University of Michigan Journal of Law Reform

Volume 38

2005

The Case for Federal Anti-Gerrymandering Legislation

Brian O'Neill
University of Michigan Law School

THE CASE FOR FEDERAL ANTI-GERRYMANDERING LEGISLATION

Brian O'Neill*

Partisan gerrymandering is a political tradition the United States can no longer afford. Due in part to the effects of partisan gerrymandering, very few congressional elections are meaningfully competitive. This Note argues that partisan gerrymandering damages both the quality of American democracy and the federal system of the United States. This Note concludes that the important federal interests at stake warrant action by Congress to halt partisan gerrymandering. The Note further concludes that any action by Congress should incorporate the principles of federalism by resisting the temptation to micromanage and Congress should instead require state commissions to draft the boundaries of congressional districts.

I. INTRODUCTION

The U.S. Constitution states that the federal legislature shall be chosen by "the People of the several States."[1] However, the Elections Clause grants states the power to regulate the "Times, Places and Manner" of congressional elections, subject to the power of Congress to "make or alter such Regulations."[2] The Constitution gives states the ability to undermine the people, but names Congress as the protector of the people's right to vote for House members.

Recent trends show Congress failing in that duty. In the 2002 congressional election, the major parties left eighty seats uncontested,[3] the average margin of victory was the highest in fifty years,[4] and 373 of the 377 incumbents who stood for reelection won.[5] More than eighty percent of incumbents won in landslides—garnering sixty percent of the vote or more.[6] All fifty-three members of the

* A.B. Princeton University, 2002; J.D., University of Michigan, 2005. Thanks are due to Professor Daniel Halberstam for assisting the author with this Note and to Professor Ellen Katz for introducing the author to voting rights law. This Note is dedicated to Katherine Vestal and the author's family, without whom this Note would not exist.

1. U.S. CONST. art. I, § 2, cl. 1.
2. *Id.* § 4, cl. 1.
3. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 195 n.52 (2003).
4. *Id.* at 182.
5. *Id.* at 187.
6. Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196, 1202 (2004) [hereinafter *A New Map*].

California House delegation were returned to Washington in 2004.[7] Statistics like those recently led Justice Stevens to conclude that "[a]mple evidence demonstrates that many of today's congressional representatives owe their allegiance not to 'the People of the several states' but to the mercy of state legislatures," which secure such results through partisan gerrymandering.[8]

State elected officials exercise significant influence on who gets elected to Congress.[9] For example, in Michigan, though the state only lost one seat to reapportionment, the state legislature was able to pit three pairs of Democratic incumbents against one another and give seven Republicans safe seats.[10] Democrats would have needed fifty-eight percent of the statewide vote to garner a majority of the delegation.[11] Pennsylvania Republicans did even better: they forced two sets of Democratic incumbents to run against one another, while pitting a Republican incumbent against a Democratic incumbent in a heavily Republican district.[12] Congress has the power to limit such state influence,[13] and it should.

---

7. *See* Adam Nagourney, *States See Growing Campaign for New Redistricting Laws*, N.Y. TIMES, Feb. 7, 2005, at A19.

8. Veith v. Jubelirer, 541 U.S. 267, 327 n.24 (2004) (Stevens, J., dissenting) (quoting *A New Map*, *supra* note 6, at 1202).

9. The precise extent of the influence of gerrymandering is debatable, at least as an empirical matter and on a national basis. *See* Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence for Incumbent Protecting Gerrymanders*, 116 HARV. L. REV. 649, 658–67 (2002). Persily offers a brief and useful explanation of arguments that the influence of gerrymandering is small, though not insignificant. These include the interesting observation that the data on incumbent reelection—which show high rates—are skewed by the choices of weak incumbents not to run. *Id.* at 659. There are clearly many factors in high incumbent reelection rates: better fund-raising, better political skills, better connections in the community, publicity, political pork, the well-known ability of elected officials to solve bureaucratic problems for their constituents, and leadership. Faced with an entire fifty-three member delegation returned to office, however, empiricism withers and other explanations lose comparative significance. Moreover, of all the factors influencing incumbent reelection, only gerrymandering permits of a simple solution devoid of constitutional problems (as opposed, for instance, to campaign-finance reform). In fact, many of the other "advantages" simply result from doing a good job in office; clearly election law should not discourage good representation. This Note will argue that the problem to be remedied is really the appearance of illegitimacy that partisan gerrymandering creates, and that the illegitimacy follows partly from the diminution of the barriers between state and federal government.

10. Hirsch, *supra* note 3, at 205. One indicator of safety was that "[o]n average, 79% of the constituents in the Republican incumbents' new districts were also constituents in their prior districts, as compared to only 51% for Democratic incumbents' new districts." *Id.*

11. Charles S. Bullock III, *Redistricting: Racial & Partisan Considerations*, *in* LAW & ELECTION POLITICS: RULES OF THE GAME 151, 165 (Mathew J. Streb ed., 2005).

12. *A New Map*, *supra* note 6, at 1203.

13. U.S. CONST. art. I, § 2.

Congress should use its power to limit state influence because partisan gerrymandering diminishes the quality of representation in the House and makes House election results dependent upon control of state government.[14] That latter effect both contravenes the original conception of federalism and diminishes the ability of voters to choose differing state and federal policies. This Note therefore argues that gerrymandering of congressional districts harms federalism and that federalist principles justify congressional intervention to separate state legislatures from the congressional districting process. It also argues, however, that federal control over the details of districting would be problematic, and that Congress should therefore leave the mechanics of the separation to the states. Part II of this Note will explain gerrymandering and the current state of the law. Part III will examine the harm to federalism caused by partisan gerrymandering from two angles: the intentions of the founders and the functional harms. Part IV will discuss the possible justifications for federal intervention, focusing on the ability of Congress to forge a political consensus for the nation and to enforce fundamental rights. Part V will discuss the possibilities of both judicial and congressional action, concluding that the judiciary cannot act, that Congress should, and that the congressional response must employ the principles of federalism. Part VI will summarize various state responses to the problem and propose language for a statute that would force states to take action. Finally, Part VII will conclude that congressional action is justified and should be federalist in nature.

II. THE DEFINITION AND TRADITIONAL HARM OF GERRYMANDERING

Congress mandates that states carve electoral districts for each seat allotted to the state from the 435 available seats in the House of Representatives.[15] The drawing of these districts, commonly

14. State redistricting, of course, is also fodder for gerrymandering. It, however, exceeds the scope of this Note.

15. 2 U.S.C.A. § 2c (West 2005):

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no

called "districting," does not begin with a blank slate. The process takes place against the backdrop of a varied nation with enormous states of small populations, large, politically uniform urban areas, and urban areas starkly divided by politics. In some areas, turnout is routinely high, while in others it is routinely low. All of these variations create bias in the electoral process.[16] Common sense indicates that drawing a district leaning to the Republicans in San Francisco would be quite difficult, while drawing a district leaning to the Democrats might be difficult in Kansas. Districting will clearly not be the most significant factor in determining who wins a district in a great many places.

But what about the larger, less homogenous areas? They present elected officials with an opportunity to handicap the opposition. Gerrymandering officials employ numerous tactics: combining large portions of two incumbents' districts into one; "packing" the maximum number of citizens who consistently vote for one party in the same district, thereby eliminating their influence elsewhere; and "cracking" a large block of partisan voters into many districts, thereby diluting their influence by spreading it everywhere.[17] In general, employment of such tactics is called "gerrymandering" after Elbridge Gerry, the Massachusetts governor who presided over the first notably bizarre and overtly partisan districting.[18]

The damage caused by such activity is difficult to define and depends largely on the concept of politics employed in the analysis. The belief that competition within electoral districts is essential will yield a different definition of the harm than the belief that proportional representation on a statewide basis is valuable. The Supreme Court previously accepted the latter belief and approved districting plans designed to eliminate competition and to provide a fair allocation of political power.[19] When allocations have been challenged as unfair, the Court has adopted an equal protection analysis.[20]

---

district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress.

16. *See generally* Hirsch, *supra* note 3, at 179, 194 (describing "distributional bias").

17. *Id.* at 194.

18. David L. Anderson, Note, *When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante*, 42 STAN. L. REV. 1549, 1550–51 (1990).

19. *See* Gaffney v. Cummings, 412 U.S. 735, 752 (1973) (upholding a districting plan that "attempted to reflect the relative strength of the parties in locating and defining election districts").

20. *See* Davis v. Bandemer, 478 U.S. 109 (1986).

Generally speaking, that is where the law stands today.[21] In *Davis v. Bandemer*, a plurality of the Court found that "unconstitutional 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."[22] The allegation is essentially that one group is given greater power at the expense of another, leaving the other in the political wilderness.[23]

An illustration may prove helpful. In a hypothetical state of 400 Democrats and 500 Republicans distributed into four districts of 100 Democrats and 125 Republicans each, no Democrats are likely to be satisfied with their representative because Republicans will win every seat. But, if Democrats controlled the districting process, the lines could be drawn to create two districts with 200 Democrats and twenty-five unhappy Republicans. The harshest gerrymander would produce three Democratic districts. Under that gerrymander, Republicans would be understandably irate that they, as a group, have not gained control of a majority of the legislative seats, though they are a clear majority of the population. Thus, the prevalent understanding of the harm is that it is "partisan vote dilution," and hence an equal protection problem.[24] It is, however, one with a unique standard of proof: consistent degradation of participation in the "political process as a whole."[25]

Not only is that standard extraordinarily high, but equal protection doctrine is also not particularly apt in the partisan gerrymandering context.[26] Its elements are essentially not provable, at least in the strict doctrinal way that the Supreme Court has analyzed the problem. Proof of an equal protection violation requires two elements: discriminatory effect and discriminatory intent.[27] Defining the effect is difficult because the affected are an amorphous and constantly shifting group.[28] Each election forms new groups.

---

21. *See* Veith v. Jubelirer, 541 U.S. 267 (2004) (failing to overturn *Bandemer* in a plurality decision).

22. *Bandemer*, 478 U.S. at 132.

23. *See id.* at 110 ("The claim is whether each political group in the State should have the same chance to elect representatives of its choice as any other political group . . . .").

24. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 604 (2002) (discussing how this conception of the harm caused by partisan gerrymandering arose).

25. *Bandemer*, 478 U.S. at 132.

26. Racial gerrymandering is different because race is an immutable characteristic.

27. Washington v. Davis, 426 U.S. 229, 239–41 (1976) (discussing the intent requirement of equal protection claims).

28. *See* Issacharoff, *supra* note 24, at 603 (noting that American political parties lack membership requirements and that their support is therefore only truly revealed in election results).

Further, "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line."[29] Each election is different, as is each candidate. Even in the most heavily gerrymandered district, "the political party which puts forward an utterly incompetent candidate will lose."[30] The group harmed—for purposes of equal protection analysis—is always shifting, never certain.[31] For the purpose of politicians engaged in gerrymandering, of course, this is manifestly not the case because politicians would not bother to gerrymander otherwise. But, the law is more exacting.[32]

The second element—intent—also presents a substantial impediment to judicial review of redistricting. Intent is difficult to determine for an entire legislature. Furthermore, the degree of intent is ambiguous: "Does it mean, for instance, that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc. . . . ?"[33] Though the "predominant intent" test advanced by Plaintiffs in *Veith v. Jubelirer*,[34] the Supreme Court's most recent redistricting case, came directly from the Court's racial gerrymandering jurisprudence, its utility in partisan gerrymandering cases is significantly lower because political considerations are legal, "root-and-branch a matter of politics."[35]

Given the above difficulties with applying equal protection to gerrymandering, a plurality of the *Veith* Court condemned the entire enterprise of policing redistricting as too nebulous:

> While one must agree with Justice Breyer's incredibly abstract starting point that our Constitution sought to create a "basically democratic" form of government . . . that is a long and impassable distance away from the conclusion that the judiciary may assess whether a group (somehow defined) has achieved a level of political power (somehow defined) com-

29. Veith v. Jubelirer, 541 U.S. 267, 287 (2004).

30. *Id.*

31. *See id.* ("These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy." (citing Davis v. Bandemer, 478 U.S. 109, 156 (1986) (O'Connor, J., concurring in judgment))). *But see Veith*, 541 U.S. at 327 (Stevens, J., dissenting) ("Gerrymanders necessarily rest on legislators' predictions that "members of certain identifiable groups . . . will vote in the same way." (quoting Mobile v. Bolden, 446 U.S. 55, 87 (1980))).

32. *See Veith*, 541 U.S. at 287.

33. *Id.* at 285.

34. *Id.*

35. *Id.*

> mensurate with that to which they would be entitled absent *unjustified* political machinations (whatever that means).[36]

Thus, it concluded that the judiciary lacks sufficient authority to protect such an "abstract" political principle.[37] Nevertheless, the court agreed that "partisan gerrymanders [are incompatible] with democratic principles."[38]

Because the Supreme Court has chosen not to solve the problem, Congress must step into the breach, or the states must reform themselves, if the problem is to be solved at all. The question then is what conception of democratic principles and democratic processes provides the soundest basis for addressing the problem. One of the principles of American democracy is federalism, and a federalist analysis of gerrymandering yields insights into both the nature of the problem and the potential solutions.

III. THE FEDERALISM HARM OF PARTISAN GERRYMANDERING

A Note recently appearing in the Harvard Law Review entitled *A New Map: Partisan Gerrymandering as a Federalism Injury* suggests that "state legislatures' current redistricting practices have subverted the Founders' conception of [the] balance of power"[39] between states and the federal government, and that they had damaged the "federalist structure"[40] by the "exercise of state choice."[41] The Note theorized that this exercise of power by state legislatures damages the "constitutional structure of dual sovereignty."[42] Implicitly, it embraces the notion that widespread competitive elections are necessary to prevent harm to federalism.[43] That conclusion, however, leaves a fundamental question unanswered: how is the federalist system supposed to work?

There are two basic ways to answer that question. First, history can provide a guide: federalism is supposed to work as the founders

---

36. *Id.* at 299.
37. *Id.*
38. *Id.* at 292.
39. *A New Map*, *supra* note 6, at 1198.
40. *Id.* at 1209.
41. *Id.* at 1211.
42. *Id.* at 1204.
43. *See id.* Though the Note ostensibly argues that the problem is not lack of voter choice, but rather the exercise of state choice, the former is the inescapable corollary of the latter. *See id.* at 1211.

intended.[44] Second, one might look to the functioning of the system: how does partisan gerrymandering affect the way the voters choose and the government works?

A. The Founders' View

The Founders viewed the House as the bastion of the people in a government otherwise closely tied to the states. They hoped to create an independent federal government by allowing the people to choose their own representatives, as opposed to their Senators and Presidents. Voting rules that give state governments significant control over the partisan balance of their congressional delegation diminish that independence, and hence diminish the federal system as well.

Federal independence derives from the "constitutional structure of dual sovereignty,"[45] which entails direct participation and citizenship in both federal and state governments. Direct elections, however, were initially quite contentious in the Constitutional Convention.[46] So too was their administration. Some delegates favored election "in such manner as the Legislature of each State should direct" because the state legislatures can "accomodate [sic] the mode [of election] to the conveniency & opinions of the people."[47] Further, one argued that state responsibility would "avoid the undue influence of large Counties which would prevail if the elections were to be made in districts as must be the mode intended by the Report of the Committee" and allow disputed elections to be resolved locally.[48] Others, including Alexander Hamilton, opposed that position as a severe weakening of the federal government.[49] The discussion ended inconclusively when a delegate "moved that the 1st. branch be elected by the people in such mode as the Legislatures should direct" and "waved it on its

44. What, if any, importance should the intentions of the founders have in constitutional interpretation or resolution of federalism issues generally is not a question that can be answered here, though it will be addressed obliquely in the following sections. Their opinions are certainly worth exploring, however, even if only because so many people believe them to be important.

45. *A New Map*, *supra* note 6, at 1204.

46. Various delegates advocated both legislative choice and direct election. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 74–81 (Ohio Univ. Press 1966) (1840).

47. *Id.* at 166 (comments of General Pinkney).

48. *Id.*

49. *Id.* at 166–67 (comments of Alexander Hamilton).

being hinted that such a provision might be more properly tried in the detail of the plan."[50] The discussion shows concern that election by the people not be degraded, tempered with pragmatic concerns regarding how such elections would work. The final language of Article I reflects both concerns by granting the right to choose to the people and delegating the logistics to the states.[51]

The grant of congressional power to overrule state decisions on elections answers Hamilton's concern that the federal government not be weakened.[52] That grant of power goes straight to the heart of the whole federalist enterprise. It shows the eventual triumph of those who wished for a federal government with independent significance—one that did not in every respect depend on the states for its identity.[53] Madison feared that choice of representatives by state legislatures would place "too great an agency of the State Governments in the General one."[54] Hamilton agreed.[55]

But, why did they want to separate the two governments? Two answers seem most important: (1) opposition will ensure freedom; and (2) the federal government will ameliorate the effects of faction.

State governments could limit the federal government to its proper sphere. Indeed, Hamilton thought state governments would combat the federal. He wrote in Federalist No. 26 that:

> [T]he State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.[56]

---

50. *Id.* at 168 (comments of General Pinkney).

51. U.S. CONST. art. I, § 4, cl. 1.

52. MADISON, *supra* note 46, at 166–67 (comments of Alexander Hamilton).

53. Whereas the powers of the federal government are independent, its identity would be compromised if all federal officers and representatives were appointed by state governments.

54. MADISON, *supra* note 46, at 75 (comments of James Madison).

55. *A New Map*, *supra* note 6, at 1200 ("State influence . . . could not be too watchfully guarded ag[ain]st.").

56. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1515 (1994) (quoting THE FEDERALIST No. 26, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

Far from anticipating cooperation to further entrenchment, Hamilton anticipated confrontation, even open war. Madison shared his view.[57] The tension between the governments, however, was not an evil; rather, these men believed such tension guarded against the "improper" use of power by the federal government.[58]

Perhaps more importantly, federal government could mitigate the dangers inherent in small republics like the states. Both Madison and Hamilton saw excessive state power as destructive to the fledgling union.[59] Madison feared the excesses of democracy, especially in the states.[60] He sought a remedy for "diseases most incident to republican government,"[61] including factional strife and minority oppression. He found a partial remedy in federalism, which he viewed as fundamental to the preservation of liberty.[62] Thus, he asked of the Constitutional Convention: "Was it to be supposed that republican liberty could long exist under the abuses of it practised [sic] in some of the States."[63] Separating the state and national governments would corral faction by forcing state factions to compete in the national arena.[64] For federalism to successfully mitigate the effects of faction, however, the Constitution had to prevent capture of the federal government by the states: Congress needed the power to overrule manipulative state election laws that could allow the ruling party to continue in power

57. *See* THE FEDERALIST No. 46, at 266 (James Madison) (Clinton Rossiter ed., 1961):

> The same combinations . . . would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other . . . . A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.

58. Kramer, *supra* note 56, at 1515 (quoting THE FEDERALIST No. 26, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

59. *See id.*; *see generally* MADISON, *supra* note 46.

60. THE FEDERALIST No. 10, at 52 (James Madison) (Clinton Rossiter ed., 1961).

61. *Id.*

62. MADISON, *supra* note 46, at 75–77. Indeed, Madison found in federalism the cure for the excesses of democracy. He argued that: "[t]he friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice," but that federalism "provides a proper cure for it." THE FEDERALIST No. 10, at 45 (James Madison) (Clinton Rossiter ed., 1961). In Madison's view, federalism would regulate faction, and thereby preserve liberty.

63. MADISON, *supra* note 46, at 76.

64. THE FEDERALIST No. 10, at 48 (James Madison) (Clinton Rossiter ed., 1961) (arguing that faction "will be unable to execute and mask its violence under the forms of the Constitution" because of the greater numbers of citizens under the federal government, and the mediating role of Congress).

in perpetuity. Otherwise, manipulation of congressional elections would magnify the power of faction in Congress.

The warnings of the Anti-Federalist author "Brutus" have peculiar and ironic resonance here.[65] "Brutus" took exception to Article I, Section 4 in particular because it could operate in an anti-democratic fashion. He worried that "[b]y this clause the right of election itself, is, in a great measure, transferred from the people to their rulers."[66] Once entrenched, "[r]easoning with [Congress] will be in vain," and the people "will then have to wrest from their oppressors, by a strong hand. [sic] that which they now possess, and which they may retain if they will exercise but a moderate share of prudence and firmness."[67] Even more despairingly, he claimed that "[w]hen a people once resign the privilege of a fair election, they clearly have none left worth contending for."[68] Brutus eloquently identified the risks of entrenched federal power. But, they apply equally well to states.[69]

Later developments augmented the sense of separation articulated by the Federalists. To a degree, the very existence of the Seventeenth Amendment argues for a constitutional policy of separation between the state legislatures and the federal government.[70] The founders favored state legislative choice of Senators "because it helped them sidestep what Madison described in Federalist No. 37 as the 'arduous' task of 'marking the proper line of partition, between the authority of the general, and that of the State Governments.'"[71] The Seventeenth Amendment turned the tenuous line of partition between governments into banishment by mandating the direct election of Senators.[72]

---

65. Brutus, *To the People of the State of New-York, in* 2 THE COMPLETE ANTI-FEDERALIST 382 (Herbert J. Storing ed., 1981). Brutus was the pen name of an unknown anti-ratification author during the constitutional debates.

66. *Id.* at 386.

67. *Id.* at 387.

68. *Id.* at 386.

69. The phenomenon of partisan redistricting is not merely due to the actions of state politicians, as the recent redistricting of Texas illustrates.

70. *See* U.S. CONST. amend. XVII, § 1:

> The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

71. THE FEDERALIST NO. 37, at 234 (James Madison) (Jacob E. Cooke ed., 1961) (*quoted in* Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 680 (1999)).

72. U.S. CONST. amend. XVII, § 1.

The intentions of the founders seem clear both from their debates and the text of the Constitution: the federal and state governments were to oppose one another.[73] Their whole notion of citizenship in the nation and direct national governance depended upon maintaining an appropriate separation between state and federal government—a separation that included the independence of the House from the states. The Madisonian purpose of the federal government is to control faction, and it cannot fulfill that purpose without independence. To the extent that state legislatures' gerrymandering efforts violate that independence by prearranging with their parties who will represent the various districts, gerrymandering therefore violates a fundamental principle of federalism.

Based on that principle, the drafters of the Constitution reasonably relied upon the self-interest of House members to protect the independence of the House and upon the Senate to moderate that self-interest. But, history proved the Founders wrong in this, as in so many other things.

B. The Party System

What the founders could not have anticipated was that the self-interest of Congressmen would run the other way. History quickly proved the "Federalist" conception of federalism unrealistic, and "within a short time, an established group of national leaders with popular support existed alongside state politicians."[74] Congressmen now depend on state politicians for protection from the people, and they do so without consequence because of the party system: political parties minimize the distinction between federal and state control of elections. The early emergence of political parties proved the "simple 'us/them' division implicit in the vision of the Federalist Papers" wrong.[75]

Two functions of political parties are of particular importance: "first, parties offer tangible aid to help candidates get elected; second, parties provide a fraternal connection among officials that helps expedite the day-to-day affairs of governing."[76] These func-

73. *See generally*, Kramer, *supra* note 56, at 1510–11 (discussing the interests of congressmen).

74. *See* Kramer, *supra* note 56, at 1518.

75. *Id.*

76. *Id.* at 1528.

tions link levels of government, with national political parties helping state candidates, and vice versa.[77]

Such entanglement complicates the understanding of gerrymandering: bare state legislative control cannot be reasonably alleged because state politicians are part of a larger system. But clearly, party loyalty has caused state politicians to abuse the power granted to them by the Constitution.

The drastic change occasioned by the rise of partisanship argues that the opinions of the framers be accorded less weight. History has proved the founders' assumptions mistaken; hence, their conclusions must be suspect. Further, originalism derives its force from the notion that "[t]he Constitution was intended by the founding generation to be not only lex legum, a law of laws, but also lex immutabilis, unalterable law, unless changed by the amendment process."[78] The historical concept of governmental independence, however, is not easily located within any particular clause of the Constitution: instead, finite components of that concept are scattered all over the Constitution. The concept exists only interstitially—between and amongst the finite provisions. It appears only in action—in the workings of the government. Thus, it cannot be lex immutabilis. Moreover, the Framers did not expect it to be. After all, they expected conflict.[79] That is not to say original intent has no force in delimiting acceptable districting, only that it is not dispositive; functional effects must be considered as well.

C. The Functional Harms of Partisan Gerrymandering

More significant than history is the gerrymander's effect. Partisan control of the redistricting process has significant effects on government: (1) decreased quality of federal representation; (2) bundled state and federal policy decisions for the voter; and (3) diminished accountability. But, a fourth consideration is that partisan gerrymandering may also allow more people to be represented by *their* party.

1. Decreased Quality of Representation—The Supreme Court has acknowledged representational harm in the context of racial

77. *Id.* at 1529.

78. Henry Paul Monaghan, *Symposium: Doing Originalism*, 104 COLUM. L. REV. 32, 34 (2004).

79. *See, e.g.*, THE FEDERALIST NO. 46 (James Madison).

gerrymandering.[80] In *Shaw v. Reno*, the Court invalidated a redistricting scheme that threatened to skew representatives' priorities.[81] The Court found the two districts at issue so bizarrely shaped that their drawing was "unexplainable on grounds other than race" and that the districting therefore violated equal protection.[82] Justice O'Connor described the injury:

> When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.[83]

Veith v. Jubelirer provided the Court an opportunity to apply that principle to partisan gerrymandering as well.[84] In his dissenting opinion in *Veith*, Justice Stevens compared the effects of racial and partisan gerrymandering. Justice Stevens noted that "[t]he parallel danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all."[85]

Thus, gerrymandering frees representatives to pursue their own interests over their constituents'.[86] "In this sense, incumbency advantage works much like increasing the length of a representative's term of office," or the granting of a monopoly.[87] These effects relegate nearly all competition to the primary, where the incumbent possesses still other advantages.[88] Partisan gerrymandering accordingly has severe antidemocratic effects, and state legislatures cause them. That makes it a federalism problem.

2. Bundling—Additionally, policy consistency across federal and state levels engendered by the party system renders the distinction

80. Shaw v. Reno, 509 U.S. 630 (1993).
81. *Id.* at 643.
82. *Id.*
83. *Id.* at 648.
84. 541 U.S. 267 (2004) (Stevens, J., dissenting).
85. *Id.* at 330.
86. Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL. 653, 675 (1988).
87. *Id.*
88. *Id.* at 677.

between national and local irrelevant in many ways.[89] In a regime of partisan gerrymandering, voting for the favored state party diminishes the probability of success for the favored federal party whenever those parties differ.[90] Partisan gerrymandering thus bundles numerous policies—from international relations to the sales tax, from Indian Gaming to environmental regulation—into a single vote. If the voter's choice for state legislature renders it more difficult to elect a federal representative favoring high defense spending (or any uniquely federal policy), that voter has lost something. The Federalist system is designed to separate those choices.[91]

3. Accountability—Extreme partisan gerrymandering also frustrates the ability of voters to hold representatives accountable. Where gerrymanders seek to protect incumbents above all else, they frequently move large numbers of voters into new districts. Thus, those voters have no opportunity to voice their disapproval of the representation they received: the representative has moved on to greener pastures—voters that already approve of his or her policies.[92] This is the corollary of diminished quality of representation.

Accountability, though, is a principle value of federalism. In *New York v. United States*, the Court struck down part of a federal law that would have required states to take title to waste not disposed of within the requisite period of time.[93] The Court feared that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[94] With gerrymandering the harm is the converse: federal officials suffer because of state elections. The critical principle of the case is

89. Kramer, *supra* note 56, at 1529.

90. The bipartisan gerrymander—where the parties agree to create safe seats for all—is a different problem. See Richard H. Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 63–64 (2004) (providing a fuller explanation of the nefarious effects of the bipartisan gerrymander).

91. Clearly, there is some overlap in policy where both governments operate, but where certain activities—like environmental regulation (itself a controversial federalism issue), national defense, and international relations—are either strongly influenced by or are the exclusive province of the federal government, the voter suffers some harm in diminished choice because of gerrymandering. Additionally, the increased power of state legislators in party politics may improve their ability to harness the federal government to uniquely state ends. Gerrymandering may also therefore pose a threat to horizontal federalism—the division of responsibilities and powers between the state and federal governments.

92. *See generally* Hirsch, *supra* note 3, at 212–13 (discussing the criterion of accountability among other redistricting criteria).

93. *See* New York v. U.S., 505 U.S. 144, 169 (1992).

94. *Id.*

that federalism precludes insulation from the "electoral ramifications" of decisions.[95] The critical point against gerrymandering is that it "threatens a core tenet of democratic legitimacy: accountability to shifting voter preferences."[96]

4. Increased Contentment With Representation—There is, however, an important countervailing consideration to the above arguments: if voters do not have defined policy preferences, and instead vote based on party affiliation, then the federalism harm may not matter to them. Because the would-be "political monopolist" governing the redistricting process "relies on barriers defined by the aggregation of consumer preferences themselves" [97] to gerrymander his or her party into greater power, the "packed" get the representation they want, even if they do not receive proportionate power in the House. On the other hand, "cracked" voters are left completely dissatisfied. The high number of landslide victories in congressional elections suggests that there is more packing than cracking.[98]

Identifying this form of representation as the principle value—not of federalism, but of democratic government—relegates the act of voting to a mere means of legitimating a predetermined outcome. The overall desirability of such a system hinges on whether or not a competitive election is desirable because of its beneficial effects: unbundling of policies, higher responsiveness, and the opportunity to hold individual representatives accountable for the quality of representation they provide. It also depends on whether or not a competitive election is necessary as a matter of fundamental rights, regardless of its practical implications for representation.

IV. THE FEDERAL INTERESTS

The federalism detriments and (lone, but not insignificant) benefit of partisan gerrymandering only begin the discussion. The next logical question is "who solves the problem?" The federal government's power to act is not self-justifying, however explicitly grounded in the constitutional text. Further, there is nothing

95. *See id.*

96. Issacharoff, *supra* note 24, at 600.

97. Ortiz, *supra* note 86, at 676.

98. There is also this to consider: voters may not care about their representative per se. Instead, they may merely care about their party's representation in the House. The resolution of this potential controversy is beyond the scope of this Note.

about the functional effects of gerrymandering that renders states incapable of solving the problem. In fact, several states have tried, as will be discussed in Part VI. Thus, federal action cannot be justified as the default position, but it can be justified by the federalism harms caused by partisan gerrymandering. Harm to the quality of representation of any one state is a matter for the whole nation. So too is the fundamental right to vote.[99]

A. Quality of Representation

The federal government is uniquely suited to protecting its own legitimacy. The allocation of responsibilities enshrined in the Constitution implies as much. For instance, each house has the responsibility of judging the disputed elections of its members.[100] Each house may also compel its members' attendance, set its own rules, and even expel members.[101] The judging function has been used frequently in the House.[102] To protect the national interest in legitimate representation, a Senate subcommittee recounted every vote in the 1924 Iowa Senatorial Election.[103] The Senate also conducted a partial recount in the 1974 New Hampshire Election.[104]

This review power acknowledges mutual interest of every citizen in the legitimate representation of all. To the extent that basic principles of federalism require the separation of state government from the federal, failure to maintain separation threatens the legitimacy of the House as a representative body. The legitimacy of any one state's congressional delegation is a national matter because every state's citizens will naturally want the federal government to be legitimate: an unrepresentative delegation could taint the entire legislative process, and tainted laws affect all citizens. Furthermore, Congress can achieve a national political consensus about what legitimate representation requires far more easily than fifty state

99. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . .").

100. U.S. CONST. art. I, § 5, cl. 1.

101. *Id.* at cls. 1, 2.

102. ANGIE WELBORN, HOUSE CONTESTED ELECTION CASES: 1933 TO 2000, vii (Susan Boriotti & Donna Dennis eds., 2003).

103. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 242 (Robert C. Clark et al. eds., rev. 2d ed. 2002).

104. *Id.*

governments, though the House as an institution has little incentive to do so. Nevertheless, as a matter of capacity, Congress is better suited to address the issue than the many states.

B. Fundamental Rights and Nationhood

There is something more to the allocation of the power of determining legitimacy to the federal government than mere expediency or consensus building. That something may be behind the Guarantee Clause of Article IV. That clause entrusts to the federal government the maintenance of the republican government of each state,[105] suggesting at least that the framers believed that Congress's judgment about basic democratic principles should have broad application. But why?

One reason is that federal action to protect rights might be necessary for national economic and social cohesion.[106] Certain basic rights are central to the American concept of the United States as a nation, and violation of these rights by individual states has in the past caused considerable turmoil. After the Civil War, Jim Crow, and the passing of both, it now appears that the federal government is the primary guarantor of rights.[107] Thus, as a historical matter, the efficacy of federal involvement to secure important or fundamental rights is amply displayed. As a Constitutional matter, the federal government is not just a guarantor of rights, but is also somehow the source of rights: the Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[108] Citizenship in the United States provides distinct rights that Congress enforces.[109] The principle suggested by the Guarantee Clause is magnified by the Fourteenth Amendment.

---

105. U.S. CONST. art. IV, § 4. Just as the Commerce Clause, U.S. CONST. art. I, § 8, cl. 8, allows Congress to bind the nation together economically, so to does the Republican Form of Government clause permit Congress to bind the nation together in values. *See* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114 (2000) (suggesting that the clause provides a firm basis for rules against malapportionment).

106. *See* Richard E. Levy, *An Unwelcome Stranger: Congressional Individual Rights Power and Federalism*, 44 U. KAN. L. REV. 61, 96–97 (1995).

107. *See generally* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1502–04 (1987) (book review).

108. U.S. CONST. amend. XIV, § 5.

109. *See id.*

As a functional matter, however, the propriety of federal enforcement of fundamental rights is less clear. The problem is that defining the right itself invites dispute. To the extent there is no national consensus, a variety of local solutions could maximize citizen contentment.[110] Because rights are likely to provoke intense feelings, that argument applies even more strongly to rights than to regulations. Furthermore, though suppression of liberty may be less likely in a larger republic, at least by Madison's theory, "[t]he lesser likelihood must be balanced against the greater magnitude of the danger."[111] With the definition and enforcement of rights in the hands of the states, national suppression is less likely.

Thus, there are at least two powerful opposing principles at issue in federal definition and enforcement of fundamental rights: the need to define national values that bind the states and their citizens together, and the desire to maximize contentment with the government. When emotions run high, as they have over rights issues in the past, the opposition has become quite stark.[112]

When the topic is dull, complicated, even esoteric, one might imagine only a small number of agitators clamoring for the imposition of their version of a fundamental right in their own state or in another's. Redistricting is like that—dull, complicated, and most certainly esoteric. Moreover, the predominance of safe districts means that in most districts the majority is probably happy with the party representing them. The system produces the right results for those voters, even if the process is less than exciting, or, indeed, even pointless. Redistricting in a general sense is not an issue integral to the nation's concept of itself.[113] It is therefore a relatively safe issue for the federal government.

Redistricting is a safe issue, but is also still a vital one. Framed differently, redistricting can be seen to implicate fundamental rights that *are* integral to the nation's concept of itself. Professor Samuel Issacharoff asks what would happen if clever districting replaced elections. It somehow seems wrong, even though the results

---

110. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) ("The whole point of federalism (or at least the best reason to care about it) is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking.").

111. McConnell, *supra* note 107, at 1503.

112. One need only recall the fight over school integration to sense the truth of that statement.

113. In fact, there is little reason to think that districted elections are integral to the nation's self-conception.

are the same.[114] Thus, Congress would be right to support the notion that the long campaign culminating in the casting of the ballot is more than merely the means by which voters register their fixed, largely immutable preferences.[115] If one instead views election campaigns as a means of creating preferences, then competition between the candidates assumes immense importance. It is competition that forces candidates to pursue the priorities of voters.[116] Thus, accountability achieved through competition validates the electoral result.[117] Accountability is also one of the bedrock principles of federalism that partisan gerrymandering undermines.[118] Cognizance of the importance of competition "lays the foundation for contesting any idea that there can be 'just' political outcomes independent of the competitive integrity of the electoral process."[119] It provides the basis for a theory of voting that "ties back to the undeveloped original Madisonian understanding of republican government as one that 'derives all its powers . . . from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour.'"[120]

This is a powerful vision of democracy, and apparently one with the endorsement of James Madison, but it is by no means uncontroversial. It has, for instance, been argued that competition will further muddy the choice between the parties.[121] Given that both parties in a competitive election will seek to maximize turnout of their voters, they will seek to define themselves against the other candidate. That objection does not seem compelling. Additionally, competitive districts might produce complete domination by one party of the delegation from an evenly divided state, at least theoretically.[122] But the probability of such an occurrence is intuitively low enough to discard.

---

114. *See* Issacharoff, *supra* note 24, at 613–15 ("The conceptual harm in simply jettisoning elections is that the concept of 'fair' representation has no meaning outside an appropriately competitive electoral process.").

115. *See id.* at 616–17 (terming the concept of fixed political preferences "dated").

116. *See id.* at 615 ("The key to this approach is to view competition as critical to the ability of voters to ensure the responsiveness of elected officials to the voters' interests through the after-the-fact capacity to vote those officials out of office.").

117. *Id.*

118. *See supra* Part II.

119. Issacharoff, *supra* note 24, at 617.

120. *Id.* (quoting THE FEDERALIST No. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961)).

121. *See, e.g.*, Persily, *supra* note 9, at 668–69.

122. *See id.*; *see also* Veith v. Jubelirer, 541 U.S. 267, 358 (2004) (Breyer, J., dissenting) (noting that small shifts in electoral preferences can conceivably produce large shifts in

Thus federal involvement is justifiable to enforce a right to some level of competition in elections as well as a concept of legitimacy of representation.[123] Federal intervention is preferable to separate state actions because suffrage, however defined, is a fundamental right.[124] That right should be actuated by the same principles from state to state throughout the nation in furtherance of national unity.

V. FEDERAL ADMINISTRATION OF A SOLUTION

Assuming gerrymandering causes some harm to federalism, and that the federal government has some justification for undertaking the solution of the problem itself, rather than leaving gerrymandering to the states, then the natural question is this: what will the solution entail? Generally, there are two possibilities: congressional action or a judicial doctrine creating a fundamental right to electoral competition.

A. Judicial Enforcement of the Fundamental Right to a Competitive Election

Unlike reform by Congress, reform by the judiciary has no inherent legitimacy. Thus, it must follow by interpretation from existing law and vindicate some extant right—in this case the right to electoral competition. But, the federal interest in eliminating partisan gerrymandering implicates a conception of the right to vote that the Supreme Court has never endorsed. The hope that it will do so is vain. Exactly why such hope is futile merits examination because the

---

party representation). *But see* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1683 (1993) (arguing that "the votes-to-seats inquiry masks a subtle departure from the premises of district-based elections," namely, that the possibility of disproportional representation for political parties is inherent in single-member district elections).

123. Determination of the requisite degree of competition is beyond the scope of this Note. It should, in any event, be left to the states for reasons discussed later in this Note. *See infra* Part V.

124. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

Court is so often seen as "charged with the evolution and application of society's fundamental principles."[125]

As discussed in Part II, the Court conceives of gerrymandering in equal protection terms: the injury is not to the federal system or to the individual voter, but to the voters as loosely affiliated, constantly fluctuating groups.[126] The harm is a "consistent degradation" of the afflicted group's political influence.[127] Though federal intervention could be based on a view of the harm as an affront to federalism—functionally or historically—the Court is nowhere near defining such a right.

In fact, no detailed description of the right to vote can be found in the Court's precedent, though it has tackled some aspects of voting.[128] With *Baker v. Carr*, the Supreme Court introduced the concept of equal representation, a concept derived from the clear mandate of equal protection.[129] The Court's finding in that case that a challenge to the allocation of state legislative seats to the various districts of Tennessee was justiciable led almost inexorably to *Reynolds v. Sims*, in which the Court pronounced the now familiar "one man, one vote" principle.[130] But, its vote equality jurisprudence is largely mechanical and inflexible. Thus, in *Karcher v. Daggett*, the Court invalidated a districting plan with a disparity of less than one percent between the most and least populous districts.[131] The Court's failure to articulate the foundation of the "one man, one vote" principle led to an opinion that "describes the injury in circular terms, substitutes general paeans to individualism for concrete doctrinal analysis, and defines equality in a rigid mechanical way."[132] The Court's inflexibility derives from its unwillingness to dive into the heart of the problem and articulate a theory of voting. The absence of such a theory has "reduced [the

125. JOHN HART ELY, DEMOCRACY AND DISTRUST 43 (Harvard University Press 1980) (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 55 (2d ed. 1962)).

126. *See Veith*, 541 U.S. 267.

127. *See* Davis v. Bandemer, 478 U.S. 109, 132 (1986) ("[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."). *See generally* Issacharoff, *supra* note 24, at 602–04 (discussing the problematic nature of the harm as conceived by the Court).

128. *See* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411, 1415 (2002) (discussing the Court's failure to articulate a broad theory of voting rights).

129. *See* Baker v. Carr, 369 U.S. 186 (1961).

130. 377 U.S. 533 (1964).

131. *See* Karcher v. Daggett, 462 U.S. 725, 728 (1983).

132. Gerken, *supra* note 128, at 1415.

Court] to asserting that population deviations cause an injury because they depart from the principle of one person, one vote," or, in Justice Harlan's words, repeating the "tautology that 'equal' means 'equal.'"[133] When confronted with the novel idea of measuring equality by the probability that an individual vote would affect a subsequent policy decision, the Court "merely asserted that the personal right to vote is a value in itself,"[134] thereby effectively separating voting from any theory of democratic decision making. The right to vote in a competitive election is not waiting to be discovered in the Court's jurisprudence.

Thus, the Harvard Note's suggestion that the Court should base a right to electoral competition on *U.S. Term Limits v. Thornton*[135] and *Cook v. Gralike*[136] is unpersuasive.[137] In *Thornton*, the Court struck down an Arkansas constitutional amendment that imposed term limits on congressional representatives.[138] Noting that choice of representatives is one of the "most sacred parts" of the Constitution,[139] the Court concluded that states cannot impose regulations that "dictate electoral outcomes . . . favor or disfavor a class of candidates, or . . . evade important constitutional restraints."[140] In *Gralike*, the Court held that the state's power to regulate the "time, place, and manner" of congressional elections does not include mandating disclosure of candidates' position on term limits on the ballot.[141] The impetus for the litigation was Article VIII of the Missouri Constitution, which mandated that the legend "Disregarded Voters' Instruction On Term Limits" appear on the ballot next to the names of candidates opposed to the term limits for congressional representatives presented therein.[142]

Neither case is rooted in a detailed analysis of what it means to vote, and neither can be easily applied to partisan gerrymandering. Gerrymandering is complicated and "empirical evidence cannot support so strong a claim as assigning to the gerrymander exclusive

133. *Id.* at 1430 (quoting Reynolds v. Sims, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting)).

134. *Id.*

135. 514 U.S. 779, 782–85 (1995) (holding that states cannot vary the constitutional qualifications for representatives by imposing term limits).

136. 531 U.S. 510, 515 (2001) (holding that states do not have the power to require that candidates' positions on term limits be noted on the ballot).

137. *See A New Map*, *supra* note 6, at 1208–13.

138. *See Thornton*, 514 U.S. at 782–85 (1995).

139. *Id.* at 795 (quoting Powell v. McCormack, 395 U.S. 486, 534 (1969)).

140. *Id.* at 833–34. *See also A New Map*, *supra* note 6, at 1209–11 (discussing both *Thornton*, 514 U.S. at 779, and *Gralike*, 531 U.S. at 510).

141. *Gralike*, 531 U.S. at 515.

142. *Id.* at 514–15.

or even primary responsibility for the electoral prowess of incumbents."[143] Moreover, gerrymandering is not the last word on a candidate, unlike term limits. In *Gralike,* the Court repudiated "a regime in which a state officer—the secretary of state—is permitted to judge and punish Members of Congress for their legislative actions or positions."[144] But, in *Gralike* the state attempted to interfere with the voters' deliberations in the voting booth because of a specific policy position. That situation is quite distant from the political jockeying of partisan gerrymandering: gerrymandering punishes the opposite party for being the opposite party, not individual legislators for their stances on individual issues. Therefore, even without consideration of contrary precedent, the extension of *Thornton* and *Gralike* to ban partisan gerrymandering is not viable.

If the problem of partisan gerrymandering cannot be solved by the Court's current doctrines, it should not attempt to resolve the problem at all.[145] Any judicial solution would create its own federalism problems by diminishing incentives for state level legislative action. Courts harm democracy when they act too quickly to address grievances that can otherwise be solved through legislation. Moreover, that harm becomes a federalism harm because a single notion of legitimacy—the Court's—supplants all others. There is no legitimacy to that usurpation of power because partisan gerrymandering cases call upon courts to "make decisions based on highly political judgments—judgments that courts are inherently ill-equipped to make."[146] Experience also shows the folly of judicial intervention. The one instance where a federal court overturned an election system because of its partisan effects starkly reveals the judiciary's incompetence in the political field. Immediately after the Fourth Circuit held that the ability of North Carolina Republicans to contest judicial elections had been unconstitutionally

143. Issacharoff, *supra* note 24, at 626.

144. *Gralike,* 531 U.S. at 517 (quoting Gralike v. Cook, 191 F.3d 911, 922 (8th Cir. 1999)).

145. In an alternative universe in which *Baker,* 369 U.S. at 186, and *Reynolds,* 377 U.S. at 533, espoused a comprehensive conception of the right to vote, the principles therein could be employed to end partisan gerrymandering. But they did not.

146. Holder v. Hall, 512 U.S. 874, 894 (1994) (Thomas, J., concurring); *see also* Issacharoff, *supra* note 122, at 1686:

> Without a discrete group on whose behalf the courts must assess the outcome fairness of the political process, judicial review threatens to become an unprincipled exercise in which judges fashion the election structures to suit their fancy or, worse, the fancy of the political powers that delivered them to judicial office.

infringed, Republicans swept the state, including the judicial elections.[147]

B. Congressional Action

In confronting gerrymandering, Congress has two alternatives: legislate standards for the states to use in districting or draw the lines itself. Direct participation by Congress is hardly an alternative, since the result will simply be gerrymandering by Congress rather than gerrymandering by the states. Congress could, however, establish an independent agency for congressional districting.

With the ability to take a prophylactic approach and ignore such issues as harm to particularized individuals or identifiable groups, Congress could create an agency tasked with drawing politically competitive districts based on data from past elections. Political isolation would ensure that it operated independently of the politicians its work impacted. That alone might be sufficient. An independent federal commission that drew district boundaries on *any basis* would eliminate the historical federalism problem and one of the key elements of the functional problem—linking federal and state choices. The key point is that the state legislature no longer be involved so that voters can chose state legislators unconstrained by any impact that choice will have on their federal representation.

Enforcing any detailed congressional scheme, however, raises federalism problems because of the diversity of interests and situations. For instance, districts shaped on the basis of competition inevitably would sometimes be quite bizarre. One might imagine that San Francisco would have to be divided into multiple districts that would meander throughout California picking up Republicans to balance the Democrats packed into the city proper. If the single-member districts do not actually correspond to anything cognizable to the population, then there would appear little reason to use them in a system where competition is paramount.[148] That a

147. *See* Issacharoff, *supra* note 24, at 604 (discussing *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992)).

148. There are many potential systems of voting that would enshrine competition as the paramount value. One such system would entail a multimember district. Several candidates competing for fewer spots might well produce a lively debate that enhances citizen participation in government in some fashion. Another plan might be to list voting on a statewide basis. Cumulative voting would also work, and it would provide the added benefit of allowing voters to express the intensity of their preference. Districted elections do, however, have

bizarrely-shaped district might pose a problem raises the prospect that competition should not be the sole goal of a districting system. Additional goals might include creating a community of interest in order to encourage citizen participation (one of the virtues of federalism);[149] they might also include creating blocks of racial minority influence under *Georgia v. Ashcroft*.[150] Suddenly, the situation is quite complex.

To contain the problem of bizarre shapes and to address other goals, the agency might use traditional districting criteria—municipal and county lines, natural features, visual compactness, and contiguity. In other words, it would ideally use the things that demarcate community in everyday life to describe the boundaries of maximally competitive political communities. That would require the federal government to delve deeply into the political identities of 435 districts.

Consequently, the federal effort to create competitive districts would run head-long into three of the principle justifications for federalism: resentment of intervention by remote powers, responsiveness to diverse preferences, and experimentation.[151] Federalization of congressional districting could engender resentment because it diffuses the power citizens have over how their political "community" is constituted. In fact, the political separation of redistricting through an independent agency would eliminate local power completely, and only by eliminating the agency or its independence could they reclaim that control. Under state regimes, voter control of congressional redistricting is greater

---

the virtue of helping create "two broad-based, relatively centrist parties," which consist of groups that have coalesced before the election. Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 694 (2002).

149. McConnell, *supra* note 107, at 1510 (discussing "public spiritedness").

150. 539 U.S. 461 (2003) (upholding disaggregation of minority voting power in a districting plan that created numerous districts of minority influence and reduced the number of districts of minority dominance).

151. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). According to the Court:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous [sic] society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id.; *See generally* McConnell, *supra* note 107, at 1491–511 (discussing the advantages of federalism, including the fulfillment of diverse preferences, experimentation, and increased involvement in the democratic process).

because it is not mediated through Congress.[152] The change would be especially drastic in states with occasional plebiscites on such matters, such as California.

A related concern is that, even within the band of legitimacy defined by Congress, different geographical communities will have varying goals for "their" districting. The federal government would find it difficult, if not impossible, to accurately process diverse preferences.[153] A meaningful congressional policy would have to provide uniform goals for the whole nation, inevitably leaving some communities with sub-optimal districting. In contrast, state level control would be more efficient because it provides fifty different sets of districting priorities to fulfill the preferences of "The People."

A further result of uniform standards is the suppression of experimentation. To the extent that federalism devolves responsibility it encourages innovation.[154] Because the most satisfactory methods cannot be known ex ante, experimentation would be essential to a successful reform movement. Though decentralization provides the benefits of experimentation,[155] it cannot easily accommodate divergent normative goals.[156] A viable national redistricting scheme should incorporate a level of flexibility that would be implausible in a merely decentralized system.

Based on those concerns, the preferable federal role is to mandate separation of state legislatures from the process of redistricting. Congress could also require the use of some districting criteria that

---

152. Though this control has federalism consequences only so long as it is mediated by the legislature, if it were mediated by an elected or appointed districting commission, one with responsibility only for districting, there would at least be no linking of state and federal policy choices.

153. McConnell, *supra* note 107, at 1493–94.

154. *See generally id.* at 1499–500.

155. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 923–25 (1994) (describing how decentralization can promote experimentation).

156. *See id.* at 923. According to Rubin and Feeley:

> [T]he Supreme Court and the commentators can argue in favor of federalism when they mean decentralization because the general absence of normative variation in the United States has made the two concepts functionally equivalent. If our federal system in fact provides opportunities for voice, options for exit, or economic efficiency, the reason is that every sub-unit of our federal system shares that goal. But this lack of variation makes federalism vestigial; it is simply decentralization in fancy clothes, and the rights that it grants to each state protect little more than their own continued existence.

Id. Decentralization works when the central authority can use experimentation to find the best method of achieving its goal. It can then implement that method broadly.

will make gerrymandering more difficult, such as compactness,[157] or the absence of which will make gerrymandering obvious, like respect for municipal boundaries.[158] That will resolve much of the federalism problem with representation while capturing the benefits of federalism in the actual process of drawing the lines.

Unfortunately, it will not resolve the political problem. As noted in Part III, political parties link all levels of government. The problem of political capture is general: the two parties have captured American government and divided the spoils between them. Federal politicians collude with state legislatures in their redistricting chicanery. The most recent and flagrant example of such collusion came from Texas in 2003, when United States House Majority Leader Tom DeLay engineered the passage of a new redistricting plan by the Texas Legislature.[159] However desirable redistricting reform may be from the federalist perspective, politicians have no incentive to enact it.

VI. STATE SOLUTIONS AS GUIDEPOSTS

Popular campaigns for change, however, might provide impetus for a legislative solution to the partisan gerrymandering problem. Numerous state campaigns for reform are building momentum, and several states have already enacted some type of independent districting process.[160] There is some momentum for change, and states with plebiscites, like California, can circumvent captured state governments. In 2001, Arizona voters passed a constitutional amendment changing the process of districting for state and federal elections.[161] Twelve states—including Arizona—have enacted some alternative to a bare-knuckled political brawl over redistricting their state legislative districts; six states have done the same for their congressional districts.[162] As happened with the Seventeenth

157. *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 90–91 (1985) (discussing the effect of a compactness criterion on districting).

158. *See id.* at 118 (listing various indicia of gerrymandering, including "[u]nnecessarily disregarding city, town, and county boundaries in drawing district lines").

159. *See* Charles Babington, *Hey, They're Taking Slash and Burn to Extremes!*, WASH. POST, Dec. 21, 2003, at B01.

160. *See* Adam Nagourney, *States See Growing Campaign for New Redistricting Laws*, N.Y. TIMES, Feb. 3, 2005, at A1.

161. *See* David K. Pauole, Comment, *Race, Politics & (In)Equality: Proposition 106 Alters the Face and Rules of Redistricting in Arizona*, 33 ARIZ. ST. L.J. 1219 (2001).

162. NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING COMMISSIONS AND ALTERNATIVES TO THE LEGISLATURE CONDUCTING REDISTRICTING (2004), *available at*

Amendment, cumulative state changes could politically force the federal government to act.[163] Any federal solution, however, would almost surely have to permit the state solutions already enacted, which can provide valuable guidance in the drafting of a statute mandating some sort of independent commission.

A. Existing State Plans

Several states already use commissions of various kinds for congressional districting.[164] Iowa's plan has been particularly successful. The plan directs a legislative staff agency to create a politically neutral plan: "[s]pecifically, the Iowa Code provides that districts shall not be drawn to favor any political party, an incumbent legislator or member of Congress, or any other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group."[165] Beyond that, the law requires populations in each district "as nearly equal as practicable to the ideal district population" and that "[t]he number of counties and cities divided among more than one district . . . be as small as possible."[166] It also stipulates that "[i]t is preferable that districts be compact in form," though it subordinates that interest to the others.[167] This plan is approved or rejected by the legislature and only corrective amendments are allowed.[168] Competition is mentioned nowhere in the law, and consideration of political factors is expressly prohibited.[169] Nevertheless, Iowa accounted for ten percent of the nation's competitive congressional elections in 2002, though

---

http://www.ncsl.org/programs/legman/redistrict/com&alter.htm (on file with the University of Michigan Journal of Law Reform) [hereinafter *Redistricting*].

163. *See generally* Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 708–11 (1999) (describing a buildup of popular sentiment).

164. These states are: Arizona, Hawaii, Idaho, Indiana (fallback commission), Montana, New Jersey, and Washington. For brief descriptions of their systems, see *Redistricting*, *supra* note 162. This Note considers only the plans used by states with the most numerous congressional delegations.

165. IOWA GENERAL ASSEMBLY—LEGISLATIVE SERVICES BUREAU, LEGISLATIVE GUIDE TO REDISTRICTING (Dec. 2000) (citing IOWA CODE § 42.4(5)), *available at* http://www.legis.state.ia.us/Central/LSB/Guides/redist.htm (on file with the University of Michigan Journal of Law Reform).

166. IOWA CODE § 42.4(1)–(2) (2003).

167. *Id.* § 42.4(4).

168. If the first plan is rejected, then the legislative staff prepares another. If this too is rejected, then the third plan prepared by the staff may be amended. *Id.* § 42.3(1)–(3).

169. *Id.* § 42.4(5).

it elects barely one percent of Congress.[170] The results show this formulation to be worthy of emulation.

Arizona's recent reform offers other alternatives. Arizona's districting is the product of a five-person commission, of which no more than two members may belong to the same political party.[171] No member may have been a candidate for office in the prior three years or be a paid lobbyist.[172] The law requires: compactness; respect for "communities of interest"; use of geographical features, cities, and counties as borders (when practical); and competitiveness, "where to do so would create no significant detriment to the other goals."[173] In other words, competition is the least favored goal. Further, the Arizona scheme also precludes the use of political data—party registration, voting history, etc.—in the initial drafting of the plan.[174] Perhaps because competition is not the principal focus of the plan and political data is excluded from consideration, the 2004 results from Arizona[175] show a significant number of landslide victories in House races.

Washington uses a plan similar to Arizona's in most material respects.[176] However, it uses a different formulation of the competition goal: "[t]he commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition," and there is no prohibition on using political data.[177] Importantly, unlike Arizona, Washington does not make competition a subordinate consideration, and of Washington's nine congressional districts, at least one had a close election in 2004, with fifty-two percent to forty-seven percent split.[178]

New Jersey uses a vastly different plan. It features a bipartisan commission consisting of twelve appointees and one nonpartisan

---

170. See Issacharoff, *supra* note 147, at 693. This may be an artifact of Iowa's relatively small size. There are only so many ways to reasonably draw districts in a small state.

171. ARIZ. CONST. art. IV, pt. 2, § 1(3). *See also* Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 ARIZ. ST. L.J. 575, 578 (2003) (reviewing qualifications for service).

172. ARIZ. CONST. art. IV, pt. 2, § 1(3).

173. *See* ARIZ. CONST. art. IV, pt. 2, § 1(14).

174. *Id.* § 1(3).

175. *Elections 2004—Arizona*, WASHINGTONPOST.COM, Nov. 24, 2004, *at* http://www.washingtonpost.com/wp-srv/elections/2004/az/ (on file with the University of Michigan Journal of Law Reform).

176. For instance, four members of the five member commission are appointed by party leaders in each house. The four then choose a chairperson. WASH. REV. CODE ANN. § 44.05.030 (West 1998).

177. *Id.* § 44.05.090.

178. *U.S. President—Washington*, WASHINGTONPOST.COM (2004), *available at* http://www.washingtonpost.com/wp-srv/elections/2004/wa/ (on file with the University of Michigan Journal of Law Reform).

commissioner chosen by the political appointees.[179] In the past, the commission's "tie-breaking members have taken an overtly political—but consciously balanced—approach to the inherently political task of redistricting," that has successfully avoided partisan gerrymandering, but succumbed to the allure of the bipartisan gerrymander.[180]

Another possible variation was recently proposed by California Governor Arnold Schwarzenegger, whose plan would entrust redistricting to retired judges.[181] Such a plan would likely eliminate the influence of party operatives and the possibility of a bipartisan gerrymander. Depending on how the judges are appointed, however, the plan could also eliminate the accountability of the panel, which presents another problem.

Considering these plans, three salient points arise: (1) how congressional districts account for existing communities is important, (2) states have already elected several different methods of creating a map, and (3) states differ as to whether or not political data may be considered in drawing the map. The diversity between them reinforces the need for a federalist approach. But, it also highlights the need for federal normative standards: the diversity may in fact be too large, especially in view of New Jersey's tendency to enact bipartisan gerrymanders.[182]

B. A Federal Statute

Any federal statute designed to reduce gerrymandering should encourage further innovation by the states both to find the most expedient means of limiting political influence and to find the right balance between competitiveness and partisan fairness. But, it should also make bipartisan gerrymandering difficult in those states—like Arizona—that use a largely bipartisan commission. A statute fulfilling such ends might read:

> Each state shall empower a board, commission, or other entity to create a redistricting plan delineating the districts required

179. N.J. CONST. art. II, § 2(1)(b)–(c).

180. Hirsch, *supra* note 3, at 215.

181. John Fund, Editorial, *Arnold v. Gerry: Schwarzenegger takes on the incumbent-protection racket*, WSJ.COM, Feb. 7, 2005, *at* http:// http://www.opinionjournal.com/diary/?id=110006260 (on file with the University of Michigan Journal of Law Reform).

182. Hirsch, *supra* note 3, at 214–15.

> by 2 U.S.C.A. § 2c. The members of such entity shall be chosen in a manner defined by state law, except that no elected or party official shall serve on the entity. Such entity: shall consider compactness; shall not divide counties and municipalities, where reasonably possible; shall utilize municipal lines, county lines, and natural barriers wherever reasonably possible to demarcate some or all of the boundaries of congressional districts; and shall consider such other factors as each state may designate. Each redistricting plan shall comply with the provisions of the Voting Rights Act, 42 U.S.C. § 1973.

Specifying how the commissions would be structured would be both unduly restrictive and unnecessary: it would be politically impossible to structure a commission to increase partisan domination of the process. Further, the proposed statute would make gerrymandering more difficult by making it hard to draw the bizarre shapes successful gerrymandering entails but otherwise preserves the states' flexibility. The proposed statute also avoids the problem of litigating the definition of compactness by not making it mandatory. Instead, it invites litigation over the definition of "reasonably possible" and the potential division of county lines. No statutory mandate will ever avoid litigation unless it abandons its purpose and imposes no restrictions on the states; all that can reasonably be hoped for is to limit litigation to a few finite issues. A great many formulations might do so while providing guidance and flexibility to states, and the above example is merely one.

VII. CONCLUSION

Partisan gerrymandering presents a serious harm to the federal system, both as originally conceived and as a matter of its present functioning. The partisan gerrymander places "too great an agency of the State Governments in the General one," in the words of James Madison.[183] Direct rule over the people and a direct dependency on the people are the foundation of the federalist system. Gerrymanders that undermine that foundation risk upsetting the edifice of federal government, turning directly elected senators into the people's counterweight to the parties. In functional terms, gerrymanders combine with the party system to make it difficult for

183. MADISON, *supra* note 46, at 75.

the people to elect differing policy choices on the state and federal levels. They diminish responsiveness and accountability. In short, the gerrymander degrades democracy.

The remedy for that problem is federal intervention, however implausible it seems. Such intervention is partly justified by its process: Congress can forge a national consensus about how to constitute itself. Such a consensus would vindicate the national interest in the legitimacy of the House of Representatives as a body. Furthermore, the federal government has a legitimate interest in galvanizing the nation with unifying principles. One such principle may be the value of electoral competition. But, there are other principles too.

Any federal remedy, however, should itself accord with the principles of federalism—experimentation, fulfillment of local preferences, and the desire for local control. To that end, it should afford the states flexibility in crafting measures that fulfill their citizens' preferences. Each state could then balance its desires for stability, partisan fairness, and competition. The paramount objective of any federal reform should be to ensure that voters can make separate decisions for state and federal elections and that such a decision follows a balanced districting process.

The absence of such a process has greatly diminished the competitiveness of House elections. In the 2002 election, roughly half of all U.S. Senate and gubernatorial elections were decided by ten points or less, while less than ten percent of House races were decided by such a margin.[184] Worse still, some of those "competitive" elections were themselves the products of redistricting.[185] State legislators are severely limiting the ability of citizens to choose their federal representatives. This limitation accords with neither the principles of democracy nor the principles of federalism. Reform is in order.

184. Hirsch, *supra* note 3, at 183.

185. *See id.* at 188–89 (discussing particular races).