ELECTION LAW — REDISTRICTING — WISCONSIN SUPREME COURT ADOPTS NEW ELECTION MAPS THAT CHANGE EXISTING DISTRICTS LEAST, REGARDLESS OF PARTISAN BIAS. — *Johnson v. Wisconsin Elections Commission*, 972 N.W.2d 559 (Wis. 2022).

When political deadlock prevents a state from redistricting, the job falls to courts. It is an uncomfortable assignment, and judges have differed widely over how to tackle it.[1] Recently, in *Johnson v. Wisconsin Elections Commission* (*Johnson III*),[2] the Wisconsin Supreme Court was forced to redistrict in the legislature's stead. Reaffirming the approach it had outlined in *Johnson v. Wisconsin Elections Commission* (*Johnson I*),[3] it refused to consider whether its maps were politically fair, instead prioritizing changing existing maps the least.[4] It reached this result by declining to craft a politically fair *remedy* because fairness was not a personal *right*. By contrast, the court did not require the proposed remedy of least change to clear this high bar. The justices thereby moved arguments for unwinding Wisconsin's gerrymander into a more stringent test than arguments for perpetuating it, fortifying gerrymanderers' political edge with an advantage in Wisconsin doctrine.

Wisconsin's Constitution assigns redistricting to the state legislature, which passes maps that become law when the governor approves them or has his veto overridden.[5] This process creates a conundrum when a new census rolls around, new maps must be drawn, and the political branches cannot agree on how to draw them. Wisconsin found itself in this muddle in 2021. The latest census had revealed population changes showing that the state's existing maps, drawn in 2011, now violated the U.S. Constitution's one-person, one-vote requirement.[6] But the Republican-controlled legislature and Democratic governor were deadlocked over replacement maps.[7]

Redistricting standoffs are a familiar ritual in Wisconsin: federal district courts drew new maps for the state after the 1980, 1990, and 2000 censuses.[8] So when a group of voters in now-overpopulated districts saw the political impasse following the 2020 census, they followed the familiar script: filing suit in the U.S. District Court for the Western

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[1] *See* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1131 (2005).

[2] 972 N.W.2d 559 (Wis. 2022).

[3] 967 N.W.2d 469 (Wis. 2021).

[4] *See id.* at 493.

[5] *See* Complaint ¶ 5, Hunter v. Bostelmann, No. 21-cv-512 (W.D. Wis. Aug. 13, 2021), 2021 WL 3599614 (citing State *ex rel.* Reynolds v. Zimmerman, 126 N.W.2d 551, 557–59 (Wis. 1964); WIS. CONST. art. V, § 10(2)(a)).

[6] *See Johnson I*, 967 N.W.2d at 474.

[7] *See id.* at 473.

[8] *See* Complaint, *supra* note 5, ¶ 32; *see also* Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis. 1982); Prosser v. Elections Bd., 793 F. Supp. 859 (W.D. Wis. 1992); Baumgart v. Wendelberger, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002).

District of Wisconsin and asking it to adopt new maps.[9] But ten days later,[10] a different group of voters brought the same claim[11] — with two differences. First, they petitioned the Wisconsin Supreme Court to take jurisdiction of their case.[12] Second, they asked the court to redistrict in a specific way — by "*making the least number of changes* to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria."[13] Since Republicans had gerrymandered those existing maps, creating a partisan advantage that making the fewest changes would perpetuate,[14] the petitioners warned that they "intend[ed] to argue that the Court . . . should not take into account projections of the likely political impact of the maps."[15]

The Wisconsin Supreme Court accepted the petition,[16] and the district court stayed its proceedings.[17] The state supreme court asked for briefing on three relevant questions: (1) "what factors [it] should consider in evaluating or creating new maps"; (2) whether the court should consider the partisan effects of potential maps; and (3) whether the court should "modify existing maps using a 'least-change' approach . . . and if not, what approach [it] should use."[18]

In *Johnson I*, the court answered. First — Justice Rebecca Grassl Bradley announced for a plurality[19] — the court would redistrict only to remedy violations of cognizable rights.[20] That would mean fixing violations of the U.S. Constitution, the Wisconsin Constitution, and the Voting Rights Act of 1965[21] (VRA), as well as ensuring new maps complied with those sources of law.[22] Second — Justice Grassl Bradley wrote for a majority — since politically fair districts are not a cognizable right, the court would not consider maps' partisan effects.[23] Justice Grassl Bradley argued that the text of the Wisconsin Constitution does not support a right to partisan fairness.[24] Instead, she held that partisan

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9 Complaint, *supra* note 5, ¶ 1.

10 *See* Petition to the Supreme Court of Wisconsin to Take Jurisdiction of an Original Action at 19, *Johnson I*, No. 2021AP1450-OA [hereinafter Petition to Take Jurisdiction].

11 *See id.* at 1.

12 *Id.* ¶¶ 37–41.

13 *Id.* ¶ 47 (emphasis added).

14 *See Johnson I*, 967 N.W.2d at 491.

15 Petition to Take Jurisdiction, *supra* note 10, ¶ 36.

16 *Johnson I*, No. 2021AP1450-OA (Wis. Sept. 22, 2021) (unpublished order).

17 *See* Hunter v. Bostelmann, No. 21-cv-00512 at 5 (W.D. Wis. May 5, 2022) (order granting temporary stay).

18 *Johnson I*, 967 N.W.2d at 474–75. The court also sought briefing on the litigation process it should use but decided that question in an order not relevant here. *See id.*

19 Justice Grassl Bradley was joined in full by Chief Justice Ziegler and Justice Roggensack. Justice Hagedorn joined all portions except the decision to consider only cognizable legal violations.

20 *Johnson I*, 967 N.W.2d at 475.

21 52 U.S.C. §§ 10101, 10301–10702.

22 *Johnson I*, 967 N.W.2d at 493.

23 *Id.* at 482.

24 *Id.* at 485–88.

gerrymanders are political questions under the state constitution, as they are under its federal counterpart.[25] She reached this conclusion because "the Wisconsin Constitution . . . assigns . . . redistricting to the legislature — a political body"[26] — and because there are no judicially manageable standards to measure partisan fairness.[27]

Third, the majority held that it would remedy legal violations by choosing the maps that complied with federal and state law while changing incumbent maps the least.[28] The majority explained that this "least change" principle was a corollary of the separation of powers.[29] While the court had to fix the incumbent maps' unlawful features, the majority argued that redistricting is a legislative act.[30] Changing existing maps any more than necessary to bring them into compliance with the law would thus be illegitimate judicial legislation.[31]

Justice Hagedorn concurred.[32] He pointed out that the court was not merely declaring maps unlawful but also crafting a remedy.[33] And, while he agreed that the remedy must comply with federal and state law and should change existing maps the least,[34] he believed the court could consider more than strict legal requirements when choosing remedies.[35] Requiring political fairness, he agreed, would have been illegitimate judicial policymaking.[36] But he was open to choosing new maps based in part on whether they satisfied traditional redistricting principles.[37]

Justice Dallet dissented.[38] She argued that because least change entrenched one party's legislative control,[39] it was "an inherently political choice."[40] Moreover, judging maps based on how closely they matched those drawn in 2011 would nullify the votes that Wisconsinites had cast since then.[41] Even worse, Justice Dallet argued, a principle of least change could perpetuate 2011's gerrymander far into the future: as long as Republicans controlled only one political branch, they could refuse to

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[25] *Id.* at 482.
[26] *Id.*
[27] *Id.* at 482–83.
[28] *Id.* at 490.
[29] *Id.* at 488.
[30] *See id.* at 489.
[31] *Id.* at 488–90.
[32] *Id.* at 493 (Hagedorn, J., concurring).
[33] *Id.* at 493–94.
[34] *Id.* at 493 n.4.
[35] *Id.* at 493–94.
[36] *Id.* at 494.
[37] *Id.* Wisconsin's traditional redistricting principles include drawing compact districts, respecting political subdivisions, *see id.* at 481 (lead opinion), preserving communities of interest, and minimizing how many voters must wait an extra election between votes for state senator, *see id.* at 494 & n.9 (Hagedorn, J., concurring).
[38] *Id.* at 496 (Dallet, J., dissenting). Justices Ann Walsh Bradley and Karofsky joined the dissent.
[39] *Id.* at 497–98.
[40] *Id.* at 496.
[41] *Id.*

agree to new maps and use least change to judicially roll forward their advantage every ten years.[42] Instead, she believed the court could achieve "true neutrality"[43] by considering legal requirements, traditional redistricting criteria, and the resulting maps' political fairness.[44] Justice Dallet closed by pointing out that no party was challenging the incumbent maps as unconstitutional gerrymanders.[45] By ruling that gerrymandering was nonjusticiable anyway, the court had indulged in "unnecessary and sweeping overreach."[46]

Having settled on criteria, the Wisconsin Supreme Court next used them to pick new maps. Instead of creating its own plan, the court invited the parties and intervenors to submit one set of maps each.[47] The justices picked a winner in *Johnson v. Wisconsin Elections Commission* (*Johnson II*).[48] Writing for the majority,[49] Justice Hagedorn defined "least change" for the first time — as "core retention," or the share of voters who stayed in the same district before and after redistricting.[50] The governor's proposed congressional and state legislative maps scored best on this measure.[51] One issue remained: the governor had intentionally created an additional majority-Black assembly district, drawing race-based districts that could violate the Equal Protection Clause.[52] But, finding that the VRA might require this district to be majority Black, Justice Hagedorn held that the plan was lawful.[53] And so the court ordered the governor's maps to be adopted.[54]

The U.S. Supreme Court reversed in a per curiam opinion, holding that the Wisconsin Supreme Court had misapplied the test that allows mapmakers to consider race when drawing districts.[55] On remand, in *Johnson III*, the Wisconsin Supreme Court began by reaffirming the

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[42] *See id.* at 498.

[43] *Id.*

[44] *See id.* at 498, 502–03.

[45] *Id.* at 501.

[46] *Id.* at 500.

[47] Johnson v. Wis. Elections Comm'n (*Johnson II*), 971 N.W.2d 402, 406 (Wis. 2022).

[48] 971 N.W.2d 402 (Wis. 2022).

[49] Justice Hagedorn was joined by Justices Walsh Bradley, Dallet, and Karofsky. Justice Walsh Bradley wrote a concurrence joined by Justices Dallet and Karofsky. *Id.* at 419 (Walsh Bradley, J., concurring). Chief Justice Ziegler and Justices Roggensack and Grassl Bradley each wrote dissents that the other two joined. *Id.* at 421 (Ziegler, C.J., dissenting); *id.* at 454 (Roggensack, J., dissenting); *id.* at 460 (Grassl Bradley, J., dissenting).

[50] *See id.* at 408 (majority opinion).

[51] *Id.* at 409, 412.

[52] *See id.* at 407.

[53] *Id.* at 418.

[54] *Id.* at 419.

[55] Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248–51 (2022). Justice Sotomayor dissented, joined by Justice Kagan. *Id.* at 1251 (Sotomayor, J., dissenting).

holding of *Johnson I*.[56] It then held that no party had shown that the VRA required drawing race-conscious districts[57] and so any map drawn for racial reasons was unconstitutional.[58] Since only the legislature's maps were race blind,[59] they won by default.[60] Wisconsin would be redistricted under the legislature's plan — the same one the governor had vetoed almost five months earlier.[61]

In *Johnson III*, the Wisconsin Supreme Court adopted aggressively gerrymandered maps.[62] But, in *Johnson I*, the court engaged in a sort of doctrinal gerrymander of its own. The lead opinion shunted arguments for fairness as a *remedy* to an inquiry into whether fairness was a personal *right*, while judging least change against the looser standards of a remedial principle.[63] This shift forced advocates of fairness to show their proposal was textually grounded, judicially manageable, and not a mere policy judgment — criteria that least change could not have met and that, because the court analyzed least change as a remedy, it did not need to. Opponents of gerrymandering already face political disadvantages. After *Johnson I*, they will face state constitutional doctrine that is slanted against them as well.

Civil cases involve two related but separate questions: Have a party's cognizable rights been violated, and, if so, what remedy should a court adopt?[64] When making these distinct inquiries, courts consider distinct questions.[65] In redistricting cases, courts require asserted rights to be textually grounded[66] and to contain judicially manageable standards.[67] By contrast, when selecting redistricting remedies, courts weigh

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[56] *See Johnson III*, 972 N.W.2d at.560. Chief Justice Ziegler wrote for the majority, joined by Justices Roggensack, Grassl Bradley, and Hagedorn. *Id.* Justice Grassl Bradley wrote a separate concurrence joined by Chief Justice Ziegler and Justice Roggensack. *Id.* at 586 (Grassl Bradley, J., concurring). Justice Hagedorn also concurred. *Id.* at 609 (Hagedorn, J., concurring). Justice Karofsky dissented, joined by Justices Walsh Bradley and Dallet. *Id.* at 611 (Karofsky, J., dissenting).

[57] *See id.* at 571 (majority opinion).

[58] *See id.* at 565.

[59] *See id.* at 577–78.

[60] *See id.* at 586.

[61] *See* Bridgit Bowden, *Evers Vetoes Republican-Drawn Redistricting Maps*, WIS. PUB. RADIO (Nov. 18, 2021, 1:35 PM), https://www.wpr.org/evers-vetoes-republican-drawn-redistricting-maps [https://perma.cc/QGZ6-WR8L].

[62] Bridgit Bowden & Shawn Johnson, *With the Help of Two Supreme Courts, Republican Map Prevails*, WIS. PUB. RADIO (June 1, 2022, 6:00 AM), https://www.wpr.org/mappedout/help-two-supreme-courts-republican-map-prevails [https://perma.cc/A4ME-TYTQ].

[63] Because Justice Grassl Bradley mostly wrote for a majority but sometimes for a plurality, this comment calls her opinion the "lead opinion" for ease of exposition.

[64] *See* DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1 (5th ed. 2019).

[65] The rights and remedies inquiries often bleed together, *see, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999), but they remain analytically separate inquiries that consider different criteria, *see* Charles W. "Rocky" Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383, 412 (2018).

[66] *See Johnson I*, 967 N.W.2d 469, 482 (Wis. 2021).

[67] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2493–94 (2019).

a host of equitable factors that are often not rooted in constitutional or statutory text, do not provide clear guidance,[68] and involve wide-ranging "equitable weighing" of "what is necessary, what is fair, and what is workable."[69] For example, while the U.S. Supreme Court has held that fairness in redistricting is not a right,[70] it has emphasized that redistricting remedies are equitable and so should consider fairness.[71] Whether a court construes a claim as an assertion of a legal right or an argument for a particular remedy can therefore affect the criteria by which the court will judge the claim — and, as a result, the claim's success.

Although political fairness was proposed as a remedy in *Johnson I*, the Wisconsin Supreme Court required it to meet the standards of a personal right. All parties involved agreed that Wisconsin's existing maps violated the right to equally apportioned districts.[72] What they disputed was what remedy the court should adopt: maps that were politically fair or maps that used least change.[73] But the lead opinion — reasoning that the court would redress only justiciable rights violations — required advocates of political fairness to show it was a cognizable right before the court would consider it.[74] By contrast, least change is clearly not a right. Nobody would argue that a legislature's map must be struck down because it changed prior districts too much. Indeed, courts often shape remedies using principles that are not cognizable rights — from ensuring officials can work effectively[75] to avoiding voter confusion[76] to, well, ensuring that a remedy is fair.[77] By shunting fairness into the rights inquiry while judging least change as a

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[68] *See* G. Michael Parsons, *Justin* [sic] *Denied: Equity, Elections, and Remedial Redistricting Rules*, 19 J.L. SOC'Y 229, 232–35 (2019).

[69] North Carolina v. Covington, 137 S. Ct. 1624, 1625 (2017) (per curiam) (quoting NAACP v. Hampton Cnty. Election Comm'n, 470 U.S. 166, 183 n.36 (1985); New York v. Cathedral Acad., 434 U.S. 125, 129 (1977)).

[70] *Rucho*, 139 S. Ct. at 2499–501.

[71] *Covington*, 137 S. Ct. at 1625 (quoting *Cathedral Acad.*, 434 U.S. at 129); *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1290 n.66 (2006) ("'[C]onsiderations of fairness' play a key role in the design of equitable remedies." (quoting Kansas v. Colorado, 543 U.S. 86, 95 (2004))).

[72] *Johnson I*, 967 N.W.2d 469, 477 (Wis. 2021).

[73] For advocates of political fairness arguing for fairness as a remedial principle, see Brief of Intervenor-Respondent Governor Tony Evers at 14, *Johnson I*, No. 2021AP1450-OA; Hunter Intervenor-Petitioners' Brief Addressing Court's October 14 Order at 5–6, *Johnson I*, No. 2021AP1450-OA; Brief of Intervenor-Petitioners Black Leaders Organizing for Communities et al. at 50–51, 55–57, *Johnson I*, No. 2021AP1450-OA; Brief of Intervenors-Petitioners Citizen Mathematicians and Scientists at 31, *Johnson I*, No. 2021AP1450-OA.

[74] *See Johnson I*, 967 N.W.2d at 482 ("Because partisan fairness presents a purely political question, we will not consider it."); *id.* at 493 ("We will not consider the partisan makeup of districts because it does not implicate any justiciable or cognizable right.").

[75] *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987).

[76] *See* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam).

[77] Fallon, *supra* note 71, at 1290 n.66 (citing Kansas v. Colorado, 543 U.S. 86, 95–96 (2004)).

remedy, the court held fairness and least change to different standards. And the standards for fairness were far more demanding.

First, the court required fairness to be textually grounded, something it did not ask of least change. The lead opinion reasoned that because political fairness lacks a "textual basis in" the U.S. Constitution, Wisconsin Constitution, and federal law, it is "untethered to legal rights" and so could not be considered.[78] But none of those sources mention least change, either.[79] Instead, Justice Grassl Bradley justified least change using structural inferences from the Wisconsin Constitution's separation of powers.[80] Other structural inferences, however, could suggest that a remedy should be politically fair. For example, the state constitution creates a nonpartisan judiciary,[81] which might support an inference that courts should not enact maps that tilt elections in favor of one political party.[82] But by shifting political fairness out of the remedy inquiry and into the rights inquiry, the court required it to rest on more than mere inference, without demanding the same textual basis for least change.

Similarly, the lead opinion required political fairness, but not least change, to contain judicially manageable standards. Fairness, Justice Grassl Bradley pointed out, could be defined in many ways[83]: Does it mean ensuring proportional representation? Maximizing competitive districts? Adhering to traditional redistricting criteria?[84] Because "[t]here are no legal standards" to "[d]ecid[e] among [these] different versions of fairness,"[85] the majority concluded that fairness was off limits.[86] But least change, too, could carry many definitions: Is it moving the fewest voters into new districts?[87] Moving the least geographic area into new districts?[88] Changing the perimeter of district boundaries the least?[89] Just as with political fairness, no legal standards existed to help the justices choose one conception.[90] Under the less stringent remedies inquiry, the court was willing to define least change using only the

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[78] *Johnson I*, 967 N.W.2d at 482; *see also id.* at 493.

[79] *See id.* at 500 (Dallet, J., dissenting); *see also* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. 985, 990–92 (2022) (arguing that least change rests on weak legal grounds).

[80] *See Johnson I*, 967 N.W.2d at 490.

[81] *See* WIS. CONST. art. VII, § 9; Ellen Langill, *Levi Hubbell and the Wisconsin Judiciary: A Dilemma in Legal Ethics and Non-partisan Judicial Elections*, 81 MARQ. L. REV. 985, 985 (1998).

[82] *See Johnson I*, 967 N.W.2d at 502–03 (Dallet, J., dissenting).

[83] *See id.* at 483 (lead opinion).

[84] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2500 (2019).

[85] *Johnson I*, 967 N.W.2d at 483 (quoting *Rucho*, 139 S. Ct. at 2500).

[86] *Id.* at 482.

[87] *See id.* at 500 (Dallet, J., dissenting).

[88] *See* Amariah Becker & Dara Gold, *The Gameability of Redistricting Criteria*, J. COMPUTATIONAL SOC. SCI., Oct. 26, 2022, at 20–21.

[89] *See id.* at 18.

[90] *See* Non-party Amicus Curiae Brief of Legal Scholars in Support of No Party at 10–12, *Johnson II*, 971 N.W.2d 402 (Wis. 2022) (No. 2021AP001450-OA) ("[T]he least-change approach is a standardless morass." *Id.* at 12.).

justices' intuitions.[91] But under the more demanding rights test, the need to do the same for political fairness doomed it.

The lead opinion exempted least change from the standards to which it held fairness in another way: least change is a policy goal. Justice Grassl Bradley proclaimed that the court would refuse to consider policy judgments — including political fairness — when redistricting.[92] But the U.S. Supreme Court has called minimizing change a "policy"[93] and a "traditional districting objective" like the ones the lead opinion disclaimed.[94] As Professor Robert Yablon argues, "[b]ecause change minimization is hardly ever required under federal or state law, a court's very decision to prioritize it is itself a policy choice."[95] In fact, Wisconsin's legislature and governor, when announcing their respective redistricting principles, each included core retention as a policy aim.[96] That is, the politicians who draw maps to achieve policy goals thought the court's definition of least change was a policy goal. Here, too, the lead opinion held political fairness to a more demanding standard than least change.

In *Johnson I*, the Wisconsin Supreme Court carved out a new form of entrenchment protecting the state's biased maps. Scholars have called entrenchment "the fundamental problem . . . that defines . . . election law."[97] Partisan gerrymanders, for instance, are insidious in part because they entrench themselves politically. Voters who want to get rid of the gerrymander often must vote out a party that has stacked elections in its favor. Just as partisan gerrymanders advantage gerrymanderers politically, *Johnson I*'s doctrinal gerrymander — selectively moving a disfavored remedy into a more demanding rights test — advantaged gerrymanderers in court. The justices thereby created a new form of entrenchment: a doctrinal skew that tilts the legal playing field against arguments for unwinding a gerrymander and toward arguments for perpetuating it. That choice, in turn, entrenches Wisconsin's biased maps more deeply than ever.

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[91] *See Johnson II*, 971 N.W.2d at 408.

[92] *See, e.g.*, *Johnson I*, 967 N.W.2d at 475.

[93] Tenant v. Jefferson Cnty. Comm'n, 567 U.S. 758, 764 (2012) (per curiam).

[94] Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 259 (2015).

[95] Yablon, *supra* note 79, at 1051 (footnote omitted).

[96] *See* S.J. Res. 63, 105th Gen. Assemb., Reg. Sess. (Wis. 2021); Wis. Exec. Order No. 66, at 2 (2020).

[97] Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1451–52 (2016).