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In Virginia, the failure of the state’s redistricting commission to agree on a plan led to two co-special masters being appointed by the state court to draw the map.[[1]](#footnote-1) In Pennsylvania there was never a map in place by the normal procedures found in the PA Constitution.[[2]](#footnote-2) Instead, the legislature and the governor, of different political persuasions, refused to negotiate.[[3]](#footnote-3) That led to the courts holding hearings and choosing among alternatives submitted to them.[[4]](#footnote-4)

OMIT MATERIAL IN BLUE SINCE WE DON’T ACTUALLY DO THIS IN THIS PAPER. 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. 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; 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 based on 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).

DELETE SINCE WE DON’T DO THIS 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.

that, even though partisan gerrymandering was, in principle, justiciable (see Bandemer) it looked hopeless to expect federal courts to rein in partisan gerrymandering since no federal court had ever found a single member district plan to be a partisan gerrymandering in three decades of litigation. While this situation changed in the latter part of the decade, with case such as XX v. YY CITE in Wisconsin and PP v. QQ in RR , after the Supreme Court reversed the trial court in Rucho in 2018, and put paid to any federal path to curing the ills of gerrymandering (bar the completely implausible option of a totally polarized U.S. Congress enacting anti-gerrymandering legislation) there was additional incentive for reformers (or the minority party in the state) to try to get an initiative passed to take redistricting out of the hands of the legislature. And, indeed, in XXXX in the state of Y , XXXX in the state of Z and XXXX in the state of AA, new redistricting initiatives passed, XX, and XX. ADD BRIEF early HISTORY OF FEDERAL CASE LAW RE PARTISAN GERRYMANDERING Bernie I did this in the main text ahead. I didn’t see you had this in a footnote.

On balance, the checks on partisan gerrymandering decreased in the 2020 round. Despite a growth in the number of commission states, many states were still under trifecta control in the 2020 round.

OMIT MATERIAL IN BLUE 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.

## C. Summaries of redistricting actions and litigation for individual states in the 2020 redistricting round

### Pennsylvania 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

## Where were challenges brought?

As shown above,

Table 4 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 where there 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*, 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*.[[5]](#footnote-5)

Table 4 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.

## Who brought challenges?

Table 5 shows the states where there partisan gerrymandering challenges raised in state court and identifies the plaintiffs.

Table 5-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.[[6]](#footnote-6)

What we see from Table 5 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?

## 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 4 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.[[7]](#footnote-7) 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.

## 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 6 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 6 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.[[8]](#footnote-8)

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 7 about here

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

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. And we can identify the partisan character of a proposed map by who voted for it. Table 8 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 plan in each branch of the legislature shown in the last column.

Table 8 about here >>

We would expect that

HYPOTHESIS 7: 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 U.S. 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 U.S. 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 U.S. 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[[9]](#footnote-9)
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 7 generalizes from court opinions the evidence for a finding of gerrymandering from the set of eleven metrics above from the state court decisions.[[10]](#footnote-10)

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 8: 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

END OMITTED MATERIAL

# REGARDING WISCONSIN STATE LEGISLATIVE MAPS

The story of Wisconsin does not end here. This plan was challenged by the state legislature to the U.S. Supreme Court because “the Governor had failed to present a strong evidentiary basis for believing the VRA mandated the district lines he drew.”[[11]](#footnote-11) The U.S. Supreme Court reasoned that drawing a district with racial motivations absent strong evidence that the district would be required violates the Equal Protection Clause.[[12]](#footnote-12) That the "VRA might support race-based districting"[[13]](#footnote-13) is not enough to justify race-based redistricting. “Under the Equal Protection Clause, districting maps that sort voters on the basis of race “‘are by their very nature odious.’”[[14]](#footnote-14) “Strict scrutiny requires more: it requires strong, district-specific evidence that race-based map drawing is required, not just that it "might" be required.”[[15]](#footnote-15) The U.S. Supreme Court remanded to the Wisconsin Supreme Court allowing the court to justify the district or to revise the plan. The Wisconsin court acted on the remand to instead choose the legislature’s plan. The court reasoned that in contrast to the governor’s map, “the maps proposed by the Wisconsin Legislature are race neutral. The Legislature's maps comply with the Equal Protection Clause, along with all other applicable federal and state legal requirements. Further, the Legislature's maps exhibit minimal changes to the existing maps, in accordance with the least change approach we adopted in *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469.”[[16]](#footnote-16)

1. Vozzella, *supra* note 167. [↑](#footnote-ref-1)
2. 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 chose a map from several that were submitted to the court: *Carter v. Chapman*, 7 MM 2022 (Pa. Mar. 9, 2022). [↑](#footnote-ref-2)
3. *Supra* note 166. *See also* Kate Huangpu, *Gov. Tom Wolf vetoes Pennsylvania congressional map sent to him by Republicans*, Spotlight PA, Jan. 26, 2022, https://www.spotlightpa.org/news/2022/01/pennsylvania-redistricting-congressional-map-veto/ (last visited Jan 7, 2023). [↑](#footnote-ref-3)
4. *See* Carter v. Chapman, 270 A3dPaSupreme Court 444 (2022). [↑](#footnote-ref-4)
5. 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-5)
6. Of course, such an identification might be merely a façade for a group with a primarily partisan motivation. [↑](#footnote-ref-6)
7. 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-7)
8. 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-8)
9. 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-9)
10. This list is not complete, but it includes all the most frequently used measures. [↑](#footnote-ref-10)
11. No. 2021AP1450-OA at 9.

    (https://www.wicourts.gov/courts/supreme/origact/docs/21ap1450\_opdec.pdf) [↑](#footnote-ref-11)
12. *Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct.* at 1249. [↑](#footnote-ref-12)
13. *Johnson*, 400 Wis. 2d 626, at 47. [↑](#footnote-ref-13)
14. *Wis. Legislature v. Wis. Elections Comm'n*, at 2, quoting *Shaw v. Reno*, 509 U. S. 630, 643 (1993)

    (https://www.supremecourt.gov/opinions/21pdf/21a471\_097c.pdf) [↑](#footnote-ref-14)
15. at 9

    (<https://www.wicourts.gov/courts/supreme/origact/docs/21ap1450_opdec.pdf>) [↑](#footnote-ref-15)
16. *Id.* at 3. [↑](#footnote-ref-16)