Notes

CONGRESSIONAL AUTHORITY TO REQUIRE STATE ADOPTION OF INDEPENDENT REDISTRICTING COMMISSIONS

RYAN P. BATES

INTRODUCTION

The continuing antics of redistricting and re-redistricting following the 2000 census and the Supreme Court's recent decision in *Vieth v. Jubelirer*[1] have again pushed the issue of gerrymandering of legislative and congressional districts into the public consciousness. Unlike the upheaval that followed the 1990 census,[2] however, neither prominority nor promajority racial gerrymanders reemerged as the defining issue of the post-2000 redistricting cycle. Instead, the polarizing debate this time around has centered on the issue of the partisan gerrymander: the manipulation of a state redistricting process by a party or political faction to ensure that it will capture more than its "fair" share of the resulting districts in subsequent elections. The most egregious example of the decade thus far occurred in Texas.

It was not until 2003 that the Texas legislature finally got serious about congressional redistricting. Although legislators had attempted to draw districts during the 2001 session, partisan deadlock prevented the adoption of a congressional redistricting plan, requiring a three-

1. 541 U.S. 267 (2004).

2. The issue of prominority racial gerrymandering reached the Supreme Court numerous times as a result of the 1990 redistricting cycle. *E.g.*, Easley v. Cromartie, 532 U.S. 234 (2001); Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993). For a more comprehensive listing of the litigation inspired by the 1990 redistricting cycle, see National Conference of State Legislatures, *Outline of Redistricting Litigation: The 1990s*, http://www.senate.mn/departments/scr/redist/redout.htm (last visited Dec. 29, 2005) [hereinafter NCSL, *1990s Redistricting Litigation*].

judge federal district court to draw the plan used in the 2002 congressional elections.[3] Under this plan, which "applied neutral districting factors," Texas elected seventeen Democratic and fifteen Republican congressional representatives.[4] But following the Republican sweep of both houses of the Texas legislature and all major state executive offices,[5] pressure from U.S. Representative Tom DeLay and other national Republican leaders to solidify the GOP margin in the U.S. House of Representatives propelled the Texas Republican leadership to revisit redistricting.[6] A first attempt was stymied when the Texas House Democrats fled the state to deny the legislature a quorum until the regular session expired,[7] forcing Governor Rick Perry to call special legislative sessions to pass the plan. In the first special session, Democrats invoked an informal Senate supermajority requirement to prevent adoption of a plan;[8] in the second, the Senate Democrats fled the state, depriving the Senate the necessary two-thirds quorum.[9] After a forty-five-day standoff, a Democratic state senator broke ranks and returned to Texas,[10] allowing Governor Perry to call a *third* special session. Only after the presiding officer changed the chamber's cloture rule could the Senate pass redistricting legislation on a virtually party-line vote, with a lone West Texas Republican joining the Democrats in opposition.[11]

---

3. *See generally* Balderas v. Texas, No. 6:01-CV-158, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex. Nov. 14, 2001) (ordering adoption of a court-drawn redistricting plan following the state legislature's failure to adopt one), *aff'd mem.*, 536 U.S. 919 (2002).

4. Session v. Perry, 298 F. Supp. 2d 451, 458 (E.D. Tex. 2004), *vacated sub nom.* Jackson v. Perry, 543 U.S. 941 (2004).

5. *Id.*

6. Juliet Eilperin, *GOP's New Push on Redistricting*, WASH. POST, May 7, 2003, at A4; Editorial, *Don't Redraw Texas' Congressional Districts*, SAN ANTONIO EXPRESS-NEWS, May 7, 2003, at 6B.

7. Christy Hoppe & George Kuempel, *Democrats Back, a Victory in Hand*, DALLAS MORNING NEWS, May 17, 2003, at 1A. The flight prompted a national manhunt, involving federal resources at DeLay's insistence. R.G. Ratcliffe & Karen Masterson, *DeLay Admits to Role in Hunting for Democrats*, HOUSTON CHRON., May 23, 2003, at 1A.

8. R.G. Ratcliffe, *Death Knell Tolls for Redistricting—For Time Being*, HOUSTON CHRON., July 26, 2003, at 1A.

9. Edmund Walsh, *Texas Legislature Adjourns Special Session*, WASH. POST, Aug. 27, 2003, at A4.

10. Robert T. Garrett, *Democrat's Return Could End Standoff*, DALLAS MORNING NEWS, Sept. 3, 2003, at 1A.

11. R.G. Ratcliffe & Janet Elliott, *Senate OKs Redistrict Plan as GOP Feuds*, HOUSTON CHRON., Sept. 24, 2003, at 1A.

The plan that Governor Perry signed into law[12] sought to shift the partisan makeup of the Texas congressional delegation from seventeen to fifteen in favor of Democrats to twenty-one to eleven in favor of Republicans, mostly by taking deliberate aim at white Democratic incumbents.[13] The legislative counsel to Republican Representative Joe Barton described it as "the most aggressive map I have ever seen. . . . This has a real national impact that should assure that Republicans keep the House no matter the national mood."[14] The Nineteenth District, formerly drawn around Lubbock, now slithers eastward some three hundred miles.[15] Metropolitan Austin, formerly a single district, was drawn and quartered—portions now belong to one district that reaches one hundred and fifty miles east to Houston and to two others that stretch more than three hundred miles south to the Mexican border,[16] a configuration that has invited comparisons of South Texas with "a pinstripe suit."[17] But the distortions of the map were not simply geographic—for example, Representative Martin Frost, a Dallas Democrat reelected in 2002 with 65 percent of the vote,[18] was thrust into a new district with a 63 percent Republican registration.[19] Because Frost's former district "simply disappear[ed]," most of his former constituents were shifted

12. The legality of this plan is currently being litigated and will be reviewed by the Supreme Court during the 2005 Term. *See* GI Forum of Tex. v. Perry, 126 S. Ct. 829 (2005) (noting probable jurisdiction); Jackson v. Perry, 126 S. Ct. 827 (2005) (same); League of United Latin American Citizens v. Perry, 126 S. Ct. 827 (2005) (same); Travis County, Tex. v. Perry, 126 S. Ct. 829 (2005) (same). Given that the Court has already passed once on a post-*Vieth* opportunity to review the Texas re-redistricting, *see* Jackson v. Perry, 543 U.S. 941 (2004), *vacating* Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), such a review seems unlikely to produce a result as unhelpful as *Vieth* and thus offers an opportunity for the Justices to bring some needed clarity to the jurisprudence.

13. *See* Editorial, *The Soviet Republic of Texas*, WASH. POST, Oct. 14, 2003, at A22 (quoting Republican state Representative Phil King as stating that "[any Democrat] who is not in a minority district would have a very competitive race" (alteration in original)).

14. Edward Walsh, *GOP Study Feeds Furor over Texas Redistricting*, WASH. POST, Oct. 12, 2003, at A9.

15. *Compare* Plan 01151C—U.S. Congressional Districts, 108th Congress, http://gis1.tlc.state.tx.us/planc01151/default.htm (last visited Dec. 21, 2005), *with* Plan 01374C—U.S. Congressional Districts, 109th Congress, http://gis1.tlc.state.tx.us/planc01374/default.htm (last visited Dec. 21, 2005).

16. Plan 01374C—U.S. Congressional Districts, 109th Congress, *supra* note 15.

17. *The Soviet Republic of Texas*, *supra* note 13, at A22.

18. Associated Press, *U.S. House*, MILWAUKEE JOURNAL-SENTINEL, Nov. 7, 2002, at 20A.

19. *The Soviet Republic of Texas*, *supra* note 13, at A22.

into two Republican-dominated districts and one preexisting majority-minority Democratic district.[20]

The plan was successful in its main aims: four of the five Democratic incumbents targeted by the map were defeated, leaving the Texas delegation with the sought-after twenty-one to eleven Republican margin,[21] and the map was successfully defended, at least initially, against charges of racial gerrymandering and minority vote dilution.[22]

The saga of the Texas re-districting, though perhaps an outlier in its vituperative partisanship, its extraordinary drama, and its national media attention, was certainly not the only gerrymander of the 2000 redistricting cycle. But as a parable illustrating the many harms engendered by partisan gerrymandering, it is without peer. The political harms inflicted by the re-districting are plain: ruination of the bipartisan tradition in the Texas legislature; inaccurate representation of voters' aggregate preferences at both the statewide and national levels; months-long hijacking of the state legislative agenda, preventing consideration of programs crucial to many Texans; millions of dollars spent on three special legislative sessions; and violence to traditional notions of proper redistricting, such as district compactness and the decennial cycle itself. Arguably constitutional harms are also apparent, if one takes the trouble to look for them: the "expressive harm"[23] of governmental classification according to one's party affiliation or voting record; the dilution of a political bloc vote, which fortuitously provided cover for what was in reality a significant dilution of aggregate racial-minority voting

---

20. *See* Walsh, *supra* note 14, at A9 (quoting analysis by the legislative counsel to U.S. Representative Joe Barton concerning the redistricting plan's effect on Representative Frost's district).

21. Robert T. Garrett, *One Democrat Survives Redistricting*, DALLAS MORNING NEWS, Nov. 4, 2004, at 23A. The six-seat gain in Texas was instrumental in the overall Republican addition of five seats to their majority in the U.S. House of Representatives. *See* Charles Babington & Juliet Eilperin, *GOP Hopes to Expand Its Majority*, WASH. POST, Nov. 3, 2004, at A17.

22. Session v. Perry, 298 F. Supp. 2d 451, 481, 486, 496, 513 (E.D. Tex. 2004), *vacated sub nom* Jackson v. Perry, 543 U.S. 941 (2004).

23. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993) (defining expressive harms as those "result[ing] from the ideas or attitudes expressed through a governmental action").

strength;[24] and the chilling of the intradistrict political competition necessary to responsive and accountable representation.

But as critical as what can be found is what cannot be: violations of the equal protection standards for evaluating partisan gerrymanders announced in *Davis v. Bandemer*.[25] Although there was plainly "intentional discrimination against an identifiable political group,"[26] one looks in vain for "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[27] However unwarranted in procedure or in outcome, it is almost certainly impossible to prove that the Texas re-redistricting "will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[28] Yet if this *ne plus ultra* of partisan gerrymanders does not violate the standards announced in *Bandemer*, it is difficult to imagine that any real-world instance of gerrymandering ever would. Because such a showing is too burdensome for any litigant to make, *Bandemer* has become, for all intents and purposes, a nullity, a quaint historical oddity of no prescriptive force.

The difficulty, as courts have consistently found in the years since *Bandemer*, is in defining an operative standard to measure "fairness" in this context: "The key problem is that there is ultimately no real conception [within the judiciary] of what a properly functioning electoral system looks like and, not surprisingly, no real conception of what is the precise harm to be remedied."[29] Responding to lower courts' inability to solve this dilemma, the *Vieth v. Jubelirer* plurality

---

24. The view that Plan 01374C was retrogressive in terms of minority voting strength was unanimously shared by the staff attorneys in the Civil Rights Divison of the Department of Justice charged with preclearance of the Texas redistricting plan under Section 5 of the Voting Rights Act. Dan Eggen, *Justice Staff Saw Texas Districting as Illegal*, WASH. POST, Dec. 2, 2005, at A1.

25. 478 U.S. 109 (1986). Following the failure of existing ex ante procedural controls such as decennial redistricting and the one-person, one-vote principle of *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), to address partisan gerrymandering successfully, *Bandemer* announced that, in principle, courts would evaluate claims of partisan gerrymandering against a substantive standard of fairness rooted in ex post evaluations of the fairness of electoral outcomes relative to the political preferences of the relevant population, 478 U.S. at 132–33 (plurality opinion).

26. *Bandemer*, 478 U.S. at 127 (plurality opinion).

27. *Id.* at 133.

28. *Id.* at 132.

29. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 611 (2002).

advocated overturning *Bandemer* and returning the issue to the political branches.[30] Though Justice Kennedy's dispositive concurrence refused to return to the view that partisan gerrymanders are nonjusticiable political questions, it nonetheless rejected every plausible yardstick for measuring allegations of constitutional harm.[31] Already doubtful under *Bandemer*, judicial relief for those injured by unconstitutional partisan gerrymanders[32] thus seems increasingly unlikely after *Vieth*.

This Note argues that, following Justice Scalia's invitation in *Vieth* for the political branches to address the problems of political gerrymandering,[33] Congress would be both authorized and justified in requiring the states to adopt independent and nonpartisan commissions as the primary mechanism for performing the (normally) decennial redistricting process, both for congressional and state legislative districts. Whether or not the Supreme Court continues to evade its responsibility to protect political minorities from structural oppression through redistricting, Congress retains both remedial and prophylactic authority to address the constitutional harm that *Bandemer* recognized in partisan gerrymanders.

As this Note and other scholarship suggest, independent redistricting commissions are an enticing policy option for addressing this harm. These commissions can temper excessive partisanship and self-dealing by distancing legislators from the redistricting process, without completely eliding the important political nature of the process. Certainly, independent redistricting commissions are not guaranteed to achieve the elusive—likely impossible—ideal of

---

30. 541 U.S. 267 (2004) (plurality opinion).

31. *See id.* at 313 (Kennedy, J., concurring) (dismissing the case for failure to state a valid claim because there was no standard with which to measure the alleged burden on plaintiffs' rights).

32. *Vieth*'s reconsideration of whether partisan gerrymanders fall under the political question doctrine is rooted in the lack of a judicially manageable standard for evaluating these claims, not in the absence of a constitutional injury. Despite the abstract debate over the justiciability of the issue, there is little question that, at least as a theoretical matter, sufficiently egregious partisan gerrymandering can give rise to constitutional claims. *See id.* at 292 (plurality opinion) (stating that "[w]e do not disagree with [the] judgment" that "severe partisan gerrymanders [are incompatible] with democratic principles"); *id.* at 311–12 (Kennedy, J., concurring) ("Allegations of unconstitutional bias in apportionment are most serious claims . . . .").

33. *See id.* at 275–76, 277 n.4 ("[T]he Framers provided a remedy for [gerrymandered districts] in the Constitution. . . . The power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant.").

balancing competitiveness, responsiveness, proportionality, interest-group representation, preservation of political subdivisions, contiguity, compactness, and the many other desired characteristics when drawing district lines. Yet they may represent the best solution available under the current legal framework.

In framing this argument, this Note first surveys federal courts' interventions against partisan gerrymanders and their concomitant failure to develop either a concept of the constitutional harm or a manageable standard of review, suggesting the need for legislative relief in the face of judicial inaction. The existing models of redistricting commissions, as implemented by several states, are then considered, along with their efficacy in relieving the evils of redistricting by self-interested legislators. Finally, this Note proposes that congressional action requiring all states to adopt a proven model for such redistricting commissions is not only warranted, but is constitutionally permissible, both as to congressional and state legislative districts.

I. INTO THE POLITICAL THICKET—JUDICIAL RESPONSES TO GERRYMANDERING

Prior to 1962, challenges to the malapportionment of congressional and state legislative districts were held nonjusticiable by federal courts, a position typically justified by invocations of the political question doctrine, concerns over administrable remedies and courts' competence to implement them, and observations that the political branches of government, notably Congress, provided more appropriate forums in which to seek relief.[34] *Baker v. Carr*[35] established for the first time that malapportionment denying equal protection—what one scholar has described as "the right of the individual citizen to approach the ballot box on an equal footing with each other citizen"[36]—presented a justiciable constitutional claim.[37] This decision sparked a revolution in reapportionment across the

34. *E.g.*, Colegrove v. Green, 328 U.S. 549, 552–56 (1946).

35. 369 U.S. 186 (1962).

36. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1648 (1993).

37. *Baker*, 369 U.S. at 237.

nation,[38] but it was not until *Reynolds v. Sims*,[39] two years later, that the Court settled on a substantive standard under the Equal Protection Clause by which to evaluate apportionment: one person, one vote.[40] As the bedrock principle for "achieving . . . fair and effective representation for all citizens,"[41] one-person, one-vote provided an objective, readily manageable standard by which claims could be measured. It was initially thought that such a powerful and wide-ranging principle could counteract all forms of district manipulation—including partisan gerrymandering[42]—in which "neither history . . . nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation."[43]

Within two decades, the optimistic belief that one-person, one-vote would successfully deter partisan gerrymanders had been definitively refuted. Despite the increasingly rigid requirement of equipopulous congressional districts,[44] creative cartography and sophisticated analytical tools allowed legislatures to continue their manipulation of census data to craft districts of bizarre shapes, thus skewing electoral outcomes but nonetheless not running afoul of the Court's equal protection criteria. The nadir came in New Jersey: in *Karcher v. Daggett*,[45] the Court sidestepped an opportunity to address a blatant gerrymander directly,[46] instead invalidating the redistricting

38. *See* Issacharoff, *supra* note 36, at 1647–48, 1648 n.25 ("[In *Baker* and *Reynolds*, t]he Court cast aside the established means of political business in virtually every state in the country . . . .").

39. 377 U.S. 533 (1964).

40. *See id.* at 568 ("[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 [i]n other parts of the State."); *see also* Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (requiring one-person, one-vote for congressional districts on a parallel theory rooted in Article I, Section 2 of the U.S. Constitution).

41. *Reynolds*, 377 U.S. at 565–66.

42. *See id.* at 578–79 ("Indiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering.").

43. *Id.* at 579–80.

44. *See* Kirkpatrick v. Preiser, 394 U.S. 526, 530–31 (1969) (requiring that congressional apportionments reflect "a good-faith effort to achieve precise mathematical equality" and rejecting *de minimis* variations as detracting from the goals of equal protection). A more generous standard was applied to state legislative districts, presuming the constitutionality of districting plans with maximum deviations from population equality no greater than ten percent. Brown v. Thompson, 462 U.S. 835, 842 (1983).

45. 462 U.S. 725 (1983).

46. *Id.* at 764–65 (Stevens, J., concurring); *see also* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 181 (rev. 2d ed. 2002)

plan on the basis of a maximum deviation from equality that was less than the margin of error for the census data itself.[47] One-person, one-vote had, essentially by virtue of its administrability alone,[48] ceased to be the means and become the end itself. Rather than serving as one measure of conformance with the constitutional commands of the Fourteenth Amendment, it served to further insulate sophisticated gerrymanders from equal protection challenges.[49]

By recognizing an equal protection claim against partisan gerrymandering independent of equipopulation deviations, *Davis v. Bandemer*[50] sought to correct this failing. However, although a majority determined that such claims were justiciable,[51] only a four-Justice plurality agreed upon a substantive standard for adjudicating them: "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[52] Though intent could be easily proven in the redistricting context,[53] the plurality set forth a discriminatory-effect test substantially more difficult to satisfy:

> [U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.
>
> . . . [A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. . . . [S]uch a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the

("The clear import of *Karcher* was a confrontation with a Democratic Party gerrymander that resulted in what was aptly termed 'a flight of cartographic fancy.'").

47. *Karcher*, 462 U.S. at 735 (plurality opinion).

48. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 121 (1980) (suggesting that one-person, one-vote's "administrability is its long suit, and the more troublesome question is what else it has to recommend it").

49. *See* Issacharoff, *supra* note 36, at 1654–55 ("The legacy of *Reynolds* became, in effect, a shield against substantive challenges to partisan manipulations so long as the ensuing districting schemes satisfied the narrow commands of one-person, one-vote.").

50. 478 U.S. 109 (1986).

51. *Id.* at 125.

52. *Id.* at 127 (plurality opinion).

53. *Id.* at 129.

> voters or effective denial to a minority of voters of a fair chance to influence the political process.[54]

However, only two Justices, evaluating the substantive claim under a different standard,[55] voted to uphold the finding of an equal protection violation.[56]

The disposition in *Bandemer* set the pattern for the next eighteen years.[57] During that time, only a single case, *Republican Party of North Carolina v. Martin*, was found to violate the *Bandemer* plurality's standard,[58] no administrable substantive standard emerged from lower-court consideration of partisan gerrymandering claims,[59] and virtually all such claims were dismissed, including many fundamentally factually indistinguishable from *Martin*.[60] So it was that the Court's decision in *Vieth v. Jubelirer*[61] was eagerly anticipated as an opportunity to correct the failings of *Bandemer*, one way or another.[62]

As with much in life, anticipation was surely better than reality. Rather than offering some degree of doctrinal clarity, whether a definitive finding of nonjusticiability or a reformulated substantive standard for adjudicating claims, *Vieth* achieved an incoherence that made *Bandemer* seem comparatively clear. Bringing the discussion of judicial cognizance of the constitutional harm full-circle, the plurality concluded that partisan gerrymandering claims are nonjusticiable,

---

54. *Id.* at 132–33.

55. *Id.* at 173 (Powell, J., concurring in part and dissenting in part) (advocating a multi-factor balancing test). Justice Stevens joined Powell's opinion.

56. *Id.* at 184.

57. *See* Vieth v. Jubelirer, 541 U.S. 267, 279 (2004) (plurality opinion) ("*Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress." (quoting SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 886 (rev. 2d ed. 2002))).

58. *See* 980 F.2d 943, 958 (4th Cir. 1992) (challenging the method by which North Carolina elected superior court judges).

59. *See Vieth*, 541 U.S. at 280 (plurality opinion) ("To think that this lower-court jurisprudence has brought forth 'judicially discernible and manageable standards' would be fantasy.").

60. *See id.* at 279–80, 280 n.6 (citing numerous cases in which "districting plans . . . were upheld despite allegations of extreme partisan discrimination, bizarrely shaped districts, and disproportionate results").

61. 541 U.S. 267 (2004).

62. *See* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After* Vieth, 3 ELECTION L.J. 626, 626 (2004) (observing the improbability that the Court would accept the case merely to reaffirm *Bandemer* and noting the expectation that *Vieth* would either overrule *Bandemer* or replace its substantive standard).

relying upon invocations of the political question doctrine, concerns over administrable remedies and courts' competence to implement them, and observations that the political branches of government, notably Congress, provided more appropriate forums in which to seek relief.[63] But with five Justices voting to retain *Bandemer*, the hopes of Tom DeLay, constitutional originalists, and yet another generation of law students struggling to understand "the law of democracy" were dashed:[64] constitutional challenges to redistricting plans remain justiciable.[65] The troubling part, however, is that whereas such challenges were previously understood as equal protection claims grounded in intentional discrimination and discriminatory effect,[66] it is no longer clear upon which constitutional grounds these challenges must now rest.

The *Vieth* dissenters, seeking to preserve the justiciability of partisan gerrymandering claims while refining the *Bandemer* conception of the equal protection harm, offered a broad array of potential replacements.[67] Justice Kennedy, writing the dispositive concurrence, rejected all of these proposals, as well as the standard utilized since *Bandemer* for measuring the constitutional harm, as "either unmanageable or inconsistent with precedent, or both."[68] On

63. *Vieth*, 541 U.S. at 277–81 (plurality opinion); *see also supra* note 34 and accompanying text.

64. *Cf.* Hasen, *supra* note 62, at 627. *See generally* ISSACHAROFF, *supra* note 46.

65. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment); *id.* at 317 (Stevens, J., dissenting).

66. Davis v. Bandemer, 478 U.S. 109, 127 (1986) (plurality opinion).

67. Justice Stevens suggested that governmental discrimination in redistricting that burdened First Amendment associational rights could be analyzed under the discernible and manageable standards offered by political patronage cases. *Vieth*, 541 U.S. at 323–25 (Stevens, J., dissenting). Justice Stevens also advanced the idea that partisan gerrymanders propagate a "representational harm" in the same manner as do racial gerrymanders, *id.* at 330, an interesting position given his vociferous opposition to such a conception of the harm in *Shaw v. Reno*, 509 U.S. 630, 678 (1992) (Stevens, J., dissenting). Justices Souter and Ginsburg, opting for a vote dilution model, propounded a five-step test for a potential plaintiff to make out a prima facie case, which the state could then rebut. *Vieth*, 541 U.S. at 346–51 (Souter, J., dissenting). One of the threshold showings would be a correlation between the challenged district's deviations from traditional districting principles and the population distribution of the group allegedly discriminated against, *id.* at 349, something like a poor man's version of the ecological regression analysis used to demonstrate racial bloc voting and its effect on districting choices in the racial gerrymandering cases. Justice Breyer similarly conceived the harm as vote dilution leading to unjustified entrenchment: "a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power." *Id.* at 360 (Breyer, J., dissenting).

68. *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment).

the other hand, he refused to "bar all future claims of injury from a partisan gerrymander."[69] Instead, Justice Kennedy speculated that administrable standards might emerge from voters' First Amendment rights against being penalized for their expression of political views or their association with a political party.[70] Yet this line of inquiry led nowhere, given that finding that a partisan gerrymander burdens a plaintiff's representational rights in violation of the First Amendment would "depend[] first on courts' having available a manageable standard by which to measure the effect of the apportionment."[71] This stopping point is identical in terms of the political question doctrine to that reached under an equal protection analysis—once one rejects vote dilution, improper motive, expressive harms, and conflicts of interest as mechanisms for measuring a First Amendment claim, as Justice Kennedy has, one has reached yet another doctrinal dead end.[72]

Although *Vieth* may be readily interpreted as a signal that federal courts are unavailable to those seeking redress against partisan gerrymanders,[73] the Court has since muddied the picture even further. After a three-judge district court declared that the Texas re-redistricting was not a partisan gerrymander under *Bandemer*'s high standard of proof,[74] the Supreme Court vacated and remanded the case for reconsideration in light of *Vieth*.[75] Perhaps the course of the Texas re-redistricting was sufficiently egregious to garner five votes for some form of ex ante review of redistricting

69. *Id.* at 309.

70. *Id.* at 314.

71. *Id.* at 315.

72. *See* Hasen, *supra* note 62, at 634 ("[T]here likely is no partisan gerrymandering standard that can simultaneously meet all of Justice Kennedy's requirements; what remains is a null set."); *id.* at 637 ("In short, there is nothing left as a test for partisan gerrymandering under Justice Kennedy's three requirements. We are at a dead end."). Perhaps this outcome was intended—that, until a broader social consensus emerges as to the nature and degree of harm posed by partisan gerrymanders, the Court will not settle upon a conception of the constitutional harm and standards for recognizing and remedying it. In the meantime, however, doctrinal foundations recede ever further into the murk.

73. *See Vieth*, 541 U.S. at 305 (plurality opinion) (inviting lower courts to treat Justice Kennedy's opinion "as a reluctant fifth vote against justiciability").

74. Session v. Perry, 298 F. Supp. 2d 451, 474 (E.D. Tex. 2004).

75. Jackson v. Perry, 543 U.S. 941 (2004), *remanded to* Henderson v. Perry, 399 F. Supp. 2d 756 (E.D. Tex. 2005). Reading the tea leaves of a vacation-and-remand order is a risky business. All that can definitively be said is that the Court found *Vieth* to be "sufficiently analogous and, perhaps, decisive to compel reexamination of [*Session*]." Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964).

plans based on the redistricting procedures themselves, leaving aside the tougher questions of reviewing the fairness of electoral outcomes.[76] The question whether procedural irregularities in the Texas re-redistricting could be sufficient in themselves to justify overturning a legislatively adopted plan might explain the Supreme Court's decision to hear appeals in four cases challenging Texas' current districts.[77] Though such an interpretation is consistent with some of the questions presented in those cases, however, the number and variety of questions presented makes it difficult to draw inferences about where the Justices' interests in these cases lie.[78] In any case, these challenges provide another chance for the Justices to consider standards of procedural or substantive fairness by which to adjudicate partisan gerrymanders, and it is hoped that they will seize the opportunity. Until they do so, whether in *Jackson* and its companion cases or in response to some future partisan gerrymander, it is clear that Justice Scalia's question criticizing *Vieth*'s disposition—

---

76. The puzzling *Session* remand came on October 18, 2004, two weeks *before* the map at issue was used in Texas congressional elections, *Jackson*, 534 U.S. at 941; thus, any disposition other than dismissal for failure to state a claim or nonjusticiability would imply a shift from the outcome-reviewing standards accepted under *Bandemer* and discussed in *Vieth*.

77. *See* GI Forum of Tex. v. Perry, 126 S. Ct. 829 (2005) (noting probable jurisdiction); Jackson v. Perry, 126 S. Ct. 827 (2005) (same); League of United Latin American Citizens (LULAC) v. Perry, 126 S. Ct. 827 (2005) (same); Travis County, Tex. v. Perry, 126 S. Ct. 827 (2005) (same).

78. The ten questions presented by the four cases range from issues of procedural and substantive fairness in defining unconstitutional partisan gerrymanders under *Bandemer* and *Vieth* to the requirements for modifying majority-minority districts under Section 2 of the Voting Rights Act and relevant Supreme Court precedents on racial gerrymandering. Most relevant to the concerns discussed here are questions raised in *Travis County*, *Jackson*, and *LULAC* concerning partisan motivation and the validity of using decennial census data in shaping a mid-decade redistricting plan. *See* Questions Presented in *Jackson v. Perry* (No. 05-276), http://www.supremecourtus.gov/qp/05-00276qp.pdf (last visited Dec. 29, 2005) ("Whether the Equal Protection Clause and the First Amendment prohibit States from redrawing lawful districting plans in the middle of the decade, for the sole purpose of maximizing partisan advantage."); Questions Presented in *League of United Latin American Citizens v. Perry* (No. 05-204), http://www.supremecourtus.gov/qp/05-00204qp.pdf (last visited Dec. 29, 2005) ("Whether the 2003 . . . [redistricting plan], adopted and developed using outdated, inaccurate 2000 Census data . . . , in violation of one person, one vote when measured against 2003 Census data, and when 'the single-minded purpose . . . was to gain partisan advantage' and when such purpose is realized, is an unconstitutional political gerrymander."); Questions Presented in *Travis County, Texas v. Perry* (No. 05-254), http://www.supremecourtus.gov/qp/05-00254qp.pdf (last visited Dec. 29, 2005) ("Does the Texas legislature's 2003 replacement of a legally valid congressional districting plan with a statewide plan, enacted for 'the singleminded purpose' of gaining partisan advantage, satisfy the stringent constitutional rule of equipopulous districts by relying on the 2000 decennial census and the fiction of inter-censal population accuracy?").

"What are the lower courts to make of this pronouncement?"[79]—remains unanswered.

II. THE POLITICAL THICKET REDUX—LEGISLATIVE RESPONSES TO PARTISAN GERRYMANDERS

States, however, have not been quiescent in the absence of judicial intervention against partisan gerrymanders. Their primary response has been the expansion of the role of nonlegislative bodies in the redistricting process, particularly independent redistricting commissions.[80] This Part first explores the varieties of commissions that have been implemented and then gives particular attention to the potential benefits of the tie-breaker commission model. Its relative merits are considered, and the systemic issues which prevent wider state adoption of redistricting commissions are then discussed.

A. The Common Forms of Independent Redistricting Commissions

Currently, slightly fewer than half of the states utilize some form of independent commission in the process of redistricting congressional or state legislative districts.[81] Although there are wide variations in these commissions' forms,[82] the most important variables are the commissions' responsibility for the redistricting process and their membership structures.[83]

---

79. *Vieth*, 541 U.S. at 305.

80. In the taxonomy of this Note, the term "independent redistricting commission" denotes a body separate from the state legislature with some role in the state's redistricting process. Each of the variations on this general theme discussed *infra*, such as primary bipartisan commissions or backup blue-ribbon commissions, is a subspecies of this genus.

81. As of this writing, twenty-three states have implemented some form of this institution. *See* sources cited *infra* notes 84, 87, 89.

82. *See* Christopher C. Confer, Note, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115, 119–23 (2003) (describing the variability of structurally significant features of state legislative redistricting commissions); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841–51 (1997) (same).

83. A third difference, less critical for the argument of this Note, is the scope of commission authority. In the majority of states implementing any form of redistricting commission, their function is limited to defining state legislative districts, leaving congressional redistricting to the state legislatures. *See* ALASKA CONST. art. VI; ARK. CONST. art. VIII, §§ 1–4; COLO. CONST. art. V, § 48; ILL. CONST. art. IV, § 3; MICH. CONST. art. IV, § 6; MISS. CONST. art. XIII, § 254; MO. CONST. art. III, § 2; OHIO CONST. art. XI, § 1; OKLA. CONST. art. V, § 11A; ORE. CONST. art. IV, § 6; PA. CONST. art. II, § 17; S.D. CONST. art. III, § 5; TEX. CONST. art. III, § 28. Only a minority employ commissions to define both congressional and state legislative districts. *See* ARIZ. CONST. art. IV, § 2(1); CONN. CONST. art. III, § 6(b); HAW. CONST. art. IV,

The first key differentiator among the various forms is a commission's degree of responsibility in the redistricting process. The states have thus far implemented three models: primary, backup, and advisory. The primary commission, the most common form,[84] has the initial responsibility for drawing up district maps and is generally tasked with beginning and completing the redistricting process within a specified period following the availability of federal census data.[85] The many states implementing the primary commission model also vary in the degree of legislative oversight imposed on the commissions.[86] In contrast to the primary commission model, the less-

---

§ 2; IDAHO CONST. art. III, § 2; ME. CONST. art. IV, pt. 1, § 3 (Maine legislative districting); MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2 (congressional redistricting); *id.* art. IV, § 3 (state legislative redistricting); WASH. CONST. art. II, § 43; IOWA CODE ANN. § 42.3 (West 1999); ME. REV. STAT. ANN., tit. 21-A, § 1206(1) (West Supp. 2004) (Maine congressional districting). No state commission is responsible for congressional, but not state legislative, redistricting.

Removing state legislative districting from the hands of state legislators eliminates, at least in theory, conflicts of interest in that branch of the redistricting process. However, their retention of control over congressional redistricting permits self-interested political maneuvering both by ambitious state legislators seeking to move up the political food chain and by current members of Congress, as Representative DeLay's involvement in the Texas re-redistricting demonstrates. Although there is no guarantee that backroom political maneuvering does not also affect independent redistricting commissions, the formal independence of such bodies from legislatures, coupled in many cases with membership selection mechanisms designed to foster political parity and defuse political incentives, provide structural impediments to subversion of the commissions' independence. Thus, unless specifically noted otherwise, this Note's argument is intended to span both congressional and state legislative redistricting.

84. Fifteen states use the primary commission model, though they vary in other important respects. ALASKA CONST. art. VI; ARIZ. CONST. art. IV, pt. 2, § 1; ARK. CONST. art. VIII, §§ 1–4; COLO. CONST. art. V, § 48; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; ME. CONST. art. IV, pt. 1, § 3; MICH. CONST. art. IV, § 6; MO. CONST. art. III, § 2; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2 (congressional redistricting); *id.* art. IV, § 3 (state legislative redistricting); OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17; WASH. CONST. art. II, § 43; IOWA CODE ANN. § 42.3 (West 1999).

85. *See, e.g.*, MO. CONST. art. III, § 2 (requiring the first meeting of the redistricting commission within fifteen days of the final member's appointment, the filing of a tentative redistricting plan within five months, and the filing of a final plan within six months); *see also* National Conference of State Legislatures, *Redistricting Law 2000*, app. E (Redistricting Commissions: Legislative Plans), http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/apecomsn.htm (last visited Dec. 29, 2005) [hereinafter NCSL, *Redistricting Commissions*] (aggregating, with some omissions, information on redistricting commissions for state legislative districts, including requirements of formation dates and initial and final deadlines for plan submission).

86. Among those states implementing the primary commission model, there is some variation on the degree of institutionalized oversight of the plans developed by the commission. The plans of the vast majority of these states' commissions become law with no judicial or legislative approval. *E.g.*, ALASKA CONST. art. VI; ARIZ. CONST. art. IV, pt. 2, § 1; ARK. CONST. art. VIII; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; MICH. CONST. art. IV, § 6; MO.

common backup commission[87] only takes responsibility for redistricting following the failure of the state legislature to fulfill its duty as the primary drafting body for a redistricting plan.[88] Finally, in the rare advisory model,[89] the commission provides nonbinding advice to the legislature during the redistricting process.[90]

The second fundamental attribute of these commissions, and the one most determinative of the "nonpartisan" nature of the commission's work and results,[91] is the mechanism by which their membership is determined.[92] Although there are minor variations

---

CONST. art. III, § 2; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2 (congressional redistricting); *id.* art. IV, § 3 (state legislative redistricting); OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17. However, four states restrict the independence of their commissions by either allowing or requiring intervention by the state judicial or legislative branches. Iowa requires direct legislative approval of commission plans and allows the legislature to take over the task of drafting the plan if three successive commission plans are rejected. IOWA CODE ANN. § 42.3 (West 1999). Maine similarly requires legislative approval or amendment, by a two-thirds vote, but grants the state Supreme Judicial Court authority to draft plans if the legislature fails to meet the supermajority threshold. ME. CONST. art. IV, pt. 1, § 3. Washington does not require legislative approval for commission plans to take effect, but the legislature may amend such plans by a two-thirds vote. WASH. CONST. art. II, § 43(7). Finally, Colorado requires commission plans to be approved by the state supreme court, rather than by its legislature. COLO. CONST. art. V, § 48(1)(e). Such forms of oversight, by providing opportunities for political actors to intervene in the otherwise independent process, represent a value judgment that the input of elected officials responsible to their constituents remains an important check upon the redistricting commission.

87. Seven states use the backup commission model. CONN. CONST. art. III, § 6(b); ILL. CONST. art. IV, § 3(b); MISS. CONST. art. XIII, § 254; OKLA. CONST. art. V, § 11A; ORE. CONST. art. IV, § 6 (vesting authority in the state supreme court); S.D. CONST. art. III, § 5 (same); TEX. CONST. art. III, § 28.

88. *See, e.g.*, OKLA. CONST. art. V, § 11A (providing that a commission shall reapportion state legislative districts if the legislature "fail[s] or refuse[s] to make such apportionment within the time provided"); *see also* NCSL, *Redistricting Commissions*, *supra* note 85 (detailing, with omissions, requirements of formation dates and final deadlines for backup commissions).

89. Vermont uses this model exclusively. VT. CONST. ch. II, § 73. Connecticut also utilizes an advisory commission, distinct from its backup commission. CONN. CONST. art. III, § 6(a).

90. Because the recommendations of advisory commissions require legislative implementation, such commissions are fundamentally dependent on state legislatures in a manner distinct from the other two models. As they therefore provide no opportunity for reduction of partisan political influence in the redistricting process, they will not be considered further here.

91. It is neither reasonably expected nor necessarily desirable that all partisan competition be removed from the redistricting process by a procedural or institution-selecting control on the process. The aim is instead to keep partisanship within an acceptable range, a purely normative goal. *See infra* text accompanying notes 109–10.

92. A secondary consideration in the membership selection mechanism is whether service on a redistricting commission should prevent members from seeking public office for a future period, either in the body for which redistricting was performed or for any major office in the state. Both measures have the effect of discouraging and preventing conflicts of interest and

among the states, three models have dominated: bipartisan, blue-ribbon, and tie-breaker panels. In addition, the Iowa model presents a unique approach to determining commission membership.

Numerically, and perhaps functionally, the most inferior option is the bipartisan panel, in which equal numbers of commission members are affiliated with one of the two major political parties.[93] Although the potential for deadlock on such panels is obvious,[94] bipartisanship can also serve as an impetus to craft a plan favorable to both parties' interests in stability and retention of incumbent representatives, when the alternative is a plan drawn in a judicial proceeding which might serve other popular interests. This outcome, of course, is not especially congruent with the vision of the independent redistricting commission as an antigerrymandering device; a bipartisan gerrymander is a plausible and undesirable outcome of such panels.[95]

---

self-dealing in the redistricting process. Four states enforce versions of both restrictions. ALASKA CONST. art. VI, § 8(a), (c); ARIZ. CONST. art. IV, pt. 2, § 1(3), (13); IDAHO CONST. art. III, § 2(2), (6); MICH. CONST. art. IV, § 6. Three states only disqualify commission members from some offices for a future period. HAW. CONST. art. IV, § 2; MO. CONST. art. III, § 2; N.J. CONST. art. II, § 2(1)(a) (congressional redistricting commission only). Three states restrict current or recent officeholders from commission membership. MONT. CONST. art. V, § 14(2); PA. CONST. art. II, § 17(b) (commission chair only); WASH. CONST. art. II, § 43(3). Naturally, only states with bipartisan or tie-breaker membership models have adopted either restriction.

93. Four states implement a pure bipartisan model. IDAHO CONST. art. III, § 2; MICH. CONST. art. IV, § 6; MO. CONST. art. III, § 2; WASH. CONST. art. II, § 43.

94. *See* Kubin, *supra* note 82, at 847 & n.51 (noting that, through the 1990 round of redistricting, Michigan's bipartisan commission had consistently failed to adopt a redistricting plan).

95. For example, in the 1970 redistricting cycle, the Connecticut redistricting commission generated a bipartisan gerrymander that was eventually challenged in the Supreme Court. Gaffney v. Cummings, 412 U.S. 735, 754 (1973) (upholding the Connecticut gerrymander and observing that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so"). Professor Samuel Issacharoff, among others, has roundly criticized *Gaffney*'s acceptance of bipartisan gerrymandering as limiting the conception of constitutional harm to "some notion of unfair conduct directed at one or the other of the major parties" rather than protecting voter welfare by ensuring competitiveness within a vibrant "political market." Issacharoff, *supra* note 29, at 612–17. *But see* Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 676 (2002) ("*Gaffney* does not demonstrate the problem of self-interested political manipulation or the need for aggressive judicial relief. If anything, [it] serves as a warning to those who would presume that judges are inherently different from politicians in the motivations underlying their redistricting decisions or that 'nonpartisan' redistricting necessarily fosters competition.").

More popular,[96] but less auspicious for reducing partisanship in the redistricting process, is the blue-ribbon panel; the numerous variations on this model employ high-ranking state officers as members of the redistricting commission without regard to any balance of partisan affiliation. The obvious risk of this model is its potential for concentrating, rather than diluting, the partisanship of the redistricting process, because there is no guarantee of representation for opposing viewpoints. In Texas, for instance, membership on the backup commission is conferred directly on specific state offices.[97] During the 2003 re-redistricting, had the commission become involved, its entirely Republican membership[98] would have been unlikely to come to a result significantly different from that of the state legislature. The potential for such one-sidedness in commission membership, particularly involving actors who are simultaneously engaged in the state political process, raises fundamental questions about the fairness of this model. The blue-ribbon variant employed in Oregon, in which the secretary of state is the sole commission member,[99] even further undermines diversity of viewpoints and enhances the potential for partisanship to predominate.

The theoretically most sound, and numerically most common, of the membership models is the tie-breaker commission.[100] Under this model, an even number of membership slots are equally divided between the two major parties, often with members chosen by the majority and minority leaders of the state legislature, and an ostensibly neutral tie-breaking member is chosen, typically by majority vote of the commission membership.[101] This design promotes

---

96. This model is employed by eight states. ALASKA CONST. art. VI, § 4; ARK. CONST. art. VIII, § 1; MISS. CONST. art. XIII, § 254; OHIO CONST. art. XI, § 1; OKLA. CONST. art. V, § 11A; ORE. CONST. art. IV, § 6; S.D. CONST. art. III, § 5; TEX. CONST. art. III, § 28.

97. *See* TEX. CONST. art. III, § 28 (naming the lieutenant governor, the speaker of the House, the attorney general, the state comptroller, and the land commissioner to the backup redistricting commission).

98. Session v. Perry, 298 F. Supp. 2d 451, 458 (E.D. Tex. 2004).

99. ORE. CONST. art. IV, § 6.

100. Nine states use tie-breaker commissions. ARIZ. CONST. art. IV, pt. 2, § 1(3); COLO. CONST. art. V, § 48; CONN. CONST. art. III, § 6(b); HAW. CONST. art. IV, § 2; ILL. CONST. art. IV, § 3; ME. CONST. art. IV, pt. 1, § 3; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2 (congressional redistricting); *id.* art. IV, § 3 (state legislative redistricting); PA. CONST. art. II, § 17.

101. *See, e.g.*, HAW. CONST. art. IV, § 2 (providing that the president of the state senate, the speaker of the state house, and designees of the minority leadership of each chamber shall each

bipartisan cooperation and discourages stonewalling. Though incentives for bipartisan gerrymandering are not eliminated, they are weaker than in the pure bipartisan model: where the deciding vote is cast by an ostensibly neutral participant, each side is likely to court that vote by proposing a plan that ensures competition. The political cost of doing so is likely lower, all other things equal, than the cost of creating a competition-free bipartisan gerrymander that attracts one or more votes from the partisan opposition.[102] Despite academic grumblings over the difficulties inherent in finding a Platonic philosopher-king to undertake the chairmanship,[103] the tie-breaker commission, through structural checks and balances, presents the best opportunity to reduce the degree of partisanship while preserving the benefits of reasonable competition.

Finally, Iowa's redistricting commission employs a unique structure, in that a semi-independent state agency, the Legislative Services Agency (LSA), performs the redistricting, subject to legislative approval. The LSA is purportedly nonpartisan,[104] but as critics of the system have noted, LSA employees serve at the pleasure of a body controlled by the legislative majority.[105] On the other hand, supporters note that plans produced by the LSA have nonetheless kept congressional districts competitive, even as competition in districts nationwide has been anemic at best.[106]

---

select two members, and that the eight so selected shall select a ninth as chairperson by a six-vote majority).

102. The major unspoken premise here, of course, is that the marginal benefits of the bipartisan gerrymander are outweighed by the marginal costs of producing a plan that attracts an opponent's vote, rather than that of the neutral chair.

103. *See* Persily, *supra* note 95, at 678 (arguing that, even if a philosopher-king could be found to develop and apply neutral redistricting principles, redistricting by self-interested representatives yields philosophically preferable results); Kubin, *supra* note 82, at 848–49, 849 n.67 (arguing that politically neutral districting is preferable despite the inability to ensure perfect neutrality).

104. *See* IOWA CODE ANN. § 2A.1 (West 1999) ("A legislative services agency is created as a nonpartisan, central legislative staff agency under the direction and control of the legislative council. The agency shall cooperate with and serve all members of the general assembly, the legislative council, and committees of the general assembly.").

105. Persily, *supra* note 95, at 675.

106. *See* Issacharoff, *supra* note 29, at 624–26 (contrasting the vitality of competition in Iowa House races with what were anticipated to be uncompetitive races in Massachusetts, California, Ohio, Illinois, Michigan, Texas, New Jersey, and New York). *But see* Persily, *supra* note 95, at 675 (attributing district competitiveness to Iowa's political culture rather than to features of the institutional form of its redistricting process).

B. The Perceived Benefits of Independent Redistricting Commissions

Selection of the institutional form for a redistricting commission has concrete consequences for both the process and outcome of redistricting. When properly designed, such commissions can moderate excessive partisanship without completely excising the political character of the process. Tie-breaker commissions accomplish this by including equal numbers of political members but placing the deciding vote in the hands of a nonaligned tie-breaking member. They thus provide an antimajoritarian brake on partisan gerrymandering,[107] while equally discouraging minority obstructionism, by threatening each side with the loss of the tie-breaking vote.

Moreover, a holdout dynamic is unlikely to emerge in tie-breaker commissions. Because losing the tie-breaking vote means that the opponent's proposal succeeds, the cost of holding out is very high. Both parties are thus discouraged from refusing to compromise in the hopes of moving the redistricting fight to a judicial forum—a practice that is common in legislatures and in purely bipartisan commissions. Instead, the institutional promotion of moderation and compromise effected by the tie-breaker form, along with the reduced self-dealing produced by removing legislators from the process, allows other important values to come to the fore.[108]

It is worth reiterating that elimination of all political considerations from the redistricting process is neither an expected nor desired result of the adoption of a commission model, despite critics' suggestions to the contrary.[109] The common description of such commissions as "nonpartisan" is admittedly incorrect; it is merely a useful linguistic handle to distinguish them from purely "bipartisan" commissions that tend to result in "bipartisan" cooperative

---

107. Note that, because the relevant majority here is legislative, rather than popular, "antimajoritarian" is not necessarily equivalent to "antidemocratic." Because of the "winner's bonus" allocated by the first-past-the-post, districted election system prevalent in our country, it is likely that the majority party is legislatively overrepresented relative to the general population. *See* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 765–67 (2004) (defining partisan fairness in redistricting in terms of the symmetry of the winner's bonus).

108. In many instances, these are constitutionally or statutorily mandated redistricting criteria that might otherwise be slighted by partisan or self-serving ardor. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1(14) (setting out a hierarchy of redistricting goals).

109. *See* Persily, *supra* note 95, at 673–79 (suggesting that such commissions are merely self-defeating attempts to "get[] the politics out of politics").

gerrymandering or "bipartisan" deadlock. However, the search for institutional controls that further the public interest in representative governance by inducing partisan actors to compromise and moderate their political aims should not be dismissed out of hand because of nomenclature. The ideal, and a more accurate though less euphonic label, is simply "less-partisan." A truly nonpartisan system, perhaps following Professor John Hart Ely's pungent suggestion to merely "[g]rid the [d]amn [t]hing,"[110] might well result in startling inequities.[111] Many of our governmental institutions instead rely on the adversarial process, tempered by institutional checks and balances, to work in the public interest; removing redistricting from the hands of self-interested legislators would more accurately align the process with this tradition.

In addition to reducing political bias in redistricting outcomes, independent redistricting commissions may have significant corollary benefits. For instance, redistricting plans drawn by nonpartisan commissions may increase the competitiveness of individual districts, as in Iowa.[112] Theoretically, increased district competitiveness brings a corresponding increase in the responsiveness of district representation[113] and may also marginally reduce voter apathy by removing one basis for the perception that individual electoral participation is irrelevant because electoral outcomes are a foregone conclusion.[114] Further, removing redistricting from the already-full plates of state legislatures will increase the amount of legislative time available to devote to other important issues. Finally, redistricting

110. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 635 & n.124 (1998).

111. *See* Gaffney v. Cummings, 412 U.S. 735, 753 (1973) (decrying "politically mindless approach[es]" as likely to produce "the most grossly gerrymandered results").

112. *See* Issacharoff, *supra* note 29, at 623–26 (contrasting the general state of incumbent entrenchment, with 98.5% incumbency retention in the 2000 congressional elections, with Iowa's four "highly competitive" House races in 2002).

113. *See id.* at 627–28 (explaining that noncompetitiveness prevents electoral outcomes from reflecting actual voter preferences).

114. It was argued in 1997, even before the Clinton impeachment, *Bush v. Gore*, and other depressing notables of recent political history, that independent redistricting commissions were justifiable because representative government has so little public confidence that virtually any reform offering the hope of improved public perceptions would be a welcome change. *See* Kubin, *supra* note 82, at 859–60, 860 n.120.

commissions may even realize tangible monetary savings by reducing administrative overhead relative to full legislative consideration.[115]

C. "Success" among Independent Redistricting Commissions

The debate over whether existing independent redistricting commissions represent an improvement over redistricting by state legislatures continues unabated, but it is largely theoretical because of the difficulty of defining standards and metrics that allow useful comparisons.[116] Anecdotal evidence does suggest that the tie-breaker model can effect at least a marginal reduction in partisanship in the redistricting process.[117] Given the continued litigation of plans in states with such commissions, however, they are clearly not a panacea.[118] In the redistricting cycle following the 2000 census, 51 percent of legislature-drawn plans and 50 percent of commission-drawn plans were litigated.[119] Although a single redistricting cycle is insufficient to draw statistically valid conclusions about the rate of challenges, it is unlikely that adoption of the independent redistricting commission model significantly reduces litigation of redistricting plans. This is hardly surprising, though; given the stakes of redistricting fights, the inability to generate an objectively fair

115. Texas, for instance, spent more than five million dollars funding its three special legislative sessions during the 2003 re-districting process. John Ratliff, *Texas Republicans Crossed the Line This Time*, WASH. POST, Oct. 19, 2003, at B1.

116. *See generally* Issacharoff, *supra* note 29 (arguing that indicia of district competitiveness such as reelection rates and margins of victory could serve as metrics for measuring the success of politically insulated commissions); Persily, *supra* note 95 (criticizing Professor Issacharoff's argument in favor of independent commissions in part by questioning the usefulness of the suggested metrics).

117. *See* Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029, 1030–31 (2001) (reflecting on personal experiences in Colorado's redistricting processes and offering suggestions to further reduce partisan effects on the independent commission).

118. *See* National Conference of State Legislatures, *Redistricting Cases: The 2000s*, http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/redsum2000.htm (last visited Dec. 29, 2005) [hereinafter NCSL, *2000s Redistricting Litigation*] (summarizing litigation challenging redistricting plans in each of the states during the 2000 cycle); NCSL, *1990s Redistricting Litigation*, *supra* note 2 (same for the 1990 cycle).

119. Eleven of eighteen state legislative redistricting plans and two of eight congressional redistricting plans drawn by commissions were challenged in court; in comparison, eighteen of thirty-two state legislative redistricting plans and twenty of forty-two congressional redistricting plans drawn by state legislatures were challenged. NCSL, *2000s Redistricting Litigation*, *supra* note 118. These summaries represent only cases self-reported to NCSL, which may affect the data significantly. In addition, the data reported here presume that when redistricting plans went unchallenged in states with backup commissions the legislatures had drawn the plans; if incorrect, this assumption would overstate the rate at which commission plans were litigated.

districting map, and the ready availability of partisan litigants, it is unlikely that anything other than a restriction on courts' subject matter jurisdiction will successfully reduce the caseload generated by redistricting.

As continued litigation is likely regardless of the adoption of redistricting commissions, perhaps a better metric for measuring their success would be the rate at which their redistricting plans are upheld. As several commentators have noted, the pattern of Supreme Court jurisprudence suggests that plans drawn by a disinterested party, whether a commission or a judge, may be an informal safe harbor against claims of racial gerrymandering.[120] Moreover, during the 1980 and 1990 redistricting cycles, plans adopted by commissions fared remarkably well compared with legislature-drawn plans.[121] Thus, although litigation following redistricting may be unavoidable, it might be possible to avoid the costs of court-ordered re-redistricting (and, likely, litigating the second plan) by adopting the commission model.

D. Obstacles to Adoption of Independent Redistricting Commissions

However normatively desirable independent redistricting commissions may be, there remain significant institutional pressures against their adoption in states that still delegate redistricting to their legislatures. To move from redistricting-by-legislature to redistricting-by-commission, power must be wrested from the grasp of legislators who are loath to relinquish it. Despite relatively frequent calls for such commissions, actual conversions are rare: in the last seven years, only two states have switched to the commission model, and both successful conversions required a popular referendum to approve a state constitutional amendment.[122] By contrast, numerous legislative

120. Ely, *supra* note 110, at 634–35; Issacharoff, *supra* note 29, at 646–47; Kubin, *supra* note 82, at 868–72.

121. *See* Kubin, *supra* note 82, at 862–68 (surveying "the litigation win-loss record of commissions in . . . state supreme court and federal district court opinions" adjudicating challenges to commission-drawn redistricting plans).

122. In 1998, Alaska voters approved a ballot measure that amended the constitutional provisions implementing an advisory commission model to require a commission with primary responsibility for drawing state legislative districts. ALASKA DIV. OF ELECTIONS, ALASKA 1998 OFFICIAL ELECTION PAMPHLET, BALLOT MEASURE 3 (1998), *available at* http://www.gov.state.ak.us/ltgov/elections/1998oep/98bal3.htm. In 2000, Arizona voters approved Proposition 106, which set up an independent commission with responsibility for redrawing both legislative and congressional districts. ARIZ. SEC'Y OF STATE, 2000 BALLOT

efforts have failed. For instance, both the Kansas and North Carolina legislatures considered bills in 2003 that would have delegated their redistricting processes to independent commissions,[123] but both measures failed. As the dean of the University of North Carolina Law School commented during a prior North Carolina dalliance with conversion to a commission system, "I feel more secure about my civil liberties in a state without initiative powers. I am also, however, far less optimistic about the possibilities for political reform."[124]

Recent efforts at such political reforms have moved forward only haltingly in referendum states: Common Cause, a nonpartisan public-interest advocacy group, placed an amendment to the Ohio state constitution on the November 2005 ballot that would have created a bipartisan redistricting commission,[125] and Governor Schwarzenegger of California supported a ballot proposition that would have appointed a panel of retired judges to redraw congressional and legislative districts in an attempt to improve electoral competitiveness.[126] Although neither of these measures was successful,[127] the reform movement may not yet be exhausted. The Committee for Fair Elections is collecting signatures in Florida in support of a 2006 ballot initiative to create a nonpartisan redistricting body,[128] a Republican state senator in Nevada has proposed adopting

---

PROPOSITIONS, PROPOSITION 106 (2000), *available at* http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf.

123. S. Con. Res. 1607, 80th Leg., 2003 Reg. Sess. (Kan. 2003); H.B. 1060, 2003 Gen. Assem., Sess. 2003 (N.C. 2003).

124. Nichol, *supra* note 117, at 1030 n.6.

125. Common Cause, Reform Ohio Now, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=880499 (last visited Dec. 29, 2005); *see also* Initiative Petition, http://www.commoncause.org/atf/cf/{FB3C17E2-CDD1-4DF6-92BEBD4429893665}/ron_amendments.pdf, at 1–3 (last visited Dec. 29, 2005) (providing the text of the proposed amendment).

126. John M. Broder, *Schwarzenegger Proposes Overhaul of Redistricting*, N.Y. TIMES, Jan. 6, 2005, at A16.

127. *See* Brookings Institution, *Redistricting Reform after the Failed Ohio and California Initiatives* 3 (Nov. 15, 2005) (transcript available at http://www.brookings.edu/comm/events/20051115.pdf) (comments of Thomas Mann) (noting the failure of reform proposals in both states); *id.* at 12 (comments of Bruce Cain) (attributing the defeat of the California proposal in part to its perceived lack of bipartisanship); *id.* at 19 (comments of Michael McDonald) (attributing the defeat of the Ohio proposal in part to its requirement of mid-decade redistricting and concomitant fears of partisan motivation in light of Texas's experience).

128. Florida's Committee for Fair Elections, http://www.committeeforfairelections.com (last visited Dec. 29, 2005); *see also* FairVote. Florida Redistricting Watch, http://www.fairvote.org/?page=1390 (last visited Dec. 29, 2005) (detailing the effect of the proposed state constitutional amendments).

an independent commission model there,[129] and efforts at reform remain ongoing in Massachusetts and other states.[130]

As the experiences of Kansas and North Carolina show, pressure external to the normal tensions of state governance may be necessary for change to occur. But, as the cases of Ohio and California demonstrate, such external pressure may not be sufficient to achieve significant reform. Although a national consensus on whether redistricting should be removed from the purview of state legislatures has not yet been achieved,[131] the numerous reform efforts now underway suggest that an ever-larger segment of the population is becoming engaged by the issue. Moreover, if the failures of single-state reform initiatives can be attributed in part to fears of partisan motivation, as in Ohio and California,[132] a nationwide federal solution may garner greater popular support because the perception of partisan motivation would be diminished when the beneficiaries of such a move were obscured, at least relative to a single-state reform effort. These conditions, combined with the persuasive normative case for independent redistricting commissions as a buffer against partisan gerrymandering, compel the investigation of what Congress's power may be when such a consensus emerges. Indeed, such an investigation is particularly timely, given that efforts to impose a federal solution are already afoot, as evidenced by the introduction in Congress of the Fairness and Independence in Redistricting Act (FIRA) of 2005.[133] The next Part initiates this investigation.

---

129. Elizabeth White, *Nevada Redistricting Proposal Stems from 2001 Fight*, LAS VEGAS SUN, May 9, 2005, *available at* http://www.lasvegassun.com/sunbin/stories/nevada/2005/may/09/050910899.html.

130. FairVote, Massachusetts Redistricting Watch, http://www.fairvote.org/?page=1395 (last visited Dec. 29, 2005).

131. *Cf.* Hasen, *supra* note 62, at 641 ("The adoption of redistricting by commission in initiative states would be the best indication of an emerging social consensus against partisan redistricting.").

132. *See* Brookings Institution, *supra* note 127, at 12, 19 (suggesting the role played by fear of underlying partisanship in the defeat of both proposals).

133. H.R. 2642, 109th Cong. (2005). The FIRA would require states to adopt an independent commission on the tie-breaker model, which would be tasked with producing a congressional districting map submitted to an up-or-down vote of the legislature, with responsibility devolving onto state and federal courts in the event of legislative inability to secure its passage. Substantive criteria such as compactness and contiguity would be imposed on the districting process, and commission members would be disqualified from running for congressional office during the ten years following implementation of the map. *See* Press Release, Rep. John Tanner, Tanner Redistricting Bill Similar to 1989 Sensenbrenner Proposal (Nov. 2, 2005), *available at* http://www.house.gov/tanner/press109-049.htm (comparing

III. THE CONSTITUTIONAL JUSTIFICATION FOR CONGRESSIONAL ACTION

From the earliest cases challenging how states have drawn district lines through the Supreme Court's October 2003 Term, federal courts have consistently reiterated that Congress retains constitutional authority to take positive action to address violations of representational rights. Justice Frankfurter, cautioning against judicial entry into the "political thicket" of redistricting,[134] argued that

> the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. . . . Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress.[135]

This claim was an important contention in Justice Scalia's argument for the *Vieth* plurality that the precedent recognizing the justiciability of partisan gerrymanders should be overruled: "[T]he Framers provided a remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished."[136] If Congress, as the *Vieth* plurality suggests, has sufficient constitutional authority to impose its own redistricting map on the states, then surely a procedural requirement, such as the use of an independent redistricting commission to control partisan gerrymandering, is not an ultra vires intrusion into states' prerogatives over redistricting.

The argument for constitutional justification proceeds first by sketching a proposition for congressional action to provide a standard against which the constitutional sufficiency of Congress's legislative authority may be measured. For purposes of historical comparison, prior instances of federal legislation regulating congressional redistricting are then briefly considered; these instances of congressional control over state redistricting processes suggest a

---

provisions of the FIRA with the Congressional Districting Reform Act of 1989). In virtually all respects except its failure to address state legislative redistricting, the FIRA accords with the proposal for action put forward by this Note. *See infra* Part III.A.

134. Colegrove v. Green, 328 U.S. 549, 556 (1946).

135. *Id.* at 554.

136. Vieth v. Jubelirer, 541 U.S. 267, 275 (2004) (plurality opinion).

number of constitutional bases for further federal action of the type suggested here. In particular, congressional action may be justified under the Elections Clause of Article I, Section 4, and under the Fourteenth Amendment. In addition, this Note briefly considers the Guarantee Clause of Article IV, Section 4, as a potential basis for positive congressional action.

A. A Straw-Man Proposal for Action

The basic requirement of the proposed legislation would be that no state could adopt a redistricting plan, either for congressional or state legislative districts, unless it were drawn by an independent commission meeting specified structural criteria and operating pursuant to certain procedural criteria.

The "best practices" of states using redistricting commissions, discussed in Part II.A, suggest such structural criteria. Based upon the states' experiences with redistricting-by-commission, Congress could reasonably require that membership of the commission conform to one or another of the variants on the tie-breaker model, perhaps allowing some latitude for state-by-state variations so long as the basic structure were observed. Further restrictions on membership, such as a prohibition on current or recent members of the state legislature and a civil disability requirement preventing commission members from running for legislative or statewide executive offices, would provide additional assurances that political self-interest is not a prominent feature of commission decisionmaking. Requiring that the commission staff be similarly independent also seems sensible.[137] This list of structural criteria is by no means exhaustive.

The set of procedural criteria to be used by the commissions could also be specified at the federal level, although it might be appropriate to preserve some degree of state flexibility to recognize the importance of continued experimentation by states in their approaches to representative democracy. Moreover, retaining such flexibility would preserve the character of the suggested reform as a purely institution-selecting one, rather than making it an outcome-

137. *Cf.* Persily, *supra* note 95, at 675 (noting, as part of a broader criticism of the project to insulate redistricting from partisanship, that the staff of Iowa's Legislative Services Agency "is appointed by and serves at the pleasure of the Legislative Council, which the majority party in the legislature controls").

oriented restriction on the states' prerogatives.[138] But if procedural criteria were required of state redistricting commissions, those imposed by Arizona on its redistricting commission—such as contiguity and compactness, respect for the integrity of "communities of interest," and competitiveness[139]—might serve as an intelligent starting point for a set of guiding principles. Additional criteria worth considering might include a restriction on the information upon which redistricting commissions may base their decisions, such as political affiliations of registered voters, previous election results, addresses of incumbent legislators,[140] or a formalization of the decennial redistricting cycle, as other scholars have already proposed.[141]

Congress could choose from a wide range of implementation mechanisms, some more intrusive upon states' traditional prerogatives than others, some more likely constitutional than others. For instance, rather than directly requiring states to adopt independent redistricting commissions, Congress could make disbursal of federal funds in key policy areas contingent on states' adoption of such commissions. This tried-and-true approach would almost certainly not violate constitutional norms.[142] On the other hand, Congress could undertake to remove redistricting from the states' purview entirely, perhaps by requiring that all redistricting be done by a federal redistricting commission; whether the courts would

---

138. Note, however, that this would be a fundamentally political, rather than constitutional, choice—the validity of congressional requirements of contiguity, compactness and other common redistricting criteria is well established. *See Vieth*, 541 U.S. at 275–76 (discussing approvingly prior congressional regulation of such criteria in state redistricting processes).

139. *See* ARIZ. CONST. art. IV, pt. 2, § 1(14) (listing redistricting goals which the state redistricting commission is required to accommodate).

140. Restrictions on the use of these data, among others, are imposed by statute on the Iowa Legislative Services Agency. *See* IOWA CODE ANN. § 42.4(5) (West 1999) (prohibiting consideration of certain data during the redistricting process).

141. *See* Cox, *supra* note 107, at 782 (proposing a decennial floor on redistricting).

142. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (requiring that the object of the funding conditions advance the general welfare, that the conditions be unambiguous and not unrelated to the purpose of the federal spending program, and that the conditions not themselves be subject to an independent constitutional bar). Given the reach of the Spending Clause precedents, it seems difficult to argue that requiring the use of independent redistricting commissions as a condition for disbursal of federal funds would be unconstitutional, so long as the requirement were rationally related to the purpose of the funds, as would clearly be the case with federal election funding. Simply because such a method would be constitutional, however, does not guarantee that it would be effective; the federal leverage on state legislatures in this instance might simply be too small to overcome legislators' inertia and self-interest. Thus, this Note looks to the more radical proposition of Congress directly requiring state action and attempts to justify its authority to do so. *See infra* Part III.B–D.

invalidate such a move is a much closer question.[143] The middle path proposed here, however—an institution-selecting requirement that nonetheless leaves the task of redistricting in state hands—is intended to approximate the proper outer bound of constitutional authority for direct action and to illustrate certain constitutional problems that such action might engender.[144]

B. The Elections Clause as a Basis of Authority

The first plausible basis of constitutional authority is the Elections Clause of Article I, Section 4.[145] Considering the prior history of congressional regulation of redistricting, this clause could reasonably support further congressional action regulating the decennial revision of congressional districts. The scope of the Elections Clause, however, is limited to federal elections. Moreover, reliance upon it to justify the proposed legislation could raise significant Tenth Amendment concerns.

Reliance on the Elections Clause provides clear precedent for congressional control over redistricting. The Apportionment Act of 1842,[146] enacted pursuant to this clause, instituted the first federal restrictions on the boundaries of congressional districts, providing a clear demonstration that the Elections Clause can be a source of congressional authority in this area. Subsequent acts, enacted under the same authority, enlarged the set of federal requirements imposed on state redistricting practices.[147] Congressional authority under the

143. The Supreme Court has repeatedly noted that redistricting is primarily a responsibility and prerogative of the states. *E.g.*, Growe v. Emison, 507 U.S. 25, 33–35 (1993); Reynolds v. Sims, 377 U.S. 533, 586–87 (1964); *see also* Cox, *supra* note 107, at 780–81, 780 n.114.

144. In many respects, this proposal is quite similar to the Fairness and Independence in Redistricting Act (FIRA) of 2005, H.R. 2642, 109th Cong. (2005). The primary difference is that the proposal advanced here would extend to state legislative redistricting, while the FIRA is limited to congressional redistricting. *See supra* note 133 and accompanying text.

145. Article I, Section 4 provides, in relevant part, that "[t]he 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." U.S. CONST. art. I, § 4, cl. 1.

146. Apportionment Act of 1842, ch. 47, 5 Stat. 491 (requiring single-member districts and district contiguity).

147. *See, e.g.*, Apportionment Act of 1901, ch. 93, 31 Stat. 733 (imposing a district compactness requirement); Apportionment Act of 1872, ch. 11, 17 Stat. 28 (imposing an equipopulation requirement).

Elections Clause to enact such redistricting rules for congressional districts has been essentially unquestioned in modern times.[148]

However, the action suggested in this Note would extend ideally to state legislative redistricting. But, the Elections Clause is limited to elections of members of the federal legislature; justifying interference with election procedures for *state* legislative officials seems well beyond its scope.

Other potential problems with relying on congressional authority derived from the Elections Clause could arise with respect to the balance of federal-state power and the underlying principle of federalism. Unlike previously enacted outcome-based restrictions, such as contiguity or compactness of districts,[149] or even proposed process-based restrictions, such as a lower bound on the frequency of redistricting,[150] a requirement that state legislatures delegate their authority over redistricting to independent commissions is an institution-selecting regulation.[151] As a general matter, institution-selecting devices such as that proposed here seem least compatible with the Elections Clause's initial textual commitment of responsibility for redistricting to state legislatures, although this commitment may be more elastic than an initial reading would indicate.[152]

A more pressing federalism concern is that the proposed action, if justified under the Elections Clause, could run afoul of the Tenth Amendment and the Supreme Court's admonishment in *New York v. United States* that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[153] If, as *New York* suggests, Congress is limited to noncoercive methods of "urg[ing] a State to adopt a legislative program consistent with

148. Cox, *supra* note 107, at 794 & n.164. Earlier views of congressional authority under the Elections Clause were more circumscribed. *See* Colegrove v. Green, 328 U.S. 549, 555 (1946) (collecting nineteenth- and early-twentieth-century commentary questioning the extent of congressional powers under the clause).

149. *See* Apportionment Act of 1901, ch. 93, 31 Stat. 733 (compactness); Apportionment Act of 1842, ch. 47, 5 Stat. 491 (contiguity).

150. *See* Cox, *supra* note 107, at 782 (proposing a lower bound on redistricting frequency).

151. *See id.* at 756 (categorizing redistricting regulations as outcome-based, process-based, and institution-selecting).

152. *See* Branch v. Smith, 538 U.S. 254, 266–72 (2003) (reaffirming the propriety of judicially drawn district boundaries in the absence of legislative action).

153. 505 U.S. 144, 188 (1992).

federal interests,"[154] then regulation under the Elections Clause that required state implementing legislation would risk being considered legislative commandeering. A requirement that states set up and fund independent redistricting commissions may well violate the Supreme Court's injunction that "state legislatures are *not* subject to federal direction."[155]

This question, "[w]hether the anticommandeering principle of *New York* and *Printz* is as robust in the Article I, § 4, context . . . as it is in the Article I, § 8, context,"[156] is addressed squarely in *Branch v. Smith*. In that case, which briefly considered the constitutionality of coercing states into performing their constitutionally mandated task of redistricting under 2 U.S.C. § 2c, the Court held that such federal prescriptions are permissible regulations under the Elections Clause:

> To be sure, § 2c "envisions legislative action," but in the context of Article I, § 4, cl. 1, such "Regulations" are *expressly* allowed. . . . Congress was not placing a statutory obligation on the state legislatures as it was in *New York v. United States*; rather it was regulating . . . the manner in which a State is to fulfill its pre-existing constitutional obligations . . . .[157]

The congressional action proposed here would require many, if not most, states to pass legislation delegating authority and appropriating funds to redistricting commissions, potentially distinguishing the proposed action from the regulation in *Branch* in that the state legislation envisioned by 2 U.S.C. § 2c involves only the adoption of redistricting plans. Although it seems unlikely that the proposed legislation (at least as to congressional redistricting) would be struck down on anticommandeering grounds, the action suggested here could certainly be seen as violating the values of federalism and comity that underlie recent Tenth Amendment jurisprudence. Thus, the initial assumption of essentially unlimited congressional authority to regulate congressional redistricting procedures under the Elections Clause may not be wholly warranted. At the same time, *Branch* provides some support for the idea that federal legislation of the type

---

154. *Id.* at 166; *see id.* at 168 ("By either of these methods, as by *any other permissible method* of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply." (emphasis added)).

155. Printz v. United States, 521 U.S. 898, 912 (1997).

156. *Branch*, 538 U.S. at 302 (2003) (O'Connor, J., concurring in part and dissenting in part).

157. *Id.* at 280 (citations omitted).

this Note advocates would be a permissible regulation under the Elections Clause, at least as to congressional districts.

C. Section 5 of the Fourteenth Amendment as a Basis of Authority

The second plausible constitutional basis for the proposed congressional action is Section 5 of the Fourteenth Amendment, which enforces the guarantee of equal protection.[158] As the Voting Rights Act[159] demonstrates, legislation protecting the elective franchise against violations of equal protection can reach both congressional and state legislative redistricting practices.[160] Moreover, the Supreme Court's recognition in *Bandemer* and *Vieth* of the equal protection violation implied by partisan gerrymanders provides a constitutional basis for using Congress's Section 5 powers to enact legislation to enforce the Equal Protection Clause, even if no judicially manageable standards are discernible to adjudicate the claims of individual plaintiffs.

But although such recognition should give wide latitude to remedial legislation to correct existing gerrymanders, the suggested reforms are effectively a prophylactic rule not unlike the statutory requirement of preclearance of redistricting plans under Section 5 of the Voting Rights Act.[161] Congressional authority to enact such prophylactic legislation has been severely limited by the line of decisions stemming from *City of Boerne v. Flores*,[162] under which congressional action must be congruent and proportional to the constitutional harm in order to prevent Congress from legislatively expanding the substantive meaning of the Equal Protection and Due Process Clauses.[163] The degree of judicial deference accorded to congressional judgment about the constitutional violation at issue depends upon the level of scrutiny applied to alleged violations of the right asserted; when the right being protected is one viewed as

158. Section 5 of the Fourteenth Amendment grants Congress the power "to enforce, by appropriate legislation," the substantive guarantees of equal protection and due process of law found in Section 1. U.S. CONST. amend. XIV, § 5.

159. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973p (2000)).

160. *See* Katzenbach v. Morgan, 384 U.S. 641, 646 (1966) (upholding Section 4(e) of the Voting Rights Act as a proper exercise of congressional power under Section 5 of the Fourteenth Amendment).

161. 42 U.S.C. § 1973c.

162. 521 U.S. 507 (1997).

163. *Id.* at 519–20.

"fundamental," Congress need not build a record of pervasive unconstitutional state government action violating the right asserted.[164]

Although the racial classifications targeted by the Voting Rights Act served to justify its prophylactic rules,[165] the Supreme Court's treatment of the "constitutional 'right' to vote"[166] has varied significantly over time.[167] This raises the important question whether infringement of the right is sufficient to justify prophylactic legislation under Section 5 in the absence of considerable documentation of pervasive unconstitutional partisan gerrymandering. Such a requirement might place a Congress that attempted to legislate against partisan gerrymandering into an even more difficult position than a private plaintiff challenging a gerrymander who sought to satisfy the *Davis v. Bandemer* standard by documenting the consistent degradation of voters' influence over the political process as a whole.[168] This would be an odd result, given *Bandemer*'s prior

---

164. *Compare* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645 (1999) ("The legislative record . . . suggests that the Patent Remedy Act [abrogating state sovereign immunity against patent infringement claims] does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation." (quoting City of Boerne v. Flores, 521 U.S. 507, 526 (1997))), *with* Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) ("Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.").

165. *See Hibbs*, 538 U.S. at 736 ("Congress was similarly successful in *South Carolina v. Katzenbach*, where we upheld the Voting Rights Act of 1965: Because racial classifications are presumptively invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment." (citation omitted)).

166. Shaw v. Reno, 509 U.S. 630, 633 (1993).

167. *Cf.* Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . ."). According to the recent interpretation of one noted constitutional scholar, "[a]s the Constitution is now understood, states are not required to provide elections for state offices. But when elections are held, the right to vote qualifies as fundamental . . . ." Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2096 (2005) (footnote omitted); *cf.* Bush v. Gore, 531 U.S. 98, 104 (2000) (noting that although there is no constitutional right to vote for electors in a presidential election, once states hold such elections the right to vote is fundamental).

168. *See* 478 U.S. 109, 132 (1986) (noting that the Court cannot presume degradation of political influence from election results without additional proofs presented by the plaintiff); *cf.* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368, 377, 389–90 & app. A (2001) (determining that "[t]he legislative record of the [Americans with Disabilities Act] . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled," despite the dissent's thirty-nine page appendix documenting the "vast legislative record [of] 'massive, society-wide discrimination' against persons with disabilities"); *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 640, 645 (finding that,

recognition of the constitutional nature of gerrymandering violations and the strident calls for the whole matter to be declared a nonjusticiable political question, but it certainly is not out of the question.

However, if future partisan gerrymandering cases are to be nonjusticiable,[169] it seems that such a judicial commitment of the issue to the political branches implies an expectation of deference to action by the political branches to correct the problems the judiciary was unable or unwilling to solve. Thus, prophylactic legislation to correct the equal protection violation recognized in *Bandemer* should be evaluated under the deferential standard of *Hibbs*, given that the courts have already identified the targeted wrong, so long as the congressional action is rationally related to the problem of partisan gerrymandering.

D. The Guarantee Clause as a Basis of Authority

The final potential constitutional basis for congressional action is the Guarantee Clause of Article IV, Section 4,[170] though it has long been dismissed for not being "a repository of judicially manageable standards" to evaluate claimed violations of representational rights.[171] The inability of judges to discern manageable standards from a constitutional provision cannot imply that the legislative and executive branches are similarly powerless with respect to it. To hold that the Guarantee Clause has no potential for positive congressional action simply because cases arising under it have been deemed nonjusticiable would effectively read the clause out of the Constitution entirely. To return to a prior theme, the commitment of a question to the political branches is an invitation to action by the political branches and necessarily carries an implication of the power

---

because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations," "[t]he legislative record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation" (quoting *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997)).

169. *See* Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion) (inviting lower courts to interpret Justice Kennedy's concurrence as a "reluctant fifth vote against justiciability"); *see also supra* notes 63–72 and accompanying text.

170. Article IV, Section 4 provides, in relevant part, that the "United States shall guarantee to every state . . . a Republican Form of Government." U.S. CONST. art IV, § 4.

171. Baker v. Carr, 369 U.S. 186, 223 (1962); *see id.* at 224 (holding that challenges to state or federal action based on the Guarantee Clause do not present a justiciable question).

to undertake such action. Any other result changes the political question doctrine from a prudential rule of judicial administration into a unilaterally exercised tool to render disfavored portions of the Constitution nugatory.

Intriguing revisionist scholarship by Professor (now Judge) Michael McConnell[172] suggests that the reliance of *Baker v. Carr* and *Reynolds v. Sims* on the Equal Protection Clause, rather than on the Guarantee Clause, for judicially manageable standards to address malapportionment has led ineluctably to the racial and partisan gerrymandering problems common in redistricting maps and legal battles of the present day.[173] If the question is whether a state system of government prevents effective majority rule, rather than whether an individual is unable to exercise equally the right to vote, then partisan gerrymandering "designed to entrench a particular political faction against effective political challenge" violates easily derivable constitutional norms.[174] Although such a doctrinal shift may not immediately yield standards for *judicial* restraint of partisan gerrymanders,[175] the republicanism norm embodied in the Guarantee Clause provides a strong argument for Congress's retention of authority to undertake legislative action against partisan gerrymanders.

IV. POLITICAL OBSTACLES TO CONGRESSIONAL IMPLEMENTATION OF INDEPENDENT REDISTRICTING COMMISSIONS

Even if the action proposed here is constitutionally permissible, there remain significant obstacles to effective implementation. Foremost among these is the political difficulty in assembling a congressional majority and a presidential signature to actually enact the legislation. A less obvious, though no less destructive, issue is the potential for partisan capture of the implementation process.

---

172. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000).

173. *Id.* at 106–07.

174. *Id.* at 116.

175. As Professor Issacharoff notes, Judge McConnell's interpretation of the Guarantee Clause "may better capture the constitutional interest in the context of the extreme malapportionment evident in *Baker* or *Reynolds*," but "[a]t some level, the same problems that challenge the Court's equal protection jurisprudence will reassert themselves in trying to give content to the equally open-textured [Guarantee] Clause." Issacharoff, *supra* note 29, at 614.

The largest hurdle to implementation of the proposed action is political—the unlikelihood of its adoption by Congress. So far as congressional redistricting goes, such a measure would require incumbent members of Congress to vote against their own interests. As discussed in Part II.D, there is a reason that effective, independent commissions are generally adopted through popular referenda. Moreover, given partisan actors' belief that gerrymandering delivers favorable electoral results, as evidenced by their continued willingness to carve states into bizarre districts, the political calculus suggests that party as well as individual interests would strongly oppose a proposal uniformly requiring independent redistricting commissions. As one scholar argues, a social consensus or near-consensus in favor of such commissions may be a necessary precondition to either legislative or judicial willingness to force reluctant states into adopting the redistricting-by-commission model.[176] In the congressional context, such consensus may be even more necessary, in that representatives unresponsive to voter preferences are insulated from electoral reproach by the lack of competition for their seats—the very state of affairs that a congressional requirement of independent redistricting commissions seeks to overturn.

Moreover, if the insights of social choice theory hold true as applied to politics,[177] then congressional power to force the states to adopt redistricting commissions may simply lead to even greater partisanship under the banner of independence. The doctrinal underpinnings of equal protection and the historical experience of remedying race-based voter discrimination provide a roadmap for one possible avenue for such capture: partisan-motivated selective application of independent commissions.

Imagine that the House Republican leadership, seeking to further increase the Republican margin in the 2012 elections and intrigued by the failed 2005 ballot measure proposed by Governor

176. *See* Hasen, *supra* note 62, at 641–42 (suggesting that judicial intervention in partisan gerrymandering cases, such as prophylactically requiring employment of an independent commission model, must await a more defined social consensus).

177. In essence, social choice theory holds that whoever controls the means controls the ends. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 75–80 (2d ed. 1963). In the political context, one scholar notes that "all election mechanisms are vulnerable to manipulation . . . by those who structure the rules concerning the presentation of questions to voters to create pathways that favor one or another outcome." Issacharoff, *supra* note 29, at 595.

Schwarzenegger,[178] introduces legislation requiring California, and only California, to implement an independent redistricting commission.[179] The idea would be that by breaking Democratic congressional incumbents' hold on their seats, Republicans would stand greatly improved chances of picking up seats within the remarkably static California delegation.[180] Both doctrine and precedent under the Equal Protection Clause would support such a move. In fact, precisely this kind of targeting by the Voting Rights Act was upheld in *South Carolina v. Katzenbach*:[181] "The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name. . . . In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary."[182] If the coverage criteria are rationally related to the evil that Congress seeks to remedy, they are permissible;[183] it does not matter that similarly situated states might be excluded.[184]

The primary limitation on this model of partisan-motivated selective application is the overall limitation on congressional power under Section 5 of the Fourteenth Amendment imposed by *City of Boerne v. Flores*. If *Boerne* were read to require state-specific findings and documentation of pervasive unconstitutional action by each state

178. *See* Broder, *supra* note 126, at A16.

179. Plainly, if the electoral positions were reversed, the political incentives would be the same, or even stronger, for Democrats to behave in an identical manner toward a gerrymandered, Republican-tilting state such as Texas.

180. In the 2004 elections, no incumbents in California's congressional delegation lost. *See* Charlie Cook, *Why Are Most House Members Unbeatable?*, 37 NAT'L J. 59, 59 (2005), *available at* http://www.cookpolitical.com/column/2004/010805.php (noting that, outside Texas, only three incumbents failed in their reelection bids—one each from Georgia, Illinois, and Indiana). Only two of fifty-three California congressional races were close by historical margins—that is, won with less than 55% of the vote. *House Members Who Won with 55% or Less*, COOK POL. REP., Dec. 6, 2004, *available at* http://www.cookpolitical.com/races/report_pdfs/2004_house_55_dec6.pdf.

181. 383 U.S. 301 (1966).

182. *Id.* at 328.

183. *See id.* at 330 ("[T]he coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies . . . .").

184. *See id.* at 330–31 ("It is irrelevant that the coverage formula excludes certain localities . . . for which there is evidence of voting discrimination by other means. . . . Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience.").

individually,[185] Congress's ability to manipulate the implementation of the proposed reform by singling out certain states would be significantly constrained, assuming the present existence of a partisan gerrymander in any given redistricting cycle was in itself insufficient evidence of "a history and pattern of unconstitutional [state action]."[186] If the lowered standards for Section 5 enforcement associated with fundamental rights are applicable in this context,[187] however, or if congressional finding of the existence of a partisan gerrymander sufficed to meet the documentary requirements, *Boerne* would not present an independent barrier to selective application of the reform, even though enacted with partisan, rather than reformist, intent. Moreover, if the legislation were constitutionally justified under one of the other bases for action discussed above, *Boerne* itself would simply be inapplicable.

CONCLUSION

Partisan gerrymandering inflicts significant political and constitutional harms on the voting public by decreasing representative responsiveness through diminished electoral competitiveness and by diluting the franchise for some voters because of their political affiliation. In some states, generally those with popular referendum mechanisms, these harms have been lessened or avoided through the adoption of independent redistricting commissions. These experiments with redistricting processes have provided several promising models for reducing partisan bias in redistricting outcomes without entirely sacrificing the benefits of a politically adversarial process. The spread of independent redistricting commissions to nonreferendum states is limited, however, by the very self-interested parties that the commissions seek to control: the state legislative majorities currently in control of the redistricting process. Moreover, the courts have largely refused to police effectively the actions of state legislatures in producing partisan gerrymanders, having failed, at least for the moment, to conceptualize the harms these district maps perpetrate against the

185. Justice Scalia has advocated this position in his dissents to decisions upholding congressional abrogation of state sovereign immunity under Section 5. Tennessee v. Lane, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting); Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 741–43 (2003) (Scalia, J., dissenting).

186. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

187. *See supra* Part III.C.

constitutional rights of individual voters in a way that provides a manageable standard for evaluating plaintiffs' claims. In recognizing that such constitutional harms do exist, however, even if the courts cannot precisely describe them, the Supreme Court has opened the door for congressional action on a remedial or prophylactic basis. As this Note argues, Congress would be normatively and constitutionally justified in walking through that door by requiring states to adopt independent commissions as the primary mechanism for redistricting following the decennial census. Although no national political consensus now exists that would support passage of such legislation, congressional action of this nature may yet address the harms posed by partisan gerrymandering.