THE ROLE OF STATE COURTS IN CONSTRAINING PARTISAN GERRYMANDERING IN CONGRESSIONAL ELECTIONS

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ABSTRACT

Federal courts were once seen as the place for partisan gerrymandering challenges to be lodged but, after 30+ years of failing to find any redistricting plan to be a partisan gerrymander even while holding partisan gerrymandering to be justiciable, the Supreme Court announced in *Rucho v. Common Cause*, 588 U.S. ___ (2019), that partisan gerrymandering is not justiciable in federal courts. State courts are now seen as the only place where a remedy for egregious partisan gerrymandering might be sought (except, of course, for taking redistricting out of the hands of the state legislature and moving responsibility into a bipartisan or ostensibly non-partisan commission). Thus, we find that partisan gerrymandering claims, while almost entirely in federal courts in the 2010 redistricting round and earlier rounds of redistricting, are now brought in state courts. We also expect that

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state courts would look to state constitutional provisions to evaluate partisan gerrymandering claims, especially language added in recent constitutional amendments that affected the procedures and criteria for redistricting. But we also see some state courts creatively reevaluating older language in their state's constitution to find a way to hold egregious gerrymanders in violation of that constitution. And we see various state court justices, relying on a variety of statistical tests proposed by academic specialists, on the one hand, and/or by examining the extent to which proposed maps satisfied traditional good government standards, on the other, implicitly challenging the Supreme Court's view in *Rucho* that no manageable standard for egregious partisan gerrymandering existed.

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INTRODUCTION

In this introductory section we provide an overview of 2020 redistricting for the U.S. House of Representatives, with more detail in later sections of this essay. We focus this essay on the role of state courts as checks on partisan gerrymandering in the U.S. House of Representatives.[1]

State courts can become involved in the redistricting process in two ways: (1) when those with primary redistricting authority fail to enact a plan in a timely fashion, state courts can be forced to draw their own map, or (2) they can be the site of litigation challenging a (congressional) plan as a partisan gerrymander under provisions of the state's own constitution (or for other violations of state law). In so doing, they may choose to be attentive to the map's partisan consequences or they may be required to do so because of specific provisions in the state constitution. To understand the role of state courts in redistricting we must understand the institutional context that governs redistricting in each state.

State legislatures are generally the body that redraws Congressional districts after decennial censuses. Following the 2020 census,[2] in 33 of the 44 states that required drawing of congressional districts, the legislature had the primary responsibility for producing new maps. Political gerrymanders are most likely to occur when all aspects of the line-drawing process are controlled by a single political party.[3] The vast bulk of these 33 states were under single party control.[4]

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[1] Much of what we say will also be relevant to state legislative redistricting but providing details of state legislative redistricting in the 2020s redistricting round is beyond the scope of this essay and requires a separate treatment.

[2] The decennial census *inter alia* enumerates the population of the country and for each state and determines the total representatives (out of 435) that each state will be allocated.

[3] Single party control is close to a necessary condition for partisan gerrymandering, but it is not a sufficient condition. You cannot gerrymander where you don't have control.

[4] See details later in the text. The term *trifecta control* is commonly used to denote states where one party controls both branches of the legislature and the governorship. But another more general term applicable to the redistricting context is *party control*—used to describe situation in which one party can unilaterally adopt a redistricting plan even if there is divided party control. In North Carolina this is possible if one party controls both branches of the legislature since that state does not have a role for the governor in the redistricting process; other states have state

In states where congressional redistricting is not primarily under legislative control, some form of commission is used, and commissions may also be used as backup if there is not political agreement on a plan.[5] Several states changed their constitutional provisions affecting redistricting after the 2010 cycle, with the key change involved taking redistricting out of the hands of the legislature and replacing the legislature with some form of commission. Commissions take a variety of forms, and some commissions can operate essentially as partisan bodies when members aligned with one party vote for plans almost entirely based on their projected advantage for that party, or when a tie-breaker member adopts a plan proposed by one side that can be regarded as a partisan gerrymander.[6]

Most states have provisions in their constitutions that guide the line-drawing process. These rules affect districting practices even in states where redistricting is out of the hands of the legislature or under divided control. Most often we find state constitutions including references to "traditional redistricting criteria," e.g., provisions that limit districts to contiguous territory (34 states), restrictions on political subdivision splits (31 states), and requirements for compact districts (31 states).[7] Language is also found in

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legislative compositions such that the governor's veto can be overridden when one party controls a supermajority in both branches of the state legislature. See later in the text for details about party control in the 2010 and 2020 rounds.

[5] See details later in the text.

[6] Not every effort to change control of redistricting was successful. In Pennsylvania, for example, groups such as the Committee of Seventy and Fair Districts PA advocated for significant changes to the redistricting process. No changes were made. Also, sometimes a redistricting commission is put into place but with a badly flawed procedure. In Missouri, voters passed the "Clean Missouri" act, but it was later amended to lose its teeth. In Ohio, the outcome was subverted by the majority party despite state court findings that adopted legislative maps were unconstitutional. In Virginia, a commission with the same number of Republican identifiers as Democratic party identifiers resulted in deadlock. See further discussion below.

[7] The exact text of constitutional provisions varies by state. Traditional criteria, in addition to those listed above, include preservation of communities of interest and protection of the voting rights of racial minorities. Some courts have also accepted that avoiding the pairing of incumbents, and/or preservation of the cores of existing districts are legitimate concerns in map-making, but these considerations would not normally be included in the category of traditional redistricting criteria of the kind that are found in most state constitutions. And they may operate to advantage the party currently controlling a chamber or congressional delegation by freezing into place a previous gerrymander.

States without specific criteria in their constitution affecting congressional

some state constitutions prohibiting plans that unduly favor or disfavor a political party or a particular candidate, with several states adding such provisions recently concomitantly with changes in control over the redistricting process.[8] But even when there was no explicit anti-gerrymandering provision in the state constitution, beginning with a Pennsylvania Supreme Court decision in 2018[9] some state courts have begun to interpret older provisions of their state constitutions as implicitly prohibiting egregious gerrymandering -- language that says elections shall be "free and equal", "free and open", or simply "free", or language regarding the "right to vote."[10]

After first reviewing the state of redistricting case law affecting partisan gerrymandering claims prior to the 2020 round, we next review the changes in the institutional context that shape how 2020 was different in important ways from previous redistricting rounds. Then we look in at the actions of state courts in dealing with challenges to enacted plans based on claims of partisan gerrymandering and their role in drawing plans of their own in cases where the legislature or commission failed to draw a plan in a timely fashion.[11]

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mapmaking are Alaska, Connecticut, Delaware, Illinois, Indiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, North Dakota, South Dakota, Tennessee, Texas, Vermont, and Wisconsin. For more, see Congressional Redistricting Criteria and Considerations, Sarah J. Eckman, November 15, 2021 (https://crsreports.congress.gov/product/pdf/IN/IN11618), the National Conference of State Legislatures [Ben Williams and Wendy Underhill, September 2017 (https://www.ncsl.org/research/redistricting/redistricting-criteria-legisbrief.aspx)], and Criteria for congressional districts, All About Redistricting (https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/criteria-for-congressional-districts/)

[8] See details later in the text.

[9] *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018)

[10] See Douglas (2014), *The Right to Vote Under State Constitutions* for more information on the right to vote found in state constitutions.

[11] As noted above, most states still have redistricting under legislative control; however, several states have advisory commissions or backup commissions if the legislature fails to pass a map. Additionally, states differ on the voting rule required to pass a map. For instance, Ohio requires the legislature to pass a map with a supermajority; otherwise, a backup commission retains jurisdiction over the creation of a Congressional plan.

BACKGROUND

The State of Partisan Gerrymandering Law Prior to 2020

In this section we look at the status of redistricting law vis-à-vis partisan gerrymandering prior to the 2020 redistricting round. While our focus in this section is to trace litigation through time and generally that has been concentrated in federal courts, we also briefly examine the role of state courts in the 2010 redistricting round, since previous precedents in other states affected how state courts saw the options for controlling partisan gerrymandering in their own state in the current decade (Cf. Grofman and Cervas 2018).

The U.S. Supreme Court first dealt with the role of partisanship in districting in 1973 in a Connecticut case, *Gaffney v. Cummings*,[12] in which political data was used to try and balance districts roughly proportional to the statewide political strength of parties. In *Gaffney*, the Court ruled that the state legislature did not violate the 14th amendment's Equal Protection Clause by taking partisanship into account to represent the parties in a fashion reflective of their electoral strength. *Gaffney* allowed for partisanship to be used in what appeared to be a benevolent fashion, but the continuing concern of good government groups and political parties has been about the malevolent uses of partisanship in districting to create political gerrymanders. Post-*Gaffney* there were various challenges to plans as partisan gerrymanders, such as *Badham v. Eu*[13] which, like several other cases, was dismissed for want of a federal claim.

The first hint that federal courts might reign in egregious manipulation of district lines drawn for political gain came thirteen years after *Gaffney* in *Davis v. Bandemer*.[14] *Bandemer* was a challenge to Indiana's legislative plans as partisan gerrymanders. In *Bandemer*, the Court's majority ruled that partisan gerrymandering claims were justiciable in federal courts, but the Court rejected the claim that the Indiana plans were gerrymanders, and seemingly set an impossible threshold for hold a plan to be unconstitutional, namely that the minority be "shut out of" the political process ("In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process").[15]

That high bar did not prevent new challenges to alleged partisan gerrymanders being brought in federal courts after *Bandemer*,[16] but again

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[12] 412 U.S. 735 (1973).

[13] 721 F. 2d 1170 (D. Calif. 1983, *cert.* denied.).

[14] 478 U.S. 109 (1986).

[15] *Davis v. Bandemer*, 478 U.S. 109, 139 (1986).

[16] see e.g., *Republican Party v. Martin* 980 F2d 943 (4th Cir. 1992).

lower courts ultimately rejected partisan gerrymandering claims. Eighteen years after *Bandemer*, in a case from Pennsylvania, *Vieth v. Jubelirer*[17] that lacked a majority opinion, the issue was again brought before the U.S. Supreme Court, and it again rejected a partisan gerrymandering claim. But now there were clear signs that the Court was rethinking the issue of the justiciability of partisan gerrymandering.

Justice Scalia, writing for a plurality,[18] would have held that there was no justiciable claim because there was no "judicially discernible and manageable standard" by which the Court could decide when a plan went from being constitutional to unconstitutional. His view would have overturned *Bandemer*. Three justices in *Vieth* (Breyer, Souter, and Stevens) wrote separate dissents, each proposing their own standard for adjudicating partisan gerrymandering claims. Justice Kennedy concurred with the plurality that the appellants' complaint be dismissed because the "proposed standards each have their own deficiencies",[19] but left open the possibility that a manageable standard might be established.[20] The *Vieth* Court also concluded that "'Fairness' is not a judicially manageable standard."[21]

A few years later, in *LULAC v. Perry*,[22] the Court heard a challenge to the mid-decade redistricting scheme by the Texas legislature but again rejected claims that the plan was a gerrymander. In that case, some Justices expressed the view that a manageable standard combining partisan symmetry approaches with other measures might yet be contrived.[23] Post-*LULAC* there was a spate of work by lawyers, social scientists, and other concerned scholars, including computer scientists, offering new ways of measuring gerrymandering (or ways to defend previously rejected metrics) to offer to federal courts. And cases challenging plans as partisan gerrymanders continued to be filed in federal courts.

After 30+ years of unsuccessful challenges, three federal trial courts, one

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[17] 541 U.S. 267 (2004).

[18] *Id.*, at 306-307.

[19] *Id.*, at 267, 269.

[20] For an overview of *Vieth* see McGann et al., *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty*, (2016)

[21] *Vieth* 541 U. S. ____ (2004) at 3.
https://www.supremecourt.gov/opinions/03pdf/02-1580.pdf

[22] 548 U.S. 399 (2006).

[23] (Grofman and King 2007).

in Wisconsin,[24] one in North Carolina,[25] and one in Maryland,[26] found proposed plans to be unconstitutional partisan gerrymanders. These cases were appealed to the U.S. Supreme Court, which issued a definitive ruling that focused on the challenged North Carolina map.

In a 5-4 opinion in *Rucho,* the court majority took away the ability to bring claims of partisan gerrymandering in federal court, with Justice Kagan dissenting, joined by Justices Ginsberg, Breyer, and Sotomayor in dissent. *Bandemer* was overruled: the justiciability of partisan gerrymandering claims was eliminated, and the lower court finding of unconstitutional partisan gerrymandering were reversed. The ruling explicitly rejected all the possible avenues for bringing a partisan gerrymandering claim that had ever been asserted: "the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, [or] Article I, § 2, of the Constitution".[27] In *Rucho,* the Supreme Court asserted, without qualification, that there is no "appropriate role for the Federal Judiciary in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere."[28] *Rucho* further asserted: "Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."[29]

The court opinion in *Rucho* was problematic in that it recognizes that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust",[30] and the Court "does not condone excessive partisan gerrymandering",[31] and yet it simultaneously shirked responsibility. The majority opinion in *Rucho* is also problematic because it misunderstands the basic measurement issue regarding partisan gerrymandering, namely how can one detect an egregious partisan gerrymander. It frames this question as: "how much representation [does a] particular political parties deserve — based on the votes of their supporters."[32] But the Court then goes on to claim that "[p]artisan gerrymandering claims invariably sound in a desire for

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[24] *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

[25] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

[26] *Lamone v. Benisek*, 139 S. Ct. 783 (2019).

[27] *Id*. at 2491.

[28] *Id*. at 2494 (quotations omitted; emphasis added).

[29] *Id.* at 2507.

[30] *Id*. at 2506.

[31] *Id*. at 2507.

[32] *Id*. at 3499.

proportional representation."[33] However, that latter assertion is flatly wrong. Social science is unequivocal in NOT expecting proportionality in single-member, winner-take-all districting schemes (Grofman 1982; Gudgin and Taylor 1980; Gudgin, Taylor, and Johnston 2012; Shugart and Taagepera 2017; Taagepera 1973). For example, metrics such as the *partisan bias* measure require only that parties are treated symmetrically (Grofman and King 2007; Katz, King, and Rosenblatt 2020). Another test, the use of outlier analysis using an ensemble of plans generated by Markov chains draws on the geography of the state to determine what is suspiciously outside the realm of what can be expected from a plan drawn according to good government criteria (Becker, Duchin, Gold, and Hirsch 2021; DeFord, Duchin, and Solomon 2021; Duchin and Spencer 2021; Duchin and Walch 2022).

Moreover, the Supreme Court majority was far too facile in asserting in *Rucho* that no manageable standard for ascertaining the presence of partisan gerrymandering is possible. In fact, in the 2010 round of decennial redistricting, two state courts had already overturned (in whole or in part) legislatively enacted plans that were found to dilute the voting strength of minority parties[34] while another did so post-*Rucho*.[35]

The Florida and Pennsylvania state courts held a trial in which they heard from expert witnesses, deposed lawmakers, and weighed the evidence to conclude that one political party was inappropriately hampered by the district lines in the translation of its votes into seats (Cervas and Grofman 2020; Grofman and Cervas 2018; Wang, Ober, and Williams 2019). The situation in North Carolina was a bit different. Instead of holding a new trial court hearing, the court used both direct statistical and circumstantial evidence from the federal court case in *Rucho*.[36] While this state court decision could be seen as a kind of direct rebuttal to the *Rucho* majority's finding that no manageable standard to detect unconstitutional gerrymandering in North Carolina exists, we see *Harper* as confirmation that state courts, interpreting their own state constitution, have the ability to craft state-specific standards for policing

[33] *Id.* at 2499.

[34] See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018); and *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015).

[35] See *Harper v. Lewis*, NO. 5:19-CV-452-FL (NC, E.D. Oct. 22, 2019).

[36] The map that was to be replaced was itself drawn as a remedy to an earlier racial gerrymander. *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). While drawing the remedy, the legislator (and named defendant) admitted to drawing with partisanship as its primary motivation, saying they "propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Rucho*, 318 F Supp. 3d at 808. That map was approved on a party line vote.

partisan gerrymandering.

In Florida there was explicit state constitutional language about the permissible role of partisanship in redistricting. In Pennsylvania the Pennsylvania Supreme Court expressly recognized that partisan gerrymandering is a justiciable violation of the Free and Equal Elections Clause.[37] Similarly, in North Carolina, the state court relied on the "Free Elections Clause" found in the Declaration of Rights in the state's constitution.[38]

In Pennsylvania, the state court brought in a "legal and technical advisor" to assist the court to redraw the map. In Florida, the legislature was permitted to offer a new plan after an initial plan had been rejected. However, after the Florida Supreme Court ruled that a greater portion of the map was invalid than those two districts found void by the trial court, and the legislature failed to agree on a new remedial plan, the court approved its own plan.[39] The North Carolina court issued a preliminary injunction on November 20, 2019,[40] but it remanded to the legislature the first right to remedy the violation,[41] and accepted the revised legislative map for use in 2020.[42]

The 2020 Redistricting Round: Institutions and Context

With federal courts opting out of policing partisan gerrymandering, if

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[37] Pa. Const. art I, § 5. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 816 (Pa. 2018).

[38] NC. Const. art. I § 10.

[39] On December 2, 2015, the Florida Supreme Court issued an opinion intended to bring finality to litigation surrounding the state's congressional redistricting that "spanned nearly four years in state courts." https://law.justia.com/cases/florida/supreme-court/2015/sc14-1905-0.html.

[40] In addition to the challenge of the Congressional maps, the state court overturned the state legislative maps. *Common Cause v. Lewis*, 834 SE 2d 425 - NC: Supreme Court 2019.

[41] Urging the General Assembly to adopt a map in "an expeditious process… that ensures full transparency and allows for bipartisan participation and consensus to create new congressional districts that likewise seek to achieve this fundamental constitutional objective." https://www.brennancenter.org/sites/default/files/2019-10/2019-10-28-Harper%20v_%20Lewis-Order.pdf 17-18.

[42] While the new maps crafted by the legislature raised questions about their fairness, the court unanimously accepted the map to avoid needing to move primaries. Judge Paul Ridgeway said, "the net result is the grievous and flawed 2016 map has been replaced." "New congressional maps in North Carolina will stand for 2020, court rules." Brian Murphy and Will Doran. December 03, 2019. *The News & Observer.* www.newsobserver.com/news/politics-government/election/article237958719.html

there was to be judicial review of partisan gerrymandering, the burden necessarily fell on state courts. One key difference between the 2020 round and earlier rounds of redistricting was a division of labor, with state courts now dealing with partisan gerrymandering claims and federal courts continuing to deal with redistricting issues related to race.

But, as noted earlier, we cannot understand the role of state courts as checks on partisan gerrymandering without understanding the straw which they had to make bricks. Below we identify more than a dozen ways in which the institutions and practices of redistricting in the 2020 round differed from earlier redistricting periods. Here we elaborate on several points made earlier and considerably add to that discussion. But we leave to a later section a detailed discussion of exactly how state courts were involved in the 2020 redistricting round.

1. During the past decade, Colorado, Michigan, New York, and Virginia replaced legislative control of the redistricting process with redistricting commissions.[43] There are now eleven states[44] in which primary responsibility to draw Congressional districts is in the hands of commissions.[45]

2. Reforms involving the addition of commissions usually included changes in the specific criteria that were to be used in mapmaking identified in the state constitution. Overall, as of the beginning of the 2020 round of redistricting, 14 states had in their constitution some prohibition

[43] Montana has had a commission since 1973, but only after the 2020 census and after the 1980 census did it have more than one congressional seat.

[44] Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, New York, Virginia, Washington

[45] Secondary (backup) responsibly is given to commissions in three other states (Connecticut, Indiana, and Ohio), with three more having advisory commissions (Iowa, Maine, and Utah). Backup commissions usually get the opportunity to draw districts when the legislature fails to act, especially likely in those states where a supermajority requirement for legislative enactment of a redistricting plan is in place. In Connecticut, both the legislature and the backup commission failed, and the state Supreme Court drew the map instead. Indiana did not require a supermajority for the legislature to pass a map. The state legislature and governor, under Republican control, passed a congressional map. In Ohio, the process is complicated because the legislature is first to act, and if it fails the backup commission has an opportunity to draw a plan. If it fails, the legislature gets another opportunity, but without the supermajority requirement. That plan, however, is only valid for two years. See further discussion of Connecticut and Ohio below.

on political gerrymandering.[46] As far as we are aware only Delaware and Hawaii had such provisions prior to the 2010 cycle (Grofman 1985, Table 3). Florida added such a prohibition in the 2010 round.[47]

3. The U.S. Supreme Court in *Rucho* gave direct encouragement for state courts to assume the burden of policing partisan gerrymandering. While the Court asserted that the federal judiciary was not the venue to adjudicate the harms caused by partisan gerrymandering, it also claimed that it was not tossing "complaints about districting to echo into a void."[48] According to the court majority, among the options left available to police bad behavior are "state amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage."[49] The Court

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[46] Arizona (Requires: Competitive; Prohibits: Favor or Disfavor an Incumbent or Candidate, Use Partisan Data); California (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party; Use Partisan Data); Colorado (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Florida (Prohibited: Intentionally Favor or Disfavor a Party or Incumbent); Hawaii (Prohibited: Unduly Favor a Person or Party); Idaho (Prohibited: Protect a Party or Incumbent); Iowa (Prohibited: Intentionally Favor a Party, Incumbent, Person or Group; Use Partisan Data); Michigan (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Montana (Prohibited: Intentionally Favor Party or Incumbent, Use Partisan Data (except as required by a court in drawing a remedy)); Nebraska (Prohibited: Protect Incumbent, Use of Partisan Data); New York (Prohibited: Intentionally Favor or Disfavor Incumbent, Candidate or Party); Ohio (Prohibited: Favor an Incumbent or Party); Oregon (Prohibited: Intentionally Favor Party, Incumbent or Person); Utah (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Washington (Required: Competitive; Prohibited: Intentionally Favor or Disfavor a Party or Group); National Conference of State Legislatures, "Redistricting Criteria." Accessed September 25, 2022. https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx

[47] In 2010, by initiative, Florida overwhelmingly passed the "Florida Congressional District Boundaries Amendment." The new constitutional provision provided "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory." FL Const. Art. III sect. 20 (a). Florida state courts made use of this language in the 2010 round (*League of Women Voters of Fla. V. Detzner*, 172 So. 3d 363 (Fla. 2015)), and see below.

[48] *Id*. at 2507.

[49] *Id*.

also noted that Congress can use the Election Clause to reform the redistricting process.[50] What is of direct relevance to the 2020 role of state courts in policing partisan gerrymandering is this language in *Rucho*: "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."[51] Thus, the Supreme Court clearly distinguished what it now saw as the distinct roles of federal and state courts in policing partisan gerrymandering.

4. The 2010 round provided inspiration for state courts in the 2020 round by showing how provisions affecting gerrymandering could be operationalized and enforced, especially in terms of showing how language such as "free and equal" in a state constitution could be used as a bar against egregious partisan gerrymandering. Even in states where there was not language directly about partisan fairness, 26 states have constitutional language, such as that requiring elections to be "Free", "Free and Open", or "Free and Equal" (Douglas 2014; Wang, Ober, and Williams 2019).[52] The Pennsylvania Court in *League of Women Voters* was the first state court to creatively reinterpret such language as being violated if there was egregious partisan gerrymandering.

5. In the post-*Baker v. Carr*[53] decades, state governments were largely under divided control (Fiorina 1994). Even when the government was not divided, there was much more crossover voting such that voters would split their ballots between parties (Jacobson 2015b). Trifecta government has increased over time, especially as states have realigned after the Solid South transitioned from Democratic control to Republican control (Aldrich and Griffin 2018; Issacharoff and Pildes 2022).[54]

   In the 2010 redistricting round Republicans disproportionately had party

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[50] *Id.*

[51] It went on to say that state statutes and constitutions do not provide a renewed basis for federal courts to wade into "one of the most intensely partisan aspects of American political life." *Id*. at 2507 (emphasis added).

[52] Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

[53] 369 U.S. 186 (1962).

[54] As noted earlier, the place where we most expect to see egregious partisan gerrymandering are states where one party has complete control of the redistricting process control. When we describe state government control, we will use the term *trifecta*. When we talk about control over redistricting, will use the term preferred by the National Conference of State Legislatures: *party control*.

control. However, this advantage in places where Republicans controlled the process declined in the 2020 round.[55] Although the total number of states where the process was controlled by a single party actually increased, and Republicans controlled the process in one additional state and the Democrats in two additional states,[56] the advantage that Republicans had in 2010 (162 district advantage) was significantly reduced in 2020 (108 district advantage).[57] See Table 1 and Table 2 below for more detail.

6. The incentives for partisan gerrymandering increased in the 2020 round. On the one hand, the U.S. is experiencing hyper levels of elite party polarization last seen more than a century ago (Fiorina and Abrams 2008; McCarty, Poole, and Rosenthal 2016; Pildes 2011). On the other hand, politics is more competitive (for the presidency, control of the Senate, and control of the U.S. House of Representatives) than at any time in the previous 130 years (Lee 2015, 2016). That level of competition raises the stakes for congressional gerrymandering since small shifts in the number of House seats could be decisive for either party to gain complete control over the national government.

7. There was not a perfect congruence between control of the legislative and executive branches of a state and dominance vis-a-vis the partisan identification of state supreme court justices. Because of longer terms for judicial officers, at-large elections, and other dynamics including

[55] Going into 2020, Democrats controlled the redistricting process in eight states (Oregon, Massachusetts, Nevada, Illinois, New Mexico, New York, Rhode Island, Maryland; 75 total districts). Republicans controlled the process in 19 states (Indiana, West Virginia, Texas, Alabama, Iowa, North Carolina, Utah, Oklahoma, Georgia, Arkansas, Kentucky, Mississippi, South Carolina, Tennessee, Kansas, Ohio, Florida, Missouri, New Hampshire; 183 total districts). In Kansas, the legislature was subject to the veto of the Democratic governor but overrode her veto with a supermajority vote. Nebraska's legislature is non-partisan.

[56] Going into 2010 Democrats had party control in six states (Arkansas, Illinois, West Virginia, Maryland, Massachusetts, Rhode Island; 44 total districts). Republicans had party control in 18 states (Indiana, Oklahoma, Texas, Louisiana, Wisconsin, Ohio, Utah, South Carolina, North Carolina, Alabama, Pennsylvania, Georgia, Tennessee, Michigan, Virginia, Florida, Kansas, New Hampshire; 206 total districts). Although Democrats nominally controlled the process in Arkansas and West Virginia, these two states were at the end of the transition from single-party Democratic control to single-party Republican control. By the end of the decade, both states in both chambers had at least 2-to-1 Republican to Democrat ratios. Nebraska's legislature is non-partisan.

[57] The district advantage is calculated by finding the difference in the total number of districts for which each party had complete control over the process.

gerrymandered legislatures, state courts were somewhat more Democratic than state legislatures. Relevant here, in some states, the balance of partisan identifications on the court was such that, if most or all of the justices who identified with the minority party found a map unconstitutional under state law, even if only one or a few justices whose party was congruent with that of the party in legislative control declined to support a map from that party, the state court might, by a divided vote, nonetheless end up rejecting that map as unconstitutional.[58]

8. Data from the federal census is required for the purpose of reapportionment and redistricting the House of Representatives. The Census Bureau report to the states of the data needed for redistricting was delayed to an unprecedented extent.[59] Usually delivered by April 1 in the year ended in "1" (and usually released earlier on a rolling basis so states that that have legislative elections in odd years have the data with enough time to complete their new districting plans), it was not delivered until August 12, four months late.[60] This delay had consequences for how the redistricting process played out. For instance, the delay meant that the time between enactment of a plan and primary elections were shortened. Pertinent to our current discussion, the delay of data meant that there was a shorter time between enactment and an election, and that resulted in less time for a plan to be litigated as being violative of state or federal law. The consequences of delay in map-making by the primary redistricting authority is elaborated on in point 12.

9. The Supreme Court's gutting of Section 5 of the Voting Rights Act in *Shelby County. v. Holder*[61] represents a radical turn from the previous five decades of redistricting (Engstrom 2014; Hasen 2013). Section 5 of the Voting Right Act[62] required preclearance by the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice or the District Court for the District of Columbia of any election law changes, including redistricting. The trigger clause for Section 5 was held to rely on outdated data (voter turnout by race) to identify which states (or portions of states)

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[58] In our view the relationship between judicial partisan identification and attitudes toward gerrymandering is not simple and varies across jurisdictions, but demonstration of that point must be left to subsequent ongoing research.

[59] This data is P.L. 94-171. It includes detailed data on the entire population of the United States and is views as the authoritative dataset for redistricting.

[60] This delay occurred in part because of COVID-19 and in part because of administrative failures.

[61] 570 U.S. 529 (2013).

[62] 42 U.S.C. §§ 1973–1973p (2006).

would come under preclearance scrutiny (Blacksher and Guinier 2014).[63] At the time of the 2010 redistricting cycle, Section 5 applied to sixteen states in whole or in part -- most of the southern states and some other states with substantial minority populations (NCSL 2009, 80; Table 6).[64] Now it applies to none. Because of the partisan divisions and polarization in Congress, Section 4 (the trigger clause) has not been restored, and the present composition of the U.S. Supreme Court suggests that even if a better designed trigger clause were to be passed by Congress it might not survive Supreme Court review. Without preclearance, states previously covered under Section 5 need not submit their plans for approval by the federal government as non-retrogressive. Taking advantage of this new freedom, some previously covered states neglected to draw districts that would have been required by Section 5 and failed to draw districts that would be seen as required by Section 2 under existing case law.

It might not seem that a provision about racial/ethnic representation would be that relevant to issues of partisan gerrymandering, but in reality the two are highly connected (Hasen 2018). In states with substantial minority populations, the consequences of maps for racial representation and the consequences of those same maps for partisan representation are usually inextricably intertwined. Minority populations are still heavily Democratic, while non-Hispanic Whites tend to vote Republican, with the proportion of non-Hispanic Whites voting Republican in some southern states now at or over 70%.[65] By "cracking" (dispersal gerrymandering) or "packing" (concentration gerrymandering) minority voters, Republicans can obtain partisan advantage. Thus, when Section 5 preclearance was eliminated in *Shelby*, it is now much easier for Republicans in states under complete Republican control to disregard the requirements of satisfying Section 2 of the Voting Rights and choose to manipulate minority population concentrations in the maps that are passed in a way that benefits them in partisan terms. Even when subsequently found as in violation of Section 2, a remedy might not occur until after one or even

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[63] *Id.* at 2619–31.

[64] Alabama, Alaska, Arizona, (part) California, (part) Florida, Georgia, Louisiana, (part) Michigan, Mississippi, (part) New Hampshire, (part) New York, (part) North Carolina, South Carolina, (part) South Dakota, Texas, Virginia.

[65] For example, in Georgia in 2020, whites supported Trump over Biden 69% to 30%. Blacks gave only 11% support to Trump, and Hispanics split 37% to Trump and 62% to Biden. Georgia Exit Polls based on 4,385 total respondents, https://www.cnn.com/election/2020/exit-polls/president/georgia. In South Carolina, Trump received the support of 73% of White voters, but only 9% of Black voters. South Carolina Exit Polls based on 1,684 total respondents.

several elections are held under discriminatory maps.

10. Challenges to the application of the *Gingles*[66] prongs for identifying a violation of Section 2 have been brought.[67] The claim is that Section 2 requires plaintiffs to show that a *race-blind* map could have been drawn (or perhaps even was *likely* to be drawn) to satisfy the first prong of the three-pronged *Gingles* test for a Section 2 violation. The first prong requires a district that is reasonably compact containing a majority of the protected minority to be drawn.[68] Just as the elimination of Section 5 had consequences for the feasibility of partisan gerrymandering, the elimination of Section 2 as it is presently implemented and its replacement by a requirement for entirely race-blind mapmaking would make partisan gerrymandering much easier.

11. Beginning in the 2010 redistricting round and continuing throughout the decade we saw dramatic changes in which type of litigant was motivated to challenges redistricting plans under the *Shaw*[69] standard that race could not be used as the preponderant motive in how (all or some) of the district lines were drawn in a plan. When the *Shaw* doctrine first came into play it was Whites, conservatives, and Republicans who brought *Shaw* suits; minorities, liberals, and Democrats opposed them. There have been major changes regarding the motivation for using a *Shaw*-based strategy to challenge a map. On the one hand there was a principled belief that the only legitimate kind of redistricting was race-neutral (if not race-blind). On the other hand, there was the strategic consideration that if a racial gerrymander was undone then the partisan gerrymander that it helped to effectuate would be mitigated even if not eliminated. When the *Shaw* decision came down, control of most southern legislatures was still in the hands of the Democrats, and so the partisan gerrymander that litigators sought to unravel was one favoring Democrats. But as time wore on, southern states came under Republican control (Kousser 2010; Mood III and McKee 2022) and so the incentives to bring a *Shaw*-type lawsuit flipped. Now it Democratic and minority interest groups who are most likely to file a *Shaw*-type lawsuit as Republicans redistrict in a way that packs minority voters into a handful of districts (which has the effect of a packing partisan gerrymandering benefiting Republicans) in proportions well beyond what is needed to provide the minority community a realistic

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[66] *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986).

[67] *Merrill v. Milligan*, No. 21A375 (U.S. Feb. 7, 2022).

[68] There are other elements that need to be satisfied for a Section 2 challenge to be successful: see NCSL Redistricting Law (2019, 43–44).

[69] *Shaw v. Reno*, 509 U.S. 630 (1993).

opportunity to elect candidates of its choice (Lublin, Handley, Brunell, and Grofman 2020).[70] Thus, just as the end of Section 5 preclearance affected the context within which districting occurs and changed the incentives/opportunities for partisan gerrymandering because race and partisanship are so closely intertwined, so too did the changes in partisan control of state legislatures affect the incentives to bring *Shaw*-type suits.

12. In 2022, to a greater extent than in previous decades, there will be congressional plans used for elections that trial courts have found to be unconstitutional. Delay in delivering census data, in conjunction with the end of Section 5 preclearance, and contemporaneously with a new and unfortunate use of the *Purcell Principle*,[71] made it possible for some maps found by trial courts to be unconstitutional to still be permitted for use for just the 2022 election. *Purcell* demands "that courts should not issue orders which change election rules in the period just before the election" (Hasen 2016). Moreover, they delayed the creation of plans in ways that prohibited courts from holding trial on the merits. Even if a trial were to happen, and that court found a legislative plan unconstitutional, it would lack sufficient time to draw a constitutional remedial plan if the court deemed it necessary to give the legislature 'another bite at the apple.' Or, on appeal, a higher court would stay the decision on either *Purcell* grounds or because of a dispute in the interpretation of existing law. In Alabama and Louisiana, federal trial courts found legislative plans to be unconstitutional on Section 2 grounds and ordered both states to draw new plans that comply with the Voting Rights Act, but the U.S. Supreme Court has stayed those rulings based on the *Purcell* principle.[72]

13. Several new metrics for assessing partisan gerrymandering were introduced in the past decade, including the *efficiency gap* and the *declination*. The degree of concordance among alternatives metrics, such as the two mentioned above with long established metrics such as *partisan bias* (in vote share or in seat share) and the *mean minus median gap* were investigated to look at the question of whether (at least for states that were reasonably competitive) it was plausible to expect a high concordance of the various measures. In states that are competitive the measures do seem to have considerable overlap in whether they evaluate plans as partisan

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[70] Sometimes, however, these gerrymandered maps had non-trivial minority support because they protected minority incumbents and/or were likely to achieve the election of descriptively similar legislators.

[71] *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

[72] *Merrill v. Milligan*, No. 21A375 (U.S. Feb. 7, 2022); *Galmon v. Ardoin*, No. 3:22-CV-214 (M.D. La. Mar. 30, 2022)

gerrymanders.[73]

14. Mapping tools such as Dave's Redistricting App and PlanScore allowed the public to participate in new ways in a process from which they had previously been excluded. These tools included data on past election results and demography. Members of the public could use them to create plans and submit them to a commission or legislature. Perhaps even more importantly, such tools enabled both line drawers and reformers to quickly assess the degree to which a plan deviated from neutrality with respect to a large set of metrics and compare legislative maps to alternatives.
15. Computer simulations played a more important role in the 2020 round than in previous rounds. Sophisticated computer simulation tools based on a state's geography were used by experts to create ensembles (a set of feasible plans satisfying pre-designated criteria) that could inform mapmakers (and courts) about the range of feasible outcomes under the specified assumptions and could be used to identify outliers or plans that came closest to perfect neutrality vis-a-vis any given metric (Becker, Duchin, Gold, and Hirsch 2021; Chen and Cottrell 2016; Chen and Rodden 2015; Duchin and Spencer 2021; Duchin and Walch 2022)

Above we described some of the important ways in which redistricting in the 2020s round differed from redistricting in earlier rounds. In Table 1 we summarize a variety of aspects of redistricting circa 2020 that impact on the likelihood of partisan gerrymandering and the likelihood that state courts will address partisan gerrymandering issues in the state if those exist.. Table 1 shows which entity has initial control over redistricting;[74] what is the party control in the state; which entity drew the congressional map used in 2022; and what does the state constitution offer vis-à-vis direct language or language with the potential to be used to prohibit/limit gerrymandering.

Table 1 Information on Party Composition of Legislatures, Initial Districting Authority, Actual Author of the 2022 Map and State Constitutional Criteria for Redistricting

[73] Personal communication with Nick Stephanopoulos.

[74] Given the stakes in the current era of fragile national majorities (Fiorina 2017), where the conditions hold for a state to enact a partisan gerrymander, we expect partisans to act in their self-interest; that is, to maximize the number of seats for their party in a state and increase the likelihood of holding a majority in Congress.

State	Population	Seats	Primary Authority for Drawing the Lines	Party Control	Who Drew the Lines	Free and Equal/Open	Direct Language
Alabama	5,024,279	7	L	GOP	L		
Alaska	733,391	1	-	-	-		
Arizona	7,151,502	9	C	GOP	Comm.	x	x
Arkansas	3,011,524	4	L	GOP	L	x	
California	39,538,223	52	C	DEM	Comm.		x
Colorado	5,773,714	8	C	DEM	Comm.	x	x
Connecticut	3,605,944	5	L(C)	SPLIT	Court		
Delaware	989,948	1	-	-	-	x	
Florida	21,538,187	28	L	GOP	L		x
Georgia	10,711,908	14	L	GOP	L		
Hawaii	1,455,271	2	C(P)	DEM	Comm.		x
Idaho	1,839,106	2	C	GOP	Comm.		x
Illinois	12,812,508	17	L	DEM	L	x	
Indiana	6,785,528	9	L	GOP	L	x	
Iowa	3,190,369	4	L	GOP	L		x
Kansas	2,937,880	4	L	GOP	L		
Kentucky	4,505,836	6	L	GOP	L	x	
Louisiana	4,657,757	6	L	GOP	L		
Maine	1,362,359	2	L	SPLIT	L		
Maryland	6,177,224	8	L	DEM*	L (Court)	x	
Massachusetts	7,029,917	9	L	DEM*	L	x	
Michigan	10,077,331	13	C	SPLIT	Comm.		x
Minnesota	5,706,494	8	L	SPLIT	Court		
Mississippi	2,961,279	4	L	GOP	L		
Missouri	6,154,913	8	L	GOP	L	x	
Montana	1,084,225	2	C	GOP	Comm.	x	x
Nebraska	1,961,504	3	L	GOP	L	x	x
Nevada	3,104,614	4	L	DEM	L		
New Hampshire	1,377,529	2	L	GOP	Court	x	
New Jersey	9,288,994	12	C(P)	DEM	Comm.		
New Mexico	2,117,522	3	L	DEM	L	x	
New York	20,201,249	26	C(L)	DEM*	Court		x
North Carolina	10,439,388	14	L	GOP	Court	x	
North Dakota	779,094	1	-	-	-		
Ohio	11,799,448	15	L	GOP	L		x
Oklahoma	3,959,353	5	L	GOP	L	x	
Oregon	4,237,256	6	L	DEM	L	x	x
Pennsylvania	13,002,700	17	L	SPLIT	Court	x	
Rhode Island	1,097,379	2	L	DEM	L		
South Carolina	5,118,425	7	L	GOP	L	x	
South Dakota	886,667	1	-	-	-	x	
Tennessee	6,910,840	9	L	GOP	L	x	
Texas	29,145,505	38	L	GOP	L		
Utah	3,271,616	4	L	GOP	L	x	x
Vermont	643,077	1	-	-	-	x	
Virginia	8,631,393	11	C(P)	DEM	Court	x	
Washington	7,705,281	10	C	DEM	Court	x	x
West Virginia	1,793,716	2	L	GOP	L		
Wisconsin	5,893,718	8	L	SPLIT	Court		
Wyoming	576,851	1	-	-	-	x	

NOTE: States we identify as meeting the conditions for the potential enactment of a gerrymander are highlighted. L=Legislature, C=Commission, C(P)=Political Commission, C(L)=Commission with Legislative Backup, -=One district.

Highlighted in bold in Table 1, we identify 28 states that meet the conditions for enacting a partisan gerrymander. We begin our analysis with these states. For the moment we ignore whether there is state law that prohibits gerrymandering, since it is possible that the legislature would simply ignore the law when selecting a plan. We are also putting aside states where commissions draw the lines.

Table 2 looks at the potential effects of party control in more detail at the aggregate level.

Table 2 Party Control over Redistricting in 2010 and 2020

Party Control	Single Seat	Split/Commission	Republican	Democratic
2010	7(7)	19(173)	18(206)	6(44)
2020	6(6)	17(171)	19(183)	8(75)

NOTE: Totals calculated by determining which institution had control over the process. We take party control in 2020 to be found in legislatures that have supermajorities that create veto proof majorities (Maryland, Massachusetts), or when commissions can be superseded by the Legislature (Ohio, New York).

What we see is that for the 2020 cycle, the Democrats controlled the process in just eight of these 28 states. In those eight states, there is a total of 75 districts. This was an increase from the 44 in the previous decade. Republicans had control in the other 19 states. Here, there are 189 districts. This is, however, a decrease from the 206 districts of the previous decade.

Critical for understanding the 2020 cycle is to notice that both the total number of states where the process was controlled by just one party increased and the number of congressional seats allocated under one party control increased, but the relative advantage of Republicans declined, even though, as in the previous round of redistricting, Republicans fully controlled more states in which they could effectuate gerrymanders than did Democrats.[75] In particular, the states in which the Democrats controlled the process changed, gaining control in large state New York, and losing control in small state West Virginia.

Comparing outcomes in congressional districts in the election of 2022 with projected outcomes of the presidential election of 2020 into the 2022 districts.

A simple calculation can be made to help determine the independent

[75] See item **Error! Reference source not found.** above.

effect of apportionment and redistricting on the balance of power in the U.S House. We can look at how many congressional districts a national candidate --here President Biden ca. 2020, did win under one set of maps and compare those results to Biden's 2020 votes projected into the 2022 districts. In this way we can determine the change in district presidential wins for each party between the districts used in the 2020 election and the districts used in the 2022 election. This simple analysis leaves aside very important considerations that would affect who wins in specific districts., such as incumbency effects, candidate quality, and the effect of campaigns. But the benefit of this apples-to-apples comparison is that it shows, using the same nationwide election, the difference between the old and new lines.

First, we must also recognize that the total number of districts in each state were affected by apportionment. Texas led the country with relative population gain between 2010 and 2020 and gained two seats in the House of Representatives. Montana added a second seat, and Florida, North Carolina, Oregon, and Colorado all added another seat. California, New York, Illinois, Michigan, Ohio, Pennsylvania, and West Virginia all lost one seat.

Using the congressional district lines from 2020, Donald Trump carried 210 districts and Joe Biden carried the other 225. Under the district lines drawn for use in the 2022 election, which includes the apportionment changes above, Trump would have carried 209 districts and Biden 226. Only one seat would have changed party based solely on these changes. That seat benefited the Republicans. Thus, redistricting and apportionment itself did not have a large effect on the outcomes in Congress as judged by projecting 2020 presidential results into the new districts.

However, of course, just as the 2020 presidential contests were only partly predictive of what happened in 2020 at the congressional level because there was a midterm tide toward the Republicans in most states.[76] Nonetheless, considering apportionment changes, the net aggregate combined effects of redistricting and apportionment on partisan outcomes were largely a wash.

If we fine-tune the analysis to the state level, a more nuanced picture emerges from our projections. Trump gained one additional seat in each of Georgia, Missouri, Montana, and Tennessee. In Texas, three Trump seats were added. In Florida, Trump gained a plurality in five additional districts. Biden added to his tally in several states, including one seat in each of

[76] In 2020 the actual congressional elections results resulted in 222 Republican seats (assuming the candidate ahead is certified the winner as of November 2022)—not that different, in the aggregate, from what we would have expected from the presidential election results that year if we disregard errors at the level of individual districts and allow Type I and Type II errors to cancel each other out at the aggregate level.

Colorado, Michigan, New Jersey, New Mexico, New York, and Oregon. He also would have added two seats in Illinois and North Carolina using the projected presidential results.

Table 3 shows this data. We should note that this data reflects the districts as they were contested in the 2022 midterm. State courts had already acted in several states to strike down plans as gerrymanders. Thus, we cannot use this simple analysis as a measure of changes in gerrymandering between 2020 and 2022;[77] it is only about comparisons between actual outcomes in 2020 and projected outcomes in 2022 based on the districts used in the 2022 election.[78] Gerrymandering did happen during the 2020 redistricting cycle; and not all gerrymanders were corrected by state courts.

Table 3 Change in Congressional Districts by Party

	OLD MAPS			NEW MAPS		
State	Total Number of Districts	Biden 2020 Districts	Trump 2020 Districts	Total Number of Districts	Biden 2020 Districts	Trump 2020 Districts
California	53	46	7	52 (-1)	45 (-1)	7
Colorado	7	4	3	8 (+1)	5 (+1)	3
Florida	27	12	15	28 (+1)	8 (-3)	20 (+5)
Georgia	14	6	8	14	5 (-1)	(+1)
Illinois	18	12	6	17 (-1)	14 (+2)	3 (-3)
Michigan	14	6	8	13 (-1)	7 (+1)	6 (-2)
Missouri	8	3	5	8	2 (-1)	6 (+1)
New Jersey	12	9	3	12	10 (+1)	2 (-1)
New York	27	20	7	26 (-1)	21 (+1)	5 (-2)
North Carolina	13	5	8	14 (+1)	7 (+2)	7 (-1)
Oregon	5	4	1	6 (+1)	5 (+1)	1
Tennessee	9	2	7	9	1 (-1)	8 (+1)
Texas	36	14	22	38 (+2)	13 (-1)	25 (+3)
West Virginia	3	0	3	2 (-1)	0	2 (-1)
Total	**246**	**143**	**103**	**43**	**0**	**11**

Note: Data compiled as downloaded from Dave's Redistricting App. The

[77] In the 2022 election, national tides linked to voter perceptions of the success of President Biden's presidency, the degree to which each party had vulnerable seats, idiosyncratic effects tied to the candidates and campaigns in each congressional district (Jacobson 2015a), and state-wide effects linked to positive or negative coattails of statewide candidates and the presence or absence of concerns about possible changes in abortion laws that would depend upon election results in the state, made the 2022 congressional elections (and state legislative elections) not merely a "no change" rerun of 2020.

[78] Moreover, several states simply perpetuated existing gerrymanders, while other states were able to undo previous gerrymanders, as was the case in Michigan which instituted a new independent commission.

states shown are those that had effects from redistricting or apportionment. The remaining states all had the same number of Trump or Biden districts in 2020 as they did after redistricting.

As of the completion of the 2020 round of mapmaking (ca. November 2022), we have identified 23 states where some claim was made that the congressional map was a partisan gerrymander:[79] Alabama,[80] Arizona, Arkansas, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Tennessee, Texas, Utah, and Wisconsin. Only some of these claims resulted in litigation and even where litigation based on partisan gerrymandering was brought (or in Alabama, Louisiana, and Georgia, where a claim about a racial gerrymander that clearly had partisan consequences was brought in federal court), maps in many of those states survived challenge, or thanks to the *Purcell* principle had plans that were allowed only for one election.[81]

The last two columns of Table 1 identifies whether there is direct or indirect language in state law that prohibits partisan gerrymandering. We now look at the intersection of those states where gerrymandering might be found and those where there is direct or indirect language in state law prohibiting partisan gerrymandering. Combining the information in Table 1 with the list of states where there is an accusation of a partisan gerrymandering. We find

[79] This includes places in which litigation led to a different map but some where it did not or where no challenge to the map was made or where litigation is still pending (sometimes with no final decision, sometimes with a plan that can be used only in 2022). We make no claim that this list is either exhaustive or authoritative. We identify these states based on journalistic and individual accounts of states where lines were drawn in ways that advantage a political party. It is possible that we have included a state which evidence would not identify as a partisan gerrymander or excluded a state that is a gerrymander.

[80] We include some states that have gerrymanders, drawn to dilute the power of protected racial and language minorities (Alabama, Georgia, Louisiana) that have been challenged on racial rather than partisan grounds and in federal rather than state courts. Usually, especially in the southern states, because of disproportionate minority support for one party and disproportionate non-Hispanic white support for a different party, a racial gerrymander has a partisan gerrymandering effect. (For an elaboration of this point, see discussion earlier in the text and (Chen and Stephanopoulos 2021).

[81] Such plans might still be changed prior to the 2024 election. Indeed, because of the unique laws governing the Ohio process, because a map was not enacted by the commission established by voters, the plan will only be in effect for the 2022 election. Changes to the membership of the Ohio Supreme Court likely will affect future litigation.

that Arizona, Florida, Iowa, Nebraska, New York, Ohio, Oregon, and Utah all prohibit partisan gerrymandering with direct language in state law. Additionally, Arkansas, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, and Utah have indirect language like that used in Pennsylvania and North Carolina in the 2010 cycle to strike down plans as partisan gerrymanders.

We find that all states on the first list except Alabama, Arizona, Georgia, Kansas, Louisiana, Nevada, New Jersey, Texas, and Wisconsin have the potential for state courts to resolve a partisan gerrymander in state courts using existing state constitutional language. But there are other routes to court action, both federal and state, that have implications for partisan gerrymandering. We also note that new innovative use of state constitutions could potentially find prohibitions on partisan gerrymandering, particularly provisions that are direct corollaries to the federal first amendment and equal protection clause of the 14th amendment.

First, all redistricting is bound by the federal constitution and federal law. Federal courts have determined that Louisiana violated the Voting Rights Act.[82] In Georgia, a federal trial court concluded that "the plaintiffs have shown that they are likely to ultimately prove that certain aspects of the State's redistricting plans are unlawful"[83] based on evidence that the state violated the Voting Rights Act. The court, however, declined to enjoin the congressional map.[84] The ruling came after the U.S. Supreme Court, using the *Purcell Principle*, stayed the court ruling in of a violation of the VRA in Alabama and Louisiana.

Second, in Arizona and New Jersey, congressional redistricting was not done by the legislatures of those states, but instead by an independent commission and a political commission with a neutral chair, respectively. We do not deny that a redistricting commission, regardless of whether some or all its members are elected officials, can craft a plan that is discriminatory. But these commissions are excluded from the analysis since there is no alternative plan produced by a court.

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[82] *Galmon v. Ardoin*, No. 3:22-CV-214 (M.D. La. Mar. 30, 2022); *Robinson v. Ardoin*, No. 3:22-CV-211 (M.D. La. Mar. 30, 2022)

[83] *Common Cause v. Raffensperger*, No. 1:22-CV-90 (N.D. Ga. Jan. 7, 2022); *Pendergrass v. Raffensperger*, No. 1:21-CV-5339 (N.D. Ga. Dec. 30, 2021); *Georgia State Conference of the NAACP v. State of Georgia*, No. 1:21-CV-5338 (N.D. Ga. Dec. 30, 2021).

[84] *Alpha Phi Alpha Fraternity V. Raffensperger*, No. 1:21-CV-5337-SCJ at 10. https://storage.courtlistener.com/recap/gov.uscourts.gand.298476/gov.uscourts.gand.298476.134.0.pdf

Finally, Kansas and Wisconsin were under divided control at the time of redistricting, though, circumstances in both states led to the legislature's preferred maps being enacted for use.[85] We consider both states to be important because in both cases, a governor vetoed the legislature's preferred plan. Both also led to litigation in state court. That leaves Nevada and Texas as the only two states in our list of potential gerrymanders drawn by a legislature with clear party control over redistricting that do not have provisions in state law of the sort that have been used by a state court to regulate partisan gerrymandering.[86]

THE ROLE AND EFFECTS OF STATE COURTS

Potential partisan gerrymanders and state law

We now relist in
Table 4 the states which were highlighted in Table 1 and in the text above as states where accusations of partisan gerrymandering had been brought. In addition to indicating if there are direct or indirect language in the state constitution prohibiting partisan gerrymandering (also shown in Table 1), we also show whether a challenge was brought in state or federal court prior to the 2022 midterm election regarding the plan's partisan or racial effects.[87] And we show what entity actually drew/adopted the plan that was put in place for 2022.

Table 4 Potential partisan gerrymanders and state law

State	Direct	Free, Equal, Open	Who Drew the Map	Challenged based on racial classificat	Not Challenged in State Court	Unsuccessful Or	Successful Challenge[89]

[85] In Kansas, the Democratic governor vetoed the congressional map passed by the legislature [https://governor.kansas.gov/governor-laura-kelly-vetoes-congressional-redistricting-map-senate-bill-355/]. The Kansas Legislature over overrode her veto. As we explain later, a state court did rule the map unconstitutional, but that judgment was vacated by the high court. In Wisconsin, the map passed by the Wisconsin Legislature was vetoed by the Democratic governor [https://content.govdelivery.com/accounts/WIGOV/bulletins/2fcd160]. The dispute led to the Wisconsin Supreme Court choosing the governor's map.

[86] Of course, both states are also obligated to adhere to federal law including prohibitions on race as a preponderant motive and adhering to the Voting Rights Act.

[87] For practical reasons we leave aside intent and focus exclusively on effects.

[89] We count only plans as successfully challenged if, upon court intervention, a new plan was put into place. We indicate with a "P" state where a federal court ruled

				ions (*Shaw* or Section 2)		Pending Challenge [88]	
Alabama			L	x	ø		P
Arizona	•	•	Comm.		ø		
Arkansas		•	L	x		p	
Florida	•		L			p	
Georgia			L	x	ø		P
Illinois		•	L	x	ø		
Iowa	•		L		ø		
Kansas			L			u	
Kentucky		•	L			p	
Louisiana			L	x	ø		P
Maryland		•	L(C)				C
Missouri		•	L	x	ø		
Nebraska	•	•	L		ø		
Nevada			L		ø		
New Jersey			Pol. Comm.			u	
New Mexico		•	L			p	
New York	•		C				x
North Carolina		•	C				C
Ohio	•		L			p	O
Oregon	•	•	L			u	
Pennsylvania		•	C		ø		C
Tennessee		•	L		ø		
Texas			L	x	ø		
Utah	•	•	L			p	
Virginia		•	C		ø		C

a plan illegal based on racial gerrymander. Ohio is marked "O". Ohio is a special case since the state court overturned plans but was unable to replace the plan with a neutral plan. We also include states in which the state court acted to put a map into place in lieu of a plan crafted through regular process. These are marked as "C". This includes Maryland, Pennsylvania, Virginia, and Wisconsin. In Wisconsin, the court chose a plan, but it was based on the previous decade's plan, which was widely considered to be a gerrymander itself. We say more about these states in the paragraphs below. Maryland's plan was initially struck down by the state court, and under its supervision the Legislature passed a replacement. We still refer to this as a court plan.

[88] We denote "p" if the case is pending as of November 2022, and "u" if the challenge was unsuccessful.

Wisconsin			C		ø		x

NOTE: States listed are those who's legislatively drawn map could reasonably be called a gerrymander by one or more measure or that have generated significant press coverage asserting them to be biased towards one party.

Some states listed in

Table 4 had state court action without a partisan gerrymandering challenge. Pennsylvania and Virginia state courts had to intercede because of the failure for a legal plan to be enacted by the governing bodies. In Virginia, the failure of the state's redistricting commission to agree on a plan led to two co-special masters being appointed by the state court to draw the map. In Pennsylvania there was never a map in place by the normal procedures found in the PA constitution.[90] Instead, the legislature and the governor, of different political persuasions, refused to negotiate. That led to the courts holding hearings and choosing among alternatives submitted to them.[91] We include Wisconsin in this list as well because the state court acted to put a map into place. The normal procedures failed in Wisconsin, and the state court choose a map that it considered to most resemble the plan used in the previous decade. That earlier plan was considered a partisan gerrymander by many academics and legal scholars.

Our primary concern is with plans that were either successfully challenged and led to changes in the plan or where challenges were defeated. In the section that follows, we omit a full discussion of challenges that either did not reach a decision on merits or standing issues before the 2022 midterm elections, though we do briefly discuss those when we look to the future of redistricting after 2022.

State court cases where partisan gerrymandering issues are implicated

Table 5 lists the key state court cases, including those in the 2010 round.

Table 5 Key Case Citations Involving State Courts

State	Citation
Arkansas	*Suttlar v. Thurston*, No. 60CV-22-1849 (Ark. Cir. Ct.

[90] We have included Pennsylvania in this list because the legislature had passed a plan that many would have classified as a partisan gerrymander. The governor was of the other party and vetoed the legislation. Ultimately, the PA Supreme Court choose a map from several that were submitted to the court: *Carter v. Chapman*, 7 MM 2022 (Pa. Mar. 9, 2022).

[91] See *Carter v. Chapman*.

	Pulaski Cty. Mar. 21, 2022)
Forlida (201)	*League of Women Voters of Fla. V. Detzner*, 172 So. 3d 363 (Fla. 2015).
Florida (2022)	*Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022)
Georgia	*Common Cause v. Raffensperger*, No. 1:22-CV-90 (N.D. Ga. Jan. 7, 2022) *Pendergrass v. Raffensperger*, No. 1:21-CV-5339 (N.D. Ga. Dec. 30, 2021) *Georgia State Conference of the NAACP v. State of Georgia*, No. 1:21-CV-5338 (N.D. Ga. Dec. 30, 2021)
Kansas	*Rivera v. Schwab*, 512 P.2d 168 (Kan. 2022)
Kentucky	*Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Jan. 20, 2022)
Maryland	*Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. March 25, 2022)
North Carolina (2019)	*Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019).
North Carolina (2022)	*Harper v. Hall*, No. 19-CVS-12667 (N.C. Super. Ct. Nov. 5, 2021)
New Jersey	*Matter of Congressional Districts by New Jersey Redistricting Comm'n*, 268 A.3d 299 (N.J. 2022) *Steinhardt v. New Jersey Redistricting Commission*, No. 086587 (N.J. Dec. 30, 2021)
New Mexico	*Republican Party of New Mexico v. Oliver*, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022)
New York	*Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 31471 (N.Y. Sup. Ct. 2022)
Ohio	*Adams v. DeWine*, No. 2021–1428 (Ohio Dec. 2, 2021) *League of Women Voters of Ohio v. Ohio Redistricting Commission*, No. 2021–1449 (Ohio Nov. 30, 2021) *League of Women Voters of Ohio v. LaRose*, No. 2022–0303 (Ohio Mar. 22, 2022) *Neiman v. LaRose*, No. 2022–0298 (Ohio Mar. 21, 2022)
Oregon	*Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021)
Pennsylvania	*League of Women Voters of Pa. v. Commonwealth*,

(2018)	178 A.3d 737 (Pa. 2018)
Pennsylvania (2022)	*Carter v. Chapman*, 7 MM 2022 (Pa. Mar. 9, 2022)
Utah	*League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah D. Ct. Mar. 17, 2022)
Wisconsin	*Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Oct. 6, 2021) *Wis. Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245 (2022)

Now that we have specified which states had litigation before the 2022 midterm election, we discuss these court cases and their consequences in more detail. We start by discussing the states where no direct language prohibits gerrymandering but there is indirect language that was used as the basis of a claim of partisan gerrymandering. In these cases, generally a non-dilutive remedy plan was put into place by a state court. We then move to cases where there is direct language in state law that can be used as the basis for the claim of unconstitutional partisan gerrymandering. Finally, we discuss the states where there were cases brought in state court raising a partisan gerrymandering claim but there is neither direct nor indirect language in state law prohibiting partisan gerrymandering. These cases were generally unsuccessful.

Our next set of states are those without cases making a partisan gerrymandering claim but where there was nonetheless state court action arising through the failure of the responsible districting authorities to act in a timely fashion. Then we consider cases that are still pending where partisan gerrymandering effects are implicated, including some where a partisan gerrymandering claim in not the basis of the litigation.

1. Cases where there was a partisan gerrymandering challenged based on indirect constitutional language prohibiting partisan gerrymandering

a. Maryland

Maryland was the subject of an unsuccessful federal lawsuit in the 2010 cycle challenging the Democratic drawn map as a partisan gerrymander.[92] That case was combined with *Rucho* and the U.S. Supreme Court ruled that partisan gerrymandering was not judiciable in federal court. In both the 2010 and 2020 cycle, Democrats had partisan control over redistricting. In 2010,

[92] See *Lamone v. Benisek*.

Democrats controlled both chambers of the legislature and held the governorship. In 2020, they held both chambers with supermajorities, but there was a Republican governor. After the Democratic legislature passed a map, the Republican governor vetoed the map, but that veto was overridden. Republicans filed a lawsuit against the state.[93]

The state court heard testimony and fact-finding. The court found that the map was an extreme gerrymander that subordinated constitutional criteria to political considerations. It found that it was an "outlier" compared to neutrally drawn maps. There is no explicit provision in the Maryland constitution concerning partisanship in the context of Congressional districting. The Maryland Supreme Court, like these other courts, found indirect language in its constitution that it interpreted as a prohibition on egregious partisan gerrymandering. The court stated that "[o]ur jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State",[94] including congressional redistricting.

Maryland's outcome differs from that of other states. Though the state courts allowed the legislature an opportunity to enact a legal map, the court itself ended up crafting the remedy. In Maryland, the legislature took the opportunity to draw a new map that met the approval of both the governor and the state court.

b. North Carolina

North Carolina does not have direct language in its constitution that prohibits the legislature from drawing a partisan gerrymandering but does have provisions promoting voting rights that can be interpreted to prohibit gerrymandering. North Carolina's redistricting process was controlled by Republicans for the entirety of the 2010 cycle. The plan originally enacted at the decade's dawn was struck down in federal court as a racial gerrymander.[95] In replacing that plan, the Legislature said it relied on partisanship as the predominant motivation for decisions about where to draw the lines. Plaintiffs in *Harper v. Lewis* argued that the legislature drew the plan with the expressed intent to maximize Republican advantage and that the 2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause,[96] Equal Protection

[93] See *Szeliga v. Lamone*.

[94] *Id.* at 27.

[95] *Cooper v. Harris*, 581 U.S. ___, 2017.

[96] N.C. Const. Art. I, § 10

Clause,[97] and Freedom of Speech and Freedom of Assembly Clauses.[98] The state court then forced the legislature to offer a new map and required that the remedy be one in which partisanship did not predominate. The new map prepared by the General Assembly resulted in five Democratic members being elected, out of 13. In the previous election, Democrats only held three of the 13 seats in Congress.

In the 2020 cycle, the Republican legislature maintained its control over redistricting. The governor, who is a Democrat, has no ability to veto a map based on state law. The map enacted by the legislature was challenged in state court.[99] The court again said that partisan gerrymandering was prohibited by the state constitution. The court ruled that "constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter."[100] The North Carolina Supreme Court remanded the case back the lower court to oversee the redrawing of the maps by the General Assembly. When the General Assembly failed to enact a legal map, the court appointed four special masters to oversee the drawing of a map. They in turn brought in a technical consultant.[101] The court eventually choose a map prepared by the special masters.

2. Cases challenging partisan gerrymandering where there is direct constitutional language prohibiting partisan gerrymandering

a. New York

New York is a case where state courts heard challenges to enacted congressional plans based on language in state law that bears directly to prohibit partisan gerrymandering. In the 2010 cycle, the legislature was under divided control with Democrats controlling the lower chamber and Republicans controlling the upper chamber, and with a Democratic governor. The legislature failed to pass a map and federal courts implemented a map. In 2014, voters placed new restrictions on congressional redistricting. Language added to the constitution includes "Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."[102] The 2014 constitutional amendment not only included language to prevent gerrymandering, but it also established a process supposed to attain bipartisanship via a commission

[97] N.C. Const. Art. I, § 19

[98] N.C. Const. Art. I, §§ 12 & 14

[99] See *Harper v. Hall.*

[100] *Id.* at (https://appellate.nccourts.org/opinions/?c=1&pdf=41183)?

[101] Disclosure: Bernard Grofman served as that technical consultant.

[102] N.Y. Const. Article III, section 4(c).

containing individuals of both parties. The commission's composition, however, contained no tie-breaking mechanism. Moreover, even if the commission was successful in its work, its map was subject to changes made by the legislature.

In the 2020 cycle, the state government was under party control for the Democrats, including supermajorities in both chambers. Due to stagnation in New York's population, the state lost one congressional seat. The commission failed to produce a map and the legislature enacted its own congressional map that was signed into law by the governor. This map was challenged in state court as having violated the 2014 constitutional amendments. In *Harkenrider v. Hochul*, the State of New York Court of Appeals ruled that the congressional plan passed by the Legislature and signed by the Governor had bypassed the Redistricting Commission and thus was not enacted through a constitutionally valid process. "Contrary to the State respondents' contentions, the detailed amendments leave no room for legislative discretion regarding the particulars of implementation; this is not a scenario where the Constitution fails to provide 'specific guidance' or is 'silen[t] on the issue[.]'"[103] The court also held that the Respondents "engaged in prohibited gerrymandering when creating the districts."[104] Viewing the evidence in the light most favorable to petitioners and drawing every inference in their favor, there is a "valid line of reasoning and permissible inferences" which could possibly lead [a] rational [factfinder] to the conclusion reached by the [factfinder] on the basis of the evidence presented at trial."[105] Moreover the court found that "There is record support in the undisputed facts and evidence presented by petitioners for the affirmed finding that the 2022 congressional map was drawn to discourage competition. Indeed, several of the State respondents' experts, who urged the court to draw the contrary inference, concededly did not take into account the reduction in competitive districts."[106] The court appointed a special master who prepared the court remedial map.[107]

b. Ohio

Ohio is perhaps the most complicated of all the cases we cover in this essay. While the primary body responsible for congressional redistricting is a political commission, in effect it can be bypassed by the legislature. Indeed, as we will explain, this is what happened in the 2020 cycle.

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[103] *Id.* at 20.

[104] *Id*. at 1.

[105] *Id.* at 26 quoting (*Cohen v Hallmark Cards,* 45 NY2d 493, 499 [1978]).

[106] *Id.* at 27.

[107] Disclosure: Jonathan Cervas served as the special master in *Harkenrider*.

Like New York, Ohio voters passed a constitutional amendment in 2018 intended to take politics out of the process of congressional redistricting. The original jurisdiction to create a congressional district plan resides with the general assembly.[108] For a plan to go into effect for the entire decade, it must have an affirmative vote of three-fifths of the members of each house, including at least 50% of each of the two largest parties. If the legislature fails to get the necessary vote, a redistricting commission is formed consisting of several state officials.[109] For the commission map to be valid, the commission vote must include members of both major political parties. Finally, if the commission fails, then the legislature can pass a plan in the form of regular legislation subject to the governor's signature; however, a plan passed in this form is only valid for four years.[110] Moreover, if passed without three-fifths of all members and half of the members from each major party, it is subject to prohibitions on partisanship.[111] The plan is to remain in effect for four years. Most importantly for our purposes, though, is that even if a map is said to violate the prohibition on partisan gerrymandering, the court has no authority to demand its own map be used.[112]

The process for drawing new congressional districts in Ohio had a rocky start for Ohio. Delayed census data pushed against deadlines laid out in the state constitution. The legislature failed to meet its first deadline for the legislature to pass a bipartisan map, with responsibility shifting to the commission. The commission was unable to agree on a bipartisan solution, so responsibility reverted to the legislature. The map passed there was on a party-line vote, meaning it would only be in effect for four years. This plan was challenged in state court.[113] The Ohio Supreme Court ruled that the "General Assembly and the Governor blatantly disregarded that, in 2018, Ohioans voted three to one to amend the Ohio Constitution to eliminate the pernicious gerrymandering of Ohio's congressional districts" by once again enacting "a rank partisan gerrymander—one that violates both the letter and

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[108] Oh. Const. Article XIX, Section 1 (A)

[109] Oh. Const. Article XI

[110] Oh. Const. Article XIX, Section 1 (C); "If the plan becomes law, the plan shall remain effective until two general elections for the United States house of representatives have occurred under the plan, except as provided in Section 3 of this article." *Id.* (3)(e).

[111] Oh. Const. Article XIX, Section 1 (C) (3)

[112] Oh. Const. Article XIX, Section 1 (J): "When a congressional district plan ceases to be effective under this article, the district boundaries described in that plan shall continue in operation for the purpose of holding elections until a new congressional district plan takes effect in accordance with this article."

[113] *Adams v. DeWine*, No. 2021–1428 (Ohio Dec. 2, 2021)

the spirit of the 2018 reforms."[114]

With the map it enacted now ruled unconstitutional, the general assembly was allowed to submit a new map. Instead, they gave authority to produce a plan back to the commission. Some Republican members of the commission argued they were no longer required to adhere to the language in the constitution that prohibited partisan gerrymandering, since that language specifically addressed legislature-enacted plans. The commission passed a map on a party-line vote. On this map, Ohio Supreme Court determined it did not retain jurisdiction and that petitioners would need to file new lawsuits.[115] Several new challenges were brought in state court, and the Ohio Supreme Court again ruled that the map was a partisan gerrymander. This plan passed by the commission only slightly modified the previously unconstitutional map. The court said that the revised plan "allocates voters in ways that unnecessarily favor the Republican Party by packing Democratic voters into a few dense Democratic-leaning districts, thereby increasing the Republican vote share of the remaining districts."[116] The 2022 election was underway at this point in terms of petitions for candidacy, so the court's order requires a redrawn plan for the 2024 election. Essentially, the time had expired to put a new map in place for the 2022 election.

c. Oregon

In the 2020 cycle, Oregon's congressional redistricting was under party control of the Democrats. It was the first state to redraw its map. After initially floating a plan that would have created significant advantage to the Democrats, the Oregon Legislature passed a map that as signed by the governor that was reduced in its bias. The plan was challenged in state court by the former Republican Secretary of State.[117] Plaintiffs alleged (1) that the plan violates the law that "[n]o district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person",[118] because the plan was enacted for the purpose of favoring the Democratic Party, Democratic incumbent legislators, and "'other person[s]' affiliated with the Democratic Party."[119] (2) that the plan violates the Oregon Constitution,

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[114] *Adams v. DeWine*, __ Ohio St.3d __, 2022-Ohio-89, __ N.E.3d __, ¶ 5, 102

[115] 03/18/2022 Case Announcements #3, 2022-Ohio-871

(https://www.13abc.com/2022/03/18/ohio-supreme-court-makes-final-judgement-congressional-map-challenges/)

[116] *Neiman v. LaRose*, Slip Opinion No. 2022-Ohio-2471 at 22

[117] *Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021).

[118] ORS 188.010(2)

[119] Petition at 60.

which guarantees freedom of expression and assembly, respectively, which together prohibit partisan gerrymandering.[120] Plaintiffs also argue that the plan violates the Privileges and Immunities Clause and the Free and Equal Elections Clause of the Oregon Constitution.[121]

Oregon law instructs the state court to appoint a "Special Judicial Panel" (SJP) to hear the petition. The SJP appointed a special master to receive briefs and fact finding. The SJP adopted the special master's "Recommended Findings of Fact" and incorporated them by reference into this opinion. The circuit court held that the Petitioners failed to demonstrate that the legislatively adopted congressional reapportionment plan does not comply with all applicable statutes and the United States and Oregon Constitutions in any of the ways they have asserted. The evidence demonstrated that the enacted map was well within the range of plans that legislatures and courts have adopted in Oregon for the past 50 years and that the enacted map is more favorable to Republicans than any map since 1990.

The Court rejected Petitioners' request that it adopt a per se rule that a party-line vote is enough to establish a violation of Oregon law. The court said "[w]e respect the legislative process in Oregon and decline to adopt the cynical view that all politics are dirty politics."[122] The court went on to say that "[s]uch a standard would vest in the minority party absolute control of whether a plan will be presumed to unlawfully favor a political party. A minority party could simply vote against any plan along party lines, regardless of the merits of the plan, and thereby create a presumption of improper purpose."[123]

Regarding measurable evidence that the plan favors Democrats, the court determined that petitioners' preferred metric for measuring partisan bias—"falls well within the range of plans that have been used in the state for the past fifty years."[124] Having reached the conclusion that Petitioners have failed to meet their burden of proof as to partisan purpose or effect, the SJP dismissed both of Petitioners' constitutional claims without further discussion. This case is important because it is the <u>only</u> example we have from the 2020 round where a case where the state had jurisprudential grounds on which to find a violation rejected the claim of gerrymandering on

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[120] OR. Const. Article 1, sections 8 and 26

[121] OR. Const. Article I, section 20, and Article II, section 1

[122] *Clarno v. Fagan* at 8.

https://www.oregonlegislature.gov/redistricting/ResourceFiles/Oregon%20Special%20Judicial%20Panel%20Decision%20-%20Upholding%20Congressional%20Redistricting%20Plan.pdf

[123] *Id.*

[124] *Id.* at 10

empirical grounds, though there are cases still pending which might provide other instances.

3. Cases challenging alleged partisan gerrymandering where there is no state constitutional language either directly or indirectly prohibiting partisan gerrymandering

a. Kansas

For the 2020 cycle, Kansas legislature was controlled with supermajorities by Republicans. The governor was a Democrat. So, while the governor was able to veto the plan drawn by the Republican legislature, her veto was overridden.[125] Plaintiffs challenged the plan in state court, arguing it was a partisan and racial gerrymander, diluting minority votes in violation of several provisions of the Kansas Constitution.[126] A state-level judge in Wyandotte County struck down the plan. The court relying on expert testimony, concluded that the plan "[was] an intentional, effective partisan gerrymander."[127] It found that the plan (nicknamed "Ad Astra 2") "was designed intentionally and effectively to maximize Republican advantage."[128] The state immediately appealed to the Kansas Supreme Court.[129] Two questions were presented to the Kansas Supreme Court: (1) Whether claims of partisan gerrymandering are justiciable; and (2) Whether Ad Astra 2 discriminates against minority voters.

The Kansas Supreme Court held that "until such a time as the Legislature or the people of Kansas choose to follow other states down the road of limiting partisanship in the legislative process of drawing district lines, neither the Kansas Constitution, state statutes, nor our existing body of case law supply judicially discoverable and manageable standards for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral[,]"[130] and therefore the question presented was nonjusticiable as a political question. The court further held that plaintiffs did not establish the elements of their race-based claims and therefore could not show that Ad Astra 2 discriminated against minority voters. The map originally passed by the state legislature was the map used in the 2022 election. Note that although the map was upheld against challenge, the

[125] The governor's veto was overridden with a minimum (27) votes in the state senate and one over the minimum (85) in the state house.

[126] *Rivera v. Schwab*, Case No. 2022-CV-000089.

[127] *Id.* at 53.

[128] *Id.* at 65.

[129] *Rivera v. Schwab*, 512 P.2d 168 (Kan. 2022).

[130] *Id.* at 29.

grounds for doing so were jurisprudential and indeed, the plan was labeled a partisan gerrymander.

b. New Jersey

The process of congressional redistricting in New Jersey resides in a political commission composed of an equal number of Democrats and Republicans (six each), along with a tiebreaker chosen either by agreement of the other members or by the state Supreme Court. In the 2020 cycle, the commission's tiebreaker exerted immense power because the two parties acted in isolation from one another to create their own plans. The tiebreaker's vote went to the Democratic plan. Former New Jersey Supreme Court Justice John Wallace, who served as the tiebreaker, justified his selection of the Democratic plan "simply because in the last redistricting map, it was drawn by the Republicans."[131]

The Republican delegation to the commission filed a complaint directly to the New Jersey Supreme Court.[132] They asked the court to vacate the commission's decision and remand. Plaintiffs argued that the actions of the Chair were "arbitrary, capricious, and unreasonable," violated "federal and state constitutional equal protection and due process protections," and posed a "common law conflict of interest."[133]

But, as can be discerned from Table 1, New Jersey does not have state constitutional provisions that directly or indirectly prohibit partisan gerrymandering. The question before the court was whether plaintiffs' allegations were insufficient to support a claim upon which relief could be granted, because they did not assert any constitutional violation. The Court has no role in the outcome of the redistricting process unless the map is "unlawful."[134] So long as the final map is constitutional, the court cannot grant any relief. Court held that plaintiffs' allegations were insufficient to support a claim upon which relief could be granted, because they did not assert any constitutional violation. The map passed by the commission was used in the

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[131] This quote was said orally and reported in multiple news outlets. Matt Friedman, "New Jersey Supreme Court asks Wallace to elaborate on redistricting decision." Politico, January 4, 2022.

https://www.politico.com/states/new-jersey/whiteboard/2022/01/04/new-jersey-supreme-court-asks-wallace-to-elaborate-on-redistricting-decision-1404229

[132] *Steinhardt v. New Jersey Redistricting Commission*, No. 086587 (N.J. Dec. 30, 2021)

[133] Am. Compl. ¶¶ 7, 8, 101

https://redistricting.lls.edu/wp-content/uploads/NJ-njrc-20220203-order-dismissing-case.pdf

[134] N.J. Const. art. II, § 2, ¶¶ 7, 9

2022 midterm election. Here, too, although the map was upheld against challenge, the grounds for doing so were jurisprudential not fact-based.

c. Wisconsin

Wisconsin, like Pennsylvania and North Carolina, had enacted one of the most extreme gerrymanders of the 2010 cycle. That plan was the subject of a federal lawsuit that reached the U.S. Supreme Court but was mooted by *Rucho*.[135] There are no provisions in the Wisconsin constitution that speak to partisan gerrymandering either directly or indirectly, and therefore no obvious route to state court litigation.

In the 2020 cycle, the political context had changed from the previous decade -- a decade when Republicans had party control over the process. Though the state legislature remained in firm control of the Republicans, the governor was a Democrat. The state legislature and governor failed to agree to a plan. The Wisconsin Supreme Court took over jurisdiction regarding congressional redistricting. The court determined that it would choose among submissions to the court employing a "least change" approach.[136] Among the proposals to the court included a plan from Governor Evers and one from the state assembly and state senate. The court adopted the governor's plan.[137] Among the reasons given was that it had the least alterations to the previous maps[138] and that it complied with the U.S. Constitution's Equal Protection Clause, the Voting Rights Act, and the Wisconsin Constitution.[139]

4. Pending cases in state courts where there is partisan gerrymandering litigation

There are several states where there is pending litigation in state courts concerning partisan gerrymandering. We will offer only limited thoughts about these cases.

a. Arkansas

Arkansas is a state under clear party control and yet there were within-party splits. The legislature passed a plan through regular legislation. The governor, who is of the same party, refused to sign off on the plan, saying "I

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[135] *Gill v. Whitford*, 585 U.S. ___

[136] We should note that we are highly skeptical of this approach, and new research from computational social science shows that the least change approach is fraught with the danger of simply perpetuating an existing gerrymander(Becker and Gold 2022).

[137] *Johnson, v. Wis. Elections Comm'n*, 400 Wis. 2d 626

[138] *Id.* at 26-33.

[139] *Id.* at 34-51.

am concerned about the impact of the redistricting plan on minority populations."[140] The governor went on to say: "I decided not to veto the bills but instead to let them go into law without my signature. This will enable those who wish to challenge this redistricting plan in court to do so." Indeed, voters did file suit in state court alleging that the plan "interferes with and impairs the free exercise of suffrage by Black voters in Arkansas . . . by diluting, impairing, and undermining their ability to elect their candidates of choice."[141] Plaintiffs further argue that the "2021 Map violates the Free and Equal Elections Clause of the Arkansas Constitution, which guarantees that '[e]lections shall be free and equal,' and that '[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited,' Ark. Const. art. 3, § 2, as well as the Equal Protection Clause, which further guarantees that '[t]he equality of all persons before the law' and 'shall ever remain inviolate,' id. art. 2, § 3."[142] This case remains pending as of November 2022.

b. Florida

A contested process led to the adoption of maps favored by the governor of Florida. The map initially passed by the Florida legislature was vetoed by the governor. The governor's opposition to the state legislature's preferred maps delayed the adoption of a plan until April 2022, which made Florida among the last states in the country to approve a plan. The plan was passed on a party-line vote. Litigants sued in state court alleging that Governor Ron DeSantis "hijacked" the redistricting process, by "unilaterally declar[ing] the Fair Districts Amendment unconstitutional" and by vetoing the Legislature's congressional plan and "conven[ing] a special legislative session, leaving the Legislature little choice but to consider and pass his own redistricting scheme."[143] Plaintiffs also allege that the DeSantis Plan "intentionally favors the Republican Party at nearly every turn, eliminating three Democratic seats

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[140] "Governor Hutchinson Allows Vaccine Mandate, Redistricting Bills to Become Law Without His Signature." October 13, 2021. https://governor.arkansas.gov/news-media/press-releases/governor-hutchinson-allows-vaccine-mandate-redistricting-bills-to-become-la

[141] *Suttlar v. Thurston*, No. 60CV-22-1849 (Ark. Cir. Ct. Pulaski Cty. Mar. 21, 2022)

[142] *Id.* Petition at 4.
https://www.democracydocket.com/wp-content/uploads/2022/03/2022-03-21-FM-Complaint-60CV-22-1849.pdf

[143] *Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022).

and transforming competitive seats into Republican-leaning ones. And in so doing, it needlessly produces noncompact districts that split geographic and political boundaries."[144]

As noted earlier, the Florida Constitution has direct language prohibiting partisan gerrymandering.[145] Plaintiffs argue that the DeSantis Plan violates Article III, § 20 of the Florida Constitution by diminishing minorities' ability to elect, intentionally abridging and diminishing minority voting strength, intentionally favoring/disfavoring a political party, and violating traditional districting principles such as compactness, and political and geographical boundary splits. Because of the very late passage of a plan, this litigation has not resulted in a verdict on the merits.

c. Kentucky

Party control over redistricting was held by one party in Kentucky for the 2020 cycle because the Republican majorities in both chambers were sufficient to override a veto of the Democratic governor. The map was like the plan used in the 2010 cycle, with changes focusing on adding Republican voters to a district where the Democratic incumbent won a narrow contest in 2018. The Democratic Party of Kentucky proceeded to sue in state court.[146]

Plaintiffs argued that (1) the "extreme partisan gerrymandering" of the maps, "violates Sections 1, 2, 3, and 6 of the Kentucky Constitution by arbitrarily denying the citizens of the Commonwealth the rights to a free and equal election, free expression, and free association"; and (2) that the "mapmakers' violat[ed] . . . Section 33 of the Kentucky Constitution by excessively and unnecessarily splitting counties into multiple districts without a legitimate purpose, and impermissibly attaching portions of split counties to others more times than is necessary to achieve districts of roughly equal size." Because the election cycle was underway by the time the case was brought, the state court determined that a temporary injunction would harm election officials in their ability to hold the forthcoming election and that there was not a sufficient showing of harm to justify interfering with the use of the plan for the 2022 election.

Just days after the 2022 midterm election, the Kentucky lower state court delivered its ruling. While it found that the plan was a partisan gerrymander, it determined it did not violate the Kentucky Constitution. It acknowledged that "[t]he Kentucky Constitution, like most state constitutions, is much more specific than the United States Constitution. Also, as recognized by the North Carolina Supreme Court, on the state level, it is easier to craft a set of criteria

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[144] *Id.* Petition at 4.

[145] Fl. Const. Article III, Section 20

[146] *Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Jan. 20, 2022)

to evaluate an alleged partisan gerrymander than it is on the federal level."[147] However, the court determined that its free and equal clause found in the Kentucky Constitution "does not prohibit partisan gerrymandering because Section 6 has nothing to do with state or Congressional apportionment".[148] The court accepts that other states have used these types of provisions to strike down plans as partisan gerrymanders, and that the plan adopted by Kentucky is indeed a partisan gerrymander, but "declines to address the validity or applicability of other states' partisan gerrymandering decisions in this action because … the Kentucky Constitution does not prohibit partisan gerrymandering because it does not apply to apportionment, but rather to interferences with the vote-placement and vote- counting process."[149] Plaintiffs retain the option to appeal this decision to the Kentucky Supreme Court.

d. New Mexico

The 2020 cycle in New Mexico was under party control of the Democrats. The state established an advisory commission recently, but plans submitted by the commission can be amended by the legislature. The commission adopted three maps, two of which were consistent with traditional redistricting principles and a third which was adopted to "maintain the status quo."[150] Six of seven commission members submitted one of the submitted maps. Indeed, the legislature adopted none of the commission's maps. It amended one of the plans, which became referred to as the "People's Map." In a signing statement, the New Mexico governor said, "It is my duty to ratify the will of the majority here, which I believe has established a reasonable baseline for competitive federal elections, in which no one party or candidate may claim any undue advantage."[151] The Republican Party of New Mexico objected to the new map and challenged it in state court.[152] Plaintiffs in *RPNM et al.* filed a complaint alleging that "Senate Bill 1... redraws New Mexico's three congressional districts in contravention of traditional redistricting

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[147] *Id*. at 51, with internal citations to *Harper v. Hall*, 868 S.E.2d 499, 533 (N.C. 2022).

[148] *Id.* at 52.

[149] *Id.* at 56

[150] Petition at 15.

[151] "Gov. Lujan Grisham signs new Congressional map approved by N.M. Legislature." December 17, 2021.

https://www.governor.state.nm.us/2021/12/17/gov-lujan-grisham-signs-new-congressional-map-approved-by-n-m-legislature/

[152] *Republican Party of New Mexico v. Oliver*, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022).

principles endorsed by the State Legislature and the New Mexico Supreme Court in order to accomplish a political gerrymander that unconstitutionally dilutes the votes of residents of southeastern New Mexico in order to achieve partisan advantage."[153] Plaintiffs argued that the plan is a political gerrymander in violation of Equal Protection clause in the New Mexico Constitution.[154] Plaintiffs claim that "[w]hen drafters of congressional maps use 'illegitimate reasons' to discriminate against regions at the expense of others, including failing to adhere to New Mexico's 'traditional districting principles,' aggrieved voters may seek redress of this constitutional injury in the courts through an equal protection challenge."[155] The case is pending in state court as of November 2022.

e. Utah

In 2018, voters of Utah established an independent commission to conduct congressional redistricting. That commission was created as an advisory commission allowing the legislature to reject a plan. In 2020, the Utah Legislature changed the law regarding congressional redistricting to make the commission fully advisory.[156] The legislature ignored the commission's recommendations and established a plan that was signed by the governor on November 12, 2021. A lawsuit was filed by the League of Women Voters of Utah in state court.[157] The complaint alleges that (1) the Utah Legislature's 2021 Congressional Plan "violates multiple provisions of the Utah Constitution, including the Free Elections Clause, the Uniform Operation of Laws Clause, protections of free speech and association, and the right to vote; and (2) that "the Legislature's repeal of Proposition 4 [a bipartisan citizen initiative that prohibited partisan gerrymandering] violated the people's constitutionally guaranteed lawmaking power and right to alter and reform their government."[158] This case is pending as of November 2022.

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[153] At 6.

https://www.brennancenter.org/sites/default/files/2022-02/Republican%20Party%20of%20New%20Mexico%20v.%20Oliver.pdf

[154] N.M. Const. art. II, § 18.

[155] *Id.* at 18.

[156] "The committee or the Legislature may, but is not required to, vote on or adopt a map submitted to the committee or the Legislature by the commission." Utah Const. Section 9. Section 20A-20-303 (5).

[157] *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah D. Ct. Mar. 17, 2022).

[158] Utah Const., Free Elections Clause, Article I, Section 17; Equal Protection Rights, Article I, Sections 2 and 24; Speech & Association Rights — Article I, Sections 1 and 15; Right to Vote Protections — Article IV, Section 2.

5. States where courts were forced to act because the legislature or a commission failed to act in a timely fashion

a. Connecticut

Connecticut's legislature and governor are both controlled by Democrats. If the legislature fails to pass a plan with two-thirds majority in both chambers and receive the governor's signature, the process is transferred to a nine-member backup political commission. Because of census data delays, the committee tasked with the legislature's map drawing missed its September 15th deadline, and the process was shifted to the commission.[159] The commission failed to deliver a plan by its statutory deadline, and the Connecticut Supreme Court took over the process and named a special master to draw the state's five congressional seats. The court approved the special master's map on February 10, 2022.

b. Minnesota

Minnesota was under divided government at the time of the 2020 redistricting cycle. Democrats controlled the state house and governorship, and Republicans controlled the state senate. Because the redistricting process failed in Minnesota to reach an agreed upon congressional map, the Minnesota Supreme Court took over.[160] It named a five-person panel to develop a map. That map was adopted by the court on February 15, 2022.

c. New Hampshire

The New Hampshire legislature and governor are both controlled by Republicans. New Hampshire is a closely contested state in statewide elections. The popular governor's term ended in 2022. The 2020 redistricting cycle ended in a stalemate, which can be traced to the different governing coalitions between the legislature in district elections and the governor running statewide. The governor vetoed the legislature's map. The governor stated that "I made it pretty clear, and they didn't want to take that advice, and I don't think my veto on any of those maps shocked them."[161] The New

[159] While the Census Bureau provided redistricting data in an older format in mid-August, there were questions about whether that data would change when the full dataset was delivered on September 16. The data was identical.

[160] Minnesota has a long history of court drawn maps. "Since the 1980 census, the courts have drawn the congressional districts in absence of enacted redistricting plans." "History of Minnesota Congressional Redistricting," Alexis C. Stangl and Matt Gehring, November 2018.

[161] "Competitive congressional districts are on the decline. New Hampshire

Hampshire Supreme Court appointed a special master to draw the two-district congressional map. New Hampshire was the final state to ratify its 2022 congressional map.

d. Pennsylvania

During the 2010 round of redistricting, Pennsylvania brought new hope that partisan gerrymandering could be litigated in the state courts. In that cycle, the Republican legislature and Republican governor agreed on a map that was widely panned as an egregious gerrymander (Cervas and Grofman 2020; McGann, Smith, Latner, and Keena 2016; Wang, Remlinger, and Williams 2018). Across three midterm elections, regardless of the vote share received by the Democratic party statewide, it was restricted to winning only five seats of the state's 18, including in elections in which it received a majority of the votes (Cervas and Grofman 2020).

In *League of Women Voters of PA. v. Commonwealth*, the state Supreme Court overturned the plan and replaced it with a court drawn plan. It relied on indirect language in the state constitution the state constitution. The court ruled it violated the Free and Equal Elections Clause[162] because the enacted plan "dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage."[163] In the subsequent two elections under the court map, Democrats were able to win nine of the 18 seats.

Approaching the 2020 cycle of redistricting, the Republicans retained control of the state legislature, but now the governor was a member of the Democratic party. The Republican legislature approved a plan, but it was vetoed. The Pennsylvania Supreme Court was now tasked with implementing a plan. It heard testimony and allowed for the interested parties to submit plans. It ultimately implemented a plan which was proposed by the *Carter* plaintiffs, drawn by a professor from Stanford University.

e. Virginia

Late in the 2010 round, Virginia's 3rd congressional district was eventually found by a three-judge federal panel to violate *Shaw's* racially preponderant motive test, and a new map was drawn by a special master appointed by that court.[164] In the process, five of Virginia's eleven

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bucks the trend." NPR, June 10, 2022.

https://www.npr.org/2022/06/10/1104025539/new-hampshire-redistricting-competitive-districts-sununu

[162] Free and Equal Elections Clause, Pa. Const. art I, § 5.

[163] *Id*. at 814.

[164] Disclosure: Bernard Grofman served as the special master in *Personhuballah.*

congressional districts were redrawn. Of the five, one retained its black Democratic incumbent, three remained in Republican control, and the fifth, which had been redrawn with a considerably increased minority population elected a black Democrat.[165]

In the 2020 round, Virginia's newly constituted redistricting commission had an even number of members associated with each party and it deadlocked, unable to pass a map. The state court intervened and appointed a team of two special masters to draw a congressional map.[166] One of these masters was appointed to represent Republican interests, the other to represent Democratic interests, but the special masters amicably co-operated to produce a map drawn with the good government principles embedded in the state constitution as their overriding considerations, including a concern to avoid partisan vote dilution.[167]

Evaluating the consequences of court action

The next issue we take up is evaluating the consequences of state court action.

In Table 6, we look at those states where the state court rejected a map as an unconstitutional partisan gerrymander after litigation (North Carolina, Maryland, New York, Ohio). Here we compare the court-imposed map with the legislative map it replaced, though Ohio is an exception. Ohio is a special case since the peculiar provisions in its constitution did not allow the Ohio Supreme Court to draw a map of its own. Instead, that Court repeatedly rejected legislative and commission maps as they submitted new maps that differed little from the previously rejected map, until the election became so close in time that the legislature was able to get one of its maps adopted by a federal court to conduct an election. Thus, even though the legislative maps

[165] That seat, VA-04, was an open seat since the previous Republican incumbent chose to contest a Republican primary with a fellow incumbent rather than to run again within the boundaries of a considerably redrawn district that was less favorable to Republicans. The change in this district came about because the previous African-American majority district, VA-03, had been unpacked. That district had two distinct pieces spanning a large distance, each of which had a large minority population, with the two pieces connected in part only by water. When VA-03 was redrawn in a good government fashion, one of those pieces became the core of a district, the new VA-03, where the African-American incumbent resided, the other became the core of a new VA-04 also redrawn to more closely satisfy good government criteria.

[166] Disclosure: Bernard Grofman served as one of the special masters in Virginia.

[167] As in other states such as New York, the court and special masters (a) directly solicited public input and (b) had a two round process such that a preliminary map was unveiled and then revised based in part on the nature of the comments received, with special attention paid to issues involving communities of interest.

were rejected by the state court, in Ohio there is no state court drawn map to compare against. We therefore compare the map first ruled unconstitutional against the map that was used in the 2022 election.

We also evaluate plans where the failure of the relevant redistricting authority to act in a timely fashion led to the state court adopting a plan (Connecticut, Minnesota, New Hampshire, Pennsylvania, Virginia, Wisconsin). For New Hampshire and Pennsylvania, we compare the Legislature's map against the court map. For Connecticut, Minnesota, Virginia, and Wisconsin, we only show the data in Table 6 for the plan that was used in the 2022 midterm election.

For the states where there is a map against which we can compare the court-ordered (or ordered to modify) map, we show in Table 6 comparisons of the two maps using metrics provided in Dave's Redistricting App. For compactness high values are better. For county splits low values are better. For partisan bias, the ideal would be a value of zero. Substantial (and statistically significant) deviations from zero are undesirable. The sign on partisan bias tells us which party is advantaged, with positive values representing pro-Republican bias.

Table 6 Direct Comparisons Between Legislatively Drawn Map and State Court Drawn Remedy Where Such Comparisons are Feasible; Otherwise, Information about the Adopted Map is Given.

State	Total County Splits	Compact-ness	Votes Bias	Biden Seats	2022 Seats
Maryland Legislature	14	23	0.55%	8	-
Maryland Remedy	9	41	0.16%	7	7
North Carolina Legislature	14	51	3.92%	4	-
North Carolina Court	13	59	0.35%	7	7
New Hampshire. Legislature	3	43	-0.15%	2	-
New Hampshire Court	5	26	-0.00%	2	2
New York Legislature	56	40	0.12%	22	-
New York Court	26	60	0.87%	21	15
Ohio Legislature	14	47	2.08%	4	-
Ohio Comm. I	14	52	1.68%	4	5
Pennsylvania Legislature	18	55	2.64%	8	-
Pennsylvania Court	17	56	0.31%	9	8
Connecticut Court	10	49	-0.02%	5	5
Minnesota Court	12	55	3.48%	4	4
Virginia Court	11	46	0.47%	7	6
Wisconsin Governor	13	54	4.28%	2	2

Notes: Total County Splits refers to the number of county piece in total. Compactness is "You Know It When You See It" measure from (Kaufman, King, and Komisarchik 2021). Votes Bias is calculated from the 2020 Presidential election, as are the number of Biden Seats. Negative vote bias numbers indicate that the plan favors Democrats while a positive sign

indicates the plan favors Republicans. The 2022 Seats is the number of Democratic seats after the 2022 midterm election.

What we see from Table 6 is that the state court map usually dominates the legislative map on most of the factors identified. But there are some notable exceptions illustrating tradeoffs. For instance, in New Hampshire, both the number of county splits and compactness scores get worse, but the vote bias gets slightly better. In New York, the county splits measure and compactness measures get markedly better, though the vote bias gets slightly worse. We also notice that among all the court-imposed maps, the vote bias is extremely low, except in two cases. First is Minnesota, where there is significant pro-Republican bias. The second is in Wisconsin, which also has an even greater amount of pro-Republican bias. We do not have an explanation for high partisan bias in Minnesota. The map adopted in 2020 has very similar district-level partisan outcomes as the 2010 map. Statewide, Minnesota has voted for the Democratic presidential candidate in every election since 1976. It also has two Democratic senators, and the governor is a Democrat. But the congressional delegation is split with four each. The least Democratic district is more likely to flip to the Republicans than the least Republican held by a Republican is to flip to the Democrats. The failure of the Wisconsin court-adopted map is easy to explain. This was a least-change map; where the baseline map was arguably a gerrymander; least change simply perpetuated that gerrymander.

The data in Table 6 only deals with cases that were resolved in time for a remedial map to be drawn for the 2022 election. Four states have maps that are currently ruled unconstitutional being used in the 2022 election, accounting for 10% of all districts. Conservative estimates are that these unconstitutional plans likely cost the Democrats between 5 and 6 seats in Congress. If their unconstitutionality is sustained by higher courts, they will need to be redrawn for the 2024 election.[168] Other court cases are still pending. But these cases will probably not be the only ones to lead to "new" maps in 2024. The U.S. Supreme Court has held that there is no bar on mid-decadal congressional redistricting [169] and states under trifecta control may well choose to polish their previous partisan gerrymandering efforts by tinkering with their map to improve its partisan performance.[170] Thus, we

[168] "Maps in Four States Were Ruled Illegal Gerrymanders. They're Being Used Anyway." Michael Wines, August 8, 2022. The New York Times. https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html

[169] *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006)

[170] There is historic precedent for mid-decade redistricting (Engstrom 2013).

expect some state courts will still have plenty to keep them busy between now and the 2024 election – and we have only been looking at congressional districting, not at state legislative districting.

CONCLUSIONS

1. It is now state courts rather than federal courts whom litigants turn to when challenging what they regard as egregious partisan gerrymanders, with one key reason for that difference being the U.S. Supreme Court's definitive opting out of any role in controlling partisan gerrymandering.
2. State courts have taken up the challenge of *Rucho* to find manageable standards to measure gerrymandering by using state constitutional provisions to craft state-specific standards for a finding that a plan was an unconstitutional partisan gerrymander. In our view they have by and large done so successfully. In so doing they have drawn on the repertoire of tools developed by social scientists, computer scientists and others, including metrics for measuring the extent of partisan gerrymandering and to assess likely durability, but also computer-based ways to evaluate plans with respect to how well they satisfy good government standards.
3. While the existence of new constitutional amendments with explicit prohibitions on partisan gerrymandering has given some state courts power to address the issue of partisan gerrymandering, state courts have made use of both old and new language in their state's constitution – with a particularly creative interpretation of the thrust of language long in their constitution.
4. When maps have been challenged as partisan gerrymanders, and where direct language prohibits partisan gerrymandering in the state constitution, challenges are usually successful.[171] On the other hand, in those situations where no language existed in the state constitution that could provide the basis for a state court to invalidate a plan as an egregious partisan gerrymander, partisan gerrymandering challenges have been rejected by state courts on jurisprudential grounds even when the court held the map to be a partisan gerrymander (Kansas). Where there is indirect language, and a case has been brought, courts have generally accepted that

[171] Oregon is a notable exception. In Oregon, the state court accepted expert witness testimony from a state's expert demonstrating flaws in testimony about gerrymandering metrics proffered by plaintiffs. See also earlier discussion of Oregon redistricting in 2020.

the language found in free and equal clauses are relevant to partisan gerrymander. Kentucky is an exception; the map was found to be a partisan gerrymander, and the state has the same type of language found in North Carolina and Pennsylvania, but the court did not find that partisan gerrymandering violated those provisions. Of course, in the cases that were brought, the plaintiffs expected to have success. The success rate for litigating partisan gerrymandering using either direct or indirect language might go down as these cases are brought in more states where the judicial politics are less favorable.

5. Both congressional maps drawn in states where Democrats had party control and maps from states where Republicans had party control have been overturned by state courts. However, even when there are state constitutional provisions that state court justices can use, some have found reasons to conclude that the challenged map really does not rise to the level of a constitutional violation even when other justices concluded that it did. Nonetheless, in the 2020 round of redistricting, while partisanship of state court justices appeared to play a role in their decision-making, it was only a muted one.

6. As we assess the overall evidence, in those settings where party control made that possible, partisan gerrymandering was as egregious and pervasive as in the past – or even more so. But several factors combined to create a situation in which the net partisan *effects* of partisan gerrymandering were substantially reduced from what might have been expected based on the willingness of state legislators to gerrymander maps to favor their party.

    a. First, taking redistricting out of the hands of the legislature by creating commissions in some states meant that in some trifecta states partisan majorities were left impotent to effectuate partisan gerrymanders. Moreover, a failure of the commission or legislature to draw a map in a timely fashion generally brought state courts into the picture.

    b. Second, state courts took a much more aggressive stance in applying provisions of their state constitution as bars to gerrymandering and drawing maps of their own than in past decades.

    c. Third, the relative balance in states where each party had control over the process meant a decrease in the advantage

for the Republicans compared to the 2010 redistricting cycle.

7. The overall level of egregious gerrymandering is less in the congressional maps being used in 2022 than many scholars anticipated would be the case after *Rucho* was decided in 2018.
8. Because Republicans are still in control of more state legislatures, the role of state courts in the 2020 round has had greater consequences in blocking Republican gerrymanders than in blocking Democratic gerrymanders.
9. Despite the variety of state constitutional provisions referenced by courts and variation in language even in similar provisions, we find that state courts have been remarkably consistent in drawing on metrics for identifying gerrymandering effects and on ensemble-based tools.[172]
10. Not only have partisan gerrymandering claims shifted from federal courts to state courts, but even situations where those with primary authority over redistricting fail to act in a timely fashion now appear to almost invariably have litigants seeking a remedial map drawn by a state court rather than a federal court. This is a change from the practice of previous decades where the fact that the past map violated federal one person, one vote standards made it most likely that, when a new map was required by an institutional failure, it would be a federal court that would draw the remedy. Such suits were still being brought in 2020 when there was a failure to draw a map in a timely fashion but the ultimate action regarding map drawing ended up in the state courts.
11. While the picture is partly mixed, on balance, state court maps are superior to those they replace with respect to partisan symmetry and good government criteria.
12. While it might appear that the future for a strong state court role in checking the excesses of partisan gerrymandering at the congressional level is now clear, that is a premature verdict.[173]

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[172] Of course, it is also true that a relatively limited pool of experts (for each side) is providing testimony about partisan gerrymandering, and they are drawing on the same body of academic literature.

[173] State court intervention is not a substitute for federal intervention. State courts are often political, change membership more often, and are only applicable to single states. Not all states have provisions against partisan gerrymandering or the ability

> Political parties are now seeing control of state courts as much more important than it had been seen in the past, with the actual or potential role of state courts in redistricting a major element of that increased concern. Much more money is being spent on state court judicial contests than in the past.[174] As money in judicial elections becomes more important it is also likely that state judges will be more ideological and more partisan than in the past. Consequently, we may see more situations where state court justices refuse to police partisan gerrymanders done by co-partisans.[175]

13. Similarly, we should not assume that most partisan gerrymandering claims will be successful in states with state constitutional provisions that facilitate the bringing of such claims. Litigant success in state courts is a function of the facts on the grounds. Relevant to this is the willingness of state court justices to enforce the law. And when the law is less clear, as in the states where only indirect language exists, *ceteris paribus*, we expect judges to be less likely to overturn state legislatures. And even in some states where they have used this language to bar partisan gerrymandering, change in the composition of state courts may lead to a reversal of that interpretation. Language that more explicitly bars partisan gerrymandering may be more efficacious than good government criteria in making partisan gerrymandering less likely. Even provisions explicitly barring partisan gerrymandering may not be efficacious if there is not adequate enforcement by state courts.[176]

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to create those laws without a legislature giving up the power voluntarily. Setting federal standards for redistricting Congress makes sense given that it is a federal body. Rules prohibiting partisan gerrymandering in federal law or with standards in federal court ensure that votes are not diluted on either the state or national level.

[174] "New Money and Messages in Judicial Elections This Year." Douglas Keith, October 31, 2022. Brennan Center for Justice.
https://www.brennancenter.org/our-work/analysis-opinion/new-money-and-messages-judicial-elections-year

[175] Some of the cases where a partisan gerrymandering challenge was successful were won by narrow margins and only because one or two justices whose party was advantaged by the challenged gerrymander nonetheless joined with justices affiliated with the other party in striking the gerrymandering down. Thus, changes in the composition of state courts can change state court outcomes.

[176] Also, a new challenge has emerged that would threaten the power of state

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League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006)

courts to hold accountable political manipulation of district maps in federal elections. The "independent state legislature" theory asserts that the Electors Clause and Elections Clause found in Article 2, Section 2, and Article I, Section 4, respectively, "vests state legislatures with plenary power to craft rules for Congressional and Presidential elections unbound by state constitutions and free from review by state courts" (Weingartner 2021 emphasis added). This theory was offered in a federal challenge brought by Republicans in Pennsylvania to that state's court-ordered congressional map, but the Supreme Court denied *cert*. But the theory is not yet dead. The Supreme Court has agreed to hear a case in the October 2022 term that challenges the North Carolina Supreme Court's ability to replace a congressional plan from the state legislature with one of their own, after having ruled that the legislature's plan violates the state constitution. If the petitioners are successful in *Moore v. Harper* (142 S. Ct. 1089, 2022) congressional plans such as the 2022 map in New York might also be unconstitutional, since it too was put into place by a state court. Of course, were the U.S. Supreme Court to adopt the independent state legislature theory it would appear to have to reject one of its own recent precedents. In *Rucho*, after its own condemnation of excessive partisan gerrymandering, in language quoted earlier in this essay, the Court points to state courts as a potential remedy for partisan gerrymandering.

League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737 (Pa. 2018) https://casetext.com/case/league-of-women-voters-of-pa-v-commonwealth-15
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Lamone v. Benisek, 139 S. Ct. 783 (2019)
League of Women Voters of Fla. v. Detzner, 179 So. 3d 258 (Fla. 2015) https://casetext.com/case/league-v-perry-3#p414 (or is this Romo v. Detzner?)
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