

WHAT'S A FEDERALIST TO DO? THE IMPENDING CLASH BETWEEN TEXTUALISM AND FEDERALISM IN STATE CONGRESSIONAL REDISTRICTING SUITS UNDER ARTICLE I, SECTION 4

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INTRODUCTION

Although each member of the United States House of Representatives must stand for reelection every two years, the number of competitive races is in fact quite low.¹ In 2004, experts predict fewer than forty close House races out of the 435 total seats on the ballot across the country.² From the beginning of the current

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1. See Theodore J. Lowi, *President v. Congress: What the Two-Party Duopoly Has Done to the American Separation of Powers*, 47 CASE W. RES. L. REV. 1219, 1232–33 (1997) (“In 1986, 1988 and 1990, 98 percent of congressional incumbents who sought re-election were successful. In 1992, . . . 95 percent of incumbents seeking re-election were successful; and in 1994, despite the earthquake producing the first two-House Republican majorities in 42 years, incumbent reelection rate was 91 percent.”); Erin P. Billings, *Democrats Urged to Seek More Targets In Effort to Take Back House Majority*, ROLL CALL, Feb. 3, 2003, available at LEXIS, Legis Library, Rollcl File (“Since 1998 . . . roughly 40 house seats—less than 10 percent of the overall body—have been truly competitive and closely contested by the parties.”); see also Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 608 (2000) (listing some of the complaints about the lack of competitive congressional elections, including “the high incumbent reelection rate (averaging over 95 percent since 1980); the ‘vanishing marginals’; the incumbency advantage in vote-share, around 8 percent; and the huge advantage incumbents have in fundraising”) (citations omitted).

2. See Stuart Rothenberg, *Less Is More in ‘04: DCCC Should Narrow, Not Expand, Target List*, ROLL CALL, July 21, 2003, available at LEXIS, Legis Library, Rollcl File (noting that “savvy Democratic insiders believe that their party should focus on no more than 15 to 20 Republican-held and soon-to-be-open House districts” to have any legitimate chance to reduce the GOP House majority); *The Few, The Not So Proud; It’s Hard to Find Vulnerable House Incumbents This Cycle*, ROLL CALL, Nov. 10, 2003, available at LEXIS, Legis Library, Rollcl File (“The decennial redistricting process left so few competitive House districts that it has become considerably more difficult to compile [Roll Call’s] traditional 10 most vulnerable House incumbents list.”); Lauren W. Whittington, *House Outlook; Even if There Is an Anti-Republican Wave in 2004, Democrats May Not Be Able to Ride It to Shore*, ROLL CALL, Nov. 10,

constitutional system, redistricting has taken place every ten years, following the census.³ However, today, in some states redistricting battles are waged every year.⁴ Contributing to this increase in litigation, redistricting law is nebulous and courts have been willing to play substantial roles in redistricting disputes.⁵ The explosion of redistricting litigation highlights a conflict between two seemingly compatible schools of constitutional interpretation—federalism and textualism—that must eventually be resolved by the Supreme Court. This conflict, as shown through a recent dispute over the interpretation of the word “legislature” in Article I, Section 4 of the United States Constitution, is the focus of this Note.

On its face, Article I, Section 4 grants state legislatures authority to redistrict their states’ respective congressional districts. This power is limited by Congress, which can impose rules and regulations on the states’ redistricting. The pertinent part of Article I, Section 4 reads,

2003, available at LEXIS, Legis Library, Rollcl File (“Although party leaders and strategists routinely cite a 40-seat battleground of targeted races in 2004, Democrats had fewer than a dozen challengers who were raising money in these districts at the end of September [2003] . . .”).

3. For a general overview of the history of redistricting, see 2 CONGRESSIONAL QUARTERLY, GUIDE TO CONGRESS 900–11 (5th ed. 2000). See also Alison Mitchell, *Redistricting 2002 Produces No Great Shake-Ups*, N.Y. TIMES, Mar. 13, 2002, at A20 (“While the trend toward fewer competitive House races has been building for decades, political analysts generally rely on the reconfiguration of House lines every 10 years to provide an initial period of ferment and more political opportunity.”).

4. The very narrow margin by which the Republicans control the House, see CONG. Q., POLITICS IN AMERICA 2004: THE 108TH CONGRESS v (David Hawkins & Brian Nuttig eds., 2003), combined with the dearth of competitive seats, makes the political stakes too high to wait a whole decade to redraw the congressional lines whenever a party seizes control of the state process. See David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1 (discussing impending votes on new redistricting plans in Texas and Colorado, with the possibility of additional votes in Illinois, California, and Oklahoma).

5. See Daniel Hays Lowenstein, *You Don’t Have to Be a Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 825 (1998) (“Because the states are left with little or no margin of error in an area where the legal standards are neither clear nor stable, there will almost certainly be an increase in litigation and, as a result, increased intervention into the states’ representational politics by federal judges.”); see also Samuel Isaacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 638–39 (2002):

First, now that the post-1990 round of redistricting litigation has concluded, there is every reason to suspect that future redistricting fights will be framed in the inflammatory language of race to increase the possibility of subsequent judicial revision. . . .

The second, and more salient, detrimental incentive the Court established was that opponents of the post-1990 districts had to construct their racial challenges after the fact, once *Shaw I* had given a green light to such claims. Imagine the effect on redistricting debates in the post-2000 round now that any salting of the record with racial issues may enhance the prospects of judicial oversight

“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 chusing Senators.”⁶ One of the foremost limitations on many states’ ability to redistrict is the Voting Rights Act.⁷ Although this law is both lengthy and complicated, basically it limits state action in applicable states by prohibiting any change in voting procedures (including voter eligibility requirements and the location of polling places) without prior approval (or preclearance) from the Department of Justice or an appropriate three-judge panel.⁸ This requirement, combined with the Supreme Court’s recent Equal Protection jurisprudence,⁹ which prohibits racial gerrymandering in redistricting, has led to substantial litigation centering on the redistricting process in states subject to the Act. Through the court system, this process illustrates an ongoing source of tension between federal and state authorities: states must receive permission from the federal government to alter their districts, and they can be haled into federal court to defend their conduct. In the current political environment, the stakes of this political tug-of-war are high.¹⁰

A recent case introduced a new constitutional battleground in this struggle: the interpretation of the word “legislature” in Article I, Section 4. In *Branch v. Smith*,¹¹ a federal district court introduced a novel constitutional theory that a state chancery court had no jurisdiction to redraw the state’s congressional districts. The court viewed Article I, Section 4 as allowing only the state legislature to draw the congressional districts; absent express authority from the legislative body, the state court could not do so.¹² This theory served as the “alternative” holding of the three-judge district court.¹³ The

6. U.S. CONST. art. I, § 4, cl. 1.

7. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973–1973bb-1 (2000)). Note that only some states (and some parts of states) are subject to the requirements of the Voting Rights Act. See *infra* note 42 for a brief discussion of the jurisdictions covered.

8. See *infra* note 43 and accompanying text.

9. See *infra* notes 44–47 and accompanying text.

10. See *supra* note 4.

11. *Smith v. Clark (Smith II)*, 189 F. Supp. 2d 548 (S.D. Miss. 2002), *aff’d sub nom.* *Branch v. Smith*, 123 S. Ct. 1429 (2003). For clarity, the case will be referred to as *Branch* throughout this Note, whether discussing the district court’s opinion or the Supreme Court’s.

12. *Id.* at 550.

13. *Id.* at 549.

court independently invalidated the redistricting plan for violating Section Five of the Voting Rights Act for failing the “timely preclearance” requirement.¹⁴ Subsequently, the Supreme Court affirmed the lower court on the latter ground, avoiding the constitutional issue.¹⁵ This Note explores *Branch’s* alternative holding and the interpretive problems it creates between federalist and textualist constitutional interpretations, resolving the impending collision in favor of federalism and state courts.¹⁶

The alternative holding of *Branch* is flawed.¹⁷ In light of interpretations of Article I, Section 4 and case law like *Grove v. Emison*,¹⁸ which encouraged federal courts to defer to state redistricting efforts,¹⁹ it seems clear that reapportioning congressional districts is a *state* function subject to numerous federal safeguards, principally the Voting Rights Act and the Constitution.²⁰ Also, adherence to the overarching tenets of the Constitution requires

14. *Id.* A three-judge district court panel heard *Branch* pursuant to 28 U.S.C. § 2284(a) (2000), which directs redistricting disputes to these somewhat rare federal district courts. Decisions of these three-judge panels proceed directly to the Supreme Court of the United States. 28 U.S.C. § 1253 (2000).

15. *See Branch*, 123 S. Ct. at 1437 (“Since we affirm the injunction on the basis of the District Court’s principal stated ground that the state-court plan had not been precleared and had no prospect of being precleared in time for the 2002 election, we have no occasion to address the District Court’s alternative holding that the State Chancery Court’s redistricting plan was unconstitutional . . . and therefore we vacate it as a basis for the injunction.”).

16. This illustrates some of the differences between two schools of interpretation frequently viewed as highly similar and endorsed by the “New Federalists” of the Rehnquist Court. Additionally, this issue may serve to demonstrate how the two schools of thought work in tandem to find the true meaning of the Constitution. *See* John Duffy, *Federalism Revived? The Printz and City of Boerne Decisions*, Address Before the Federalism and Separation of Powers Practice Group Panel of The Federalist Society (Oct. 17, 1997), at <http://www.fed-soc.org/Publications/practicegroupnewsletters/federalism/fd020103.htm> (on file with the *Duke Law Journal*):

[T]his enterprise—interpreting the enumerated powers with care—is a *textually rigorous way to protect federalism*. . . . [A]ll true Federalists [should] . . . embrace the Court’s rediscovered enterprise of interpreting the congressional powers faithfully and to think of decisions like *Printz*, *New York v. United States*, and *City of Boerne*, not as cases based solely on ‘underlying postulates’ of federalism, but as based on the textual limits of congressional power.

(emphasis added).

17. The Article I, Section 4 argument is novel because most of the recent redistricting litigation and Supreme Court jurisprudence has focused on the Equal Protection clause and the Voting Rights Act. *See infra* notes 38–48 and accompanying text.

18. 507 U.S. 25 (1993).

19. *Id.* at 33; *see infra* notes 117–119, 129–132 and accompanying text.

20. *Cf. Grove*, 507 U.S. at 34 (“[T]he doctrine of *Germano* prefers *both* state branches [legislative and judicial] to federal courts as agents of apportionment.”).

federal courts to stay their hand²¹ before invading the states' province in creating congressional districts. Accordingly, in the spirit of comity and federalism, federal courts should not strip state courts of jurisdiction over redistricting cases, even if the state courts physically redraw the districts after finding a constitutional infirmity. *Branch's* alternative holding is incorrect because the Mississippi constitution gave the chancery court authority, albeit attenuated, to redistrict the state.²² Although the United States Constitution trumps all other concerns, it cannot be read in a vacuum: Article I, Section 4 "imposes a duty" on states to draw congressional lines much like Article II, Section 1 requires states to appoint electors for president and vice president.²³ For this reason, if a state legislature is unable to perform this task, a state court should be given a reasonable opportunity to act on the state's behalf. The legislative scheme should receive priority; if the state court determines, in accordance with state law, that the legislature cannot accomplish this goal, the court may use its equitable powers to do so. Only if the state court lacks all authority to draw congressional districts under Article I, Section 4, or threatens its citizens' constitutional rights by refusing to do so, should a federal court intervene.

Part I of this Note briefly discusses the pertinent legal challenges to congressional redistricting plans and the constitutional issue raised in *Branch v. Smith*. It then introduces the jurisprudential tension

21. See *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("We believe the District Court should have stayed its hand. The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.").

22. Mississippi state courts have jurisdiction over "[a]ll matters in equity." MISS. CONST. art. 6, § 159. Additionally, the Mississippi Supreme Court specifically held that the chancery court at issue had jurisdiction over this case. *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001), cited and quoted in *Smith v. Clark (Smith II)*, 189 F. Supp. 2d 548, 557 (S.D. Miss. 2002), vacated by *Mauldin v. Branch*, 866 So.2d 429 (Miss. 2003). In *Branch*, the three-judge panel conceded that the state supreme court had ruled specifically in the chancery court's favor on this point, but dismissed the holding partially because "[t]he court did not provide any basis for its holding, did not refer to its earlier cases to the contrary, and did not point to any legislative authority that authorized the chancery court to act." *Smith II*, 189 F. Supp. 2d at 557.

However, it is important—and an interesting political point—to note that the Mississippi Supreme Court later vacated the opinion on which both the district court and United States Supreme Court relied in *Branch*. See *Mauldin v. Branch*, 866 So.2d 429 (Miss. 2003) ("[C]hancery courts lack jurisdiction to adjudicate disputes over congressional redistricting.").

23. *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (noting that "there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of state government" in discussing Article I, Section 2); see also U.S. CONST. art. II, § 1, cl. 2; *infra* notes 70–78 and accompanying text.

between these two interpretations of the issue.²⁴ Part II examines the textual approach to Article I, Section 4. Part III evaluates Article I, Section 4 in a broader, federalist sense. The conclusion offers a resolution to the conflict between the two interpretations and urges federal courts to avoid the temptation of invoking Article I, Section 4 to seize control of the redistricting process from the states.

I. BACKGROUND

This Part of the Note focuses on the typical constitutional challenges to redistricting plans, including a brief discussion of the major cases and statutory provisions at issue. Additionally, this Part introduces the scant case law interpreting Article I, Section 4 of the United States Constitution, and focuses on Article II, Section 1 of the Constitution, which the Supreme Court views as “parallel” to Article I, Section 4.²⁵ Finally, this Part establishes the conceptual framework examined more thoroughly in Parts II and III.

A. *General Redistricting Requirements and Legal Challenges*

Ever since *Baker v. Carr*,²⁶ when the Supreme Court held that redistricting schemes no longer present nonjusticiable political questions,²⁷ significant litigation has accompanied the redistricting process. For better or worse, almost every new round of redistricting involves litigation.²⁸ Litigation is almost perpetual in some states, where new lines must be drawn even before existing redistricting cases are resolved.²⁹

24. Obviously, there are numerous ways of interpreting the Constitution. This Note focuses only on textualism and federalism for two reasons. First, these two views of the constitution are important for determining how the Supreme Court might decide redistricting cases. Second, this focus highlights the tension between two schools of interpretation that frequently reach the same conclusions.

25. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995); see *infra* notes 68–78 and accompanying text.

26. 369 U.S. 186 (1962).

27. *Id.* at 209.

28. See Isaacharoff, *supra* note 5.

29. Both Texas and North Carolina, for example, had ongoing redistricting litigation throughout the 1990s that never resulted in a permanent, constitutional apportionment plan. See, e.g., *infra* notes 45, 47 (discussing some of this litigation).

This cycle is about to intensify, as states attempt to redistrict every year (not just every ten years). See Halbfinger, *supra* note 4, at A1 (discussing impending votes on new redistricting plans in Texas and Colorado, with the possibility of additional votes in Illinois, California, and Oklahoma, despite the fact that each of these states passed new congressional district maps immediately following the 2000 census). Courts disagree over whether state legislatures have

The Constitution mandates reapportionment of congressional seats after every decennial census.³⁰ There are two main aspects to reapportionment: (1) determining how many congressional representatives each state will receive,³¹ and (2) redrawing the actual district lines within each state. Congress determines part one,³² and the states have responsibility for part two.³³ Although the constitutional authority vested in the states is broad, they are subject to congressional regulations like the Voting Rights Act.³⁴ Additionally, states must conform to other constitutional requirements such as the “one person, one vote” principle.³⁵ Beyond these limitations, however, states are free to redistrict themselves as they see fit. In fact, state legislatures have so much authority in this process—and can thereby affect the congressional agenda by favoring one party’s incumbents over another’s—that the national parties pay close attention to state legislative elections preceding redistricting years.³⁶ By stacking the deck in favor of one party or another in key

the right to redistrict every year. *Compare* *People ex. rel. Salazar v. Davidson*, 79 P.3d 1221, 1240 (Colo. 2003) (“[T]he framers of the Colorado Constitution intended that congressional districts must only be drawn once per decade.”), *with* *Session v. Perry*, 298 F. Supp. 2d 451, 457 (E.D. Tex. 2004) (“We . . . reject Plaintiffs’ argument that the Texas Legislature lacked authority to draw new districts after a federal court drew them following the 2000 census.”).

30. U.S. CONST. art. I, § 2, cl. 3.

31. *See id.* Of course the Fourteenth Amendment repealed the first line of this clause, striking the offensive “three-fifths compromise” from the nation’s governing document. *See* U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State . . .”).

32. *See* U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

33. *See* U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”); *Smiley v. Holm*, 285 U.S. 355, 364–67 (1932) (including reapportionment as part of the “manner” in which states determine how to conduct elections).

34. *See infra* notes 38–43 and accompanying text.

35. This general principle is derived from several Supreme Court cases. *See* *Kirkpatrick v. Preisler*, 394 U.S. 526, 527–28 (1969) (“[A]s nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964))); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“[A]n individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”).

36. *See* Steven Hill, *Behind Closed Doors: The Recurring Plague of Redistricting and the Politics of Geography*, 91 NAT’L CIVIC REV. 317, 325 (2002) (“In fact, numerous observers have stated that the outcome of the 1994 elections, when Republicans took control of Congress for the first time in forty years, was due in no small part to Republican gains made during the 1991–92 redistricting.”); *DCCC Cries Foul Over NRCC Contribution to Schrock*, BULL.’S FRONTRUNNER, June 27, 2000, available at LEXIS, News Library, Frntrn File (“The NRCC

states, state legislatures can alter the makeup of the House of Representatives and subsequently alter the national agenda emanating from the House. In this way, redistricting can have national implications. However, in America's dual federal system, a state's right to compose its own congressional districts is also of vital importance to the state's own sovereignty.³⁷

The Voting Rights Act³⁸ often provides the primary mechanism for challenging redistricting schemes. This law, enacted to enforce the Fifteenth Amendment,³⁹ sets forth numerous requirements that states (and parts of states) covered by the law must meet before making any changes to their election laws.⁴⁰ The impetus behind the Voting

[National Republican Congressional Campaign Committee, whose goal is to elect Republicans to the U.S. House of Representatives] 'says it poured more than \$700,000 into Virginia Republican party and campaign committees in 1999 for state races and party building, in part to influence federal and state legislative redistricting next year.'"); Kathy Kiely & Jim Drinkard, *The Hidden Election*, USA TODAY, Jan. 4, 2000, at A1 (chronicling the actions of the national political parties, particularly their congressional campaign committees, as they prepared to spend millions on state legislative elections in 2000—the last election year before the most recent census and mandatory reapportionment).

In fact, the national parties also pay close attention to control of the state legislative redistricting process. The reason is simple: if the state legislative lines are politically gerrymandered, a given party will then control the statehouse. The party in control of the statehouse will in turn gerrymander the state to favor that party's congressional candidates. See Leslie Wayne, *National Parties Donate to State Races*, N.Y. TIMES, Nov. 3, 1998, at A24:

Mr. Blackwell, the [Republican] State Treasurer in Ohio, said Republicans gave him additional money [for his Secretary of State campaign] after he decided not to oppose Mr. Taft in a [Republican] primary [for governor]. The party also contributed to his campaign because, as secretary of state, Mr. Blackwell would cast one of the five votes on the state reapportionment board, which draws the districts for the state Legislature. State lawmakers, in turn, draw the map for the United States House districts.

37. See *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.").

38. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973–1973bb-1 (2000)).

39. H.R. REP. NO. 89-439 (1965), reprinted in 1965 U.S.C.A.N. 2437, 2437.

40. The two main sources of litigation under the Voting Rights Act are from sections 2 and 5. Section 2 reads, "[n]o voting . . . procedure shall be . . . applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race . . . or in contravention of the guarantees set forth [elsewhere in the Act]." Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a). See *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test' . . ."). Section 2 can be used to require majority-minority districts where minority communities have been pulled out of majority-minority districts to benefit white incumbents. See *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) ("Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice . . ."). For a discussion of Section 5, see *infra* note 43.

Rights Act was the desire to prevent states from disenfranchising minority voters by denying their right to vote or diluting their votes.⁴¹ The Act requires some states and parts of states, primarily in the South,⁴² to preclear any change of electoral plans with the United States Department of Justice or the United States District Court for the District of Columbia.⁴³

Equal Protection challenges to state redistricting plans,⁴⁴ a more recent development, have become an additional source of litigation.⁴⁵ According to the most recent Supreme Court pronouncement on the matter, race considerations can be used in redistricting schemes as long as they are not the “predominant factor.”⁴⁶ If race is the

41. Previous attempts at enforcing voting rights laws encountered “serious obstacles in various regions of the country,” prompting support of the Voting Rights Act. H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. *See also id.* at 2484–85 (statement of Rep. Cahill) (“If there are any doubts of the need for federal legislation in this field, an examination of the report [of the U.S. Commission of Civil Rights] and its account of intimidation, reprisal, interference, and violence will, I submit, be most convincing.”).

42. *See* Voting Rights Act of 1965 § 4(b), 42 U.S.C. § 1973b(b) (establishing the formula for determining which jurisdictions are subject to the preclearance requirement); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. pt. 51, app. (2003) (listing jurisdictions subject to the preclearance requirement); *see also* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1587 n.87 (2002):

Basically the formula looks at two factors: whether, on one of three specified dates, a jurisdiction conditioned the right to vote by imposing a literacy ‘test or device’ . . . and whether, on that date, either less than fifty percent of the persons of voting age were registered to vote or less than fifty percent of such persons voted in the presidential election.

43. *See* Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973(c) (2000) (requiring preclearance by any “covered jurisdiction” seeking to implement a new “standard, practice, or procedure with respect to voting”); Scope of Requirement, 28 C.F.R. § 51.12 (2003) (requiring preclearance of “[a]ny change affecting voting,” no matter how minor); *see also* Beer v. United States, 425 U.S. 130, 140–41 (1976) (requiring the submitting state to prove that the change would neither “lead to a retrogression in the [political] position of racial minorities” nor have a racially discriminatory purpose or effect).

44. These challenges build on *Wesberry v. Sanders* and *Reynolds v. Sims*. *See supra* note 35.

45. *See, e.g.,* Shaw v. Reno (*Shaw I*), 509 U.S. 630, 658 (1993) (holding that appellants “state[d] a claim under the Equal Protection Clause” to challenge North Carolina’s redistricting scheme); Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 902 (1996) (deciding that the plan at issue in *Shaw I* did in fact violate the Equal Protection Clause); Hunt v. Cromartie (*Cromartie I*), 526 U.S. 541, 551–552 (1999) (reversing the district court’s grant of summary judgment to the challengers because the state had a nonracial motive for the redistricting plan, which created an issue of triable fact); Easley v. Cromartie (*Cromartie II*), 532 U.S. 234, 237 (2001) (reversing the district court’s conclusion that North Carolina violated the Equal Protection Clause in drawing its congressional district boundaries).

46. *See Cromartie II*, 532 U.S. at 249 (“[T]he Constitution does not place an affirmative obligation upon the legislature to avoid creating districts that turn out to be heavily, even

predominant factor behind a redistricting scheme, strict scrutiny applies.⁴⁷ In the past, courts have assumed that state courts have concurrent jurisdiction over legal challenges to redistricting plans under the Voting Rights Act and the Constitution.⁴⁸ However, this assumption is now under attack.⁴⁹

Branch arose following the 2000 census, when the Mississippi legislature failed to pass a redistricting plan for the state's congressional districts.⁵⁰ Lawsuits were filed in both state and federal court.⁵¹ A state chancery court asserted jurisdiction and began the process of redrawing the state's congressional districts.⁵² Even though the state supreme court upheld the chancery court's jurisdiction,⁵³ opponents challenged the chancery court's decision in federal court on two grounds: (1) that the chancery court's plan could not be

majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations.”).

47. *Shaw I*, 509 U.S. at 653. The details of both the Voting Rights Act and the *Shaw* progeny are outside the scope of this Note, but they are pertinent as the source of most redistricting litigation. One reason for frequent litigation in this area is that standards are very difficult to ascertain. For a discussion of the Voting Rights Act, *Shaw*, and the current state of the law, see Robinson O. Everett, *Redistricting in North Carolina: A Personal Perspective*, 79 N.C. L. REV. 1301, 1327 (2001) (discussing the original *Shaw* case and the effects on the decision by the Court's most recent pronouncement, *Hunt v. Cromartie II*, 532 U.S. 234 (2001), and expressing disappointment that the Court failed to “provide an incentive for abandoning racial gerrymanders, rather than disguising them”); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731 (1998) (discussing the state of the law and predicting challenges that will arise in the wake of the 2000 census). See also *id.* at 758–62 (elaborating upon the extent of state courts' involvement in this process); Robert F. Kravetz, Recent Decision, *Where Race and Political Behavior Highly Correlate Within a Congressional District, it is Unlikely that the District Will be Held to be an Unconstitutional Racial Gerrymander: Easley v. Cromartie*, 40 DUQ. L. REV. 561 (2002) (discussing *Cromartie* and its implications).

48. See, e.g., *Adams County Election Comm'n v. Sanders*, 586 So. 2d 829, 831 (Miss. 1991) (“[S]tate courts have concurrent jurisdiction with the federal courts to decide whether § 5 of the Voting Rights Act applies to contemplated changes in election procedures . . . [but] state courts may not actually grant pre-clearance [to an apportionment plan].”).

49. See *Smith v. Clark (Smith II)*, 189 F. Supp. 2d 548, 558 (S.D. Miss. 2002) (finding that the chancery court does not have jurisdiction over redistricting matters unless it was granted by the Mississippi state legislature).

50. *Branch v. Smith*, 123 S. Ct. 1429, 1433 (2003).

51. *Id.* at 1433–34.

52. *Id.* at 1434.

53. *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001), vacated by *Mauldin v. Branch*, 866 So.2d 429 (Miss. 2003). The fact that the state supreme court later vacated this decision is irrelevant in considering the *Branch* litigation for purposes of this Note. See *supra* note 22. The vacation of *In re Mauldin* occurred well after the federal litigation discussed here; additionally, this Note focuses primarily on the *theoretical* issues raised by *Branch* and not the case itself. See *infra* note 57.

precleared⁵⁴ in time for primary elections because preclearance would be needed for both the plan itself *and* for the chancery court's jurisdiction to redistrict the state;⁵⁵ and (2) that the chancery court lacked jurisdiction to reapportion the congressional districts under Article I, Section 4 of the Federal Constitution.⁵⁶ The district court ruled in favor of the challengers on both issues, rejecting the chancery court's plan and redrawing the congressional districts itself.⁵⁷

B. Article I, Section 4

The Constitution gives states authority through their legislatures to determine the “Times, Places and Manner” of congressional elections.⁵⁸ Redistricting fits within this clause as part of the “manner” of holding elections for the House of Representatives.⁵⁹

There is very little case law interpreting the meaning of “Legislature” in Article I, Section 4. In *Davis v. Hildebrant*,⁶⁰ the Court permitted a citizen initiative, as authorized by the state constitution, to reapportion the state's districts, stating, “so far as the State had the power to [reapportion], the referendum constituted a part of the state constitution and laws and was contained within the legislative power.”⁶¹ The Court also invoked a state constitution in

54. See *supra* note 43.

55. *Smith v. Clark (Smith I)*, 189 F. Supp. 2d 503, 507–08 (S.D. Miss. 2002). The district court viewed the chancery court's grant of jurisdiction as “a change in Mississippi's election procedures that must be precleared by federal authorities pursuant to § 5 of the Voting Rights Act” because previous decisions of the state supreme court, *Brumfield v. Brock*, 142 So. 745 (Miss. 1932) and *Wood v. State*, 142 So. 747 (Miss. 1932), held that the chancery courts lacked jurisdiction over disputes relating to congressional redistricting plans. *Smith I*, 189 F. Supp. 2d at 507–08. However, these cases were decided well before *Baker v. Carr*. See *supra* notes 26–27 and accompanying text.

56. *Smith II*, 189 F. Supp. 2d at 558–59.

57. *Id.* Deeper examination of the facts underlying this case seems unnecessary for this Note, which focuses on the court's alternative holding. For a more thorough analysis of the facts of *Branch*, see Jonathan H. Steinberg & Aimee Dudovitz, *Branch v. Smith—Election Law Federalism after Bush v. Gore: Are State Courts Unconstitutional Interlopers in Congressional Redistricting?*, 2 ELECTION L.J. 91 (2003).

58. U.S. CONST. art. I, § 4, cl. 2.

59. See *supra* note 33. However, some courts believe that the states' reapportionment authority comes from Article I, § 2 alone. See *O'Lear v. Miller*, 222 F. Supp. 2d 850, 859 (2002), *aff'd mem.*, 123 S. Ct. 512 (2002) (citing *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), for the proposition that “[Article I, Section 2] governs intrastate redistricting” and limiting Article I, Section 4 to “the Supreme Court's admonition that states may not use section 4 to ‘immunize’ action that would otherwise be unconstitutional”).

60. 241 U.S. 565 (1916).

61. *Id.* at 568.

Smiley v. Holm,⁶² requiring the Minnesota legislature to act, subject to the governor's veto.⁶³ Justice Hughes found that the state legislature's "exercise of . . . authority must be in accordance with the method which the State has prescribed for legislative enactments."⁶⁴ In addition to the paucity of Supreme Court precedent, few lower courts have interpreted this part of the Constitution.⁶⁵

In light of the scant case law on the issue, Judge Jolly in *Branch* viewed the act of redrawing the congressional districts as a lawmaking role; and, even though the legislature itself is not required to draw the lines, he stated that any entity that undertakes that act must "find the source of its power to redistrict in some act of the legislature."⁶⁶ The *Branch* court found no statute or grant of legislative authority permitting the chancery court to redraw the state's congressional districts, and thus determined that the chancery court's action had violated Article I, Section 4.⁶⁷

The Supreme Court has viewed the duty imposed by Article I, Section 4 as "parallel" to the duty of states under Article II, Section 1, Clause 2 of the Constitution,⁶⁸ which reads in part, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"⁶⁹ Needless to say, Article II, Section 1 has received considerable attention from scholars in the wake of *Bush v. Gore*.⁷⁰

62. 285 U.S. 355 (1932).

63. *Id.* at 369.

64. *Id.* at 367.

65. One court held that Article I, Section 4 empowered only the state legislature, and rejected a state election board's effort to reapportion the state. *See* *Grills v. Branigin*, 284 F. Supp. 176, 180 (S.D. Ind. 1968), *aff'd per curiam*, 391 U.S. 364 (1968) ("This power [to redistrict] is granted to the Indiana General Assembly and the Election Board does not possess the legislative power under the Indiana Constitution nor does it possess judicial power under the Indiana Constitution.").

66. *Smith v. Clark (Smith II)*, 189 F. Supp. 2d 548, 550 (S.D. Miss. 2002).

67. *Id. But see In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001) (finding jurisdiction), *vacated*, *Mauldin v. Branch*, 866 So. 2d 429 (2003) (holding that the chancery court had no jurisdiction over the case).

68. *See* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (viewing the two clauses as "parallel" and as "express delegations of power to the States to act with respect to federal elections").

69. U.S. CONST. art. II, § 1, cl. 2.

70. 531 U.S. 98 (2000); *see, e.g.*, Richard Epstein, "In such Manner as the Legislature Thereof May Direct": *The Outcome of Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 634 (2001) (defending the Rehnquist concurrence as the best rationale for the outcome of the case); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 651-52 (2001) (arguing that the

This controversial case may provide insight into how the Court could approach the Article I, Section 4 issue. In *Bush v. Gore*, the Supreme Court held that Florida violated the Equal Protection clause of the Fourteenth Amendment by relying on an inadequate and unfair vote-counting method.⁷¹ More significantly for this Note, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, also asserted that the Florida Supreme Court had no authority to adjudicate the case before it.⁷² Under Article II, Section 1 of the United States Constitution, the Florida legislature had the sole authority to choose the state's presidential electors.⁷³ Therefore, the concurring justices would have altogether prevented the Florida Supreme Court from infringing upon the legislature's expressly granted authority—in this case, the (perceived) statutory mandate that the Florida Division of Elections not, under any circumstances, miss the federal “safe harbor” for delivering the state's votes to Congress.⁷⁴ Justice Stevens strongly disagreed, arguing that the Florida Supreme Court had the sole authority to interpret Florida's laws.⁷⁵ In light of controlling precedent, Stevens believed that the state court's jurisdiction was both “consistent with, and indeed contemplated by, the grant of authority in Article II.”⁷⁶

If the Rehnquist concurrence in *Bush v. Gore* is persuasive, state courts may indeed have no jurisdiction over redistricting matters: like the decisionmaking process for presidential electors, the determination of congressional districts could be an “exceptional case[] in which the Constitution imposes a duty or confers a power on a particular branch of a State's government.”⁷⁷ In contrast, if Justice

Constitution and statutory scheme left the final decision to Congress and that the Supreme Court should not have enforced the “safe harbor” provision of 3 U.S.C. § 5); Laurence H. Tribe, *Erog .v Hsub and Its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001) (arguing that the Article I rationale constituted only a “red herring,” that the Fourteenth Amendment grounds for the decision were a “shell game,” and that the entire case was a nonjusticiable political question).

71. 531 U.S. at 110.

72. *See id.* at 111–22 (Rehnquist, C.J., concurring).

73. *Id.* at 113 (Rehnquist, C.J., concurring).

74. *Id.* at 114 (Rehnquist, C.J., concurring). The concurrence found that the Florida Supreme Court's remedy jeopardized the legislature's desire to use the safe harbor provided by 3 U.S.C. § 5 (2000). *Id.* at 120–21 (Rehnquist, C.J., concurring).

75. *See id.* at 123 (Stevens, J., dissenting) (remarking that although “on rare occasions . . . federal judicial intervention in state elections” may be appropriate, *Bush v. Gore* did “not [present] such an occasion”).

76. *Id.* at 124 (Stevens, J., dissenting).

77. *Id.* at 112 (Rehnquist, C.J., concurring).

Stevens' view is persuasive, then Article I, Section 4, like Article II, views state legislatures in their "lawmaking capacity." The legislature would be subject to ordinary judicial review within the state constitutional structure. *Bush v. Gore* can be distinguished because the state redistricting process may not rise to the "exceptional" level of selecting presidential electors.⁷⁸ Additionally, even if one agrees with Chief Justice Rehnquist, the Supreme Court's holding refers only to the selection of presidential electors, meaning that it cannot serve as controlling precedent for cases like *Branch*.

Compounding the problem is the Court's recent view of state-federal relations. Decisions like *New York v. United States*,⁷⁹ *Printz v. United States*,⁸⁰ and *National League of Cities v. Usery*⁸¹ underscore the Rehnquist majority's willingness to protect the integrity of states from intrusion by the federal government. Additionally, cases like *United States v. Lopez*⁸² and *United States v. Morrison*⁸³ have made the Rehnquist Court famous for appreciating the separation of state responsibilities from federal responsibilities. In this respect, the

78. However, this distinction is not particularly strong. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803–04 (1995) (recognizing that members of Congress are *federal* officeholders, not solely representatives of the state).

79. 505 U.S. 144 (1992). In this case, the Court held that the federal government cannot "commandeer" state governments into advancing federal regulatory aims because doing so "would . . . be inconsistent with the Constitution's division of authority between federal and state governments." *Id.* at 175.

80. 521 U.S. 898 (1997). In *Printz*, the Court held that the federal government could not require local law enforcement officers to enforce part of the Brady Handgun Violence Prevention Act. See *id.* at 933 ("[T]he obligation [imposed on 'chief law enforcement officers' by 18 U.S.C. § 922(s)(2) (2000)] to 'make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law' . . . is unconstitutional."). Central to this holding was the belief that the Constitution allows the federal government power to regulate only "individuals, not states." *Id.* at 920 (quoting *New York v. United States*, 505 U.S. at 166).

81. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). In *National League of Cities*, Justice Rehnquist provided an early look at the jurisprudence that the Court under his leadership would later produce; his opinion looked to history, federalist principles, and "undoubted attribute[s] of state sovereignty" in recognizing, on Tenth Amendment grounds, that states are exempt from certain provisions of the Fair Labor Standards Act. 426 U.S. at 845.

82. 514 U.S. 549 (1995). In *Lopez*, the Court invalidated part of the Gun-Free School Zones Act of 1990 for violating the Commerce Clause. See *id.* at 551. In his majority opinion, Chief Justice Rehnquist emphasized the importance of maintaining a "distinction between what is truly national and what is truly local." *Id.* at 567–68.

83. 529 U.S. 598 (2000). In *Morrison*, the Court reinvigorated *Lopez* by striking down the Violence Against Women Act for exceeding the bounds of the Commerce Clause, despite findings documented in the legislative history that Congress thought would obviate Commerce Clause objections. See *id.* at 614.

Article I, Section 4 conflict could present the Rehnquist Court with the same challenge it faced in *Bush v. Gore*: Does the Constitution's text provide power only to a particular part of state government, or does it delegate power to the state as an entity? The same paradox that scholars have recognized after *Bush v. Gore* could arise in making such a determination.⁸⁴

C. *The Conflict between Textualism and Federalism Inherent in Article I, Section 4*

The Article I, Section 4 argument in *Branch* merits a careful examination of the Constitution. For this purpose, this Note examines two approaches embraced by members of the Rehnquist Court: textualism and federalism. Frequently these two methods of interpretation are considered similar or identical—the five members of the Rehnquist majority frequently rely on both.⁸⁵ In the abstract,

84. The paradox is that the conservative “states’ rights” judges will not hesitate to displace the decision of a state government and impose national control when it suits their political preferences. See, e.g., Tribe, *supra* note 70, at 175 (discussing one caricature of the five judges in the majority in *Bush v. Gore* as “departing from their long-held states’ rights principles” to reach the political result they desired).

The cynical, political critique of *Bush v. Gore*—that the Republican Justices turned their backs on their own ideology to provide a victory for a Republican president, *see id.*, seems equally applicable to *Branch*. There, the chancery court judge who attempted to draw the congressional districts was a Democrat, whereas each judge on the three-judge federal panel that denied the chancery court’s jurisdiction was appointed by a Republican president. See Patrice Sawyer, *Judges Set Redistricting Deadline*, THE CLARION-LEADER (Jackson, Miss.), Feb. 20, 2002, at 1A (emphasizing that a ruling against redistricting would serve Republican interests, and identifying the political affiliations of the judges involved); *see also* E.J. Dionne, Jr., *Payback in Judges*, WASH. POST, Jan. 10, 2003, at A21 (discussing *Branch* as an example of judicial activism among Republican judges aiming “to remake the world according to the specifications of Justice Antonin Scalia”); Richard A. Serrano & David G. Savage, *Renewed Focus on Scalia Trip*, L.A. TIMES, Apr. 25, 2004, at A26 (discussing Justice Scalia’s apparent change of philosophy vis-à-vis federal meddling in state redistricting disputes by first denying an emergency stay and then authoring the majority opinion in *Branch*, which benefited Republican Congressman Chip Pickering, son of Judge Charles Pickering, a longtime Scalia friend and turkey hunting partner).

85. See, e.g., *Printz*, 521 U.S. at 918–19 (Scalia, J.) (describing as an “essential postulate[]” the “incontestible [sic] [concept] that the Constitution established a system of ‘dual sovereignty.’ Although the states surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty[.]’ This is reflected throughout the Constitution’s text”) (citations omitted); *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (approving the Court’s refusal to uphold detailed regulations imposed by the district court on Arizona’s state prisons and stating, in this connection, that “[i]t is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental”); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) (looking to the specific language of

logic dictates that the two approaches frequently should yield the same result; if federalism is the design underlying the Constitution, the plain meaning of its text should yield a “federalist” result. More specifically, it seems that a textualist approach to constitutional interpretation frequently generates a pro-state autonomy view of federalism.⁸⁶

However, in the context of Article I, Section 4, the two approaches yield opposite results. The “plain meaning” of “Legislature” is just that—the legislature. Because Article I, Section 4 nowhere mentions state courts, they should play no part in redistricting. Yet, viewing the situation in broader, federalist terms counsels against this view. Redistricting is a state function: state courts can play a role in this process as they do when interpreting any law, and to remove a state entity in favor of a national entity violates the federalist principle underlying Article I, Section 4.

II. THE TEXTUALIST APPROACH TO ARTICLE I, SECTION 4

Textualists believe that when determining whether an action or law violates the Constitution, a court should look first to the document’s text. This form of interpretation has been the topic of much scholarly debate,⁸⁷ but its underlying rationale is logical: where

the Constitution, concluding that “nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress,” and determining that the Tenth Amendment reserves those powers to the States); *Lopez*, 514 U.S. at 567–68 (Rehnquist, C.J.) (basing the holding in part on the importance of maintaining a “distinction between what is truly national and what is truly local”); *Gregory v. Ashcroft*, 501 U.S. 452, 457, 460 (1991) (O’Connor, J.) (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”); see also *infra* notes 121, 123 (citing federalist statements by members of the Rehnquist and Burger Courts).

86. I thank Professor H. Jefferson Powell for this observation. See also *supra* notes 79–81 and accompanying text (discussing cases favoring state autonomy).

87. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 25–38 (1982) (examining the strengths and weaknesses of textualist interpretation); Ronald Dworkin, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115 (Amy Gutmann ed., 1997) [hereinafter *A MATTER OF INTERPRETATION*] (criticizing Justice Scalia’s scholarly arguments for textualism); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 113–22 (1990) (criticizing textualism as a mode of statutory interpretation); Laurence H. Tribe, *Comment, in A MATTER OF INTERPRETATION, supra*, at 65 (responding to Justice Scalia’s scholarly arguments for textualism); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 *CARDOZO L. REV.* 1597 (1991) (assessing Justice Scalia’s jurisprudence of statutory interpretation).

the Constitution’s “words are plain and clear, and [determinate] . . . there is generally no necessity to have recourse to other means of interpretation.”⁸⁸ Justice Scalia celebrates textualism as his guiding philosophy,⁸⁹ and Chief Justice Rehnquist has spoken about the danger of courts’ departing too far from “the language of the Constitution that the people adopted.”⁹⁰ Regardless of one’s opinion of textualism, it is an analysis worth exploring for the purposes of predicting the meaning that the Supreme Court will attach to the word “Legislature” in Article I, Section 4.

A. *The Literal Meaning: “Legislature” Means “Legislature” and No Other State Entity*

Looking only at the Constitution’s text, it appears that state legislatures alone have been granted the authority to draw congressional districts.⁹¹ As suggested by litigants and amici in *Bush v. Gore*, a court could hold that “[s]tate courts may not invoke even the state constitution to circumscribe this state legislative power.”⁹² Chief Justice Rehnquist’s statement in *Bush v. Gore* that “[t]his inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures”⁹³ seems equally applicable in this context—state legislatures should act alone in drawing congressional lines.

88. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 182 (Carolina Academic Press 1987) (1833); see also *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (approving this maxim and highlighting that when words are ambiguous, “contemporaneous and subsequent practical construction” of a text merits greater consideration).

89. See ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION, *supra* note 87, at 3, 13 (defending textualism and claiming that those who view the Constitution as “a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like . . . frustrate[] the whole purpose of a written constitution”).

90. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976). For then-Associate Justice Rehnquist, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), and *Lochner v. New York*, 198 U.S. 45 (1905), exemplify the perils that can befall the nation if the Court abandons the Constitution’s text. See Rehnquist, *supra*, at 700–04.

91. See U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof . . .”).

92. Brief of the Florida House of Representatives and Florida Senate as Amici Curiae in Support of Neither Party and Seeking Reversal at 5, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949); see also Brief for Petitioner at 47, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836).

93. *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (emphasis omitted).

The next question to ask is whether a state legislature may delegate this power to another entity like a redistricting commission or court. The strictest view of the Constitution prohibits the legislature from delegation: the state legislature alone is given the authority to determine the congressional districts, and any attempt by another state entity to do so must be rejected. Another view is that the legislature may delegate the redistricting power, but that the delegation must be explicit. This leads to a very state-specific inquiry, requiring the reviewing court to determine whether the respective state legislature (or state constitution, or both) delegated its apportionment authority. The broadest view of the text is that a general authority of state courts to interpret state law through the state constitution—recognized by the legislature—permits state courts to hear redistricting disputes and use their equitable powers to remedy infirmities. Under this view, regardless of the Constitution's delegation of power to state "Legislatures," redistricting plans operate like any other law passed in the state and are subject to traditional judicial review. The authority for judicial review under a state constitution or statute coexists, and does not conflict with, any constitutionally granted right to the state legislature to redistrict.⁹⁴

Another aspect of *Bush v. Gore* and *U.S. Term Limits, Inc. v. Thornton*⁹⁵ could play a role in this broad interpretation. If members of Congress are federal officers,⁹⁶ their selection is a process subject to discrete federal constitutional requirements, like those used in appointing presidential electors. The federal nature of congressional seats removes all traditional aspects of state lawmaking and applies strict federal constitutional requirements. This view comports with the other specific constitutional requirements for electing members of Congress.⁹⁷ If drawing congressional districts implicates Article I, Section 4, the literal requirement that only the "Legislature" draw the districts is invoked, and no other entity may do so. However, one

94. See also *infra* note 122 and accompanying text (discussing the parallel nature of the state and federal court systems, and the Framers' belief that giving each system responsibility—and at times autonomy—will enhance protection of constitutional rights).

95. 514 U.S. 779 (1995). In this case, the Court reversed Arkansas' attempt to limit the terms of members of Congress. See *id.* at 783.

96. See *id.* at 805 n.17 ("The Clauses also reflect the idea that the Constitution treats both the President and Members of Congress as federal officers.").

97. See U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); *supra* note 78 (discussing the relative weakness of this distinction).

could argue that members of Congress are less exceptional than the president. Under this view, the requirements of Article I, Section 4 do not require divesting state courts of their preexisting right to judicial review.⁹⁸

The second part of Article I, Section 4, permits congressional regulation of House of Representative elections.⁹⁹ Consistent with this power and the Fifteenth Amendment, a federal court may use its equitable powers to draw congressional lines under the Voting Rights Act, if the legislature fails to do so properly.¹⁰⁰ Additionally, the Fifteenth Amendment and some of its supporting legislation, like the Voting Rights Act, specifically remove some state discretion in voting procedures.¹⁰¹ Viewed in this manner, a federal court could strip a state court of authority to use its existing state equity powers absent an express grant of such authority from the state legislature.¹⁰² A federal court also could stop a state court from entering the redistricting process if the state court violated the Fifteenth Amendment or a federal law like the Voting Rights Act.

Although state courts could play a role if the state legislature conferred redistricting authority to another entity, a federal court could intervene whenever a state court's interpretation of the statutory redistricting scheme at issue "[did] not fall within the boundaries of acceptable interpretation, but rather represent[ed] . . . a gross deviation from the scheme outlined in the statute."¹⁰³ In these circumstances, a federal constitutional question would be raised and the state's constitution would have no role to play whatsoever.¹⁰⁴

98. For example, Members of Congress are elected by only one district of people and are solely accountable to those constituents, whereas the president is accountable to the whole nation and has wide-sweeping powers.

99. U.S. CONST. art. I, § 4, cl. 1 ("[B]ut the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

100. See S. REP. NO. 94-295, at 19 (1975), reprinted in 1978 U.S.C.C.A.N. 774, 785 (acknowledging that in "exigent circumstances, [a court may] actually fashion[] the [redistricting] plan itself"); see also *McDaniel v. Sanchez*, 452 U.S. 130, 148-49 (1981) (quoting the Senate Report with approval).

101. See *supra* notes 40-43 and accompanying text.

102. See, e.g., *Smith v. Clark (Smith II)*, 189 F. Supp. 2d 548, 554, 558 (S.D. Miss. 2002) (declining to allow Mississippi chancery courts to invoke their equity jurisdiction to draw the state's congressional districts).

103. Epstein, *supra* note 70, at 619. Epstein uses this language in the context of defending the Rehnquist concurrence in *Bush v. Gore*. See *id.*

104. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (vacating the Florida Supreme Court's decision partly because the Supreme Court was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the

B. “Legislature” as Part of a Wider Grant of Authority to States as Entities

Even the purest textualist looks to the meaning of the language in the Constitution as a whole, not just the lone word in a vacuum—the search is for the meaning of the word as it applies to the text. A textualist could argue that Article I, like Article II, “does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions.”¹⁰⁵ In *Smiley v. Holm*,¹⁰⁶ the Court advised, “[w]herever the term ‘legislature’ is used in the Constitution it is necessary to consider the nature of the particular action in view.”¹⁰⁷ In his *Bush v. Gore* dissent, Justice Stevens argued that both Article II, Section I and Article I, Section 4 “call upon legislatures to act in a lawmaking capacity.”¹⁰⁸ And in *Grills v. Branigin*,¹⁰⁹ the district court rested its decision partly on the fact that the state election board had no judicial or legislative authority under the state’s constitution.¹¹⁰ *Federalist* No. 78 further reflects an understanding on the part of the Framers that, in a republican government, judicial review would play a role in construing the statutes of a legislature.¹¹¹ Viewed in this light, a state court has a clear role in construing the laws of the legislature, and can therefore use its equitable powers to redraw a state’s congressional

legislature’s authority under Art. II, § 1, cl. 2”). In this respect, the United States Supreme Court seemed to indicate that the Florida legislature did not confer authority on the Florida Supreme Court to rule on the choice of presidential electors.

105. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

106. 285 U.S. 355 (1932).

107. *Id.* at 366.

108. *Bush v. Gore*, 531 U.S. at 124 n.1 (Stevens, J., dissenting).

109. 284 F. Supp. 176 (S.D. Ind. 1968), *aff’d per curiam sub nom.*, *Branigin v. Duddleston*, 391 U.S. 364 (1968).

110. *See id.* at 180. (“Article I, Section 4, Clause 1 of the United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly and the Election Board does not possess the legislative power under the Indiana Constitution nor does it possess judicial power under the Indiana Constitution.”).

111. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The interpretation of the laws is the proper and peculiar province of the courts.”). Justice Scalia endorses the use of *The Federalist* in searching for a textualist interpretation of the Constitution, “not because [the authors] were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.” SCALIA, *supra* note 89, at 38. This view has been adopted by the Supreme Court, at least in some decisions. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 910 (1997) (Scalia, J.) (viewing *The Federalist* “as indicative of the original understanding of the Constitution”).

districts if the legislature is unable to do so within the confines of either the state or Federal Constitution.

The scant case law interpreting Article I, Section 4 reflects a view that “Legislature” in the Constitution means a state legislature acting in its ordinary, lawmaking capacity, as limited by its state constitution. In *Smiley*, the Court permitted a governor to veto a redistricting plan, stating, “the exercise of the [redistricting] authority must be in accordance with the method which the State has prescribed for legislative enactments.”¹¹² Use of a voter initiative as “lawmaking power” has also been permitted.¹¹³ However, this can lead to two opposing conclusions. One conclusion is that—in contrast to a state governor, whose signature the state legislature requires to pass any new law—courts have no actual role in enacting legislation, and so cannot act in a “legislative capacity” by drawing lines without express permission of the legislature. Alternatively, one could conclude that the normal role of state courts in construing and interpreting statutes applies equally to redistricting situations—if the state courts have equitable powers derived from their state’s constitution or laws, they can act to redraw congressional districts to remedy constitutional or statutory infirmity.¹¹⁴ One’s choice of interpretation in this regard could make the finding of state court authority under Article I, Section 4 dispositive.

However, the cases demonstrate that the Supreme Court has not taken the most literal view of “Legislature.” In *Baker v. Carr*, Justice Douglas explained that, with few exceptions, “the Court has never thought the protection of voting rights was beyond judicial cognizance.”¹¹⁵ There is nothing in these dicta to indicate that state courts have any less “judicial cognizance” than federal courts. In *Grove v. Emison*,¹¹⁶ the Supreme Court emphasized that both state

112. 285 U.S. at 367.

113. See, e.g., *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (upholding an Ohio initiative that enabled voters to approve or disapprove redistricting).

114. By its very definition, equity is not a lawmaking process; it is limited to the facts of the particular case before the court.

115. 369 U.S. 186, 249–50 (1962) (Douglas, J., concurring). The exceptions listed by Justice Douglas included *Colegrove v. Green*, 328 U.S. 549 (1946), *MacDougall v. Green*, 335 U.S. 281 (1948), and *South v. Peters*, 339 U.S. 276 (1950). In each of these cases, the Court (with some divergence in terms of specific language) declined jurisdiction on political question grounds (something the Court changed in *Baker*). For a succinct explanation of the political question rationale, see *Baker*, 369 U.S. at 277–78 (Frankfurter, J., dissenting).

116. 507 U.S. 25 (1994).

legislatures and state courts are proper “agents of apportionment,”¹¹⁷ and that federal courts must defer to state action “where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.”¹¹⁸ However, the Article I, Section 4 issue was not before the *Grove* Court—both parties had conceded that the state court had jurisdiction to redraw the congressional districts.¹¹⁹

A strict textual approach to this issue may conclude that the redistricting power belongs to the state legislature alone. From this perspective, although state courts may hear challenges to congressional redistricting schemes, they cannot actually redraw the districts absent a delegation of authority directly from the state legislature.

III. THE FEDERALIST APPROACH TO ARTICLE I, SECTION 4

Although the text of the Constitution seems to indicate that state legislatures should act alone in drawing congressional districts, federalism counsels against removing state courts from this process. The Rehnquist Court’s “New Federalism” approach encourages those evaluating the Constitution to “appreciate the significance of federalism in the whole structure of the Constitution.”¹²⁰ The Framers embraced a system of dual sovereignty to protect the people; therefore, the federal government should not interfere with the traditional roles of state governments and vice-versa.¹²¹ Respect for federalism requires respect for states as entire entities—“[t]he different governments will control each other, at the same time that each will be controlled by itself.”¹²² The states as entities have been granted the authority to draw their congressional districts through both Article I, Section 4 and Article I, Section 2; if the legislature fails to redistrict properly, the courts of the state should have an opportunity to correct the problems before the federal government,

117. *Id.* at 34.

118. *Id.* at 33.

119. *See id.* at 32 (“The parties do not dispute that both [state and federal] courts had jurisdiction to consider the complaints before them.”).

120. *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

121. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841 (Kennedy, J., concurring) (“That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.”).

122. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

through its courts, enters the dispute.¹²³ Particularly in the redistricting context, one commentator has complained that the difficulty of the requirements of redistricting and the involvement of federal courts “can only be described as a hostile takeover of the districting process—a process the Constitution commits to the states—by the federal judiciary.”¹²⁴ Invoking Article I, Section 4 to keep state courts out of the redistricting process will only perpetuate the coup by the federal judiciary. In light of the federalist scheme of the Constitution, Article I, Section 4 grants authority to state courts to review congressional districts drawn by state legislatures. In this capacity, state courts should also be permitted to use their equitable powers to redistrict the state.

A. *Analysis of Article I, Section 4*

If a federal court strips a state court of jurisdiction over the redistricting process in the name of protecting the state legislature, the most likely result will be that the federal court itself will take over the process.¹²⁵ There is no doubt that the initial authority for drawing

123. The Court has specifically told federal courts to stay out of redistricting disputes to further the spirit of comity and federalism. See *Growe*, 507 U.S. at 34 (applying *Germano* and explaining that the lower court improperly established only a deadline for the state legislature, “ignoring the possibility and legitimacy of *judicial resolution*” of the redistricting dispute); see also *id.* at 33 (noting that “state courts have a significant role in redistricting”). This illustrates part of the Rehnquist and Burger Courts’ approach to state-federal relations, and underscores the Court’s belief that state courts play a vital role in protecting their citizens’ constitutional rights. See, e.g., *Alden v. Maine*, 527 U.S. 706, 755 (1999) (Kennedy, J.) (“We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.”); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (Powell, J.) (stating that the Court is “unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the . . . courts of the several States”).

124. Melissa L. Saunders, *The Dirty Little Secrets of Shaw*, 24 HARV. J.L. & PUB. POL’Y 141, 146–47 (2000).

125. If the state legislature has been unable to develop a redistricting scheme that can be signed into law, a court will have to create a plan of its own. In this situation, the only question is which court, state or federal, will be doing the line drawing. For this reason, forum shopping in redistricting litigation is quite prevalent. See Pamala S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1708 (1993) (“One-person, one-vote provides a wedge for partisan participation in the litigation process, permits a variety of forum-shopping stratagems, and, in combination with remedial doctrines, provides opportunities for the two major political parties to advance conceptions of the Act that serve their partisan ends.”); Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 MICH. J.L. REFORM 79, 101–04 (1996) (discussing forum shopping in redistricting litigation); see also Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 880 n.24 (2001) (listing some recent examples of forum shopping in redistricting litigation).

congressional districts lies with legislatures;¹²⁶ state courts play a role only in challenges to the plan developed by the legislature. In *Branch v. Smith*, the federal court ignored the overall constitutional scheme, which permits states to establish their own congressional boundaries. Furthermore, the Supreme Court has applauded state courts for their efforts in settling redistricting disputes.¹²⁷

Although the Court did not address the Article I, Section 4 issue in *Grove*, the holding and dicta of *Grove* are instructive about the Court's skepticism concerning the role of federal courts in the redistricting process. Justice Scalia, writing for the majority, emphasized principles of comity and federalism in denying the federal court's effort to employ its own redistricting plan in place of the state court's.¹²⁸ The Court equated "*Germano* deferral" with the *Pullman* doctrine.¹²⁹ As Justice Scalia succinctly explained, "*Pullman* recognizes that federal courts should not prematurely resolve the constitutionality of a state statute, just as *Germano* deferral recognizes that federal courts should not prematurely involve themselves in redistricting."¹³⁰ This statement should not be ignored when lower courts address the Article I, Section 4 issue.

126. See *White v. Weiser*, 412 U.S. 783, 794–95 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), for the proposition that "reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having an adequate opportunity to do so").

127. See *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a state to require . . . a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 674 (1964) ("We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes."). Although both of these cases concerned state legislative apportionment plans, the Court in *Grove* renewed its "adherence to the principles expressed in *Germano*" in a case involving a state court's involvement in creating both state legislative and congressional redistricting plans. 507 U.S. at 34.

128. *Grove*, 507 U.S. at 35–36.

129. See *id.* at 32 n.1 ("We have referred to the *Pullman* doctrine as a form of 'abstention.' To bring out more clearly, however, the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of *Pullman* 'deferral.'") (citation omitted).

130. *Id.* *Pullman* abstention is invoked by federal courts to avoid ruling on sensitive areas of state social policy. See, e.g., *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941) (refusing to hear a claim that rules of the Texas Railroad Commission sleeping car trains operated in a racially discriminatory manner because it presented an issue that "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open"). For a general overview of courts' use of the *Pullman* Doctrine, see ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* § 12.2.1 (4th ed. 2003).

A recent state supreme court case, *Alexander v. Taylor*,¹³¹ summarized its view of *Grove's* command in this way:

The failure of a legislature to act is a violation of the state's citizens' constitutional rights under [Article] I, [Section] 2 and the [Fourteenth] Amendment . . . Such a failure is subject to redress by the state court if it will act and only by the federal court if it will not.¹³²

This view of the situation comports best with the Supreme Court's command; federal courts should defer to state courts unless and until those courts fail to act on their citizens' behalf. The *Alexander* court looked to the command of *Baker v. Carr* as justifying its role in the redistricting process: *Baker v. Carr* allowed courts, both federal and state, to play a role in the redistricting process, and some of the earliest cases following *Baker* seem rooted at least partly in Article I, Section 4.¹³³

The impending dispute over Article I, Section 4's role in redistricting litigation highlights an ongoing tension between states and the federal government—one inherent in the Voting Rights Act. The Act was passed in response to attempts by southern states, including their courts, to dilute the voting power of minorities. There is little dispute that the assertion of federal power to protect this right was warranted.¹³⁴ However, as long as the Voting Rights Act singles out some individual states for special federal restrictions,¹³⁵ it is

131. 51 P.3d 1204 (Okla. 2002).

132. *Id.* at 1209.

133. *See id.*:

Many state legislatures . . . routinely refused to reapportion themselves, and many state courts . . . routinely ruled that they were powerless to do anything about it. Thus, something had to be done and was done in *Baker v. Carr*. The [C]ourt in *Baker v. Carr* also recognized that courts have jurisdiction in congressional redistricting matters under [Article] I, [Section] 4 of the federal constitution, pointing out, "The first cases involved the redistricting of states under [Article] I, [Section] 4."

(quoting *Baker v. Carr*, 369 U.S. 186, 201 (1962)).

134. *See* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 817 (1998) (discussing the history that southern states and their courts have of "defying the rule of law, particularly federal constitutional law, in the areas of race and criminal justice"); Robert J. Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 870–86, 929–32 (1994) (arguing that these changes instituted by the Warren Court that expanded federal involvement in state courts were arguably justified because of the extreme injustice occurring at the time, but that—in light of the achievements of the preexisting system of state-federal comity—the Warren Court's actions should now be reined in to prevent a permanent alteration of America's federal system).

135. *See supra* notes 7 and 42 and accompanying text.

particularly important for federal courts to observe traditional principles of comity, not only out of respect for federalism, but also to permit state courts to play the role in the enforcement of federal law anticipated by the Rehnquist Court's New Federalism.

B. Viewing Article I, Section 4 in Light of the New Federalism Decisions

The Rehnquist Court's New Federalism jurisprudence may also inform the potential conflict between state and federal courts. If one looks to the Supreme Court's aggressive protection of states both in terms of autonomy and in terms of viewing states as guardians of constitutional rights, the likelihood of state courts being granted a role in the redistricting process is more likely.

Although this Note will not go through various Supreme Court opinions to prove this point, some of the Court's language may prove enlightening. For example, a majority of the current Court has stated that "state legislatures are *not* subject to federal direction."¹³⁶ If state legislatures are not subject to federal direction, why should a perfectly competent state *court*, whose actions comport with federal constitutional and statutory requirements, subject itself to federal direction? Additionally, in the context of the Commerce Clause, the Supreme Court has demanded a separation between "what is truly national and what is truly local."¹³⁷ Numerous other cases support the "residuary and inviolable sovereignty"¹³⁸ of the states.¹³⁹

In view of this case law, if the constitutional question raised in *Branch* returned to the Supreme Court in the course of another redistricting dispute, it could present the Rehnquist Court with another opportunity to advance its New Federalist cause. In the redistricting context, state courts could be given the opportunity both

136. *Printz v. United States*, 521 U.S. 898, 912 (1997); *see also* *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

137. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

138. *THE FEDERALIST* NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

139. *See, e.g., Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress lacks authority under Article I to abrogate states' sovereign immunity from private suits in their own courts); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (insisting that "a State's express waiver of sovereign immunity [must] be unequivocal."); *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress lacks authority under Article I to abrogate states' sovereign immunity from private suits in federal court).

to protect their own sovereignty and to safeguard their citizens' constitutional rights.

C. Aspects of Competitive Federalism Served by State Court Involvement

The concept of competitive federalism is noted best in Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*:¹⁴⁰ "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹⁴¹ This aspect of federalism can affect state courts in redistricting disputes: the courts can use novel state laws and state constitutional interpretations to protect the rights of voters.¹⁴² The prospect of this experimentation may be stifled if state courts and state constitutions are removed from the redistricting process. Competition for taxpayers among states can lead to a greater protection of rights.¹⁴³ In the redistricting context, for example, a state may find that the equal protection clause of its constitution provides greater protection of its citizens' rights than the federal equal protection clause.¹⁴⁴

140. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

141. *Id.* at 311 (Brandeis, J., dissenting).

142. Justice Brennan noted the importance of this element of federalism, claiming, "[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Brennan noted the growing number of state courts "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased." *Id.* at 495. State courts have recognized rights as diverse as the right to possess and use marijuana at home, *Ravin v. State*, 537 P.2d 494 (Alaska 1975), to the right to an equally funded public education, *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973). For a lengthier list of rights recognized by state courts (and what one scholar perceives as a threat that judicial elections pose to these rights), see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 99–107 (Summer 1998).

143. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987) (book review):

If a community can attract additional taxpayers, each citizen's share of the overhead costs of government is proportionately reduced. Since people are better able to move among states or communities than to emigrate from the United States, competition among governments for taxpayers will be far stronger at the state and local than at the federal level.

144. Such a claim has succeeded in Alaska in the state legislative redistricting context. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1369 (Alaska 1987) (requiring proof of "a consistent degradation of a minority's voting power" to make out an equal protection violation under the

Even if one applies the alternative view to competitive federalism—that politicians will experiment less out of fear of losing their jobs¹⁴⁵—a positive result is yielded in the redistricting context. If state courts are more political, risk-averse redistricting bodies, these courts will, at the least, enforce rights as they currently exist.¹⁴⁶ Regardless, if state courts overstep their bounds through experimentation that violates federal law or the Constitution, federal courts can continue to provide a remedy to those whose rights are violated by state courts. With federal courts acting as the extra level of protection envisioned by the Founders,¹⁴⁷ competitive federalism demands permitting state courts to play a role in the redistricting process.

D. Policy Considerations Supporting a Federalist View of Article I, Section 4

Additional policy considerations support the federalist view of Article I, Section 4.¹⁴⁸ State court judges are often elected or subject

Alaska constitution, which is stricter than the Federal Constitution's mandate). Plaintiffs challenging state legislative redistricting in Texas have prevailed using the state's Equal Rights Amendment. See James C. Harrington & Judith Sanders-Castro, *Legislative Redistricting in 1991–1992: The Texas Bill of Rights v. The Voting Rights Act*, 26 ST. MARY'S L.J. 33 (1994). Similar claims have been raised in state redistricting suits in other states. See, e.g., *In re Apportionment Law*, 263 So.2d 797, 807 (Fla. 1972) (No. 42253) (declining to extend protection, holding, “[t]here are no provisions in the Florida Constitution relating to apportionment of the legislature more stringent than those of the United States Constitution”); Brief of Amici Curiae Americans for the Defense of Constitutional Rights at 12, *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) (urging use of the state equal protection clause to limit further the political and racial gerrymanders in state legislative apportionment plans) (on file with the *Duke Law Journal*).

145. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980):

[T]he reelection motive, the lack of sorting by risk preferences, external effects, and the impact of migration combine to prevent many searches from being carried out and to bias those projects that are undertaken. If state and local governments are supposed to be “laboratories,” then [the author’s] model predicts that few useful experiments will be carried out by them.

(citing *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting)).

146. These rights include, most crucially for the purposes of redistricting, the right to one-person, one-vote representation highlighted in *Baker v. Carr*, 369 U.S. 186 (1962), and the additional protections provided by the Fourteenth and Fifteenth Amendments.

147. See *supra* note 122 and accompanying text.

148. For a contrary view, urging more active involvement of federal courts in redistricting litigation, see generally Note, *supra* note 125.

to recall¹⁴⁹ by the voters of their respective states. Although historical evidence indicates that electing judges violates the Framers' concept of an independent judiciary,¹⁵⁰ the fact that elected judges may behave more like politicians is ideal in the redistricting context: redistricting is inherently political, and it makes sense for the more accountable of the two judicial systems to enter this political thicket. If state court judges give in to partisan temptations in redistricting their respective states, there is a political solution for the people.¹⁵¹ Further, federal courts are not above partisan temptation: In evaluating state legislative redistricting plans, federal judges are much more likely to rule against plans drawn by the party of which they are not members than they are to vote against plans drawn by their own party.¹⁵² Although no data are available about federal judges' rulings on *congressional* redistricting plans, it is doubtful that such data would show dramatically different results.

As Justice Ginsberg has noted, "the slim judicial competence to draw district lines weigh[s] heavily against judicial intervention in apportionment decisions . . ." ¹⁵³ Although this is true and state courts should not eagerly undertake this role, if a court must draw district lines, a state court that is more closely connected to the people

149. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725 ("[I]n only twelve states are most judges not electorally accountable to the citizenry . . . [Many of these states] choose lower or local judges electorally . . .").

150. See, e.g., THE FEDERALIST NO. 78, *supra* note 111, at 471 (Alexander Hamilton) ("Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the judiciary's] necessary independence."); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 269 (George Lawrence trans., Doubleday 1969) (arguing that states electing their judges will ultimately discover the elections attack "not judicial power only but the democratic republic itself"). For an analysis of elected state judges, see Croley, *supra* note 149. Croley lists several historical reasons contributing to the rise of elected state judiciaries: *Marbury v. Madison*, Jacksonianism, participation in politics by settlers from the western frontier, judicial rulings favorable to creditors, resistance to the English common law, and judicial corruption. *Id.* at 717. Although it is beyond the scope of this Note to discuss, this history could lead one to believe that, contrary to much existing scholarly opinion, having an election mechanism on state courts ultimately confers greater protection to the judiciary as one entity because citizens feel they have at least one avenue of recourse (short of constitutional amendment) against an otherwise independent branch of government.

151. Furthermore, a state court judge whose own congressional reapportionment plan violates federal law or the Constitution can be subject to review by a federal court.

152. Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 417 (1995). No similar study has been done with respect to state courts.

153. *Miller v. Johnson*, 515 U.S. 900, 934–35 (1995) (Ginsburg, J., dissenting).

through election and geography¹⁵⁴ appears marginally more competent to do so. A state judge's need to be more politically aware of his state and community for reelection purposes will also aid the judge in drawing district lines.¹⁵⁵

Some call for the use of the public law litigation model in hearing redistricting cases.¹⁵⁶ A state court judge facing reelection would seem more likely to evaluate the wide interests involved in redistricting litigation commanded by the public law litigation model. A state judge subject to reelection has the most to lose in drawing congressional districts; therefore, even if a judge attempts to skew district lines in a partisan manner, she would be best served to appear to listen to as many affected parties as possible in the course of the litigation. Additionally, state judges will want their treatment of litigants and the overall tenor of their trials to appear maximally nonpartisan. In this connection, the public law litigation model would assist state court judges to pursue this goal. A federal judge, having already secured life tenure, has less incentive to pursue a novel mode of adjudication.

Another reason to allow state courts to play a greater role in the redistricting process is to preserve the integrity of the federal courts. The political pressures inherent to redistricting schemes strain the "least dangerous"¹⁵⁷ branch of government—as evidenced by federal judges' preference, conscious or subconscious, for their own party's redistricting plans.¹⁵⁸ Federal courts will maintain their proper role by providing an additional check against the potential excesses of state

154. Lower state courts have jurisdiction over smaller numbers of citizens and are therefore literally "closer to the people"; obviously a state supreme court in a state with more than one federal judicial district oversees a larger number of people than a federal district court in that state.

155. Under the model suggested by this Note, citizens and academics alike can further test their faith in their elected *state* judges, while maintaining the constitutional safeguard of federal judges who, at least theoretically, are above the partisan fray of the suits before them if the state court violates the Constitution.

156. See Note, *supra* note 125, at 899–900 (citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976)). The public law model calls for a "diffused adversarial structure" in which judges take a broader view of standing in hope of facilitating a solution to a complex problem of social policy. Chayes, *supra*, at 1308. Although the article addresses use of the public law model in federal courts, it concedes that "corresponding departures from the tradition [judicial] model in the state courts" also occur. *Id.* at 1284 n.12.

157. THE FEDERALIST NO. 78, *supra* note 111, at 465 (Alexander Hamilton).

158. See *supra* notes 84 and 152.

courts, and will also preserve their own political capital by showing restraint before entering disputes.

When Article I, Section 4 is analyzed in light of the entire Constitution, a more holistic meaning to the text emerges. Taken in context, the meaning of “Legislature” flows from the federalist nature of the Constitution and the transfer of power from the federal government to the states (subject to the individual state’s own constitution and delegations of power to courts). Both policy and practical rationales support this interpretation. State courts should play a role in the redistricting process at the state level, and federal courts should not attempt to strip state courts of their authority in this important, constitutionally guaranteed role.

CONCLUSION

Examining both textual and federalist approaches to Article I, Section 4, reveals a conflict between the two interpretations that must be resolved by courts. Courts should read the term “Legislature” as used in this part of the Constitution taking into consideration similar passages elsewhere and the structure of the document as a whole; doing so fosters a broader, federalist conception of the state as an entity.¹⁵⁹ State legislatures have principal and initial authority to draw congressional districts, but this authority is subject to review by the courts of that state.¹⁶⁰ If a state legislature has failed to redistrict its congressional delegation properly, a state court may exercise its equitable powers to redistrict as long as some power to do so exists under the state constitution, or pursuant to a delegation of authority from the legislature. Principles of comity and federalism require federal courts to abstain from interfering with this process, unless and until the state courts cannot or will not enforce legal redistricting schemes.

The impending conflict surrounding Article I, Section 4 in the redistricting context may manifest a surprising contrast between the two often-similar positions of strict textualist and federalist constitutional interpretations. Even a textualist, however, may view

159. Apparently the Colorado Supreme Court agrees with this assertion, because it recently asserted jurisdiction over a redistricting dispute and rejected an attempt by the state legislature to enact another redistricting plan (replacing the plan enacted after the 2000 census). *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003) (“[T]he U.S. Constitution does not grant redistricting power to the state legislatures exclusively, but instead, to the states generally. The state may draw congressional districts via any process that it deems appropriate.”).

160. This assumes a judicial review mechanism within every state constitution.

Article I, Section 4 as conferring power on the state judiciary, even in the absence of explicit language granting this power. Under this view, power is initially conferred on state legislatures and then exercised in the manner prescribed by the state's constitution and laws, including judicial action by state courts. However, if an interpretive conflict persists, the federalist nature of the Constitution and the two provisions granting states the authority to redistrict their congressional seats command the conclusion that state courts may assert jurisdiction over this process. In light of the Supreme Court's jurisprudential command for renewed comity and federalism by the federal courts, a federal court should enter this political thicket only after both the state legislature *and* its courts have attempted to redistrict a state's congressional lines.