THE ROLE OF State Courts IN ConstrainING Partisan Gerrymandering in Congressional Elections

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Jonathan Cervas[[1]](#footnote-2)\*

Bernard Grofman[[2]](#footnote-3)+

Scott Matsudo[[3]](#footnote-4)#

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PLEASE ADDRESS SUGGESTIONS/CORRECTIONS TO CERVAS@CMU.EDU

Abstract

Federal courts were once seen as the place for partisan gerrymandering challenges to be lodged, but when, after 30+ years of vacillation, the Supreme Court announced in *Rucho v. Common Cause*, 588 U.S. \_\_\_ (2019), that partisan gerrymandering is not-justiciable in federal courts, state courts are now seen as the only place where a remedy for egregious partisan gerrymandering might be sought (except, of course, for taking redistricting out of the hands of the state legislature and moving responsibility into a bipartisan or ostensibly non-partisan commission). Thus, we would expect that partisan gerrymandering claims, while almost entirely in federal courts in the 2010 redistricting round and earlier rounds of redistricting, would now be brought in state courts if they were brought anywhere. We also expect that state courts would look to state constitutional provisions to evaluate partisan gerrymandering claims, especially language added in recent constitutional amendments that affected the procedures and criteria for redistricting. But we also see state courts creatively reevaluating older language in their state’s constitution to find a way to hold egregious gerrymanders in violation of that constitution. And we see various state court justices implicitly challenging the Supreme Court’s view in *Rucho* that no manageable standard for egregious gerrymandering existed by relying on a variety of statistical tests proposed by academic specialists, on the one hand, and/or by examining the extent to which proposed maps satisfied traditional good government standards, on the other.

Table of Contents

Introduction 3

Background: Federal courts and partisan gerrymandering 5

The 2020 Redistricting Round: Institutions and Context 9

The effects of redistricting and apportionment on congressional districts 18

The role of state courts in the 2020 redistricting round 24

1. Cases concerning indirect language prohibiting partisan gerrymandering 28

2. Cases concerning direct language prohibiting partisan gerrymandering 30

3. Cases concerning partisan gerrymandering where there no language prohibiting partisan gerrymandering 33

4. Pending cases in state courts 35

5. States where courts were forced to act because legislature or commission failed 38

Evaluating the consequences of court action 40

Discussion 41

Looking to the Future 42

Further institutional remedies to limit partisan gerrymandering are going to be hard to implement and/or of limited utility 42

Mid-decadal redistricting 44

Congressional power to seat members 45

Independent state legislature theory 45

Recommendations 46

Cases Referenced 48

References 49

# Introduction

Now that partisan gerrymandering has been ruled non-justiciable in federal courts, state courts are the exclusive outlet for policing overly political districting schemes. We focus this essay on the role of state courts as checks on partisan gerrymandering in the U.S. House of Representatives. Much of what we say will also be relevant to state legislative redistricting. To understand the role of state courts we must understand the institutional context that governs redistricting in each state. In this introductory section we provide an overview, with more detail in later sections of this essay.

State legislatures are generally the body that redraws Congressional districts after decennial censuses. The decennial census *inter alia* enumerates the population of the country and for each state and determines the total representatives (out of 435) that each state will be allocated. Following the 2020 census, in 33 of the 44 states that required drawing of congressional districts, the legislature had the primary responsibility for producing new maps.[[4]](#footnote-5) Political gerrymanders are most likely to occur when all aspects of the line-drawing process are controlled by a single political party. Of these 33 states, as of 2021, 24 had Republican control of both branches of the legislature and the governorship (often called *trifecta control*); 15 had Democratic control of both branches of the legislature and the governorship, and 11 had divided control.[[5]](#footnote-6)

Most states have provisions in their constitutions that guide the line-drawing process. These provisions might reduce the risk that the process is used to advantage the party in control of the process. These rules also effect districting practices even in states where redistricting is out of the hands of the legislature or under divided control. These “traditional redistricting criteria” include provisions that limit districts to contiguous territory (34 states), restrictions on political subdivision splits (31 states), and requirements for compact districts (31 states).[[6]](#footnote-7) However, even when enforced, these traditional criteria might not prevent differences in each party’s ability to translate votes into seats that result solely from the geographic distribution of voters (Rodden 2010), nor can they prevent what we have labeled as *stealth gerrymanders* (Cervas and Grofman 2020), i.e., maps that are gerrymandered even though they satisfy traditional districting criteria.

Several stateschanged their constitutional provisions affecting redistricting after the 2010 cycle, with good government and other groups recognizing that simply requiring that legislatively drawn maps satisfy traditional criteria might not be effective enough at limiting vote dilution. The key change involved taking redistricting out of the hands of the legislature and replacing the legislature with some form of commission.[[7]](#footnote-8)

At the same time as changes were made in who was responsible for mapmaking, changes also were usually made in the criteria to be used for mapmaking. Perhaps most importantly, language was added to the state constitution in a few states prohibiting plans that unduly favored or disfavored a political party or a particular candidate.[[8]](#footnote-9) Even when there was no explicit anti-gerrymandering provision in the state constitution, some state courts began to interpret older provisions of their state constitutions as implicitly prohibiting egregious gerrymandering -- language that says elections shall be “free and equal”, “free and open”, or simply “free”, and implicit, or language regarding the “right to vote”.[[9]](#footnote-10) Here we review both the institutional context and the actions of state courts in dealing with challenges to enacted plans bases on claims of partisan gerrymandering or in drawing plans of their own in cases where the legislature or commission failed to draw a plan in a timely fashion.[[10]](#footnote-11) While we are most concerned with what happened in the 2020 redistricting round, we also briefly examine the role of state courts in the 2010 redistricting round, since previous precedents in other states affected how state courts saw the options for controlling partisan gerrymandering in their own state in the current decade (Cf. Grofman and Cervas 2018) .

# Background: Federal courts and partisan gerrymandering

The U.S. Supreme Court first dealt with the role of partisanship in districting in 1973 in a Connecticut case, *Gaffney* *v.* *Cummings* 412 U.S. 735 (1973), in which political data was used to try and balance districts roughly proportional to the statewide political strength of parties. In *Gaffney*, the Court ruled that the state legislature did not violate the 14th amendment’s Equal Protection Clause by taking partisanship into account to represent the parties in a fashion reflective of their electoral strength. *Gaffney* allowed for partisanship to be used in what appeared to be a benevolent fashion, but the continuing concern of good government groups and political parties was about the malevolent uses of partisanship in districting to create political gerrymanders. Post-*Gaffney* there were various challenges to plans as partisan gerrymanders, such as *Badham v. Eu*, 721 F. 2d 1170 (D. Calif. 1983, *cert*. denied.) which, like several other cases, was dismissed for want of a federal claim.

The first hint that federal courts might reign in egregious manipulation of district lines drawn for political gain came thirteen years after *Gaffney* in *Davis v. Bandemer,* 478 U.S. 109 (1986). *Bandemer* was a challenge to Indiana’s legislative plans as partisan gerrymanders. In *Bandemer*, the Court’s majority ruled that partisan gerrymandering claims were justiciable in federal courts, but the Court rejected the claim that the Indiana plans were gerrymanders, and seemingly set an impossible threshold for hold a plan to be unconstitutional, namely that the minority be “shut out of” the political process *Davis v. Bandemer*, 478 U.S. 109, 139 (1986) (“In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process”).

That high bar did not prevent new challenges to alleged partisan gerrymanders being brought in federal courts (see e.g., *Republican Party v. Martin* 980 F2d 943 (4th Cir. 1992)) but again lower courts ultimately rejected partisan gerrymandering claims. Eighteen years after *Bandemer*, in a case from Pennsylvania, *Vieth v. Jubelirer* 541 U.S. 267 (2004) that lacked a majority opinion, the issue was again brought before the U.S. Supreme Court, and it again rejected a partisan gerrymandering claim. But now there were clear signs that the Court was rethinking the issue of the justiciability of partisan gerrymandering. Justice Scalia, writing for a plurality *Id.*, at 306-307, would have held that there was no justiciable claim because there was no “judicially discernible and manageable standard” by which the Court could decide when a plan went from being constitutional to unconstitutional. His view would have overturned *Bandemer*. Three justices in *Vieth* (Breyer, Souter, and Stevens) wrote separate dissents, each proposing their own standard for adjudicating partisan gerrymandering claims. Justice Kennedy concurred with the plurality that the appellants’ complaint be dismissed because the “proposed standards each have their own deficiencies” *Id.*, at 267, 269,but left open the possibility that a manageable standard might be established.[[11]](#footnote-12) That Court concluded that “’Fairness’ is not a judicially manageable standard.” *Vieth* 541 U. S. \_\_\_\_ (2004) at 3.[[12]](#footnote-13)

A few years later, in *LULAC v. Perry* 548 U.S. 399 (2006), the Court heard a challenge to the mid-decade redistricting scheme by the Texas legislature but again rejected claims that the plan was a gerrymander. In that case, although some Justices expressed the view that a manageable standard combining partisan symmetry approaches with other measures might yet be contrived.[[13]](#footnote-14) However, rather than giving up hope, post-*LULAC* there was a spate of work by lawyers, social scientists, and other concerned scholars, including computer scientists, offering new ways of measuring gerrymandering (or ways to defend previously rejected metrics) to offer to federal courts. And cases challenging plans as partisan gerrymanders continued to be filed in federal courts.

After 30+ years of unsuccessful challenges at the trial court level, three federal trial courts, one in Wisconsin *Gill v. Whitford*, 138 S. Ct. 1916 (2018), one in North Carolina *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) and one in Maryland *Lamone v. Benisek*, 139 S. Ct. 783 (2019) found proposed plans to be unconstitutional partisan gerrymanders. These cases were appealed to the U.S. Supreme Court, which issued a definitive ruling that focused on the challenged North Carolina map.

In a 5-4 opinion in *Rucho*, the court majority took away the ability to bring claims of partisan gerrymandering in federal court, with Justice Kagan dissenting, joined by Justices Ginsberg, Breyer, and Sotomayor in dissent, *Bandemer* was overruled: the justiciability of partisan gerrymandering claims was eliminated, and the lower court findings of unconstitutional partisan gerrymandering were reversed. The ruling explicitly rejected all the possible avenues for bringing a partisan gerrymandering claim that had ever been asserted: “the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, [or] Article I, § 2, of the Constitution” (*Id*. at 2491). In *Rucho*, the Supreme Court asserted, without qualification, that there is no "appropriate role for the Federal Judiciary in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere." *Id*. at 2494 (quotations omitted; emphasis added). *Rucho* further asserted: “Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.” *Id* at 2507).

The court opinion in *Rucho* was problematic in that it recognizes that “[e]xcessive partisanship in districting leads to results that reasonably seem unjust” *Id*. at 2506, and the Court “does not condone excessive partisan gerrymandering” *Id*. at 2507, and yet it simultaneously shirked responsibility.

The majority opinion in *Rucho* is also problematic because it misunderstands the basic measurement issue regarding partisan gerrymandering, namely how can one detect an egregious partisan gerrymander. It frames this question as: “how much representation [does a] particular political parties deserve —based on the votes of their supporters” *Id*. at 3499. But the Court then claims that “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation” *Id.* at 2499. However, that assertion is flatly wrong.

Social science is unequivocal in NOT expecting proportionality in single-member, winner-take-all districting schemes (Grofman 1982; Gudgin and Taylor 2012; Taagepera and Shugart 1989). For example, metrics such as the *partisan bias* measure require only that parties are treated symmetrically (Katz, King, and Rosenblatt 2020). Another test, the use of outlier analysis using an ensemble of plans generated by Markov chains draws on the geography of the state to determine what is suspiciously outside the realm of what can be expected from a plan drawn according to good government criteria. (Becker et al. 2021; Duchin 2018). Moreover, the Supreme Court majority was far too facile in asserting in *Rucho* that no manageable standard for ascertaining the presence of partisan gerrymandering is possible. In fact, in the 2010 round of decennial redistricting, a few state courts had already overturned (in whole or in part) legislatively enacted plans that were found to dilute the voting strength of minority parties. See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018); and *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015). *Harper v. Lewis*, NO. 5:19-CV-452-FL (NC, E.D. Oct. 22, 2019).

The Florida and Pennsylvania state courts held a trial in which they heard from expert witnesses, deposed lawmakers, and weighed the evidence to conclude that one political party was inappropriately hampered by the district lines in the translation of its votes into seats (Cervas and Grofman 2020; Grofman and Cervas 2018; Wang, Ober Jr., and Williams 2019). The situation in North Carolina was a bit different. Instead of holding a new trial court hearing, the court used both direct statistical and circumstantial evidence from the federal court case in *Rucho*.[[14]](#footnote-15) While this state court decision could be seen as a kind of direct rebuttal to the *Rucho* majority’s finding that no manageable standard to detect unconstitutional gerrymandering in North Carolina exists, we see *Harper* as confirmation that state courts, interpreting their own state constitution, have the ability to craft state-specific standards for policing partisan gerrymandering.

In Florida there was explicit state constitutional language about the permissible role of partisanship in redistricting. In Pennsylvania the Pennsylvania Supreme Court expressly recognized that partisan gerrymandering is a justiciable violation of the Free and Equal Elections Clause, Pa. Const. art I, § 5. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 816 (Pa. 2018). Similarly, in North Carolina, the state court relied on the “Free Elections Clause” found in the Declaration of Rights in the state’s constitution. NC. Const. art. I § 10.

In Pennsylvania, the state court brought in a “legal and technical advisor” to assist the court to redraw the map. In Florida, the legislature was permitted to offer a new plan after an initial plan had been rejected. However, after the Florida Supreme Court ruled that a greater portion of the map was invalid than those two districts found void by the trial court, and the legislature failed to agree on a new remedial plan, the court approved its own plan.[[15]](#footnote-16) The North Carolina court issued a preliminary injunction on November 20, 2019,[[16]](#footnote-17) but it remanded to the legislature the first right to remedy the violation,[[17]](#footnote-18) and accepted the revised legislative map for use in 2020.[[18]](#footnote-19)

## The 2020 Redistricting Round: Institutions and Context

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

But, as noted earlier, we cannot understand the role of state courts as checks on partisan gerrymandering without understanding the straw which they had to make bricks. Below we identify more than adozen ways in which the context within which redistricting occurred, and the institutions and practices of redistricting in the 2020 round, differed from earlier redistricting periods. Here we elaborate on several points made earlier and considerably add to that discussion.

1. There are several changes to redistricting language in state constitutions recently added (via initiative) after it seemed --based on the responses to challenges to partisan gerrymandering brought in the early part of the 2010 round of redistricting and in earlier decades-- that federal courts would not entertain claims against partisan gerrymandering. The most important of such changes involved taking redistricting out of the hands of legislatures and putting it into the hands of a commission. The pressure to take redistricting out of the hands of legislatures intensified after *Rucho*. There are now eleven states[[19]](#footnote-20) in which primary responsibility to draw Congressional districts is in the hands of commissions.[[20]](#footnote-21) Colorado, Michigan, and Virginia established these commissions during the past decade.[[21]](#footnote-22)
2. Reforms involving the addition of commissions usually included changes in the specific criteria that were to be used in mapmaking identified in the state constitution. As of the beginning of the 2020 round of redistricting, 14 states had in their constitution some prohibition on political gerrymandering.[[22]](#footnote-23) The effectiveness of those statutes or provisions in place for the 2010 redistricting round were not tested in court (with Florida the notable exception).[[23]](#footnote-24)
3. The 2010 round provided inspiration for state courts in the 2020 round by showing how provisions affecting gerrymandering could be operationalized and enforced, but especially in terms of showing how language such as “free and equal” in a state constitution could be used as a bar against egregious partisan gerrymandering. Even in states where there was not language directly about partisan fairness, 26 states have constitutional language, such as that requiring elections to be “Free”, “Free and Open”, or “Free and Equal” (Douglas 2014; Wang, Ober Jr., and Williams 2019).[[24]](#footnote-25) The Pennsylvania Court in *League of Women Voters* was the first state court to creatively reinterpret such language as being violated if there were egregious partisan gerrymandering. But in most state courts that had this language that could be interpreted as anti-gerrymandering, they did not do so (a point we elaborate on in the next section).
4. The U.S. Supreme Court in *Rucho* gave direct encouragement for state courts to assume the burden of policing partisan gerrymandering. While the Court asserted that the federal judiciary was not the venue to adjudicate the harms caused by partisan gerrymandering, it also claimed that it was not tossing “complaints about districting to echo into a void” *Id*. at 2507. According to the court majority, among the options left available to police bad behavior are “state amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage” *Id*. The Court also noted that Congress can use the Election Clause to reform the redistricting process. *Id.* What is ofdirect relevance to the 2020 role of state courts in policing partisan gerrymandering is this language in *Rucho*: "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id*. at 2507 (emphasis added).[[25]](#footnote-26) Thus, the Supreme Court clearly distinguished what it now saw as the distinct roles of federal and state courts in policing partisan gerrymandering.
5. The place where we most expect to see egregious partisan gerrymandering are states where one party has complete control of the redistricting process. This is often called “trifecta” control. Any instance of this is such that one political party is unconstrained by any veto-gate. When we describe state government control, we will use the term trifecta. When we talk about control over redistricting, will use the term preferred by the National Conference of State Legislatures: *party control*.[[26]](#footnote-27)

In the post-*Baker v. Carr,* 369 U.S. 186 (1962) decades, state governments were largely under divided control (Fiorina 1994). Even when the government was not divided, there was much more crossover voting such that voters would split their ballots between parties (Jacobson 2015b). Trifecta government has increased especially as states have realigned after the Solid South has transitioned from Democratic control to Republican control (Aldrich and Griffin 2018; Issacharoff and Pildes 2022).

In the 2010 redistricting round Republicans disproportionately had party control.[[27]](#footnote-28) However, this advantage in places where Republicans controlled the process declined in the 2020 round.[[28]](#footnote-29) Although the total number of states where the process was controlled by a single party actually increased, and Republicans controlled the process in one additional state and the Democrats in two additional states, the specific states where this control was an the number of districts in those states meant that the advantage that Republicans had in 2010 (162 district advantage) was significantly reduced in 2020 (108 district advantage).[[29]](#footnote-30) See for the complete breakdown of party control.

1. The incentives for partisan gerrymandering increased in the 2020 round. On the one hand, the U.S. is experiencing hyper levels of elite party polarization last seen more than a century ago (Fiorina and Abrams 2008; McCarty, Poole, and Rosenthal 2016; Pildes 2011). On the other hand, politics is more competitive (for the presidency, control of the Senate, and control of the U.S. House of Representatives) than at any time in the previous 130 years (Lee 2015, 2016). That level of competition raises the stakes for congressional gerrymandering since small shifts in the number of House seats could be decisive for either party to gain complete control over the national government.
2. There was not a perfect congruence between control of the legislative and executive branches of a state and dominance vis a vis the partisan identification of state supreme court justices. Because of longer terms for judicial officers, at-large elections, and other dynamics including gerrymandered legislatures, state courts were somewhat more Democratic than state legislatures. Relevant here, in some states, the balance of partisan identifications on the court was such that, if most or all of the justices who identified with the minority party found a map unconstitutional under state law, even if only one or a few justices whose party was congruent with that of the party in legislative control declined to support a map from that party, the state court might, by a divided vote, nonetheless end up rejecting that map as unconstitutional.[[30]](#footnote-31)
3. Data from the federal census is required for the purpose of reapportionment and redistricting the House of Representatives. The Census Bureau report to the states of the data needed for redistricting was delayed to an unprecedented extent.[[31]](#footnote-32) Usually delivered by April 1 in the year ended in “1” (and usually released earlier on a rolling basis so states that that have legislative elections in odd years have the data with enough time to complete their new districting plans), it was not delivered until August 12, four months late.[[32]](#footnote-33) This delay had consequences for how the redistricting process played out. For instance, the delay meant that the time between enactment of a plan and primary elections were shortened. Pertinent to our current discussion, the delay of data meant that there was a shorter time between enactment and an election, and that resulted in less time for a plan to be litigated as being violative of state or federal law. This point is elaborated on in point 10.
4. It might not seem that a provision about racial/ethnic representation would be that relevant to issues of partisan gerrymandering, but in reality the two are highly correlated (Hasen 2018). In states with substantial minority populations, the consequences of maps for racial representation and the consequences of those same maps for partisan representation are usually inextricably intertwined. Minority populations are still heavily Democratic, while non-Hispanic Whites tend to vote Republican, with the proportion of non-Hispanic Whites voting Republican in some southern states now at or over 75%.[[33]](#footnote-34) By “cracking” (dispersal gerrymandering) or “packing” (concentration gerrymandering) minority voters, Republicans can obtain partisan advantage. Thus, when Section 5 preclearance was eliminated, it is now much easier for Republicans in states under complete Republican control to disregard the requirements of satisfying Section 2 of the Voting Rights and choose to manipulate minority population concentrations in the maps that are passed in a way that benefits them in partisan terms.
5. The Supreme Court’s gutting of Section 5 of the Voting Rights Act in *Shelby County. v. Holder*, 570 U.S. 529 (2013) represents a radical turn from the previous five decades of redistricting (Engstrom 2014; Hasen 2013). Section 5 of the Voting Right Act[[34]](#footnote-35) required preclearance by the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice or the District Court for the District of Columbia of any election law changes, including redistricting. The trigger clause for Section 5 was held to rely on outdated data (voter turnout by race) to identify which states (or portions of states) would come under preclearance scrutiny (Blacksher and Guinier 2014).[[35]](#footnote-36) At the time of the 2010 redistricting cycle, Section 5 applied to sixteen states in whole or in part -- most of the southern states and some other states with substantial minority populations (NCSL 2009, 80; Table 6).[[36]](#footnote-37) Now it applies to none. Because of the partisan divisions and polarization in Congress, Section 4 (the trigger clause) has not been restored, and the present composition of the U.S. Supreme Court suggests that even if a better designed trigger clause were to be passed by Congress it might not survive Supreme Court review. Without preclearance, states previously covered under Section 5 need not submit their plans for approval by the federal government as non-retrogressive. Taking advantage of this new freedom, some previously covered states neglected to draw districts that would have been required by Section 5 and failed to draw districts that would be seen as required by Section 2 under existing case law. Even when subsequently found as in violation of Section 2, a remedy might not occur until after one or several elections are held under discriminatory maps.
6. Challenges to the application of the *Gingles* prongs for identifying a violation of Section 2 have been brought.[[37]](#footnote-38) The claim is that Section 2 requires plaintiffs to show that a *race-blind* map could have been drawn (or perhaps even was *likely* to be drawn) to satisfy the first prong of the three-pronged *Gingles* test for a Section 2 violation. The first prong requires a district that is reasonably compact containing a majority of the protected minority to be drawn.[[38]](#footnote-39)
7. In 2022, to a greater extent than in previous decades, there will be congressional plans used for elections that trial courts have found to be unconstitutional. Delay in delivering census data, in conjunction with the end of Section 5 preclearance, and contemporaneously with a new and unfortunate use of the *Purcell Principle*,[[39]](#footnote-40)made it possible for some maps found by trial courts to be unconstitutional to still be permitted for use for just the 2022 election. *Purcell* demands “that courts should not issue orders which change election rules in the period just before the election” (Hasen 2016). Moreover, they delayed the creation of plans in ways that prohibited courts from holding trial on the merits. Even if a trial were to happen, and that court found a legislative plan unconstitutional, it would lack sufficient time to draw a constitutional remedial plan if the court deemed it necessary to give the legislature “another bite at the apple.” Or, on appeal, a higher court would stay the decision on either *Purcell* grounds or because of a dispute in the interpretation of existing law. In Alabama and Louisiana, federal trial courts found legislative plans to be unconstitutional on Section 2 grounds and ordered both states to draw new plans that comply with the Voting Rights Act, but the U.S. Supreme Court has stayed those rulings based on the *Purcell* principle.[[40]](#footnote-41)
8. Beginning in the 2010 redistricting round and continuing throughout the decade we saw dramatic changes in which type of litigant was motivated to challenges redistricting plans under the *Shaw* (*Shaw v. Reno*, 509 U.S. 630, 1993)standard that race could not be used as the preponderant motive in how (all or some) of the district lines were drawn in a plan. When the *Shaw* doctrine first came into play it was Whites, conservatives, and Republicans who brought *Shaw* suits; minorities, liberals, and Democrats opposed them. There were two kinds of motivation at play for using a *Shaw*-based strategy to challenge a map. On the one hand there was a principled belief that the only legitimate kind of redistricting was race-neutral (if not race-blind). On the other hand, there was the strategic consideration that if a racial gerrymander was undone then the partisan gerrymander that it helped to effectuate would be mitigated even if not eliminated. When the *Shaw* decision came down, control of most southern legislatures was still in the hands of the Democrats, and so the partisan gerrymander that litigators sought to unravel was one favoring Democrats. But as time wore on, southern states came under Republican control (Kousser 2010; Mood III and McKee 2022) and so the incentives to bring a *Shaw*-type lawsuit flipped. Now it Democratic and minority interest groups who are most likely to file a *Shaw*-type lawsuit as Republicans redistrict in a way that packs minority voters into a handful of districts (which has the effect of a packing partisan gerrymandering benefiting Republicans) in proportions well beyond what is needed to provide the minority community a realistic opportunity to elect candidates of its choice (Lublin, Handley, Brunell, and Grofman 2020).[[41]](#footnote-42)

Thus, just as the end of Section 5 preclearance affected the context within which districting occurs and changed the incentives/opportunities for partisan gerrymandering because race and partisanship are so closely intertwined, so too did the changes in partisan control of state legislatures affect the incentives to bring *Shaw*-type suits.

1. Several new metrics for assessing partisan gerrymandering were introduced in the past decade, including the *efficiency gap* and the *declination*. The degree of concordance among alternatives metrics, such as the two mentioned above with long established metrics such as partisan bias (in vote share or in seat share) and the *mean minus median gap* were investigated to look at the question of whether (at least for states that were reasonably competitive) it was plausible to expect a high concordance of the various measures. The measures are all quite collaborative in states that are competitive.[[42]](#footnote-43)
2. Tools -- such as Dave’s Redistricting App and PlanScore -- enabled both line drawers and reformers to quickly assess the degree to which a plan deviated from neutrality with respect to a large set of metrics. Moreover, these tools allowed the public to participate in new ways to the process they had previously been excluded from. For instance, members of the public could create plans and submit them to a commission or legislature and put pressure on these line-drawers to consider alternatives. No longer was the process only open to professionals and to legislators and their staff.
3. Computer simulations played a more important role in the 2020 round than in previous rounds. Sophisticated computer simulation tools based on a state’s geography were used to create ensembles (a set of feasible plans satisfying pre-designated criteria) that could inform mapmakers (and courts) about the range of feasible outcomes under the specified assumptions and to identify outliers or plans that came closest to perfect neutrality vis-a-vis any given metric (Becker, Duchin, Gold, and Hirsch 2021; Duchin and Spencer 2021; Duchin and Walch 2022).

# The effects of redistricting and apportionment on congressional districts

Above we describe some of the important aspects of redistricting circa 2020 and highlighted potential impact on the likelihood of partisan gerrymandering. Given the stakes in the current era of tenuous majorities (Fiorina 2017), where the conditions hold for a state to enact a partisan gerrymander, we expect partisans to act in their self-interest; that is, to maximize the number of seats for their party in a state and increase the likelihood of holding a majority in Congress. Thus, it is important to see the nature of party control in states apportioned more than one district.

Table 1 Who Controls Redistricting and Which States Prohibit Gerrymandering?

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

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

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

What we see is that for the 2020 cycle, the Democrats controlled the process in just eight of these states. In those eight states, there is a total of 75 districts. This was an increase from the 44 in the previous decade. Republicans had control in the other 19 states. Here, there are 189 districts. This is, however, a decrease from the 206 districts of the previous decade. So, as in the previous round of redistricting, Republicans had disproportion control in places in which a gerrymander could be enacted.[[43]](#footnote-44) Critical for understanding the 2020 cycle is to notice that although the total number of states where the process was controlled by just one party. But it’s important to notice that the states in which the Democrats controlled the process changed, gaining control in large state New York, and losing control in small state West Virginia.

Table 2 Party Control over Redistricting in 2010 and 2020

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

*Note: Totals calculated by determining which institution had control over the process. As with most aspects of redistricting, it gets somewhat complicated when legislatures have supermajorities that create vetoproof majorities (Maryland, Massachusetts), or when commissions can be superseded by the Legislature (Ohio, New York).*

A simple calculation can be made to help determine the independent effect of apportionment and redistricting on the balance of power in the U.S House.[[44]](#footnote-45) We can look at how many districts a national candidate would have won under one set of maps -- here those that were used in the 2020 election -- and using those same election results projected into the 2022 districts, determine the change in district wins.

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

Using the new district lines from 2020, Donald Trump would have carried 210 districts and Joe Biden would have carried the other 225. Under the district lines drawn for use in the 2022 election, which includes the apportionment changes above, Trump would have carried 209 and Biden 226. Only one seat would have changed party based solely on these changes. That seat benefited the Republicans. Redistricting and apportionment itself did not have a large effect on the outcomes in Congress as judged by projecting 2020 results in new districts. However, the 2020 presidential contests were only partly predictive of what happened in 2022, because there was a midterm tide toward the Republicans in most states. Moreover, candidate quality and campaigns continued to have an impact on electoral outcomes (Jacobson 2015a). Nonetheless, because of the dearth of competitive seats, most seats stayed in the same hands. But that does not mean that gerrymandering did not happen during the 2020 redistricting cycle; rather, as we will describe below, the effects of gerrymandering and apportionment were largely a wash.

At the state level, different patterns emerge. Trump gained one additional seat in each of Georgia, Missouri, Montana, and Tennessee. In Texas, three Trump seats were added. In Florida, Trump gained a plurality in five additional districts. Biden added to his tally in several states, including one seat in each of Colorado, Michigan, New Jersey, New Mexico, New York, and Oregon. He also would have added two seats in Illinois and North Carolina.

Table 3 shows this data. This analysis gives us some clues as to where to look for potential gerrymanders. But we should note that this data reflects the districts as they were contested in the 2022 midterm, and that state courts had stepped in in several states to strike down plans as gerrymanders. Moreover, several states perpetuated existing gerrymanders and this simple analysis would not have identified their map as having been gerrymandered. Other states were able to undo previous gerrymanders, as was the case in Michigan which instituted a new independent commission.

Table 3 Change in Congressional Districts by Party

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

Note: Data compiled as downloaded from Dave’s Redistricting App. The states shown are those that had effects from redistricting or apportionment. The remaining states all had the same number of Trump or Biden districts in 2020 as they did after redistricting.

As of the completion of the 2020 round of mapmaking (ca. November 3, 2022), we have identified 23 states where some claim was made that the congressional map was a partisan gerrymander:[[45]](#footnote-46) Alabama,[[46]](#footnote-47) Arizona, Arkansas, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Tennessee, Texas, Utah, and Wisconsin. Only some of these claims resulted in litigation and even where litigation based on partisan gerrymandering was brought (or in Alabama, Louisiana, and Georgia), where a claim about a racial gerrymander that clearly had partisan consequences was brought in federal court), maps in many of those states survived challenge, or thanks to the *Purcell* principle had plans that were allowed only for one election.[[47]](#footnote-48)

The last two column of Table 1 is an indication of whether there is direct or indirect language in state law that prohibits partisan gerrymandering. Combining the information with the list of states where there is an accusation of a partisan gerrymandering, we find that Arizona, Florida, Iowa, Nebraska, New York, Ohio, Oregon, and Utah all have language that prohibits partisan gerrymandering directly through state law. Additionally, Arkansas, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, and Utah have indirect language like that used in Pennsylvania and North Carolina in the 2010 cycle to strike down plans as partisan gerrymanders.

We now consider these two lists of states where there is direct or indirect language in state law prohibiting partisan gerrymandering and compare to the list of states where a claim that the enacted plan was a partisan gerrymander. We find that all states on the list except Alabama, Arizona, Georgia, Kansas, Louisiana, Nevada, New Jersey, Texas, and Wisconsin have potential for state courts to resolve a partisan gerrymander in state courts. For these states that do not have these state law provisions, we notice several important qualifications. First, all states are bound by the federal constitution and federal law. Federal courts have determined that Louisiana violated the Voting Rights Act.[[48]](#footnote-49) In Georgia, a federal court concluded that “the plaintiffs have shown that they are likely to ultimately prove that certain aspects of the State’s redistricting plans are unlawful”[[49]](#footnote-50) based on evidence that the state violated the Voting Rights Act. The court declined to enjoin the congressional map.[[50]](#footnote-51) The ruling came after the U.S. Supreme Court, using the *Purcell Principle*, stayed the court ruling in of a violation of the VRA in Alabama and Louisiana. Second, in Arizona and New Jersey, congressional redistricting was not done by the legislatures of those states, but instead by an independent commission and a political commission with a neutral chair, respectively. We do not deny that a redistricting commission, whether independent or political, can craft a plan that is discriminatory. But they are excluded from our analysis since there is no alternative plan produced by a court. Finally, Kansas and Wisconsin were under divided control at the time of redistricting, though, circumstances in both states led to the legislature’s preferred maps being enacted for use.[[51]](#footnote-52) We consider both states to be important because in both cases, a governor vetoed the legislature’s preferred plan. Both also led to litigation in state court. In Wisconsin, we have several plans to compare. That leaves Nevada and Texas as the only two states in our list that was drawn by a legislature (with party control over redistricting) that do not have provisions in state law that could be used by a state court to regulate partisan gerrymandering.[[52]](#footnote-53)

# The role of state courts in the 2020 redistricting round

We now relist the states which were highlighted in Table 1 and in the text above in Table 4. In addition to indicating if there are direct or indirect language in the state constitution prohibiting partisan gerrymandering (also shown in Table 1), we now show whether a challenge was brought in state or federal court prior to the 2022 midterm election regarding the plan’s partisan or racial effects.[[53]](#footnote-54)

Table 4 Potential partisan gerrymanders and state law

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| State | Direct | Free, Equal, Open | Challenged based on racial classifications (*Shaw* or Section 2) | Not Challenged in State Court | Unsuccessful  Or Pending Challenge[[54]](#footnote-55) | Successful Challenge[[55]](#footnote-56) |
| *Alabama* |  |  | x | ø |  | P |
| *Arizona* | • | • |  | ø |  |  |
| *Arkansas* |  | • | x |  | p |  |
| *Florida* | • |  |  |  | p |  |
| *Georgia* |  |  | x | ø |  | P |
| *Illinois* |  | • | x | ø |  |  |
| *Iowa* | • |  |  | ø |  |  |
| *Kansas* |  |  |  |  | u |  |
| *Kentucky* |  | • |  |  | p |  |
| *Louisiana* |  |  | x | ø |  | P |
| *Maryland* |  | • |  |  |  | C |
| *Missouri* |  | • | x | ø |  |  |
| *Nebraska* | • | • |  | ø |  |  |
| *Nevada* |  |  |  | ø |  |  |
| *New Jersey* |  |  |  |  | u |  |
| *New Mexico* |  | • |  |  | p |  |
| *New York* | • |  |  |  |  | x |
| *North Carolina* |  | • |  |  |  | C |
| *Ohio* | • |  |  |  | p | O |
| *Oregon* | • | • |  |  | u |  |
| *Pennsylvania* |  | • |  | ø |  | C |
| *Tennessee* |  | • |  | ø |  |  |
| *Texas* |  |  | x | ø |  |  |
| *Utah* | • | • |  |  | p |  |
| *Virginia* |  | • |  | ø |  | C |
| *Wisconsin* |  |  |  | ø |  | x |

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

But there are other states where there was state court action listed in Table 4. A keen eye will notice that we have added two states to this list: Pennsylvania and Virginia. In these two states, court had to intercede because of the failure for a legal plan to be enacted by the governing bodies. In Virginia, the failure of the state’s redistricting commission to agree on a plan led to two co-special masters being appointed to draw the map. In Pennsylvania there was never a map in place by the normal procedures found in the PA constitution.[[56]](#footnote-57) Instead, the legislature and the governor, of different political persuasions, refused to negotiate. That led to the courts holding hearings and choosing among alternatives submitted to them.[[57]](#footnote-58) We include Wisconsin in this list as well because the state court acted to put a map into place. The normal procedures failed in Wisconsin, and although the state court first choose the governor’s plan, when the U.S. Supreme Court remanded in *Wis. Legislature v. Wisconsin Elections Comm'n*, the state court instead choose a map that it considered to most resemble the plan used in the previous decade. That plan was largely considered a partisan gerrymander. Maryland follows for similar reasons; since the plan that was enacted by the state legislature originally was thrown out by a state court, it is consistent with the motivation of this paper.

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

State court case concerning partisan gerrymandering

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

Table 5 Key Case Citations Involving State Courts

|  |  |
| --- | --- |
| State | Citation |
| Arkansas | *Suttlar v. Thurston*, No. 60CV-22-1849 (Ark. Cir. Ct. Pulaski Cty. Mar. 21, 2022) |
| Florida | *Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022) |
| Georgia | *Common Cause v. Raffensperger*, No. 1:22-CV-90 (N.D. Ga. Jan. 7, 2022)  *Pendergrass v. Raffensperger*, No. 1:21-CV-5339 (N.D. Ga. Dec. 30, 2021)  *Georgia State Conference of the NAACP v. State of Georgia*, No. 1:21-CV-5338 (N.D. Ga. Dec. 30, 2021) |
| Kansas | *Rivera v. Schwab*, 512 P.2d 168 (Kan. 2022) |
| Kentucky | *Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Jan. 20, 2022) |
| Maryland | *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. March 25, 2022) |
| North Carolina (2019) | *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019). |
| North Carolina (2022) | *Harper v. Hall*, No. 19-CVS-12667 (N.C. Super. Ct. Nov. 5, 2021) |
| New Jersey | *Matter of Congressional Districts by New Jersey Redistricting Comm’n*, 268 A.3d 299 (N.J. 2022)  *Steinhardt v. New Jersey Redistricting Commission*, No. 086587 (N.J. Dec. 30, 2021) |
| New Mexico | *Republican Party of New Mexico v. Oliver*, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022) |
| New York | *Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 31471 (N.Y. Sup. Ct. 2022) |
| Ohio | *Adams v. DeWine*, No. 2021–1428 (Ohio Dec. 2, 2021)  *League of Women Voters of Ohio v. Ohio Redistricting Commission*, No. 2021–1449 (Ohio Nov. 30, 2021)  *League of Women Voters of Ohio v. LaRose*, No. 2022–0303 (Ohio Mar. 22, 2022)  *Neiman v. LaRose*, No. 2022–0298 (Ohio Mar. 21, 2022) |
| Oregon | *Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021) |
| Pennsylvania (2018) | *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) |
| Pennsylvania (2022) | *Carter v. Chapman*, 7 MM 2022 (Pa. Mar. 9, 2022) |
| Utah | *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah D. Ct. Mar. 17, 2022) |
| Wisconsin | *Johnson v. Wis. Elections Comm’n*,  No. 2021AP1450-OA (Wis. Oct. 6, 2021)  *Wis. Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245 (2022) |

Now that we have determined which states had litigation before the 2022 midterm election, we can discuss these court case in more detail. We start by discussing the states where no direct language prohibits gerrymandering but there is indirect language that was used to ensure a plan was put into place that was non-dilutive. We then move to cases where there is direct language in state law. Finally, we discuss the states where there were cases brought in state court but there is neither direct nor indirect language in state law prohibiting partisan gerrymandering.

### Cases concerning indirect language prohibiting partisan gerrymandering

#### Pennsylvania

We begin with Pennsylvania primarily because Pennsylvania brought new hope that partisan gerrymandering could be litigated in the state courts. During the 2010 round of redistricting, the Republican legislature and Republican governor agreed on a map that was widely panned as an egregious gerrymander (Cervas and Grofman 2020; McGann, Smith, Latner, and Keena 2016; Wang, Remlinger, and Williams 2018). Across three midterm elections, regardless of the vote share received by the Democratic party statewide, it was restricted to winning only five seats of the state’s 18, including in elections in which it received a majority of the votes (Cervas and Grofman 2020). In *League of Women Voters of Pa. v. Commonwealth*, the state Supreme Court overturn the plan and replaced it with a court drawn plan. It relied on indirect language in the state constitution the state constitution. The court ruled it violated the Free and Equal Elections Clause[[58]](#footnote-59) because the enacted plan “dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage.”[[59]](#footnote-60) In the subsequent two elections under the court map, Democrats were able to win nine of the 18 seats.

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

#### North Carolina

Like Pennsylvania, North Carolina does not have direct language in its constitution that prohibits the legislature from drawing a partisan gerrymandering but does have provisions that can be interpreted to prohibit it. Also, like Pennsylvania, North Carolina’s redistricting process was controlled by Republicans for the entirety of the 2010 cycle. The plan originally enacted at the decade’s dawn was struck down in federal court as a racial gerrymander.[[60]](#footnote-61) In replacing that plan, the Legislature said it relied on partisanship as the predominant motivation for decisions about where to draw the lines. Plaintiffs in *Harper v. Lewis* argued that the legislature drew the plan with the expressed intent to maximize Republican advantage and that the 2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause[[61]](#footnote-62), Equal Protection Clause,[[62]](#footnote-63) and Freedom of Speech and Freedom of Assembly Clauses.[[63]](#footnote-64) The court then forced a new draw in which partisanship did not predominate. This map was prepared by the General Assembly. It resulted in five Democratic members being elected, out of 13. In the previous election, Democrats only held three of the 13 seats in Congress.

In the 2020 cycle, the Republican legislature maintained its control over redistricting. The governor, who is a Democrat in North Carolina, has no ability to veto a map based on state law. The map enacted by the legislature was challenged in state court.[[64]](#footnote-65) The court again said that partisan gerrymandering was prohibited by the state constitution. The court ruled that “constitution’s Declaration of Rights guarantees the equal power of each person’s voice in our government through voting in elections that matter.”[[65]](#footnote-66) The NC Supreme Court remanded the case back the lower court to oversee the redrawing of the maps by the General Assembly. When the General Assembly failed to enact a legal map, the court appointed four special masters to oversee the drawing of a map. The court eventually choose a map it prepared with the help of the special masters.

#### Virginia

Bernie, can you write about Virginia?

#### Maryland

Maryland was the subject of an unsuccessful federal lawsuit in the 2010 cycle challenging the Democratic drawn map as a partisan gerrymander.[[66]](#footnote-67) That case was combined with *Rucho* and the U.S. Supreme Court ruled that partisan gerrymandering was not judiciable in federal court. In both the 2010 and 2020 cycle, Democrats had partisan control over redistricting. In 2010, Democrats controlled both chambers of the legislature and held the governorship. In 2020, they held both chambers with supermajorities, but there was a Republican governor. After the Democratic legislature passed a map, the Republican governor vetoed the map, but that veto was overridden. Republicans filed a lawsuit against the state.[[67]](#footnote-68) The court heard testimony and fact-finding. It ruled that based on the evidence of expert Sean Trende, that the map was an extreme gerrymander that subordinated constitutional criteria to political considerations. It found that it was an "outlier" compared to neutrally drawn maps. Like North Carolina and Pennsylvania, there is no explicit provision in the Maryland constitution addressing Congressional districting concerning partisanship. It too found indirect language that prohibits partisan gerrymandering. The court stated that “[o]ur jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State”, including congressional redistricting.

Maryland’s remedy differs from that of Pennsylvania or North Carolina. In those states, though the courts allowed the legislature the first discretion to enact a legal map, the court itself crafted the remedy. In Maryland, the legislature took the opportunity to draw a new map that met the approval of the governor and the courts.

### Cases concerning direct language prohibiting partisan gerrymandering

#### New York

New York is our first case where state courts heard challenges to enacted congressional plans based on language in state law that bare directly on the prohibition of partisan gerrymandering. In the 2010 cycle, the legislature failed to pass a map and federal courts implemented a map. The legislature was under divided control with Democrats controlling the lower chamber and Republicans controlling the upper chamber, with a Democratic governor. In 2014, voters placed new restrictions on congressional redistricting. Language in the constitution includes “Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.”[[68]](#footnote-69) The 2014 constitutional amendment included language to prevent gerrymandering, but they also established a process to attain bipartisan redistricting maps by designing a commission containing individuals of both parties. The commission’s composition, however, contained no tie-breaking mechanism. Even if the commission was successful in its work, it was subject to changes made by the legislature.

In the 2020 cycle, the state government was under party control for the Democrats, including supermajorities in both chambers. The commission failed to produce a map and the legislature enacted its own congressional map that was signed into law by the governor. This map was challenged in state court as having violated the 2014 constitutional amendments. In *Harkenrider v. Hochul*, the State of New York Court of Appeals ruled that the congressional plan passed by the Legislature and signed by the Governor had bypassed the Redistricting Commission and thus were not enacted through a constitutionally valid process. For the congressional plan, the Court also held that the Respondents “engaged in prohibited gerrymandering when creating the districts" *Id*. at 1. The court appointed a special master who prepared the court remedial map.[[69]](#footnote-70)

#### Ohio

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

Like New York, Ohio voters passed a constitutional amendment in 2018 intended to take politics out of the process of congressional redistricting. The original jurisdiction to create a congressional district plan resides with the general assembly.[[70]](#footnote-71) For a plan to go into effect for the entire decade, it must have an affirmative vote of three-fifths of the members of each house, including at least 50% of each of the two largest parties. If the legislature fails to get the necessary vote, a redistricting commission is formed consisting of several state officials.[[71]](#footnote-72) Similarly, the commission vote must include members of both major political parties. Finally, if the commission fails, then the legislature can pass a plan in the form of regular legislation subject to the governor’s signature; however, a plan passed in this form is only valid for two years.[[72]](#footnote-73) Moreover, if passed without three-fifths of all members and half of the members from each major party, it is subject to prohibitions on partisanship.[[73]](#footnote-74) The plan is to remain in effect for four years. Most importantly for our purposes, though, is that even if a map is said to violate the prohibition on partisan gerrymandering, the court has no authority to demand its own map used.[[74]](#footnote-75)

The process for drawing new congressional districts in Ohio had a rocky start for Ohio. Delayed census data pushed against deadlines laid out in the state constitution. The legislature failed to meet its first deadline for the legislature to pass a bipartisan map, with responsibility shifting to the commission. The commission was unable to agree on a bipartisan solution, so responsibility reverted to the legislature. The map passed there were on a party-line vote, meaning they would only be in effect for four years. This plan was challenged in state court.[[75]](#footnote-76) The Ohio Supreme Court ruled that the “General Assembly and the Governor blatantly disregarded that, in 2018, Ohioans voted three to one to amend the Ohio Constitution to eliminate the pernicious gerrymandering of Ohio’s congressional districts” by once again enacting “a rank partisan gerrymander—one that violates both the letter and the spirit of the 2018 reforms.”[[76]](#footnote-77)

With the map it enacted now ruled unconstitutional, the general assembly was allowed to submit a new map. Instead, they gave authority to produce a plan back to the commission. Some Republican members of the commission argued they were no longer required to adhere to the language in the constitution that prohibited partisan gerrymandering, since that language specifically addressed legislature-enacted plans. The commission passed a map on a party-line vote. On this map, Ohio Supreme Court determined it did not retain jurisdiction and that petitioners would need to file new lawsuits.[[77]](#footnote-78) Several new challenges were brought in state court, and the Ohio Supreme Court to ruled that the map passed by the redistricting commission was a partisan gerrymander. Specifically, the court said that the revised plan “allocates voters in ways that unnecessarily favor the Republican Party by packing Democratic voters into a few dense Democratic-leaning districts, thereby increasing the Republican vote share of the remaining districts.”[[78]](#footnote-79) The 2022 election was underway at this point, so the court’s order requires a redrawn plan for the 2024 election. Essentially, the time had expired to put a new map in place for the 2022.

### Cases concerning partisan gerrymandering where there no language prohibiting partisan gerrymandering

#### Wisconsin

Wisconsin, like Pennsylvania, had enacted one of the most extreme gerrymanders of the 2010 cycle. That plan was the subject of a federal lawsuit that reached the U.S. Supreme Court but was mooted by *Rucho*.[[79]](#footnote-80) There are no provisions in the Wisconsin constitution that speak to partisan gerrymandering, and therefore no route to litigation.

In the 2020 cycle, the political context had changed from the previous decade when Republicans had party control over the process. Though the state legislature remained in firm control for the Republicans, the governor was a Democrat. The state legislature and governor failed to agree to a plan. The Wisconsin Supreme Court took over jurisdiction regarding congressional redistricting. The court determined that it would choose among submissions to the court employing a “least change” approach. We should note that we are skeptical of this approach, and new research from computational social science shows that the least change approach is fraught (Becker and Gold 2022). Among the proposals to the court included a plan from Governor Evers and one from the state assembly and state senate. The court adopted the governor’s plan.[[80]](#footnote-81) Among the reasons given was that it had the least alterations to the previous maps[[81]](#footnote-82) and that it complied with the U.S. Constitution’s Equal Protection Clause, the Voting Rights Act, and the Wisconsin Constitution.[[82]](#footnote-83)

#### Kansas

For the 2020 cycle, Kansas legislature was controlled with supermajorities by Republicans. The governor was a Democrat. So, while the governor was able to veto the plan drawn by the Republican legislature, she was overridden.[[83]](#footnote-84) Plaintiffs challenged the plan in state court, arguing it was at partisan and racial gerrymander, diluting minority votes in violation of several provisions of the Kansas Constitution. A state-level judge in Wyandotte County struck down the plan. The court found that the plan (nicknamed “Ad Astra 2”) "was designed intentionally and effectively to maximize Republican advantage," relying on expert testimony to conclude that the plan "[was] an intentional, effective partisan gerrymander.” The state immediately appealed to the Kansas Supreme Court.[[84]](#footnote-85) Two questions were presented to the Kansas Supreme Court: (1) Whether claims of partisan gerrymandering are justiciable; and (2) Whether Ad Astra 2 discriminates against minority voters. “that until such a time as the Legislature or the people of Kansas choose to follow other states down the road of limiting partisanship in the legislative process of drawing district lines, neither the Kansas Constitution, state statutes, nor our existing body of caselaw supply judicially discoverable and manageable standards ‘for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral[,]” and therefore the question presented was nonjusticiable as a political question. The court further held that plaintiffs did not establish the elements of their race-based claims and therefore could not show that Ad Astra 2 discriminated against minority voters. The map originally passed by the state legislature was the map used in the 2022 election.

#### New Jersey

The process of redistricting in New Jersey resides in a political commission composed of an equal number of Democrats and Republicans (six each). In the 2020 cycle, the commission’s tiebreak exerted immense power because the two parties acted independently to create their own plans. The tiebreaker vote went to the Democratic plan. Former New Jersey Supreme court Justice John Wallace, who served as the tiebreaker, justified his selection of the Democratic plan “simply because in the last redistricting map, it was drawn by the Republicans.”[[85]](#footnote-86) The Republican delegation to the commission filed a complaint directly to the New Jersey Supreme Court. They asked the court to vacate the commission’s decision and remand. o Plaintiffs argued that the actions of the Chair were "arbitrary, capricious, and unreasonable," violated "federal and state constitutional equal protection and due process protections," and posed a "common law conflict of interest."[[86]](#footnote-87) But, as can be discerned from Table 1, New Jersey does not have laws that prohibit partisan gerrymandering. The question before the court was whether plaintiffs' allegations were insufficient to support a claim upon which relief could be granted, because they did not assert any constitutional violation. The Court has no role in the outcome of the redistricting process unless the map is "unlawful."[[87]](#footnote-88) So long as the final map is constitutional, the court cannot grant any relief. Court held that plaintiffs' allegations were insufficient to support a claim upon which relief could be granted, because they did not assert any constitutional violation. The map passed by the commission was used in the 2022 midterm election.

### Pending cases in state courts

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

#### Arkansas

Arkansas is a state under party control. The legislature passed a plan through regular legislation. The governor, who is of the same party, refused to sign off on the plan, saying “I am concerned about the impact of the redistricting plan on minority populations.”[[88]](#footnote-89) The governor went on to say: “I decided not to veto the bills but instead to let them go into law without my signature. This will enable those who wish to challenge this redistricting plan in court to do so.” Indeed, voters did file suit in state court alleging that the plan “interferes with and impairs the free exercise of suffrage by Black voters in Arkansas . . . by diluting, impairing, and undermining their ability to elect their candidates of choice.”[[89]](#footnote-90) Plaintiffs further argue that the “2021 Map violates the Free and Equal Elections Clause of the Arkansas Constitution, which guarantees that ‘[e]lections shall be free and equal,’ and that ‘[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited,’ Ark. Const. art. 3, § 2, as well as the Equal Protection Clause, which further guarantees that ‘[t]he equality of all persons before the law’ and ‘shall ever remain inviolate,’ id. art. 2, § 3.”[[90]](#footnote-91) This case remains pending as of November 2022.

#### Florida

A contested process led to the adoption of maps favored by the governor of Florida. The maps initially passed by the Florida legislature was vetoed by the governor. The governor’s opposition to the state legislature’s preferred maps delayed the adoption of a plan until April 2022, which was among the last states in the country to approve a plan. The plan was passed on a party-line vote. Litigants sued in state court alleging that Governor Ron DeSantis “hijacked” the redistricting process, by “unilaterally declar[ing] the Fair Districts Amendment unconstitutional” and by vetoing the Legislature’s congressional plan and “conven[ing] a special legislative session, leaving the Legislature little choice but to consider and pass his own redistricting scheme.”[[91]](#footnote-92) Plaintiffs also allege that the DeSantis Plan “intentionally favors the Republican Party at nearly every turn, eliminating three Democratic seats and transforming competitive seats into Republican-leaning ones. And in so doing, it needlessly produces noncompact districts that split geographic and political boundaries.” The Florida Constitution has direct language prohibiting partisan gerrymandering.[[92]](#footnote-93) o Plaintiffs argue that the DeSantis Plan violates Article III, § 20 of the Fla. Constitution by diminishing minorities’ ability to elect, intentionally abridging and diminishing minority voting strength, intentionally favoring/disfavoring a political party, and violating traditional districting principles such as compactness, and political and geographical boundary splits. Because of the very late passage of a plan, this litigation has not resulted in verdict on the merits.

#### Kentucky

Party control over redistricting was held by one party in Kentucky for the 2020 cycle. Republicans held supermajorities in both chambers and were able to override the veto of the Democratic governor. The map was largely like the plan used in the 2010 cycle, with changes focusing on adding Republican voters to a district where the incumbent won a narrow contest in 2018. The Democratic Party of Kentucky preceded to sue in state court.[[93]](#footnote-94)

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

#### New Mexico

The 2020 cycle in New Mexico was under party control of the Democrats. An advisory commission was established recently, but plans submitted by the commission can be amended by the legislature. Indeed, the legislature did amend the recommendation of a plan called the “People’s Map.” In a signing statement, the New Mexico governor said, “It is my duty to ratify the will of the majority here, which I believe has established a reasonable baseline for competitive federal elections, in which no one party or candidate may claim any undue advantage.”[[94]](#footnote-95) The Republican Party of New Mexico objected to the new map and challenged in state court.[[95]](#footnote-96) Plaintiffs in *RPNM et al.* filed a complaint alleging that “Senate Bill 1... redraws New Mexico’s three congressional districts in contravention of traditional redistricting principles endorsed by the State Legislature and the New Mexico Supreme Court in order to accomplish a political gerrymander that unconstitutionally dilutes the votes of residents of southeastern New Mexico in order to achieve partisan advantage.”[[96]](#footnote-97) Plaintiffs argued that the plan is a political gerrymander in violation of Equal Protection clause in the New Mexico Constitution.[[97]](#footnote-98) The case is pending in state court as of November 2022.

#### Utah

In 2018, voters of Utah established an independent commission to conduct congressional redistricting. That commission was created as an advisory commission allowing the legislature to reject a plan. In 2020, the Utah Legislature changed the law regarding congressional redistricting to make the commission fully advisory.[[98]](#footnote-99) The legislature ignored the commission’s recommendations and established a plan that was signed by the governor on November 12, 2021. A lawsuit was filed by the League of Women Voters of Utah in state court.[[99]](#footnote-100) The complaint alleges that (1) the Utah Legislature’s 2021 Congressional Plan “violates multiple provisions of the Utah Constitution, including the Free Elections Clause, the Uniform Operation of Laws Clause, protections of free speech and association, and the right to vote; and (2) that “the Legislature’s repeal of Proposition 4 [a bipartisan citizen initiative that prohibited partisan gerrymandering] violated the people’s constitutionally guaranteed lawmaking power and right to alter and reform their government.”[[100]](#footnote-101) This case is pending as of November 2022.

### States where courts were forced to act because legislature or commission failed

#### New Hampshire

The New Hampshire legislature and governor are both controlled by Republicans. New Hampshire is a closely contested state in statewide elections. The popular governor’s term ended in 2022. The 2020 redistricting cycle ended in a stalemate, which can be traced to the different governing coalitions between the legislature in district elections and the governor running statewide. The governor vetoed the legislature’s map. The governor stated that “I made it pretty clear, and they didn't want to take that advice, and I don't think my veto on any of those maps shocked them.”[[101]](#footnote-102) The New Hampshire Supreme Court appointed a special master to draw the two-district congressional map. New Hampshire was the final state to codify its 2022 congressional map.

#### Connecticut

In contrast to New Hampshire, Connecticut’s legislature and governor are both controlled by Democrats. If the legislature fails to pass a plan with two-thirds majority in both chambers and receive the governor’s signature, the process is transferred to a nine-member backup political commission. Because of census data delays, the committee tasked with the legislature’s map drawing missed its September 15th deadline, and the process was shifted to the commission.[[102]](#footnote-103) The commission failed to deliver a plan by its statutory deadline, and the Connecticut Supreme Court took over the process and named a special master to draw the state’s five congressional seats. The court approved the special master’s map on February 10, 2022.

#### Minnesota

Minnesota was under divided government at the time of the 2020 redistricting cycle. Democrats controlled the state house and governorship, and Republicans controlled the state senate. Because the typical process failed in Minnesota, the Minnesota Supreme Court took over the process.[[103]](#footnote-104) It named a five-person panel to develop a map. That map was delivered by the court on February 15, 2022.

# Evaluating the consequences of court action

The next issue we take up is evaluating the consequences of state court action in those states where the state court rejected as an unconstitutional partisan gerrymander (North Carolina, Maryland, New York, Ohio). We also evaluate plans where the failure of the relevant redistricting authority to act in a timely fashion led to the state court adopting a plan (Connecticut, Minnesota, New Hampshire, Pennsylvania, Virginia, Wisconsin). For New Hampshire and Pennsylvania, we compare the Legislature’s map against the court map. For Connecticut, Minnesota, Virginia, and Wisconsin, we only show the data for the plan that was used in the 2022 midterm election.

For the states where there is a map against which we can compare the court-ordered (or ordered to modify) map, we show in Table 6 comparisons of the two maps using metrics provided in Dave’s Redistricting App. Ohio is a special case since the peculiar provisions in its constitution did not allow the Ohio Supreme Court to draw a map of its own. Instead, that Court repeatedly rejected legislative and commission maps as they submitted new maps that differed little from the previously rejected map, until the election became so close in time that the legislature was able to get one of its maps adopted by a federal court to conduct an election. Thus, even though the legislative maps were rejected by the state court, in Ohio there is no state court drawn map to compare against. We therefore compare the map first ruled unconstitutional against the map that was used in the 2022 election.

Table 6 Direct Comparisons Between Legislatively Drawn Map and State Court Drawn Remedy

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

*Notes: Total County Splits refers to the number of county piece in total. Compactness is “You Know It When You See It” measure from (Kaufman, King, and Komisarchik 2021). Votes Bias is calculated from the 2020 Presidential election, as are the number of Biden Seats. Negative vote bias numbers indicate that the plan favors Democrats while a positive sign indicates the plan favors Republicans. The 2022 Seats is the number of Democratic seats after the 2022 midterm election.*

What we see from Table 6 is that the state court map usually dominates the legislative map. But there are some notable exceptions illustrating tradeoffs. For instance, in New Hampshire, both the number of county splits and compactness scores get worse, but the vote bias gets slightly better. In New York, the county splits measure and compactness measures get markedly better, though the vote bias gets slightly worse. We also notice that among all the court-imposed maps, the vote bias is extremely low, except in two cases. First is Minnesota, where there is significant pro-Republican bias. The second is in Wisconsin, which also has an even greater amount of pro-Republican bias.

# Discussion

As we discussed above, there are many reasons why the 2020 round of redistricting is different from previous round, with one key aspect of that difference being the U.S. Supreme Court’s definitive opting out of any role in controlling gerrymandering and the concomitant new role of state courts in regulating partisan gerrymandering as the last avenue of defense. The existence of new constitutional amendments with explicit prohibitions on partisan gerrymandering has given some state courts power to address the issue of partisan gerrymandering. But state courts have also shown creativity in reinterpreting other state constitutional provisions. Not all state court justices, however, have been willing to consider partisan gerrymandering to be something appropriate for state courts to deal with using state constitutional provisions, at least in the absence of specific provisions for them to rely upon. And even when there are such provisions, some state court justices have found reasons to conclude that the challenged map really does not rise to the level of a constitutional violation even when academic scholarship suggests that it did. We have not here detailed the decisions by the court and the justifications for hold a plan to be unconstitutional. Nor did we attempt to determine what factors would cause a justice to either ignore the law or to interpret the evidence differently than from those justices that did find a violation.

As we assess the overall evidence, attempted gerrymandering was as egregious and pervasive than in the past. Several factors combined has meant that the national *effect* of gerrymandering was largely offsetting. First, taking redistricting out of the hands of the legislature in several states meant that some trifecta states were left impotent. Second, state courts took a much more aggressive stance in applying provisions of their state constitution as bars to gerrymandering and drawing maps of their own. Third, the relative balance in state where each party had control over the process meant a decrease in the advantage for the Republicans comparted to the 2010 redistricting cycle. The overall level of egregious gerrymandering is less in the congressional maps being used in 2022 than many scholars anticipated would be the case after *Rucho* was decided in 2018. But in our view, in some states, such as Florida, it is still unacceptably high, and a threat to democracy. Moreover, the failures of the Ohio and New York commissions, along with significant bias in some commission drawn maps, lead us to additional questions about the best path forward for fair districting considering the federal judiciary’s abdication.

# Looking to the Future

## Further institutional remedies to limit partisan gerrymandering are going to be hard to implement and/or of limited utility

In rejecting a federal role in policing gerrymandering while not condoning gerrymandering, the *Rucho* court majority explicitly states that it is not expect to “condemn complaints about districting to echo into a void.”[[104]](#footnote-105) Among the options left available to police bad behavior, according to the Court, are “state amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage.”[[105]](#footnote-106) But, as we have emphasized, the *Rucho* opinion, in effect, encouraged state courts to involve themselves in policing gerrymandering and left open the potential for a state court to take partisan considerations into account if it was given responsibility for state redistricting because of the failures of redistricting bodies. Further, the Court says that Congress can use the Election Clause to reform the redistricting process.[[106]](#footnote-107) And it mentionsother ways states can limit partisanship in districting. “Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, § 3.”[[107]](#footnote-108)

But each of these potential mechanisms is limited. State legislatures in control of redistricting are the same ones that benefit from the self-perpetuation of incumbents and the maintenance of partisan control based in part on partisan gerrymandering and have little incentive to eliminate their own power to gerrymander (Wang, Cervas, Grofman, and Lipsitz 2021). State legislatures are unlikely to limit their own power to draw districts. As such, state usually needs to permit citizen initiatives to take control of redistricting out of the hands of legislatures or add language which might directly or indirectly limit gerrymandering. Many states do not have these procedures, and often when they do, the legislature is still able to evade them by rending the commissions as advisory or eliminating them completely (Utah, Missouri). Even where initiative potential exists, initiatives are very expensive to get on the ballot and then very expensive to run if you want any chance of success, especially if there is a determined and well-funded opposition. Still, we know such initiatives did get on the ballot in the past and some did pass, and so we can expect at least some states to change their constitution to take redistricting out of the hands of the legislature in the future or attempt to limit gerrymandering in other ways.

Unfortunately, however, few redistricting commissions are truly independent of partisanship, and the newest ones are, on balance, as flawed as ones created earlier. Many have legislators or other political figures on them; others have the nomination process for some or all the commission members in the hands of politicians; and some have rules that allow legislatures to amend commission recommendations or reject them entirely.

Moreover, some of the new commission rules were, in essence, designed as recipes for failure, because they were likely to lead to partisan deadlock (New York, Virginia), or to a cycle of irreconcilable conflict between the state legislature and the state court (Ohio), or simply to a bipartisan deal with incumbents of both parties protected and the status quo frozen. Thus, even though some states have attempted to remove partisanship from the redistricting process by shifting responsibility to redistricting commissions, not all commission states are likely to end up with good government maps.

Passing new initiatives specifying redistricting criteria has the same problem as passing new initiatives to take redistricting out of the hands of the legislature. But perhaps even more importantly, it is an error to rely on specifying criteria to be used for redistricting to prevent partisan gerrymandering. As we have seen, even states with clear anti-gerrymandering rules may fail to see those rules enforced, and even with a litany of good government criteria enshrined, unless partisan bias is directly evaluated, there is always the potential for what we have called a “stealth gerrymander” (Cervas and Grofman 2020). Moreover, parchment rules are only as good as the will and efficacy of the enforcing agency.

Moreover, waiting for Congress to act to remedy gerrymandering is likely to be futile, since it would require trifecta control of Congress in the hands of the party that most greatly suffers from gerrymandering. Gerrymandering itself makes it unlikely that that would be the party would have such trifecta control. Moreover, even with trifecta control it is likely that there would be divergence of opinion among the party’s House members. Some House members are beneficiaries of partisan gerrymandering. Moreover, action would have to overcome a supermajority filibuster in the U.S. Senate. Expecting Congress to police partisan gerrymandering is highly unrealistic. Congress is highly polarized, and both the Senate and the House are closely divided in party terms so that even if one party controlled both branches and the presidency, it would be hard to get sufficient agreement that a bill regulating gerrymandering could pass. Moreover, if there were trifecta control at the federal level, it is highly likely that the political party with that control would also be the party that was benefiting the most from partisan gerrymandering and thus unlikely to want to undo its current advantages no matter how concerned it might be about what might happen to it in future redistricting decades.

Similarly relying on state courts to police gerrymandering is also limited. We have seen its importance in the 2010 round in three states. In the 2020 round, five states were found to violate state laws regarding partisan gerrymandering before maps were even enacted, with many more states under pending litigation. One reason for concern is that political parties are now seeing control of state courts as much more important than it had been seen in the past, with the actual or potential role of state courts in redistricting a major element of that increased concern. Much more money is being spent on state court judicial contests than in the past.[[108]](#footnote-109) As money in judicial elections become more important it is also likely that state judges will be more ideological and more partisan than in the past.

## Mid-decadal redistricting

Four states have maps that are currently ruled unconstitutional being used in the 2022 election, accounting for 10% of all districts.[[109]](#footnote-110) Conservative estimates are that these unconstitutional plans likely cost the Democrats between 5 and 6 seats. If their unconstitutionality is sustained by higher courts, they will need to be redrawn for the 2024 election. But these will not be the only “new” maps in 2024. The Supreme Court has held that there is no bar on mid-decadal congressional redistricting and states under trifecta role may well choose to polish their previous partisan gerrymandering efforts by tinkering with their map to improve its partisan performance.[[110]](#footnote-111) Moreover, there is historic precedent for mid-decade redistricting (Engstrom 2013).

## Congressional power to seat members

There are several issues to consider regarding election administration and the power of entities under partisan control to refuse to accept the (legitimate) results of elections (Grofman 2022). One that is particularly relevant to redistricting is about the use of Congressional power to refuse to seat members. Could the House refuse to seat members from a state whose map they viewed as a partisan gerrymander? What about refusing to seat just those members whose individual districts were categorized as partisan gerrymanders? Were this to happen, one can readily imagine a constitutional crisis. Though this is not a proposal that has been floated, especially since a majority in Congress would need to agree and that majority would have had to already overcome the bias from gerrymandering, we view it as important to recognize.

## Independent state legislature theory

Can state courts constrain partisan gerrymandering? In both the 2010 round and the 2020 round state courts have rejected plans they determined to be partisan gerrymandering, using a variety of evidence, even if they then allowed the previous redistricting authority to propose a revised map which they subsequently approved. However, a new challenge has emerged that would threaten this power to hold accountable political manipulation of district maps for federal elections. The independent state legislature theory is based on the premise that state legislatures are vested with full and unconstrainted authority in the U.S. constitution for exercising its power over federal elections. This theory asserts that the Electors Clause and Elections Clause found in Article 2, Section 2, and Article I, Section 4, respectively, “vests state legislatures with plenary power to craft rules for Congressional and Presidential elections unbound by state constitutions and free from review by state courts” (Weingartner 2021 emphasis added).[[111]](#footnote-112)

The U.S. Supreme Court has agreed to hear a case in the October 2022 term that challenges the North Carolina Supreme Court’s ability to replace a congressional plan from the state legislature with one of their own, after having ruled that the legislature’s plan violates the state constitution. If the petitioners are successful in *Moore v. Harper*,[[112]](#footnote-113) all non-legislative solutions to cure partisan gerrymandering are suspect. In particular, the 2022 plans in Pennsylvania and New York would also be unconstitutional, since they, too, were put into place by state courts. Of course, were the U.S. Supreme Court to adopt the independent state legislature theory it would have to reject one of its own recent precedents, that in *Rucho*, where the Court, *after its own condemnation of excessive partisan gerrymandering,* points to state courts as a potential remedy -- in language quoted earlier in this essay.

# Recommendations

There are several aspects of the 2022 redistricting that we think can and should be improved prior to 2030 districting.

1. The notion that changes in election law should not come too close to an election is a sensible insofar as there is ‘potential for public confusion and election chaos’. But, in our view, the *Purcell* *Principle* has been wrongly applied in the 2020 round. The Supreme Court has given too much credibility to state legislative claims that there was not enough time to draw a congressional map that was constitutional. Even in New York it took a team led by one of U.S. less than 30 days to draw the congressional map for a state court and make it available for public comment and redraw it extensively after public comment was received. It was, in our view, clearly a superior map to the partisan gerrymander proffered by the state. Moreover, as Hasen (2016) argues, the public interest of having constitutional plans (as judged by the trial court) at the time of an election outweighs overstated claims about the dangers of changing deadlines for things like the collection of nomination petitions. Even if the U.S. Supreme Court were to eventually overturn a lower court map, the balance of risks seems to us such that we are better off using that map for one election than using a map the trial court found unconstitutional for that same election. We propose a simple solution as to how to avoid situations where the *Purcell Principle* might be likely to apply. Once it appears that the legislature may not be able to offer a constitutional map in a timely enough fashion, the Court should bring in a special master in advance[[113]](#footnote-114) to have a map in place that can then be circulated for public comment on a very tight schedule.[[114]](#footnote-115)
2. As we suggested above most legislative commissions are badly designed. Here we suggest the California model, with a mix of citizens with different partisan preferences, including those who have no expressed party preference. One thing to avoid are commissions with an even number of members and no “neutral” chair to steer the progress away from partisan extremism or simple incumbency protection.
3. we do not view direct criteria in state law as sufficient to prevent partisan gerrymandering, we do view it as necessary. Drafting a set of criteria that prohibits favoring or disfavoring a political party seems to have a significant effect on reducing partisanship in districting schemes. In terms of ordering criteria, this should be listed as most important, above other limiting criteria such as limiting political subdivision splits, since a revers ordering can lead to a *stealth gerrymander*.

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*Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004) <https://casetext.com/case/vieth-v-jubelirer-4#p272>

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1. \* Postdoctoral teaching fellow, Institute for Politics and Strategy, Carnegie-Mellon University. The authors would like to thank Nicholas Murphy, Paloma Del Toro, and Dorothy Lu for research assistance. We are grateful for comments from Ben Williams, and conversation with Sam Wang. We were added by research from the Brennan Center, FiveThirtyEight, All About Redistricting, Dave’s Redistricting App, and various other sources for help tracking down litigation, data, and map source files. [↑](#footnote-ref-2)
2. + Distinguished Professor and Jack W. Peltason Chair of Democracy Studies, Department of Political Science, University of California Irvine [↑](#footnote-ref-3)
3. # New York Law School [↑](#footnote-ref-4)
4. Among the states where legislatures draw congressional maps, all but North Carolina allow the governor to veto the plan. [↑](#footnote-ref-5)
5. As we will explain below, legislatures do not all draw redistricting plans. Moreover, in some states where there is split control, the legislature has a vetoproof majority. [↑](#footnote-ref-6)
6. The exact text of constitutional provisions varies by state. Traditional criteria, in addition to those listed above, include preservation of communities of interest and protection of the voting rights of racial minorities. Some courts have also accepted that avoiding the pairing of incumbents, and/or preservation of the cores of existing districts are legitimate concerns in map-making, but these considerations would not normally be included in the category of traditional redistricting criteria of the kind that are found in most state constitutions.

   States without specific criteria in their constitution affecting congressional mapmakingare Alaska, Connecticut, Delaware, Illinois, Indiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, North Dakota, South Dakota, Tennessee, Texas, Vermont, and Wisconsin. For more, see Congressional Redistricting Criteria and Considerations, Sarah J. Eckman, November 15, 2021 (https://crsreports.congress.gov/product/pdf/IN/IN11618), the National Conference of State Legislatures [Ben Williams and Wendy Underhill, September 2017 (https://www.ncsl.org/research/redistricting/redistricting-criteria-legisbrief.aspx)], and Criteria for congressional districts, All About Redistricting (https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/criteria-for-congressional-districts/) [↑](#footnote-ref-7)
7. Not every effort to change control of redistricting was successful. In Pennsylvania, for example, groups such as the Committee of Seventy and Fair Districts PA advocated for significant changes to the redistricting process. No changes were made. In Missouri, voters passed the “Clean Missouri” act, but it was later amended to lose its teeth. Ohio voters passed a significant change in constitutional redistricting rules, but with a flawed process that was subverted by the majority party which continued to have influence over the map. [↑](#footnote-ref-8)
8. Some reformers have also advocated a change in the basis of elections, from single seat plurality rules to some form of proportional representation with multi-seat constituencies. Reformers in some states have also considered language that would require single member districts to be drawn so as to give expected seat share results proportional to a party’s statewide vote in prior elections, but this idea has generally foundered on the fact that single seat plurality elections cannot be expected to give proportional results (Grofman 1982). [↑](#footnote-ref-9)
9. See Douglas (2014), *The Right to Vote Under State Constitutions* for more information on the right to vote found in state constitutions. [↑](#footnote-ref-10)
10. As noted above, most states still have redistricting under legislative control; however, several states have advisory commissions or backup commissions if the legislature fails to pass a map. Additionally, states differ on the voting rule required to pass a map. For instance, Ohio requires the legislature to pass a map with a supermajority; otherwise, a backup commission retains jurisdiction over the creation of a Congressional plan. [↑](#footnote-ref-11)
11. For an overview of *Vieth* see McGann et al., *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty*, (2016) [↑](#footnote-ref-12)
12. https://www.supremecourt.gov/opinions/03pdf/02-1580.pdf [↑](#footnote-ref-13)
13. (Grofman and King 2007). [↑](#footnote-ref-14)
14. The map that was to be replaced was itself drawn as a remedy to an earlier racial gerrymander. *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). While drawing the remedy, the legislator (and named defendant) admitted to drawing with partisanship as its primary motivation, saying they “propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Rucho*, 318 F Supp. 3d at 808. That map was approved on a party line vote. [↑](#footnote-ref-15)
15. On December 2, 2015, the Florida Supreme Court issued an opinion intended to bring finality to litigation surrounding the state’s congressional redistricting that “spanned nearly four years in state courts.” https://law.justia.com/cases/florida/supreme-court/2015/sc14-1905-0.html. [↑](#footnote-ref-16)
16. The case was in direct response to the U.S. Supreme Court’s ruling in *Rucho* and heard challenges to both the state legislative maps *Common Cause v. Lewis*, 834 SE 2d 425 - NC: Supreme Court 2019 and the congressional Maps. [↑](#footnote-ref-17)
17. Urging the General Assembly to adopt a map in “an expeditious process… that ensures full transparency and allows for bipartisan participation and consensus to create new congressional districts that likewise seek to achieve this fundamental constitutional objective.” <https://www.brennancenter.org/sites/default/files/2019-10/2019-10-28-Harper%20v_%20Lewis-Order.pdf> 17-18. [↑](#footnote-ref-18)
18. While the new maps crafted by the legislature raised questions about their fairness, the court unanimously accepted the map to avoid needing to move primaries. Judge Paul Ridgeway said, “the net result is the grievous and flawed 2016 map has been replaced.” “New congressional maps in North Carolina will stand for 2020, court rules.” Brian Murphy and Will Doran. December 03, 2019. The News & Observer. www.newsobserver.com/news/politics-government/election/article237958719.html [↑](#footnote-ref-19)
19. Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, New York, Virginia, Washington [↑](#footnote-ref-20)
20. Secondary (backup) responsibly is given to commissions in three other states (Connecticut, Indiana, and Ohio), with three more having advisory commissions (Iowa, Maine, and Utah). Backup commissions usually get the opportunity to draw districts when the legislature fails to, again usually because of supermajority requirements. In Connecticut, both the legislature and the backup commission failed, and the state Supreme Court drew the map instead. In Ohio, the process is complicated because the legislature is first to act, and if it fails the backup commission has an opportunity to draw a plan. If it fails, the legislature gets another opportunity, but without the supermajority requirement. That plan, however, is only valid for two years. Indiana passed its map through the legislature, which did not require a supermajority. [↑](#footnote-ref-21)
21. Montana has had a commission since 1973, but only after the 2020 census and after the 1980 census did it have more than one congressional seat. [↑](#footnote-ref-22)
22. Arizona (Requires: Competitive; Prohibits: Favor or Disfavor an Incumbent or Candidate, Use Partisan Data); California (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party; Use Partisan Data); Colorado (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Florida (Prohibited: Intentionally Favor or Disfavor a Party or Incumbent); Hawaii (Prohibited: Unduly Favor a Person or Party); Idaho (Prohibited: Protect a Party or Incumbent); Iowa (Prohibited: Intentionally Favor a Party, Incumbent, Person or Group; Use Partisan Data); Michigan (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Montana (Prohibited: Intentionally Favor Party or Incumbent, Use Partisan Data (except as required by a court in drawing a remedy)); Nebraska (Prohibited: Protect Incumbent, Use of Partisan Data); New York (Prohibited: Intentionally Favor or Disfavor Incumbent, Candidate or Party); Ohio (Prohibited: Favor an Incumbent or Party); Oregon (Prohibited: Intentionally Favor Party, Incumbent or Person); Utah (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Washington (Required: Competitive; Prohibited: Intentionally Favor or Disfavor a Party or Group); National Conference of State Legislatures, “Redistricting Criteria.” Accessed September 25, 2022. https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx [↑](#footnote-ref-23)
23. Florida is the pioneer. In 2010, by initiative, Florida overwhelmingly passed the “Florida Congressional District Boundaries Amendment.” Florida was the pioneer in 2010. The new constitutional provision provided “No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.” FL Const. Art. III sect. 20 (a). [↑](#footnote-ref-24)
24. Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. [↑](#footnote-ref-25)
25. It went on to say that state statutes and constitutions do not provide a renewed basis for federal courts to wade into "one of the most intensely partisan aspects of American political life." 139 S.Ct. at 2507. [↑](#footnote-ref-26)
26. This is distinguished from the term *trifecta* by the fact that some states do not have a role for the governor in the redistricting process, and other states have state legislative compositions such that the governor’s veto can be overridden. *Party control* describes a situation in which one party can unilaterally adopt a redistricting plan. [↑](#footnote-ref-27)
27. Going into 2010 Democrats had party control in six states (Arkansas, Illinois, West Virginia, Maryland, Massachusetts, Rhode Island; 44 total districts). Republicans had party control in 18 states (Indiana, Oklahoma, Texas, Louisiana, Wisconsin, Ohio, Utah, South Carolina, North Carolina, Alabama, Pennsylvania, Georgia, Tennessee, Michigan, Virginia, Florida, Kansas, New Hampshire; 206 total districts). Although Democrats nominally controlled the process in Arkansas and West Virginia, these two states were at the end of the transition from single-party Democratic control to single-party Republican control. By the end of the decade, both states in both chambers had at least 2-to-1 Republican to Democrat ratios. Nebraska’s legislature is non-partisan. [↑](#footnote-ref-28)
28. Going into 2020, Democrats controlled the redistricting process in eight states (Oregon, Massachusetts, Nevada, Illinois, New Mexico, New York, Rhode Island, Maryland; 75 total districts). Republicans controlled the process in 19 states (Indiana, West Virginia, Texas, Alabama, Iowa, North Carolina, Utah, Oklahoma, Georgia, Arkansas, Kentucky, Mississippi, South Carolina, Tennessee, Kansas, Ohio, Florida, Missouri, New Hampshire; 183 total districts). In Kansas, the legislature was subject to the veto of the Democratic governor but overrode her veto with a supermajority vote. Nebraska’s legislature is non-partisan. [↑](#footnote-ref-29)
29. 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. [↑](#footnote-ref-30)
30. In our view the relationship between judicial partisan identification and attitudes toward gerrymandering is not simple and varies across jurisdictions, but demonstration of that point must be left to subsequent ongoing research. [↑](#footnote-ref-31)
31. This data is P.L. 94-171. It includes detailed data on the entire population of the United States and is views as the authoritative dataset for redistricting. [↑](#footnote-ref-32)
32. This delay occurred in part because of COVID-19 and in part because of administrative failures. [↑](#footnote-ref-33)
33. e.g., Georgia in 2020. Whites supported Trump over Biden 69% to 30%. Blacks gave only 11% support to Trump, and Hispanics split 37% to Trump and 62% to Biden. Georgia Exit Polls based on 4,385 total respondents, <https://www.cnn.com/election/2020/exit-polls/president/georgia>. In South Carolina, Trump received the support of 73% of White voters, but only 9% of Black voters. South Carolina Exit Polls based on 1,684 total respondents. [↑](#footnote-ref-34)
34. 42 U.S.C. §§ 1973–1973p (2006) [↑](#footnote-ref-35)
35. *Id.* at 2619–31 [↑](#footnote-ref-36)
36. Alabama, Alaska, Arizona, (part) California, (part) Florida, Georgia, Louisiana, (part) Michigan, Mississippi, (part) New Hampshire, (part) New York, (part) North Carolina, South Carolina, (part) South Dakota, Texas, Virginia. [↑](#footnote-ref-37)
37. *Merrill v. Milligan*, No. 21A375 (U.S. Feb. 7, 2022). [↑](#footnote-ref-38)
38. There are other elements that need to be satisfied for a Section 2 challenge to be successful: see NCSL Redistricting Law (2019, 43–44). [↑](#footnote-ref-39)
39. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). [↑](#footnote-ref-40)
40. *Merrill v. Milligan*, No. 21A375 (U.S. Feb. 7, 2022); *Galmon v. Ardoin*, No. 3:22-CV-214 (M.D. La. Mar. 30, 2022) [↑](#footnote-ref-41)
41. Sometimes, however, these gerrymandered maps had non-trivial minority support because they protected minority incumbents and/or were likely to achieve the election of descriptively similar legislators. [↑](#footnote-ref-42)
42. Personal communication with Nick Stephanopoulos [↑](#footnote-ref-43)
43. See item 5 above. [↑](#footnote-ref-44)
44. This simple analysis leaves aside very important considerations of incumbency effects, candidate quality, and the effect of campaigns that would be determinative of who wins in specific districts. But the benefit of this apples-to-apples comparison is that it shows, using the same nationwide election, the difference between the old and new lines. Using another set of elections would necessarily lead to different totals, but we regard these differences as beside the point. [↑](#footnote-ref-45)
45. This includes places in which litigation led to a different map. This list is not exhaustive nor is it authoritative. We identify these states based on journalistic and individual accounts of states where lines were drawn in ways that advantage a political party. It is possible that we have included a state which evidence would not identify as a partisan gerrymander or excluded a state that is a gerrymander. [↑](#footnote-ref-46)
46. We include some states that have gerrymanders, drawn to dilute the power of protected racial and language minorities (Alabama, Louisiana) that have been challenged on racial rather than partisan grounds and in federal rather than state courts. Usually, especially in the southern states, because of disproportionate minority support for one party and disproportionate non-Hispanic white support for a different party, a racial gerrymander has a partisan gerrymandering effect. (For an elaboration of this point, see discussion later in the text and Chen and Stephanopoulos 2020). [↑](#footnote-ref-47)
47. Such plans might still be changed prior to the 2024 election. Indeed, because of the unique laws governing the Ohio process, because a map was not enacted by the commission established by voters, the plan will only be in effect for the 2022 election. Changes to the membership of the Ohio Supreme Court likely will affect future litigation. [↑](#footnote-ref-48)
48. *Galmon v. Ardoin*, No. 3:22-CV-214 (M.D. La. Mar. 30, 2022); *Robinson v. Ardoin*, No. 3:22-CV-211 (M.D. La. Mar. 30, 2022) [↑](#footnote-ref-49)
49. <https://storage.courtlistener.com/recap/gov.uscourts.gand.298476/gov.uscourts.gand.298476.134.0.pdf> at 10 [↑](#footnote-ref-50)
50. *Common Cause v. Raffensperger*, No. 1:22-CV-90 (N.D. Ga. Jan. 7, 2022); *Pendergrass v. Raffensperger*, No. 1:21-CV-5339 (N.D. Ga. Dec. 30, 2021); *Georgia State Conference of the NAACP v. State of Georgia*, No. 1:21-CV-5338 (N.D. Ga. Dec. 30, 2021) [↑](#footnote-ref-51)
51. In Kansas, the Democratic governor vetoed the congressional map passed by the legislature [https://governor.kansas.gov/governor-laura-kelly-vetoes-congressional-redistricting-map-senate-bill-355/]. The Kansas Legislature over overrode her veto. As we explain later, a state court did rule the map unconstitutional, but that judgment was vacated by the high court. In Wisconsin, the map passed by the Wisconsin Legislature was vetoed by the Democratic governor [https://content.govdelivery.com/accounts/WIGOV/bulletins/2fcd160]. The dispute led to the Wisconsin Supreme Court choosing the governor’s map. However, the map was challenged at the U.S. Supreme Court (*Wis. Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 2022), which remanded to the state supreme court. At that point, the state court instead put into place a map that it determined constituted a “least change” from the 2010 map. [↑](#footnote-ref-52)
52. Though, both states are also obligated to adhere to federal law including prohibitions on racial gerrymandering and adhering to the Voting Rights Act. [↑](#footnote-ref-53)
53. For practical reasons we leave aside intent and focus exclusively on effects. [↑](#footnote-ref-54)
54. We denote “p” if the case is pending as of November 2022, and “u” if the challenge was unsuccessful. [↑](#footnote-ref-55)
55. We count only plans as successfully challenged if, upon court intervention, a new plan was put into place. We indicate with a “P” state where a federal court ruled a plan illegal based on racial gerrymander. Ohio is marked “O”. Ohio is a special case since the state court overturned plans but was unable to replace the plan with a neutral plan. We also include states in which the state court acted to put a map into place in lieu of a plan crafted through regular process. These are marked as “C”. This includes Maryland, Pennsylvania, Virginia, and Wisconsin. In Wisconsin, the court choose a plan, but it was based on the previous decade’s plan, which was widely considered to be a gerrymander itself. We say more about these states in the paragraphs below. [↑](#footnote-ref-56)
56. We have included Pennsylvania in this list because the legislature had passed a plan that many would have classified as a partisan gerrymander. The governor was of the other party and vetoed the legislation. Ultimately, the PA Supreme Court choose a map from several that were submitted to the court *Carter v. Chapman*, 7 MM 2022 (Pa. Mar. 9, 2022). [↑](#footnote-ref-57)
57. See Carter v. Chapman. [↑](#footnote-ref-58)
58. Free and Equal Elections Clause, Pa. Const. art I, § 5. [↑](#footnote-ref-59)
59. *Id*. at 814. [↑](#footnote-ref-60)
60. *Cooper v. Harris*, 581 U.S. \_\_\_, 2017. [↑](#footnote-ref-61)
61. N.C. Const. Art. I, § 10 [↑](#footnote-ref-62)
62. N.C. Const. Art. I, § 19 [↑](#footnote-ref-63)
63. N.C. Const. Art. I, §§ 12 & 14 [↑](#footnote-ref-64)
64. See *Harper v. Hall* [↑](#footnote-ref-65)
65. *Id.* at (https://appellate.nccourts.org/opinions/?c=1&pdf=41183)? [↑](#footnote-ref-66)
66. See *Lamone v. Benisek* [↑](#footnote-ref-67)
67. See *Szeliga v. Lamone*. [↑](#footnote-ref-68)
68. N.Y. Const. Article III, section 4(c). [↑](#footnote-ref-69)
69. Discloser: Jonathan Cervas served as the special master in *Harkenrider*. [↑](#footnote-ref-70)
70. Oh. Const. Article XIX, Section 1 (A) [↑](#footnote-ref-71)
71. Oh. Const. Article XI [↑](#footnote-ref-72)
72. Oh. Const. Article XIX, Section 1 (C) [↑](#footnote-ref-73)
73. Oh. Const. Article XIX, Section 1 (C) (3) [↑](#footnote-ref-74)
74. Oh. Const. Article XIX, Section 1 (J): “When a congressional district plan ceases to be effective under this article, the district boundaries described in that plan shall continue in operation for the purpose of holding elections until a new congressional district plan takes effect in accordance with this article.” [↑](#footnote-ref-75)
75. *Adams v. DeWine*, No. 2021–1428 (Ohio Dec. 2, 2021) [↑](#footnote-ref-76)
76. *Adams v. DeWine*, \_\_ Ohio St.3d \_\_, 2022-Ohio-89, \_\_ N.E.3d \_\_, ¶ 5, 102 [↑](#footnote-ref-77)
77. 03/18/2022 Case Announcements #3, 2022-Ohio-871

    (https://www.13abc.com/2022/03/18/ohio-supreme-court-makes-final-judgement-congressional-map-challenges/) [↑](#footnote-ref-78)
78. *Neiman v. LaRose*, Slip Opinion No. 2022-Ohio-2471 at 22 [↑](#footnote-ref-79)
79. *Gill v. Whitford*, 585 U.S. \_\_\_ [↑](#footnote-ref-80)
80. *Johnson, v. Wis. Elections Comm'n*, 400 Wis. 2d 626 [↑](#footnote-ref-81)
81. *Id.* at 26-33. [↑](#footnote-ref-82)
82. *Id.* at 34-51. [↑](#footnote-ref-83)
83. The governor’s veto was overridden with a minimum (27) votes in the state senate and one over the minimum (85) in the state house. [↑](#footnote-ref-84)
84. *Rivera v. Schwab*, 512 P.2d 168 (Kan. 2022). [↑](#footnote-ref-85)
85. This quote was said orally and reported in multiple news outlets. Matt Friedman, “New Jersey Supreme Court asks Wallace to elaborate on redistricting decision.” Politico, January 4, 2022.

    https://www.politico.com/states/new-jersey/whiteboard/2022/01/04/new-jersey-supreme-court-asks-wallace-to-elaborate-on-redistricting-decision-1404229 [↑](#footnote-ref-86)
86. Am. Compl. ¶¶ 7, 8, 101

    https://redistricting.lls.edu/wp-content/uploads/NJ-njrc-20220203-order-dismissing-case.pdf [↑](#footnote-ref-87)
87. N.J. Const. art. II, § 2, ¶¶ 7, 9 [↑](#footnote-ref-88)
88. “Governor Hutchinson Allows Vaccine Mandate, Redistricting Bills to Become Law Without His Signature.” October 13, 2021. https://governor.arkansas.gov/news-media/press-releases/governor-hutchinson-allows-vaccine-mandate-redistricting-bills-to-become-la [↑](#footnote-ref-89)
89. *Suttlar v. Thurston*, No. 60CV-22-1849 (Ark. Cir. Ct. Pulaski Cty. Mar. 21, 2022) [↑](#footnote-ref-90)
90. CITATION NEEDED [↑](#footnote-ref-91)
91. *Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022). [↑](#footnote-ref-92)
92. Fl. Const. Article III, Section 20 [↑](#footnote-ref-93)
93. *Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Jan. 20, 2022) [↑](#footnote-ref-94)
94. “Gov. Lujan Grisham signs new Congressional map approved by N.M. Legislature.” December 17, 2021.

    https://www.governor.state.nm.us/2021/12/17/gov-lujan-grisham-signs-new-congressional-map-approved-by-n-m-legislature/ [↑](#footnote-ref-95)
95. *Republican Party of New Mexico v. Oliver*, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022). [↑](#footnote-ref-96)
96. At 6.

    https://www.brennancenter.org/sites/default/files/2022-02/Republican%20Party%20of%20New%20Mexico%20v.%20Oliver.pdf [↑](#footnote-ref-97)
97. N.M. Const. art. II, § 18. [↑](#footnote-ref-98)
98. “The committee or the Legislature may, but is not required to, vote on or adopt a map submitted to the committee or the Legislature by the commission.” Utah Const. Section 9. Section 20A-20-303 (5). [↑](#footnote-ref-99)
99. *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah D. Ct. Mar. 17, 2022). [↑](#footnote-ref-100)
100. Utah Const., Free Elections Clause, Article I, Section 17; Equal Protection Rights, Article I, Sections 2 and 24; Speech & Association Rights — Article I, Sections 1 and 15; Right to Vote Protections — Article IV, Section 2; [↑](#footnote-ref-101)
101. “Competitive congressional districts are on the decline. New Hampshire bucks the trend.” NPR, June 10, 2022.

     https://www.npr.org/2022/06/10/1104025539/new-hampshire-redistricting-competitive-districts-sununu [↑](#footnote-ref-102)
102. While the Census Bureau provided redistricting data in an older format in mid-August, there were questions about whether that data would change when the full dataset was delivered on September 16. The data was identical. [↑](#footnote-ref-103)
103. Minnesota has a long history of court drawn maps. “Since the 1980 census, the courts have drawn the congressional districts in absence of enacted redistricting plans.” “History of Minnesota Congressional Redistricting,” Alexis C. Stangl and Matt Gehring, November 2018. [↑](#footnote-ref-104)
104. *Rucho* at 2507 [↑](#footnote-ref-105)
105. *Id*. [↑](#footnote-ref-106)
106. *Id.* [↑](#footnote-ref-107)
107. *Id.* [↑](#footnote-ref-108)
108. “New Money and Messages in Judicial Elections This Year.” Douglas Keith, October 31, 2022. Brennan Center for Justice.

     https://www.brennancenter.org/our-work/analysis-opinion/new-money-and-messages-judicial-elections-year [↑](#footnote-ref-109)
109. “Maps in Four States Were Ruled Illegal Gerrymanders. They’re Being Used Anyway.” Michael Wines, August 8, 2022. The New York Times.

     https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html [↑](#footnote-ref-110)
110. *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) [↑](#footnote-ref-111)
111. See also (Morley 2020). [↑](#footnote-ref-112)
112. Docket no: 21-1271 [↑](#footnote-ref-113)
113. One of the present authors drew a congressional map in the 2020 round in under a week that the masters appointed by a state court found to work well as a constitutional remedy after they had offered several relatively minor suggested improvements. Anticipating that he might be brought in as a mapmaker, that author began reviewing relevant data and preparing preliminary maps well in advance of the actual map-drawing. [↑](#footnote-ref-114)
114. Public comment can be useful, but it is usually most useful when the comments are on an actual draft map. [↑](#footnote-ref-115)