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## The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections

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Jonathan Cervas, Bernard Grofman, & Scott Matsuda

## The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections

21 U.N.H. L. Rev. 421 (2023)

**ABSTRACT.** Federal courts were once seen as the place for partisan gerrymandering challenges to be lodged, but after thirty-plus years of failing to find any redistricting plan to be a partisan gerrymander, even while holding partisan gerrymandering to be justiciable, the Supreme Court announced in *Rucho v. Common Cause*, 139 S.Ct. 2484, 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 find that partisan gerrymandering claims, while almost entirely in federal courts in the 2010 and earlier rounds of redistricting, are now brought in state courts. 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. However, we also see some state courts creatively reevaluating older language in their state's constitution to find a way to hold egregious gerrymanders in violation of that constitution. Moreover, we see various state court justices relying on a variety of statistical tests proposed by academic specialists, and/or examining the extent to which proposed maps satisfied traditional good government standards. Thus, they are implicitly challenging the Supreme Court's view in *Rucho* that no manageable standard for egregious partisan gerrymandering existed.

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## INTRODUCTION

The focus of this essay is the role of state courts as checks on partisan gerrymandering in the U.S. House of Representatives.<sup>1</sup> State courts can become involved in the redistricting process in two ways: (1) when those with primary redistricting authority fail to enact a plan in a timely fashion, state courts can be forced to draw their own map, or (2) they can be the site of litigation challenging a (congressional) plan as a partisan gerrymander under provisions of the state's own constitution (or for other violations of state law). In so doing, they may choose to be attentive to the map's partisan consequences, or they may be required to do so because of specific provisions in the state's constitution. To understand the role of state courts in redistricting, we must understand the institutional context that governs redistricting in each state.

State legislatures are generally the body that redraws Congressional districts after decennial censuses. Following the 2020 census,<sup>2</sup> in thirty-three of the forty-four states that required the drawing of congressional districts, the legislature had the primary responsibility for producing new maps.<sup>3</sup> Political gerrymanders are most likely to occur when all aspects of the line-drawing process are controlled by a single political party.<sup>4</sup> The vast bulk of these thirty-three states were under single-party control.<sup>5</sup>

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<sup>1</sup> Much of what we say will also be relevant to state legislative redistricting but providing details of state legislative redistricting in the 2020s redistricting round is beyond the scope of this essay and requires a separate treatment.

<sup>2</sup> The decennial census *inter alia* enumerates the population of the country and for each state and determines the total representatives (out of 435) that each state will be allocated. U.S. Census Bureau, *2020 Census Apportionment Results*, Census.gov (April 26, 2021), [https://census.gov/data/tables/U.S. Census Bureau, 2020 Census Apportionment Results, Census.gov \(April 26, 2021\), https://census.gov/data/tables/2020/dec/2020-apportionment-data.html](https://census.gov/data/tables/U.S. Census Bureau, 2020 Census Apportionment Results, Census.gov (April 26, 2021), https://census.gov/data/tables/2020/dec/2020-apportionment-data.html) [https://perma.cc/LN43-GJN7] (last visited Dec. 22, 2022).

<sup>3</sup> Justin Levitt, National Overview, All About Redistricting, <https://redistricting.ils.edu/national-overview> [https://perma.cc/5Y75-LM6A] (last visited Dec. 21, 2022).

<sup>4</sup> Single party control is close to a necessary condition for partisan gerrymandering, but it is not a sufficient condition. You cannot gerrymander where you do not have control.

<sup>5</sup> See details later in the text. See *infra* tbl. 1. The term *trifecta control* is commonly used to denote states where one party controls both branches of the legislature and the governorship. But another more general term applicable to the redistricting context is *party control*—used to describe situation in which one party can unilaterally adopt a redistricting plan even if there is divided party control. In North Carolina, this is possible if one party controls both branches of the legislature since that state does not have a role for the governor in the redistricting process (see

In states where congressional redistricting is not primarily under legislative control, some form of commission is used, and commissions may also be used as backup if there is not political agreement on a plan.<sup>6</sup> Several states changed their constitutional provisions affecting redistricting after the 2010 cycle. The key change involved taking redistricting out of the hands of the legislature and replacing the legislature with some form of commission.<sup>7</sup> Commissions take a variety of forms, and some commissions can operate essentially as partisan bodies when members aligned with one party vote for plans almost entirely based on their projected advantage for that party, or when a tie-breaker member adopts a plan proposed by one side that can be regarded as a partisan gerrymander.<sup>8</sup>

Most states have provisions in their constitutions that guide the line-drawing process.<sup>9</sup> These rules affect districting practices even in states where redistricting is out of the hands of the legislature or under divided control. Most often, we find state constitutions including references to “traditional redistricting criteria,” e.g., provisions that limit districts to a contiguous territory (thirty-four states), restrictions on political subdivision splits (thirty-one states), and requirements for compact districts (thirty-one states).<sup>10</sup> Language is also found in some state

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generally Richard F. Ober et al, *Up by Their Own Bootstraps: Will a New Supreme Court Let Legislatures Bypass Governors Over Redistricting?*, 83 ALB. L. REV. (2022) (forthcoming) <https://www.albanylawreview.org/article/57790-up-by-their-own-bootstraps-will-a-new-supreme-court-let-legislatures-bypass-governors-over-redistricting> [https://perma.cc/8JZD-AU8W]); other states have state legislative compositions such that the governor’s veto can be overridden when one party controls a supermajority in both branches of the state legislature. See later in the text for details about party control in the 2010 and 2020 rounds.

<sup>6</sup> See *infra* notes 66 and 67.

<sup>7</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2020, at 96 (2019).

<sup>8</sup> See further discussion below. See *infra* at p.444. Not every effort to change control of redistricting was successful. In Pennsylvania, for example, groups such as the Committee of Seventy and Fair Districts PA advocated for significant changes to the redistricting process. No changes were made. Also, sometimes a redistricting commission is put into place but with a badly flawed procedure. In Missouri, voters passed the “Clean Missouri” act, but it was later amended to lose its teeth. In Ohio, the outcome was subverted by the majority party despite state court findings that adopted legislative maps were unconstitutional. In Virginia, a commission with the same number of Republican identifiers as Democratic party identifiers resulted in deadlock.

<sup>9</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 7 app. E.

<sup>10</sup> The exact text of constitutional provisions varies by state. Traditional criteria, in addition to those listed above, include preservation of communities of interest and protection of the voting rights of racial minorities. Some courts have also accepted that avoiding the pairing of incumbents and/or preservation of the cores of existing districts are legitimate concerns in map-

constitutions prohibiting plans that unduly favor or disfavor a political party or a particular candidate, with several states adding such provisions recently concomitantly with changes in control over the redistricting process.<sup>11</sup> But even when there was no explicit anti-gerrymandering provision in the state constitution, beginning with a Pennsylvania Supreme Court decision in 2018,<sup>12</sup> some state courts have begun to interpret older provisions of their state constitutions as implicitly prohibiting egregious gerrymandering—language that says elections shall be “free and equal,” “free and open,” simply “free,” or language regarding the “right to vote.”<sup>13</sup>

After first reviewing the state of redistricting case law affecting partisan gerrymandering claims prior to the 2020 round, we next review the changes in the institutional context that shape how 2020 was different in important ways from previous redistricting rounds. Then, we look in at the actions of state courts in dealing with challenges to enacted plans based on claims of partisan gerrymandering and their role in drawing plans of their own in cases where the legislature or commission failed to draw a plan in a timely fashion.<sup>14</sup>

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making, but these considerations would not normally be included in the category of traditional redistricting criteria of the kind that are found in most state constitutions. And they may operate to advantage the party currently controlling a chamber or congressional delegation by freezing into place a previous gerrymander.

States without specific criteria in their constitution affecting congressional mapmaking are Alaska, Connecticut, Delaware, Illinois, Indiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, North Dakota, South Dakota, Tennessee, Texas, Vermont, and Wisconsin. For more, see SARAH J. ECKMAN, *Congressional Redistricting Criteria and Considerations*, (2021), <https://crsreports.congress.gov/product/pdf/IN/IN11618> (last visited Dec. 28, 2022); Ben Williams & Wendy Underhill, *Redistricting Criteria*, 25 NAT'L. CONF. OF STATE LEGISLATURES (2017), <https://www.ncsl.org/research/redistricting/redistricting-criteria-legisbrief.aspx> (last visited Dec. 28, 2022); Justin Levitt, *Criteria for Congressional Districts*, ALL ABOUT REDISTRICTING, <https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/criteria-for-congressional-districts/> [<https://perma.cc/5Y75-LM6A>] (last visited Dec. 28, 2022).

<sup>11</sup> See *infra* note 68.

<sup>12</sup> *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

<sup>13</sup> See Joshua A Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 103-04 (2014) (providing information on the right to vote found in state constitutions).

<sup>14</sup> As noted above, most states still have redistricting under legislative control; however, several states have advisory commissions or backup commissions if the legislature fails to pass a map. See *infra* note 70. Additionally, states differ on the voting rule required to pass a map. For instance, Ohio requires the legislature to pass a map with a supermajority; otherwise, a backup commission retains jurisdiction over the creation of a Congressional plan. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 7 at 91.

## I. BACKGROUND

### A. *The State of Partisan Gerrymandering Law Prior to 2020*

In this section, we look at the status of redistricting law vis-à-vis partisan gerrymandering prior to the 2020 redistricting round. While our focus in this section is to trace litigation through time, and generally that has been concentrated in federal courts, we also briefly examine the role of state courts in the 2010 redistricting round since previous precedents in other states affected how state courts saw the options for controlling partisan gerrymandering in their own state in the current decade.<sup>15</sup> And while we view malapportionment as having potential partisan consequences, we will begin our review after the series of U.S. Supreme Court decisions resolving malapportionment.<sup>16</sup>

The U.S. Supreme Court first dealt with the role of partisanship in districting in 1973 in a Connecticut case, *Gaffney v. Cummings*,<sup>17</sup> in which political data was used to try and balance districts roughly proportional to the state-wide political strength of parties.<sup>18</sup> In *Gaffney*, the court ruled that the state legislature did not violate the Fourteenth Amendment's Equal Protection Clause by taking partisanship into account to represent the parties in a fashion reflective of their electoral strength.<sup>19</sup> *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 has been 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*, which, like several other cases, was dismissed for want of a federal claim.<sup>20</sup>

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<sup>15</sup> Cf. Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania (2018)*, 17 ELECTION L. J. 264 (2018).

<sup>16</sup> See especially *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>17</sup> *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

<sup>18</sup> *Id.* at 738. (stating that “the Board . . . created what was thought to be a proportionate number of Republican and Democratic legislative seats”).

<sup>19</sup> *Id.* at 754 (providing that “neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.”).

<sup>20</sup> *Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988), *aff'd sub nom.* *Badham v. Eu*, 488 U.S. 1024, 109 S. Ct. 829, 102 L. Ed. 2d 962 (1989) (“We hold that plaintiffs have not alleged, and on this

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*.<sup>21</sup> *Bandemer* was a challenge to Indiana's legislative plans as partisan gerrymanders.<sup>22</sup> 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 to hold a plan to be unconstitutional. Namely, that the minority be "shut out of" the political process.<sup>23</sup>

That high bar did not prevent new challenges to alleged partisan gerrymanders from being brought in federal courts after *Bandemer*,<sup>24</sup> but again, lower courts ultimately rejected partisan gerrymandering claims.<sup>25</sup> Eighteen years after *Bandemer*, in a case from Pennsylvania, *Vieth v. Jubelirer*,<sup>26</sup> that lacked a majority opinion, the issue was again brought before the U.S. Supreme Court, and it again rejected a partisan gerrymandering claim.<sup>27</sup> But now there were clear signs that the Court was rethinking the issue of the justiciability of partisan gerrymandering.<sup>28</sup>

Justice Scalia, writing for a plurality, would have held that there was no justiciable claim because there was no "judicially discernible and manageable

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record cannot allege, facts sufficient to state a claim under the Supreme Court's holding in *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Accordingly, the motion to dismiss is granted with prejudice." )

<sup>21</sup> *Davis v. Bandemer*, 478 U.S. 109, 110, 106 S. Ct. 2797, 2798, 92 L. Ed. 2d 85 (1986), abrogated by *Rucho v. Common Cause*, 204 L. Ed. 2d 931, 139 S. Ct. 2484 (2019). ("The claim is whether each political group in the State should have the same chance to elect representatives of its choice as any other political group, and this Court declines to hold that such claim is never justiciable.")

<sup>22</sup> *Id.* at 113. ("Although we find such political gerrymandering to be justiciable, we conclude that the District Court applied an insufficiently demanding standard in finding unconstitutional vote dilution. Consequently, we reverse.")

<sup>23</sup> *Id.* at 139 (stating that "[i]n those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process.").

<sup>24</sup> *See, e.g.*, *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 947 (4th Cir. 1992).

<sup>25</sup> *See, e.g.*, *Duckworth v. State Admin. Bd. of Election L.*, 332 F.3d 769 (4th Cir. 2003); *Smith v. Boyle*, 144 F.3d 1060 (7th Cir. 1998); *La Porte County Republican Cent. Comm. v. Bd. of Comm'rs of County of La Porte*, 43 F.3d 1126 (7th Cir. 1994). *See Vieth v. Jubelirer*, 541 U.S. 267, 280 (2004) note 6. In *Vieth*, Justice Scalia listed a multitude of cases post-*Bandemer* involving partisan gerrymandering claims where relief was denied.

<sup>26</sup> *Vieth*, 541 U.S. at 271-72.

<sup>27</sup> *Id.* at 305-06.

<sup>28</sup> *See id.* at 317. (Stevens, J., dissenting); *see also* ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY 22 (2016).



standard” by which the Court could decide when a plan went from being constitutional to unconstitutional.<sup>29</sup> His view would have overturned *Bandemer*. Three justices in *Vieth* (Breyer, Souter, and Stevens) wrote separate dissents, each proposing their own standard for adjudicating partisan gerrymandering claims.<sup>30</sup> Justice Kennedy concurred with the plurality that the Appellants’ complaint be dismissed because the “proposed standards each have their own deficiencies,”<sup>31</sup> but left open the possibility that a manageable standard might be established.<sup>32</sup> The *Vieth* Court concluded that “‘Fairness’ is not a judicially manageable standard.”<sup>33</sup>

A few years later, in *League of United Latin American Citizens v. Perry*, the Court heard a challenge to the mid-decade redistricting scheme by the Texas Legislature but again rejected claims that the plan was a gerrymander.<sup>34</sup> In that case, some Justices expressed the view that a manageable standard combining partisan symmetry approaches with other measures might yet be contrived.<sup>35</sup> 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

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<sup>29</sup> *Vieth*, 541 U.S. at 306.

<sup>30</sup> See generally, *id.* at 317 (Stevens, J. dissenting); *id.* at 343 (Souter, J., with Ginsberg, J., dissenting); *id.* at 355. (Breyer, J., dissenting). See also J. Clark Kelso, *Vieth v. Jubelirer: Judicial Review of Political Gerrymanders*, 3 ELECTION L.J. 47 (2004).

<sup>31</sup> *Vieth*, 541 U.S. at 269.

<sup>32</sup> For an overview of *Vieth*, see MCGANN ET AL., *supra* note 28, at 52.

<sup>33</sup> *Vieth*, 541 U.S. at 268.

<sup>34</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 447 (2006). (“We reject the statewide challenge to Texas’ redistricting as an unconstitutional political gerrymander.”)

<sup>35</sup> Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 ELECTION L.J. 2 (2007), <http://www.liebertpub.com/doi/10.1089/elj.2006.6002> [https://perma.cc/C9CL-MLN8] (last visited Oct. 18, 2022).

courts.<sup>36</sup> And cases challenging plans as partisan gerrymanders continued to be filed in federal courts.<sup>37</sup>

After more than thirty years of unsuccessful challenges, three federal trial courts, one in Wisconsin,<sup>38</sup> one in North Carolina,<sup>39</sup> and one in Maryland,<sup>40</sup> found proposed plans to be unconstitutional partisan gerrymanders. These cases were appealed to the U.S. Supreme Court, which issued a definitive ruling that focused on the challenged North Carolina map.<sup>41</sup>

In a 5-4 opinion in *Rucho*, the court majority took away the ability to bring claims of partisan gerrymandering in federal court, with Justice Kagan, joined by Justices Ginsberg, Breyer, and Sotomayor, in dissent.<sup>42</sup> *Bandemer* was overruled: the justiciability of partisan gerrymandering claims was eliminated, and the lower court findings of unconstitutional partisan gerrymandering were reversed.<sup>43</sup> 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.”<sup>44</sup> 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.*”<sup>45</sup> *Rucho* further asserted: “Federal judges have no license to reallocate political power between the two major political

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<sup>36</sup> Kristopher Tapp, *Measuring Political Gerrymandering*, 126 AM. MATHEMATICAL MONTHLY 593 (2019) (“Motivated by Kennedy’s criteria, Stephanopoulos and McGhee proposed their efficiency gap formula to measure the degree of partisan gerrymandering in an election [11, 16]. Their formula was one key to the plaintiffs’ success in the *Gill v. Whitford* (2016 case)”); Moon Duchin, *Outlier Analysis for Pennsylvania Congressional Redistricting*, TECH. REP. 18 (2018); Jonathan Rodden & Thomas Weighill, *Political Geography and Representation: A Case Study of Districting in Pennsylvania*, in POLITICAL GEOMETRY 101 (Moon Duchin & Olivia Walch eds., 2022).

<sup>37</sup> See, e.g., *Gill v. Whitford*, 138 S. Ct. at 1919–20; *Rucho v. Common Cause*, 139 S.Ct. at 2487 (2019).

<sup>38</sup> *Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016).

<sup>39</sup> *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 597–98 (M.D.N.C. 2018).

<sup>40</sup> *Benisek v. Lamone*, 241 F. Supp. 3d 566, 568 (D. Md. 2017).

<sup>41</sup> *Rucho*, 139 S. Ct. at 2506–07.

<sup>42</sup> See generally *Id.* at 2509–2525.

<sup>43</sup> *Davis*, 478 U.S. at 113.

<sup>44</sup> *Rucho*, 139 S. Ct. at 2491.

<sup>45</sup> *Id.* at 2494 (emphasis added, quotations omitted) citing *Gill* at 1926; See also *id.* at 2506–07.

parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.”<sup>46</sup>

The Court’s opinion in *Rucho* was problematic in that it recognizes that “[e]xcessive partisanship in districting leads to results that reasonably seem unjust,”<sup>47</sup> and the Court “does not condone excessive partisan gerrymandering,”<sup>48</sup> yet it simultaneously shirked responsibility. The majority opinion in *Rucho* is also problematic because it misunderstands the basic measurement issue regarding partisan gerrymandering, namely, how one can detect an egregious partisan gerrymander. It frames this question as: “how much representation [do] particular political parties *deserve*—based on the votes of their supporters . . . .”<sup>49</sup> But the Court then goes on to claim that “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation.”<sup>50</sup> However, that latter assertion is flatly wrong. Social science is unequivocal in NOT expecting proportionality in single-member, winner-take-all districting schemes.<sup>51</sup> For example, metrics such as the *partisan bias* measure require only that parties are treated symmetrically.<sup>52</sup> 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.<sup>53</sup>

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<sup>46</sup> *Id.* at 2507.

<sup>47</sup> *Id.* at 2506.

<sup>48</sup> *Id.* at 2507.

<sup>49</sup> *Id.* at 2499 (emphasis in original).

<sup>50</sup> *Id.*

<sup>51</sup> Bernard Grofman, *For Single-Member Districts, Random is Not Equal*, in REPRESENTATION AND REDISTRICTING ISSUES, 55 (Bernard Grofman et al. eds., 1982); G. Gudgin & P. J. Taylor, *The Decomposition of Electoral Bias in a Plurality Election*, 10 BR. J. POL. SCI. 515, 516 (1980); G. GUDGIN ET AL., SEATS, VOTES, AND THE SPATIAL ORGANISATION OF ELECTIONS 200 (2012); M.S. SHUGART & R. TAAGEPERA, VOTES FROM SEATS: LOGICAL MODELS OF ELECTORAL SYSTEMS 4 (2017); Rein Taagepera, *Seats and Votes: A Generalization of the Cube Law of Elections*, 2 SOC. SCI. RES. 257 (1973).

<sup>52</sup> Grofman and King, *supra* note 35 at 5; Jonathan N. Katz et al., *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, 114 AM. POL. SCI. REV. 164, 166 (2020).

<sup>53</sup> Amariah Becker et al., *Computational Redistricting and the Voting Rights Act*, 20 ELECTION L.J. 407, 409 (2021); Daryl DeFord et al., *Recombination: A Family of Markov Chains for Redistricting*, HARV. DATA SCI. REV. (2021), <https://hdsr.mitpress.mit.edu/pub/ids8ptxu> [<https://perma.cc/BL6R-CKWZ>] (last visited Oct. 18, 2022); Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, YALE L. J. FORUM 744, 750 (2021); POLITICAL GEOMETRY: RETHINKING

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, two state courts had already overturned (in whole or in part) legislatively enacted plans that were found to dilute the voting strength of minority parties,<sup>54</sup> while another did so post-*Rucho*.<sup>55</sup>

The Florida and Pennsylvania state courts held a trial in which they heard from expert witnesses, deposed lawmakers, and weighed the evidence to conclude that one political party was inappropriately hampered by the district lines in the translation of its votes into seats.<sup>56</sup> 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*.<sup>57</sup> While this state court decision could be seen as a direct rebuttal to the *Rucho* majority's finding that no manageable standard to detect unconstitutional gerrymandering in North Carolina exists, we see *Harper* as confirmation that *state courts, interpreting their own state constitution, have the ability to craft state-specific standards for policing partisan gerrymandering*.<sup>58</sup>

In Florida, there was explicit state constitutional language about the permissible role of partisanship in redistricting.<sup>59</sup> In Pennsylvania, the Pennsylvania Supreme Court expressly recognized that partisan gerrymandering is

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REDISTRICTING IN THE US WITH MATH, LAW, AND EVERYTHING IN BETWEEN 109 (Moon Duchin & Olivia Walch eds., 2022).

<sup>54</sup> See League of Women Voters of Pa., 178 A.3d at 825; League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 449 (Fla. 2015).

<sup>55</sup> See *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. 2019).

<sup>56</sup> Jonathan R. Cervas & Bernard Grofman, *Tools for Identifying Partisan Gerrymandering with an Application to Congressional Districting in Pennsylvania*, 76 POL. GEOGRAPHY 102069 (2020); Grofman and Cervas, *supra* note 15 at 270; Samuel Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. OF PA. J. CONST. L. 203, 223 (2019).

<sup>57</sup> 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 (2016). While drawing the remedy, the legislator (and named defendant) admitted to drawing with partisanship as its primary motivation, saying they "propose[d] that [the Committee] draw the maps to give a partisan advantage to ten Republicans and three Democrats because [he] d[id] not believe it [would be] possible to draw a map with eleven Republicans and two Democrats." *Common Cause*, 279 F. Supp. 3d at 604. That map was approved on a party-line vote.

<sup>58</sup> *Harper*, No. 19-CVS-012667.

<sup>59</sup> Fla. Const. art. III, §20 (a).

a justiciable violation of the Free and Equal Elections Clause.<sup>60</sup> Similarly, in North Carolina, the state court relied on the “Free Elections Clause” found in the Declaration of Rights in the state’s constitution.<sup>61</sup>

In Pennsylvania, the state court brought in a “legal and technical advisor” to assist the court in redrawing the map.<sup>62</sup> In Florida, the legislature was permitted to offer a new plan after an initial plan had been rejected.<sup>63</sup> However, after the Florida Supreme Court ruled that a greater portion of the map was invalid than those two districts found void by the trial court, and the legislature failed to agree on a new remedial plan, the court approved its own plan.<sup>64</sup> The North Carolina court issued a preliminary injunction on November 20, 2019,<sup>65</sup> but it remanded to the legislature the first right to remedy the violation,<sup>66</sup> and accepted the revised legislative map for use in 2020.<sup>67</sup>

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<sup>60</sup> Pa. Const. art. I, § 5; *League of Women Voters of Pa.*, 178 A.3d at 816.

<sup>61</sup> N.C. Const. art. I § 10.

<sup>62</sup> *League of Women Voters of Pa.*, 178 A.3d at 830. (referring to “Professor Nathaniel Persily, the expert [the] Court engaged in its Order of January 26th”). Nathaniel Persily is the James B. McClatchy Professor of Law at Stanford Law School. *Nathaniel Persily, Biography*, STAN. L. SCH., <https://law.stanford.edu/directory/nathaniel-persily/> [https://perma.cc/3ATH-RA9V] (last visited Dec. 22, 2022).

<sup>63</sup> *See Romo v. Detzner*, Nos. 2012-CA-412 & 2012-CA-490 (Fla. 2d. Cir. Ct. July 10, 2014) (trial court order).

<sup>64</sup> On December 2, 2015, the Florida Supreme Court issued an opinion intended to bring finality to litigation surrounding the state’s congressional redistricting that “spanned nearly four years in state courts.” *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 449 (Fla. 2015); *see also League of Women Voters v. Detzner*, No. 2012-CA-2842 (Fla. Cir. Ct., Dec. 30, 2015) (final judgment adopting remedial senate plan).

<sup>65</sup> In addition to the challenge of the Congressional maps, the state court first overturned the state legislative maps. *Common Cause v. Lewis*, 834 S.E.2d 425 (2019).

<sup>66</sup> 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.” *Harper v. Lewis*, No. 19-CVS-012667, at 17-18 (N.C. Super. Ct. Oct. 28, 2019) (order granting injunctive preliminary relief).

<sup>67</sup> 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.” Brian Murphy & Will Doran, *New Congressional Maps in North Carolina Will Stand for 2020, Court Rules*, THE NEWS & OBSERVER (Dec. 3, 2019), <https://www.newsobserver.com%2Fnews%2Fpolitics-government%2Felection%2Farticle237958719.html> [https://perma.cc/ZD3K-TUZH].

### *B. The 2020 Redistricting Round: Institutions and Context*

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

But, as noted earlier, we cannot understand the role of state courts as checks on partisan gerrymandering without understanding the straw which they had to make bricks. Below we identify more than a dozen ways in which the institutions and practices of redistricting in the 2020 round differed from earlier redistricting periods. Here, we elaborate on several points made earlier and considerably add to that discussion. But we leave to a later section a detailed discussion of exactly how state courts were involved in the 2020 redistricting round.

1. During the past decade, Colorado, Michigan, New York, and Virginia replaced legislative control of the redistricting process with redistricting commissions.<sup>68</sup> There are now eleven states<sup>69</sup> in which primary responsibility to draw Congressional districts is in the hands of commissions.<sup>70</sup>
2. Reforms involving the addition of commissions usually included changes in the specific criteria that were to be used in mapmaking identified in the state constitution. Overall, as of the beginning of the

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<sup>68</sup> Montana has had a commission since 1973, but only after the 2020 census and after the 1980 census did it have more than one congressional seat. See also NAT'L CONF. OF STATE LEGISLATURES (2021), <https://www.ncsl.org/redistricting-and-census/creation-of-redistricting-commissions> [<https://perma.cc/7QDS-JR9W>].

<sup>69</sup> *Id.* (Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, New York, Virginia, Washington)

<sup>70</sup> *Id.* Secondary (backup) responsibility is given to commissions in three other states (Connecticut, Indiana, and Ohio), with three more having advisory commissions (Iowa, Maine, and Utah). Backup commissions usually get the opportunity to draw districts when the legislature fails to act, especially likely in those states where a supermajority requirement for legislative enactment of a redistricting plan is in place. In Connecticut, both the legislature and the backup commission failed, and the state Supreme Court drew the map instead. Indiana did not require a supermajority for the legislature to pass a map. The state legislature and governor, under Republican control, passed a congressional map. In Ohio, the process is complicated because the legislature is first to act, and if it fails, the backup commission has an opportunity to draw a plan. If it fails, the legislature gets another opportunity, but without the supermajority requirement. That plan, however, is only valid for two years. See further discussion of Connecticut and Ohio below.

2020 round of redistricting, fourteen states had in their constitution some prohibition on political gerrymandering.<sup>71</sup> As far as we are aware, only Delaware and Hawaii had such provisions prior to the 2010 cycle.<sup>72</sup> Florida added such a prohibition in the 2010 round.<sup>73</sup>

3. The U.S. Supreme Court in *Rucho* gave direct encouragement for state courts to assume the burden of policing partisan gerrymandering. While the Court asserted that the federal judiciary was not the venue to adjudicate the harms caused by partisan gerrymandering, it also claimed that it was not tossing “complaints about districting to echo into a void.”<sup>74</sup> According to the Court majority, among the options left available to police bad behavior are “state constitutional 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.”<sup>75</sup> The Court also noted that Congress can use the Election

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<sup>71</sup> Williams and Underhill, *supra* note 10. Arizona (Requires: Competitive; Prohibits: Favor or Disfavor an Incumbent or Candidate, Use Partisan Data); California (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party; Use Partisan Data); Colorado (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Florida (Prohibited: Intentionally Favor or Disfavor a Party or Incumbent); Hawaii (Prohibited: Unduly Favor a Person or Party); Idaho (Prohibited: Protect a Party or Incumbent); Iowa (Prohibited: Intentionally Favor a Party, Incumbent, Person or Group; Use Partisan Data); Michigan (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Montana (Prohibited: Intentionally Favor Party or Incumbent, Use Partisan Data (except as required by a court in drawing a remedy)); Nebraska (Prohibited: Protect Incumbent, Use of Partisan Data); New York (Prohibited: Intentionally Favor or Disfavor Incumbent, Candidate or Party); Ohio (Prohibited: Favor an Incumbent or Party); Oregon (Prohibited: Intentionally Favor Party, Incumbent or Person); Utah (Prohibited: Intentionally Favor or Disfavor an Incumbent, Candidate or Party); Washington (Required: Competitive; Prohibited: Intentionally Favor or Disfavor a Party or Group).

<sup>72</sup> Bernard Grofman, *Criteria For Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 177 tbl. 3 (1985).

<sup>73</sup> In 2010, by initiative, Florida overwhelmingly passed the “Florida Congressional District Boundaries Amendment.” The new constitutional provision provided, “[n]o 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.” Fla. Const. art. III § 20(a). Florida state courts made use of this language in the 2010 round. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 375 (Fla. 2015)

<sup>74</sup> *Rucho*, 139 S. Ct. at 2507.

<sup>75</sup> *Id.* at 2490.

Clause to reform the redistricting process.<sup>76</sup> 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*.”<sup>77</sup> Thus, the Supreme Court clearly distinguished what it now saw as the distinct roles of federal and state courts in policing partisan gerrymandering.

4. The 2010 round provided inspiration for state courts in the 2020 round by showing how provisions affecting gerrymandering could be operationalized and enforced, especially in terms of showing how language such as “free and equal” in a state constitution could be used as a bar against egregious partisan gerrymandering. Even in states where there was not language directly about partisan fairness, twenty states have constitutional language, such as that requiring elections to be “Free,” “Free and Open,” or “Free and Equal.”<sup>78</sup> The Pennsylvania Supreme Court in *League of Women Voters* was the first state court to creatively reinterpret such language as being violated if there was egregious partisan gerrymandering.<sup>79</sup>
5. In the post-*Baker v. Carr*<sup>80</sup> decades, state governments were largely under divided control.<sup>81</sup> Even when the government was not divided, there was much more crossover voting such that voters would split

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<sup>76</sup> U.S. Const., art. I, § 4 (“The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.”); *Rucho*, 139 S. Ct. at 2507.

<sup>77</sup> It went on to say that state statutes and constitutions do not provide a renewed basis for federal courts to wade into “one of the most intensely partisan aspects of American political life.” *Id.* at 2507 (emphasis added).

<sup>78</sup> Douglas, *supra* note 13 at 103; Wang et al, *supra* note 56 at 258-88. (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).

<sup>79</sup> Grofman and Cervas, *supra* note 15 at 267.

<sup>80</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>81</sup> Morris P. Fiorina, *Divided Government in the American States: A Byproduct of Legislative Professionalism?*, 88 AM. POL. SCI. REV. 304, 304 (1994).



their ballots between parties.<sup>82</sup> Trifecta government has increased over time, especially as states have realigned after the Solid South transitioned from Democratic control to Republican control.<sup>83</sup>

In the 2010 redistricting round, Republicans disproportionately had party control.<sup>84</sup> However, this advantage in places where Republicans controlled the process declined in the 2020 round.<sup>85</sup> Although the total number of states where the process was controlled by a single party actually increased, and Republicans controlled the process in one additional state and the Democrats in two additional states,<sup>86</sup> the advantage that Republicans had in 2010 (162 district advantage) was significantly reduced by 2020 (108 district advantage).<sup>87</sup>

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<sup>82</sup> Gary C. Jacobson, *It's Nothing Personal: The Decline of the Incumbency Advantage in US House Elections*, 77 J. POL. 861, 861 (2015).

<sup>83</sup> J.H. ALDRICH & J.D. GRIFFIN, WHY PARTIES MATTER: POLITICAL COMPETITION AND DEMOCRACY IN THE AMERICAN SOUTH 122-23 (2018), <https://books.google.com/books?id=bSE-DwAAQBAJ> [<https://perma.cc/6GET-9SV6>]; Samuel Issacharoff & Richard H. Pildes, *Majoritarianism and Minoritarianism in the Law of Democracy*, N.Y.U. PUB. L. AND LEGAL THEORY RSCH. PAPER SERIES (2023), <https://www.ssrn.com/abstract=4240006> [<https://perma.cc/Y5NE-WX9Q>] (last visited Oct. 21, 2022). As noted earlier, the place where we most expect to see egregious partisan gerrymandering are states where one party has complete control of the redistricting process control. When we describe state government control, we will use the term *trifecta*. When we talk about control over redistricting, will use the term *party control*.

<sup>84</sup> Levitt, *supra* note 3.

<sup>85</sup> Going into 2020, Democrats controlled the redistricting process in eight states (Oregon, Massachusetts, Nevada, Illinois, New Mexico, New York, Rhode Island, Maryland; seventy-five total districts). Republicans controlled the process in nineteen states (Indiana, West Virginia, Texas, Alabama, Iowa, North Carolina, Utah, Oklahoma, Georgia, Arkansas, Kentucky, Mississippi, South Carolina, Tennessee, Kansas, Ohio, Florida, Missouri, New Hampshire; 183 total districts). In Kansas, the legislature was subject to the veto of the Democratic governor but overrode her veto with a supermajority vote. Nebraska's legislature is non-partisan.

<sup>86</sup> Going into 2010, Democrats had party control in six states (Arkansas, Illinois, West Virginia, Maryland, Massachusetts, Rhode Island; forty-four total districts). Republicans had party control in eighteen states (Indiana, Oklahoma, Texas, Louisiana, Wisconsin, Ohio, Utah, South Carolina, North Carolina, Alabama, Pennsylvania, Georgia, Tennessee, Michigan, Virginia, Florida, Kansas, New Hampshire; 206 total districts). Although Democrats nominally controlled the process in Arkansas and West Virginia, these two states were at the end of the transition from single-party Democratic control to single-party Republican control. By the end of the decade, both states in both chambers had at least two-to-one Republican-to-Democrat ratios. Nebraska's legislature is non-partisan.

<sup>87</sup> See *infra* tbl. 1 and tbl. 2 for more detail. The district advantage is calculated by finding the difference in the total number of districts for which each party had complete control over the process.

## THE ROLE OF STATE COURTS IN CONSTRAINING PARTISAN GERRYMANDERING

1. The incentives for partisan gerrymandering increased in the 2020 round. On the one hand, the U.S. is experiencing hyper levels of elite party polarization, last seen more than a century ago.<sup>88</sup> 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.<sup>89</sup> That level of competition raises the stakes for congressional gerrymandering since small shifts in the number of House seats could be decisive for either party to gain complete control over the national government.
2. There was not a perfect congruence between control of the legislative *and* executive branches of a state *and* dominance vis-à-vis the partisan identification of state supreme court justices. Because of longer terms for judicial officers, at-large elections, partisan (or nonpartisan) contests versus appointment, and other dynamics, including gerrymandered legislatures, state courts were somewhat more Democratic than state legislatures.<sup>90</sup> Relevant here, in some states, the balance of partisan identifications on the court was such that if most or all of the justices who identified with the minority party found a map unconstitutional under state law, even if only one or a few justices whose party was congruent with that of the party in legislative control declined to support a map from that party,<sup>91</sup> the state court might, by a

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<sup>88</sup> Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563 (2008); N. McCARTY ET AL., *POLARIZED AMERICA, SECOND EDITION: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 24 (2016); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 62 (2011); KEENA LIPSITZ, *COMPETITIVE ELECTIONS AND THE AMERICAN VOTER* (University of Pennsylvania Press) (2011).

<sup>89</sup> Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261 (2015); FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* (2016).

<sup>90</sup> At least in Pennsylvania and North Carolina.

<sup>91</sup> For instance, in New York, the Court of Appeals split 4-3, though all members of the Court were appointed by Democratic governors. Sara Dorn, *Court of Appeals Throws Out New York Redistricting Maps*, CITY & STATE N.Y. (2022), <https://www.cityandstateny.com/policy/2022/04/court-appeals-throws-out-ny-maps/366199/> [<https://perma.cc/L2QE-7LL6>] (last visited Dec. 22, 2022). In Ohio, all the Democratic justices were joined by the a single GOP justice in overturning the maps on a 4-3 vote, with all three dissents by GOP justices. Associated Press, *Ohio Supreme Court Scraps 2nd GOP-Drawn Congressional Map*, POLITICO (July 19, 2022, 2:16 P.M.), <https://www.politico.com/news/2022/07/19/ohio-supreme-court-scraps-2nd-gop-drawn-congressional-map-00046583> [<https://perma.cc/CX96-3U8V>].

divided vote, nonetheless end up rejecting that map as unconstitutional.<sup>92</sup>

3. Data from the federal census is required for the purpose of reapportionment and redistricting the House of Representatives. The Census Bureau's report to the states of the data needed for redistricting was delayed to an unprecedented extent.<sup>93</sup> Usually delivered by April 1 in the year ended in "1" (and usually released earlier and on a rolling basis, so states that have legislative elections in odd years have the data with enough time to complete their new districting plans), it was not delivered until August 12, four months late.<sup>94</sup> This delay had consequences for how the redistricting process played out. Pertinent to our current discussion, the delay of data meant that there was a shorter time between enactment and an election, and that resulted in less time for a plan to be litigated as being violative of state or federal law. The consequences of delay in map-making by the primary redistricting authority are elaborated on in point twelve.
4. The Supreme Court's gutting of Section Five of the Voting Rights Act in *Shelby County v. Holder*<sup>95</sup> represents a radical turn from the previous five decades of redistricting.<sup>96</sup> Section Five of the Voting Right Act required preclearance by the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice or the District Court for the District of Columbia of any election law changes, including redistricting.<sup>97</sup> The trigger clause for Section Five was held to rely on outdated data (voter turnout by race) to identify which states (or

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<sup>92</sup> In our view, the relationship between judicial partisan identification and attitudes toward gerrymandering is not simple and varies across jurisdictions, but demonstration of that point must be left to subsequent ongoing research.

<sup>93</sup> This data is P.L. 94-171. It includes detailed data on the entire population of the United States and is viewed as the authoritative dataset for redistricting.

<sup>94</sup> See NCSL, *2020 Census Delays and the Impact on Redistricting*, NAT'L CONF. ON STATE LEGISLATURES (2021), <https://www.ncsl.org/research/redistricting/2020-census-delays-and-the-impact-on-redistricting-637261879.aspx> [<https://perma.cc/NGA7-2DHA>] (last visited Dec. 22, 2022). This delay occurred in part because of COVID-19 and in part because of administrative failures.

<sup>95</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>96</sup> Richard L. Engstrom, *Shelby County v. Holder and the Gutting of Federal Preclearance of Election Law Changes*, 2 POL. GROUPS IDENTITIES 530, 534 (2014); Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 716 (2013).

<sup>97</sup> 52 U.S.C. §§ 10301-10313 (2014) (originally enacted 42 U.S.C. §§ 1973-73p (2006)).

portions of states) would come under preclearance scrutiny.<sup>98</sup> At the time of the 2010 redistricting cycle, Section Five applied to sixteen states in whole or in part—most of the southern states and some other states with substantial minority populations.<sup>99</sup> Now it applies to none.<sup>100</sup> Because of the partisan divisions and polarization in Congress, Section Four (the trigger clause) has not been restored,<sup>101</sup> and the present composition of the U.S. Supreme Court suggests that even if a better designed trigger clause were to be passed by Congress, it might not survive Supreme Court review. Without preclearance, states previously covered under Section Five need not submit their plans for approval by the federal government as non-retrogressive.<sup>102</sup> Taking advantage of this new freedom, some previously covered states neglected to draw districts that would have been required by Section Five and failed to draw districts that would be seen as required by Section Two under existing case law.<sup>103</sup>

It might not seem that a provision about racial/ethnic representation would be that relevant to issues of partisan gerrymandering but, in reality, the two are highly

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<sup>98</sup> James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote Shelby County v. Holder*, 8 HARV. L. POL'Y REV. 39, 43-44 (2014).

<sup>99</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2020, at 80 tbl. 6 (2019). (Alabama, Alaska, Arizona, (part) California, (part) Florida, Georgia, Louisiana, (part) Michigan, Mississippi, (part) New Hampshire, (part) New York, (part) North Carolina, South Carolina, (part) South Dakota, Texas, Virginia).

<sup>100</sup> By invalidating section 4(b) of the Voting Rights Act, the *Shelby* court eliminated the enforcement mechanism provided by Section 5. See *Shelby County*, 570 U.S. at 557.

<sup>101</sup> The John R. Lewis Voting Rights Advancement Act was proposed by the Congress in 2021. It has not been passed at the time of the writing of this essay. Andrews Garber, *Debunking False Claims About the John Lewis Voting Rights Act*, BRENNAN CENTER FOR JUSTICE (Jan. 13, 2022), <https://www.brennancenter.org/our-work/research-reports/debunking-false-claims-about-john-lewis-voting-rights-act> [<https://perma.cc/ZSZ3-BXCW>].

<sup>102</sup> MICHELLE DAVIS ET AL., NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 7, at xvi.

<sup>103</sup> See generally *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) ("In light of this Court's many precedents applying the Purcell principle and staying lower court injunctions of state election laws in the period close to an election, I concur in the Court's order granting a stay of the District Court's injunction here."); *Ardoin v. Robinson*, 142 S.Ct. 2892 (Mem) (October 12, 2022) ("The case is held in abeyance pending this Court's decision in *Merrill*, *AL Sec. of State, et al. v. Milligan, Evan, et al.* (No. 21-1086 and No. 21-1087) or further order of the Court.")

connected.<sup>104</sup> 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.<sup>105</sup> 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 seventy percent.<sup>106</sup> By “cracking” (dispersal gerrymandering) or “packing” (concentration gerrymandering) minority voters, Republicans can obtain *partisan* advantage. Thus, when Section Five preclearance was eliminated in *Shelby*, it is now much easier for Republicans in states under complete Republican control to disregard the requirements of satisfying Section Two 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. Even when subsequently found as in violation of Section Two, a remedy might not occur until after one or even several elections are held under discriminatory maps.

1. Challenges to the application of the *Gingles*<sup>107</sup> prongs for identifying a violation of Section Two were brought.<sup>108</sup> The claim was that Section Two requires plaintiffs to show that a *race-blind* map could have been drawn (or perhaps even was *likely* to be drawn) to satisfy the first prong of the three-pronged *Gingles* test for a Section Two violation.<sup>109</sup> The court rejected these claims in June 2023.<sup>110</sup> The first prong requires a

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<sup>104</sup> Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. L. REV. 1837, 1839 (2018).

<sup>105</sup> *Id.* at 1838.

<sup>106</sup> For example, in Georgia in 2020, whites supported Trump over Biden 69% to 30%. Blacks gave only 11% support to Trump, and Hispanics split 37% to Trump and 62% to Biden. Georgia Exit Polls based on 4,385 total respondents, CNN, CNN POLITICS, *Exit Polls*, <https://www.cnn.com/election/2020/exit-polls/president/georgia> [https://perma.cc/Q66Z-UDSW] (last visited Jan. 27, 2023). In South Carolina, Trump received the support of 73% of White voters but only 9% of Black voters. South Carolina Exit Polls based on 1,684 total respondents, CNN, CNN POLITICS, *Exit Polls*, <https://www.cnn.com/election/2020/exit-polls/president/south-carolina> [https://perma.cc/X7Y1-XCB8] (last visited Jan. 27, 2023).

<sup>107</sup> *See Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>108</sup> *See Merrill*, 142 S. Ct. at 879.

<sup>109</sup> *Id.* at 882-83.

<sup>110</sup> *Allen v. Milligan*, 143 S.Ct. 1487, 1492 (2023) (“The Court rejects the State’s contention that adopting the race-neutral benchmark as the point of comparison in § 2 cases would best match the text of the VRA.”)

district that is reasonably compact containing a majority of the protected minority to be drawn.<sup>111</sup> Just as the elimination of Section Five had consequences for the feasibility of partisan gerrymandering, the elimination of Section Two as it is presently implemented, and its replacement by a requirement for entirely race-blind mapmaking, would make partisan gerrymandering much easier.

2. Beginning in the 2010 redistricting round and continuing throughout the decade, we saw dramatic changes in which type of litigant was motivated to challenge redistricting plans under the *Shaw* standard that race could not be used as the preponderant motive in how (all or some) of the district lines were drawn in a plan.<sup>112</sup> When the *Shaw* doctrine first came into play it was Whites, conservatives, and Republicans who brought *Shaw* lawsuits; minorities, liberals, and Democrats opposed them.<sup>113</sup> There have been major changes regarding the motivation for using a *Shaw*-based strategy to challenge a map. On the one hand, there was a principled belief that the only legitimate kind of redistricting was race-neutral (if not race-blind).<sup>114</sup> On the other hand, there was the strategic consideration that if a racial gerrymander was undone then the partisan gerrymander that it helped to effectuate

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<sup>111</sup> There are other elements that need to be satisfied for a Section Two challenge to be successful. *See* Davis et al., *supra* note 102 at 43–44.

<sup>112</sup> *Shaw v. Reno*, 509 U.S. 630, 641-42 (1993).

<sup>113</sup> Frank R. Parker, *Shaw v. Reno: A Constitutional Setback for Minority Representation*, 28 PS POL. SCI. AND POL. 47 (1995) (stating “[t]he striking increases in the number of majority-black and majority-Hispanic districts triggered a white backlash that focused on the use of race in drawing majority-minority districts and on the shapes of some of the districts. Offended white voters have filed federal court lawsuits in five states—North Carolina, Louisiana, Georgia, Texas, and Florida—alleging that the creation of majority-minority districts violates the Equal Protection Clause of the Fourteenth Amendment.”).

<sup>114</sup> *Shaw*, 509 U.S. at 641–642. (Highlighting how the appellants “alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a ‘color-blind’ electoral process.”). *See also* Allen v. Milligan, No. 21-1086, 2023 WL 3872517, at \*38 (U.S. June 8, 2023). (“Today, however, by approving the plaintiffs’ racially gerrymandered maps as reasonably configured, refusing to ground § 2 vote-dilution claims in a race-neutral benchmark, and affirming a vote-dilution finding that can only be justified by a benchmark of proportional control, the majority holds, in substance, that race belongs in virtually every redistricting.”)

would be mitigated even if not eliminated.<sup>115</sup> When the *Shaw* decision came down, control of most southern legislatures was still in the hands of the Democrats, and so the partisan gerrymander that litigators sought to unravel was one favoring Democrats.<sup>116</sup> But as time wore on, southern states came under Republican control and so the incentives to bring a *Shaw*-type lawsuit flipped.<sup>117</sup> Now it is Democratic and minority interest groups who are most likely to file a *Shaw*-type litigation as Republicans redistrict in a way that packs minority voters into a handful of districts (which has the effect of a packing partisan gerrymandering benefiting Republicans) in proportions well beyond what is needed to provide the minority community a realistic opportunity to elect candidates of its choice.<sup>118</sup> Thus, just as the end of Section Five preclearance affected the context within which districting occurs and changed the incentives/opportunities for partisan gerrymandering because race and partisanship are so closely intertwined, so too did the changes in partisan control of state legislatures affect the incentives to bring *Shaw*-type suits.

3. 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.<sup>119</sup> Delay in delivering census data, in conjunction

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<sup>115</sup> This occurs because of the predictable alignment between race and party affiliation. See Pew Research Center, *A Deep Dive Into Party Affiliation*, (2015), <https://www.pewresearch.org/politics/2015/04/07/a-deep-dive-into-party-affiliation/> [<https://perma.cc/WCT6-7XWW>] (last visited Dec. 23, 2022). (Noting that “Democrats hold an 80%-11% advantage among blacks, lead by close to three-to-one among Asian Americans (65%-23%) and by more than two-to-one among Hispanics (56%-26%).”).

<sup>116</sup> See generally M.V. (TREY) MOOD III & SETH C. MCKEE, *RURAL REPUBLICAN REALIGNMENT IN THE MODERN SOUTH: THE UNTOLD STORY* (2022).

<sup>117</sup> J. Morgan Kousser, *The Immutability of Categories and the Reshaping of Southern Politics*, 13 ANNU. REV. POL. SCI. 365, 371 (2010); MOOD III & MCKEE, *supra* note 116.

<sup>118</sup> David Lublin et al., *Minority Success in Non-Majority Minority Districts: Finding the “Sweet Spot,”* 5 J. RACE ETHN. POL. 275, 276 (2020). Sometimes, however, these gerrymandered maps had non-trivial minority support because they protected minority incumbents and/or were likely to achieve the election of descriptively similar legislators.

<sup>119</sup> In 2022, Alabama, Georgia, Louisiana, and Ohio each used maps in their elections that were found unconstitutional by state courts. See generally, Michael Wines, *Four States Will Use Congressional Maps Rejected by Courts, Helping G.O.P. Odds*, N.Y. TIMES, (Aug. 9, 2022), <https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html> [<https://perma.cc/74S8-3DGZ>] (stating how “[w]e’re seeing a revolution in

with the end of Section Five preclearance and contemporaneously with a new and unfortunate use of the *Purcell Principle*,<sup>120</sup> made it possible for some maps found by trial courts to be unconstitutional to still be permitted for use for just the 2022 election.<sup>121</sup> *Purcell* demands “that courts should not issue orders which change election rules in the period just before the election.”<sup>122</sup> Moreover, the delay in the creation of plans prohibited courts from holding trial on the merits and issue rulings in time for the first election held under the new plan.<sup>123</sup> Even if a trial were to happen, and that court found a legislative plan unconstitutional, it would lack sufficient time to draw a constitutional remedial plan if the court deemed it necessary to give the legislature “another bite at the apple.” Alternatively, on appeal, a higher court would stay the decision on either *Purcell* grounds or because of a dispute in the interpretation of existing law. In Alabama and Louisiana, federal trial courts found legislative plans to be unconstitutional on Section Two grounds and ordered both states to draw new plans that comply with the Voting

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courts’ willingness to allow elections to go forward under illegal or unconstitutional rules,’ [said] Richard L. Hasen, a professor at the U.C.L.A. School of Law. . .”).

<sup>120</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam).

<sup>121</sup> *See generally* *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (“In light of this Court’s many precedents applying the *Purcell* principle and staying lower court injunctions of state election laws in the period close to an election, I concur in the Court’s order granting a stay of the District Court’s injunction here.”); *Ardoin v. Robinson*, 142 S.Ct. 2892 (Mem) (October 12, 2022) (“The case is held in abeyance pending this Court’s decision in *Merrill*, *AL Sec. of State, et al. v. Milligan, Evan, et al.* (No. 21-1086 and No. 21-1087) or further order of the Court.”); *Gonidakis v. LaRose*, 599 F.Supp.3d 642 (S.D.Ohio, 2022) (“Group of voters brought action against Ohio Redistricting Commission and Secretary of State, alleging state Supreme Court’s enjoining of Commission’s second revised decennial reapportionment plans for General Assembly, on basis that they failed to comply with state constitutional anti-gerrymandering provisions regarding partisanship and proportionality, left voters without legislative districts allowing them to organize, campaign and vote for offices as they had in past election cycles. Various parties intervened. After approval of third revised plan, plaintiffs moved for preliminary injunction to ensure primary election would take place.”)

<sup>122</sup> Richard L Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

<sup>123</sup> For instance, Kentucky’s court held trial before the 2022 election and issued a ruling after the election. *See* *Complaint, Graham v. Adams*, (No. 22-CI-00047) (Ky. Cir. Ct. 2022). We detail other pending litigation in this article.



Rights Act<sup>124</sup>, but the U.S. Supreme Court has stayed those rulings based on the *Purcell* principle.<sup>125</sup>

4. Several new metrics for assessing partisan gerrymandering were introduced in the past decade, including the *efficiency gap* and the *declination*.<sup>126</sup> The degree of concordance among alternatives metrics, such as the two mentioned above, with long-established metrics such as *partisan bias* (in vote share or in seat share) and the *mean minus median gap* were investigated to look at the question of whether (at least for states that were reasonably competitive) it was plausible to expect a high concordance of the various measures.<sup>127</sup> In states that are competitive, the measures do seem to have considerable overlap in whether they evaluate plans as partisan gerrymanders.<sup>128</sup>

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<sup>124</sup> Singleton v. Merrill, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022), order clarified, No. 2:21-CV-1291-AMM, 2022 WL 272637 (N.D. Ala. Jan. 26, 2022), and appeal dismissed sub nom. Milligan v. Sec'y of State for Alabama, No. 22-10278-BB, 2022 WL 2915522 (11th Cir. Mar. 4, 2022), and aff'd sub nom. Allen v. Milligan, No. 21-1086, 2023 WL 3872517 (U.S. June 8, 2023) ("Because the Milligan plaintiffs are substantially likely to prevail on their claim under the Voting Rights Act, under the statutory framework, Supreme Court precedent, and Eleventh Circuit precedent, the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice."); Robinson v. Ardoin, 605 F. Supp. 3d 759, 766–67 (M.D. La.), cert. granted before judgment, 213 L. Ed. 2d 1107, 142 S. Ct. 2892 (2022). ("[t]he Court ORDERS the Louisiana Legislature to enact a remedial plan on or before June 20, 2022. If the Legislature is unable to pass a remedial plan by that date, the Court will issue additional orders to enact a remedial plan compliant with the laws and Constitution of the United States.")

<sup>125</sup> Merrill v. Milligan, 142 S. Ct. 879 (2022) ("The district court's January 24, 2022 preliminary injunctions in No. 2:21-cv-1530 and No. 2:21-cv-1536 are stayed pending further order of the Court."); Ardoin v. Robinson, 142 S. Ct. 2892 (2022) ("The case is held in abeyance pending this Court's decision in Merrill, AL Sec. of State, et al. v. Milligan, Evan, et al. (No. 21-1086 and No. 21-1087) or further order of the Court.")

<sup>126</sup> Both measures use election results projected into districts (or prior election results from districts under scrutiny) to measure whether one party is disproportionately "wasting" votes. This type of detection helps to identify plans in which voters are "packed" into districts to create disproportionate results. See Marion Campisi et al., *Declination as a Metric to Detect Partisan Gerrymandering*, 18 ELECTION L.J. 371 (2019).

<sup>127</sup> Robin E. Best et al., *Considering the Prospects for Establishing a Packing Gerrymandering Standard*, 17 ELECTION L.J. 1, 13 (2018); Grofman & King, *supra* note 35 at 5.

<sup>128</sup> Presentation of Nick Stephanopoulos at the Redistricting Data Hub Redistricting and Data Convening Conference, Stanford University, Palo Alto, California (Sept. 16, 2022). This was a private conversation at Stanford University among a group of redistricting experts who convened to discuss the 2020 cycle.

5. Mapping tools such as Dave’s Redistricting App and PlanScore allowed the public to participate in new ways in a process from which they had previously been excluded. These tools included data on past election results and demography.<sup>129</sup> Members of the public could use them to create plans and submit them to a commission or legislature.<sup>130</sup> Perhaps even more importantly, such tools enabled both line drawers and reformers to quickly assess the degree to which a plan deviated from neutrality, with respect to a large set of metrics, and compare legislative maps to alternatives.<sup>131</sup>
6. Computer simulations played a more important role in the 2020 round than in previous rounds. Sophisticated computer simulation tools based on a state’s geography were used by experts to create ensembles (a set of feasible plans satisfying pre-designated criteria) that could inform mapmakers (and courts) about the range of feasible outcomes under the specified assumptions and could be used to identify outliers or plans that came closest to perfect neutrality vis-à-vis any given metric.<sup>132</sup>

Above, we described some of the important ways in which redistricting in the 2020s round differed from redistricting in earlier rounds. In Table 1, we summarize a variety of aspects of redistricting circa 2020 that impact the likelihood of partisan gerrymandering and the likelihood that state courts will address partisan gerrymandering issues in the state, if those exist.

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<sup>129</sup> For information about data in Dave’s Redistricting, see DAVE’S REDISTRICTING, <https://davesredistricting.org/maps#aboutdata> [<https://perma.cc/V7K3-2YC3>] (last visited Jan. 28, 2023). For information about PlanScore, see PLANSCORE, <https://github.com/PlanScore> [<https://perma.cc/D7A4-GYWK>] (last visited Jan. 28, 2023).

<sup>130</sup> For instance, the Pennsylvania Reapportionment Commission set up a website where the public could submit maps. See PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT COMMISSION, *Citizens Can Now Submit Maps*, (Oct. 29, 2021), <https://www.redistricting.state.pa.us/commission/article/1081> [<https://perma.cc/B7ME-7UD7>] (last visited Dec. 22, 2022).

<sup>131</sup> See PLANSCORE, <https://github.com/PlanScore> [<https://D7A4-GYWK>] (last visited Jan. 28, 2023); DAVE’S REDISTRICTING, Section Analyze, <https://davesredistricting.org> [<https://perma.cc/V398-D2YR>] (last visited Jan. 28, 2023).

<sup>132</sup> See Becker et al., *supra* note 53, at 407; Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 ELECT. STUD. 329, 329 (2016); Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 ELECTION L.J. 331 (2015); Duchin & Spencer, *supra* note 53; POL. GEOMETRY, *supra* note 53, at 29.

Table 1 shows which entity has initial control over redistricting;<sup>133</sup> which party is in control in the state; which entity drew the congressional map used in 2022; and what does the state constitution offer vis-à-vis direct language or language with the potential to be used to prohibit/limit gerrymandering.

**Table 1. Information on Party Composition of Legislatures, Initial Districting Authority, Actual Author of the 2022 Map, and State Constitutional Criteria for Redistricting<sup>134</sup>**

State	Population	Seats	Primary Authority for Drawing the Lines	Party Control	Who Drew the Lines	Direct Language	Free and Equal / Open
<i>Alabama</i>	5,024,279	7	L	GOP	L		
<i>Alaska</i>	733,391	1	-	-	-		
<i>Arizona</i>	7,151,502	9	C	GOP	Comm.	x	x
<i>Arkansas</i>	3,011,524	4	L	GOP	L		x
<i>California</i>	39,538,223	52	C	DEM	Comm.	x	
<i>Colorado</i>	5,773,714	8	C	DEM	Comm.	x	x
<i>Connecticut</i>	3,605,944	5	L(C)	SPLIT	Court		
<i>Delaware</i>	989,948	1	-	-	-		x
<i>Florida</i>	21,538,187	28	L	GOP	L	x	
<i>Georgia</i>	10,711,908	14	L	GOP	L		
<i>Hawaii</i>	1,455,271	2	C(P)	DEM	Comm.	x	
<i>Idaho</i>	1,839,106	2	C	GOP	Comm.	x	
<i>Illinois</i>	12,812,508	17	L	DEM	L		x

<sup>133</sup> Given the stakes in the current era of fragile national majorities, where the conditions hold for a state to enact a partisan gerrymander, we expect partisans to act in their self-interest; that is, to maximize the number of seats for their party in a state and thus increase the likelihood of holding a majority in Congress. See Morris P. Fiorina, *An Era of Tenuous Majorities*, (2016), <https://www.hoover.org/research/era-tenuous-majorities> [<https://perma.cc/T74C-JJUU>] (last visited Nov. 4, 2022) (highlighting the stakes in the current era of fragile national majorities).

<sup>134</sup> U.S. CENSUS BUREAU, *2020 Census Apportionment Results*, <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html> (last visited Jan. 29, 2023) (population and apportionment data) [<https://perma.cc/DJ9U-4SHU>]; National Conference of State Legislatures, *Redistricting and Elections*, REDISTRICTING AND ELECTIONS STANDING COMMITTEE, <https://www.ncsl.org/ncsl-in-dc/standing-committees/redistricting-and-elections.aspx> [<https://perma.cc/A7N8-HJKD>] (last visited Dec. 28, 2022) (party control and authority; direct language data); Doug Spencer, *All About Redistricting*, <https://redistricting.ils.edu> (last visited Dec. 28, 2022) (providing detailed information available by clicking on the links to each state).

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<i>Indiana</i>	6,785,528	9	L	GOP	L		x
<i>Iowa</i>	3,190,369	4	L	GOP	L	x	
<i>Kansas</i>	2,937,880	4	L	GOP	L		
<i>Kentucky</i>	4,505,836	6	L	GOP	L		x
<i>Louisiana</i>	4,657,757	6	L	GOP	L		
<i>Maine</i>	1,362,359	2	L	SPLIT	L		
<i>Maryland</i>	6,177,224	8	L	DEM*	L (Court)		x
<i>Massachusetts</i>	7,029,917	9	L	DEM*	L		x
<i>Michigan</i>	10,077,331	13	C	SPLIT	Comm.	x	
<i>Minnesota</i>	5,706,494	8	L	SPLIT	Court		
<i>Mississippi</i>	2,961,279	4	L	GOP	L		
<i>Missouri</i>	6,154,913	8	L	GOP	L		x
<i>Montana</i>	1,084,225	2	C	GOP	Comm.	x	x
<i>Nebraska</i>	1,961,504	3	L	GOP	L	x	x
<i>Nevada</i>	3,104,614	4	L	DEM	L		
<i>New Hampshire</i>	1,377,529	2	L	GOP	Court		x
<i>New Jersey</i>	9,288,994	12	C(P)	DEM	Comm.		
<i>New Mexico</i>	2,117,522	3	L	DEM	L		x
<i>New York</i>	20,201,249	26	C(L)	DEM*	Court	x	
<i>North Carolina</i>	10,439,388	14	L	GOP	Court		x
<i>North Dakota</i>	779,094	1	-	-	-		
<i>Ohio</i>	11,799,448	15	L	GOP	L	x	
<i>Oklahoma</i>	3,959,353	5	L	GOP	L		x
<i>Oregon</i>	4,237,256	6	L	DEM	L	x	x
<i>Pennsylvania</i>	13,002,700	17	L	SPLIT	Court		x
<i>Rhode Island</i>	1,097,379	2	L	DEM	L		
<i>South Carolina</i>	5,118,425	7	L	GOP	L		x
<i>South Dakota</i>	886,667	1	-	-	-		x
<i>Tennessee</i>	6,910,840	9	L	GOP	L		x
<i>Texas</i>	29,145,505	38	L	GOP	L		
<i>Utah</i>	3,271,616	4	L	GOP	L	x	x
<i>Vermont</i>	643,077	1	-	-	-		x
<i>Virginia</i>	8,631,393	11	C(P)	DEM	Court		x
<i>Washington</i>	7,705,281	10	C	DEM	Comm.	x	x
<i>West Virginia</i>	1,793,716	2	L	GOP	L		
<i>Wisconsin</i>	5,893,718	8	L	SPLIT	Court		
<i>Wyoming</i>	576,851	1	-	-	-		x

NOTE: States we identify as meeting the conditions for the potential enactment of a gerrymander are shown highlighted. Primary control of the process: L=Legislature, C=Commission, C(P)=Political Commission, C(L)=Commission with Legislative Backup, -=One district. Who Drew the Lines: L=Legislature, Comm.=Commission, Court=Federal or State Court.

Table 1 highlights the twenty-nine states that meet the normal conditions for enacting a partisan gerrymander. Those are the states in which the control over Congressional redistricting resides in the state legislature (or political commission), and one party controls all aspects of the process (aside from judicial oversight), and the state was apportioned at least two districts. For the moment, we ignore whether there is state law that prohibits gerrymandering since it is possible that the legislature would simply ignore the law when selecting a plan. Some states are included even when there is no potential for gerrymandering to occur, such as situations where the state's political composition is so dominated by one party that no matter how the districts are drawn, the majority party cannot possibly gain additional seats (e.g., Massachusetts, West Virginia).<sup>135</sup> Additionally, we have left off commission drawn plans, which means we exclude states where tie-breaking decisions on otherwise split commissions can lead to potentially biased plans (e.g., Arizona, New Jersey). This table also neglects the possibility that a court could enact a plan that is potentially dilutive (e.g., Minnesota, Wisconsin). Later, in Table 4, we will focus on a different subset of states where claims that a plan was political (and racial) gerrymanders were made.<sup>136</sup>

Table 2 summarizes the potential effects of party control at the aggregate level.

**Table 2. Party Control over Redistricting in 2010 and 2020**

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

NOTE: Totals calculated by determining which institution had control over the process. We take party control in 2020 to be found in legislatures that have supermajorities that create veto-proof majorities (Maryland, Massachusetts) or when commissions can be superseded by the Legislature (Ohio, New York).<sup>137</sup>

<sup>135</sup> For a proof that Republicans had no possibility of winning even one of the 9 or 10 seats in the state despite winning 30% of the statewide vote, see Moon Duchin et al., *Locating the Representational Baseline: Republicans in Massachusetts*, 18 ELECTION L.J. 388 (2019).

<sup>136</sup> The term “gerrymander” is regularly used in ways different from the standard interpretation given to this term by legal scholars or other academics, e.g., to include any maps in which one or more districts has a bizarre shape, or maps in which one party receives a larger than proportional share of the seats compared to its vote share. Indeed, sometimes we find claims of gerrymandering made when one party or group one party simply does not like the outcome of the redistricting process.

<sup>137</sup> Spencer, *supra* note 134 (data collection); cf. NATIONAL CONFERENCE OF STATE LEGISLATURES, *Redistricting and Elections*, *supra* note 134.

What we see is that for the 2020 cycle, the Democrats controlled the process in eight states. In those eight states, there is a total of seventy-five districts. This was an increase from forty-four in the previous decade. Republicans had control in the other nineteen states. Here, there are 183 districts. This is a decrease from the 206 districts of the previous decade.

Critical for understanding the 2020 cycle is to notice that both the total number of states where the process was controlled by just one party increased and the number of congressional seats allocated under one-party control increased, but the relative advantage of Republicans declined. Republicans gained a state under full party control between 2010 and 2020, but Democrats gained two states.<sup>138</sup> More importantly, the states in which the Democrats controlled the process changed, e.g., gaining control in large state New York, and losing control in small state West Virginia.<sup>139</sup>

### *C. Comparing Outcomes in Congressional Districts Before and After Redistricting*

First, we must recognize that the total number of districts in each state was affected by apportionment. Texas led the country with relative population gain between 2010 and 2020 and gained two seats in the House of Representatives. Montana added a second seat, and Florida, North Carolina, Oregon, and Colorado all added another seat. California, New York, Illinois, Michigan, Ohio, Pennsylvania, and West Virginia all lost one seat.<sup>140</sup>

A simple calculation can be made to help determine the independent effect of apportionment and redistricting on the balance of power in the U.S House. We can look at how many congressional districts a national candidate — here, President Biden ca. 2020 — did win under one set of maps and compare those results to Biden’s 2020 votes projected into the 2022 districts. This simple analysis leaves aside very important considerations that would affect who wins in specific districts, such as incumbency effects, candidate quality, and the effect of campaigns. But the benefit of this apples-to-apples comparison is that it shows, using the same nationwide election, the difference between the old and new lines.

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<sup>138</sup> See *supra* tbl. 2.

<sup>139</sup> See Spencer, *supra* note 134.

<sup>140</sup> U.S. CENSUS BUREAU, *2020 Census Apportionment Results*, <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html> [https://perma.cc/DJ9U-4SHU] (last visited Dec. 22, 2022).

Using the congressional district lines from 2020, Donald Trump carried 210 districts, and Joe Biden carried the other 225.<sup>141</sup> Under the district lines drawn for use in the 2022 election, which includes the apportionment changes above, Trump would have carried 209 districts and Biden 226.<sup>142</sup> Only one seat would have changed party based solely on these changes.<sup>143</sup> That seat benefited the Democrats. Thus, redistricting and apportionment itself did not have a large effect on the outcomes in Congress as judged by projecting 2020 presidential results into the new districts.

However, the 2020 presidential contests were only partly predictive of what happened in 2020 at the congressional level. The differences between the 2020 presidential election and the 2022 midterm election are even more apparent because there was a midterm tide toward the Republicans in some states and toward Democrats in other states.<sup>144</sup> Nonetheless, the net aggregate combined effects of redistricting and apportionment on partisan outcomes were largely a wash.<sup>145</sup>

If we fine-tune the analysis to the state level, a more nuanced picture emerges from our projections. Trump gained one additional seat in each of Georgia, Missouri, Montana, and Tennessee. In Texas, three Trump seats were added. In Florida, Trump gained a plurality in five additional districts. Biden added to his tally in several states, including one seat in each of Colorado, Michigan, New Jersey, New Mexico, New York, and Oregon. He also would have added two seats in Illinois and North Carolina using the projected presidential results.

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<sup>141</sup> See *infra* tbl. 3.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Nate Cohn, *2022 Review: How Republicans Lost Despite Winning the Popular Vote*, N. Y. TIMES, Dec. 13, 2022, <https://www.nytimes.com/2022/12/13/upshot/2022-republicans-midterms-analysis.html> (last visited Dec. 21, 2022). In 2020, the actual congressional elections results resulted in 222 Republican seats—not that different, in the aggregate, from what we would have expected from the presidential election results that year if we disregard errors at the level of individual districts and allow Type I and Type II errors to cancel each other out at the aggregate level.

<sup>145</sup> In the 2022 election, national tides linked to voter perceptions of the success of President Biden's presidency, the degree to which each party had vulnerable seats, idiosyncratic effects tied to the candidates and campaigns in each congressional district, and state-wide effects linked to positive or negative coattails of state-wide candidates and the presence or absence of concerns about possible changes in abortion laws that would depend upon election results in the state, made the 2022 congressional elections (and state legislative elections) not merely a "no change" rerun of 2020. Gary C. Jacobson, *How Do Campaigns Matter?*, 18 ANNU. REV. POL. SCI. 31 (2015), <https://www.annualreviews.org/doi/10.1146/annurev-polisci-072012-113556> [<https://perma.cc/C9TW-FTG4>] (last visited Oct. 18, 2022) (providing support for voter perceptions, vulnerable seats, and idiosyncratic effects).

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Table 3 shows this data. We show only the states in which there was a change in the number of districts won by Trump/Biden because of the new maps. The column labeled “Total Number of Districts” shows the change in seats resulting from apportionment. The district totals for the “OLD MAPS” are actual results for the 2020 presidential election, and the totals for the “NEW MAPS” are the results of the 2020 election projected into the districts used in the 2022 election. State courts in several states had already acted to strike down plans as gerrymanders and replace them with court-drawn plans.<sup>146</sup> Thus, we use this simple analysis to make comparisons between actual outcomes in 2020 and projected outcomes in 2022.<sup>147</sup>

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<sup>146</sup> *Harkenrider v. Hochul*, 197 N.E.3d 437, 454 (N.Y. 2022); *North Carolina Harper v. Hall*, 868 S.E.2d 499, 559 (N.C. 2022).

<sup>147</sup> Moreover, several states simply perpetuated existing gerrymanders, while other states were able to undo previous gerrymanders, as was the case in Michigan which instituted a new independent commission.



**Table 3. Change in Congressional Districts by Party Using Projected or Actual 2020 Presidential Votes**

State	OLD MAPS			NEW MAPS		
	Total Number of Districts	Biden 2020 Districts	Trump 2020 Districts	Total Number of Districts	Biden 2020 Districts	Trump 2020 Districts
<i>California</i>	53	46	7	52 (-1)	45 (-1)	7
<i>Colorado</i>	7	4	3	8 (+1)	5 (+1)	3
<i>Florida</i>	27	12	15	28 (+1)	8 (-3)	20 (+5)
<i>Georgia</i>	14	6	8	14	5 (-1)	(+1)
<i>Illinois</i>	18	12	6	17 (-1)	14 (+2)	3 (-3)
<i>Michigan</i>	14	6	8	13 (-1)	7 (+1)	6 (-2)
<i>Missouri</i>	8	3	5	8	2 (-1)	6 (+1)
<i>New Jersey</i>	12	9	3	12	10 (+1)	2 (-1)
<i>New York</i>	27	20	7	26 (-1)	21 (+1)	5 (-2)
<i>North Carolina</i>	13	5	8	14 (+1)	7 (+2)	7 (-1)
<i>Oregon</i>	5	4	1	6 (+1)	5 (+1)	1
<i>Tennessee</i>	9	2	7	9	1 (-1)	8 (+1)
<i>Texas</i>	36	14	22	38 (+2)	13 (-1)	25 (+3)
<i>West Virginia</i>	3	0	3	2 (-1)	0	2 (-1)
<b>United States</b>	<b>435</b>	<b>225</b>	<b>210</b>	<b>435</b>	<b>226 (+1)</b>	<b>209 (-1)</b>

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

#### *D. Identifying Potential Gerrymanders*

As of the completion of the 2020 round of mapmaking (ca. November 2022), we have identified twenty-three states where some claim was made that the congressional map was a partisan gerrymander:<sup>148</sup> Alabama,<sup>149</sup> Arizona, Arkansas,

<sup>148</sup> This includes places in which litigation led to a different map but some where it did not or where no challenge to the map was made or where litigation is still pending (sometimes with no final decision, sometimes with a plan that can be used only in 2022). We make no claim that this list is either exhaustive or 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.

<sup>149</sup> We include some states that have gerrymanders, drawn to dilute the power of protected racial and language minorities (Alabama, Georgia, Louisiana) that have been challenged on racial

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Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Utah, and Wisconsin. Only some of these claims resulted in litigation<sup>150</sup> and even where litigation based on partisan gerrymandering was brought (or in Alabama, Georgia, Louisiana, and Georgia, South Carolina), where a claim about a racial gerrymander that clearly had partisan consequences was brought in federal court), maps in many of those states survived challenge or thanks to the *Purcell* principle had plans that were allowed only for one election.<sup>151</sup>

The last two columns of Table 1 identify whether there is direct or indirect language in state law that prohibits partisan gerrymandering. We now look at the intersection of those states where gerrymandering might be found and those where there is direct or indirect language in state law prohibiting partisan gerrymandering. Combining the information highlighted in

Table 1 with the list of states where there is an accusation of a partisan gerrymandering, we find that Florida, Iowa, Nebraska, New York, Ohio, Oregon, and Utah all prohibit partisan gerrymandering with direct language in state law.<sup>152</sup> States that have indirect language like that used in Pennsylvania and North Carolina in the 2010 cycle to strike down plans as partisan gerrymanders are Arkansas, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Nebraska, New

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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 earlier in the text and Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L. J. 85 (2021).

<sup>150</sup> Information regarding litigation is available at several websites. *See* Spencer, *supra* note 134; *Redistricting Litigation Roundup*, BRENNAN CENTER FOR JUSTICE (May 2, 2023), <https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-o> [<https://perma.cc/WQ4X-63HQ>]; *Redistricting Litigation*, DEMOCRACY DOCKET (2022), <https://www.democracymocket.com/topic/redistricting-litigation/> [<https://perma.cc/3976-F74U>] (last visited Feb. 20, 2023).

<sup>151</sup> Such plans might still be changed prior to the 2024 election. Indeed, because of the unique laws governing the Ohio process, because a map was not enacted by the commission established by voters, the plan will only be in effect for the 2022 election. Changes to the membership of the Ohio Supreme Court likely will affect future litigation. *See* Lublin et al., *supra* note 118.

<sup>152</sup> *See supra* tbl. 1.

Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, and Utah.<sup>153</sup>

We find that all states on our list of states where an accusation of partisan gerrymandering was made except Alabama, Arizona, Georgia, Kansas, Louisiana, Nevada, New Jersey, Texas, and Wisconsin have the potential for state courts to resolve a partisan gerrymander using existing state constitutional language. But there are other routes to court action, both federal and state, that have implications for partisan gerrymandering. We also note that new innovative use of state constitutions could potentially find prohibitions on partisan gerrymandering in other provisions, particularly provisions that are direct corollaries to the federal First Amendment and Equal Protection Clause of the Fourteenth Amendment.

First, all redistricting is bound by the federal Constitution and federal law. Federal courts have determined that Louisiana violated the Voting Rights Act.<sup>154</sup> In Georgia, a federal trial court concluded that “the plaintiffs have shown that they are likely to ultimately prove that certain aspects of the State’s redistricting plans are unlawful” based on evidence that the state violated the Voting Rights Act.<sup>155</sup> The court, however, declined to enjoin the congressional map.<sup>156</sup> The ruling came after the U.S. Supreme Court, using the *Purcell Principle*, stayed the court ruling of a violation of the VRA in Alabama and Louisiana.<sup>157</sup>

Second, in Arizona and New Jersey, congressional redistricting was not done by the legislatures of those states but instead by an independent commission and a political commission with a neutral chair, respectively.<sup>158</sup> We do not deny that a

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<sup>153</sup> *Id.* The states in these lists are only those in which the conditions exist for the enactment of a partisan gerrymander. They do not include states where the power to draw a map is under split party control, there is only one district, or the plan is drawn by a commission. *See id.*

<sup>154</sup> *Robinson v. Ardoin*, 605 F.Supp.3d 759, 766 (M.D.La., 2022) (“For the reasons set forth herein, the Court concludes that Plaintiffs are substantially likely to prevail on the merits of their claims brought under Section 2 of the Voting Rights Act.”)

<sup>155</sup> *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1233–34 (N.D. Ga. 2022). (“Court finds that while the plaintiffs have shown that they are likely to ultimately prove that certain aspects of the State’s redistricting plans are unlawful, preliminary injunctive relief is not in the public’s interest because changes to the redistricting maps at this point in the 2022 election schedule are likely to substantially disrupt the election process. As a result, the Court will not grant the requests for preliminary injunctive relief.”)

<sup>156</sup> *Id.*

<sup>157</sup> *Purcell*, 549 U.S. at 6. (“[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.”).

<sup>158</sup> *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 68.

redistricting commission, regardless of whether some or all its members are elected officials, can craft a plan that is discriminatory. But these commissions are excluded from the analysis since there is no alternative plan produced by a court.

Finally, Kansas and Wisconsin were under divided control at the time of redistricting, though circumstances in both states led to the legislature's preferred maps being enacted for use.<sup>159</sup> We consider both states to be important because, in both cases, a governor vetoed the legislature's preferred plan. Both also led to litigation in state court.<sup>160</sup> That leaves Nevada and Texas as the only two states in our list of potential gerrymanders drawn by a legislature with clear party control over redistricting that do not have provisions in state law of the sort that have been used by a state court to regulate partisan gerrymandering.<sup>161</sup>

## II. THE ROLE AND EFFECTS OF STATE COURTS

### A. *Potential Partisan Gerrymanders and State Law*

Table 4 is a subset of Table 1. It includes the states where accusations of partisan or racial gerrymandering had been brought.<sup>162</sup> In addition to indicating if there is direct or indirect language in the state constitution prohibiting partisan gerrymandering (also shown in Table 1 we show whether a challenge was brought in state or federal court prior to the 2022 midterm election regarding the plan's partisan or racial effects.<sup>163</sup> And we show what entity actually drew/adopted the plan that was put in place for 2022.

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<sup>159</sup> In Kansas, the Democratic governor vetoed the congressional map passed by the legislature. See KANSAS OFFICE OF THE GOVERNOR, *Governor Laura Kelly Vetoes Congressional Redistricting Map, Senate Bill 355*, <https://governor.kansas.gov/governor-laura-kelly-vetoes-congressional-redistricting-map-senate-bill-355/> [<https://perma.cc/6AU7-RW5J>]. The Kansas Legislature overrode her veto. As we explain later, a state court did rule the map unconstitutional, but that judgment was vacated by the high court. In Wisconsin, the map passed by the Wisconsin Legislature was vetoed by the Democratic governor. See OFFICE OF THE GOVERNOR STATE OF WISCONSIN, *Evers Vetoes GOP's "Gerrymandering 2.0" Maps*, <https://content.govdelivery.com/accounts/WIGOV/bulletins/2fcd160> [<https://perma.cc/UM67-V9WV>]. The dispute led to the Wisconsin Supreme Court choosing the governor's map.

<sup>160</sup> *Id.*

<sup>161</sup> See *supra* tbl. 1. Of course, both states are also obligated to adhere to federal law, including prohibitions on race as a preponderant motive and adhering to the Voting Rights Act.

<sup>162</sup> See *supra*, page 444-45.

<sup>163</sup> For practical reasons, we leave aside intent and focus exclusively on effects.

Table 4. Potential Partisan Gerrymanders and State Law

State	Direct Language	Free and Equal/Open	Who Drew the Map	Challenged based on racial classifications ( <i>Shaw</i> or Section Two)	Not Challenged in State Court	Unsuccessful Or Pending <sup>164</sup> Challenge <sup>165</sup>	Successful Challenge <sup>166</sup>
<i>Alabama</i>			Leg.	x	∅		F
<i>Arizona</i>	x	x	Indep. Comm.		∅		
<i>Arkansas</i>		x	Leg.	x		p	
<i>Florida</i>	x		Leg.			p	
<i>Georgia</i>			Leg.	x	∅		F
<i>Illinois</i>		x	Leg.	x	∅		
<i>Iowa</i>	x		Leg.		∅		
<i>Kansas</i>			Leg.			u	
<i>Kentucky</i>		x	Leg.			p	
<i>Louisiana</i>			Leg.	x	∅		F
<i>Maryland</i>		x	Leg. (Court)				S
<i>Missouri</i>		x	Leg.	x	∅		
<i>Nebraska</i>	x	x	Leg.		∅		
<i>Nevada</i>			Leg.		∅		
<i>New Jersey</i>			Pol. Comm.			u	
<i>New Mexico</i>		x	Leg.			p	
<i>New York</i>	x		Comm.				x

<sup>164</sup> We denote “p” if the case is pending as of November 2022.

<sup>165</sup> We denote “u” if the challenge was unsuccessful.

<sup>166</sup> We count only plans as successfully challenged if, upon court intervention, a new plan was put into place. We indicate with “F” states where a federal court ruled a plan illegal based on racial gerrymander. South Carolina’s case had a ruling on the merits striking down a district after we finished the manuscript. The state defended the district on grounds that the intent was motivated by partisanship, but the court found that it had improperly used race in the creation of the district. Ohio is marked “O”. Ohio is a special case since the state court overturned plans but was unable to replace the plan with a neutral plan. States in which the state court acted to replace a map crafted through regular process are marked as “S”. In Wisconsin, the Court chose a plan, but it was based on the previous decade’s plan, which was widely considered to be a gerrymander itself. We say more about these states in the paragraphs below. Maryland’s plan was initially struck down by the state court, and under its supervision, the Legislature passed a replacement. We still refer to this as a court plan.

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<i>North Carolina</i>		x	Comm.				S
<i>Ohio</i>	x		Leg.			p	O
<i>Oregon</i>	x	x	Leg.			u	
<i>Tennessee</i>		x	Leg.		∅		
<i>Texas</i>			Leg.	x	∅		
<i>Utah</i>	x	x	Leg.			p	
<i>Wisconsin</i>			Comm.		∅		x

Note: States listed are those who's legislatively drawn map could reasonably be called a gerrymander by one or more measure or that have generated significant press coverage asserting them to be biased towards one party. Highlighted are the states in which a challenge to the initially approved plans were successful either in federal or state court.

For now, we continue to leave aside states where state courts interceded without a partisan gerrymandering challenge. These states are Connecticut, Minnesota, New Hampshire, Pennsylvania, and Virginia. These state courts had to mediate because of the failure for a legal plan to be enacted by the governing bodies.<sup>167</sup> They are excluded from Table 4 because the map the state court<sup>168</sup> put into place is considered one of the most gerrymandered in the country.<sup>169</sup> The normal

<sup>167</sup> See *Connecticut Supreme Court Adopts Expert's Redistricting Plan*, AP NEWS (Feb. 11, 2022), <https://apnews.com/article/congress-connecticut-supreme-court-connecticut-redistricting-523c396a1151a8da9262107b3de9f617> [<https://perma.cc/9V89-MC4U>]; Tom Nehil & Ashley Hackett, *How each of Minnesota's Congressional Districts Changed with Redistricting*, MINN. POST (Feb. 16, 2022), <https://www.minnpost.com/elections/2022/02/how-each-of-minnesotas-congressional-districts-changed-with-redistricting/> [<https://perma.cc/E76N-9E5Y>]; Ellen Morrissey, *New Hampshire Becomes Final State to Enact Congressional Map*, BALLOTPEDIA NEWS, <https://news.ballotpedia.org/2022/06/01/new-hampshire-becomes-final-state-to-enact-congressional-map/> [<https://perma.cc/E5KS-KLKD>]; Kate Huangpu, *Congressional Map Picked by Pennsylvania Supreme Court Unlikely to Dramatically Alter Partisan Balance*, SPOTLIGHT PA (Feb. 23, 2022), <https://www.spotlightpa.org/news/2022/02/pennsylvania-redistricting-congressional-map-supreme-court-pick/> [<https://perma.cc/8GZ8-EE3W>]; Laura Vozzella, *Virginia Supreme Court Approves Redrawn Congressional, General Assembly Maps*, WASH. POST (Dec. 28, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/28/virginia-redistricting-final-maps-supreme-court/> [<https://perma.cc/3CXB-B6K7>].

<sup>168</sup> See *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 4, 399 Wis. 2d 623, 632 ("In 2021, those maps no longer comply with the constitutional requirement of an equal number of citizens in each legislative district, due to shifts in population across the state. This court will remedy that malapportionment, while ensuring the maps satisfy all other constitutional and statutory requirements.")

<sup>169</sup> WIZM Staff, *Evers' Statement on Wisconsin Supreme Court Decision to Accept Governor's Redistricting Maps*, WIZM 92.3FM 1410AM (Mar. 3, 2022),

procedures failed in Wisconsin, and the state court chose a map that it considered to most resemble the plan used in the previous decade.<sup>170</sup> That earlier plan was considered a partisan gerrymander by many academics and legal scholars.<sup>171</sup>

Our primary concern is with plans that were either successfully challenged and led to changes in the plan or where challenges were defeated. In the section that follows, we omit a full discussion of challenges that either did not reach a decision on merits or standing issues before the 2022 midterm elections.

1. State Court Cases Where Partisan Gerrymandering Issues Are Implicated

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

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<https://www.wizmnews.com/2022/03/03/evers-statement-on-wisconsin-supreme-court-decision-to-accept-governors-redistricting-maps/> [<https://perma.cc/D8AJ-98J8>].

<sup>170</sup> Johnson, 399 Wis. 2d at 634. (“[T]his court will confine any judicial remedy to making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements.”)

<sup>171</sup> Joseph A. Ranney, *Wisconsin Lawyer: Battle Maps: A History of Wisconsin Redistricting Law*, WISCONSIN L., 32 (May 14, 2021), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=5&ArticleID=28393> [<https://perma.cc/C7SA-HFLU>] (stating “[i]n 2012, Republican candidates won 49 percent of the total vote for Assembly but 60 percent of Assembly seats, and later elections produced similar gaps.”).

**Table 5. Key Case Citations Involving State Courts**

State	Citation
Arkansas	<i>Suttlar v. Thurston</i> , No. 60CV-22-1849 (Ark. Cir. Ct. Mar. 21, 2022).
Florida (2015)	<i>League of Women Voters of Fla. V. Detzner</i> , 172 So.3d 363 (Fla. 2015).
Florida (2022)	<i>Black Voters Matter Capacity Building Inst., Inc. v. Lee</i> , No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022).
Georgia	<i>Common Cause v. Raffensperger</i> , No. 1:22-CV-90 (N.D. Ga. Jan. 7, 2022). <i>Pendergrass v. Raffensperger</i> , No. 1:21-CV-5339 (N.D. Ga. Dec. 30, 2021). <i>Georgia State Conference of the NAACP v. State of Georgia</i> , No. 1:21-CV-5338 (N.D. Ga. Dec. 30, 2021).
Kansas	<i>Rivera v. Schwab</i> , 512 P.2d 168 (Kan. 2022).
Kentucky	<i>Graham v. Adams</i> , No. 22-CI-00047 (Ky. Cir. Ct. Jan. 20, 2022).
Maryland	<i>Szeliga v. Lamone</i> , No. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022).
North Carolina (2019)	<i>Harper v. Lewis</i> , No. 19-CVS-012667 (N.C. Super. Ct., Oct. 28, 2019).
North Carolina (2022)	<i>Harper v. Hall</i> , No. 19-CVS-12667 (N.C. Super. Ct. Nov. 5, 2021).
New Jersey	<i>Matter of Congressional Districts by New Jersey Redistricting Comm'n</i> , 268 A.3d 299 (N.J. 2022). <i>Steinhardt v. New Jersey Redistricting Commission</i> , No. 086587 (N.J. Dec. 30, 2021).
New Mexico	<i>Republican Party of New Mexico v. Oliver</i> , No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022).
New York	<i>Harkenrider v. Hochul</i> , 2022 N.Y. Slip Op. 31471 (N.Y. Sup. Ct. 2022).
Ohio	<i>Adams v. DeWine</i> , No. 2021-1428 (Ohio Dec. 2, 2021). <i>League of Women Voters of Ohio v. Ohio Redistricting Commission</i> , No. 2021-1449 (Ohio Nov. 30, 2021). <i>League of Women Voters of Ohio v. LaRose</i> , No. 2022-0303 (Ohio Mar. 22, 2022). <i>Neiman v. LaRose</i> , No. 2022-0298 (Ohio Mar. 21, 2022).
Oregon	<i>Clarno v. Fagan</i> , No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021).
Pennsylvania (2018)	<i>League of Women Voters of Pa. v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).
Pennsylvania (2022)	<i>Carter v. Chapman</i> , 7 MM 2022 (Pa. Mar. 9, 2022).
Utah	<i>League of Women Voters of Utah v. Utah State Legislature</i> , No. 220901712 (Utah D. Ct. Mar. 17, 2022).
Wisconsin	<i>Johnson v. Wis. Elections Comm'n</i> , No. 2021AP1450-OA (Wis. Oct. 6, 2021).



Now that we have specified which states had litigation before the 2022 midterm election, we discuss these court cases and their consequences in more detail. We start by discussing the states where no direct language prohibits gerrymandering, but there is indirect language that was used as the basis of a claim of partisan gerrymandering. In these cases, generally, a non-dilutive remedy plan was put into place by a state court. We then move to cases where there is direct language in state law that can be used as the basis for the claim of unconstitutional partisan gerrymandering. Finally, we discuss the states where there were cases brought in state court raising a partisan gerrymandering claim, but there is neither direct nor indirect language in state law prohibiting partisan gerrymandering. These cases were generally unsuccessful.

Our next set of states are those without cases making a partisan gerrymandering claim but where there was nonetheless state court action arising through the failure of the responsible districting authorities to act in a timely fashion. Then we consider cases that are still pending (circa November 2022) where partisan gerrymandering effects are implicated, including some where a partisan gerrymandering claim is not the basis of the litigation.

2. Cases Where There Was a Partisan Gerrymandering Challenged Based on Indirect Constitutional Language Prohibiting Partisan Gerrymandering

a. *Maryland*

Maryland was the subject of an unsuccessful federal lawsuit in the 2010 cycle challenging the Democratic-drawn map as a partisan gerrymander.<sup>172</sup> That case was combined with *Rucho*, and the U.S. Supreme Court ruled that partisan gerrymandering was not judiciable in federal court.<sup>173</sup> In both the 2010 and 2020 cycle, Democrats had partisan control over redistricting.<sup>174</sup> In 2010, Democrats controlled both chambers of the legislature and held the governorship.<sup>175</sup> In 2020,

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<sup>172</sup> *Benisek v. Lamone*, 266 F. Supp. 3d 799, 801 (D. Md. 2017). ("Plaintiffs have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief."), *aff'd*, 201 L. Ed. 2d 398, 138 S. Ct. 1942 (2018) ("The Supreme Court noted its jurisdiction and held that the balance of equities and the public interest tilted against the request for a preliminary injunction.")

<sup>173</sup> *Cf. Rucho*, 139 S.Ct. at 2507.

<sup>174</sup> *See id.* at 2493; 2020 *Maryland Legislative Session*, BALLOTPEDIA, [https://ballotpedia.org/2020\\_Maryland\\_legislative\\_session](https://ballotpedia.org/2020_Maryland_legislative_session) [<https://perma.cc/Q68A-PTXC>] (last visited Dec. 23, 2022).

<sup>175</sup> *See* 2020 *Maryland Legislative Session*, *supra* note 174.

they held both chambers with supermajorities, but there was a Republican governor.<sup>176</sup> After the Democratic legislature passed a map, the Republican governor vetoed the map, but that veto was overridden.<sup>177</sup> Republicans filed a lawsuit against the state.<sup>178</sup>

The state court heard testimony and fact-finding.<sup>179</sup> The court found that the map was a partisan gerrymander that subordinated constitutional criteria to political considerations.<sup>180</sup> It found that it was an “outlier” compared to neutrally drawn maps.<sup>181</sup> There is no explicit provision in the Maryland Constitution concerning partisanship in the context of Congressional districting.<sup>182</sup> The Maryland Supreme Court, like these other courts, found indirect language in its Constitution that it interpreted as a prohibition on partisan gerrymandering.<sup>183</sup> The court stated that “[o]ur jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State,” including congressional redistricting.<sup>184</sup>

Maryland’s outcome differs from that of other states. Courts typically allowed the legislature an opportunity to enact a legal map, but if it fails, the court itself

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<sup>176</sup> *Id.*

<sup>177</sup> *See* Szeliga v. Lamone, Cir Ct, Anne Arundel County, Md, Mar. 25, 2022, case No. C-02-CV-21-0011773 (Order Granting Relief) at \*56.

<sup>178</sup> *See id.* at \*2.

<sup>179</sup> *Id.* at \*4-7.

<sup>180</sup> *Id.* at \*88. (“[C]onsideration of the weight afforded to the evidence presented by the experts yields the conclusion that the 2021 Congressional Plan in Maryland is an “outlier,” an extreme gerrymander that subordinates constitutional criteria to political considerations.”)

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*, at \*10. (“There are no provisions in the Maryland Constitution explicitly addressing Congressional districting.”)

<sup>183</sup> *See* MD. CONST. art. III, § 4; DECL. OF RTS. ART. VII, XXIV, XV.

<sup>184</sup> Szeliga, Nos. C-02-CV-21-001816, C-02-CV-21-001773 at \*27.

ended up crafting the remedy.<sup>185</sup> In Maryland, the legislature took the opportunity to draw a new map that met the approval of both the governor and the state court.<sup>186</sup>

*b. North Carolina*

North Carolina does not have direct language in its Constitution that prohibits the legislature from drawing a partisan gerrymandering but does have provisions promoting voting rights that can be interpreted to prohibit gerrymandering.<sup>187</sup> North Carolina's redistricting process was controlled by Republicans for the entirety of the 2010 cycle.<sup>188</sup> The plan originally enacted at the decade's dawn was struck down in federal court as a racial gerrymander.<sup>189</sup> In replacing that plan, the legislature said it relied on partisanship as the predominant motivation for decisions about where to draw the lines.<sup>190</sup> Plaintiffs in *Harper v. Lewis*<sup>191</sup> argued that the legislature drew the plan with the expressed intent to maximize Republican advantage and that the 2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause,<sup>192</sup> Equal Protection Clause,<sup>193</sup> and Freedom of Speech and Freedom of

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<sup>185</sup> *Grove v. Emison*, 507 U.S. 25, 33 (1993) ("In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself."); see also Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131–1165 (2005); Jeffrey M. Wice & Leonard M. Kohon, *Court Deference to State Legislatures in Redistricting After Perry v. Perez*, 11 ELECTION L.J. 431–445 (2012).

<sup>186</sup> Associated Press, *Governor Approves New Congressional Map in Maryland*, POLITICO: ELECTIONS (Apr. 4, 2022, 07:39 PM EDT), <https://www.politico.com/news/2022/04/04/redistricting-maryland-hogan-congressional-map-00022904> [<https://perma.cc/K7LQ-J8PE>] (last visited Dec. 23, 2022).

<sup>187</sup> See *Harper v. Lewis*, No. 19-CVS-012667, at 7–15 (N.C. Super. Ct. 2019); *Harper v. Hall*, 380 N.C. 317, 455 (2022) (Newby, J., dissenting) (stating "[n]o express provision of our constitution has been violated here. Nonetheless, in the majority's view, it is the members of this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, §§ 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting when met with complaints of partisan gerrymandering.").

<sup>188</sup> See *Rucho*, 139 S. Ct. at 2491, 2509.

<sup>189</sup> See *Cooper v. Harris*, 581 U.S. 285 (2017).

<sup>190</sup> See *id.* at 313 (describing how "Hofeller explained that *Rucho* and *Lewis* instructed him, first and foremost, to make the map as a whole 'more favorable to Republican candidates.'").

<sup>191</sup> *Harper v. Lewis*, No. 19-CVS--12667 (N.C. Super. Ct. 2019).

<sup>192</sup> See N.C. Const. art. I, § 10.

<sup>193</sup> See N.C. Const. art. I, § 19.

Assembly Clauses.<sup>194</sup> The state court then forced the legislature to offer a new map and required that the remedy be one in which partisanship did not predominate.<sup>195</sup> The new map prepared by the General Assembly resulted in five Democratic members being elected, out of thirteen.<sup>196</sup> In the previous election, Democrats only held three of the thirteen seats in Congress.<sup>197</sup>

In the 2020 cycle, the Republican legislature maintained its control over redistricting.<sup>198</sup> The Governor, who is a Democrat, has no ability to veto a map based on state law.<sup>199</sup> The map enacted by the legislature was challenged in state court.<sup>200</sup> The court again said that partisan gerrymandering was prohibited by the state constitution.<sup>201</sup> The court ruled that the “constitution’s Declaration of Rights guarantees the equal power of each person’s voice in our government through voting in elections that matter.”<sup>202</sup> The North Carolina Supreme Court remanded the case back to the lower court to oversee the redrawing of the maps by the General Assembly.<sup>203</sup> When the General Assembly failed to enact a legal map, the court appointed three special masters to oversee the drawing of a map.<sup>204</sup> They in turn

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<sup>194</sup> See generally N.C. Const. art. I, §§ 12, 14

<sup>195</sup> Harper, No. 19-CVS-012667 at 22–24.

<sup>196</sup> See *North Carolina Election Results*, N.Y. TIMES (Mar. 7, 2021), <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-north-carolina.html> [https://perma.cc/WN8J-QNU7].

<sup>197</sup> See *North Carolina Election Results*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-north-carolina-elections.html> [https://perma.cc/2WRR-F8XY].

<sup>198</sup> See *supra* tbl. 1; Spencer, *supra* note 134.

<sup>199</sup> Fiona Kniaz, *Governors and the Redistricting Process*, EAGLETON CENTER ON THE AMERICAN GOVERNOR (2021), <https://governors.rutgers.edu/governors-and-the-redistricting-process/> [https://perma.cc/TV6Q-MJUY].

<sup>200</sup> See Harper v. Hall, 868 S.E.2d 499, 510-11 (N.C. Super. Ct. 2022).

<sup>201</sup> *Id.* at 382–383.

<sup>202</sup> *Id.* at 321.

<sup>203</sup> *Id.* at 323.

<sup>204</sup> Order Appointing Special Masters at 2-7, Harper v. Hall, 868 S.E.2d 499, 510-11 (N.C. Super. Ct. 2022); see also Steve Doyle, *NC Redistricting Special Masters Have Greensboro Flavor*, FOX 8 GREENSBORO: YOUR LOCAL ELECTION HQ (Apr. 5, 2022), <https://myfox8.com/your-local-election-hq/nc-redistricting-special-masters-have-greensboro-flavor/> [https://perma.cc/W5SN-YMHJ] (last visited Dec. 24, 2022).

brought in a technical consultant.<sup>205</sup> The court eventually chose a map prepared by the special masters.<sup>206</sup>

### 3. Cases Challenging Partisan Gerrymandering Where There is Direct Constitutional Language Prohibiting Partisan Gerrymandering

#### a. *New York*

*New York* is a case where state courts heard challenges to enacted congressional plans based on language in state law that bears directly to prohibit partisan gerrymandering. In the 2010 cycle, the legislature was under divided control, with Democrats controlling the lower chamber and Republicans controlling the upper chamber, and with a Democratic governor.<sup>207</sup> The legislature failed to pass a map, and federal courts implemented a map.<sup>208</sup> In 2014, voters placed new restrictions on congressional redistricting.<sup>209</sup> Language added to the constitution includes “[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.”<sup>210</sup> The 2014 constitutional amendment not only included language to prevent gerrymandering, but it also established a process supposed to attain bipartisanship via a commission containing individuals of both parties.<sup>211</sup> The commission’s composition, however, contained no tie-breaking mechanism.<sup>212</sup> Moreover, even if the commission was successful in its work, its map was subject to changes made by the legislature.<sup>213</sup>

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<sup>205</sup> Disclosure: Bernard Grofman served as that technical consultant.

<sup>206</sup> Order on Remedial Plans at 23, *Harper*, 868 S.E.2d.

<sup>207</sup> See BALLOTPEDIA, *Party Control of New York State Government*, [https://ballotpedia.org/Party\\_control\\_of\\_New\\_York\\_state\\_government](https://ballotpedia.org/Party_control_of_New_York_state_government) [<https://perma.cc/N4NE-RPSZ>] (last visited Dec. 23, 2022).

<sup>208</sup> BALLOTPEDIA, *Redistricting in New York After the 2010 Census*, [https://ballotpedia.org/Redistricting\\_in\\_New\\_York\\_after\\_the\\_2010\\_census](https://ballotpedia.org/Redistricting_in_New_York_after_the_2010_census) [<https://perma.cc/8HQ8-LRRR>] (last visited Dec. 23, 2022).

<sup>209</sup> See Marissa Zanfardino & Jeffrey M. Wice, *New York State Constitutional Amendment Explainer*, REDISTRICTING RESOURCES 11 (2021); NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, <https://www.nyirc.gov/about> [<https://perma.cc/T24N-NG8T>] (last visited Dec. 24, 2022) (providing background on the Commission).

<sup>210</sup> N.Y. Const. art. III, § 4(c).

<sup>211</sup> See N.Y. Const. art. III, § 5-b(a).

<sup>212</sup> N.Y. Const. art. III, § 5-b(g).

<sup>213</sup> *Id.*

In the 2020 cycle, the state government was under party control for the Democrats, including supermajorities in both chambers.<sup>214</sup> Due to stagnation in New York's population, the state lost one congressional seat.<sup>215</sup> The commission failed to produce a map and the legislature enacted its own congressional map that was signed into law by the Governor.<sup>216</sup> This map was challenged in state court as having violated the 2014 constitutional amendments.<sup>217</sup> In *Harkenrider v. Hochul*, the State of New York Court of Appeals ruled that the congressional plan passed by the legislature and signed by the governor had bypassed the Commission and thus was not enacted through a constitutionally valid process.<sup>218</sup> The court rejected the legislature's argument that they had discretion to draw their own plan notwithstanding the redistricting commission failing to fulfill their own obligations.<sup>219</sup> The court also held that the Respondents engaged in prohibited gerrymandering when creating the districts.<sup>220</sup> The court found:

[T]he undisputed facts and evidence presented by Petitioners for the affirmed finding that the 2022 congressional map was drawn to discourage competition. Indeed, several

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<sup>214</sup> *Redistricting in New York After the 2020 Census*, BALLOTPEDIA, [https://ballotpedia.org/Redistricting\\_in\\_New\\_York\\_after\\_the\\_2020\\_census](https://ballotpedia.org/Redistricting_in_New_York_after_the_2020_census) [https://perma.cc/C7RR-48YW] (last visited Dec. 23, 2022).

<sup>215</sup> U.S. Census Bureau, *supra* note 140; Shane Goldmacher, *After 2020 Count, New York Narrowly Loses Some Clout*, N.Y. TIMES, Apr. 27, 2021, at 18, <https://www.nytimes.com/2021/04/26/nyregion/new-york-census-congress.html> [https://perma.cc/Q3TH-STGJ]. *See also* Jonathan Cervas & Bernard Grofman, *The unanticipated effect of COVID-19 on house apportionment*, 102 SOCIAL SCIENCE QUARTERLY 2432–2434 (2021).

<sup>216</sup> Nicholas Fandos, Luis Ferré-Sadurní & Grace Ashford, *A 'Master Class' in Gerrymandering, This Time Led by N.Y. Democrats*, N.Y. TIMES, (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/nyregion/redistricting-gerrymandering-ny.html> [https://perma.cc/N7RZ-NFMR].

<sup>217</sup> *Harkenrider v. Hochul*, 197 N.E.3d 437, 442 (2022); Nicholas Fandos, *Democrats Lose Control of N.Y. Election Maps, as Top Court Rejects Appeal*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/nyregion/redistricting-congress-gerrymander-ny.html> [https://perma.cc/L7ND-S3H5].

<sup>218</sup> *Harkenrider*, 197 N.E.3d at 449–50.

<sup>219</sup> *Id.* at 449. (saying "Contrary to the State respondents' contentions, the detailed amendments leave no room for legislative discretion regarding the particulars of implementation; this is not a scenario where the Constitution fails to provide "specific guidance" or is "silen[t] on the issue".").

<sup>220</sup> *Id.* at 454. ("[T]he enactment of the congressional and senate maps by the legislature was procedurally unconstitutional, and the congressional map is also substantively unconstitutional as drawn with impermissible partisan purpose...")

of the State respondents' experts, who urged the court to draw the contrary inference, concededly did not take into account the reduction in competitive districts.<sup>221</sup>

The court appointed a special master who prepared the court remedial map.<sup>222</sup>

*b. Ohio*

Ohio is perhaps the most complicated of all the cases we cover in this essay. While the primary body responsible for congressional redistricting is a political commission, in effect, it can be bypassed by the legislature.<sup>223</sup> Indeed, as we will explain, this is what happened in the 2020 cycle.

Ohio voters passed a constitutional amendment in 2018 intended to take politics out of the process of congressional redistricting.<sup>224</sup> The original jurisdiction to create a congressional district plan resides with the general assembly.<sup>225</sup> For a plan to go into effect for the entire decade, it must have an affirmative vote of three-fifths of the members of each house, including at least 50% of each of the two largest parties.<sup>226</sup> If the legislature fails to get the necessary vote, a redistricting commission is formed consisting of several state officials.<sup>227</sup> For the commission map to be valid, the commission vote must include members of both major political parties.<sup>228</sup> Finally, if the commission fails, then the legislature can pass a plan in the form of regular legislation subject to the governor's signature; however, a plan passed in this form is only valid for four years.<sup>229</sup> Moreover, if passed without three-fifths of all members and half of the members from each major party, it is subject to prohibitions on partisanship.<sup>230</sup> The plan is to remain in effect for four years.<sup>231</sup>

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<sup>221</sup> *Id.* at 453

<sup>222</sup> Disclosure: Jonathan Cervas served as the special master in *Harkenrider*, 197 N.E.3d. Bernard Grofman served as a consultant to the special master.

<sup>223</sup> Levitt, *supra* note 3.

<sup>224</sup> Andrew Prokop, *Ohio's Gerrymandering Reform Was Just Approved by the State's Voters*, VOX (May 8, 2018), <https://www.vox.com/2018/5/7/17302388/ohio-issue-1-gerrymandering-redistricting> [<https://perma.cc/24HN-GL8X>].

<sup>225</sup> Oh. Const. art. XIX, § 1(A).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Oh. Const. art. XIX, § 1(C)(3)(e) (providing "[i]f the plan becomes law, the plan shall remain effective until two general elections for the United States house of representatives have occurred under the plan, except as provided in Section 3 of this article.>").

<sup>230</sup> Oh. Const. art. XIX, § 1(C)(3).

<sup>231</sup> *Id.*

Importantly, though, is that even if a map is said to violate the prohibition on partisan gerrymandering, the court has no authority to demand its own map be used.<sup>232</sup>

The process for drawing new congressional districts in Ohio had a rocky start for Ohio. Delayed census data pushed against deadlines laid out in the state constitution.<sup>233</sup> The legislature failed to meet its first deadline for the legislature to pass a bipartisan map, with responsibility shifting to the commission.<sup>234</sup> The commission was unable to agree on a bipartisan solution, so responsibility reverted to the legislature.<sup>235</sup> The map passed there was on a party-line vote, meaning it would only be in effect for four years.<sup>236</sup> This plan was challenged in state court.<sup>237</sup> The Ohio Supreme Court ruled that the “General Assembly and the Governor blatantly disregarded that, in 2018, Ohioans voted three to one to amend the Ohio Constitution to eliminate the pernicious gerrymandering of Ohio’s congressional districts” by once again enacting “a rank partisan gerrymander—one that violates both the letter and the spirit of the 2018 reforms.”<sup>238</sup>

With the map it enacted now ruled unconstitutional, the General Assembly was allowed to submit a new map.<sup>239</sup> Instead, they gave authority to produce a plan back to the commission.<sup>240</sup> Some Republican members of the commission argued they were no longer required to adhere to the language in the constitution that

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<sup>232</sup> Oh. Const. art. XIX, § 1(J) (stating “[w]hen a congressional district plan ceases to be effective under this article, the district boundaries described in that plan shall continue in operation for the purpose of holding elections until a new congressional district plan takes effect in accordance with this article.”).

<sup>233</sup> Julie Carr Smyth, *Ohio Redistricting Process Falters as Panel Hits Impasse*, AP NEWS (Feb. 17, 2022), <https://apnews.com/article/ohio-legislature-redistricting-005319224508f729fe93f066a59eae7> [<https://perma.cc/C95G-TQ7F>].

<sup>234</sup> *Adams v. DeWine*, 195 N.3d 74, 78 (Ohio 2022).

<sup>235</sup> *Id.*

<sup>236</sup> Complaint at 4, *Adams v. DeWine*, 195 N.3d (Ohio 2022) (No. 2021-1428) (stating “with little notice to the public, the General Assembly introduced a unified Republican proposal with roughly the same partisan breakdown as the earlier proposals (worse than the 2011 plan), which was then promptly rammed through each chamber on party-line votes.”).

<sup>237</sup> *Adams*, 195 N.3d at 76.

<sup>238</sup> Complaint at 1, *Adams*.

<sup>239</sup> Andy Chow, *Legislative Leaders Send Congressional Mapmaking Back to Ohio Redistricting Commission*, WOSU NEWS (Feb. 8, 2022), <https://news.wosu.org/politics-government/2022-02-08/legislative-leaders-sending-congressional-mapmaking-back-to-ohio-redistricting-commission> [<https://perma.cc/YT5K-X8AG>].

<sup>240</sup> *Id.*



prohibited partisan gerrymandering, since that language specifically addressed legislature-enacted plans.<sup>241</sup> The commission passed a map on a party-line vote.<sup>242</sup> On this map, Ohio Supreme Court determined it did not retain jurisdiction and that Petitioners would need to file new lawsuits.<sup>243</sup> Several new challenges were brought in state court, and the Ohio Supreme Court again ruled that the map was a partisan gerrymander.<sup>244</sup> The plan passed by the commission only slightly modified the previously unconstitutional map.<sup>245</sup> The court said that the revised plan “allocates voters in ways that unnecessarily favor the Republican Party by packing Democratic voters into a few dense Democratic-leaning districts, thereby increasing the Republican vote share of the remaining districts.”<sup>246</sup> The commission readopted its second plan already rejected by the State Supreme Court.<sup>247</sup> Ultimately, the commission failed to approve a new legal map.<sup>248</sup> Thus there was an impasse with no legal plan in place, since the State Court was not empowered to draw a map of its

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<sup>241</sup> Jessie Balmert, *Redistricting: Ohio Supreme Court Rejects Congressional Map Used in May, Orders New One*, THE COLUMBUS DISPATCH (July 19, 2022), <https://www.dispatch.com/story/news/politics/elections/2022/07/19/ohio-supreme-court-strikes-down-congressional-map-used-may-primary/9359835002/> [https://perma.cc/4GVT-QFZV] (providing “[b]efore approving this map, Senate President Matt Huffman, R-Lima, argued that the Ohio Redistricting Commission didn’t need to abide by voter-approved rules that prevent maps from unduly favoring one party. The court, ultimately, disagreed.”).

<sup>242</sup> Jim Gaines, *Ohio Redistricting Commission Approves New U.S. House Map on Another Party-Line Vote*, DAYTON DAILY NEWS (Mar. 2, 2022), <https://www.daytondailynews.com/local/ohio-redistricting-commission-approves-new-us-house-map-on-another-party-line-vote/TBWPX5E64FC47EKUKS5LBQYQF4/> <https://perma.cc/QV8N-EXKG>].

<sup>243</sup> WTVG Staff, *Ohio Supreme Court Makes Final Judgement on Congressional Map Challenges*, ABC ACTION NEWS 13 (Mar. 18, 2022), <https://www.13abc.com/2022/03/18/ohio-supreme-court-makes-final-judgement-congressional-map-challenges/> [https://perma.cc/AS8Z-7DTQ].

<sup>244</sup> *Neiman v. LaRose*, 2022-Ohio-2471, 207 N.E.3d 607 (Ohio July 19, 2022).

<sup>245</sup> *Id.* at 616.

<sup>246</sup> *Id.* at 621..

<sup>247</sup> Dan Trevas, *Readopted House and Senate District Maps Remain Invalid*, COURT NEWS OHIO (May 25, 2022), <http://www.courtnewsOhio.gov/cases/2022/SCO/0525/redistricting.asp> [https://perma.cc/6KFT-C2PQ].

<sup>248</sup> *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 651 (S.D. Ohio 2022). (“The Commission failed to pass a map within that window of time.”)

own.<sup>249</sup> A federal court found that the time had expired to put a new map in place for the 2022 election.<sup>250</sup> They ended the stalemate by ordering the implementation of the last rejected map, “Map 3”, on May 28, 2022.<sup>251</sup> However, the federal ruling requires that the commission produce a redrawn plan beginning with the 2024 election.<sup>252</sup>

*c. Oregon*

In the 2020 cycle, Oregon’s congressional redistricting was under party control of the Democrats.<sup>253</sup> It was the first state to redraw its map.<sup>254</sup> After initially floating a plan that would have created significant advantage to the Democrats, the Oregon Legislature passed a map signed by the Governor that was reduced in its bias.<sup>255</sup> The plan was challenged in state court by the former Republican Secretary of State.<sup>256</sup> Plaintiffs alleged (1) that the plan violates the statutory law prohibiting partisan

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<sup>249</sup> Balmert, *supra* note 241. (stating that “[t]he map struck down by the Ohio Supreme Court will be used in the November elections because candidates were already selected in the May primary using these districts.”).

<sup>250</sup> The 2022 election was underway at this point in terms of petitions for candidacy. The court was reluctant to intervene in the state process stating they acted only “as a last resort, after giving [the] state[] every opportunity” to enact a new plan. Gonidakis at 646, citing *Grove v. Emison*, 507 U.S. 25, 34 (1993).

<sup>251</sup> *Id.* at 647. (stating the federal court was “[h]anded a menu of unappetizing options, [and] we defer ordering Map 3 as long as possible—a final pause in hope that Ohio finally approves a map that complies with federal and state law.”).

<sup>252</sup> *Id.* at 692. (dissenting) (“[I]amentably, the majority opinion remedy moves Ohio no closer to resolving its redistricting saga. Since these maps are approved for the 2022 election only, the Commission soon will take up the task of redistricting for 2024 and beyond. I shudder at the perverse incentives of which the Commission could avail itself.”).

<sup>253</sup> Party Control of Oregon State Government, Ballotpedia, [https://ballotpedia.org/Party\\_control\\_of\\_Oregon\\_state\\_government](https://ballotpedia.org/Party_control_of_Oregon_state_government) [https://perma.cc/FHZ4-75CK] (last visited Dec. 24, 2022).

<sup>254</sup> Chandelis Duster, *Oregon Approves the Nation’s First New Congressional Map* | *CNN Politics*, CNN POLITICS (Sep. 28, 2021), <https://www.cnn.com/2021/09/28/politics/oregon-new-congressional-map/index.html> [https://perma.cc/N6K4-T6F6].

<sup>255</sup> Dirk VanderHart, *Judicial Panel Upholds Oregon Democrats’ New US Congressional Districts*, OPB (Nov. 24, 2021), <https://www.opb.org/article/2021/11/24/judicial-panel-upholds-oregon-democrats-new-congressional-districts/> [https://perma.cc/2KWL-5XWA] (stating that “[d]emocrats ultimately softened their proposal, but the plan that passed is still seen by many in the GOP as a blatant gerrymander.”).

<sup>256</sup> *See* *Clarno v. Fagan*, No. 21-CV-40180, at \*1 (Or. Cir. Ct. Marion Cnty. Nov. 24, 2021).

gerrymandering<sup>257</sup> because the plan was enacted for the purpose of favoring the Democratic Party, Democratic incumbent legislators, and “other person[s] affiliated with the Democratic Party,”<sup>258</sup> and (2) that the plan violates the Oregon Constitution, which guarantees freedom of expression and assembly, respectively, which together prohibit partisan gerrymandering.<sup>259</sup> Plaintiffs also argue that the plan violates the Privileges and Immunities Clause and the Free and Equal Elections Clause of the Oregon Constitution.<sup>260</sup>

Oregon law instructs the state court to appoint a “Special Judicial Panel” (SJP) to hear the petition.<sup>261</sup> The SJP appointed a special master to receive briefs and fact-finding.<sup>262</sup> The SJP adopted the special master’s “Recommended Findings of Fact” and incorporated them by reference into this opinion.<sup>263</sup> The Circuit Court held that the Petitioners failed to demonstrate that the legislatively adopted congressional reapportionment plan does not comply with all applicable statutes and the United States and Oregon Constitutions in any of the ways they have asserted.<sup>264</sup> The “evidence demonstrated that the enacted map was well within the range of plans that legislatures and courts have adopted in Oregon for the past 50 years and that the enacted map is more favorable to Republicans than any map since 1990.”<sup>265</sup>

The court rejected Petitioners’ request that it adopt a *per se* rule that a party-line vote is enough to establish a violation of Oregon law.<sup>266</sup> The court said, “[w]e respect the legislative process in Oregon and decline to adopt the cynical view that all politics are dirty politics.”<sup>267</sup> The court went on to say: the following:

[s]uch a standard would vest in the minority party absolute control of whether a plan will be presumed to unlawfully favor a political party. A minority party could simply vote against any plan along party lines,

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<sup>257</sup> Or. Rev. Stat. § 188.010(2). (“[n]o district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person[.]”)

<sup>258</sup> Pet. at 10, *Clarno v. Fagan*, No. 21-CV-40180 (Or. Cir. Ct. Marion Cnty. Oct. 11, 2021).

<sup>259</sup> Or. Const. art. I, §§ 8, 26.

<sup>260</sup> Or. Const. art. I, § 2; Or. Const. art. II, § 1.

<sup>261</sup> 2021 Or. Laws, ch. 419, § 1(6).

<sup>262</sup> *See Clarno*, No. 21-CV-40180, at \*1.

<sup>263</sup> *Id.* at \*2.

<sup>264</sup> *Id.* at \*13–14.

<sup>265</sup> *Clarno*, No. 21-CV-40180, at \*7

<sup>266</sup> *Id.* at \*8.

<sup>267</sup> *Id.*

regardless of the merits of the plan, and thereby create a presumption of improper purpose.<sup>268</sup>

Regarding measurable evidence that the plan favors Democrats, the court determined that Petitioners’ “[p]etitioners’ preferred metric for measuring partisan bias—‘falls well within the range of plans that have been used in the state for the past fifty years.’”<sup>269</sup> Having reached the conclusion that Petitioners have failed to meet their burden of proof as to partisan purpose or effect, the SJP dismissed both of Petitioners’ constitutional claims without further discussion.<sup>270</sup> This case is important because it is the only example we have from the 2020 round where a case where the state had jurisprudential grounds on which to find a violation but rejected the claim of gerrymandering on empirical grounds, though there are cases still pending which might provide other instances.<sup>271</sup>

4. Cases Challenging Alleged Partisan Gerrymandering Where There is No State Constitutional Language Either Directly or Indirectly Prohibiting Partisan Gerrymandering

a. *Kansas*

For the 2020 cycle, Kansas Legislature was controlled with supermajorities by Republicans.<sup>272</sup> The governor was a Democrat.<sup>273</sup> While the governor was able to veto the plan drawn by the Republican legislature, her veto was overridden.<sup>274</sup> Plaintiffs challenged the plan in state court, arguing it was a partisan and racial gerrymander, diluting minority votes in violation of several provisions of the Kansas

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at \*10.

<sup>270</sup> *Id.* at \*13–14.

<sup>271</sup> For example, *See Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-CA-000666 (Fla. Cir. Ct. 2022); *see also* *Republican Party of New Mexico v. Oliver*, No. -506-CV-202200041 (N.M. 5th Dist. Jan. 21, 2022); *see also* *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah 3rd Dist. Ct. Mar. 17, 2022).

<sup>272</sup> Tim Carpenter, *GOP Clings to Kansas House Supermajority Entering Kelly’s Second Term as Governor*, KANSAS REFLECTOR (Nov. 10, 2022), <https://kansasreflector.com/2022/11/10/gop-clings-to-kansas-house-supermajority-entering-kellys-second-term-as-governor/> [<https://perma.cc/FT3F-3E7B>].

<sup>273</sup> *Party Control of Kansas State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Kansas\\_state\\_government](https://ballotpedia.org/Party_control_of_Kansas_state_government) [<https://perma.cc/E3Y7-Z7D8>] (last visited Dec. 24, 2022).

<sup>274</sup> The Governor’s veto was overridden with the minimum, twenty-seven (27), votes in the state senate and one over the minimum, eighty-five (85), in the state house.

Constitution.<sup>275</sup> A state-level judge in Wyandotte County struck down the plan.<sup>276</sup> The court, relying on expert testimony, concluded that the plan “[was] an intentional, effective partisan gerrymander.”<sup>277</sup> It found that the plan (nicknamed “Ad Astra 2”) “was designed intentionally and effectively to maximize Republican advantage.”<sup>278</sup> The state appealed to the Kansas Supreme Court.<sup>279</sup> Four questions were presented to the Kansas Supreme Court, with the relevant questions relating to justiciability of partisan claims and discrimination against minorities<sup>280</sup> The Kansas Supreme Court held that:

until such a time as the Legislature or the people of Kansas choose to follow other states down the road of limiting partisanship in the legislative process of drawing district lines, neither the Kansas Constitution, state statutes, nor our existing body of case law supply judicially discoverable and manageable standards for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral[.]<sup>281</sup>

and therefore the question presented was nonjusticiable as a political question.<sup>282</sup> The court further held that plaintiffs did not establish the elements of their race-based claims and therefore could not show that Ad Astra 2 discriminated against minority voters.<sup>283</sup> The map originally passed by the state legislature was the map used in the 2022 election. Note that although the map was upheld against challenge, the grounds for doing so were jurisprudential, and indeed, because the state

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<sup>275</sup> *Rivera v. Schwab*, 315 Kan. 877 (2022).

<sup>276</sup> *Id.* at 880.

<sup>277</sup> *Id.* 885

<sup>278</sup> *Id.* at 946.

<sup>279</sup> *Id.* at 881. (saying “Defendants, who we will refer to as the State, appealed and on May 18 we held that, on the record before us, plaintiffs have not prevailed on their claims that Sub. SB 355 violates the Kansas Constitution.”).

<sup>280</sup> *Id.* at 888 (listing, “(1) whether the Elections Clause bars state courts from reviewing reapportionment legislation for compliance with state law; (2) what standards this court should use when interpreting and applying the relevant provisions in the Kansas Constitution; (3) whether claims of partisan gerrymandering are justiciable; and (4) whether Ad Astra 2 discriminates against minority voters.”)

<sup>281</sup> *Id.* at 906.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 917.

supreme court did not reverse on the fact-finding, the plan is labeled a partisan gerrymander.<sup>284</sup>

*b. New Jersey*

The process of congressional redistricting in New Jersey resides in a political commission composed of an equal number of Democrats and Republicans (six each), along with a tiebreaker chosen either by agreement of the other members or by the state Supreme Court.<sup>285</sup> In the 2020 cycle, the commission's tiebreaker exerted immense power because the two parties acted in isolation from one another to create their own plans. The tiebreaker's vote went to the Democratic plan.<sup>286</sup> Former New Jersey Supreme Court Justice John Wallace, who served as the tiebreaker, justified his selection of the Democratic plan "simply because in the last redistricting map, it was drawn by the Republicans."<sup>287</sup>

The Republican delegation to the commission filed a complaint directly to the New Jersey Supreme Court.<sup>288</sup> They asked the court to vacate the commission's decision and remand.<sup>289</sup> Plaintiffs argued that the actions of the Chair were "arbitrary, capricious, and unreasonable," violated "federal and state constitutional equal protection and due process protections," and posed a "common law conflict of interest."<sup>290</sup>

But, as can be discerned from Table 1, New Jersey does not have state constitutional provisions that directly or indirectly prohibit partisan gerrymandering.<sup>291</sup> The question before the court was whether Plaintiffs' allegations were insufficient to support a claim upon which relief could be granted, because they did not assert any constitutional violation.<sup>292</sup> The court has no role in

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<sup>284</sup> *See id.* At 918. (stating "In the future, should the people of Kansas choose to codify clear standards limiting partisan gerrymandering, or should future plaintiffs be able to properly establish the elements legally required to show unlawful racial discrimination in the redistricting process, Kansas courthouse doors will be open. For now, the legal errors permeating the lower court's decision compel us to reverse its judgment.")

<sup>285</sup> *See* In re Cong. Dists. by N.J. Redistricting Comm'n, 249 N.J. 561, 566-67(2022).

<sup>286</sup> *See id.* at 575.

<sup>287</sup> *Id.* at 573.

<sup>288</sup> *Id.* at 568. ("Plaintiffs ask the Court to vacate the Commission's decision and remand the matter to the Commission for further proceedings, with the Chair, Justice Wallace, recused.")

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 569, citing Am. Compl. ¶¶ 7, 8, 101.

<sup>291</sup> *See supra* tbl. 1.

<sup>292</sup> In re Cong. Dists. by N.J. Redistricting Comm'n, 249 N.J. at 577.

the outcome of the redistricting process unless the map is “unlawful.”<sup>293</sup> So long as the final map is constitutional, the court cannot grant any relief.<sup>294</sup> The court held that Plaintiffs’ allegations were insufficient to support a claim upon which relief could be granted because they did not assert any constitutional violation.<sup>295</sup> The map passed by the commission was used in the 2022 midterm election.<sup>296</sup> Here, too, although the map was upheld against challenge, the grounds for doing so were jurisprudential, not fact-based.<sup>297</sup> New Jersey stands apart from Kansas in that, unlike the latter, its plan has not been deemed a partisan gerrymander by any court.<sup>298</sup>

*c. Wisconsin*

Wisconsin, like Pennsylvania and North Carolina, had enacted one of the most extreme gerrymanders of the 2010 cycle.<sup>299</sup> That plan was the subject of a federal lawsuit that reached the U.S. Supreme Court but was mooted by *Rucho*.<sup>300</sup> There are no provisions in the Wisconsin Constitution that speak to partisan gerrymandering either directly or indirectly, and therefore no obvious route to state court litigation.<sup>301</sup>

In the 2020 cycle, the political context had changed from the previous decade — a decade when Republicans had party control over the process. Though the state legislature remained in firm control of the Republicans, the governor was a

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<sup>293</sup> N.J. Const. art. II, § 2, ¶¶ 7, 9.

<sup>294</sup> *In re Cong. Dists. by N.J. Redistricting Comm’n*, 249 N.J. at 580.

<sup>295</sup> *Id.*

<sup>296</sup> View Adopted 2022 Map, NEW JERSEY CONGRESSIONAL REDISTRICTING COMMISSION, <https://www.njredistrictingcommission.org/adoption2022map.asp> [https://perma.cc/A8LN-PHUN] (last visited Jan. 7, 2023).

<sup>297</sup> *In re Cong. Dists. by N.J. Redistricting*, 249 N.J. at 580.

<sup>298</sup> *Id.* at 576. (“[Plaintiffs’] argument [] does not purport to establish that the map is unlawful. Plaintiffs’ claim therefore cannot prevail.”)

<sup>299</sup> See Sam Wang, *The Great Gerrymander of 2012*, THE NEW YORK TIMES, Feb. 2, 2013, <https://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html> [https://perma.cc/8ZRR-TM9V] (last visited June 29, 2023).

<sup>300</sup> *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018).

<sup>301</sup> See Wis. Const. art. IV, § 3.

Democrat.<sup>302</sup> The state legislature and governor failed to agree to a plan.<sup>303</sup> The Wisconsin Supreme Court took over jurisdiction regarding congressional redistricting.<sup>304</sup> The court determined that it would choose among submissions to the court employing a “least change” approach.<sup>305</sup> Among the proposals to the court included a plan from Governor Evers and one from the state assembly and state senate.<sup>306</sup> The court adopted the Governor’s plan.<sup>307</sup> Among the reasons given was that it had the least alterations to the previous maps<sup>308</sup> and that it complied with the U.S. Constitution’s Equal Protection Clause, the Voting Rights Act, and the Wisconsin Constitution.<sup>309</sup> This plan is seen by some experts as being among the most gerrymandered maps after the 2020 cycle, but given the data in Table 1 and that the state court itself ordering this plan’s implementation, it is difficult to imagine a route towards a remedy.<sup>310</sup>

#### 5. Pending Cases in State Courts Where There is Partisan Gerrymandering Litigation

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

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<sup>302</sup> *Party Control of Wisconsin State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Wisconsin\\_state\\_government](https://ballotpedia.org/Party_control_of_Wisconsin_state_government) [<https://perma.cc/7FD7-L5Y3>] (last visited Dec. 24, 2022).

<sup>303</sup> *Johnson v. Wisconsin Elections Comm'n*, 400 Wis. 2d 626, 633 (2022). (“We have given the political branches a fair opportunity to carry out their constitutional responsibilities.”)

<sup>304</sup> *Id.* (“We are therefore left with the unwelcome task of filling the gap.”)

<sup>305</sup> *Id.* at 634. We should note that we are highly skeptical of this approach, and new research from computational social science shows that the least change approach is fraught with the danger of simply perpetuating an existing gerrymander. Amariah Becker & Dara Gold, *The Gameability of Redistricting Criteria*, 5 J. COMPUT. SOC. SCI. 1735, (2022).

<sup>306</sup> *Johnson*, 400 Wis. 2d at 635.

<sup>307</sup> *Id.* at 637.

<sup>308</sup> *Id.* at 659.

<sup>309</sup> *Id.* at 650-51, 659.

<sup>310</sup> See WIZM staff, *supra* note 169.



a. *Arkansas*

Arkansas is a state under clear party control, and yet there were within-party splits.<sup>311</sup> The legislature passed a plan through regular legislation.<sup>312</sup> The Governor, who is of the same party, refused to sign off on the plan, saying, “I am concerned about the impact of the redistricting plan on minority populations.”<sup>313</sup> The Governor went on to say: “I decided not to veto the bills but instead to let them go into law without my signature. This will enable those who wish to challenge this redistricting plan in court to do so.”<sup>314</sup> Indeed, voters did file suit in state court alleging that the plan “interferes with and impairs the free exercise of suffrage by Black voters in Arkansas . . . by diluting, impairing, and undermining their ability to elect their candidates of choice.”<sup>315</sup> Plaintiffs further argue that the:

2021 Map violates the Free and Equal Elections Clause of the Arkansas Constitution, which guarantees that ‘[e]lections shall be free and equal,’ and that ‘[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited,’ Ark. Const. Art. 3, § 2, as well as the Equal Protection Clause, which further guarantees that ‘[t]he equality of all persons before the law’ and ‘shall ever remain inviolate,’ *id.* A. rt. 2, § 3.<sup>316</sup>

This case remains pending as of November 2022.<sup>317</sup>

b. *Florida*

A contested process led to the adoption of maps favored by the Governor of Florida.<sup>318</sup> The map initially passed by the Florida Legislature was vetoed by the Governor.<sup>319</sup> The Governor’s opposition to the state legislature’s preferred maps

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<sup>311</sup> Daniel Breen, *In Post-Trump GOP Split, Gov. Asa Hutchinson Often At Odds With His Party*, NPR (Mar. 7, 2021), <https://www.npr.org/2021/05/07/994812107/in-post-trump-gop-split-gov-asa-hutchinson-often-at-odds-with-his-party> [https://perma.cc/LP4F-ZZWA].

<sup>312</sup> Complaint at 2, *Suttlar v. Thurston*, No. 60CV-22-1849 (Ark. Cir. Ct. Pulaski Cty 2022).

<sup>313</sup> *Governor Hutchinson Allows Vaccine Mandate, Redistricting Bills to Become Law Without His Signature*, THE OFFICIAL STATE WEBSITE OF THE STATE OF ARKANSAS: GOVERNOR’S OFFICE (Oct. 13, 2021), <https://directory.arkansas.gov/agency/governors-office/news/governor-hutchinson-allows-vaccine-mandate-redistricting-bills-to-become-law-without-his-signature/> [https://perma.cc/Q7S7-FR2M].

<sup>314</sup> *Id.*

<sup>315</sup> Complaint at 3, *Suttlar*, No. 60CV-22-1849.

<sup>316</sup> *Id.* at 4.

<sup>317</sup> *Id.*

<sup>318</sup> Complaint at 3, *Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-CA-000666 (Fla. Cir. Ct. 2022).

<sup>319</sup> *Id.*

delayed the adoption of a plan until April 2022, which made Florida among the last states in the country to approve a plan.<sup>320</sup> The plan was passed on a party-line vote.<sup>321</sup> Litigants sued in state court alleging that Governor Ron DeSantis “hijacked” the redistricting process, by “unilaterally declar[ing] the Fair Districts Amendment unconstitutional” and by vetoing the Legislature’s congressional plan and “conven[ing] a special legislative session, leaving the Legislature little choice but to consider and pass his own redistricting scheme.”<sup>322</sup> Plaintiffs also allege that the DeSantis Plan “intentionally favors the Republican Party at nearly every turn, eliminating three Democratic seats and transforming competitive seats into Republican-leaning ones.<sup>323</sup> And in so doing, it needlessly produces non-compact districts that split geographic and political boundaries.”<sup>324</sup>

As noted earlier, the Florida Constitution has direct language prohibiting partisan gerrymandering.<sup>325</sup> Plaintiffs argue that the DeSantis Plan violates Art. III, §20 of the Florida Constitution by diminishing minorities’ ability to elect, intentionally abridging and diminishing minority voting strength, intentionally favoring/disfavoring a political party, and violating traditional districting principles such as compactness, and political and geographical boundary splits.<sup>326</sup> Because of the very late passage of a plan, this litigation has not resulted in a verdict on the merits.<sup>327</sup>

*c. Kentucky*

Party control over redistricting was held by one party in Kentucky for the 2020 cycle because the Republican majorities in both chambers were sufficient to override a veto of the Democratic governor.<sup>328</sup> The map was like the plan used in the 2010 cycle, with changes focusing on adding Republican voters to a district where

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<sup>320</sup> *Id.* at 22.

<sup>321</sup> *Id.* at 23.

<sup>322</sup> *Id.* at 3.

<sup>323</sup> *Id.* at 4.

<sup>324</sup> *Id.*

<sup>325</sup> Fl. Const. art. III, § 20.

<sup>326</sup> Complaint at 25-32, Black Voters Matter Capacity Building Inst., Inc. v. Lee, No. 2022-CA-000666 (Fla. Cir. Ct. 2022).

<sup>327</sup> *See id.*

<sup>328</sup> *Party Control of Kentucky State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Kentucky\\_state\\_government](https://ballotpedia.org/Party_control_of_Kentucky_state_government) [https://perma.cc/RK7E-76AD] (last visited Dec. 24, 2022).

the Democratic incumbent won a narrow contest in 2018.<sup>329</sup> The Democratic Party of Kentucky proceeded to sue in state court.<sup>330</sup>

Plaintiffs argued that (1) the “extreme partisan gerrymandering” of the maps “violates Sections 1, 2, 3, and 6 of the Kentucky Constitution by arbitrarily denying the citizens of the Commonwealth the rights to a free and equal election, free expression, and free association;”<sup>331</sup> and (2) that the “mapmakers[] violat[ed] . . . Section 33 of the Kentucky Constitution by excessively and unnecessarily splitting counties into multiple districts without a legitimate purpose, and impermissibly attaching portions of split counties to others more times than is necessary to achieve districts of roughly equal size.”<sup>332</sup> Because the election cycle was underway by the time the case was brought, the state court determined that a temporary injunction would harm election officials in their ability to hold the forthcoming election and that there was not a sufficient showing of harm to justify interfering with the use of the plan for the 2022 election.<sup>333</sup>

Just days after the 2022 midterm election, the Kentucky lower state court delivered its ruling. While it found that the plan was a partisan gerrymander, it determined it did not violate the Kentucky Constitution.<sup>334</sup> It acknowledged that “[t]he Kentucky Constitution, like most state constitutions, is much more specific than the United States Constitution.”<sup>335</sup> The court continued, “[a]lso, as recognized by the North Carolina Supreme Court, on the state level, it is easier to craft a set of criteria to evaluate an alleged partisan gerrymander than it is on the federal level.”<sup>336</sup> However, the court determined that the free and equal clause found in the Kentucky Constitution “does not prohibit partisan gerrymandering because Section 6 has nothing to do with state or Congressional apportionment.”<sup>337</sup> The court accepts that other states have used these types of provisions to strike down plans as partisan gerrymanders, and that the plan adopted by Kentucky is indeed a partisan gerrymander, but “declines to address the validity or applicability of other states’ partisan gerrymandering decisions in this action because. . . the Kentucky

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<sup>329</sup> Complaint at 2-3, *Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. 2022).

<sup>330</sup> *Id.* at 2.

<sup>331</sup> *Id.* at 50.

<sup>332</sup> *Id.* at 2.

<sup>333</sup> *Id.* at 69-71.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 51 (citing to *Harper v. Hall*, 868 S.E.2d 499, 533 (N.C. 2022)).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 52.

Constitution does not prohibit partisan gerrymandering because it does not apply to apportionment, but rather to interferences with the vote-placement and vote-counting process.<sup>338</sup> Plaintiffs retain the option to appeal this decision to the Kentucky Supreme Court.<sup>339</sup>

*d. New Mexico*

The 2020 cycle in New Mexico was under party control of the Democrats.<sup>340</sup> The state established an advisory commission recently, but plans submitted by the commission can be amended by the legislature.<sup>341</sup> The commission adopted three maps, two of which were consistent with traditional redistricting principles and a third which was adopted to “maintain the status quo.”<sup>342</sup> Six of seven commission members submitted one of the submitted maps.<sup>343</sup> The legislature adopted none of the commission’s maps.<sup>344</sup> It amended one of the plans, which became referred to as the “People’s Map.”<sup>345</sup> In a signing statement, the New Mexico Governor said, “[i]t is my duty to ratify the will of the majority here, which I believe has established a reasonable baseline for competitive federal elections, in which no one party or candidate may claim any undue advantage.”<sup>346</sup>

The Republican Party of New Mexico objected to the new map and challenged it in state court.<sup>347</sup> Plaintiffs in *Republican Party of Nex Mexico v. Oliver* filed a complaint alleging that:

Senate Bill 1. . .redraws New Mexico’s three congressional districts in contravention of traditional redistricting principles endorsed by the state legislature and the New Mexico Supreme Court in order to accomplish a political gerrymander that unconstitutionally

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<sup>338</sup> *Id.* at 56.

<sup>339</sup> *Id.* at 71.

<sup>340</sup> *Party Control of New Mexico State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_New\\_Mexico\\_state\\_government](https://ballotpedia.org/Party_control_of_New_Mexico_state_government) [https://perma.cc/FVJ5-7326] (last visited Dec. 24, 2022).

<sup>341</sup> *Republican Party of New Mexico v. Oliver*, No. D-506-CV-202200041 at \*12-14 (N.M. D. Ct. Jan. 21, 2022).

<sup>342</sup> *Id.* at \*15.

<sup>343</sup> *Id.* at \*16.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Gov. Lujan Grisham Signs New Congressional Map Approved by N.M. Legislature*, OFFICE OF THE GOVERNOR - MICHELLE LUJAN GRISHAM (Dec. 17, 2021), <https://www.governor.state.nm.us/2021/12/17/gov-lujan-grisham-signs-new-congressional-map-approved-by-n-m-legislature/> [https://perma.cc/6LF3-723K] (last visited Dec. 23, 2022).

<sup>347</sup> *Republican Party of New Mexico*, No. D-506-CV-202200041 at \*6.

dilutes the votes of residents of southeastern New Mexico in order to achieve partisan advantage.<sup>348</sup>

Plaintiffs argued that the plan is a political gerrymander in violation of Equal Protection clause in the New Mexico Constitution.<sup>349</sup> Plaintiffs claim that “[w]hen drafters of congressional maps use ‘illegitimate reasons’ to discriminate against regions at the expense of others, including failing to adhere to New Mexico’s ‘traditional districting principles,’ aggrieved voters may seek redress of this constitutional injury in the courts through an equal protection challenge.”<sup>350</sup> The case is pending in state court as of November 2022.<sup>351</sup>

*e. Utah*

In 2018, voters of Utah established an independent commission to conduct congressional redistricting.<sup>352</sup> That commission was created as an advisory commission allowing the legislature to reject a commission plan, but in 2020, the Utah Legislature changed the law regarding congressional redistricting to make the commission fully advisory.<sup>353</sup> The legislature ignored the commission’s recommendations and established a plan that was signed by the governor on November 12, 2021.<sup>354</sup> A lawsuit was filed by the League of Women Voters of Utah in state court.<sup>355</sup> The complaint alleges that (1) the Utah Legislature’s “2021 Congressional Plan violates multiple provisions of the Utah Constitution, including the Free Elections Clause, the Uniform Operation of Laws Clause, protections of free speech and association, and the right to vote”; and (2) that “the Legislature’s repeal of Proposition 4” (a bipartisan citizen initiative that prohibited partisan gerrymandering) “violated the people’s constitutionally guaranteed lawmaking

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<sup>348</sup> *Id.*

<sup>349</sup> N.M. Const. art. II, § 18; *Republican Party of New Mexico*, No. D-506-CV-202200041 at \*6.

<sup>350</sup> *Republican Party of New Mexico*, No. D-506-CV-202200041 at \*18.

<sup>351</sup> *Republican Party of New Mexico v. Oliver*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/case/republican-party-of-nm-v-oliver/> [<https://perma.cc/E8FH-R9QA>] (last visited Dec. 23, 2022).

<sup>352</sup> DeArbea Walker, *Utah Voters Want Independent Redistricting. GOP Lawmakers are Fighting It.*, CENTER FOR PUBLIC INTEGRITY (Oct. 6, 2022), <http://publicintegrity.org/politics/elections/who-counts/utah-voters-want-independent-redistricting-gop-lawmakers-are-fighting-it/> [<https://perma.cc/XF3F-FQR2>].

<sup>353</sup> “The committee or the Legislature may, but is not required to, vote on or adopt a map submitted to the committee or the Legislature by the commission.” Utah Code § 20A-20-303(5).

<sup>354</sup> Walker, *supra* note 352.

<sup>355</sup> *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 at \*1-2 (Utah D. Ct. Mar. 17, 2022).

power and right to alter and reform their government.”<sup>356</sup> This case is pending as of November 2022.<sup>357</sup>

6. States Where Courts Were Forced to Act Because the Legislature or a Commission Failed to Act in a Timely Fashion

a. *Connecticut*

Connecticut’s Legislature and Governor are both controlled by Democrats.<sup>358</sup> If the legislature fails to pass a plan with a two-thirds majority in both chambers and receive the governor’s signature, the process is transferred to a nine-member backup political commission.<sup>359</sup> Because of census data delays, the committee tasked with the legislature’s map drawing missed its September 15<sup>th</sup> deadline, and the process was shifted to the commission.<sup>360</sup> The commission failed to deliver a plan by its statutory deadline, and the Connecticut Supreme Court took over the process and named a special master to draw the state’s five congressional seats.<sup>361</sup> The court approved the special master’s map on February 10, 2022.<sup>362</sup>

b. *Minnesota*

Minnesota was under divided government at the time of the 2020 redistricting cycle.<sup>363</sup> Democrats controlled the state house and governorship, and Republicans controlled the state senate.<sup>364</sup> Because the redistricting process failed in Minnesota to reach an agreed upon congressional map, the Minnesota Supreme Court took

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<sup>356</sup> Utah Const. art. I, §§ 1, 2, 15, 17, 24; Utah Const. art. IV, § 2.

<sup>357</sup> *League of Women Voters of Utah*, No. 220901712 at \*80.

<sup>358</sup> *Party Control of Connecticut State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Connecticut\\_state\\_government](https://ballotpedia.org/Party_control_of_Connecticut_state_government) [https://perma.cc/J4ST-9ESY] (last visited Dec. 24, 2022).

<sup>359</sup> Levitt, *supra* note 3.

<sup>360</sup> While the Census Bureau provided redistricting data in an older format in mid-August, there were questions about whether that data would change when the full dataset was delivered on September 16. The data was identical.

<sup>361</sup> Order at 1, *In re Petition of Reapportionment Commission ex rel.*, No. SC 20661 (Feb. 10, 2022) (stating how “the Court hereby adopts as the established plan of congressional districting the plan depicted and described in exhibits 1 and 4 of the Report and Plan of the Special Master, Nathaniel Persily, dated January 18, 2022.”).

<sup>362</sup> *Id.*

<sup>363</sup> *Party Control of Minnesota State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Minnesota\\_state\\_government](https://ballotpedia.org/Party_control_of_Minnesota_state_government) [https://perma.cc/9HW4-JNGL] (last visited Dec. 24, 2022).

<sup>364</sup> *Id.*

over.<sup>365</sup> It named a five-person panel to develop a map.<sup>366</sup> That map was adopted by the court on February 15, 2022.<sup>367</sup>

*c. New Hampshire*

The New Hampshire Legislature and Governor are both controlled by Republicans.<sup>368</sup> New Hampshire is a closely contested state in state-wide elections.<sup>369</sup> The 2020 redistricting cycle ended in a stalemate, which can be traced to the different governing coalitions created by district-based elections for legislators versus those for the governor who run state-wide.<sup>370</sup> The Governor vetoed the legislature's map.<sup>371</sup> The Governor stated that "I made it pretty clear, and they didn't want to take that advice, and I don't think my veto on any of those maps shocked them."<sup>372</sup> The New Hampshire Supreme Court appointed a special master

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<sup>365</sup> Minnesota has a long history of court-drawn maps. Alexis C Stangl & Matt Gehring, *History of Minnesota Congressional Redistricting*, MINNESOTA LEGISLATURE: LEGISLATIVE COORDINATING COMM'N (Nov. 2018), [https://www.gis.lcc.mn.gov/html/history\\_of\\_congressional\\_redistricting.pdf](https://www.gis.lcc.mn.gov/html/history_of_congressional_redistricting.pdf). [<https://perma.cc/D33K-G6PB>] (stating that "[s]ince the 1980 census, the courts have drawn the congressional districts in absence of enacted redistricting plans.").

<sup>366</sup> The "*Wattson*" redistricting panel consisted of five judges. Final Order Adopting A Congressional Redistricting Plan, *Wattson v. Anderson*, Nos. A21-0243, A21-0546 at 20 (Minn. Feb. 15, 2022).

<sup>367</sup> *Id.*

<sup>368</sup> *Party Control of New Hampshire State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_New\\_Hampshire\\_state\\_government](https://ballotpedia.org/Party_control_of_New_Hampshire_state_government) [<https://perma.cc/QM54-4UJY>] (last visited Dec. 24, 2022).

<sup>369</sup> David Weigel, *Primary Season Concludes with Bitterly Contested GOP Races in N.H.*, WASH. POST (Sep. 12, 2022), <https://www.washingtonpost.com/politics/2022/09/11/new-hampshire-bolduc-morse-senate-house/> [<https://perma.cc/QGU8-3RWS>] (last visited Dec. 24, 2022).

<sup>370</sup> Amanda Gokee, *New Hampshire Supreme Court Rules Current Congressional Districts Unconstitutional*, NEW HAMPSHIRE BULLETIN (May 12, 2022), <https://newhampshirebulletin.com/briefs/new-hampshire-supreme-court-rules-current-congressional-districts-unconstitutional/> [<https://perma.cc/X69D-9ZKU>] (last visited Dec. 24, 2022).

<sup>371</sup> Todd Bookman, *Competitive Congressional Districts are on the Decline. New Hampshire Bucks the Trend*, NPR (Jun. 10, 2022), <https://www.npr.org/2022/06/10/1104025539/new-hampshire-redistricting-competitive-districts-sununu> [<https://perma.cc/YLG2-CPLT>] (last visited Dec. 24, 2022).

<sup>372</sup> *Id.*

to draw the two-district congressional map.<sup>373</sup> New Hampshire was the final state to ratify its 2022 congressional map.<sup>374</sup>

*d. Pennsylvania*

During the 2010 round of redistricting, Pennsylvania brought new hope that partisan gerrymandering could be litigated in the state courts. In that cycle, the Republican legislature and Republican governor agreed on a map that was widely condemned as an egregious gerrymander.<sup>375</sup> Across three midterm elections, regardless of the vote share received by the Democratic party state-wide, Democrats were limited to winning only five seats of the state's eighteen, including elections in which it received a majority of the total votes cast for congressional candidates.<sup>376</sup>

In *League of Women Voters of Pennsylvania v. Commonwealth*, the Pennsylvania Supreme Court overturned the legislatively drawn plan and replaced it with a court-drawn plan.<sup>377</sup> It relied on indirect language in the state constitution.<sup>378</sup> The Court ruled the plan violated the Free and Equal Elections Clause<sup>379</sup> because the enacted plan “dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage.”<sup>380</sup> In the subsequent two elections under the court map, Democrats were able to win nine of the eighteen seats.<sup>381</sup>

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<sup>373</sup> *Norelli v. Secretary of State*, 2022 WL 1747769 (N.H. May 31, 2022) (stating that the “court hereby adopts as the congressional district plan for New Hampshire the plan recommended by the special master . . .”).

<sup>374</sup> *Morrissey*, *supra* note 167. As identified in the section above, there are still states where resolution of lawsuits was postponed until after the November 2022 elections.

<sup>375</sup> *Cervas and Grofman*, *supra* note 56, at 1; MCGANN ET AL., *supra* note 28; Samuel S.-H. Wang, Brian A. Remlinger & Ben Williams, *An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into Tests of Opportunity and Outcome*, 17 ELECTION L. J. 302 (2018).

<sup>376</sup> *Cervas and Grofman*, *supra* note 56.

<sup>377</sup> *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 825 (Pa. 2018). *See also supra* note 15.

<sup>378</sup> *League of Women Voters of Pa.*, 178 A.3d. at 740.

<sup>379</sup> Pa. Const. art I, § 5 (stating that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”).

<sup>380</sup> *League of Women Voters of Pa.*, 178 A.3d at 814.

<sup>381</sup> *Democrats Have Won Nine of Pennsylvania's 17 U.S. House Seats*, POLITICO (Dec. 23, 2022), <https://www.politico.com/2022-election/results/pennsylvania/house/> [<https://perma.cc/VM7A-ZZXA>].



Approaching the 2020 cycle of redistricting, the Republicans retained control of the state legislature, but now the Governor was a member of the Democratic party.<sup>382</sup> The Republican legislature approved a plan, but it was vetoed.<sup>383</sup> The Pennsylvania Supreme Court was now tasked with implementing a plan.<sup>384</sup> It heard testimony and allowed for the interested parties to submit plans.<sup>385</sup> It ultimately implemented a plan which was proposed by the *Carter* plaintiffs, drawn by a professor from Stanford University.<sup>386</sup>

*e. Virginia*

Late in the 2010 round, Virginia's third congressional district was eventually found by a three-judge federal panel to violate *Shaw's* racially preponderant motive test, and a new map was drawn by a special master appointed by that court.<sup>387</sup> In the process, five of Virginia's eleven congressional districts were redrawn.<sup>388</sup> Of the five, one retained its Black Democratic incumbent, three remained in Republican control, and the fifth, which had been redrawn with a considerably increased minority population, elected a Black Democrat.<sup>389</sup>

In the 2020 round, Virginia's newly constituted redistricting commission had an even number of members associated with each party, and it deadlocked, unable

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<sup>382</sup> *Party Control of Pennsylvania State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Pennsylvania\\_state\\_government](https://ballotpedia.org/Party_control_of_Pennsylvania_state_government) [<https://perma.cc/VZ69-E3ZG>] (last visited Dec. 28, 2022).

<sup>383</sup> *Carter v. Chapman*, 270 A.3d 444, 450 (Pa. 2022) (per curiam).

<sup>384</sup> *Id.* at 450–51.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 470.

<sup>387</sup> Disclosure: Bernard Grofman served as the special master in *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016).

<sup>388</sup> *See id.*; *Page v. Va. State Bd. of Elections*, 2015 WL 3604029 (E.D. Va. 2015), (appeal dismissed for lack of standing sub nom. *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016)).

<sup>389</sup> That seat, VA-04, was an open seat since the previous Republican incumbent chose to contest a Republican primary with a fellow incumbent rather than to run again within the boundaries of a considerably redrawn district that was less favorable to Republicans. The change in this district came about because the previous Black majority district, VA-03, had been unpacked. That district had two distinct pieces spanning a large distance, each of which had a large minority population, with the two pieces connected in part only by water. When VA-03 was redrawn in a good government fashion, one of those pieces became the core of a district, the new VA-03, where the Black incumbent resided, the other became the core of a new VA-04, also redrawn to satisfy good government criteria more closely.

to pass a map.<sup>390</sup> The state court intervened and appointed a team of two special masters to draw a congressional map.<sup>391</sup> One of these masters was appointed to represent Republican interests, the other to represent Democratic interests, but the special masters amicably cooperated to produce a map drawn with the good government principles embedded in the state constitution as their overriding considerations, including a concern to avoid partisan vote dilution.<sup>392</sup>

### ***B. Evaluating the Consequences of Court Action***

The next issue we take up is evaluating the consequences of state court action.

In Table 6, we look at those states where the state court rejected a map as an unconstitutional partisan gerrymander after litigation (North Carolina, Maryland, New York, Ohio).<sup>393</sup> Here, we compare the court-imposed map with the legislative map it replaced, though Ohio is an exception. Ohio is a special case since the peculiar provisions in its Constitution did not allow the Ohio Supreme Court to draw a map of its own.<sup>394</sup> Instead that Court repeatedly rejected legislative and commission maps as they submitted new maps that differed little from the previously rejected map until the election became so close in time that the legislature was able to get one of its maps adopted by a federal court to conduct an election.<sup>395</sup> Thus, even though the legislative maps were rejected by the state court, in Ohio, there is no state court-drawn map to compare against. We, therefore, compare the map first ruled unconstitutional against the map that was used in the 2022 congressional election in Ohio.

We also evaluate plans where the failure of the relevant redistricting authority to act in a timely fashion led to the state court adopting a plan (Connecticut,

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<sup>390</sup> Graham Moomaw, *Va. Political Leaders Name 8 Legislators Who'll Serve on New Redistricting Commission*, VIRGINIA MERCURY (Dec. 1, 2020), <https://www.virginiamercury.com/2020/12/01/va-political-leaders-name-8-legislators-wholl-serve-on-new-redistricting-commission/> [<https://perma.cc/SKU8-89QY>]; Meagan Flynn, *Partisan Biases Laid Bare on Virginia Redistricting Commission as More Gridlock Stymies Congressional Map*, WASH. POST (Oct. 20, 2021), <https://www.washingtonpost.com/dc-md-va/2021/10/20/virginia-congressional-redistricting-gridlock/> [<https://perma.cc/RR86-E783>].

<sup>391</sup> Disclosure: Bernard Grofman served as one of the two special masters in Virginia.

<sup>392</sup> As in other states, such as New York, the court and special masters (a) directly solicited public input and (b) had a two-round process such that a preliminary map was unveiled and then revised based in part on the nature of the comments received, with special attention paid to issues involving communities of interest.

<sup>393</sup> *See infra* tbl. 6.

<sup>394</sup> Spencer, *supra* note 134.

<sup>395</sup> *Id.*

Minnesota, New Hampshire, Pennsylvania, Virginia, Wisconsin). For New Hampshire and Pennsylvania, we compare the Legislature's map against the court map. For Connecticut, Minnesota, Virginia, and Wisconsin, we only show the data in Table 6 for the plan that was used in the 2022 midterm election.

For the states where there is a map against which we can compare the court-ordered (or ordered to modify) map, we show in Table 6 comparisons of the two maps using metrics provided in Dave's Redistricting App. For compactness, high values are better. For county splits, low values are better. For partisan bias, the ideal would be a value of zero. Substantial (and statistically significant) deviations from zero are undesirable in that metric. The sign on partisan bias tells us which party is advantaged, with positive values representing pro-Republican bias.

**Table 6. Direct Comparisons Between Legislatively Drawn Map and State Court Drawn Remedy Where Such Comparisons are Feasible; Otherwise, Information about the Adopted Map is Given.<sup>396</sup>**

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

Notes: Maps rejected by a state court are highlighted. Total County Splits refers to the number of county piece in total. Compactness is “You Know It When You See It” measure from.<sup>397</sup> Votes Bias is calculated from the 2020 Presidential election, as are the number of Biden Seats. Negative vote bias numbers indicate that the plan favors Democrats, while a positive sign indicates the plan favors Republicans. The 2022 Seats are the number of Democratic seats after the 2022 midterm election.

What we see from Table 6 is that the state court map usually dominates the legislative map on most of the factors identified.<sup>398</sup> But there are some notable

<sup>396</sup> *Welcome to Dave’s Redistricting*, DAVE’S REDISTRICTING, <https://davesredistricting.org/> [https://perma.cc/DK5X-9E52].

<sup>397</sup> Aaron R. Kaufman, Gary King & Mayya Komisarchik, *How to Measure Legislative District Compactness If You Only Know It When You See It*, 65 AM. J. POL. SCI. 533 (2021).

<sup>398</sup> See *supra* tbl. 6.

exceptions illustrating tradeoffs. For instance, in New Hampshire, both the number of county splits and compactness scores get worse, but the vote bias gets slightly better.<sup>399</sup> In New York, the county splits measure and compactness measures get markedly better, though the vote bias gets slightly worse.<sup>400</sup> We also notice that among all the court-imposed maps, the vote bias is extremely low, except in two cases. First is Minnesota, where there is significant pro-Republican bias.<sup>401</sup> The second is in Wisconsin, which also has an even greater amount of pro-Republican bias.<sup>402</sup> We do not have an explanation for high partisan bias in Minnesota. The map adopted in 2020 has very similar district-level partisan outcomes as the 2010 map. Statewide, Minnesota has voted for the Democratic presidential candidate in every election since 1976.<sup>403</sup> It also has two Democratic senators, and the governor is a Democrat.<sup>404</sup> But the congressional delegation is split with four each.<sup>405</sup> The failure of the Wisconsin court-adopted map is easy to explain. This was a least change map; where the baseline map was arguably a gerrymander<sup>406</sup>; the least change simply perpetuated that gerrymander.

The data in Table 6 also show an important fact about modern U.S. elections; there is high predictability of aggregate congressional outcomes based on past presidential votes in the congressional district. But this correlation is context dependent. New York is a substantial exception to this predictability. There, the predictive failure has been attributed to many factors: GOP emphasis on crime that helped them to gain votes in the suburbs,<sup>407</sup> an especially large decline in turnout

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<sup>399</sup> *See id.*

<sup>400</sup> *See id.*

<sup>401</sup> *See id.*

<sup>402</sup> *See id.*

<sup>403</sup> *See generally* Dave Leip, *Dave Leip's Atlas of U.S. Presidential Elections*, <https://uselectionatlas.org/RESULTS/> [<https://perma.cc/9QZD-D28J>] (last visited Jan 7, 2023).

<sup>404</sup> *Party Control of Minnesota State Government*, *supra* note 363.

<sup>405</sup> *U.S. House Election Results: Republicans Win*, N.Y. TIMES (Nov. 8, 2022), <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-house.html> [<https://perma.cc/3K9K-NUHL>].

<sup>406</sup> *See* Wang, *supra* note 299.

<sup>407</sup> Nicholas Fandos, *Meet the Voters Who Fueled New York's Seismic Tilt Toward the G.O.P.*, N.Y. TIMES (Nov. 27, 2022), <https://www.nytimes.com/2022/11/27/nyregion/republicans-election-ny-suburbs.html> [<https://perma.cc/46NE-MKU5>].

among Democrats as compared to Republicans,<sup>408</sup> and the unpopularity of the Democratic governor in the state.<sup>409</sup> In general, trends in 2022 favored Republicans, as would be expected in a midterm election where the President was a Democrat.<sup>410</sup>

The data in Table 6 only deals with cases that were resolved in time for a remedial map to be drawn for the 2022 election. Five states have maps that are currently ruled unconstitutional that were used in the 2022 election, accounting for ten percent of all districts.<sup>411</sup> We estimate that these unconstitutional plans likely cost the Democrats between five and six seats in Congress. If their unconstitutionality is sustained by higher courts, they will need to be redrawn for the 2024 election.<sup>412</sup> Other court cases are still pending. But these cases will probably not be the only ones to lead to “new” maps in 2024. The U.S. Supreme Court has held that there is no bar on mid-decadal congressional redistricting,<sup>413</sup> and states under trifecta control may well choose to polish their previous partisan gerrymandering efforts by tinkering with their map to improve its partisan performance.<sup>414</sup> Thus, we expect some state courts will still have plenty to keep them busy between now and the 2024 election — and we have only been looking at congressional districting, not at state legislative districting.

## CONCLUSION

1. It is now state courts rather than federal courts that litigants turn to when challenging what they regard as egregious partisan gerrymanders, with one key reason for that difference being the

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<sup>408</sup> Joshua Soloman & Alexandra Harris, *GOP Voter Turnout at Presidential Levels, Outpaces Democrats in N.Y. Governor's Race*, TIMES UNION (Nov. 26, 2022), <https://www.timesunion.com/state/article/Voter-turnout-of-Republicans-far-outpaces-17605110.php> [<https://perma.cc/ZQ5Z-84H7>].

<sup>409</sup> Daniel Marans, *New York Democrats May Have Cost Their Party The House. What Happened?*, HUFFPOST (Nov. 18, 2022), [https://www.huffpost.com/entry/new-york-democrats-house-kathy-hochul\\_n\\_6377ad06e4boa97fec7c1537](https://www.huffpost.com/entry/new-york-democrats-house-kathy-hochul_n_6377ad06e4boa97fec7c1537) [<https://perma.cc/9GGU-26WS>].

<sup>410</sup> Cohn, *supra* note 144.

<sup>411</sup> Wines, *supra* note 119; Michael Wines, *Federal Panel Rules South Carolina Congressional District Is Illegal Gerrymander*, N.Y. TIMES (Jan. 6, 2023), <https://www.nytimes.com/2023/01/06/us/south-carolina-gerrymandering.html> [<https://perma.cc/H3JM-TYLF>].

<sup>412</sup> Wines, *supra* note 119.

<sup>413</sup> *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 415 (2006).

<sup>414</sup> There is historic precedent for mid-decade redistricting. *See generally* ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY (2013).

U.S. Supreme Court's definitive opting out of any role in controlling partisan gerrymandering.

2. State courts have taken up the challenge of *Rucho* to find manageable standards to measure gerrymandering by using state constitutional provisions to craft state-specific standards for a finding that a plan was an unconstitutional partisan gerrymander. In our view, they have, by and large, done so successfully. In so doing, they have drawn on the repertoire of tools developed by social scientists, computer scientists, and others, including metrics for measuring the extent of partisan gerrymandering and to assess likely durability, but also computer-based ways to evaluate plans with respect to how well they satisfy good government standards.

3. While 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, state courts have made use of both old and new language in their state's constitution — some with a creative interpretation of the thrust of language long in their constitution.

4. When maps have been challenged as partisan gerrymanders, and where direct language prohibits partisan gerrymandering in the state constitution, challenges are usually successful.<sup>415</sup> On the other hand, in those situations where no language existed in the state constitution that could provide the basis for a state court to invalidate a plan as an egregious partisan gerrymander, partisan gerrymandering challenges have been rejected by state courts on jurisprudential grounds even when the court held the map to be a partisan gerrymander (Kansas, Kentucky). Where there is indirect language, and a case has been brought, courts have generally accepted that the language found in free and equal clauses are relevant to partisan gerrymander. Kentucky is an exception; the map was found to be a partisan gerrymander, and the state has the same type of language found in North Carolina and Pennsylvania, but the court did not find that partisan gerrymandering violated

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<sup>415</sup> Oregon is a notable exception. In Oregon, the state court accepted expert witness testimony from a state's expert demonstrating flaws in testimony about gerrymandering metrics proffered by plaintiffs. *See supra* text accompanying notes 253-271 for earlier discussion of Oregon redistricting in 2020.

those provisions. Of course, in the cases that were brought, the plaintiffs expected to have success. The success rate for litigating partisan gerrymandering using either direct or indirect language might go down as these cases are brought in more states where the judicial politics are less favorable.

5. Both congressional maps drawn in states where Democrats had party control and maps from states where Republicans had party control have been overturned by state courts. However, even when there are state constitutional provisions that state court justices can use, some had found reasons to conclude that the challenged map really does not rise to the level of a constitutional violation, even when other justices concluded that it did. Nonetheless, in the 2020 round of redistricting, it is our view that while partisanship of state court justices appeared to play a role in their decision-making, it was only a muted one.

6. As we assess the overall evidence, in those settings where party control made that possible, partisan gerrymandering was as egregious and pervasive as in the past — or even more so.<sup>416</sup> But several factors combined to create a situation in which the *net* partisan effects of partisan gerrymandering were substantially reduced from what might have been expected based on the willingness of state legislators to gerrymander maps to favor their party.

a) First, taking redistricting out of the hands of the legislature by creating commissions in some states meant that in some trifecta states partisan majorities were left impotent to effectuate partisan gerrymanders.<sup>417</sup> Moreover, a failure of the commission or legislature to draw a map in a timely fashion generally brought state courts into the picture.

b) Second, state courts took a much more aggressive stance in applying provisions of their state constitution as bars to gerrymandering and drawing maps of their own than in past decades.

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<sup>416</sup> See, e.g., *League of Women Voters of PA. v. Commonwealth*, 178 A.3d 737 (2018); *see also* *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (2015).

<sup>417</sup> *See supra* tbl. 1.



- c) Third, the relative balance in states where each party had control over the process meant a decrease in the advantage for the Republicans compared to the 2010 redistricting cycle.
7. 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.
8. Because Republicans are still in control of more state legislatures, the role of state courts in the 2020 round has had greater consequences in blocking Republican gerrymanders than in blocking Democratic gerrymanders.
9. Despite the variety of state constitutional provisions referenced by courts and variation in language even in similar provisions, we find that state courts have been remarkably consistent in drawing on metrics for identifying gerrymandering effects and on ensemble-based tools.<sup>418</sup>
10. Not only have partisan gerrymandering claims shifted from federal courts to state courts, but even situations where those with primary authority over redistricting fail to act in a timely fashion now appear to almost invariably have litigants seeking a remedial map drawn by a state court rather than a federal court. This is a change from the practice of previous decades, where the fact that the past map violated federal one person, one vote standards made it most likely that, when a new map was required by an institutional failure, it would be a federal court that would draw the remedy.<sup>419</sup>
11. While the picture is partly mixed, on balance, state court maps are superior to those they replace with respect to partisan symmetry and good government criteria.<sup>420</sup>
12. While it might appear that the future for a strong state court role in checking the excesses of partisan gerrymandering at the

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<sup>418</sup> Of course, it is also true that a relatively limited pool of experts (for each side) is providing testimony about partisan gerrymandering, and they are drawing on the same body of academic literature.

<sup>419</sup> See NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 7 at 96.

<sup>420</sup> See *supra* tbl. 6.

congressional level is now clear, that is a premature verdict.<sup>421</sup> Political parties are now seeing control of state courts as much more important than it had been seen in the past, with much more money being spent on state court judicial contests than in the past.<sup>422</sup> The role of state courts in redistricting is a major element that increased focus on election of ideological and partisan judges to state courts.<sup>423</sup> As money in judicial elections becomes more important, we believe it is also likely that state judges will be more ideological and more partisan than in the past, as judicial contests reflect the hyperpolarization of both national and state politics.<sup>424</sup> Consequently, we may see more situations where state court justices refuse to police partisan gerrymanders done by co-partisans.<sup>425</sup>

13. Similarly, we should not assume that most partisan gerrymandering claims will be successful in states with state constitutional provisions that facilitate the bringing of such claims. Litigant success in state courts is a function of the facts on the grounds. But when the law is less clear, as in the states where only indirect language exists, *ceteris paribus*, we expect judges to

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<sup>421</sup> State court intervention is not a substitute for federal intervention. State courts are often political, change membership more often, and state court decisions are only applicable to single states. Not all states have provisions against partisan gerrymandering or the ability to create those laws without a legislature giving up the power voluntarily. Setting federal standards for redistricting Congress makes sense, given that it is a federal body, but doing so would require action by Congress, and that is unlikely. In principle, there could be a finding by the U.S. Supreme Court that recent state court decisions had shown the potential for manageable judicial standards to constrain gerrymandering, and thus show the need to revisit *Rucho*, but we do not see a reversal of *Rucho* as likely.

<sup>422</sup> Douglas Keith, *New Money and Messages in Judicial Elections This Year*, BRENNAN CENTER FOR JUSTICE (Oct. 21, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/new-money-and-messages-judicial-elections-year> [<https://perma.cc/CR2T-N7VH>].

<sup>423</sup> Steve Reilly, *Conservative Activist Leonard Leo is Remaking State High Courts*, GRID (Dec. 27, 2022), <https://www.grid.news/story/politics/2022/12/27/leonard-leo-is-quietly-remaking-state-high-courts-in-his-conservative-image/> [<https://perma.cc/RL9U-J2KY>].

<sup>424</sup> See generally Pildes, *supra* note 88.

<sup>425</sup> Some of the cases where a partisan gerrymandering challenge was successful were won by narrow margins and only because one or two justices whose party was advantaged by the challenged gerrymander nonetheless joined with justices affiliated with the other party in striking the gerrymandering down. Thus, changes in the composition of state courts can change state court outcomes.

be less likely to overturn state legislatures. And even in some states where they have used language such as that about free and equal elections to bar partisan gerrymandering, change in the composition of state courts may lead to a reversal of that interpretation. Language that more explicitly bars partisan gerrymandering may be more efficacious than good government criteria in making partisan gerrymandering less likely. Relevant also to success is the willingness of state court justices to enforce the law. Even provisions explicitly barring partisan gerrymandering may not be efficacious if there is not adequate enforcement by state courts.<sup>426</sup>

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<sup>426</sup> Also, a challenge has emerged that would threaten the power of state courts to hold accountable political manipulation of district maps in federal elections. An extreme version of this theory was offered in a federal challenge brought by Republicans in Pennsylvania to that state's court-ordered congressional map, but the Supreme Court denied certiorari. *Costello v. Carter*, No. 21-1509, 143 S.Ct. 102 (2022) (cert. denied). In (slip op.) *Moore v. Harper*, No. 21-1271, 2023 WL 4187750, the Supreme Court heard a case challenging the ability of North Carolina Supreme Court to replace a congressional plan adopted by the state legislature with one of their own after having ruled that the legislature's plan violates the state constitution. Speaking for the court majority, Chief Justice Roberts says, "State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause." *Id.* at \*17. The court rejected this theory. But the theory is not yet completely dead. Roberts continues, "But federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution." *Ibid.* But the court did not give any standard by which a state court would "exceed the bounds of ordinary judicial review" since they did "decline[d] to address" whether the North Carolina court exceeded their authority when interpreting their states' Free Elections Clause, Equal Protection Clause, or Freedom of Speech and Freedom of Assembly Clauses (*see* notes 192-194). *Moore*, No. 21-1271 at \*17.