Can State Courts Constrain Partisan Gerrymandering in Congressional Elections

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Abstract

Federal courts were once seen as the place for partisan gerrymandering challenges to be lodged, but after the Supreme Court has announced (after 30+ years of vacillation) that partisan gerrymandering is not-justiciable in federal courts *Rucho v. Common Cause*, 588 U.S. \_\_\_ (2019), 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 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 by examining the extent to which proposed maps satisfied traditional good government standards, on the other.

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# Introduction

Several states implemented new laws prohibiting partisan gerrymandering during the intermittent decade between censuses. Other state courts began to interpret older provisions of their state constitutions as requiring electoral districts provide “free and equal” representation. For states with such provisions, it is important to classify how judges determined if the districts were compliant. For instance, which judges voting for or against a plan? If they overturned a plan, on what grounds did they use? Was it a metric such as efficiency gap or partisan bias, was it based on traditional criteria like county and municipality splits? If they voted to uphold a plan, what was the reasoning? For each of the states where action reached a state’s high court, we determine how the judges ruled and what explanations they gave for their rulings.

For decades, academics and lawyers hoped that the federal courts would reign in egregious manipulation of district lines drawn for political gain. The US Supreme Court first heard a considered a partisan gerrymandering claim in 1973 in a Connecticut case in which political data was used to try and balance districts roughly proportional to the statewide political strength of parties *Gaffney* *v.* *Cummings (*412 U.S. 735, 1973) and a second time 13 years later in *Bandemer* (*Davis v. Bandemer,* 478 U.S. 109 (1986))*.* In *Gaffney*, the Court ruled that the state legislature did not violate the 14th amendment’s Equal Protection Clause. In *Bandemer*, the Court’s majority ruled that partisan gerrymandering claims were justiciable in federal courts, with the promise that a standard could be found. Eighteen years after Bandemer, the Court heard another claim from Pennsylvania in *Vieth*, where no majority ruled *Vieth v. Jubelirer* 541 U.S. 267 (2004). Justice Scalia, writing for a plurality, 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, which would have overturn *Bandemer* *Id.*, at 306-307. Three justices (Breyer, Souter, and Stevens) wrote separate dissents, each proposing their own standard for adjudicating partisan gerrymandering claims. Justice Kennedy concurred with a majority that the appellants’ complaint be dismissed because the “proposed standards each have their own deficiencies” *Vieth v. Jubelirer*, 541 U.S. 267, 269 (2004) but left off the possibility that a manageable standard might be established.[[4]](#footnote-4) Finally, the Court heard a challenge to the mid-decade redistricting scheme by the Texas legislature in *LULAC*, but again failed to resolve the perennial substantive standard question *LULAC v. Perry* 548 U.S. 399 (2006). “"Fairness" is not a judicially manageable standard.” *Vieth v. Jubelirer*, 541 U.S. 267, 268 (2004) quoting *Bandemer*. Despite the numerous social science solutions available to the Court, so far all are unacceptable.

Hope ended in 2019 after the Court’s ruling in *Rucho* (*Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). In a 5-4 opinion, with Justice Kagan dissenting, joined by Justices Ginsberg, Breyer, and Sotomayor, the Court took away the ability to bring suit in federal court based on the “First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, [or] Article I, § 2, of the Constitution” Id. at 2491.

And while the Court recognizes that “[e]xcessive partisanship in districting leads to results that reasonably seem unjust” *Id*. at 2506, and the Court’s “conclusion does not condone excessive partisan gerrymandering” *Id*. at 2507 It simultaneously shirked responsibility, determining that the federal judiciary was not the venue to adjudicate those harms. (“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.”)

While refusing to police partisan gerrymandering, the majority explicitly states that the Court does not “condone excessive partisan gerrymandering nor condemns complaints about districting to echo into a void” *Id* at 2507. 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” *Id*. Further, the Court says that Congress can use the Election Clause to reform the redistricting process. *Id.* That is, the institutions responsible for establishing standards (state legislatures) are the same ones that benefit from the positive feedback created by partisan gerrymandering (Wang et al. 2021), and the question is out of reach for the institution insulated from electoral effects and positive feedback that can establish a baseline for the entire country (the federal courts).

The majority does acknowledge the question which must be addressed in terms of political advantage: “how much representation [does a] particular political parties deserve —based on the votes of their supporters” *Id*. at 3499. The Court claimed that “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation” *Id.* at 2499. Social science is unequivocal in not expecting proportionality in single-member, winner-take-all districting schemes (Gudgin and Taylor 2012; Taagepera and Shugart 1989). One metric, the *partisan bias* measure, requires 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 does not rely on any relationship between votes and seats (Becker et al. 2021; Duchin 2018).

Indeed, even before the 2020 round of decennial redistricting, state courts had been making use of these various measures to overturn legislatively enacted plans that served to dilute the voting strength of minority parties *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *Harper v. Lewis*, NO. 5:19-CV-452-FL (E.D.N.C. Oct. 22, 2019); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015).These state courts held trial, heard from expert witnesses, deposed lawmakers, and weighed the of evidence to conclude that one party we aided by the district lines in the translation of their votes into seats (J. R. Cervas and Grofman 2020; Grofman and Cervas 2018; Wang, Ober Jr., and Williams 2019).

Other states had taken other actions in the intermediate decade to reduce partisanship in redistricting. Beginning with the 2020 round of redistricting, 14 states had placed in their laws some prohibition on political gerrymandering. [[5]](#footnote-5) Still other states attempted removed partisanship completely from the process by placing responsibility in independent commissions. Eight states[[6]](#footnote-6) placed primary responsibility to draw Congressional districts in the hands of independent commissions.[[7]](#footnote-7) In more states, despite the efforts of reformers, many states left redistricting in the hands of politicians whose self-interest overrode the demands of political equality.

It can be true that states with laws prohibiting gerrymandering can still result in biased maps. Likewise, states that have no prohibitions on partisan line drawing can result in maps that are non-dilutive. In this paper, we examine the 2020 round of redistricting with focus on the structure of state law, the institutional processes for drawing Congressional districts, and the plans that resulted from the drawing of plans. For the purposes of this paper, we focus only on Congressional redistricting, and only on states with at least three districts.

At the completion of the 2020 round of mapmaking, while not unanimous in its proposed classification, reports identified XX states where there could have been a plausible claim that the congressional map that was put into place was a partisan gerrymander: Alabama[[8]](#footnote-8), Florida, Georgia, Illinois, Iowa, Louisiana, Maryland, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Utah, and Wisconsin, though not all those survived litigation.[[9]](#footnote-9)

Addressing partisan gerrymandering in state courts is a recent innovation. Floridais the pioneer. In 2010, by initiative, Florida overwhelmingly passed “Florida Congressional District Boundaries Amendment”.[[10]](#footnote-10) 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).

Even where there was not language directly about partisan fairness, 26 states have constitutional language, such as that requiring “Free”, “Free and Open”, or “Free and Equal” (Douglas 2014; Wang, Ober Jr., and Williams 2019).[[11]](#footnote-11) 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.

In North Carolina, the state court relied on the “Free Elections Clause” found in the Declaration of Rights in the state’s constitution. NC Cont. Art. I Sect. 10. The case was in direct response to the US Supreme Court’s ruling in *Rucho* and heard challenges to both the state legislative maps *Common Cause v. Lewis CITE* and the congressional Maps (“The Legislative Defendants argue that *Rucho* is inapposite because the claims in that case were brought under the United States Constitution whereas the claims in the instant case are brought under the North Carolina Constitution. But this provides more reason, not less, to doubt jurisdiction in the instant matter. "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id*. at 2507 (emphasis added). They do not provide a renewed basis for federal courts such as this one to wade into an area that *Rucho* characterized as "one of the most intensely partisan aspects of American political life." 139 S.Ct. at 2507. In *Rucho*, the Supreme Court confirmed, 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). Thus, where there is no "appropriate role for the Federal Judiciary," *Id.*, it is immaterial whether the partisan gerrymandering claims are couched in state or federal law.” *Harper v. Lewis*, NO. 5:19-CV-452-FL, 6 (E.D.N.C. Oct. 22, 2019; emphasis original to quoted case). The court exercised its power “to declare an act of the General Assembly unconstitutional.” *Harper* at 11.

The congressional maps in North Carolina had been challenged in federal courts for better part of the decade. *Common Cause v.* *Rucho*, 318 F. Supp. 3d 777. Following the US Supreme Court’s decision in *Rucho* that partisan gerrymandering was not a judiciable claim in federal court, the North Carolina Superior Court overturned the Congressional maps *Harper.* 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 he “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. Instead of holding a new trial court hearing, the court used both direct statistical and circumstantial evidence from the federal court case in *Rucho*. The court issued a preliminary injunction on November 20, 2019, recognizing the urgency created by the 2020 election and wanting to remand to the legislature the first right to remedy the violation. (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). And 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.”[[12]](#footnote-12)

## Independent state legislature theory

Can state courts constrain partisan gerrymandering? So far, we have established that three state courts have used their separation of powers to act against plans they determined to be partisan gerrymandering, using a variety of evidence. 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 US constitution for exercising its power over federal elections. That is, 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 2023).[[13]](#footnote-13)

The US 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 directed by the state legislature with one of their own, after ruling that the legislature’s plan violates the state constitution. If successful, plans in Pennsylvania and New York are also suspect, since they too were put into place by state courts. Ruling this way would act to undermine language in *Rucho*, where the Court, in its own condemning of “excessive partisan gerrymandering”, and in suggesting other ways in which action against these excessive can be taken point to state courts as a potential remedy. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (“The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State’s congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (2015).”). The Court majority also point to other ways states can limit partisanship in districting. *Id.* 2507. (“Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions.”) The Court even points to limitations passed directly by voters through direct democracy, bypassing the state legislature. *Id.* 2507. (“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.”). If the petitioners are successful in *Moore v. Harper* 413PA21, all these state-level solutions to cure partisan gerrymandering are suspect.

## Challenges to plans after the 2020 census

Our primary concern is with plans that were either successfully challenged and led to changes in the plan or where challenges to a plan reached a state’s highest court, where the challenge was defeated. We set aside challenges that either did not reach a decision on merits or standing issues before the 2022 midterm elections.

There is not statute of limitations on challenges to districting plans. Plans can and do have challenges throughout the decade. Pennsylvania and North Carolina plans were tossed out by state courts late in the cycle; Pennsylvania in 2018 and North Carolina in 2019. Federal courts likewise hear challenges to plans at different intervals of time. It is not unusual for challenges to occur after an election or a series of elections has been conducted under a plan, so that the effect of the plan is known. We view projection of previous election results into new or proposed districting schemes as an appropriate way to judge the partisanship of a plan (J. R. Cervas and Grofman 2020), courts may want to have elections run under those new lines before acting. Moreover, especially because of delays in receiving the 2020 census data due to COVID-19 policies at the Census Bureau, the time between enactment and the 2022 midterm elections may not have been sufficient to conduct a trial based on claims of partisan gerrymandering. We highlight, however, that state legislatures could strategically delay adopting a new districting plan to ensure running at least one cycle on maps that are otherwise illegal. Once applicable to states under Section 5 of the Voting Rights Act preclearance requirements, states had to have their plans approved by the Justice Department or the DC Court of Appeals before they were implemented; this type of preclearance could be employed by Congress under the US Constitution’s Election’s Clause to ensure plans meet the criteria laid out in federal and state law. States could additionally add court review as part of the process for producing new districting plans, in the same way the Pennsylvania’s “Legislative Reapportionment Commission” has a 30-day appeal process to the Pennsylvania Supreme Court before it has the force of law. PA Const. art. II, § 17 (d).

## State Court decisions

Now we turn to an analysis of how state court cases involving claims of partisan gerrymandering were resolved. In the next section, we provide case summaries for each of the rulings from state courts regarding the absence or presence of a partisan gerrymander. Before we move to the details of the case, Table 1 provides a list of states that have some basis of consideration to be partisan gerrymanders either by journalistic accounts or by academic consensus. We then show whether there is direct or indirect language in state law that prohibits partisan gerrymandering, whether it was challenged in state court, and if that challenge was successful or not.

Table 1-Potential partisan gerrymanders and state law

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **State** | **Direct** | **Free, Equal, Open** | **Challenged based on racial classifications (*Shaw* or Section 2)** | **Not Challenged** | **Unsuccessful Challenge** | **Successful Challenge[[14]](#footnote-14)** |
| *Alabama* |  |  | x |  |  |  |
| *Florida* | x |  |  |  | x |  |
| *Georgia* |  |  |  |  |  |  |
| *Illinois* |  | x | x |  |  |  |
| *Iowa* | x |  |  | x |  |  |
| *Kansas* |  |  |  |  | x |  |
| *Louisiana* |  |  | x |  |  |  |
| *Maryland* |  | x |  |  |  | x |
| *Missouri* |  | x |  | x |  |  |
| *Nebraska* | x | x |  | x |  |  |
| *New York* | x |  |  |  |  | x |
| *North Carolina* |  | x |  |  |  | x |
| *Ohio* | x |  |  |  |  |  |
| *Pennsylvania[[15]](#footnote-15)* |  | x |  |  |  | x |
| *Tennessee* |  |  |  | x |  |  |
| *Texas* |  |  |  | x |  |  |
| *Utah* |  |  |  |  |  |  |
| *Wisconsin* |  |  |  | x |  |  |

Note: States listed are those that could reasonably be called a gerrymander by one or more measure or has generated significant press coverage as biased towards one party.

## Measures of vote dilution

The US Supreme Court said in *Rucho* “how much representation [does a] particular political parties deserve —based on the votes of their supporters” and “federal courts are not equipped to apportion political power as a matter of fairness” at 3499. To the first question, we agree that it is difficult to determine the proper amount of representation *in some* states—but not in other state. We disagree that the federal courts are not equipped. We want to say more about the type of metrics developed by social scientist and mathematical experts upon which are relied on by justices who cited statistical evidence to support their view that a plan was a partisan gerrymander. In states that are closely divided, such that the parties receive roughly the same vote share statewide, there is an academic consensus that several measures of partisan gerrymandering and vote dilution work equally well in determining when a state is gerrymandered based on partisan interests such that some voters have diluted influence over outcomes (Nagle 2015, 2017)CITES. At least in these states, there should be no controversy about federal court intervention. In states where one party wins an overwhelming share of the vote, it is admittedly more difficult to determine the proper share of representation (Nagle and Ramsay 2021).

We review and cite to several of the measures found in academic literature below. We can generalize the methods to three categories; vote-based measures of dilution, deviations from geographic-adjusted baselines measured typically be computer simulation of random plans, and deviations from traditional redistricting criteria. The three types have distinct advantages. Vote-based measures of dilution allow us to determine if some set of voters has more influence in the translation of votes into seats. The other two types are used to show intent on the first. Ensemble generation allows for hypothesis testing. For instance, a court might want to know if the level of vote dilution found in a plan is explainable. For instance, geographic cluster of voters (Rodden 2019) can lead to a “packing” of voters that makes them less efficient at translating votes into seats. It could alternatively demonstrate, as in *LWV*, that a legislature found some combination of people to form districts that is a statistical outlier compared to maps produced under a similar set of rules. That is, it can show that an enacted plan is more biased than most maps. The third set of measures relate to what has become known a “traditional redistricting criteria.” Nonconformity to these criteria as been used by the US Supreme Court in racial predominance cases to show that other factors were subordinated to race. (“a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,” *Miller v. Johnson*, 515 U.S. 900, 916 (1995) “legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so.” *Bethune-Hill*, 137 S. Ct. at 798 (quoting *Shaw II*, 517 U.S. at 907)). Departure from traditional criteria can be used to show that a legislature intended to achieve some non-traditional goal, such as sorting voters based on race or political preferences. We caution that plans that adhere closely to traditional principles or even call in the center of a distribution of random plans can still fail on vote-dilution measures. We have called plans of this nature *stealth gerrymanders* (J. R. Cervas and Grofman 2018).

#### Bias or responsiveness measures based on seats-votes relationships

1. partisan bias in terms of the difference between hypothesized seat share at a 50% vote share and 50%
2. partisan bias in terms of the difference between hypothesized vote share at a 50% seat share and 50% (Katz, King, and Rosenblatt 2020)
3. mean minus median gap (Best et al. 2018)
4. efficiency gap (McGhee 2017)
5. comparison to seat shares from an ensemble (simulation) (Becker et al. 2021; Liu, Cho, and Wang 2016)
6. number of competitive districts[[16]](#footnote-16)
7. inspection of an overlay of (expected) number of highly competitive, somewhat competitive, and non-competitive districts in a proposed map and in a good-government-based simulation

#### Measures based on good government criteria

1. malapportionment measured by the total population deviation (J. Cervas and Grofman 2020)
2. compactness (usually measured by Polsby-Popper or Reock) (Kaufman, King, and Komisarchik 2021; Polsby and Popper 1991; Reock 1961)
3. county splits (total number of counties split into two or more districts, total number of country pieces) (Carter et al. 2020)
4. city splits (total number of cities split into two or more districts, total number of city pieces)- usually with comparison to a good-government-based computer simulation

State courts have utilized this toolkit for determining when excessive partisanship has resulted in illegal vote dilution. Table 2 generalizes from court opinions the evidence for a finding of gerrymandering from the set of eleven metrics above from the state court decisions.[[17]](#footnote-17)

Table 2-Measures of vote dilution used in state court cases

|  |  |
| --- | --- |
|  | Measures |
| Florida (2015) |  |
| Pennsylvania (2018) | j |
| Pennsylvania (2022) |  |
| New York | g |
| North Carolina (2019) |  |
| North Carolina (2022) |  |
| Ohio |  |
|  |  |

## Case Summaries

In the following section, we provide summaries of each of the court proceedings in states where the state court heard a challenge to partisan gerrymandering.

Pennsylvania -- Carter v. Chapman, 270 A.3d 444 (Pa. 2022) (per curiam).

New York -- Matter of Harkenrider v. Hochul, No. 60, 2022 N.Y. LEXIS 874, at \*1 (N.Y. Apr. 27, 2022).

North Carolina

Ohio

Maryland

As recalled from Table 1 the states that might be considered political gerrymanders. We show in that table where a claim was heard in state court, and whether a challenge was either successful (at least in part) or unsuccessful. From these cases and from those instances where no claim was made in state court (or moved forward before the time of print), we can draw several hypotheses that speak to the ability of state courts to cure partisan gerrymandering.

HYPOTHESIS 1: In each state where a state court had constitutional language explicitly forbidding partisan gerrymandering and where the public consensus suggested that a challenge might be justified, there would be such a challenge.

HYPOTHESIS 2: In states where there was old constitutional language that might be adapted to allow for a gerrymandering challenge but no direct language explicitly forbidding partisan gerrymandering and where a public consensus suggested that a challenge might be justified, there would be such a challenge.

Both hypotheses have mixed supported. We count xx states might reasonably be challenged as partisan gerrymanders based on popular conceptions. Of these, five have direct language prohibiting partisan gerrymandering. Of those these 5 states that there might have been a state court challenge to the congressional map on the grounds that the map was a partisan gerrymander and where there were also direct state constitutional provisions making partisan gerrymandering illegal, such a successful challenge was brought in only one state (New York).

Of the six states where there might have been a state court challenge to the congressional map on the grounds that the map was a partisan gerrymander based on language that could be interpreted to prohibit partisan gerrymandering, three had successful challenges.

Thus,in situations wherethere might have been a state court challenge to the congressional map on the grounds that the map was a partisan gerrymander even where the state court had no direct constitutional language to rely upon, half of the time court cases challenging the map were nonetheless brought; all of these were successful.

We should also note that challenges to plans based on the claim that a plan was a racial gerrymander i.e., one where race was a predominant motive *Shaw v. Reno, 509 U.S. 630, 642 (1993)*, or based on a violation of Section 2 of the Voting Rights Act, were, without exception,brought in federal courts. Challenges to plans as partisan gerrymanders were exclusively litigated in state court, given that no claimant would have standing in federal court *Rucho*.[[18]](#footnote-18)

Table 1 deals with whether a gerrymandering claim was raised in state court and how the challenge was resolved. But in understanding American electoral politics it is useful to consider who/which groups are bringing these partisan gerrymandering claims. Table 3 shows the states where there partisan gerrymandering challenges raised in state court and identifies the plaintiffs.

Table 3-Who challenges in state courts? The plaintiffs identified

|  |  |  |
| --- | --- | --- |
| Pennsylvania (2018) | League of Woman Voters |  |
| North Carolina (2019) | Common Cause |  |
| Pennsylvania (2022) | Carter Petitioners: Citizens registered to vote in PA.  Gressman Petitioners: Citizens registered to vote in PA and “leading professors of mathematics and science[.]” |  |
| Maryland | Republican voters |  |
| New Jersey | Republican members of the redistricting commission |  |
| New Mexico | Republican Party |  |
| New York | Voters of New York |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |

HYPOTHESIS 3: Most challenges to redistricting were brought by non-partisan groups such as League of Women Voters or Common Cause or local groups that identify themselves in non-partisan terms.[[19]](#footnote-19)

What we see from Table 3 is murky. On the one hand, good government groups like the League of Woman Voters and Common Cause were the plaintiffs in some of the early cases in state court. After the 2020 redistricting cycle, however, many of the plaintiffs were explicitly affiliated with the political party that served to gain from state courts overturning the enacted plan.

The best available case citations are shown in Table 4.

Table 4– Case Citations

|  |  |
| --- | --- |
| State | Citation |
| 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) |
| Maryland | *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. March 25, 2022) |
| New York | *Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 31471 (N.Y. Sup. Ct. 2022) |
| North Carolina (2019) | *Harper v. Lewis*, NO. 5:19-CV-452-FL (E.D.N.C. Oct. 22, 2019) |
| North Carolina (2022) |  |
| 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) |
| New Jersey | *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) |

HYPOTHESIS 4: In states where there are claims that a congressional plan was drawn under partisan auspices, most state court challenges to such plans were successful, but the highest proportion of successful challenges comes in states where there are constitutional provisions that explicitly bar partisan gerrymandering (and/or ban special treatment for incumbents).

We do not find support for hypothesis 4. Summarizing the results in Tables 1 and 3, we find that state courts were more likely to overturn plans based on interpreted constitutional prohibitions on partisan gerrymandering than direct langue. In the states where there were explicit provisions against partisan gerrymandering and where public claims supported such a challenge to the congressional plan, it was successful in only one case, New York. The success rate was higher (3 of 6) in such states where no such explicit provision was found. We are not entirely surprised by this result, however, since legislatures charged with drawing districts under explicit direction of the state law are likely to follow the law, knowing the consequence of not following the law is overturn and possibly forfeiture of control over the process in the remedial stage. This is the same reason we feel the Section 5 of the Voting Rights Act reduced the frequency of discriminatory maps in preclearance state. *Shelby Cnty. v. Holder*, 570 U.S. 529, 589 (2013) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”)

We also expect plans to be challenged as partisan gerrymanders when maps are not as favorable to one party as they would have preferred. We refer to our list of states that had challenges in Table 1 and identify four states where challenges were made, but most academic or journalistic accounts would not identify them as gerrymanders. This list includes states like New Jersey, where a bipartisan commission drew its congressional plan. In additional to New Jersey, we include Arkansas, New Mexico, and Kentucky. We are not taking the position that these states are not partisan (or racial) gerrymanders based on analytics, because in all four of these cases there is some evidence that at least some of these excessive partisan advantages.[[20]](#footnote-20) Our classification is based on the much less attention to these states in the media. In none of these states did a court agree that there was a partisan gerrymander, at least as of press on this article.

HYPOTHESIS 5: Ceteris paribus, in each state, most justices who rejected a claim that a map was unconstitutional did so on purely legal grounds.

Here, looking at Table 5 we see

But it is not enough to look at the reasons why some justices rejected a partisan gerrymandering claim, it is also important to consider in more depth how particular justices who accepted a partisan gerrymandering claim justified their view that the empirical evidence sustained such a conclusion.

As we have argued elsewhere, we can have claims of gerrymandering based on statistical tests of partisan bias/partisan vote dilution, and/or based on the failure of maps to satisfy traditional good government criteria and/or based on process grounds (such a failure to comply with requirements for public comment). In Table 6 we characterize each of the individual justices who accepted a gerrymandering claim in terms of checkoffs of (a) use of statistical tests and (b) mention of failure to comply with good government criteria, and (c) mention of process considerations.

Table 5 about here >>

HYPOTHESIS 6: Ceteris paribus, in each state, most justices who accepted a claim of unconstitutionality provided multiple types of arguments to justify this decision; however, failure to comply with good government criteria was the most frequently cited reason for why a plan was being found unconstitutional.

The evidence in Table 6 shows

Table 6 about here

HYPOTHESIS 7: Ceteris paribus, in each state, the most common metric referenced by justices who made use of criteria based on seats-votes relationships (or competition levels) was the efficiency gap.

Turning to Table 5, we see that

But of course, regardless of the stated reasons for individual justice’sultimate decisions about plan unconstitutionality, there is always the suspicion that underlying those stated reasons are hidden partisan motivations.

To address the role of partisanship in affecting state court decisions about whether or not a given challenged congressional map was an egregious partisan gerrymander, it is useful to break down the actual votes of individual state Supreme Court Justices based on their party affiliation and to compare the votes of justices vis-a-vis their partisanship and the partisan bias direction in the plan they were evaluating. We are able to do this in most instances because so many of the state Justices are elected in partisan contests. In other instances, we can identify the partisan identity of an appointing governor**.** Andwe can identify the partisan character of a proposed map by who voted for it. Table 5 shows this data, with the number (percentage) of state court justices finding or not finding a gerrymander categorized by party affiliation in one column, with the partisan nature of the plan identified in the next column as either R or D or bi-partisan, and with the vote by party for the adopted planin each branch of the legislature shown in the last column**.**

Table 7 about here >>

We would expect that

HYPOTHESIS 8: Ceteris paribus, in each state, Democratic (Republican) appointed justices would be less likely to vote against a plan proposed (favoring) by their own party than justices who would see the plan as favoring the other party.

As we see, this hypothesis is confirmed.

## Constitutional Crisis

Can Congress choose not to seat members from states with undo partisan bias?

Four states have maps that are currently ruled unconstitutional being used in the 2022 election, accounting for 10% of all districts, likely costing the Democrats between 5 and 6 seats.

Being cautious about the language urde dto prohibit gerrymandering and how it can be manipulated.

# Recommendations

The 2020 redistricting cycle started off with a severely delayed census. Population data states needed to conduct their decennial redistricting was delivered four months late. The delayed data comes on the cusp of evolving redistricting guidance from the US Supreme Court, with rulings on aspects of the process throughout the decade. Section 5 of the Voting Rights Act ended after SCOTUS struck down the preclearance formula in *Shelby Cnty*. The use of race in redistricting had been litigated and relitigated in *Alabama v. Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015) and *Bethune-Hill*. The Court overturned *Bandamer* in *Rucho.*

Without preclearance, states need not verify their plans with the federal government. Taking advantage of this new freedom, states neglected to draw districts as required by Section 2. Those choices resulted in challenges in Alabama, and Louisiana *Merrill v. Milligan*, No. 21A375 (U.S. Feb. 7, 2022); *Galmon v. Ardoin*, No. 3:22-CV-214 (M.D. La. Mar. 30, 2022). Federal courts have ordered both states to draw new plans that comply with the Voting Rights Act. The US Supreme Court has stayed those rulings. These two states, and others, knowingly violated federal law in crafting their new congressional districting plans. They did so with the knowledge that plaintiffs would need to bring suit, and given the delays to the process described above, do so in a short time before the looming midterm election. The Court stayed those rulings based on the *Purcell* principle *Purcell v. Gonzalez*, 549 U.S. 1 (2006). *Purcell* demands “that courts should not issue orders which change election rules in the period just before the election” (Hasen 2016). But, as Hasen argues, the public interest of having constitutional plans at the time of an election outweighs the “potential for public confusion and election chaos” on which the principle is guided.

# Discussion

There are many reasons why the 2020 round of redistricting is totally different from previous round in terms of the role of state courts. The Supreme Court’s definitive opting out of any role in controlling gerrymandering combined with the fact that such gerrymandering is more egregious and more pervasive than in the past, has left state courts as the last avenue of defense. This has left courts sometimes having to be creative by reinterpreting older state constitutional provisions. The existence of new constitutional amendments with explicit prohibitions on partisan gerrymandering has also sensitized courts to this issue. 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.

We can attempt to assess the magnitude of the state court decision on the degree of partisan bias in the plan by looking at (a) an estimate of how many districts would have been won by the majority party under the challenged plan versus how many districts were expected to be won under the Court-ordered plan if there was one (b) and, to control for delegation size, an estimate of the proportion of districts that would have been won by the majority party under the challenged plan versus the proportion of districts were expected to be won under the Court-ordered plan if there was one (with a label of NO FINDING OF UNCONSTITUTIONaLITY otherwise). This information is provided in Table 4.

<<Table 4 about here >>

If we exclude states where the academic literature was skeptical that there really was egregious gerrymandering in terms of t individual opinions, we can classify failed partisan gerrymandering (a) rejections of claims based on purely legal grounds, i.e., states where justice asserted that their constitution simply did not provide a cure for partisan gerrymandering, (b) rejection of claims based partly almost entirely on empirical grounds , i.e., assertions that the evidence presented , (c) rejection of claims based partly on legal and partly on empirical grounds, e.g., states where a justice, echoing the views of the Supreme Court majority in *Rucho*, simply rejected the idea that it was possible to accurately measure (in advance of an election) the extent of partisan gerrymandering and thus no legally manageable standard was possible. Table 5 presents this tabulation of the three categories, state by state, based on our reading of each of the individual opinions in the **XX** states where a partisan gerrymandering claim was brought in state court.[[21]](#footnote-21)

<<Table 5 about here >>

1. \* Postdoctoral teaching fellow, Institute for Politics and Strategy, Carnegie-Mellon University. [↑](#footnote-ref-1)
2. + Distinguished Professor and Jack W. Peltason Chair of Democracy Studies, Department of Political Science, University of California Irvine [↑](#footnote-ref-2)
3. # New York Law School [↑](#footnote-ref-3)
4. For a rich 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-4)
5. 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: Compact, Contiguous, Preserve Political Subdivisions, Preserve Communities of Interest, 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-5)
6. Arizona, California, Colorado, Idaho, New York, Michigan, Montana, Washington (Levitt, Justin, “Who draws the Lines?” Accessed September 25, 2022. All about redistricting; https://redistricting.lls.edu/national-overview/?colorby=Institution&level=Congress&cycle=2020) [↑](#footnote-ref-6)
7. Though, as we will show later, not every independent commission is independent. New York’s independent commission was checked by the legislature, who was allowed to amend the plan submitted by the commission. [↑](#footnote-ref-7)
8. We include states which are racial gerrymanders, drawn to dilute the power of protected groups including racial and language minorities. Usually, because of racially polarized voting patterns, a racial gerrymander has the effect of partisan gerrymandering (see Chen and Stephanopoulos 2020 for more). [↑](#footnote-ref-8)
9. 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. 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-9)
10. The newer constitutional redistricting provisions largely came after it was apparent in the early 2010s round of redistricting that federal courts would not entertain claims against partisan gerrymandering. [↑](#footnote-ref-10)
11. 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-11)
12. “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-12)
13. See also (Morley 2020). [↑](#footnote-ref-13)
14. We count only plans as successfully challenged if, upon court intervention, a new plan was put into place. [↑](#footnote-ref-14)
15. Pennsylvania is a unique case, because there was never a map in place by the normal procedures found in the PA constitution. 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. See more details in our sections on *Carter v. Chapman*. [↑](#footnote-ref-15)
16. The academic literature does not support this idea, but a requirement for competitive districts can be found in some state’s constitutions. For an argument on why competition could be bad for democracy, see Brunell, 2008 “Redistricting and Representation: Why Competitive Elections are Bad for America”. [↑](#footnote-ref-16)
17. This list is not complete, but it includes all the most frequently used measures. [↑](#footnote-ref-17)
18. *Shaw* claims: Alabama, Georgia, South Carolina, Texas. Section 2 claims: Alabama, Arkansas, Georgia, Louisiana, Ohio, Texas. Other race claims: Alabama, Arkansas, Florida, Georgia, Michigan, North Carolina, Ohio, South Carolina, Tennessee, Texas. Source, Brennan Center for Justice, “Litigation Over This Decade’s New Maps”, https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 [Accessed September 17, 2022]. [↑](#footnote-ref-18)
19. Of course, such an identification might be merely a façade for a group with a primarily partisan motivation. [↑](#footnote-ref-19)
20. For instance, Planscore.org shows that Kentucky has an efficiency gap of 12.7% favoring the Republicans, and that the plan is in the tails of a distribution of all potential plans for Congress in Kentucky. Planscore.org, https://planscore.campaignlegal.org/plan.html?20220210T144538.556577174Z [Accessed September 28, 2022]. Moreover, many people have said that the New Jersey plan has a built-in advantage for Democrats. Planscore.org shows that there is a pro-Democratic efficiency gap of 8.8%. Planscore.org, https://planscore.campaignlegal.org/plan.html?20220109T041754.170010595Z [Accessed September 28, 2022]. [↑](#footnote-ref-20)
21. If more than one justice joins in an opinion we attribute the views in that opinion to each of its signators. If a justice also has a separate concurrence, we add any reasons given in that concurrence to our categorization of the views of that justice.**.** [↑](#footnote-ref-21)