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

Prepared for the Conference organized by the *University of New Hampshire Law Review*

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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.

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# INTRODUCTION

**Our focus in this essay on the role of state courts as checks on partisan gerrymandering in the U.S. House of Representatives, [[4]](#footnote-4) though 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. Several states changed their constitutional provisions affecting redistricting in the past decade. These changes involved taking redistricting out of the hands of the legislature and replacing the legislature with some form of commission, though the vast majority of states still have redistricting under legislative control.[[5]](#footnote-5) At the same time as changes were made in who was responsible for mapmaking, changes also were made in the criteria to be used for mapmaking, with language in some states prohibiting plans that unduly favored or disfavored a political party or a particular candidate**. 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 requiring electoral districts to provide “free and equal” representation as implicitly prohibiting egregious gerrymandering.

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. While we are most concerned with what happened in the 2020 redistricting round**, we also 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** **(Grofman and Cervas, 2018)**

For each of the states where litigation reached a state’s highest court, we look to the history of the litigation, including who brought the litigation, **with a focus on how the judges in the state’s highest court ruled and what** explanations they gave for their rulings. In particular, **if a court overturned a plan as a partisan gerrymander,** what grounds did the judges who voted to strike down the plan use? **Was it a metric intended to measure partisan effects;**[[6]](#footnote-6) was it based on traditional criteria like county and municipality splits; was it based on process features such as party-line votes, **no opportunity for public comment** and little or no opportunity for the minority party to review the plan; or was it based on some combination of the above considerations? **If the court voted to uphold a plan, what was the reasoning of the judges in the majority?** In each of these two situations how did judges in the minority explain the reasons for their vote?

**Similarly, where the state court ended up with responsibility for line drawing for reasons of institutional failure, we examine how the court interpreted the redistricting requirements in their state. Moreover, we examine the claim that the actions of state court judges will largely be predictable on the basis of their partisanship (in terms of the party under whose label they ran in states where judges are elected and partisan identities are shown, or in other cases where we use the party of the appointing governor as a proxy for the judge’s partisanship).**

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# BACKGROUND: FEDERAL COURTS AND PARTISAN GERRYMANDERING

The US 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)), **a challenge to Indian 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 CITE NEEDED**.

**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 US 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*. 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.[[7]](#footnote-7) Three justices in *Vieth* (Breyer, Souter, and Stevens) wrote separate dissents, each proposing their own standard for adjudicating partisan gerrymandering claims. 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 plans was a gerrymander. **Although some Justices expressed the view that a manageable standard combining partisan symmetry approaches with other measures might yet be contrived**,[[8]](#footnote-8) the Court, quoting *Bandemer,* reiterated that “‘Fairness’ is not a judicially manageable standard.” **JONATHAN IS THIS a cite to VIETH OR is it to LULAC?**

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 CITE NEEDED, one in North Carolina CITE NEEDED, and one in Maryland CITE NEEDED found proposed plans to be unconstitutional partisan gerrymanders. These cases were appealed to the Supreme Court, which issues a definitive ruling that focused on the challenged North Carolina map but which effectively ended all** hope for a federal court rule in policing partisan gerrymandering. In a 5-4 opinion in  *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019), with Justice Kagan dissenting, joined by Justices Ginsberg, Breyer, and Sotomayor in dissent, the Court majority took away the ability to bring suit against partisan gerrymandering in federal court. ***Bandemer* was overruled in that the justiciability of partisan gerrymandering claims was eliminated, and the lower court findings of unconstitutional partisan gerrymandering were reversed. The ruling explicitly rejected all of 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).

The Court Opinion **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’s “conclusion does not condone excessive partisan gerrymandering” *Id*. at 2507, and yet it simultaneously shirked responsibility. 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 majority opinion in *LULAC* is also problematic because it misunderstands the basic measurement issue re 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 Grofman, Bernard N. 1982. For single‑member districts, random is not equal. In Bernard Grofman, Arend Lijphart, Robert McKay and Howard Scarrow (Eds.), Representation and Redistricting Issues, Lexington, MA: Lexington Books,55‑58**; 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 f**ound 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 trial, heard from expert witnesses, deposed lawmakers, and weighed the evidence to conclude that one **political** party was **inappropriately aided 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*.[[9]](#footnote-9) **While this decision could be seen as a kind of direct rebuttal to the *Rucho* Court’s finding that no manageable standard to detect unconstitutional gerrymandering in North Carolina exists, we see it, rather, 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 Court relied on the language in its state constitution that** **JONATHAN PLEASE FILL IN**. 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 Cont. Art. I Sect. 10.

**In Pennsylvania, the state court brought in a special master to redraw the map.** **JONATHAN IS THIS CORRECT? In Florida, the legislature was permitted to offer a new plan after an initial plan had been rejected.[[10]](#footnote-10) JONATHAN IS THIS CORRECT?** **and that plan was accepted by the court.** **JONATHAN IS THIS CORRECT?** The North Carolina court issued a preliminary injunction on November 20, 2019, but it remanded to the legislature the first right to remedy the violation, [[11]](#footnote-11) **and accepted the revised legislative map for use in 2020.**[[12]](#footnote-12)

# 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 a dozen 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.**

1.  **There are a number of 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 some kind of commission.** The pressure to take redistricting out of the hands of legislatures intensified after *Rucho*. There are now eight states[[13]](#footnote-13) in which primary responsibility to draw Congressional districts is in the hands of commissions. **SHOULDN’T OHIO BE IN THIS LIST?** **Of these, X have been created in the past decade.**

**2. Along with the constitutional changes that increased the number of states where congressional districting was in the hands of some kind of commission, usually came changes in the specific criteria that were to be used in mapmaking identified in the state constitution. In particular, as of the beginning of** the 2020 round of redistricting, 14 states had in their constitution some prohibition on political gerrymandering[[14]](#footnote-14) **X of those fourteen were added to the state constitution in the past decade** [[15]](#footnote-15) **JONATHAN NEED TO INDENTIFY WHICH THOSE WERE.** **Most of those already in place for the 2010 redistricting round seemed to have been dead letters in that round (with Florida the notable exception) JONATHAN IS THIS CORRECT? As we will see, that changed dramatically in the 2020 round.**

**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 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).[[16]](#footnote-16) 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 even where state courts were in a position to require the satisfaction of criteria that could be seen as anti-gerrymandering, even in the 2020 round they did not always do so (a point we elaborate on in the next section).**

5. The Supreme Court itself, in *Rucho*, gave direct encouragement for state courts to assume the burden of policing partisan gerrymandering.  **While it 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 notes that Congress can use the Election Clause to reform the redistricting process. *Id.* **What is of** **direct relevance to the 2020 role of state courts in policing partisan gerrymandering, is this language in *Rucho*:** "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id*. at 2507 (emphasis added).[[17]](#footnote-17) **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. In the 2010 redistricting round, unlike most of the post-*Reynolds v. Sims* CITE NEEDEDdecades, Republicans disproportionately had trifecta control of both branches of the state legislature and the governorship and there were more states under Republican trifecta control than in previous decades. JONATHAN CAN YOU PROVIDE SOME DATA? Thus, even though there were fewer states where redistricting was under legislative control in the 2020 round than in previous redistricting rounds because of an increase in the number of redistricting commissions with congressional responsibilities, the vast bulk of congressional gerrymanders in the 2020 redistricting round favored Republicans, with New York and Maryland key exceptions (see discussion below)**

5. **There was not a perfect congruence between Republican control of the legislative and executive branches of a state and Republican dominance vis a vis the partisan identification of state supreme court justices. Because of longer terms for judicial appointments, state courts were somewhat more Democratic than state legislatures in states that had been undergoing partisan realignment in a pro-Republican direction. JONATHAN IS THIS CORRECT? Most importantly 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.**

**Later in the text we will examine the apparent degree to which partisan congruity of state court justices and the party responsible for the map affected the decision to find that map a violation of the state constitution. As we will see, the relationship between judicial partisan identification and attitudes toward gerrymandering is not simple and varies across jurisdictions.**

6**. The incentives for partisan gerrymandering increased in the 2020 round. On the one hand, the US is experiencing of hyper levels of party polarization last seen more than a century ago. 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. JONATHAN CITES NEEDED AND PERHAPS EXPAND That level of competition raises the stakes for congressional gerrymandering since it is now more conceivable than even a small shift in the number of House seats each party controls could lead to a situation in which one party gained complete control over the national government.**

**7. On balance, despite a growth in the number of commission states, the checks on partisan gerrymandering decreased in the 2020 round. We have already mentioned the large number of states under trifecta control in the 2020 round, but we also need to look at the effect on potential for gerrymandering coming with the gutting of Section 5 of the Voting Rights Act in 2013. Section 5 of the Voting Right Act required preclearance by the Voting Rights Section of the Civil Rights Division of the US Department of Justice of any election law changes, including redistricting, In *Shelby* CITE NEEDED) the trigger clause for Section 5 was held to rely on outdated data (on voter turnout by race) to identify which states (or portions of states) would come under preclearance scrutiny. At the time of *Shelby*, Section 5 applied to sixteen states in whole or in part – most of the southern states and some other states with substantial minority populations. Now it applies to none. NEED TO DOUBLECHECK. THERE WERE SOME JURISDICTIONS PLACED UNDER SECTION 5 COVERAGE BY FEDERAL COURTS BECAUSE OF THEIR PAST ACTIONS. Because of the partisan divisions and polarization in Congress, Section 5 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.**

**It might not seem that a provision about racial/ ethnic representation would be that relevant to issues of partisan gerrymandering, but that is about as far from the truth as it is possible to get. 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% JONATHAN CITE NEEED. By “cracking” (dispersal gerrymandering) or “packing” (concentration gerrymandering) minority voters Republicans are able to 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.**

**8. The Census report to the states of the data needed for redistricting was delayed to an unprecedented extent,** delivered four months late.  **This delay occurred in part because of COVID-19 and in part because of administrative failures. This delay had consequences for how the redistricting process played out.**

**9. 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 in conjunction with a new and unfortunate use of the *Purcell Rule,* made it possible for some maps found by trial courts to be unconstitutional to still be permitted for use for just the 2022 election.**

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 Section 2 case law**. **Moreover, they delayed the creation of plans until it could be argued that courts that found a legislative plan unconstitutional 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.” JONATHAN IS THIS CORRECT?** In Alabama, and Louisiana federal trial courts found legislative plans to be unconstitutional : *Merrill v. Milligan*, No. 21A375 (U.S. Feb. 7, 2022); *Galmon v. Ardoin*, No. 3:22-CV-214 (M.D. La. Mar. 30, 2022 and ordered both states to draw new plans that comply with the Voting Rights Act, but the US Supreme Court has 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).

10. **TBA**

11. **TBA**

12. **TBA**

THE ROLE OF STATE COURTS IN THE 2020 REDISTRICTING ROUND: STATE-BY-STATE ANALYSES

## A. What happened in 2020 re partisan gerrymandering: a state-by-state review.

As of the completion of the 2020 round of mapmaking (ca. October 3 2022), we have identified **XX** states where a claim was made that the congressional map that was put into place was a partisan gerrymander: [[18]](#footnote-18) Alabama[[19]](#footnote-19), Florida, Georgia, Illinois, Iowa, Louisiana, Maryland, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, 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, 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 Rule* had plans that were allowed only for one election.[[20]](#footnote-20)**

**In the next section we review, on a state-by-state basis what happened in each of these states.** 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, but the challenge was defeated. We 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.

**Before we move to the details of the cases, Table 1 provides information about a set 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.

**JONATHAN THE SET OF STATES IN TABLE 1 DOESN’T MATCH THE SET LISTED IN THE PARAGRAPH ABOVE**

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[[21]](#footnote-21)** |
| *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[[22]](#footnote-22)* |  | 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 that have generated significant press coverage asserting them to be biased towards one party.

## B. State court case citations

Table 2 lists the key state court cases, including those in the 2010 round..

Table 2– Case Citations **JONATHAN THESE ARE NOT ALPHABETICAL BY STAT NOT ARE THEY CHRONOLOGICAL**

|  |  |
| --- | --- |
| 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) |

## C. Summaries of redistricting actions and litigation for individual states in the 2020 redistricting round **JONATHAN THESE WILL NEED TO BE ARANGED APLHABETICALLY OR IN SOME OTHER ORDER THAT MAKES SENSE**

### 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

# HYPOTHESES ABOUT STATE COURTS WITH AGGREGATE DATA IN TABULAR FORM

## A. Where were challenges brought?

As shown above, Table 1 identifies the states that might be considered political gerrymanders. The table provides information about whether 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 we can draw several hypotheses that speak to the ability of state courts to cure partisan gerrymandering, **though there are several cases whose final disposition in federal court is not yet set as of the time of this writing (October 4, 2022)**

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*.[[23]](#footnote-23)

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.

## B. Who brought challenges?

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.[[24]](#footnote-24)

**What we see from Table 3 is interesting**. **In the 2010 round,** 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 (or implicitly) affiliated with the political party that served to gain from state courts overturning the enacted plan. **JONATHAN IS THIS CORRECT?**

## C. When are challenges successful?

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 language. 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.[[25]](#footnote-25) 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.

## D. How were decisions reached?

HYPOTHESIS 5: Ceteris paribus, in each state, most justices who rejected a claim that a map was unconstitutional did so on purely legal grounds rather than rejecting the empirical evidence as inadequate

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

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 7 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.

# EVALUATING THE EFFECTS OF COURT ORDERED MAPS AS COMPARED TO THEIR REJECTED LEGISLATIVE COUNTERPART

## Measures of vote dilution and how they were used

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[[26]](#footnote-26)
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.[[27]](#footnote-27)

Table 7-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 |  |
|  |  |

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 7, we see that

## Measuring the Effects of State Courts in Limiting Partisan Gerrymandering

JONATHAN TO BE COMPLETED

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 >> JONATHAN TO PROVIDE

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.[[28]](#footnote-28)

<<Table 5 about here >> JONATHAN TO PROVIDE

# DISCUSSION

**As we discussed above, there are many reasons why the 2020 round of redistricting is very different from previous round, with one key aspect of that difference being the 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 older 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.

**As we assess the overall evidence, gerrymandering is more egregious and more pervasive than in the past at least in legislatively controlled states, but the combination of taking redistricting out of the hands of the legislature, and state courts taking an much more aggressive stance in applying provisions of their state constitution as bars to gerrymandering, has meant that 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, it is still unacceptably high, and a threat to democracy.** **JONATHAN THINK ABOUT LANGUAGE.**

# LOOKING TO THE FUTURE

## A. 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 majority explicitly states that it is not expect to “ condemn 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*. **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. *Id.* 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.”).

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 et al. 2021). **Less than half the states that presently leave redistricting in the hand of the state legislature permit citizen initiatives JONATHAN IS THIS CORRECT?? that might take control of redistricting out of the hands of legislatures or add language which might directly or indirectly limit gerrymandering. 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 of 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 (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 in redistricting commissions, not all commission states are likely to end up**. **with good government maps.**  **Similarly, advisory commissions or state demographers can be overruled by legislatures.**

**Passing new initiatives specify 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 as a way 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, 2018). 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 then most greatly suffering from gerrymandering, but the fact of gerrymandering 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.**

**Similarly relying on state courts to police gerrymandering is also limited though we have seen its importance in the 2010 round in three states and in the 2020 round in XX states. 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 where (as in XX states) state court judges are elected. 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.**

**Expecting Congress to police partisan gerrymandering is also 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.**

## Mid-decadal redistricting

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. 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.**

## C. 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 US 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 2023 **emphasis added**).[[29]](#footnote-29)

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 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* 413PA21 (2022), 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 US 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.**

## D. Congressional power to seat members

**There are a number of issues re election administration in terms of the power of entities under partisan control to refuse to accept the (legitimate) results of elections.[[30]](#footnote-30) 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.**

# 

# RECOMMENDATIONS

**There are a number of 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 us only JONATHAN FILL IN number of 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 (CITE) 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 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. JONATHAN PLEASE THINK ABOUT BETTER WORDING**

**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[[31]](#footnote-31) so as to have a map in place that can then be circulated for public comment on a very tight schedule. [[32]](#footnote-32) JONATHAN PLEASE THINK ABOUT BETTER WORDING**

**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 definitely 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. JONATHAN, PLEASE THINK ABOUT**

**3. JONATHAN PLEASE THINK ABOUT MORE RECOMMENDATIONS**

# Cases Referenced

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*Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797 (1986) <https://casetext.com/case/davis-v-bandemer#p116>

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

*League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015) <https://casetext.com/case/league-v-perry-3#p414> (or is this Romo v. Detzner?)

*League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) <https://casetext.com/case/league-of-women-voters-of-pa-v-commonwealth-15>

*Harper v. Lewis*, NO. 5:19-CV-452-FL (E.D.N.C. Oct. 22, 2019) <https://casetext.com/case/harper-v-lewis-1>

*Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019) <https://casetext.com/case/rucho-v-common-cause-2>

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*Common Cause v. Rucho,* No. 1:16-CV-1026 318 F.Supp.3d 777 <https://case-law.vlex.com/vid/common-cause-v-rucho-893750595>

*Shaw v. Reno, 509 U.S. 630, 642 (1993) (Shaw I)*

*Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 31471 (N.Y. Sup. Ct. 2022)*.* [*https://casetext.com/case/harkenrider-v-hochul-7*](https://casetext.com/case/harkenrider-v-hochul-7)

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

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

*Galmon v. Ardoin*, No. 3:22-CV-214 (M.D. La. Mar. 30, 2022).

***Republican Party v. Martin* 980 F2d 943 (4th Cir. 1992)**

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. We limit ourselves to states with at least three congressional districts. [↑](#footnote-ref-4)
5. All but **X** of the states where legislatures draw congressional maps allow the governor to veto the plan [↑](#footnote-ref-5)
6. Such metrics include the *efficiency gap*, *partisan bias*, and the *mean-median gap*, We discuss these later in the essay. [↑](#footnote-ref-6)
7. 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-7)
8. **Grofman, Bernard and Gary King. 2007. Partisan Symmetry and the Test for Gerrymandering Claims after *LULAC v. Perry*. *Election Law Journal*, 6 (1)** [↑](#footnote-ref-8)
9. 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. [↑](#footnote-ref-9)
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. [↑](#footnote-ref-10)
11. (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-11)
12. 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-12)
13. 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-13)
14. 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-14)
15. Floridais 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-15)
16. 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-16)
17. It went on to say that state statutes and constitutions do not provide a renewed basis for federal courts such as this one to wade into "one of the most intensely partisan aspects of American political life." 139 S.Ct. at 2507. [↑](#footnote-ref-17)
18. 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-18)
19. 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-19)
20. **Such plans might still be overturned prior to the 2024 election. JONATHAN, SHOULD THOSE STATES BE LISTED?** [↑](#footnote-ref-20)
21. We count only plans as successfully challenged if, upon court intervention, a new plan was put into place. [↑](#footnote-ref-21)
22. 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-22)
23. *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-23)
24. Of course, such an identification might be merely a façade for a group with a primarily partisan motivation. [↑](#footnote-ref-24)
25. 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-25)
26. 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-26)
27. This list is not complete, but it includes all the most frequently used measures. [↑](#footnote-ref-27)
28. 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-28)
29. See also (Morley 2020). [↑](#footnote-ref-29)
30. **Grofman, Bernard. 2022. Prospects for Democratic Breakdown: Bringing the States Back In. *Perspectives in Politics*. 1040-1046.** [↑](#footnote-ref-30)
31. **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 a number of 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-31)
32. **Public comment can be useful, but it is usually most useful when the comments are on an actual draft map.** [↑](#footnote-ref-32)