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Partisan Gerrymandering Cases in State Supreme Courts in the 2020s Redistricting Round

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Abstract. After the U.S. Supreme Court opted out of any federal court role in policing partisan gerrymandering in its 2019 decision, Rucho v. Common Cause, if a redistricting plan was alleged to be a partisan gerrymander, that challenge needed to be brought in state courts. There are three possibilities: (a) a state supreme court could hold partisan gerrymandering claims nonjusticiable under state as well as federal law; (b) it could review a proposed map and find it unconstitutional; (c) it could review a map and reject the gerrymandering claim. Here, we focus on state court decisions that took place before the November 2022 elections in partisan gerrymandering claims regarding maps drawn for elections to the U.S. House of Representatives in the 2020s redistricting round. We are primarily interested in three issues: (1) How did state courts faced with a redistricting challenge based on a claim of partisan gerrymandering decide whether state law allowed them to address the factual aspects of the claim rather than treating the claim as non-justiciable? (2) If the court decided the claim was justiciable, what definition of partisan gerrymandering was used and, in particular, what kind of empirical evidence was cited by the justices – e.g., measuring the extent of gerrymandering via metrics based on election data, and/or evaluating maps in terms of the degree to which traditional good government criteria were satisfied, and/or considering the process of map drawing and what it implied about partisan intent? (3) Is there indirect evidence that the partisan predilections of the justices affected their decision about the constitutionality of a challenged congressional map?

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[I. Introduction 2](#_Toc139221820)

[I. THREE KEY QUESTIONS 23](#_Toc139221821)

[A. How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and “excessive” partisanship decide whether state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable? 23](#_Toc139221822)

[B. How do courts determine what is an unconstitutional partisan gerrymander? 26](#_Toc139221823)

[C. Is there (indirect) evidence that the decisions of individual state supreme court justices on partisan gerrymandering challenges to a congressional map reflect their partisan leanings? 31](#_Toc139221824)

[II. THREE KEY QUESTIONS 43](#_Toc139221825)

[D. How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and “excessive” partisanship decide whether or not state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable? 43](#_Toc139221826)

[E. How do courts determine what is an unconstitutional partisan gerrymander? 45](#_Toc139221827)

[F. Is there (indirect) evidence that the decisions of individual state supreme court justices on partisan gerrymandering challenges to a congressional map reflect their partisan leanings? 48](#_Toc139221828)

I. Introduction

State courts can become involved in the redistricting process (a) when those with primary redistricting authority fail to enact a plan in a timely fashion or (b) when they are the site of litigation challenging a plan as violating requirements of the state’s own constitution or other elements of state law. If they cannot motivate the primary redistricting authority to draw a constitutional map under specified time constraints, state courts can decide to draw their own map. However, courts may do so only reluctantly, and they may allow the principal redistricting authority a second chance (or additional time) to provide a constitutional map before a court seeks to provide a map of its own.[[1]](#footnote-1)

In this essay we limit ourselves to redistricting cases that (a) came before state courts, (b) challenge plans for U.S. Congressional districts[[2]](#footnote-2) and, (c) except for some background information from the 2010 redistricting round, we limit ourselves to cases that were brought in the 2020 redistricting round and decided before the November 2022 elections.[[3]](#footnote-3) But most importantly, (d) we focus on decisions about partisan gerrymandering. Because of the Supreme Court’s 2019 abdication in Rucho v. Common Cause of any federal court responsibility to police partisan gerrymandering,[[4]](#footnote-4) claims of partisan gerrymandering have become the exclusive domain of state courts.[[5]](#footnote-5) But prior to the 2020 round, state courts had largely been uninvolved with the issue of partisan gerrymandering.[[6]](#footnote-6) While some states have direct language in their state constitution that, in effect, bars partisan gerrymandering—often language recently added via the initiative process—the majority of states do not.[[7]](#footnote-7) Thus, if such a state were to choose to review claims that a districting plan was a partisan gerrymander, it would have had to provide a novel interpretation of long standing language in its constitution (e.g., about “free and open elections”) as a legal justification for court intervention.[[8]](#footnote-8) Indeed, Justice Brennan argued in 1977 that individual rights could be protected to greater degrees in *state courts* and through *state constitutions* than the federal constitution could provide.[[9]](#footnote-9)

While there has been other work on the role of state courts as a check on partisan gerrymandering in the 2020 redistricting round, both in terms of an overview and in examining what happened in individual states (such as North Carolina, Virginia and New York),[[10]](#footnote-10) our approach in this essay is distinctive in being more explicitly jurisprudentially focused in looking at the types of evidence used by state courts, including social science evidence.[[11]](#footnote-11) For the 2020s round of congressional redistricting, we go beyond merely identifying the highest level state court resolution of the challenge and look at the partisan decision breakdown on that court as well as the differences in judicial reasoning and evaluation of empirical evidence found across justices both within and across states. We are primarily interested in three issues:

(1) How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and “excessive” partisanship decide whether state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable? In seeking to answer this question we distinguish between those states that had some direct prohibition on partisan gerrymandering from those where a prohibition must be inferred from long existing provisions of the state constitution.

(2) Given that the concept of partisan gerrymandering and appropriate metrics for its measurement remain controversial,[[12]](#footnote-12) when state court justices did choose to confront claims of partisan gerrymandering on the merits, what definition of partisan gerrymandering was used? In particular, what kind of empirical evidence was cited by the Court majority when it did find partisan gerrymandering—e.g., measuring the extent of gerrymandering via metrics based on election data, and/or evaluating maps in terms of the degree to which traditional good government criteria were satisfied, and/or considering the process of map drawing and what it implied about partisan intent?[[13]](#footnote-13)

(3) Is there indirect evidence that the partisan predilections of the Justices affected their decision about the presence of unconstitutional partisan gerrymandering in a map in the state drawn by the majority party in the form of apparent differences between the voting choices of justices who are sympathetic to that party as compared to justices who are sympathetic to the minority party?

Before we address these three issues, we offer some useful background information about the 2020 redistricting round.

Table 1, incorporating data compiled in Cervas, Grofman, and Matsuda (2023, forthcoming: Table 1, Table 4)[[14]](#footnote-14), along with additional information collected by the present authors, reports on a state-by-state basis some basic data about the 2020 redistricting process ca. July 2023. The information in that table includes:

1. what type of entity oversaw districting in each state
2. and, for states where plans were under legislative control, whether there was unified party control
3. and if so, in favor of which party

Table 1 also shows the states where partisan gerrymandering claims vis-à-vis congressional districting were made, and it shows whether those states had a partisan gerrymandering challenge in state court.[[15]](#footnote-15) In the cases where a partisan gerrymandering challenge was brought, or a race-related challenge with *partisan* implications was brought, we distinguish cases where the highest state court has already issued a ruling (ca. 2023) and those still pending. For the partisan gerrymandering cases where we have a definitive court opinion, we indicate whether there was a ruling on the merits versus a finding by the state court that partisan gerrymandering was not a justiciable offense under that state’s constitution. Where a court determined that partisan gerrymandering is justiciable, we identify whether that ruling found in favor of plaintiffs.[[16]](#footnote-16) So as to locate within a single table information for easy access on multiple factors that affected whether a partisan challenge was successful, we also include within this table some important information about the nature of the state constitutional provisions relevant to partisan gerrymandering. We show whether the state constitution provides either a direct language prohibiting partisan gerrymandering (e.g., a requirement that a plan neither favor or disfavor any political party) or an indirect check in terms of language like that relied upon by the Pennsylvania Supreme Court when it overturned a congressional map under a state constitutional requirement for “free and equal elections.”[[17]](#footnote-17)

<< Table 1 about here>>

In 34 of the 44 states where there was more than a single congressional district, line drawing remained in the hands of state legislatures in 2021.[[18]](#footnote-18) But this reflected a reduction in the proportion of districts that were drawn by legislatures. Initiative procedures created the possibility that in states where redistricting had been in legislative hands, that control could be removed from the legislature and put into the hands of a bipartisan or ostensible non-partisan commission.[[19]](#footnote-19) In 2011, commissions drew congressional maps in six states[[20]](#footnote-20); in 2021, commissions drew—or attempted to draw—congressional maps in 11 states.[[21]](#footnote-21)

Common sense and the empirical evidence tells us that the likelihood of partisan gerrymandering is highest in situations where one political party fully controls the redistricting process.[[22]](#footnote-22) The most common way in which full party control occurs is with what is called trifecta control, where the map is legislatively drawn and both branches of the legislature and the governor are under the control of the same party, but it can also occur even without trifecta control if the governor has no veto power over a redistricting map,[[23]](#footnote-23) or if one party controls both branches of the legislature and the governor is of the opposite party but the majorities in each branch of the legislature are sufficiently large to override a gubernatorial veto. Given the rise in partisan polarization operating at all levels of government[[24]](#footnote-24), the number of states with trifecta control has increased since the 1980s especially as states have realigned after the “Solid South” transitioned from Democratic control to Republican control.[[25]](#footnote-25) However, although the total number of states where the redistricting process was wholly controlled by a single party increased from 2010 to 2020, the number of total *districts* in states under one party control decreased from 2010 to 2020.[[26]](#footnote-26)

Although it is possible to have partisan gerrymandering even when it is not legislative decisions that determine the shape of the map,[[27]](#footnote-27) reformers viewed replacing legislative control over the map-making process with a reapportionment commission of a bi-partisan or non-partisan nature as a major goal.[[28]](#footnote-28)Most of the state court cases we consider from the 2020s redistricting round involved states where the legislature is the primary redistricting authority. The belief in the need for institutional reform of the redistricting process only increased after the Supreme Court’s decision in Rucho.[[29]](#footnote-29)

**Table 2** shows a different type of information about the litigation in states where partisan gerrymandering challenges were raised in state court; it shows who were the plaintiffs in those cases. Plaintiffs may have different motivations for bringing partisan gerrymandering challenges. The minority party may hope to improve their electoral chances by overturning a gerrymander benefiting the party that drew the map, or racial and community groups may wish to overturn a map that has consequences for their representation. On the other hand, good government groups may simply be concerned with traditional districting criteria or their own notions of overall “fairness.” Perhaps the most important point to be made about Table 2 comes when we compare the limited number of partisan gerrymandering challenges in the 2010 redistricting in state courts, compared to the number of partisan gerrymandering challenges state courts in the 2020 redistricting round. But in making comparisons between 2020s round partisan gerrymandering litigants and 2020s round partisan gerrymandering litigants, we also need to take into account the partisan gerrymandering challenges filed in federal courts in the 2010 redistricting round, including Pennsylvania, Maryland, North Carolina, and Wisconsin, since such federal challenges were not yet ruled out, and indeed the challenges in three of these four states – all but Pennsylvania, were successful in the lower federal courts. The next most important point to make about this table is that we can see that while state chapters of the League of Women Voters and groups such as Common Cause remain important in partisan gerrymandering litigation in state courts in the 2020 redistricting round, they were more important in state and federal courts in the previous round.[[30]](#footnote-30) Although groups of individual plaintiffs were also found in the 2010 round, redistricting challenges of the 2020 round were more likely to have the lawyers for such groups of “individuals” as key players. It does not seem unduly cynical to believe that partisan actors recruited members of the public to serve as named plaintiffs, so that what may appear to be civic-minded complaints about neutrality or fairness have partisan underpinnings, and there is clear evidence to exactly this effect.[[31]](#footnote-31) Of course, it is very difficult to infer “true” motivations. Interest groups that are ostensibly non-partisan may have been “captured” by a political interest, or racial groups may recognize a kind of common fate with the party which provides most of the descriptive representation to members of their group.

<<Table 2 about here>>

Drawing on the information in Tables 1 and 2 and other data sources we can summarize some important facts about 2020s redistricting as of November 2022.

1. While full partisan control is not a sufficient condition for a legislature to choose to impose a partisan gerrymander (or to maintain one already in place), in the 2020 round, when we look at the states where redistricting remained under legislative control – still the vast bulk of the states –the removal of any possibility of a federal lawsuit to restrain gerrymandering led many legislatures under one party control to offer congressional plans that were labeled as partisan gerrymanders (or as racial gerrymanders with important partisan implications[[32]](#footnote-32)) by journalists in the state (and/or by academics). 11 of the 38 states under one party control had an actual partisan gerrymandering challenge in state court to that congressional map entered prior to November 2022, although not all were resolved prior to the 2022 election.

2. State courts were far more involved in redistricting in the 2020 round than in any previous redistricting round, with the most important congressional cases involving challenges to congressional maps as partisan gerrymanders. However, the anticipation of a successful state court challenge to a map was reduced in deterrent impact because of the uncertainty about whether state courts would choose to act on partisan gerrymandering challenges, and further reduced by the delay in obtaining the census data needed for redistricting, thus creating a greater potential for stretching out the redistricting process to the point that a legislative map might be used in 2022 even if later found to be an unconstitutional gerrymander.[[33]](#footnote-33)

3. An usually high proportion of partisan gerrymandering challenges were left unresolved in the 2020 redistricting round (5 of 11), with other plans permitted for use in the 2022 election only.[[34]](#footnote-34) There are also maps that might yet be challenged as partisan or racial gerrymander.[[35]](#footnote-35)

4. The proportion of partisan gerrymander challenges to legislatively drawn maps in states under one party control (11 of 38) is much higher than the proportion of partisan gerrymander challenges to legislatively drawn maps in states under divided control, since there were no such challenges (0 of 0).

5. In most of the cases where there was a partisan gerrymandering challenge resolved by November 2022, the state court found in favor of plaintiffs: 3 of 6 instances (Maryland, New York, Ohio).[[36]](#footnote-36)

6. The proportion of successful partisan gerrymander challenges to legislatively drawn maps in states under one party control (3 of 6) resolved by November 2022 is much higher than the proportion of successful partisan gerrymander challenges to legislatively drawn maps in states under divided control (0 of 0), since the latter is an empty set.[[37]](#footnote-37)

7. While these comparisons must be interpreted with care since the nature of the case facts obviously affects the outcome, and commissions differ in their institutional rules, we see that the likelihood of a partisan challenge being brought to a congressional plan was higher in challenges brought to a legislative map than to a commission map (10 of 34 challenges vs. 1 of 10 challenges) and the success rate of plaintiffs in challenges to a legislatively drawn map was higher than the success rate of challenges to a map drawn by a commission (3 of 10 vs. 0 of 1).[[38]](#footnote-38)

8. In the 2020 redistricting round, not only did Republicans have many more states under one party control than did the Democrats, there were also many more congressional districts in states under full Republican control than there were congressional districts in states under full Democratic control. Though the difference was smaller than in the 2010 round, partisan control in 2020 redistricting round still very disproportionately favored one party, the Republicans, and the partisan disproportionality from the partisan gerrymandering in the 2010 round reinforced the Republican advantage in the 2020 round because of the advantages of incumbency that persisted even as district configurations changed.[[39]](#footnote-39)

9. The proportion of partisan challenges to congressional maps in states under Democratic control was lower than that in states under Republican control (5 of 11 , MD, NM, NJ, NY, OR, vs. 6 of 11 , FL, KS, KY, NC, OH, UT,[not including race-based claims]) and the proportion of successful partisan challenges to congressional maps in states under Democratic control was higher than that in states under Republican control (2 of 5, MD, NY, vs. 1 of 6, OH) but the numbers are too small for the difference to be of statistical significance

10. We might expect that partisan gerrymandering litigation will come from non-partisan groups such as League of Women Voters or Common Cause, or local groups that identify themselves in non-partisan terms, on the one hand, or groups of voters whose strong partisan identifications make them willing to sign on as plaintiffs to partisan gerrymandering litigation when recruited by party officials, on the other. What we see from Table 2 is interesting. In the 2010 round, since there were only a handful of cases brought in state court it is easy to determine that it was good government groups such as the League of Woman Voters which were the plaintiffs in the these early partisan gerrymandering cases in state court, and good government groups were also instrumental in the 2010 round in bringing partisan gerrymandering challenges in federal courts.[[40]](#footnote-40) During the 2020 redistricting cycle, although non-partisan groups continued to be active, many of the plaintiffs were explicitly (or implicitly) affiliated with the political party that served to gain from state courts overturning the enacted plan.

Now we turn to the three key questions about state court jurisprudence in the 2020 redistricting round identified earlier.

# THREE KEY QUESTIONS

## How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and “excessive” partisanship decide whether state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable?

While both decisions to bring a challenge to a map and judicial rulings depend upon the particular case facts, we can nonetheless ask whether the features of the state constitution that are of direct or potential effect on partisan gerrymandering appear to influence such choices. The categories highlighted in Table 1 identify constitutions that have an explicit prohibition on partisan gerrymandering in the form of a prohibition on favoring or disfavoring particular parties or candidates.[[41]](#footnote-41) Some state constitutions have other (older) language that is less direct (e.g. a requirement for free and open elections) that can be used to justify bringing a partisan gerrymandering challenge-- as was shown in the Pennsylvania and North Carolina cases from the 2010 round.[[42]](#footnote-42)

As shown earlier, partisan gerrymandering challenges to legislative maps occur in states controlled by one party. Presumably, this is not a coincidence, since partisanship is more likely in these states. But, ceteris paribus, is the likelihood of challenge affected by the nature of state constitutional provisions? In particular:

Hypothesis 1. Ceteris paribus, we expect the highest likelihood of partisan gerrymandering challenges to congressional maps in states where there is direct language affecting partisan gerrymandering, and the lowest likelihood in states where there is neither direct nor indirect language that could be used to restrain partisan gerrymandering. In the intermediate category, we expect the states with only an indirect constitutional constraint on partisan gerrymandering.

Turning now to the evidence. As shown in Table 1, in states with an explicit constitutional prohibition on partisan gerrymandering, where congressional districting was under single party legislative control and the redistricting authority actually offered a map, a challenge to the map was brought in only 5 of the 14 such states, FL, OH, UT, NY, OR). In states with an indirect constitutional provision (e.g. Pennsylvania and North Carolina in the previous round) and the same prerequisites above, a challenge was brought in only 4 of the 15 states, KY, NM, NC, MD. In states where neither direct nor indirect provisions were found and the same prerequisites as above were met, a challenge was brought in only 2 of the 9 states, Kansas and New Jersey. Thus, in the decision to bring a challenge, the direct or indirect nature of the state constitutional provisions did not substantially affect whether a challenge would be brought, however, the absence of any sort of prohibition on partisan gerrymandering resulted in fewer challenges being brought.

As also noted earlier, in the 20220 round when there was a partisan gerrymandering challenge to a congressional map in cases resolved before the 2022 election, in 3 (OH, MD, NY) of the 11 (FL, KY, NM, NC, OH, UT, KS, MD, NJ, NY, OR) instances where there was such a challenge the court agreed that the challenged map was unconstitutional. But what can we say about the likely influence of state constitutional provisions on the success of partisan gerrymandering challenges? In particular, are states with constitutional provisions that prohibit favoring or disfavoring particular candidates more likely, ceteris paribus, to have a successful gerrymandering challenge?[[43]](#footnote-43)

Hypothesis 2a. Ceteris paribus, we expect the lowest likelihood of successful partisan gerrymandering challenges to legislatively drawn maps in states where there is neither direct nor indirect state constitutional language that could be used to restrain partisan gerrymandering.

Hypothesis 2b. Ceteris paribus, we expect the highest likelihood of successful partisan gerrymandering challenges to congressional maps in states where there is direct language affecting partisan gerrymandering.

Hypothesis 2b’. Ceteris paribus, we expect the highest likelihood of successful partisan gerrymandering challenges to congressional maps in states where there is indirect but not direct state constitutional language affecting partisan gerrymandering.

The reason we have listed two contradictory hypotheses above is that there are arguments pointing in both directions. On the one hand, absent a direct bar on gerrymandering we might expect it to be difficult for plaintiffs to prevail in gerrymandering litigation. On the other hand, in states where there is a direct bar on partisan gerrymandering, we might expect mapmakers to be more cautious about drawing partisan gerrymanders and thus making it less likely that their plans are overturned.[[44]](#footnote-44)

While the number of cases where there was a successful partisan gerrymandering challenge in the 2020 round before the November 2022 election is low; nonetheless the data suggest that there are no clear differences re successful litigation in terms of differences in the state constitutional language upon which the challenge might hang.[[45]](#footnote-45)

## How do courts determine what is an unconstitutional partisan gerrymander?

We can have claims of partisan gerrymandering based (1) on the failure of maps to satisfy traditional good government criteria and/or (2) on statistical tests of partisan bias/partisan vote dilution and/or (3) on process grounds such as failure to comply with requirements for public comment, or votes on passage that are entirely along partisan lines and/or (4) on examination of specific changes made in the proposed map vis-a-vis the map from the last decade such that inferences could be drawn about a deliberate intent to achieve partisan advantage. In Table 3, we characterize each of the opinions in terms of these four categories. We also quote or paraphrase in that table the language used to define a partisan gerrymander when this is available.[[46]](#footnote-46) Table 3 also displays the partisan affiliations of the deciding Justices, with those Justices voting in favor of the opinion on the first line, followed by those Justices who dissent on the second line.

<< Table 3 about here >>

There are a number of interesting features of Table 3. First, we see that of the majority/plurality opinions finding unconstitutionality in the 2020 round, one of the four opinions that found unconstitutionality relied largely or entirely on one type of factor to identify gerrymanders, while the other three made substantial use of two different types of factors.[[47]](#footnote-47) Second, of the three majority/plurality opinions finding unconstitutionality based on two factors, all three cases used factor 1 (violation of good government criteria) and factor 2 (use of statistical criteria for evaluating the extent of gerrymandering). In fact, looking at both the 2010 and 2020 round, all but one the six cases where there was a finding of unconstitutionality used either the first or second factor to make their determination. Third, while process arguments were never key, the New York Supreme Court did emphasize a finding of intent to treat the two parties unequally by discouraging competition and favoring Democrats.[[48]](#footnote-48) Fourth, we see that despite the Supreme Court’s ruling in Rucho, only one state (Kansas) used similar reasoning to find that the case was non-justiciable in state court.[[49]](#footnote-49) Fifth, we see a surprisingly high proportion of states in our sample where the majority party in the legislature is different from the majority party in the state’s Supreme Court (Pennsylvania (twice), Kansas, and North Carolina). Additionally, in half of the cases we see states with a majority party in the legislature that is different from the majority party that rendered the final decision in the case in the state court. Finally, and perhaps most importantly, while there remains no clear consensus in the legal literature on how to define/operationalize a partisan gerrymander, two state courts in the 2010 round and four state courts in the 2020 round were able to develop judicially manageable standards sufficient to identify and determine a partisan gerrymander. These standards all seem to converge around a common idea that partisan gerrymandering occurs when there is an improper advantage based on political party affiliation. The academic literature on partisan gerrymandering generally emphasizes the use of various statistical metrics, and a majority of the above cases followed suit, but a majority of cases also relied heavily on traditional good government criteria.

## Is there (indirect) evidence that the decisions of individual state supreme court justices on partisan gerrymandering challenges to a congressional map reflect their partisan leanings?

Regardless of the stated reasons for individual justice’s ultimate decisions about plan unconstitutionality, there is always the suspicion that underlying those stated reasons are hidden partisan motivations. We begin with the presupposition that legal decision-makers make decisions based on what facts are in front of them and what constitutional provisions inform their decision. But we also believe that the breakdown of votes on the state courts in terms of actual or inferred partisan affiliations of state court justices can be used to create indirect evidence about the claim that partisan considerations affected the judicial outcomes in redistricting cases before state courts. Here our first focus is on comparing the votes for unconstitutionality on grounds of partisan gerrymandering cast by justices whose affiliation is most likely to the party that drew the map versus those cast by justices whose leanings are likely to be to the minority party in the state.[[50]](#footnote-50)

HYPOTHESIS 3a: Ceteris paribus, in each state, Democratic or Republican appointed justices would be more likely to vote down a plan proposed by the opposing party, or a plan that seems to favor the opposing party.

HYPOTHESIS 3b: In each state, regardless of which party drew the map, Republican (appointed) justices would be less likely to rule plans as partisan gerrymanders than Democratic (appointed) justices.

Table 4 allows us to examine these hypotheses. This table examines the number of republican or democratic justices that voted in favor of the decision, displayed as a percentage of the total number of justices from the majority or minority party. For example, in Florida, the congressional map was drawn by a Republican legislature. There were four Republican justices, two of whom voted that the plan was unconstitutional, leading to 50% majority party agreement with the decision.

What we find is that Hypothesis 3a is clearly confirmed. Although some justices vote to find a congressional plan drawn by a legislature controlled by their own party unconstitutional, this is rare. Overall, only 38.1% of majority party justices agree that the plan offered by their own party is unconstitutional when a majority of their fellow justices held the plan to be unconstitutional. In contrast, members of the minority party overwhelmingly vote to find a plan drawn by the opposite party to be an unconstitutional partisan gerrymander.[[51]](#footnote-51) Overall, 95.2% of all minority party Justice’s agreed that a plan offered by the opposing party was an unconstitutional gerrymander when there is a finding of unconstitutionality. But, because all but one of the maps we are examining were drawn by Republican legislatures, we cannot fully rule out the potential confound (Hypothesis 3b) that Republicans are simply less willing to find plans as unconstitutional partisan gerrymanders compared to their Democratic counterparts.

When we look in more detail at Table 4 we see that the presence of an explicit provision prohibiting partisan gerrymandering appears to affect the willingness of majority party justices to vote to find a plan favorable to their own party to be an unconstitutional gerrymander. In the three states with express prohibitions of partisan gerrymandering in their state constitutions (Florida, New York, Ohio), justices identified with the majority party agreed with a finding of unconstitutionality at a level between 25% and 50% as compared to a level of 0% in the three states where more indirect language had to be construed as a ban on partisan gerrymandering. Nonetheless the data show that, even in situations where there is an explicit constitutional prohibition on partisan gerrymandering, there is still some unwillingness on the part of justices to find a map drawn by their own party as unconstitutional. This is true both for cases where the map was drawn by Republicans and where the map was drawn by Democrats.

In states where there is not a direct ban on partisan gerrymandering, the failure of majority party justices to find a map unconstitutional might reflect partisan concerns, or might simply come as a result of an unwillingness of justices to read into the state constitutions a prohibition on partisan gerrymandering when the language is less clear, or perhaps the dissenting justices do not find the concept of partisan gerrymandering sufficiently well-defined to allow for a finding of unconstitutionality.

When we turn to what has happened since November 2022, the most important information relevant to this section of our paper comes after the November 2022 election changed the partisan majority on the North Carolina Supreme Court from Democratic to Republican. A very large amount of money was spent on this judicial election, with the view in mind that both redistricting decisions and abortion-related decisions were going to come before the North Carolina Supreme Court. After the partisan majority on the North Carolina Supreme Court changed from Democratic to Republican, the Court rather promptly reversed its earlier decision finding the Republican-drawn congressional map in the state to be unconstitutional and now finds that partisan gerrymandering claims are not justiciable under the North Carolina Constitution.[[52]](#footnote-52) . Thus, the North Carolina legislature will be unchecked in its ability to draw a partisan gerrymander. Similarly, after the New York Court of Appeals ruled the New York congressional map unconstitutional and implemented a map of its own for 2022, we see the same pattern but with the partisanship reversed – a Democratically-backed map being held unconstitutional by the partisan majority. When there was a post-election vacancy on the New York Court of Appeals, the Democrat-controlled New York legislature was unwilling to accept a replacement that in their view wasn’t sufficiently committed to upholding the 2022 court-drawn map, i.e., reversing the earlies state court decision. Additionally, a Democrat-affiliated justice who voted against finding the legislatively-drawn map unconstitutional was appointed the new Chief Justice of the New York Court of Appeals[[53]](#footnote-53). Given the shifting makeup of the Court since its original decision in 2022, there is an expectation that the Democrats may get a second opportunity to redraw the map in their favor. [[54]](#footnote-54) If that were to happen, in addition to the evidence gleaned from Table 4, it would seem impossible to deny that partisanship plays a factor in how partisan gerrymandering cases are decided.

Drawing on the information in Tables 1 and 2 and other data sources we can summarize some important facts about 2020s redistricting as of November 2022.

1. While full partisan control is not a sufficient condition for a legislature to choose to impose a partisan gerrymander (or to maintain one already in place), in the 2020 round, when we look at the states where redistricting remained under legislative control – still the vast bulk of the states –the removal of any possibility of a federal lawsuit to restrain gerrymandering led many legislatures under one party control to offer congressional plans that were labeled as partisan gerrymanders (or as racial gerrymanders with important partisan implications) by journalists in the state (and/or by academics).[[55]](#footnote-55)

2. State courts were far more involved in redistricting in the 2020 round than in any previous redistricting round, with the most important congressional cases involving challenges to congressional maps as partisan gerrymanders. 11 of the 38 states under one party control had an actual partisan gerrymandering challenge in state court to that map entered prior to November 2022, although not all were resolved prior to the 2022 election.[[56]](#footnote-56)

3. An usually high proportion of partisan gerrymandering challenges were left unresolved in the 2020 redistricting round (6 of 11), with plans permitted for use in the 2022 election only. There are also maps that might yet be challenged.[[57]](#footnote-57)

4. The proportion of partisan gerrymander challenges to legislatively drawn maps in states under one party control (11 of 38) is much higher than the proportion of partisan gerrymander challenges to legislatively drawn maps in states under divided control, since there were no such challenges (0 of 6).

5. In most of the cases where there was a partisan gerrymandering challenge resolved by November 2022, the state court found in favor of plaintiffs: 3 of 5 instances (Maryland, New York, Ohio).

6. The proportion of successful partisan gerrymander challenges to legislatively drawn maps in states under one party control (3 of 5) resolved by November 2022 is much higher than the proportion of successful partisan gerrymander challenges to legislatively drawn maps in states under divided control (0 of 0), since the latter is an empty set.[[58]](#footnote-58)

7. While these comparisons must be interpreted with care since the nature of the case facts obviously affects the outcome, and commissions differ in their institutional rules, we see that the likelihood of a partisan challenge being brought to a congressional plan was higher in challenges brought to a legislative map than to a commission map (10 of 34 challenges vs. 1 of 10 challenges) and the success rate of plaintiffs in challenges to a legislatively drawn map was higher than the success rate of challenges to a map drawn by a commission (3 of 10 vs. 0 of 1).

8. In the 2020 redistricting round, not only did Republicans have many more states under one party control than did the Democrats, there were also many more congressional districts in states under full Republican control than there were congressional districts in states under full Democratic control. Though the difference was smaller than in the 2010 round, partisan control in 2020 redistricting round still very disproportionately favored one party, the Republicans, and the partisan disproportionality from the partisan gerrymandering in the 2010 round reinforced the Republican advantage in the 2020 round because of the advantages of incumbency that persisted even as district configurations changed.[[59]](#footnote-59)

9. The proportion of partisan challenges to congressional maps in states under Democratic control was lower than that in states under Republican control (5 of 11 vs. 6 of 11 [not including race-based claims]) and the proportion of successful partisan challenges to congressional maps in states under Democratic control was higher than that in states under Republican control (2 of 5 vs. 1 of 6) but the numbers are too small for the difference to be of statistical significance.

10. We might expect that partisan gerrymandering litigation will come from non-partisan groups such as League of Women Voters or Common Cause, or local groups that identify themselves in non-partisan terms, on the one hand or groups of voters who are whose strong partisan identifications make them willing to sign on to partisan gerrymandering litigation when recruited by party officials, on the other. What we see from Table 2 is interesting. In the 2010 round, since there were only a handful of cases brought in state court it is easy to determine that it was good government groups such as the League of Woman Voters which were the plaintiffs in the these early partisan gerrymandering cases in state court, and good government groups were also instrumental in the 2010 round in bringing partisan gerrymandering challenges in federal courts.[[60]](#footnote-60) During the 2020 redistricting cycle, although non-partisan groups continued to be active, many of the plaintiffs were explicitly (or implicitly) affiliated with the political party that served to gain from state courts overturning the enacted plan.

Now we turn to the three key questions about state court jurisprudence in the 2020 redistricting round identified earlier.

# THREE KEY QUESTIONS

## How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and “excessive” partisanship decide whether or not state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable?

While, clearly, both decisions to bring a challenge to a map and judicial rulings depend upon the particular case facts, we can nonetheless ask whether the features of the state constitution that are of direct or potential effect on partisan gerrymandering appear to influence such choices. The categories highlighted in Table 1 identify constitutions that have an explicit prohibition on partisan gerrymandering in the form of a prohibition on favoring or disfavoring particular parties or candidates, [[61]](#footnote-61) and constitutions that have other (older) language in the state constitution that is less direct (such as a requirement for free and open elections) but that can also be used to justify bringing a partisan gerrymandering challenge-- as was shown in the Pennsylvania and North Carolina cases from the 2010 round.[[62]](#footnote-62)

As shown earlier, it is in states under one party control that we get partisan gerrymandering challenges to legislative maps. Presumably this is not an accident since it is these states where partisanship is most likely. But, ceteris paribus, is the likelihood of challenge affected by the nature of state constitutional provisions? In particular,

**Hypothesis 1**. Ceteris paribus, we expect the highest likelihood of partisan gerrymandering challenges to congressional maps in states where there is direct language affecting partisan gerrymandering, and the lowest likelihood in states where there is neither direct or indirect language that could be used to restrain partisan gerrymandering, with the states with only an indirect constitutional constraint on partisan gerrymandering in the intermediate category.

Turning now to the evidence. Where congressional districting was under single party legislative control and the redistricting authority actually offered a map, in 5of the 14 such states where there was a provision in the state constitution which directly regulated partisanship in districting, a partisan gerrymandering challenge was brought; but a challenge was also brought in 4 of the 15 states which met these prerequisites where there was no direct language but the state constitutional provisions allowed for the type of ruling found in the previous round in North Carolina and Pennsylvania; in cases which met these prerequisites but where neither direct nor indirect provisions were found only 2 of the 9 states that fell into this category was a challenge brought. Thus, in the decision to bring a challenge, while the nature of the state constitutional provisions mattered, lawsuits were still being brought even absent the most favorable conditions for likely success.

As also noted earlier, in the 20220 round when there was a partisan gerrymandering challenge to a congressional map in cases resolved before the 2022 election, in 3 of the 11 instances where there was such a challenge the court agreed that the challenged map was unconstitutional. But what can we say about the likely influence of state constitutional provisions on the success of partisan gerrymandering challenges. In particular, are states that provision prohibiting seeking favoring or disfavoring particular candidates more likely, ceteris paribus, to have a successful gerrymandering challenge?[[63]](#footnote-63)

Hypothesis 2a. Ceteris paribus, we expect the lowest likelihood of successful partisan gerrymandering challenges to legislatively drawn maps in states where there is neither direct or indirect state constitutional language that could be used to restrain partisan gerrymandering.

Hypothesis 2b. Ceteris paribus, we expect the highest likelihood of successful partisan gerrymandering challenges to congressional maps in states where there is direct language affecting partisan gerrymandering.

Hypothesis 2b’. Ceteris paribus, we expect the highest likelihood of successful partisan gerrymandering challenges to congressional maps in states where there is indirect but not direct state constitutional language affecting partisan gerrymandering.

The reason we have listed two contradictory hypotheses above is that there are arguments pointing in both directions. On the one hand, absent a direct bar on gerrymandering we might expect it to be difficult for plaintiffs to prevail in gerrymandering litigation. On the other hand, in states where there is a direct bar on partisan gerrymandering we might expect mapmakers to be more cautious about drawing partisan gerrymanders and thus making it less likely that their plans are overturned. [[64]](#footnote-64)

Unfortunately, testing these hypotheses cannot be done with the present data because the number of cases where there was a successful partisan gerrymandering challenge in the 2020 round before the November 2022 election is so low that identifying the conditions for that success in terms of differences in the state constitutional language upon which the challenge might hang is impossible.

## How do courts determine what is an unconstitutional partisan gerrymander?

We can have claims of gerrymandering based (1) on the failure of maps to satisfy traditional good government criteria and/or (2) on statistical tests of partisan bias/partisan vote dilution and/or ON (3) process grounds such as failure to comply with requirements for public comment, or votes on passage that are entirely along partisan lines and/or (4) on examination of specific changes made in the proposed map vis-a-vis the **(constitutional??)** map from the last decade such that inferences could be drawn about a deliberate intent to achieve partisan advantage. In Table 3 we characterize each of the majority (or sometimes plurality opinions if there is no majority opinion) in terms of checkoffs using these four categories. We also quote or paraphrase in that table the language used to define a partisan gerrymander when this is available.[[65]](#footnote-65)

<<Table 3 about here>>

There are a number of interesting features of Table 3. First, we see that of the majority/plurality opinions finding unconstitutionality, three of the opinions relied largely or entirely on one type of factor to identify gerrymanders while two made substantial use of two different types of factors. Second, of the majority/plurality opinions finding unconstitutionality, the two most common types of assertions, each found in three cases, involved either a finding that good government criteria were violated or made use of statistical criteria for evaluating the extent of gerrymandering. Third, while process arguments were never key, the New York Supreme Court did emphasize a finding of intent to treat the two parties unequally. Fourth, though some opinions by individual justices did rebut empirical claims made by a majority that found a plan to be unconstitutional, the two state courts in the 2020 round whose majority opinion rejected claims of unconstitutionality did so because they accepted the legal argument that the state’s constitution made a partisan gerrymandering claim justiciable.[[66]](#footnote-66) Fourth, what we see from Table 3 is the surprisingly high proportion of states in our sample where the majority party in the legislature is different from the majority party in the state’s Supreme Court (Pennsylvania (twice), Kansas, and North Carolina).[[67]](#footnote-67) Finally, and perhaps most importantly while the academic literature on partisan gerrymandering generally emphasizes various statistical metrics (though sometimes with disagreement on which are best and where thresholds for unconstitutionality lie), there remains no clear consensus in state courts on how to define/operationalize a partisan gerrymander in the legal literature, and yet three state courts in the 2020 round and two in the 2010 round were able to recognize a partisan gerrymander when they saw it.

## Is there (indirect) evidence that the decisions of individual state supreme court justices on partisan gerrymandering challenges to a congressional map reflect their partisan leanings?

Regardless of the stated reasons for individual justice’s ultimate decisions about plan unconstitutionality, there is always the suspicion that underlying those stated reasons are hidden partisan motivations. We begin with the presupposition that legal decision-makers make decisions based on what facts are in front of them and what are the constitutional provisions they can use to inform their decision But we also believe that the breakdown of votes on the state courts in terms of actual or inferred partisan affiliations of state court justices can be used to create indirect evidence about the claim that partisan considerations affected the judicial outcomes in redistricting cases before state courts. Here our first focus is on comparing the votes for unconstitutionality on grounds of partisan gerrymandering cast by justices who affiliation is most likely to the party that drew the map versus those cast by justices whose leanings are likely to be to the minority party in the state.[[68]](#footnote-68)

HYPOTHESIS 3a: Ceteris paribus, in each state, Democratic (Republican) appointed justices would be less likely to vote against a plan proposed (favoring) by their own party than justices who would see the plan as favoring the other party.

HYPOTHESIS 3b: In each state, regardless of which party drew the map, Republican (appointed) justices would be less likely to find plans to be partisan gerrymanders than is the case for Democratic (appointed) justices.

Table 4 allows us to examine these hypotheses.

<<Table 4 about here>>

What we find is that Hypothesis 3a is clearly confirmed. While there are some justices who vote to find unconstitutional a congressional plan drawn by a legislature controlled by their own party, they are rare, while almost always overall (and always in most states), members of the minority party vote to find a plan drawn by the opposition party to be an unconstitutional partisan gerrymander.[[69]](#footnote-69) But, because almost but one of the legislatively drawn maps we are examining are drawn by legislatures under Republican control, we cannot fully rule out the potential confound (Hypothesis 3b) that Republicans are simply unwilling to read a restraint on partisan gerrymandering into their state constitution, while Democrats are much more willing to do so.[[70]](#footnote-70) The behavior of the Republican member of the state Supreme Court in the one map drawn by a Democratic legislature (New York) demonstrates, however, that at least one Republican leaning justice is willing to vote to overthrow as unconstitutional a map drawn by Democrats.

When we turn to what has happened since November 2022, the most important information relevant to this section of our paper comes after that November election changed the partisan majority on the North Carolina Supreme Court from Democratic to Republican. A large amount of money was spent on this judicial election, with the view in mind that both redistricting decisions and abortion and related decisions were going to come before the North Carolina Supreme Court After the partisan majority on the North Carolina Supreme Court changes, the court rather promptly reversed its earlier decision finding the Republican-drawn congressional map in the state to be unconstitutional and now finds that partisan gerrymandering claims are not justiciable under the North Carolina Constitution. Thus the North Carolina legislature will be unchecked in its ability to draw a partisan gerrymander. Moreover, when we look at what is happening in New York after the New York Supreme Court ruled the New York congressional map unconstitutional and implemented a map of its own for 2022, we see a similar pattern but with the partisanship reversed. When there was post-election vacancy on the New York Supreme Court, the Democrat-controlled New York legislature was unwilling to accept as a court replacement someone whom they did not view as sufficiently committed to overturning the 2022 court-drawn map. Also, a Democrat-affiliated justice who voted against finding the legislatively-drawn map unconstitutional was appointed the new Chief Justice of the New York Supreme Court. It is expected that that court, too might reverse its earlier opinion and now hold that partisan gerrymandering was not justiciable under the New York Constitution. If that were to happen, on top of the other evidence we have about the importance of judicial partisan identities in voting on issues that trigger such identities, it would then seem impossible to deny that partisanship matters for how partisan gerrymandering cases get decided.

1. *Growe v. Emison,* 507 U.S. 25, 33 (1993) (“In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.”); *See also Connor v. Finch,* 431 U.S. 407, 414, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) (“We have repeatedly emphasized that ‘legislative reapportionment is primarily a matter for legislative consideration and determination’ ”.) (internal citation omitted); Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*. George Washington Law Review 73, 1131–1165, (2005); Jeffrey M. Wice & Leonard M. Kohen, *Court Deference to State Legislatures in Redistricting After Perry v. Perez*, 11 Election Law Journal: Rules, Politics, and Policy 431–445 (2012). [↑](#footnote-ref-1)
2. The issues in partisan gerrymandering challenges to state legislative maps are very similar to those for congressional maps, except for differences in specific provisions of state law regarding legislative redistricting. For example, in Missouri, in addition to the traditional redistricting criteria required for both legislative and congressional redistricting, legislative maps are further required to create districts that are proportional to the political party power in the state and are competitive. *See* Mo. Const. art. III, § 7. Both Kentucky (Congressional but not legislative) and North Carolina (Legislative but not congressional) must further consider the preservation of communities of interest. *See Redistricting Criteria*, Nat’l Conf. of State Leg. (July 16, 2021), https://www.ncsl.org/redistricting-and-census/redistricting-criteria. Related issues arise in local redistricting, but the majority of local elections are formally non-partisan in nature in that party labels are not on the ballot. Of course, even in non-partisan elections, the partisan orientations of many candidates may be known—at least to the more sophisticated voters. For example, in the City of Irvine, California, candidates for mayor in the 21st century have included someone who sought the Democratic Party nomination for President, and another who was a Republican Party leader in the California Senate. However, we are not aware of any partisan gerrymandering challenges to districted maps drawn for non-partisan elections. [↑](#footnote-ref-2)
3. Limitations in the time remaining to hold a trial and then to draw a new constitutional map may result in a court accepting the use of a challenged map for one election only, even though the evidence suggests the map is unconstitutional, and may later be proven unconstitutional. Under the *Purcell* principle (*Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam)), courts are, in effect, prohibited from interfering with an ongoing election process or one where the court concludes that there is not sufficient time to draw a remedial constitutional map with an adequate review of its properties. Under the *Purcell* principle, decisions on some congressional redistricting cases brought in 2021 or 2022 were postponed until after the November 2022 election. This happened with several cases involving race-based challenges, e.g., *Merrill v. Milligan*, 595 U.S. \_ (2022) (granting Alabama’s motion to stay a lower court order to redraw a second majority-black congressional district and allowing a likely unconstitutional map to be used for the 2022 election); *Alpha Phi Alpha v. Raffensperger*, Nos. 1:21-CV-5337-SCJ, 1:21-CV-5339-SCJ; and 1:22-CV-122-122-SCJ (N.D. Ga. Feb. 28, 2022) (finding that some parts of Georgia’s legislative redistricting plans were unconstitutional racial gerrymanders, yet allowing the maps to be used for the 2022 election); Robinson v. Ardoin, 605 F.Supp.3d 759, 766 (M.D.La., 2022) (Concluding “that Plaintiffs are substantially likely to prevail on the merits of their claims brought under Section 2 of the Voting Rights Act” and would require the drawing of a second Black-opportunity district.). We do not discuss these or similar racial cases in any detail given our focus on cases that produced a final state court decision on whether a plan was an unconstitutional partisan gerrymander prior to the November 2022 election. [↑](#footnote-ref-3)
4. In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), a case from North Carolina, the Supreme Court definitively abdicated any federal responsibility for policing partisan gerrymandering, claiming, *inter alia*, that no judicially manageable standard allowed for courts to distinguish unconstitutional gerrymandering from politics as usual, and therefore partisan gerrymandering claims presented a non-justiciable political question*Rucho*, 139 S. Ct. at 2506–07 (concluding that “[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.”).The Supreme Court’s decision in the *Rucho* case, though specifically dealing with North Carolina, reversed other lower federal court decisions about maps created during the 2010 redistricting round which had struck down congressional or legislative plans as egregious partisan gerrymanders. *See* *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (finding the redistricting plan enacted by the Wisconsin Legislature constituted an unconstitutional partisan gerrymander), *vacated* 138 S. Ct. 1916 (2018), *remanded* No. 15-cv-421-jdp, 2019 U.S. Dist. LEXIS 111625 (W.D. Wis. July 2, 2019) (dismissing the lawsuit in light of *Rucho*); *see also**Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018) (concluding that the “plaintiffs have sufficiently demonstrated that Maryland's 2011 redistricting law violates the First Amendment by burdening both the plaintiffs’ representational rights and associational rights based on their party affiliation and voting history”), *vacated per Rucho*, 139 S. Ct. 2484). The Court’s abdication of responsibility for policing partisan gerrymandering came 30+ years after the Supreme Court had declared, in *Davis v. Bandemer*, 478 U.S. 109 (1986),that partisan gerrymandering was justiciable in federal courts. In *Davis,* 478 U.S.*,* however, the lower court’s finding of a partisan gerrymander was reversed because the Court majority held it necessary to show that the disfavored party was “shut out of the political process” and this showing was not made in the challenge to Indiana’s legislative map. *Davis*, 478 U.S.at 139. In those 30+ years, the Supreme Court failed to agree to any more specific and judicially manageable standards with which to decide partisan gerrymandering cases, though some Justices enunciated proposed metrics, nor did the Supreme Court ever hold a redistricting map to be unconstitutional.*See Vieth v. Jubelirer*, 541 U.S. 267 (2004); *see also League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). [↑](#footnote-ref-4)
5. *See*, *e.g.*, Florida (*Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022)); Kansas (*Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022) (consolidated with *Alonzo v. Schwab*, No. 2022-CV-90 (Kan. Dist. Ct. Feb. 14, 2022); and *Frick v. Schwab*, No. 2022-CV-71 (Kan. Dist. Ct. Mar. 1, 2022))); Kentucky (*Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Nov. 10, 2022)); Maryland (*Szeliga v. Lamone*, Nos. C-02-CV-21-001816, C-02-CV-21-001773, (Md. Cir. Ct. Mar. 25, 2022) (consolidated with *Parrott v. Lamone*, No. C-02-CV-21–001773 (Md. Cir. Ct. Dec. 21, 2021)); New Jersey (*Matter of Congressional Districts by New Jersey Redistricting Comm’n*, 268 A.3d 299 (N.J. 2022)); New Mexico (*Republican Party of New Mexico* v. Oliver, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022)); New York (*Matter of Harkenrider v. Hochul*, No. 60, 2022 N.Y. LEXIS 874, at \*1 (N.Y. Apr. 27, 2022)); North Carolina (*Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022)); Ohio (*Adams v. DeWine*, No. 2021–1428 (Ohio Dec. 2, 2021)); Oregon (*Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021)); Utah (*League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah D. Ct. Mar. 17, 2022)).Although there are state constitutional provisions about the representation of communities of interest, *see*, *e.g.*, New York, N.Y. Const. art. III, § 4 (“The commission shall consider . . . communities of interest”), Hawaii, Haw. Const. art. IV, §6 (“Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided”), Colorado, Colo. Const. art. V, § 44 (“Competitive elections for members of the United States House of Representatives provide voters with a meaningful choice among candidates, promote a healthy democracy, help ensure that constituents receive fair and effective representation, and contribute to the political well-being of key communities of interest and political subdivisions”), with racial groups treated as an important type of community of interest, there are also legislative provisions even more directly about the role of race in redistricting. *e.g.*, the California Voting Rights Act of 2001, Cal. Elec. Code § 14025 et seq. (West 2011); and the John R. Lewis Voting Rights Act of New York, 2022 N.Y. Sess. Laws (S.1046-E/A.6678-E) -- (did not apply to the 2022 congressional redistricting in that state). However, the primary focus for resolution of race-related claims about unconstitutional mapmaking remains with the federal courts. After the Supreme Court held the coverage formula in Section 4(b) of the Voting Rights Act unconstitutional in *Shelby County. v. Holder*, 570 U.S. 529 (2013), and essentially nullified the preclearance provisions of Section 5, federal courts have three primary avenues to deal with claims of race-related Constitutional violations: (a) race-based voter dilution claims brought under Section 2 of the Voting Rights Act of 1965 as amended (*see*, *e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986), laying out *Gingle*s Factors that must be proved before courts can consider the totality of the circumstances to determine whether electoral structure was discriminatory in results), (b) racial vote dilution claims brought directly under the 14th or 15th Amendments (*see*, *e.g.*, *Mobile v. Bolden*, 446 U.S. 55 (1980)) (must prove discriminatory impact and intent); *Rogers v. Lodge*, 458 U.S. 613 (1982) and (c) racial gerrymandering claims brought under the Equal Protection Clause of the 14th amendment, where the claim is that race is the predominant factor used by mapmakers (a line of jurisprudence originating in *Shaw v. Reno*, 509 U.S. 630 (1993), *see also* *Alabama Black Legislative Caucus v. Alabama*, 575 U.S. 254 (2015). Notwithstanding the overlapping nature of racial claims, regarding Congressional maps, as of November 2022, six states had Section 2 congressional challenges: Alabama, Arkansas, Georgia, Louisiana, Ohio, Texas; *Shaw v. Reno* claims were brought in sixstates: Alabama, Arkansas, Georgia, Missouri, South Carolina, and Texas; intentional race discrimination claims were brought in seven states: Alabama, Arkansas, Florida, Georgia, Ohio, South Carolina, and Texas; and other miscellaneous race-based claims were brought in six states: Arkansas, Florida, Kansas, Michigan, North Carolina, and Ohio. *See* *Redistricting Litigation Roundup*, Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 (last visited July 2, 2023) (hereafter, “Redistricting Litigation Roundup”). While there was once doubt that Section 2 of the VRA would have its constitutionality upheld in future challenges, in *Allen v. Milligan* (decided by the U.S. Supreme Court on June 8, 2023 (*Allen v. Milligan*, 143 S. Ct. 1487 (2023)), a five to four opinion written by Chief Justice Roberts affirmed the *Gingles* standards, though Justice Kavanaugh’s concurrence suggests that all the issues related to the standards for enforcing Section 2 are not yet permanently settled. While the various race-related cases are not directly about partisan gerrymandering, because minority voters are disproportionately Democrat, any plan that packs or cracks minority voters has partisan implications. Race-linked challenges were, for the most part,brought in federal courts. Partial exceptions are Kansas, Missouri, and North Carolina. Challenges to congressional plans as partisan gerrymanders were exclusively litigated in state court, given that no claimant would have standing in federal court post-*Rucho*. In ninestates (Alabama, Arkansas, Florida, Georgia, Louisiana, Michigan, North Carolina, Ohio, South Carolina, and Texas)there are still pending claims of racial gerrymandering ca. May 2023. *See supra,* Redistricting Litigation Roundup*.* [↑](#footnote-ref-5)
6. Florida, Pennsylvania, and North Carolina are notable exceptions. See discussion of the Florida and North Carolina cases and a general review of the limited role of state courts in the 2010 redistricting round in Cervas, Grofman, and Matsuda, *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections*, 21 U.N.H. L. Rev. (2023). For detailed discussion of the 2011 Pennsylvania map invalidated by the Pennsylvania Supreme Court, *see* Cervas and Grofman, *Tools for Identifying Partisan Gerrymandering, with an Application to Congressional Districting in Pennsylvania*, 76 Pol. Geo. 102069:1–27 (2020) (with corrigendum in volume 80). [↑](#footnote-ref-6)
7. *See supra* Cervas, Grofman, and Matsuda, note 6. [↑](#footnote-ref-7)
8. *See Ibid*. *See also* Samuel Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 University of Pennsylvania Journal of Constitutional Law 203 (2019), https://scholarship.law.upenn.edu/jcl/vol22/iss1/5 (last visited Oct 18, 2022); Joshua A Douglas, *The Right to Vote Under State Constitutions*, 67 Vanderbilt Law Review 61 (2014). [↑](#footnote-ref-8)
9. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harvard Law Review 489–504 (1977) at 9, <https://www.jstor.org/stable/1340334> (last visited Jul 3, 2023) (“Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.”) [↑](#footnote-ref-9)
10. *See*, *e.g.*, *supra* note 6, Cervas, Grofman and Matsuda (2023); *see also* Chad M. Oldfather, *Rucho in the States: Districting Cases and the Nature of State Judicial Power*, 1 Fordham L. Voting Rts. & Democracy F. 111 (2023); Aroosa Khokher, Note, *Free and Equal Elections: A New State Constitutionalism for Partisan Gerrymandering*, 52.1 Columbia Human Rights L. Rev. 1 (2020); Brett Graham, *“Free and Equal”: James Wilson’s Election Clause and its Implications for Fighting Partisan Gerrymandering in State Courts*, 85 Albany L. Rev. 799 (2023); Richard Briffault, *Epic Fail: Harkenrider v. Hochul and New York’s 2022 Misadventure in “Independent” Redistricting*, 1 Fordham Law Voting Rights and Democracy Forum 251–260 (2023), <https://ir.lawnet.fordham.edu/vrdf/vol1/iss3/1/>; David Imamura, *The Rise and Fall of Redistricting Commissions: Lessons from the 2020 Redistricting Cycle*, American Bar Association (Oct 24, 2022), <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economics-of-voting/the-rise-and-fall-of-redistricting-commissions/>; Alex Keena, *2021 Redistricting in Virginia: Evaluating the Effectiveness of Reforms*, 26 Rich. Pub. Int. L. Rev. 85 (2022). [↑](#footnote-ref-10)
11. While we have most to say about direct challenges to maps as partisan gerrymanders, we also take notice of activities of a state court triggered by the failure of the principal redistricting authority to enact a new map in time for elections, since any court-drawn map will also have partisan consequences. [↑](#footnote-ref-11)
12. In *Rucho*,139 S. Ct.at 2500, Chief Justice Roberts, writing for the majority, opined that “[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral[,]” that would allow federal courts to determine partisan gerrymandering. This view is strongly disputed by most election law experts in the social sciences and related areas. And, although there is not agreement on the best metric, there is a widely shared view that egregious partisan gerrymanders will raise red flags for most proposed metrics. See Grofman, Bernard and Gary King. 2007. Partisan Symmetry and the Test for Gerrymandering Claims after *LULAC v. Perry*. Election Law Journal. 6 (1):2-3;Grofman, Bernard. 2019. Partisan Gerrymandering Post-*Gill*. Election Law Journal. 18(2): 93-115; cf.Stephanopoulos & McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stanford L. Rev. 1503, 1508–10 (2018) (discussing the current academic debate and contentions regarding the utility of the efficiency gap metric, partisan bias, and the mean-median difference metric). [↑](#footnote-ref-12)
13. In this essay we do not try to provide an independent evaluation of the features of initial or remedial congressional maps used in the 2022 election in terms of their partisan or other consequences. *See*, *e.g.*, *Economist*, “America’s congressional maps are a bit fairer than a decade ago, but even fewer seats in Congress will be competitive” (June 2, 2022); Michael Li, *Anti-Gerrymandering Reforms had Mixed Results*. Brennan Center (September 19, 2022); Cervas, Grofman and Matsuda *infra* note 14. [↑](#footnote-ref-13)
14. Cervas, Grofman and Matsuda \_\_ U.N.H. L. Rev. \_\_ (2023) [↑](#footnote-ref-14)
15. For more information on how we determined these states, see Cervas et al., *supra* note 14 at ??-??. [↑](#footnote-ref-15)
16. Of course, new challenges might still be brought now that actual election outcomes are known, and there is a non-trivial chance that, in states under clear partisan control, new maps may be proposed for the 2024 election to improve the dominant party’s expected seat margins. *See* Erik J. Engstrom, Partisan Gerrymandering and the Construction of American Democracy (University of Michigan Press) (2013) for a historical account of mid-decade redistricting. [↑](#footnote-ref-16)
17. See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018). [↑](#footnote-ref-17)
18. Justin Levitt, *National Overview*, All About Redistricting, https://redistricting.lls.edu/national-overview [https://perma.cc/5Y75-LM6A] (last visited Dec. 21, 2022). [↑](#footnote-ref-18)
19. There are many ways to develop a typology for forms of redistricting commissions. We believe that the most useful multidimensional typology offers answers to most of the following questions: (1) Is there an odd or an even number of members on the commission? (2) Are currently serving legislators or holders of other political offices banned from commission membership? Conversely, are (some) currently serving legislators or holders of other political offices automatically placed on the commission? (3) If there is partisan-linked representation on the commission is that representation equal for each of the two major parties, or is it based in part on which parties control some statewide offices so that one party might have a majority of the commission members (as occurred in Ohio in 2021)? (4) Does the commission use simple majority or some form of supermajority, including rules that require agreement from some number of members of each party? (5) If the commission has an odd number of members and uses majority rule is one of its members a “tie breaker” who is selected by a process different from that of another member and if so, how exactly is that tie-breaker chosen? (6) What type of criteria is the commission constitutionally obligated to make use in evaluating potential plans. In particular, (6a) Is the commission required to take the potential partisan consequences of a plan into account? (6b) is the commission required to consider the potential consequences of a plan for political competition? (6c) What are the “good government /traditional” criteria that the commission is required to consider in some fashion above and beyond simple population equality, e.g., minimizing splitting of municipal or county lines, compactness, contiguity, etc.? (6d) Are there specific requirements to be attentive to racial groups beyond what is required for compliance with the federal Voting Rights Act? (6e) are there specific requirements to be attentive to communities of interests? [↑](#footnote-ref-19)
20. *See supra* note 18 under “Who Draws the Lines?” Commissions in 2010: Arizona, California, Hawaii, Idaho, New Jersey, Washington. [↑](#footnote-ref-20)
21. *Id.* Commissions in 2020: Commissions in 2010: Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, New York, Virginia, Washington. In 2021, the Virginia Redistricting Commission released two statewide congressional map proposals but missed its deadline for approving the map proposals. Accordingly, the Virginia Supreme Court assumed authority over the process, and two special masters selected by the court released proposals for congressional districts which were subject to public comment and then revised and subsequently approved by the Virginia Supreme Court. *See Redistricting in Virginia after the 2020 census*, Ballotpedia, <https://ballotpedia.org/Redistricting_in_Virginia_after_the_2020_census> (last visited May 31, 2023). In 2014, the citizens of New York voted to adopt historic reforms to the redistricting process by establishing an Independent Redistricting Commission (IRC), and by “declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering.” However, in 2021, after the IRC reached an impasse as to the design of its second set of constitutionally required maps, the Democrat-controlled Legislature enacted its own set of maps without participation of the Republican minority party. In *Harkenrider v. Hochul*, No. 60, 2022 N.Y. LEXIS 874, at \*1 (N.Y. Apr. 27, 2022), the New York Court of Appeals held that the Legislature’s failure to follow the prescribed constitutional procedure warranted invalidation of the Legislature’s congressional and state senate maps. Subsequently, new congressional and state senate districts were drawn by special master. [↑](#footnote-ref-21)
22. *Cf.* Samuel Issacharoff & Richard H. Pildes, *Majoritarianism and Minoritarianism in the Law of Democracy*, N.Y.U. Sch. of L., Pub. L. Rsch. Paper No. 23-19 (Oct. 6, 2022), https://www.ssrn.com/abstract=4240006. [↑](#footnote-ref-22)
23. In states with commissions, “the governor has no veto power over state or federal maps because the legislature does not play a role in passing the maps. Finally, in North Carolina, while the legislature does pass both state and federal maps as regular legislation, the governor is expressly denied veto power over those maps.” *See* Fiona Kniaz & Kristoffer Shields, Redistricting: The Road to Reform, Rutgers (2021), https://governors.rutgers.edu/governors-and-the-redistricting-process/. [↑](#footnote-ref-23)
24. *See* Kelsey L. Hinchliffe & Frances E. Lee, *Party Competition and Conflict in State Legislatures*, 16 State Politics & Policy Quarterly 172–197 (2016). *See also* Joel Sievert & Seth C. McKee, *Nationalization in U.S. Senate and Gubernatorial Elections*, 47 American Politics Research 1055–1080 (2019). Cf. Thomas L. Brunell & Bernard Grofman, *Explaining Divided U.S. Senate Delegations, 1788–1996: A Realignment Approach*, 92 American Political Science Review 391–399 (1998). [↑](#footnote-ref-24)
25. Robert N. Lupton & Seth C. McKee, *Dixie’s Drivers: Core Values and the Southern Republican Realignment*, 82 The Journal of Politics 921–936 (2020). *See also* John R. Petrocik, *Realignment: New Party Coalitions and the Nationalization of the South*, 49 The Journal of Politics 347–375 (1987). [↑](#footnote-ref-25)
26. *See**infra* notes 38 and 58. [↑](#footnote-ref-26)
27. This can happen for several reasons. Examples include when a court requires a map that is based on *least change* from the prior decade when the prior decade’s plan was excessively partisan or when a commission with evenly balanced partisan affiliations and a tiebreaker who is ostensibly neutral adopts a map proposed by one of the parties that results in a partisan gerrymander. In 2021 this latter situation was allegedly found in thestate of New Jersey, where the tiebreaking Chair of the redistricting commission, John E. Wallace, Jr., a former state Supreme Court Justice and registered Democrat, was appointed by the New Jersey Supreme Court and was challenged as being partisan by state Republicans. *Matter of Congressional Districts by New Jersey Redistricting Comm’n*, 268 A.3d 299 (N.J. 2022). In addition to New Jersey, states with constitutional provisions that also require a state supreme court to appoint a tiebreaking member include Hawaii, Idaho, Montana, and Washington. Another potential way to get a partisan map from a commission is when there are state legislators or other elected officials as members whose selection rules leave open the possibility of one party having a majority of commission members. [↑](#footnote-ref-27)
28. For example, the Brennan Center for Justice published and advocated for model legislation that would establish independent redistricting commissions to “promote[] independence, inclusivity, and transparency in the map-drawing process.” *See* Yurij Rudensky & Annie Lo, *A Better Way to Draw Districts*, Brennan Cntr. for Justice (Dec. 12, 2019), <https://www.brennancenter.org/our-work/policy-solutions/better-way-draw-districts>. In addition, Common Cause, a nonpartisan grassroots organization “dedicated to upholding the core values of American democracy,” was also a forceful advocate for redistricting reform via independent commissions. *See Fair Maps, Fair Representation, and a Fair Say*, Common Cause, <https://www.commoncause.org/our-work/redistricting_and_representation/gerrymandering-redistricting/> (last visited Aug. 7, 2023). Since 2010, four additional states (Colorado, Michigan, New York, and Virginia) have established commissions to conduct redistricting more independently. In addition, in 2020, Montana used a commission to draw its congressional maps after the state gained a second congressional seat (in 2010, Montana’s one congressional seat did not require the state to establish a commission to draw its congressional map). New York’s implementation for the use of a commission is only advisory since the legislature has the ability to amend any proposal. [↑](#footnote-ref-28)
29. *See Rucho*, 139 S. Ct. 2484. Not all commissions are equal in terms of their likelihood of directly acting as a check on partisan gerrymandering.For example, Hawaii, New Jersey, and Virginia have commissions that may include current officeholders.Moreover,several of the new commissions created prior to the 2020 redistricting round were severely flawed, either in creating a high likelihood of deadlock(e.g.,commissions with an equal number of members affiliated with each party and without any tie-breaker mechanism, such as the one in Virginia, Va. Const. art. II, §6-A),or with rules, such as those in Ohio, Ohio Const. art. XIX, §1, that allowed the legislature to repeatedly override the court and that prevented the state court from imposing a plan of its own*Adams v. DeWine*, Nos. 2021–1428 and 2021-1449 (Ohio Jan. 14, 2022). [↑](#footnote-ref-29)
30. There are also some useful things to be learned from who/which type of entity was charged as defendants in the litigation. For example, how often are there named defendants who are part of the legislative majority and key actors in the redistricting process? We do not pursue these issues here, but we do provide Table A1 in the Appendix that compiles the relevant information. [↑](#footnote-ref-30)
31. For example, in Florida, Ohio, and Pennsylvania, the citizen plaintiffs were supported by the National Democratic Redistricting Committee (“NRDC”) or an affiliate, such as the National Redistricting Foundation or National Redistricting Action Fund. The NDRC was established to fight for fairer maps and is chaired by former Attorney General Eric Holder and supported by democratic party leaders such as President Barack Obama and former House Speaker Nancy Pelosi, and others. *See Our Work*, Nat’l Democratic Redistricting Committee, <https://democraticredistricting.com/our-work/> (last visited Apr. 19, 2023); *NRF-supported Voters File Petition to Florida Supreme Court*, Nat’l Redistricting Foundation (May 23, 2022), <https://redistrictingfoundation.org/news/nrf-supported-voters-file-petition-to-florida-supreme-court>; *Supreme Court Blocks Republican Attempt to Overturn Pennsylvania’s Fair Congressional Map*, Nat’l Redistricting Action Fund, <https://redistrictingaction.org/news/supreme-court-blocks-republican-attempt-to-overturn-pennsylvanias-fair-congressional-map> (last visited Apr. 19, 2019); Supreme Court Blocks Extreme Republican Efforts to Absolve Checks and Balances Within State Governments, Nat’l Redistricting Action Fund, <https://redistrictingaction.org/news/scotus-blocks-extreme-republican-efforts-to-absolve-checks-and-balances-within-state-govs> (last visited Apr. 19, 2023). In Kansas, Kentucky, Maryland, New Mexico, New Jersey, New York, and Oregon, at least one of the individually named plaintiffs was a partisan elected official or candidate for elected office in 2022. For North Carolina and Utah, the individual plaintiffs were largely led by good government groups, such as Common Cause or the Campaign Legal Center and Mormon Women for Ethical Government. [↑](#footnote-ref-31)
32. As noted earlier, there were also legal challenges to some congressional maps brought on race-related grounds in a federal court. [↑](#footnote-ref-32)
33. Given the delay in the delivery of the census data needed for redistricting in 2021, *see* *Census Bureau Statement on Redistricting Data Timeline*, U.S. Census Bureau (Feb. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>, even if state courts did accept a partisan gerrymandering challenge (or where there was litigation in a federal court involving a challenge to racial gerrymandering whose resolution almost certainly would have partisan consequences), legislators were aware that court action might come too late to prevent legislative plans from going into effect in the critical 2022 election – thus allowing incumbency advantage for the gerrymandering party to carry over into the new redistricting decade. This happened in Florida: *Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022). [↑](#footnote-ref-33)
34. For example, the maps used for NC and OH in 2022 will need to be redrawn for future election cycles. *See* Michael Li, *How Voting Districts Could Change Before 2024*, Brennan Center (Feb. 6, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/how-voting-districts-could-change-2024>. [↑](#footnote-ref-34)
35. [I think we actually have FL listed in our Table 1 as having been challenged. Perhaps we could instead include Alabama, which for a second time chose not to draw a second minority congressional district?] For example, the Florida legislature—under instruction from the Florida governor—could be accused of having gone “hog wild” in the 2020 redistricting round in seeking to advantage Republicans. *See* Joshua Kaplan, *How Ron DeSantis Blew Up Black-Held Congressional Districts and May Have Broken Florida Law*, ProPublica (Oct 11, 2022), <https://www.propublica.org/article/ron-desantis-florida-redistricting-map-scheme>; Greg Allen, *Gov. DeSantis takes over congressional redistricting in Florida*, NPR (Apr. 12, 2022), https://www.npr.org/2022/04/12/1092414662/gov-desantis-takes-over-congressional-redistricting-in-florida; Gary Fineout, *Florida Supreme Court locks in DeSantis-backed redistricting map*, Politico (June 2, 2022), https://www.politico.com/news/2022/06/02/florida-redistricting-map-court-decision-00036740)). [↑](#footnote-ref-35)
36. Ohio is difficult to classify because of the inability of the state court to draw a map of its own, leading to federal court intervention to resolve a deadlock ,but the map needs to be redrawn for 2024. However, the state court did reject various legislatively drawn maps. [↑](#footnote-ref-36)
37. There is a conditional probability effect in that we can expect challenges to be more likely to be brought and those challenges to be more likely to be successful in states where there actually is egregious partisan gerrymandering and, as emphasized earlier, we also expect that partisan gerrymandering is most likely to be found in states where the redistricting process is under single party control. [↑](#footnote-ref-37)
38. See Table 1. Apparent inconsistency with numbers previously shown is due to the treatment of Virginia. It is a court-drawn map but the court action does not come via a legal challenge, but due to the inability of the Commission to agree on a map. [↑](#footnote-ref-38)
39. In the 2010 redistricting round, Democrats had party control in six states (Arkansas, Illinois, West Virginia, Maryland, Massachusetts, Rhode Island; 44 total districts). Republicans had party control in eighteen 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 a 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. Going into 2020, Democrats controlled the redistricting process in eight states (Oregon, Massachusetts, Nevada, Illinois, New Mexico, New York, Rhode Island, Maryland; seventy-five total districts). Republicans controlled the process in nineteen 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. Thus, in 2020 Democrats controlled two more states than they had in 2010, and Republicans controlled the process in one more state in 2020 than they in 2010. But, more importantly for the U.S. House of Representatives, in terms of districts, the advantage that Republicans had in 2010 (a 162 district advantage) was significantly reduced by 2020 (a 108 district advantage). 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. Details are given in Tables 1 and 2 in Cervas, Grofman, Matsuda, 2023 forthcoming, *op cit*. [↑](#footnote-ref-39)
40. *See*, *e.g.*, *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015). In *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019), Rebecca Harper, a member of the organization Common Cause, volunteered to be one of the named plaintiffs on the case. *See* Laura Leslie, *Meet the Cary woman behind the Supreme Court case* Moore v. Harper, WRAL News (Dec. 9, 2022), https://www.wral.com/story/meet-the-cary-woman-behind-the-supreme-court-case-moore-v-harper/20621561/. [↑](#footnote-ref-40)
41. A state constitutional prohibition on the use of partisan data in the redistricting process – found in the state constitutions of Arizona, California, Colorado, Florida, Hawaii, Idaho, Iowa, Montana, Nebraska, Ohio, Oregon, Utah, and Washington, may also trigger a partisan gerrymandering claim if it is thought that the redistricting authorities have flouted that provision. [↑](#footnote-ref-41)
42. “[E]ven when there was no explicit anti-gerrymandering provision in the state constitution, beginning with the Pennsylvania Supreme Court decision in 2018, 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,’ simply ‘free,’ or language regarding the ‘right to vote.’” *See* Cervas, Grofman, and Matsuda at 6 & n.13 (2023 forthcoming). [↑](#footnote-ref-42)
43. Of course, the likelihood of successful challenge depends not just on the state-specific legal environment, but also state-specific case facts. [↑](#footnote-ref-43)
44. Legislatures charged with drawing districts under explicit direction of state law may choose to follow the law, or at least avoid violating it in a blatant fashion, knowing that a consequence of not following the law is possible forfeiture of any control over the process in the remedial stage. Relatedly, we would note that the vigorous implementation of Section 5 of the Voting Rights Act reduced the frequency of many types of discriminatory action by state authority and made counting successful section 5 challenges a misleading way of judging the success of that provision. As the dissenters said in *Shelby County. v. Holder*, 570 U.S. 529, 589 (2013), “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

    [↑](#footnote-ref-44)
45. Of the three successful partisan gerrymandering claims that were brought, one state had only an indirect state constitutional provision (MD), and two had a direct constitutional provision (NY; OH). In the three unsuccessful partisan gerrymandering claims, two states had neither direct nor indirect constitutional provisions (NJ; KS) and one state had both direct and indirect constitutional provisions (OR). [↑](#footnote-ref-45)
46. We leave to a subsequent essay a more detailed analysis of the use by individual justices or sets of justices of specific criteria/metrics and how they set a threshold to decide when a metric could be taken to provide evidence that the level of partisan gerrymandering was beyond “politics as usual” and rose to the level of a constitutional violation. In that essay we also discuss how justices dealt with tradeoffs/conflicts among criteria. [↑](#footnote-ref-46)
47. As noted earlier, another state supreme court (Alaska) is prepared to reject legislative plans as unconstitutional gerrymanders, but having only one congressional district, that state is not included in our data set. [↑](#footnote-ref-47)
48. *See In re Harkenrider*, 38 N.Y.3d at 519-20. [↑](#footnote-ref-48)
49. However, after there was a change in the partisan composition of the North Carolina Supreme Court in 2023, the new Republican majority reversed the previous Democratic majority and held that partisan gerrymandering was in fact, nonjusticiable under North Carolina state law. [↑](#footnote-ref-49)
50. There are multiple ways that states have chosen to select supreme court justices: gubernatorial election, where the governor directly appoints justices (New Jersey); partisan elections, where justices indicate their party affiliation on a ballot and are elected by the people (Pennsylvania, North Carolina, Ohio); and assisted appointment, where a commission either appointed by the governor or the state bar association compiles a list of judges for nomination that the governor then votes on (Florida, New York, Kansas). *See* “Judicial Election Methods by State.” *Ballotpedia*. <https://ballotpedia.org/Judicial_election_methods_by_state>. Accessed 18 June 2023. [↑](#footnote-ref-50)
51. Of course, the cases in Table 4 do not reflect a random sample of all redistricting maps, but they should not! We want to examine the relationship between partisanship and the Justice’s decision in situations where maps are drawn under one party control and where a suspicion of partisan gerrymandering is sufficient to trigger a credible lawsuit**.** [↑](#footnote-ref-51)
52. *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023) (granting petition for rehearing). [↑](#footnote-ref-52)
53. *See In re Harkenrider*, 494 N.Y.3d at 527 (J. Wilson dissenting); Ferré-Sadurní, L. (2023 April 18). Rowan Wilson Is Confirmed as New York’s Chief Judge. *The New York Times*, A12. [↑](#footnote-ref-53)
54. Fandos, N. (2023 8 June). Could Democrats Get Another Shot at Redistricting in New York? *The New York Times*, A14. [↑](#footnote-ref-54)
55. Also, given the delay in the delivery of the census data needed for redistricting in 2021, *see* *Census Bureau Statement on Redistricting Data Timeline*, U.S. Census Bureau (Feb. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html), even if state courts did accept a partisan gerrymandering challenge (or where there was litigation in a federal court involving a challenge to racial gerrymandering whose resolution almost certainly would have partisan consequences), legislators were aware that court action might come too late to prevent legislative plans from going into effect in the critical 2022 election – thus allowing incumbency advantage for the gerrymandering party to carry over into the new redistricting decade. This happened in Florida: *Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022. [↑](#footnote-ref-55)
56. As noted earlier, there were also legal challenges to some congressional maps brought on race-related grounds in a federal court. [↑](#footnote-ref-56)
57. 1. For example the Florida legislature (under instruction from the Florida governor -- *see* Joshua Kaplan, *How Ron DeSantis Blew Up Black-Held Congressional Districts and May Have Broken Florida Law*, ProPublica (Oct 11, 2022), <https://www.propublica.org/article/ron-desantis-florida-redistricting-map-scheme>; Greg Allen, *Gov. DeSantis takes over congressional redistricting in Florida*, NPR (Apr. 12, 2022), https://www.npr.org/2022/04/12/1092414662/gov-desantis-takes-over-congressional-redistricting-in-florida; Gary Fineout, *Florida Supreme Court locks in DeSantis-backed redistricting map*, Politico (June 2, 2022), https://www.politico.com/news/2022/06/02/florida-redistricting-map-court-decision-00036740)) could be accused of having gone “hog wild” in the 2020 redistricting round in seeking to advantage Republicans

    [↑](#footnote-ref-57)
58. There is a conditional probability effect in that we can expect challenges to be more likely to be brought and those challenges to be more likely to be successful in states where there actually is egregious partisan gerrymandering and, as emphasized earlier, we also expect that partisan gerrymandering is most likely to be found in states where the redistricting process is under single party control. [↑](#footnote-ref-58)
59. In the 2010 redistricting round, Democrats had party control in six states (Arkansas, Illinois, West Virginia, Maryland, Massachusetts, Rhode Island; 44 total districts). Republicans had party control in eighteen 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 a 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. Going into 2020, Democrats controlled the redistricting process in eight states (Oregon, Massachusetts, Nevada, Illinois, New Mexico, New York, Rhode Island, Maryland; seventy-five total districts). Republicans controlled the process in nineteen 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. Thus, in 2020 Democrats controlled two more states than they had in 2010, and Republicans controlled the process in one more state in 2020 than they in 2010. But, more importantly for the U.S. House of Representatives, in terms of districts, the advantage that Republicans had in 2010 (a 162 district advantage) was significantly reduced by 2020 (a 108 district advantage). 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. Details are given in Tables 1 and 2 in Cervas, Grofman, Matsuda, 2023 forthcoming, *op cit*. [↑](#footnote-ref-59)
60. *See*, *e.g.*, *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015). In *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019), Rebecca Harper, a member of the organization Common Cause, volunteered to be one of the named plaintiffs on the case. *See* Laura Leslie, *Meet the Cary woman behind the Supreme Court case* Moore v. Harper, WRAL News (Dec. 9, 2022), https://www.wral.com/story/meet-the-cary-woman-behind-the-supreme-court-case-moore-v-harper/20621561/. [↑](#footnote-ref-60)
61. A state constitutional prohibition on the use of partisan data in the redistricting process – found in the state constitutions of Arizona, California, Colorado, Florida, Hawaii, Idaho, Iowa, Montana, Nebraska, Ohio, Oregon, Utah, and Washington, may also trigger a partisan gerrymandering claim if it is thought that the redistricting authorities have flouted that provision. [↑](#footnote-ref-61)
62. “[E]ven when there was no explicit anti-gerrymandering provision in the state constitution, beginning with the Pennsylvania Supreme Court decision in 2018, 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,’ simply ‘free,’ or language regarding the ‘right to vote.’” *See* Cervas, Grofman, and Matsuda at 6 & n.13 (2023 forthcoming). [↑](#footnote-ref-62)
63. Of course, the likelihood of successful challenge depends not just on the state-specific legal environment but also state-specific case fact. [↑](#footnote-ref-63)
64. Legislatures charged with drawing districts under explicit direction of state law may choose to follow the law, or at least avoid violating it in a blatant fashion, knowing the consequence of not following the law is possible forfeiture of any control over the process in the remedial stage. Relatedly, we would note that the vigorous implementation of Section 5 of the Voting Rights Act reduced the frequency of many types of discriminatory action by state authority and made counting successful section 5 challenges a misleading way of judging the success of that provision. As the dissenters said in *Shelby County. v. Holder*, 570 U.S. 529, 589 (2013) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”)

    [↑](#footnote-ref-64)
65. We leave to a subsequent essay a more detailed analysis of the use by individual justices or sets of justices of specific criteria/metrics and how they set a threshold to decide when a metric could be taken to provide evidence that the level of partisan gerrymandering was beyond “politics as usual” and rose to the level of a constitutional violation. In that essay we also discuss how justices dealt with tradeoffs/conflicts among criteria. [↑](#footnote-ref-65)
66. The contrast between the opinion in the State of **XXX** finding justiciability and that in the State of YYY finding non-justiciability is particularly interesting, since these two states have virtually identical language in their constitution. [↑](#footnote-ref-66)
67. As noted earlier, another state supreme court (Alaska) is prepared to reject plans as unconstitutional gerrymanders, but having only one congressional district, that state is not included in our data set. [↑](#footnote-ref-67)
68. [↑](#footnote-ref-68)
69. Of course, the cases in Table 4 do not reflect a random sample of all redistricting maps, but they should not! We want to examine the links to partisanship of justices in situations whether maps are drawn under one party control and where partisan gerrymandering is suspected enough to trigger a credible lawsuit. [↑](#footnote-ref-69)
70. We will revisit this question in future work when we look in more detail at these court opinions to see the reasons given for their view by those justices who did not find a plan to be unconstitutional when a majority of their fellow justices did find the plan to be unconstitutional. [↑](#footnote-ref-70)