*, 565 U.S. at 396 (citing *Balderas*, 2001 WL 36403750).

156 536 U.S. 919 (2002).

157 *Perry*, 565 U.S. at 396 (emphasis added) (citing *Balderas*, 2001 WL 36403750).

158 *See id.*; *see, e.g.*, TEX. REDISTRICTING, TEXAS REDISTRICTING: 2000S TIMELINE.

159 *See generally Balderas*, 2001 WL 36403750.

160 *See generally Perry*, 565 U.S. 388.

> notion of the public good. Because the District Court here had the benefit of a recently enacted plan to assist it, the court had neither the need nor the license to cast aside that vital aid.[161]

Given the complete lack of discussion about the unadopted Texas bill, the Supreme Court seemed to implicitly endorse that a plan must pass through the proper legislative process to adoption to constitute a "recently enacted plan" owed deference.

Lower courts agree that any plan that does not make it through the proper legislative process to legislative adoption is not owed deference as state policy.[162] This is particularly intuitive because "the failure of a bill to be enacted evidences a legislative policy that the bill is not desired by the legislature."[163] Likewise, a reapportionment plan devised by a state body that does not have the authority vested in it to reapportion is not owed deference.[164] To give deference to such a reapportionment plan or simply the reapportionment bill that made it the furthest in the legislative process "would be a massive intrusion into the legislative process. [A federal court] would, in effect, be amending the [state constitutional] rules for enacting legislation."[165] Thus, there is no "recently enacted plan" owed deference in an intralegislative stalemate because no reapportionment plan has made it to adoption.

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[161] *Id.* at 396.

[162] *See, e.g.*, Shayer v. Kirkpatrick, 541 F. Supp. 922, 929 (W.D. Mo.), *aff'd*, 456 U.S. 966, 102 (1982) (stating that a plan not adopted by a state legislature "can hardly be said to demonstrate any legislative intent other than a rejection of the plan"); Essex v. Kobach, 874 F. Supp. 2d 1069, 1084 (D. Kan. 2012) (per curiam) ("[W]e owe no deference to any proposed plan, as none has successfully navigated the legislative process to the point of enactment."); Favors v. Cuomo, 2012 WL 928216, at *17 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012) ("Had the New York State Legislature done its job and passed its own redistricting plan, judicial deference would be paid.").

[163] *Shayer*, 541 F. Supp. at 932.

[164] *See, e.g.*, Bodker v. Taylor, 2002 WL 32587312, at *5 (N.D. Ga. June 5, 2002) (refusing to defer to a county board reapportionment plan where the board had no power to reapportion under the state constitution). The *Bodker* court explained:

> For the court to defer to a redistricting plan proposed by the Fulton County Board of Commissioners, one that has not been considered by the General Assembly [which was vested reapportionment power under the state constitution], would give to Fulton County that which the state of Georgia intended to retain, and in so doing would raise serious federalism concerns.

[165] *Shayer*, 541 F. Supp. at 932.

B. Vetoed Maps

Courts widely agree that a vetoed reapportionment plan is not a "recently enacted plan" owed deference as a valid state policy.[166] The Supreme Court spoke on this scenario in *Beens*, where it held that a vetoed state electoral map was only a "proffered current policy" on equal footing with the executive's proposed maps.[167] A legislative plan is "nullified by the Governor's veto"[168] and the deference afforded to it is likewise nullified. In determining such, the U.S. Supreme Court cited to a Minnesota Supreme Court opinion holding that "a qualified veto was put in the [Minnesota] [C]onstitution as a check upon the power of the legislature to redistrict and apportion."[169] On remand from the Court's opinion, the three-judge court proceeded to redraw the maps in accordance with the district numbers as prescribed by statute, without so much as a reference to the vetoed map.[170]

Lower federal courts, across several states, appear to agree unanimously with the reasoning in *Beens*.[171] Often, these courts put particular emphasis on the fact that a governor's approval is required for a plan to become law, and explain that a plan that has not gone through the process to become law is not owed deference.[172] This reasoning tracks established U.S. Supreme Court precedent finding that a gubernatorial veto is not preempted by the Elections Clause for federal congressional maps because it is a part of the lawmaking process under the state constitution.[173]

A federal court may be tempted to simplify its remedial task by deferring to a reapportionment plan solely on the basis of its

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166 *See, e.g.*, Carstens v. Lamm, 543 F. Supp. 68, 79 (D. Colo. 1982); O'Sullivan v. Brier, 540 F. Supp. 1200, 1202 (D. Kan. 1982); Colleton Cnty. Council v. McConnell, 201 F. Supp. 2d 618, 623 (D.S.C. 2002). *But see* Donnelly v. Meskill, 345 F. Supp. 962, 965 (D. Conn. 1972).

167 *Beens*, 406 U.S. at 197.

168 *Id.* at 195.

169 Duxbury v. Donovan, 138 N.W.2d 692, 704 (Minn. 1965).

170 *See generally* Beens v. Erdahl, 349 F. Supp. 97 (D. Minn. 1972).

171 *See supra* note 166.

172 *See, e.g.*, *O'Sullivan*, 540 F. Supp. at 1202 ("[W]e are not required to defer to any plan that has not survived the full legislative process to become law.").

173 *See* Smiley v. Holm, 285 U.S. 355, 372–73 (1932) (noting that "nothing in Article I, section 4, which precludes a State from providing that legislative action in districting the State for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power"); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808 (2015) (affirming that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto"); Moore v. Harper, 600 U.S. at 17–18 (reaffirming *Smiley* and *Arizona Independent Redistricting Commission*).

legislative adoption, despite rejection by gubernatorial veto.[174] But to do so would mean that

> a partisan state legislature could simply pass any [redistricting] bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the Court defer to their proposal[,] . . . [using the federal court to] override the Governor's veto when the General Assembly did not do so.[175]

This is precisely the danger of a federal court determining that a vetoed map is owed deference: it effectively overrides the gubernatorial veto, eliminating a vital state constitutional check on the state legislature's power. A federal court imposing a map rejected by gubernatorial veto thereby creates an outcome in a bitter intrastate partisan dispute that could not occur under the state constitution. As such, a federal court owes no "recently enacted plan" deference in a gubernatorial-legislative redistricting stalemate.

C. Maps Invalidated by the State Supreme Court as Unconstitutional

A stalemate between the state judiciary and the state mapmaking body is a rare fact pattern to date in Equal Protection one-person, one-vote cases because state courts usually have the remedial power to impose their own maps to cure state constitutional violations.[176] This Section explores two cases in which a stalemate between a state judiciary and state mapmaking body wound up in federal court, and argues that a map struck down by a state supreme court should not be considered a "recently enacted plan" owed deference by the federal court.

In 1965, just a few years after the U.S. Supreme Court first declared redistricting cases justiciable[177] (before the state policy deference standard was established[178]), the majority of a three-judge federal district court imposed a plan that was previously

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[174] *See Donnelly*, 345 F. Supp. at 965 (basically adopting a vetoed legislative plan with minor changes to cure equal representation issues because "[t]he legislative adoption of [the plan] tips the scales in favor of the plan"). The *Carstens* court distinguished this case on the basis that the *Donnelly* court faced "severe time constraints." *Carstens*, 543 F. Supp. at 78.

[175] *Id.* at 79. Ultimately, the court concluded that both the legislature and the governor's proposed plans were merely "'proffered current policy' rather than clear expressions of state policy." *Id.* at 79 (quoting *Beens*, 406 U.S. at 197).

[176] And federal courts must generally defer to state-court remedial processes. *See* Growe v. Emison, 507 U.S. 25, 35–36 (1993).

[177] *See supra* note 98 and accompanying text.

[178] *See supra* Section III.A.

invalidated as unconstitutional under the state constitution by New York's highest court.[179] The dissenter, Judge Richard Levet, intuited the tension of this holding:

> It is my opinion that no interim plan should be based upon a form of legislative plan which violates the New York State Constitution . . . and which has been so held by the highest court of this state.[180]

Judge Levet further stated:

> [T]he 14th Amendment gives no possible power, no basis for this court to suspend the valid provisions of the State Constitution unless directly necessary to obtain the results demanded by the governing decision by the Supreme Court affecting legislative apportionment in this state. . . . Even the temporary adoption of [the invalidated plan] by order of this court violates what I believe to be a basic principle governing the relationship of states and nation under our Federal Constitution.[181]

On appeal to the U.S. Supreme Court, without a full briefing on the merits or argument by the parties, the Court refused to grant a stay and summarily affirmed.[182] The lone opinion in the case came from dissenting Justice John Marshall Harlan II, who noted that

> the propriety of a federal court's ordering a state election to proceed under a plan which the highest court of the State has found to violate the State Constitution in respects not

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[179] *See generally* WMCA, Inc. v. Lomenzo (S.D.N.Y. May 24, 1965) (oral opinion), *as reprinted in* Jurisdictional Statement, Screvane v. Lomenzo, 382 U.S. 11 (1965) (No. 449) [hereinafter, *WMCA* May 24, 1965, Oral Opinion]. The three-judge federal district court initially struck down New York's state legislative maps as unconstitutional under the newly established Equal Protection one-person, one-vote requirement, and gave the state legislature a cure period to enact properly reapportioned maps. *See* WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 918–19 (S.D.N.Y. 1965). During that cure period, the New York state legislature enacted a map that enlarged the New York state assembly to 165 seats. *Id.* *WMCA* May 24, 1965, Oral Opinion, *supra*, at 18a. Then, in parallel state court litigation, New York's highest court invalidated the cure period plan, as it was violative of the New York constitutional requirement that the state assembly be 150 seats. *See generally* In re Orans, 15 N.Y.2d 339 (1965).

[180] WMCA, Inc. v. Lomenzo (S.D.N.Y. May 10, 1965), *as reprinted in* Jurisdictional Statement at 9a, Screvane v. Lomenzo, 382 U.S. 11 (1965) (No. 449) (oral opinion).

[181] *WMCA* May 24, 1965, Oral Opinion, *supra* note 179, at 23a–24a.

[182] Travia v. Lomenzo, 381 U.S. 431 (1965) (per curiam); WMCA, Inc. v. Lomenzo, 382 U.S. 4, 4 (1965) (per curiam), *abrogated on other grounds by* Davis v. Bandemer, 478 U.S. 109 (1986).

> claimed to be violative of the Federal Constitution, when a number of alternatives are available, raises what I consider to be very serious federal questions which this Court should at least hear. . . . I would set the case for immediate argument, and would have the Court render its decision on the stay promptly thereafter, with opinions on the merits of the controversy to follow in due course.[183]

This early case holds little precedential value, given the Court's summary affirmance.[184] It is further uninformative because it predates the state policy deference standard. But the dissenting judge and Justice picked up on a controversy that would rear its ugly head nearly six decades later.

Recent amendments in Ohio and Michigan's state constitutions expressly bar their state courts from imposing remedial electoral maps.[185] Accordingly, if those states' judiciaries repeatedly reject the states' reapportioned maps as unconstitutional, these states can end up without reapportioned maps approaching their impending elections. In the very first instance that Ohio underwent redistricting following its constitutional amendment, this very stalemate occurred, and a federal court was forced to intervene and impose a map to protect the right to vote.[186] If other states mimic Ohio and Michigan's reforms, this could become an increasingly common occurrence.[187] Likewise, if *Moore* did indeed

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[183] *Travia*, 381 U.S. at 435 (Harlan, J., dissenting).

[184] Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 425 (2019) ("[T]he whole Court agrees that summary dispositions are entitled to some weight, but to less than fully articulated decisions. . . . [T]he Justices feel less intellectual commitment to such decisions, even though they are a disposition on the merits." (quoting STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 307 (10th ed. 2013))).

[185] These states both adopted this change recently, in 2015 and 2018 respectively, as part of a multistate trend to enact bipartisan redistricting reform via constitutional amendment. *See* OHIO CONST. art XI, § 9(D); MICH. CONST. art. IV, § 6(19); *see, e.g.*, Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 237 n.162 (2019).

[186] Gonidakis v. LaRose, 599 F. Supp. 3d 642, 646 (S.D. Ohio 2022) (per curiam).

[187] Ohio could see a redistricting stalemate like this as often as every two years. *See* OHIO CONST. art. XI, § 8, cl. C(1)(a) (specifying that a plan that is not adopted by a bipartisan vote of the Ohio Redistricting Commission shall stay in place for only two election cycles); *see also Gonidakis*, 599 F. Supp. 3d at 692 (Marbley, C.J., concurring in part and dissenting from the remedy) (noting that "[t]he 2024 Commission, faced with the options of ceding political power or simply waiting out adverse court decisions, likely will be tempted to take the same course [of allowing a federal court to impose its will]").

strip state courts of their remedial powers in congressional apportionment cases as "exceed[ing] the bounds of ordinary judicial review" permissible under the Elections Clause,[188] the frequency of state-judiciary-prompted redistricting stalemate cases reaching federal courts could absolutely explode in the coming decades.[189] This could very well become the most routinely heard type of intrastate stalemate in federal court—especially in the many, if not most, states whose constitutions do not formally delegate remedial congressional redistricting power to their state courts.[190]

It is well established that every act of the state legislature repugnant to the state constitution is absolutely void.[191] State judicial review acts as a critical state constitutional check on the state legislature's power, much like an executive veto. It seems to naturally follow that a state reapportionment plan rejected by a state supreme court as unconstitutional could not possibly be perceived as a validly enacted state plan that is owed deference. However, in 2022, two of the three federal judges in *Gonidakis v. LaRose*[192] decided otherwise.[193]

In the wake of the 2020 census data's release, Ohio's map-making body, the Ohio Redistricting Commission (the Commission), faced its first task since Ohio's 2015 bipartisan redistricting constitutional amendment: to draw new electoral maps in time for the 2022 primary election. The Ohio Constitution requires the Commission to act in accordance with specific guidelines, including that electoral maps reflect the partisanship of Ohio voters and not unfairly favor one party.[194] It quickly became clear that the

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188 *Moore*, 600 U.S. at 30.

189 *See supra* Part I where this is discussed in more detail.

190 *See generally, e.g.*, MINN. CONST.; N.C. CONST.; ILL. CONST.; N.Y. CONST. An early piece of post-*Moore* scholarship keenly suggests that "[i]f a state were to confer *lawmaking* (rather than judicial) power on its courts in [congressional redistricting], nothing in *Moore* would prevent such a delegation." Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country and Commentators*, 2023 CATO S. CT. REV. 275, 283 (emphasis in original). This seems permitted under the Court's interpretation of the Elections Clause, and a possible solution to allow state courts to retain the first bite at the remedial congressional reapportionment if states so amended their constitutions. *See supra* note 77 and accompanying text.

191 *See supra* Part II.

192 599 F. Supp. 3d 642 (S.D. Ohio 2022) (per curiam).

193 *Id.* at 675 (holding that "the fact that [the state electoral map rejected by the Ohio Supreme Court] does not comply with the Ohio Supreme Court's interpretation of [the state constitution] does not prevent this court from imposing it"). *See generally* Gonidakis v. LaRose (*Gonidakis II*), 2022 WL 1709146 (S.D. Ohio May 27, 2022) (per curiam) (imposing the remedy selected in the April 20 *Gonidakis* opinion).

194 OHIO CONST. art. XI, § 6.

Commission was unwilling to meet its state constitutional duties.[195] On five separate occasions, the Commission presented maps to the Ohio Supreme Court that the Court rejected as unconstitutional as they were flagrantly gerrymandered to disfavor the minority party.[196] Despite being ordered by the Ohio Supreme Court to redraw the maps alongside an independent map drawer,[197] the Commission continued to shirk its duties until Ohio's 2022 primary election was in crisis.

So, in *Gonidakis*, less than two weeks before the primary election was scheduled to occur by state statute,[198] a three-judge federal court intervened to protect the right to vote and impose state electoral maps that met the one-person, one-vote criteria. The court suspended the primary election date but made clear that there was not time for it to draw its own maps and, and it opted to select among three state electoral maps presented by the parties.[199] Two of those maps, drawn and approved by the Commission, had been struck down by the Ohio Supreme Court as unconstitutional partisan gerrymanders under the Ohio Constitution.[200] The other map had been drawn by the independent mapmaker that the Ohio Supreme Court had ordered the Commission to hire, but the Commission ultimately rejected that mapmaker's map, largely because the Commission was unable to address technical concerns before the deadline imposed by the Ohio Supreme Court.[201]

The two-judge majority in the district court placed emphasis on the fact that to impose a map not adopted by the Commission would violate the state constitution, which explicitly vested sole

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[195] League of Women Voters of Ohio v. Ohio Redistricting Comm'n (*League I*), 192 N.E.3d 379, 387–88 (Ohio 2022).

[196] *See id.* at 384; League of Women Voters of Ohio v. Ohio Redistricting Comm'n (*League II*), 195 N.E.3d 974, 978 (Ohio 2022) (per curiam); League of Women Voters of Ohio v. Ohio Redistricting Comm'n (*League III*), 198 N.E.3d 812, 814 (Ohio 2022) (per curiam); League of Women Voters of Ohio v. Ohio Redistricting Comm'n (*League IV*), 199 N.E.3d 485, 488 (Ohio 2022) (per curiam); League of Women Voters of Ohio v. Ohio Redistricting Comm'n (*League V*), 200 N.E.3d 197, 199 (Ohio 2022) (per curiam).

[197] *League III*, 198 N.E.3d at 821.

[198] *Gonidakis*, 599 F. Supp. 3d at 646.

[199] *Id.* at 669–70, 677.

[200] *Id.* at 653, 671.

[201] *See, e.g.*, *id.* at 676; *see also id.* at 688 (Marbley, C.J., concurring in part and dissenting from the remedy) (noting that "[b]y unrebutted testimony . . . , the necessary technical adjustments would take no more than one day to implement" (quotation marks omitted)).

mapmaking power in the Commission.[202] The court saw "no basis in Ohio or federal constitutional law for favoring some provisions of the Ohio Constitution over others."[203] Even while acknowledging that "every map [before the court] lack[ed] legal force,"[204] the two-judge majority "emphasiz[ed] the deference due the legislative process in districting,"[205] and thus opted to elevate the Commission's policy preferences as expressed in its unconstitutional maps "even when doing so [ ] violate[d] other state laws, including [the] state constitution[ ]."[206] The two-judge majority held that "the fact that [the state electoral map rejected by the Ohio Supreme Court] does not comply with the Ohio Supreme Court's interpretation of [the state constitution] does not prevent this court from imposing it."[207]

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[202] *Gonidakis*, 599 F. Supp. 3d at 675–76 (majority opinion) ("[W]hile the Ohio Constitution places numerous substantive restraints on redistricting, it also assigns mapmaking authority *solely* to the Commission." (emphasis added)).

[203] *Id.* at 674.

[204] *Id.* at 673 n.19 (emphasis omitted).

[205] *Id.* at 675.

[206] *Id.* at 674. The two-judge majority relied on three VRA cases to support this inference. *See* Tallahassee Branch of NAACP v. Leon County, 827 F.2d 1436, 1438 (11th Cir. 1987) (finding that a reapportionment plan enacted by a county commission was owed deference even though the plan had not been subject to referendum as required by state statutory law); Straw v. Barbour County, 864 F. Supp. 1148, 1152 (M.D. Ala. 1994) (finding that a properly adopted reapportionment plan that did not comply with state statutory notice requirement was still owed deference); Navajo Nation v. Ariz. Indep. Redistricting Comm'n, 230 F. Supp. 2d 998, 1008 (D. Ariz. 2002) (finding a plan that did not meet state constitutional notice requirements was owed deference as a properly enacted plan, where all parties stipulated to the plan and conceded they were unable to meet the notice requirements under the emergency situation created by failed VRA preclearance). These three cases explicitly explore the bounds of what is "'legislatively enacted' for purposes of section 2 and section 5" of the VRA. *Tallahassee Branch of NAACP*, 827 F.2d at 1440. They stand for the proposition that "under the special exigent circumstances presented [in a VRA case], the court holds that it must give deference to the plan enacted . . . even if state law was violated." *Straw*, 864 F. Supp. at 1155. To divorce the reasoning in these cases from the specific exigent circumstances presented in a VRA case is unwise.

[207] *Gonidakis*, 599 F. Supp. 3d at 675. The two-judge majority also couched its deference to the unconstitutional map as a matter of administrative convenience and minimizing disruption for the Ohio Secretary of State as that map had begun to be implemented. *See id.* at 672–73. The two-judge majority reasoned that selecting that map allowed the state to maximally focus on properly enacting its own maps during the one-month cure period that followed this opinion before the selected remedy was officially imposed. *See id.* The dissenting judge rebuked the necessity and consequences of such a choice. *See id.* at 685, 690–91 (Marbley, C.J., concurring in part and dissenting from the remedy). The one-month cure period came and went, and, perhaps unsurprisingly, given the federal court's pronounced impending favorable injunction, the Commission made no further efforts to construct a new proper map prior to the May 28 deadline. *See* Ohio Redistricting Commission Meeting, *Meeting Transcript* (May 5, 2022), at 8–12; *League V*, 200 N.E.3d at 199–200. As such, the federal court imposed the map that had been stricken by the Ohio Supreme

The third *Gonidakis* judge dissented from the two-judge majority's selected remedy.[208] Explaining that the state constitution "is the paramount law . . . written by the supreme power of the state, the people themselves,"[209] Chief Judge Algenon Marbley wrote:

> I fail to see how the . . . Commission['s maps], authoritatively invalidated by the Ohio Supreme Court, can constitute a legislative policy pronouncement that now deserves the benefit of deference. . . . [The Commission's plan imposed by the majority] does not express the policies of the state. . . . [I]t was an *ultra vires* enactment that the Ohio Supreme Court voided because it directly contravened state policies. . . . Our deference was owed to the people's clear command that redistricting is to be fair, bipartisan, and transparent—not to the Commission's invalidated decisions to prioritize partisan favoritism over constitutional strictures.[210]

Chief Judge Marbley concluded that the court instead should have imposed the map drawn by the independent mapmaker as the "closest embodiment of legitimate state policy."[211]

Rather than understanding, as the dissenting judge did, that the state supreme court's ruling on state constitutional grounds authoritatively invalidated the map, in *Gonidakis* the two-judge majority posed the following question in their opinion: "[A]re we required to favor the decision of one organ of state government over another?"[212] Treating the state judiciary as simply another state branch is a significant mischaracterization of the role of a state supreme court in reviewing the state constitutionality of state legislation: "The legislature [or other mapmaking body] is created by the state constitution, so it must be limited by it."[213] It is the well-established and unique role of the state supreme court to interpret and enforce state constitutional law, voiding state

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Court. *See Gonidakis II*, 2022 WL 1709146, at *1. Ohio proceeded with this court-imposed unconstitutional, hyperpartisan map for the 2022 election.

[208] *Gonidakis*, 599 F. Supp. 3d at 679 (Marbley, C.J., concurring in part and dissenting from the remedy).

[209] *Id.* at 685 (quoting State *ex rel.* Weinberger v. Miller, 99 N.E. 1078, 1079 (1912)).

[210] *Id.* at 684, 690.

[211] *Id.* at 690. Though, he did note that a court-drawn map was within the court's remedial power. *See id.* at 689.

[212] *Gonidakis*, 599 F. Supp. 3d at 673.

[213] Matt Vasilogambros & Ethan Edward Coston, *Contentious Fringe Legal Theory Could Reshape State Election Laws*, PEW (Mar. 18, 2022), https://perma.cc/PPL9-37XV (quoting Professor Carolyn Shapiro); *see also Moore*, 600 U.S. at 19.

legislative acts that conflict with the state constitution.[214] The Supreme Court has held that when a state court imposes a redistricting remedy,

> the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. § 1738, obligate[ ] [a] federal court to give [a state court's] judgment *legal effect*, rather than treating it as simply one of several competing legislative redistricting proposals available for the District Court's choosing.[215]

Although, in *Gonidakis*, the state supreme court was unable to impose a remedy, the "principles of federalism and comity"[216] should mandate that a federal court give a state supreme court's judgment invalidating a redistricting plan its proper legal effect, rather than treat the unconstitutional redistricting plan as a valid plan available for choosing.

As such, when a state court invalidates a map as unconstitutional under the state constitution, a federal court should not lean on a state constitution's delegatory provisions to flaunt that critical check. The *Gonidakis* majority placed undue emphasis on the legislative preferences expressed by the mapmaking body over a higher source of state law: the state constitution. It escaped this uncomfortable truth by pointing to the state constitution's express allocation of mapmaking power to the Commission. But this logic does not hold up. The Supreme Court recognizes that a veto nullifies the deference owed to a map—largely because the Court recognizes state constitutional checks on state legislative power as controlling.[217] Therefore, a state judiciary striking down a reapportionment plan—exercising its state constitutional check on a state legislature of enforcing the state constitution through ordinary judicial review—must have at least equal nullifying effect.

Further, a map stricken by the state court as unconstitutional is potentially even more objectionable than a vetoed plan. A vetoed plan is procedurally defective, but it does not necessarily

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[214] *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("[T]his Court [ ] repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions." (citing Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875))); Winters v. New York, 333 U.S. 507 (1948); HAINES, *supra* note 71, at 60. *But see infra* note 240.

[215] *Growe*, 507 U.S. at 35–36 (emphasis in original).

[216] *Id.* at 35.

[217] *Beens*, 406 U.S. at 195 (citing Duxbury v. Donovan, 138 N.W.2d 692, 704 (Minn. 1965) (holding that "a qualified veto was put in the [state] constitution as a check upon the power of the legislature to redistrict and apportion")).

conflict with the state constitution's substantive provisions that provide commands and controls for electoral maps.[218] In contrast, a redistricting plan struck down as unconstitutional by a state court is confirmedly and independently incongruent with the redistricting policies as proffered by the highest body of state law: the state constitution. Therefore, a lower federal court, bound by the state supreme court's interpretation of the state constitution,[219] beyond merely not owing deference to the plan, should not use its remedial powers to impose the overturned plan. To do otherwise "disarms the state Supreme Court from policing its own Constitution."[220] Thus, there must be no "recently enacted plan" to which a federal court owes deference in a state judiciary–derived intrastate stalemate, and, in fact, imposing such a stricken map presents an even larger affront to state policy.

D. So What Is Owed Deference?

As established *supra* Sections IV.A, B, and C, intrastate stalemates do not present federal courts with any "recently enacted" state reapportionment plans that should be owed deference. In fact, deferring to a reapportionment plan that failed the state legislative process, was vetoed, or was voided by the state supreme court puts a federal court in the position of overriding state constitutional checks and balances, picking a winner in a bitter, partisan breakdown, and picking an outcome that would not occur under the state constitution. Only when a state constitutional requirement is incompatible with the Federal Constitution would the "Supremacy Clause of the Federal Constitution [ ] cause any irreconcilable and conflicting requirement of the State Constitution to give way."[221] State constitutional checks and balances are neither irreconcilable with the Federal Constitution, nor do they conflict with the Federal Constitution. When a state legislature or mapmaking body fails to meet these barest state constitutional requirements, there is only one state constitutional

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[218] *See infra* Section IV.D.2.

[219] *See, e.g.*, Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."); *see also* Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [state] law by the highest court of the State.").

[220] *Gonidakis*, 599 F. Supp. 3d at 692 (Marbley, C.J., concurring in part and dissenting from the remedy).

[221] Sims v. Frink, 208 F. Supp. 431, 439 (M.D. Ala. 1962), *aff'd sub nom*. *Reynolds*, 377 U.S. 533.

requirement that must always give way to allow a federal court to remedially impose a map that protects the right to vote and one-person, one-vote principle. That requirement is the state constitutional provision that explicitly vests reapportionment power to the state legislature or mapmaking body—already effectively mooted as the state's delegated mapmaking body has divested its reapportionment duties to a federal court.[222]

Thus, "[i]n the wake of a [state mapmaking body or] legislature's failure . . ., a federal court is left with the unwelcome obligation of performing in the [mapmaking body or] legislature's stead" to remediate the intrastate conflict.[223] In doing so, the federal court, acting under its equitable powers, may do any of the following: "(1) adopt a [plan] proposed [ ] [by the parties] in its entirety, (2) adopt a proposed plan and modify it or (3) devise a new plan."[224] Often state actors are parties or intervenors in these intrastate stalemate cases and submit their own reapportionment plans to the court as proposed remedial maps.[225] These proposed plans are obviously not state law, but only the "proffered current policy" of the particular state actor or body proposing or arguing for the maps.[226] As such, these proposed plans are not owed deference as valid pronouncements of state policy, but may receive "thoughtful consideration" by the federal court.[227]

Regardless of whether a federal court selects among proposed maps or opts to craft its own, the federal court must defer to valid pronouncements of the state policies as embodied in a state's "statutory and constitutional provisions."[228] The state constitution, as the state's highest body of law, must be the starting place for a federal court in assessing state policy.[229] Any remedial plan

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[222] *See* Connor v. Finch, 431 U.S. 407, 414–15 (1977).

[223] *Finch*, 431 U.S. at 415.

[224] *Essex*, 874 F. Supp. 2d at 1083.

[225] It is worth mentioning that "[m]ost of the[se] intervenors have unabashedly political reasons for intervening, and they seek to advance their respective political agendas by arguing for and against various [proposed] maps." *Id.* at 1078–79.

[226] *O'Sullivan*, 540 F. Supp. at. 1202 (quoting *Beens*, 406 U.S. at 197).

[227] *Id.* (quoting *Beens*, 406 U.S. at 197).

[228] *White*, 412 U.S. at 795.

[229] Doing so does not implicate the *Pennhurst* doctrine. *See* Branch v. Smith, 538 U.S. 254, 278 n.1 (2003) (citations and emphasis omitted) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984)):

> [O]ur reading creates no conflict with *Pennhurst State School and Hospital v. Halderman*. Here a federal court granted relief on the basis of federal law—specifically, the Federal Constitution. The District Court did not "instruc[t] state officials on how to conform their conduct to state law," rather, it deferred to the

should not unnecessarily conflict with the state constitution, the purest expression of state policy. But there will never be a remedial plan—court-imposed or proposed by a party—that will perfectly comport with a state constitution. This is because a federal court, by imposing a map, has already necessarily usurped the state constitutional provision vesting reapportionment power in a specific state body.[230] It therefore becomes necessary to distinguish between state constitutional provisions and how they should be understood and used in the remedial process.

1. State constitutional provisions delegating mapmaking power and the legislative process.

Delegatory state constitutional provisions should serve a limited purpose in remediating an intrastate redistricting stalemate. The state constitutional provisions that specify which state body shall draw electoral maps and how those maps shall be enacted as law are crucial in making the threshold determination of whether a reapportionment plan has been properly enacted, and, thus, owed deference, as I have discussed extensively. But, beyond that initial inquiry, these delegatory and procedural state constitutional provisions cease to be particularly useful in intrastate stalemate scenarios.

In post-census intrastate stalemate Equal Protection cases, a state constitutional failure of process is inherent. By the time a federal court may intervene in an intrastate redistricting stalemate, there has been a protracted failure of the body constitutionally delegated with mapmaking power,[231] either internally within the mapmaking body or via a repeated failure to clear the checks and balances that the state constitution requires of the mapmaking body. In the remedial stage, a federal court cannot itself cure a failure of the state constitution's mapmaking process, as demonstrated by the state's intractable stalemate. Even where a mapmaking body successfully creates maps, U.S. Supreme Court precedent reveals that state constitutional checks and balances are binding on whatever state body has reapportionment power—and a reapportionment plan that does not clear those checks and

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State's "policies and preferences" for redistricting. Far from intruding on state sovereignty, such deference respects it.

See also White, 412 U.S. at 795.

230 *See supra* note 222 and accompanying text.

231 *See, e.g.*, *Growe*, 507 U.S. at 34.

balances to become law is not a valid pronouncement of state policy.[232] Thus, state constitutional provisions delegating mapmaking power to a specific body are effectively moot in intrastate stalemate cases, and cannot and should not be used to elevate one body of the state's "proffered current policy" above those state constitutional checks and balances when the state mapmaking body has failed to clear them.

Therefore, delegatory provisions of a state constitution should not be used as a tool to unilaterally implement the will of the state body that has the power to reapportion but failed to do so. Rather, delegatory and procedural state constitutional provisions should be used only to (1) determine if there is any valid, recently enacted map owed deference; and to (2) perceive what may be the next most controlling source of state apportionment policies or preferences after the state constitution. For example, in *Beens*, the Court looked to the delegatory state provision vesting reapportionment power to the state legislature to conclude that a valid state statute specifying the number of state legislative districts was owed deference.[233] The *Beens* Court did not thereby conclude that the legislative map vetoed by the state governor was owed deference.[234] Instead, it concluded that, though the governor recommended a reduction in the number of state legislative districts, a valid state statute specifying the number of districts was the controlling state policy owed deference, negating the governor's recommendation.[235] On remand, the district court redrew the remedial maps in accordance with the valid statutory number of districts, but without reference to the vetoed maps.[236]

2. State constitutional provisions providing commands and controls for electoral map outcomes.

Unlike the constitutional provisions that delegate mapmaking power and define the lawmaking process, there is no inherent reason a federal court's remedial maps cannot comport with a state constitution's substantive commands and controls for electoral map outcomes. State constitutional substantive commands

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[232] See the discussion of *Beens*, 406 U.S. 190, and *Chapman*, 420 U.S. 5, in Section III.B.

[233] *Beens*, 406 U.S. at 196.

[234] In fact, it held that the vetoed plan was only "the legislature's proffered current policy." *Id.* at 197.

[235] *Id.*

[236] *See generally* Beens v. Erdahl, 349 F. Supp. 97 (D. Minn. 1972).

and controls may include, for example, providing the required number of districts, controlling partisan outcomes, and requiring compactness, contiguity, or political boundaries to be followed.[237] In selecting among parties' proposed plans or in crafting court-drawn plans, these substantive commands and control provisions should be given the utmost deference as the highest sources of state reapportionment policy. And given the fact that "[t]he federal courts by contrast [to the state mapmaking body] possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name,"[238] it is particularly important that federal courts honor these policies enshrined in the state constitution—the purest expression of the people's political will—in shaping a remedial redistricting remedy over conflicting sources of state redistricting policy.

At times, these constitutional commands and controls may be ambiguous.[239] Where ambiguity arises, a federal court should defer to a state supreme court's interpretation of the state constitutional provision, a well-established principle of our federalist system.[240]

3. State statutes.

A state's properly enacted statutes are also a source of state policy owed deference. One such properly enacted statute is a state's old reapportionment plan from the previous decennial census, now federally unconstitutional under the one-person, one-vote principle. The Supreme Court has suggested in dictum that "[w]here shifts in a State's population have been relatively small, a court may need to make only minor or obvious adjustments to

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[237] To the extent that a substantive state constitutional provision that provides commands and controls for electoral maps conflicts with Equal Protection one-person, one-vote principles, it must give way. *See Reynolds*, 377 U.S. at 568.

[238] *Finch*, 431 U.S. at 415.

[239] Wang et al., *supra* note 185, at 225–46 (detailing state constitutional command-and-control provisions across states and their varied interpretations).

[240] *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quoting *Nat'l Tea Co.*, 309 U.S. at 557)); *supra* note 214. Beyond the scope of this Comment is the alternative interpretation of *Moore*'s holding, that federal courts are now being invited to second-guess state court interpretation of state constitutional law in cases that implicate the Elections Clause. *See, e.g.*, Michael Weingartner, *Textualism and Anti-Novelty Under* Moore v. Harper, FORDHAM L. VOTING RTS. & DEMOCRACY PROJECT (Aug. 9, 2023), https://perma.cc/37ES-KJUB. If post-*Moore* caselaw develops in this way, in congressional reapportionment cases, a federal court would additionally be required to assess if the state court's interpretation was "ordinary" before it afforded deference.

the State's [old reapportionment plan] in order to devise an interim plan."[241] At least one three-judge federal district court has disagreed, holding that a federal "court owes no [ ] deference to the outdated policy judgments of a now unconstitutional plan."[242]

Indeed, the Supreme Court has never gone so far—in any case—as to require a federal court to make de minimis changes to an outdated, federally unconstitutional reapportionment plan to satisfactorily defer to state policy. Perhaps this is because it is often moot—"where population shifts are so large that no semblance of the existing plan's district lines can be used, that plan offers little guidance to a court drawing an interim map."[243] Or, perhaps because it is intuitively unappealing for a federal court to use its equitable powers to replicate the frozen legislative preferences expressed in a decade-old, now federally unconstitutional plan. Moreover, to the extent that there are substantial state constitutional amendments in the decade between reapportionment plans, as there were in *Gonidakis*, the old plan becomes even less helpful. Because to make de minimis changes to the old plan would be to craft a remedial plan that conflicts with new state constitutional amendment requirements.

Nonetheless, courts owe some degree of deference to the state policies housed in old reapportionment plans that do not directly conflict with federal law. *Beens* is illustrative: the Supreme Court reversed the lower federal court's remedial reapportionment plan that slashed the size of the Minnesota state legislature, and ordered the court on remand to sever the prescribed number of state legislative districts from Minnesota's outdated apportionment act.[244] *Beens* did not go so far as to require the lower federal court to defer to other policy judgments reflected in the outdated apportionment act's electoral maps given their federal unconstitutionality after the recent census.[245] As the Court instructed in *Beens*,

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241 *Perry*, 565 U.S. at 392.

242 Favors v. Cuomo, 2012 WL 928223, at *6 (E.D.N.Y. Mar. 19, 2012).

243 *Perry*, 565 U.S. at 392; *see also Essex*, 874 F. Supp. 2d at 1090 (quoting *Perry*, 565 U.S. at 392):

> Ideally, we would begin our effort to redraw the districts with the [old] map and adjust that map as necessary to achieve constitutional compliance. Where, however, the degree of changes in a state's population requires significant changes to the state's legislative districts, and particularly where, as here, legislative districts may need to be collapsed or relocated to areas of new growth, it may be that "no semblance of the existing plan's district lines can be used."

244 *Beens*, 406 U.S. at 197–98.

245 *Id.*

federal courts should look to outdated reapportionment acts to sever and preserve state policies that do not conflict with federal law or state constitutional command-and-control provisions.[246] Other aspects of the old reapportionment plan, such as district boundaries, that are "[infected with] constitutional infirmities"[247] should be treated as persuasive authority of state policies at most.

V. APPLICATION

Now that I have clarified that a state's constitution and properly enacted statutes are owed deference, I recommend a process for federal courts in selecting or crafting an intrastate stalemate redistricting remedy.

First, a court should look to a state constitution's provisions that delegate mapmaking power and establish the legislative process to evaluate if there is any recently and legitimately enacted redistricting plan that is owed deference. As discussed *supra*, there will not be a recently enacted plan owed deference in an intrastate stalemate case. Because the phrase "recently enacted," as contemplated by the Court, means post-census enactment, the outdated reapportionment act prior to the census does not come in under this step.

After this initial inquiry, the only other use a court should make of the state constitutional delegatory provisions is to determine which state policy is next owed deference after the state constitution.[248] Most often, the state legislature is the mapmaking body, and, from that, a court knows that other valid state statutes are owed immediate deference after the state constitution.[249]

Next, a court should proceed with assembling the state constitution's command-and-control provisions that pertain to redistricting, deferring to state supreme court interpretation of ambiguous provisions. These provisions should serve as a checklist of required qualities in whatever remedial reapportionment plan the federal court imposes. To adequately defer to state policy as required by the U.S. Supreme Court, a federally imposed remedy should comport with these state constitutional command-and-

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[246] *Id.* at 198–99 (noting that changes in a state legislature's size effectuated by judicial reapportionment are "justified by a state constitutional demand").

[247] *Favors*, 2012 WL 928216, at *14.

[248] *See supra* note 122 and accompanying text.

[249] *Id.*

control provisions—which reflect the purest expression of the people's will and the highest source of state policy.[250]

If time permits, the court should proceed with creating (or instructing an independent mapmaker to create) maps that comply with the state constitutional command-and-control provisions and reflect any state redistricting policies expressed in valid state statutes or that can be severed from the outdated reapportionment plan.[251] In intrastate stalemate cases, court-drawn maps should be the default since picking among the parties' maps quickly becomes problematic given that each party has a partisan agenda and are often in federal court only because they deliberately obstructed the state process.

But if a court is unable to craft its own maps due to timing constraints, a court must then look to the parties' maps. Courts must remain vigilant that even a map proposed by a branch of state government is merely the "proffered current policy" of *that branch*, not a valid *state* policy that is owed deference. Therefore, a court should evaluate each party's proposed maps under the state constitution's redistricting command-and-control provisions. The court should discard proposed maps that conflict with these state constitutional provisions or unnecessarily conflict with the policy preferences expressed in valid state statutes.

The court should select from—among the parties' proposed maps—the map that (1) complies with the state constitution's command-and-control provisions; and (2) most closely approximates other valid pronouncements of state policy embodied in state statutes (which include policies expressed in the outdated reapportionment plan to the extent they do not conflict with the federal or state constitution[252]). The court may use its equitable powers to adopt a party's plan that best meets these criteria whole cloth, even if that plan is one explicitly not owed deference.[253] But the court should consider using its equitable discretion to fuse together or modify parties' plans which arguably is the fairest approach to disincentivize obstinate state government parties from using the federal courts to enforce their will.

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[250] *See supra* Part II.

[251] *See supra* Section IV.D.3.

[252] *Id.*

[253] *See, e.g.*, Skolnick v. State Electoral Bd. of Ill., 336 F. Supp. 839, 846 (N.D. Ill. 1971) (imposing a map that passed one branch of the state legislature because, among the proposed maps, it most comported with long-standing state redistricting policy). This will not be the case for a plan overturned by a state court as unconstitutional, because the plan would plainly not meet state constitutional command-and-control provisions.

If the *Gonidakis* court had followed this process, the court would have first inquired into if the Commission-adopted electoral maps invalidated by the state supreme court were a "recently enacted plan" owed deference. The court would have found those maps were not a recently enacted plan owed deference because they were nullified by the critical state constitutional check of judicial review. The court did not have time to draw its own maps, so it next would evaluate the parties' proposed maps. Since the state supreme court found the Commission's proposed maps to conflict with the state constitution's partisanship control provision, the *Gonidakis* court should have easily concluded that the Commission's invalidated maps could not stand as congruent state policy, as any act of state legislation repugnant to the state constitution is necessarily void. The *Gonidakis* court would not have placed undue emphasis on the delegatory state constitutional provision that gave an explicit grant of reapportionment power to the Commission.[254] Therefore, the federal court would have immediately removed the Commission's maps that vitiated the state constitutional commands and controls from consideration, and instead evaluated the merits of the proposed independent-mapmaker-drawn plan under the state constitution's command-and-control provisions and any relevant state statutory provisions. From there, the court should have either selected the independent-mapmaker-drawn plan if it comported with the state constitutional command-and-control provisions, or modified the plan to ensure its compliance, and imposed that remedy.

CONCLUSION

In this Comment, I distinguish post-census intrastate redistricting stalemate cases—which put a federal court in the unenviable position of remedying a bitter, partisan conflict—from other Equal Protection one-person, one-vote redistricting cases. As *Moore v. Harper* may have stripped state courts' remedial powers in congressional redistricting cases, federal courts could be tasked with remediating many more intrastate redistricting stalemates in the near future. In the remedial stage of an intrastate redistricting stalemate case, it is of particular importance that a federal court approaches its duty of parsing what is a state

254 *See Gonidakis*, 599 F. Supp. 3d at 671 (placing emphasis on two parts of the Ohio Constitution, one "mandating that [the] Commission approve maps," OHIO CONST. art. XI, § 1(A), and one "barring courts from doing so," OHIO CONST. art. XI, § 9(D)).

policy or plan owed deference with precision, to do the least damage to state law. The state constitution, as the supreme source of state law, should be treated as the supreme source of a state's reapportionment policy for state electoral maps. A plan that does not clear the state constitution's checks and balances to become enacted as a law should not be owed deference. And it is almost a given there will not be a properly recently enacted state reapportionment plan in an intrastate redistricting stalemate case. Likewise, a plan that conflicts with the state constitution cannot be a valid pronouncement of state policy.

To disregard the primacy of the state constitution among state policies owed deference is not only improper under the U.S. conception of the role of constitutions, but also guts the redistricting protections and controls that the citizens of the states alone are able to enact into their state constitutions. Critically, these controls include all partisan gerrymandering reform efforts, expressly endorsed as proper state redistricting controls by the U.S. Supreme Court in 2019,[255] which must be enacted and enforced on the state level. Therefore, a federal court's redistricting remedy in an intrastate stalemate should be in accord with all substantive command-and-control provisions of the state constitution.

[255] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).