POLITICAL GERRYMANDERING AFTER *LULAC V. PERRY*: CONSIDERING POLITICAL SCIENCE FOR LEGISLATIVE ACTION

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I. Introduction

In a recent lecture, Professor of Politics Paul Herrnson noted the obtrusive nature of gerrymandered districts, likening them to jetties that hinder the flow of the waves of democracy.[1] Such an image is disconcerting not only for those who study political science, but also for the American polity. To most citizens, redistricting seems to be a normal function of democracy: It happens every so often, appears in the news, and then goes unnoticed for most of the decade. Yet political gerrymandering may be increasing in frequency and has significant consequence for the American political system. More specifically, political gerrymandering, at the state level, is a dangerous threat to the composition of Congress and American democracy.

Gerrymandering, or malapportionment, is one political party's alteration of district lines to dilute the voting power of the other party. There are two kinds of malapportionment in the United States which are treated differently when addressed by courts: gerrymandering along racial lines and gerrymandering along political lines. Racial gerrymandering—drawing a district to disenfranchise voters based on their ethnicity or race—has a well-developed body of jurisprudence, and its own body of federal law.[2] In sharp contrast is the murkier practice of political gerrymandering—attempts to disenfranchise individuals based on

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[1] Paul Herrnson, Professor of Politics, University of Maryland, Lecture before CPOL 674, Catholic University (Sept. 11, 2006).

[2] *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended 42 U.S.C. §§ 1973–73p (2000). *See generally* Frederick McBride & Meredith Bell-Platts, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 327 (2005) (providing a history of racial gerrymandering and the Voting Rights Act in the judiciary); Symposium, *The Promise of Voter Equality: Examining the Voting Rights Act at Forty*, 57 S.C. L. REV. 785 (2006) (providing a historical detail of the Voting Rights Act, and how it was utilized by the courts). Plaintiffs and defendants alike attempt to blur the line between the racial/political division. Due to the existence of legislation and sound jurisprudence concerning racial gerrymandering, plaintiffs tend to present the issue as racial, while a defendant will claim the gerrymandering is political in nature (thus making the courts less likely to take the case). For a discussion of mixing the motives of a gerrymander see Robert Redwine, *Constitutional Law: Racial and Political Gerrymandering—Different Problems Require Different Solutions*, 51 OKLA. L. REV. 373, 393–94 (1998).

their party affiliation. Political gerrymandering is not a novel concept; however, under the current political climate, political gerrymandering is a unique, growing, and often overlooked threat to the democratic process.

The Supreme Court's recent decision in *League of United Latin American Citizens v. Perry*[3] has yet again renewed the national debate about political gerrymandering. The case could not have come at a more critical time. There was a resurgence of fierce partisan redistricting between 2001 and 2003.[4] With the November 2006 elections, state legislatures and governorships have now swung in favor of the Democrats,[5] where before they were mostly in perfect parity.[6] The Democratic Party is now poised to assume control of several state legislatures, after languishing in the minority at the national level for over a decade, and in many states for the past several years. Unfortunately, these inevitable changes in party dominance invite redistricting abuse without clear guidance from the Supreme Court about the constitutional limits of political gerrymandering.

Since the latter half of the twentieth century, the Supreme Court has attempted to respond to political gerrymandering with multiple approaches, considering various laws (e.g., the Voting Rights Act of 1964), and using various constitutional doctrines (e.g., First & Fourteenth Amendments); however, the Court is no further along in resolving political gerrymandering via the United States Constitution than it was over forty years ago. By taking up political gerrymandering cases, the Court has attempted the "most remarkable and far-reaching exercise of judicial power in our history."[7] Yet there is still no discernable standard for judges to apply when determining whether a legislature has drawn a district to disenfranchise a political party. There has been no consensus from the Court even as to when the judiciary can take up political

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[3] 126 S. Ct. 2594 (2006).

[4] CAMPAIGN LEGAL CENTER, REDISTRICTING REFORM CONFERENCE, THE SHAPE OF REPRESENTATIVE DEMOCRACY 3 (June 2005), *available at* http://www.campaignlegalcenter.org/attachments/1460.pdf.

[5] *See* Kirk Johnson, *Democrats Oust G.O.P. in Governing Six States*, N.Y. TIMES, Nov. 7, 2006, at P1.

[6] Kirk Johnson, *Democrats are Seen to Gain in Statehouse Races*, N.Y. TIMES, Oct. 31, 2006, at A1.

[7] RICHARD C. CORTNER, THE APPORTIONMENT CASES 253 (1970).

gerrymandering cases—i.e., whether the cases are even justiciable. The Court's lack of clarity suggests that this particular issue may not be well-suited for the judiciary.

The legislature is an obvious alternative to the courts. In particular, the United States Congress is the best conduit for addressing the issue. After all, these federal redistricting schemes affect the members of Congress, and not the members of a state legislature. Congress has put forth reforms aimed at reducing gerrymandering in general; however, these measures have generally stalled. One commentator blames Congress' failure to enact reform on its very nature – its members' individual interests depend upon their gerrymandered home districts.[8]

Yet someone needs to act, and act soon. As will be shown, political gerrymandering has detrimental effects on the political process, such as poor representation of the people of the state, the protection of incumbents and a resulting lack of competitive districts, and the fostering of additional ill-will between the two parties. The last consequence is of particular concern because the national political climate is increasingly polarized, "with concern about extremism at particular junctures."[9] Cooperation between the parties is a long-forgotten memory and the last thing American politics needs today is additional strife between the parties based on redistricting, especially if the redistricting is done out of revenge.

This paper offers a practical and well-grounded solution that Congress should adopt in order to halt the damage caused by political gerrymandering. This paper also considers political science literature on gerrymandering which both the federal courts and the legislature have been reluctant to examine. Part II of this paper puts political gerrymandering in proper context. Parts II.A and II.B discuss the history of redistricting in America, while Part II.C touches on the judiciary's handling of the issue beginning in 1962. Part III brings to light contributions the field of political science offers to the issue of gerrymandering, by

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[8] Ryan P. Bates, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L. J. 333, 368 (2005).

[9] John C. Green & Paul Herrnson, *The Search for Responsibility*, *in* RESPONSIBLE PARTISANSHIP? THE EVOLUTION OF AMERICAN POLITICAL PARTIES SINCE 1950, at 7 (John C. Green & Paul S. Herrnson eds., 2003).

providing a broad overview of the political science community's views on gerrymandering and the limited judicial response. Finally, Part IV provides suggestions for Congress that incorporate lessons learned not only from the past, but from current political science. The benefits of such a proposed course of action are laid out in this part as well.

II. Background of Gerrymandering

A. The Framers and the Constitution

Two sections of the United States Constitution concern redistricting. First is the Elections Clause, which provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[10] With this in mind, the Constitution also requires that the apportionment of the members of the House for each district will occur once every ten years after the national census.[11] These two clauses serve as the baseline Congress and the courts must consider when dealing with excessive political redistricting; they are bare minimums that must always be met, yet can also be built upon by the Congress, the executive agencies, or court jurisprudence.

The deliberations of the Founding Fathers—most notably *The Federalist*, the instruction manual for the Constitution—provide worthy insight into these portions of the Constitution. In answering whether slaves may ever be counted in voting, James Madison explains the Elections Clause in *Federalist* No. 54:

> It is a fundamental principle of the proposed Constitution that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate.[12]

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[10] U.S. CONST. art. 1, § 4.

[11] U.S. CONST. art. 1, § 2.

[12] THE FEDERALIST NO. 54 at 306 (James Madison) (Clinton Rossiter ed., 1999).

Thus, the Founders saw the Elections Clause as a balance of federalism: the federal government controls the *amount* of representatives that come to Washington, but the several states choose the *manner* in which they are chosen.[13]

Taken in context today, the Founders would agree that the number of members in the House can be limited to 435,[14] while the state legislatures determine the borders for each member's district. The Founders identified the federal power as a self-protecting, reactionary power that the federal government can use to check the states in "extraordinary circumstances."[15] Some historians have even described this clause as a reaction derived from the fears of the Founders.[16] If anything, the federalism protections, via the construction of the Elections Clause and the comments in *The Federalist*, show that the Founders had much foresight into the nature of redistricting.

B. Legislative History of Redistricting

The term gerrymander is derived from Elbridge Gerry, who was Massachusetts' governor from 1810 to 1812. A district drawn by his party allegedly resembled a salamander.[17] From then on, American politics had to deal with this "new-mangled" creature, the "Gerry-mander."

Between the founding of the republic and 1962, states had their own redistricting battles and anomalies.[18] Frequent and fierce gerrymandering commonly occurred each time the state

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[13] *See also* THE FEDERALIST NO. 59 at 330 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (noting how the Constitutional Convention could have vested all the election powers in the state or the federal government, but decided to balance the power between the two).

[14] *See* An Act for the Apportionment of Representatives in Congress Among the Several States Under the Thirteenth Census, Pub. L. No. 62-5, 37 Stat. 13 (1911).

[15] THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 13, at 331. Of course, this power can only be used for federal elections. This discussion, out of respect for the doctrine of federalism, does not consider state government elections.

[16] ANDREW HACKER, CONGRESSIONAL DISTRICTING, THE ISSUE OF EQUAL REPRESENTATION 9 (1964).

[17] *See* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 3 (2002).

[18] *See id.* at 96–97; DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 24–26 (1992).

legislatures switched party control in the nineteenth century.[19] Yet the courts did not respond to those instances. Instead, Congress enacted several national standards for redistricting based on factors such as contiguity, compactness, and equality of population.[20] The courts did not take up the gerrymandering issue until the latter half of the twentieth century.[21]

After intervention by the courts, there were redistricting battles; however, they generally came about after the constitutionally mandated decennial redistricting. It was not until the end of the twentieth century that states began to divert from past practices and perform redistricting in the middle of the decade. Besides the increasingly volatile political atmosphere, legal scholars have put forth a few reasons to account for the recent phenomenon of mid-decade redistricting. First, during recent times, Republicans, eager to make use of their new power, have gained seats in state legislatures, which historically were the realm of the Democratic Party.[22] Second, politicians have "become [more] attuned . . . to the potential benefits of redrawing legislative districts more than once per decennial census cycle."[23] Third, there is a recent unification of purpose within the political parties. Previously, incumbents generally desired to leave their districts intact to ensure they remained in office, while the party majority wanted redistricting to tailor seats for the entire party's benefit. A resurgence in party discipline is credited for forcing incumbents to fall in line and accept recent mid-decade redistricting.[24]

The mechanics of redistricting are straightforward as set out in the United States Code.[25] The process begins with the Census

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[19] David M. Halbfinger, *Across U.S. Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1.

[20] BUTLER & CAIN, *supra* note 18, at 96–97.

[21] *See infra* Part II. C.

[22] *See* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 788 (2004). Although the 2006 elections may have this pendulum swinging in the other direction. *See* Kirk Johnson, *In Statehouses, Too, Democrats Post Sizable Gains*, N.Y. TIMES, Nov. 9, 2006, at P1.

[23] A. Cox, *supra* note 22 at 788–89.

[24] *Id.* at 789. Tom DeLay (R-Tex.) was not called "The Hammer" because of his carpentry skills.

[25] *See* 2 U.S.C. §2(a) et seq. (2000).

Bureau, which must give an enumeration of the national population on April 1 at the beginning of each decade. The Constitution provides that each state be allotted one House seat and the census figures are used to determine how many additional seats each state receives.[26] Once each state has its determined amount of seats, the second phase begins and the Census Bureau gives figures to the states at the local/block level. The states then redraw the district boundaries to ensure that districts have equal populations.[27] The second phase is more of a political process[28] and is the only stage used for mid-decade redistricting. If states fail to meet deadlines during this stage, the courts may step in and draw the districts themselves.[29]

During the second phase, political actors in the state legislatures use two primary forms of gerrymandering to gain more seats for their party: the political gerrymander and the "sweetheart" bipartisan gerrymander. The political gerrymander comes about when the party in control of the legislature "draws district lines to maximize its political advantage at the expense of the minority party."[30] The more congenial sweetheart form is when both parties work together to draw districts to protect their incumbents.[31] Both types of redistricting use common methods for redrawing district boundaries. The packing method is used to "lasso in" a neighboring population into a newly-expanded district. These "lassoed" groups are selected for inclusion in a district to strengthen a certain political population in the original district. Cracking, on the other hand, is a method of redrawing a district to divide a certain political population and dilute their presence at the ballot box.[32]

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[26] BUTLER & CAIN, *supra* note 18, at 44.

[27] *Id.* at 44–45.

[28] *Id.* at 45. Some states, however, do not have political actors involved in redistricting and instead use independent commissions. *See infra* notes 33–34 and accompanying text.

[29] BUTLER & CAIN, *supra* note 18, at 45.

[30] Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 258 (2006).

[31] *Id.* at 258–59.

[32] *See* Shaw v. Reno, 509 U.S. 630, 670 (1993) (White, J., dissenting) (delineating various methods of racial gerrymandering).

Legislatures across the country have responded to political gerrymandering in various ways, most of which have failed. Currently, thirteen states have independent commissions to conduct redistricting decennially.[33] The commissions' memberships vary from state to state, but are typically comprised of non-partisan third parties who draw districts for the legislature. Yet these commissions are not as effective as intended. The appointment process is usually politically-influenced and not truly independent.[34]

The mechanics of the redistricting process reflect the power of the state legislatures in this arena. Congress does not have any direct say in the process that impacts how its membership is created; rather, state politicians determine who may or may not go to Congress. State-level politicians are no more accommodating to the other party then their "inside-the-Beltway" counterparts. State legislators have several motives for taking such action. First, these local politicians may run for federal office at a later date; it is in their interest to stack the deck before they leave the state capitol.[35] More obvious is the reason that state legislators have more similarities with their own caucus than the other party.[36]

At the federal level, Congress has intervened occasionally. An early attempt at controlling redistricting included the Apportionment Act of 1842. This Act responded to parties that took advantage of their clout in states with at-large state-wide elections. If a party had an impenetrable majority in the state, it simply meant that it also had the entire delegation from that state. To remedy this issue, the 1842 Act mandated that each state must have equally populated districts and that each district have one representative.[37] Other attempts came in 1872 and 1901, the former stressing equally-populated districts and the latter

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[33] *Developments in the Law - Voting and Democracy*, 119 HARV. L. REV. 1127, 1165 n.27 (2006).

[34] *Id.* at 1169. *But see generally*, Bates, *supra* note 8 (arguing that Congress should require states to have independent commissions).

[35] BUTLER & CAIN, *supra* note 18, at 108.

[36] *Id.*

[37] *See* HACKER, *supra* note 16, at 48–49.

emphasizing the need for districts to be "compact territory."[38] None of these provisions are in effect today.

In 1964, the House of Representatives attempted to enact legislation which would have stripped federal courts' jurisdiction over state redistricting.[39] Later that year, 130 resolutions and bills were introduced to deal with redistricting.[40] Yet from 1980 to 2004, only five bills were introduced to regulate gerrymandering.[41] Today, the 109th Congress has put forth some new options. Both the House and the Senate have bills pending that would limit states to one redistricting a decade after the census.[42] These bills also would require the states to have their redistricting conducted either by an independent commission, the state's highest court, or a U.S. District Court.[43] An additional bill from the 109th incorporated all of these provisions and even created a private right of action for those aggrieved by a state or state actor who does not carry out these provisions.[44]

C. *The Judiciary and Political Gerrymandering*

1. Gerrymandering, Justiciability, and the Constitution

In recent decades, the judiciary, not the legislature, has ordinarily responded to gerrymandering.[45] Both state and federal courts have examined political gerrymandering; however, this paper will focus on the federal judiciary, in particular the Supreme Court. Traditionally, the Supreme Court avoided cases involving gerrymandering. For most of its history, the Court treated the issue as non-justiciable. The Court believed that this

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[38] *Id.* at 49.

[39] *Id.* at 46–47.

[40] BUTLER & CAIN, *supra* note 18, at 28. Such a wave was a reaction to the *Reynolds* case. *See infra* notes 60–65 and accompanying text.

[41] Vieth v. Jubelirer, 541 U.S. 267, 276–77 (2004). *See e.g.*, H.R. 5037, 101st Cong. (1990) (setting forth several standards for creating districts).

[42] *See* H.R. 2642, 109th Cong. (2005); S. 2350, 109th Cong. (2005).

[43] *See* H.R. 2642; S. 2350.

[44] *See* H.R. 4094, 109th Cong. (2005).

[45] BUTLER & CAIN, *supra* note 18, at 28 ("[T]he power to determine the broad approach to redistricting passed from Congress and the state legislatures to the courts. Redistricting history after 1962 has been primarily driven by legal decisions.").

particular topic was not appropriate for the judicial branch due to reasons of prudentiality and efficiency.[46] Specifically, it held that the process of apportionment was political in nature and not meant for judicial intervention.[47] Gerrymandering was seen as a political question, i.e., an issue that, due to the doctrine of separation of powers, was meant only for the legislative and executive branches, not the judiciary (whose duty was to simply interpret the Constitution).[48]

During the 1960s, the Supreme Court developed a revolutionary treatment of the Fourteenth Amendment. The Fourteenth Amendment's Due Process Clause protections, and especially the Equal Protection Clause, were invoked a great deal more when analyzing government regulations found in economic and social welfare legislation.[49] A novel area into which the Court brought the Equal Protection Clause was the realm of Congressional redistricting.

Decided in 1962, *Baker v. Carr*[50] is the keystone case in modern Supreme Court jurisprudence on reapportionment. *Baker* involved a challenge to the Tennessee legislature's apportionment plan. Certain Tennessee voters alleged that the plan was decided in an arbitrary and capricious manner, with no logical formula.[51] The plaintiffs argued that implementing the plan led to a debasement of their votes and therefore did not give them equal protection under the apportionment law, a violation of the Fourteenth Amendment.[52]

First, the Court held that jurisdiction was not at issue since the plaintiffs in this case alleged a denial of their rights under the

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[46] *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 166 (1803) (determining some actions by the executive branch as political, and thus out of the reach of the judiciary); Cohens v. Virginia, 19 U.S. 264, 404 (1821) (stating that the Court's duty not to usurp power is just as important as its duty to take up constitutional questions).

[47] Colegrove v. Green, 328 U.S. 549, 554 (1946) ("But due regard for the Constitution as a viable system precludes judicial correction.").

[48] *Id.*

[49] *See* JOHN E. NOWAK & DONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4, at 448–450 (7th ed. 2004).

[50] 369 U.S. 186 (1962).

[51] *Id.* at 192.

[52] *Id.* at 187–88.

Constitution.[53] The Court then reasoned that under Article III, section two, the federal judiciary had subject matter jurisdiction.[54] Addressing justiciability, the Court stated that the political question doctrine was not meant to apply to state redistricting.[55] The Court noted previous issues that it properly deemed as inappropriate for the federal judiciary, such as certain foreign relation cases, the validity of a legislature's enacting process, the status of Indian tribes, and who represented the true state government under the Guaranty Clause.[56] The Court explained that the redistricting plan was not related to these types of cases. Instead, the issue was potential violations to a constitutional right which is not political in nature.[57] The Court therefore extended the Equal Protection Clause of the Fourteenth Amendment to allow those allegedly wronged by a redistricting law to bring a justiciable claim in the federal courts.[58] Concluding that all citizens have a right to vote under the Equal Protection Clause, the Court held that this right can not be infringed upon by a gerrymander.[59]

While ruling that vote-debasing gerrymandering had the potential to violate voters' equal protection rights, the Court declined to adopt a standard for lower courts to apply to determine whether a gerrymander has violated the Constitution. Two years after *Baker*, the Court addressed that void in *Reynolds v. Simms*.[60] *Reynolds* involved a challenge to Alabama's reapportionment of state legislative districts, with plaintiffs claiming that it violated both federal and state constitutional rights.[61] In an effort to clarify *Baker* and two subsequent related cases,[62] the Court established the notable "one person, one vote" paradigm that is to apply to all gerrymandering cases that allege a

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[53] *Id.* at 199.

[54] *Id.* at 198–99.

[55] *Id.* at 209.

[56] *Baker*, 369 U.S. at 210–30.

[57] *Id.* at 232.

[58] *Id.* at 237.

[59] *Id.* at 208.

[60] 377 U.S. 533 (1964).

[61] *Id.* at 537.

[62] *See* Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964).

violation of the Equal Protection Clause.[63] In particular, the Court held that "the seats in both houses of a bicameral legislature must be apportioned on a population basis."[64] This requirement was grounded in Article I of the Constitution stating that representatives are to be chosen "by the People of the several States."[65] In essence, the court created a system where redistricting can not create a situation in which one's vote is valued more than another's, especially if the Constitution calls for each individual person to select his representative.

2. Political Gerrymandering

Baker, *Reynolds*, and their progeny[66] addressed malapportionment in general. However, this first wave of gerrymandering cases did not specifically address political gerrymandering. In fact, after *Reynolds* and *Baker*, the Court affirmed various district court decisions that dismissed political gerrymandering cases through summary judgment because they were seen as nonjusticiable under the Equal Protection Clause.[67] During this interim, the Court acknowledged the role of politics and political affiliation when discussing gerrymandering cases, but ultimately made its final decision along other lines, such as finding that the plan resulted in an unconstitutional vote deviation.[68]

In 1986, *Davis v. Bandemer*[69] marked another distinctive alteration by the Court. *Bandemer* gave the Court a formal role in this issue. In *Bandemer*, the Court attempted to determine whether a reapportionment based on political affiliation—i.e., a district

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[63] *Reynolds*, 377 U.S. at 558.

[64] *Id.* at 568.

[65] U.S. CONST. art. I, § 2.

[66] *See, e.g.*, Mobile v. Bolden, 446 U.S. 55 (1980); Rogers v. Lodge, 458 U.S. 613 (1982).

[67] *See, e.g.*, Wells v. Rockefeller, 398 U.S. 901 (1970), *summarily aff'g*, 311 F. Supp. 48 (S.D.N.Y.).

[68] *See e.g.*, Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment."); Karcher v. Dagget 462 U.S. 725, 739 ("We [the Court] have never denied that apportionment is a political process . . . .").

[69] 478 U.S. 109. *See generally* POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman ed., 1990) (collection of essays on *Bandemer* and its impact from a political science perspective).

drawn to disenfranchise a group based on its membership to a certain political party—was justiciable under the Equal Protection Clause. Indiana Democrats brought the case claiming that the Republican-controlled General Assembly passed an unconstitutional redistricting plan that severely altered state districts to give the Republicans greater control of the state capitol.[70] The majority opinion began by stating that it was not bound by its previous summary judgments, which could be seen as preventing the Court, via *stare decisis*, from taking such cases.[71]

The Court then looked at both the nature of the rights asserted by the plaintiffs and the nature of the group. First, the Court held that when one's ability to be represented properly is at stake, the issue can never be nonjusticiable. Because of the "one person, one vote" requirement of the Equal Protection Clause, gerrymandering, even if political, cannot be ignored by the courts.[72] Additionally, the Court held that just because an aggrieved party is a political group does not mean that standing should be denied.[73] Basically, when determining standing, the Court wanted the judiciary to be "politically color-blind." With standing now given for political gerrymandering cases, the Court provided a test for trial courts to use in order to determine whether a political group's Equal Protection Clause rights were violated. The plaintiffs must prove "an intentional discrimination against an identifiable political group," and "an actual discriminatory effect on that group."[74]

In applying this two-pronged test to the case at hand, this plurality decided that no constitutional harm was done; it did not find a "discriminatory effect" on the Democrats. The plurality stated that the plaintiffs needed to show more than a "mere lack of proportional representation" from the suspect plan in order to "render that scheme constitutionally infirm."[75] Instead, the

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[70] *Bandemer*, 478 U.S. at 113.

[71] *Id.* at 121. The Court did not see these summary judgments as having the same weight as a decided case.

[72] *See id.* at 123–24.

[73] *Id.* at 125.

[74] *Id.* at 127 (plurality opinion). The future of this standard, however, would be in question.

[75] *Id.* at 131.

plaintiffs needed to show that their ability to effectively influence the political process had been diminished, which they failed to do.[76] Furthermore, in a challenge to a state-wide redistricting plan, the Court held that the plaintiffs' cause of action "must be supported by 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."[77] In determining this high standard, the plurality did not want to have the threshold be so low that an equal protection claim would arise whenever the state interferes with one's choice as to who should be elected.[78]

3. Recent Developments From the Court on Political Gerrymandering

In dealing with a congressional redistricting plan, the Supreme Court changed course in the 2004 case of *Vieth v. Jubelirer*.[79] The plaintiffs, Democratic voters from Pennsylvania, brought a suit claiming, *inter alia*, that a Republican-passed redistricting plan for the U.S. Congress violated their equal protection rights, as well as the "one person, one vote" requirement found in Article I of the Constitution.[80] In taking up the *Bandemer* test, Justice Scalia, along with a plurality of three other Justices, noted that, when it came to establishing such a test, there was not really a majority of the Court speaking in the 1986 case when the test was given. Instead, only four Justices agreed on the two-pronged test, while the other two Justices used a different test.[81] The *Vieth* plurality also noted troubles the lower courts were having with the test and concluded that since the Court decided *Bandemer*, there was "nothing to show for it [to] justify [] revisiting the question whether the standard promised by *Bandemer* exists."[82] Additionally, the plurality attacked the test by saying that its standards were indeterminate and too subjective.[83] Finding the test

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[76] *See Bandemer*, 478 U.S. at 132–33.

[77] *Id.* at 133 (emphasis added).

[78] *Id.*

[79] 541 U.S. 267 (2004) (plurality opinion).

[80] *Id.* at 272.

[81] *Id.* at 278–79.

[82] *Id.* at 281.

[83] *Id.* at 283.

unworkable, the Court held that neither the Equal Protection Clause nor Article I provided any limits on political gerrymandering.[84]

In all, the plurality found that political gerrymandering should be a political question once again, and therefore nonjusticiable. Also, *Bandemer* was called into doubt because there was no mechanism for the Court to use that can provide either a standard or a remedy for such an alleged constitutional violation. *Stare decisis* was not a concern to this plurality because this was an issue of constitutional interpretation regarding a badly reasoned and impracticable test.[85]

The five remaining Justices all agreed that political gerrymanders should generally remain justiciable. The four dissenting Justices believed that not only were political gerrymanders justiciable but also that the case at hand was justiciable; however, none of the dissenting Justices arrived at a uniform standard to analyze the redistricting plan.[86]

Justice Kennedy wrote a decisive concurring opinion. He agreed with the plurality that the standards from *Bandemer* were not well-suited for overcoming the barriers to determining the occurrence of political gerrymandering; however, he wanted to make it clear that the door on the issue should remain open and the Court should not terminate its handling of political gerrymanders.[87] Justice Kennedy's concurring opinion, therefore, left politically gerrymandered districts justiciable for the courts, but the standard by which to judge the districts remained unclear. There was "no standard by which to measure the burden" a redistricting plan can place on a political classification under the Fourteenth Amendment.[88]

If anything, by not taking up political gerrymandering and abolishing any previous review standards, *Vieth* signaled to the political parties that it would be difficult for federal courts to fix any unfairly altered districts based on political association. The

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[84] *Id.* at 305.

[85] *Vieth*, 541 U.S. at 305–06.

[86] *See id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

[87] *Id.* at 306–10 (Kennedy, J., concurring).

[88] *Id.* at 313–14 (Kennedy, J., concurring).

tone in *Vieth* suggested that the Court did not trust its earlier formulation in *Bandemer*, thus making it seem like *Bandemer* was only a useless nicety. If *Bandemer* was strike one, then *Vieth* was strike two. The Court gave no standards, and the legal community was left guessing as to how the courts would, if ever, deal with political gerrymandering.

Strike three came in the summer of 2006 in the form of *League of United Latin American Citizens v. Perry* (*LULAC*).[89] *LULAC* arose out of a political gerrymandering plan that was the brainchild of Republican House Majority Whip, Tom DeLay,[90] for his home state of Texas. What is novel about this case is that Texas was already redistricted by the courts in 2002.[91] In 2003, after the Republicans gained control of both chambers of the state legislature, the GOP created a new district map.[92] Thus, in 2003, Texas and Colorado[93] were the first two states to successfully perform additional redistricting after the constitutionally required decennial redistricting. The political parties went ahead with mid-decade redistricting because the Court had not yet fully addressed the political gerrymandering issue.

LULAC began in federal district court with the plaintiffs claiming that the newly drawn district map violated the Equal Protection Clause.[94] After several years, the case took an interesting path before it came to the Court for a second time in 2006.[95] The Supreme Court's opinion in *LULAC*, like *Vieth*, did not have a majority. There were six different opinions, with Justice Kennedy writing the plurality opinion. In the end, the Court found a violation of the Voting Rights Act for one of the redrawn districts. With regard to political gerrymandering, the Court had a

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[89] 126 S. Ct. 2594 (2006).

[90] Richard L. Hasen, *Latest Supreme Court Rulings on Election Law May Foreshadow a Far More Conservative Approach*, LEGAL TIMES, July 10, 2006 at 52.

[91] Alison Mitchell, *Redistricting 2002 Produces No Great Shake-Ups*, N.Y. TIMES, Mar. 12, 2002, at A20.

[92] Charles Lane & Dan Balz, *Justices Affirm GOP Map For Texas*, WASH. POST, June 29, 2006, at A01.

[93] *See* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (striking down a mid-decade redistricting plan under the state constitution).

[94] League of United Latin Am. Citizens v. Perry, 457 F. Supp. 2d 716 (E.D.Tex. 2006).

[95] *LULAC*, 126 S. Ct. 2594.

chance not only to put forth a clear standard for the lower courts but also to limit mid-decade redistricting. Unfortunately, it did neither.

The Court gave the green-light to states contemplating a mid-decade redistricting:

> The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own. And if there were, the face of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders.[96]

The Court noted that there was nothing it could see that stood in the way of states redistricting in the middle of the decade.[97] It also tied this lack of a prohibition to the cause of action for political gerrymandering, stating that if a gerrymander happens in the middle of the decade, it does not necessarily mean that it was unlawfully political and violated one's constitutional rights.[98] True, there was never a prohibition against mid-decade redistricting before *LULAC*, but the language of the case gives a clear indication that districts can be redrawn not just when the Constitution requires such action, but whenever the legislature wishes to do so.[99] This message, as will be shown, is a dangerous one.

Yet again, the Court had an opportunity to fix what it faulted in *Bandemer*, but nothing came forth. Only a plurality spoke for the Court with no agreement on the issue of justiciability. Agreement on a standard was even harder to find in the opinion. Further, the decisive position of Justice Kennedy in *Vieth* won out with the newest members of the Court, Chief Justice Roberts and Justice Alito. The door will probably remain open in hope that

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[96] *Id.* at 2610.

[97] *Id.*

[98] *See id.*

[99] *See* Press Release, League of Women Voters, U.S. Supreme Court Opens Floodgates to Partisan Gerrymandering (July 28, 2006), http://www.lwv.org/AM/Template.cfm?Section=Home&template=/CM/HTMLDisplay.cfm&ContentID=5683 (last visited Feb. 17, 2008).

later the Court can find a standard for adjudication of unconstitutional partisan gerrymandering claims.[100]

Finally, it is important to touch on the Court's recognition of the legal fiction of redistricting. Out of necessity, the Court has held that states can operate under the assumption that the decennial redistricting is constitutionally valid until the next required census and redistricting.[101] With Americans currently more apt to moving, it is not safe to assume that a district plan is accurate and representational of the population (especially in a constitutional sense) for a ten-year period. It would be foolish to require a new census and redistricting every year; however, the solution outlined below[102] addresses the reality of the American population better than this attenuated legal fiction.

In all, the Court has not given lawyers and scholars much guidance for dealing with mid-decade political gerrymandering. The evolution from Equal Protection Clause-suspect decennial redistricting of *Baker* to blatantly politically drawn districts,[103] which do not even represent cognizable shapes – in Euclidian geometry, at least – demonstrates that the federal judiciary has taken too long to deal with this pressing issue. While the judiciary has failed to adequately address political gerrymandering, those in academia, in particular political scientists, have written much to shed light on this topic.

III. Of Classrooms and Ivory Towers No Longer: Political Science's Contributions to Political Gerrymandering

It is quite curious that the courts have never really considered political science's contributions when it has come to political gerrymandering. Political scientists have credibly analyzed redistricting for as long as the courts. Perhaps the judiciary's reluctance to incorporate the views of this community stems from

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[100] L. PAIGE WHITAKER, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: CONGRESSIONAL REDISTRICTING: A LEGAL ANALYSIS OF THE SUPREME COURT RULING IN LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) V. PERRY, at 4 (2006).

[101] Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003).

[102] *See infra* Part IV.

[103] *See e.g.*, PETER S. WATTSON, 1990S SUPREME COURT REDISTRICTING DECISIONS (2002), http://www.senate.leg.state.mn.us/departments/scr/REDIST/red907.htm (includes some interesting drawings of oddly shaped districts).

some political scientists' strong criticism of the courts. Also, the courts may not have applied the work of political scientists because the scientists' work generally does not take into consideration the constitutional rights and requirements developed by jurists over the past two centuries. This reluctance is unfortunate, as the contributions of political science are readily available and useful for the legal analysis of gerrymandering.

Most of those who seriously study politics believe that redistricting has not, on the whole, turned out to be advantageous for either the American political system or the institution of democracy. Redistricting impacts the way congressional races are perceived by the parties and the candidates. For example, after a redistricting, one commentator noted that many incumbents retire.[104] Tenured politicians may feel more comfortable passing their seat on if the chances are good that their successor will be a member of their party. The congressional campaign committees are also left scrambling when districts are altered.[105] This effect is especially pronounced if the committee belongs to the adversely affected party.

The data put forth by political scientists backs up this perception. Several studies have shown that when one party controls the state government, there are direct impacts on the district planning and subsequent elections, and thus Congress. Data from the 1970s through the 1980s have yielded evidence "that partisan control and reversionary outcomes systematically affect the nature of a redistricting plan and the subsequent elections held under it."[106] Although such a claim may be obvious without looking at the numbers, it runs counter to previous assessments that partisan control of the process causes only modest differences.[107] In a specific case study, political scientists

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[104] PAUL S. HERRNSON, CONGRESSIONAL ELECTIONS CAMPAIGNING AT HOME AND IN WASHINGTON 38 (4th ed. 2004).

[105] *See id.* at 96 ("Redrawn districts or newly created seats are only two of several factors that complicate the committees' tasks.").

[106] Gary W. Cox & Jonathan N. Katz, *The Reapportionment Revolution and Bias in U.S. Congressional Elections*, 43 AM. J. OF POL. SCI. 812, 834 (1999).

[107] *Id.*

have found that Democratic redistricting directly affected the 1982 elections, giving the party 7.1% more seats.[108]

In the end, however, there is minimal impact from partisan redistricting. Even though *Baker* and its progeny were revolutionary, legally speaking, they did not result in much change politically.[109] The data shows that net gains do not pan out for political parties years down the line.[110] The advantage exists only at the initial stages of redistricting.[111] Additionally, it has been shown that the use of computers in redistricting has not made any significant impact on the gerrymandering process.[112] Even though they increase the speed at which redistricting can take place, it has not yet been proven that computer programs actually improve redistricting plans.[113]

The consequences of all of this data may not be good for the political world. If the effects of redistricting wear out after only a few years, then majorities will seek more redistricting during the decade to sustain any edge initially achieved. The Founding Fathers did not want redistricting to give parties an advantage,[114] and this modern data proves their concerns were valid. As will be discussed shortly, redistricting is meant to assure that the House is responsive to the constituents in each state. Redistricting should not be used, as revealed by political science studies, to benefit political parties.

If partisan gerrymandering does not, on the whole, produce effective results for political parties, the question must be asked: what does political gerrymandering actually produce? Unfortunately, a discernable result from this type of redistricting is simply more partisanship. Bad blood can linger from a redistricting plan well after the redrawing. Moreover, the court

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[108] Richard G. Neimi & Laura Winsky, *The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s*, 54 J. POL. 565 (1992).

[109] COX & KATZ, *supra* note 17, at 209.

[110] BUTLER & CAIN, *supra* note 18, at 8.

[111] Neimi & Winsky, *supra* note 108, at 569, 571.

[112] Micah Altman, Karin MacDonald & Michael McDonald, *How Computing Has Changed Redistricting, in* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 62 (Thomas E. Mann & Bruce E. Cain eds. 2005).

[113] *Id.*

[114] THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 13, at 331.

system, when used to resolve these disputes, serves only as an echo chamber for partisan politics.[115]

The Democratic redistricting of California in the early 1980s illustrates such an occurrence and experts point to it today as a case study of how a party can mold a state so that the other party is shut out of the political process for years to come.[116] Although California is still a Democratic state, the Republicans used the redistricting plan to rally their base in a 1986 attempt to recall three liberal state Supreme Court justices.[117] Also, when an entire party absconds the state to avoid the enactment of a partisan redistricting plan, as in Texas in 2003,[118] the legislature as a whole suffers. Reaching across the aisle can not occur in such an environment.

Another detrimental effect of political gerrymandering is the impact on the American system of government and democracy. Ideally, elections should carry the slogan: "Let the best man win." Realistically, other variables, such as funding and image of the national party, can swing an election one way or the other. Presumably, the playing field for the candidates should initially be even. Yet, recent studies have shown incumbents enjoy a substantial advantage and that competitive districts have been on the decline.[119] This decline can be traced to redistricting, the "recipe for incumbency protection."[120] This elimination of competition harms the political process. The House was meant to be competitive so it could respond to the changes of the American polity. The Founders deliberately designed House elections to be frequent checks by the people on the government, since Senators are only elected every six years and the President every four.[121]

There are three advantages to having competitive districts. First, as previously mentioned, legislatures in a democracy should

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[115] BUTLER & CAIN, *supra* note 18, at 3.

[116] *See* Legislature v. Deukmejian, 669 P.2d 17 (Cal. 1983).

[117] BUTLER & CAIN, *supra* note 18, at 3.

[118] *See Deep in the Heart of New Mexico*, N.Y. TIMES, Sept. 9, 2003, at A30.

[119] Bruce E. Cain, Karin MacDonald & Michael McDonald, *From Equality to Fairness: The Path of Political Reform Since Baker v. Carr*, *in* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 6, 22 (Thomas E. Mann & Bruce E. Cain eds. 2005).

[120] *Id.* at 22–23.

[121] *See* Pildes, *supra* note 30, at 260–61.

be responsive to electoral change. "If the mood or attitudes of voters shift, that should lead to some corresponding change in the share of party - or incumbent-held seats."[122] Second, when there is "sweetheart" redistricting, strong candidates are deterred from opposing incumbents.[123] How can the "best man" win if he is deterred from even throwing his hat in the ring in the first place? The third, and key, reason why competitive districts are needed is because competitive districts promote moderate politics.[124] Redistricting decisions not only suffer from a lack of moderate politics, but they breed further partisanship. Thus, if political gerrymandering is decreased, partisan politics may decline as well—not only because of the inherently political nature of the process, but also because of a rise in competitive districts.

The lesson to take from these studies is not that redistricting is detrimental to democracy, but rather that it needs to be done in moderation. Some in the political science community have posited that redistricting, even if political in nature, increases responsiveness and reduces partisan bias in the electoral system.[125] Yet this position assumes that redistricting is done only once a decade, as constitutionally prescribed.[126] Frequent politically-motivated gerrymandering, on the other hand, does not have the same benefits as limited and fair redistricting.

Political scientists have also commented on what the courts and legal scholars have said about political gerrymandering. There is no schism between the two communities; however, there are differences in how they view each other's work.[127] Most

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[122] Cain et al., *supra* note 119, at 20.

[123] *See* L. Sandy Maisel, Cherie D. Maestas & Walter J. Stone, *The Impact of Redistricting on Candidate Emergence, in* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 31, 33 (Thomas E. Mann & Bruce E. Cain eds. 2005).

[124] *See* Cain et al., *supra* note 119, at 20.

[125] *See* Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541 (1994).

[126] *See id.* at 553.

[127] *See e.g.*, Cox & Katz, *supra* note 106, at 833–34 ("[A]lthough legal scholars were quick to recognize the enormous jurisprudential importance of the [gerrymandering] decisions, hailing them as nothing less than a 'reapportionment revolution,' political scientists have not found that the decisions produced sweeping consequences—other than the immediate consequence of redistricting itself."); Nathaniel Persily, *Judicial Review of the Redistricting Process, in* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 67, 68 (Thomas E.

commentary on the Court's jurisprudence for political gerrymandering has been negative. The first major criticism is that the actual field of jurisprudence has not fully developed on this issue. Despite various opportunities to put forth a clear constitutional standard to determine whether a political gerrymander violates one's rights, the Court has not even come to a consensus as to whether the issue is justiciable.[128] Even those in the legal community have criticized the Court, portraying politics as a thicket that has entrapped the courts.[129]

Political scientists have pointed out that the problem starts with the Court's defining of the issue. Since *Bandemer*, the Court has refused to define what a "political gerrymander" even is.[130] Without giving indicators that can be used to spot a political gerrymander, the Court has already inhibited itself (and the lower federal courts) from properly identifying the issue at the start. Also, the Court has not properly defined what a "political group" is or what constitutes "fair representation."[131] Without defining these key terms, the Court cannot fully address, or even understand, partisan electoral behavior. The Court's faulty approach has been outlined as:

1. Partisan behavior is consistent from election to election.
2. Therefore, voters can be easily classified as group members who tend to vote for their group's candidate most of the time.
3. Therefore, the size of political groups is easily determined by referring to election results.
4. Therefore, the fair representation of groups as well as the denial of fair representational opportunity can be determined simply by comparing the percentage of the vote received by a given group . . . .

Mann & Bruce E. Cain eds. 2005) ("The number of ways to analyze the redistricting case law is limited only by the number and ingenuity of law professors hoping to gain tenure by publishing studies on the topic.").

[128] *See supra* Part II.C.

[129] *See* Bates, *supra* note 8, at 339.

[130] *See* BUTLER & CAIN, *supra* note 18, at 34.

[131] *See* MARK RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR 7 (1993).

> 5. Finally, it is presumed that votes cast for one party in one district have the same meaning as votes cast for the same party in another district . . . .[132]

These faulty assumptions prohibit the Court from performing a proper constitutional analysis. Effective analysis under the Equal Protection Clause requires the Court to adequately define the group that is affected by the law (e.g., women, African Americans, children born out of wedlock). Voters are extremely unpredictable and do not have consistent preferences;[133] therefore, they cannot be placed into a static group, let alone a group with assigned constitutional rights. Even a group that is deemed unified and partisan has its profile transformed as the demographics in the region change from political era to political era.[134] The Court has especially missed the mark with "incomplete and inconsistent appraisals of the voting behavior of individuals and groups."[135] There is no concrete characteristic in the electorate that can give the Court the ability to constitutionally analyze a political gerrymander. In sum, to determine if a certain constituency is denied fair representation, the Court must account for the ever-changing political conditions found at the state-level,[136] which it has not.

Further compounding this problem is that the Supreme Court, by its very nature, is inhibited from properly looking at the gerrymandering issue because, as an appellate court, it can not serve as a fact finder. Plaintiffs and defendants present facts and frame the issues at the district court level. No new voting data can be presented at the later stages. Thus, the Supreme Court, when attempting to solve a gerrymander, bases its decision on data and, more importantly, behavior that predates the litigation.[137] The Court is already an electoral day late and a dollar short, and the new map to be put forth (whether through guidelines or in fact) is faulty due to its inability to reflect the current situation. Additionally, at the trial court level, complications arise with those

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[132] *Id.* at 9.

[133] *See id.* at 126, 141.

[134] *See id.* at 53.

[135] *Id.* at 39.

[136] *See id.* at 125.

[137] RUSH, *supra* note 131, at 135.

who actually wear the robes. Political scientists have suggested that trial judges' own political affiliations have negatively affected the redistricting process.[138]

IV. Recommendations to Solve the Mid-Decade Redistricting Problem

The game has changed because the old rules have been abandoned. It was once thought that mid-decade redistricting would never happen because there would be too much seesawing between the parties.[139] Yet partisanship has led to a modern disregard for political norms, and even the intent of the Founding Fathers. Now the party controlling the local government determines the redistricting cycle, rather than the calendar year.[140] The circumstances surrounding these changes do not suggest that conditions will improve. In the 2006 mid-term elections, Democrats made huge gains claiming the House, the Senate, nine chambers in state legislatures, and six governorships. Fifteen additional states are now completely in Democratic hands,[141] a scenario lending itself to additional mid-decade redistricting. The coupling of this shift in the composition of the local governments with the opening of the floodgates by the Court in *LULAC*, has led some commentators to anticipate "the redistricting festivals [to] begin."[142]

There is a vicious cycle: political gerrymandering leads to an increase in partisan politics, which, in turn, results in more political gerrymandering.[143] The cycle needs to be broken, and the United States Congress is the best branch of government to do so.[144] As indicated above, the Founding Fathers framed the Elections Clause so that Congress can step in during an

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[138] *See* COX & KATZ, *supra* note 17, at 87, 101.

[139] *See* HACKER, *supra* note 16, at 74.

[140] *See* Halbfinger, *supra* note 19.

[141] *See* Johnson, *supra* note 6.

[142] Mary Alice Robbins, *Opinion in Texas Case May Lead to More Mid-Decade Redistricting*, TEX. LAWYER, July 3, 2006, at 5 (quoting an election law lawyer who was involved with *LULAC*).

[143] *See* REDISTRICTING REFORM CONFERENCE, *supra* note 4, at 3 (2005).

[144] The suggestions herein will only affect federal elections, and not those elections for state or local offices. Nonetheless, this lack of comprehensive coverage should not deter the U.S. Congress from attempting to ameliorate the situation on the state or local level where possible.

"extraordinary circumstance[]."[145] The state of redistricting today is certainly such a circumstance. In fact, the Supreme Court has pointed out in *Vieth* that Congress has such power.[146] Congress has the ability to bring about change, but will it exercise that power?

Despite the environment just depicted, there is some hope. Democrats, who now control both chambers of Congress, were the main supporters of the bills in the 109th Congress aimed at solving the redistricting problem.[147] Therefore, they could effect redistricting reform during the 110th Congress. Yet, as mentioned earlier, the bills introduced in the 109th Congress leave much to be desired. Three specific suggestions to repair the status quo are offered below. These suggestions are nonpartisan. They represent a form of distributive justice for the political parties, the legislative branch, and the judicial branch.[148]

A. *Strip the Supreme Court of Jurisdiction to Hear Gerrymandering Cases*

Congress needs to strip all federal courts, including the Supreme Court, of subject matter jurisdiction over any cases resulting from a state redistricting plan which is alleged to violate constitutional rights. The federal courts have failed to find a resolution to political gerrymandering. Even though such a judicial solution may protect one's constitutional rights better than a policy enactment by Congress, the clock is ticking and the political environment is only getting worse. The only permissible exception would be to allow the courts to retain jurisdiction over any cause of action arising from the Voting Rights Act. Equal protection jurisprudence concerning non-political—e.g., racial—redistricting is more sound and Congress has expressed a desire to

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[145] THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 13, at 331.

[146] Vieth v. Jubelirer, 541 U.S. 267, 275–77 (2004).

[147] *See* H.R. 2642, 109th Cong. (2005); S. 2350, 109th Cong. (2005); H.R. 4094, 109th Cong. (2005)

[148] *See* JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press 1971) (Rawls advocates putting policy makers behind a "veil of ignorance," whereby they do not know how the policies they create will affect them *post facto*. Such a scenario fosters a sense of justice as fairness.).

let the Court protect these rights via this Act and its subsequent extensions.[149]

This jurisdiction stripping by Congress should affect both the lower courts and the Supreme Court. Congress's ability to establish the district courts allows it to control the jurisdiction of the courts.[150] Furthermore, the Supreme Court does not have original jurisdiction over gerrymandering cases. Therefore, nothing prevents Congress from stripping jurisdiction from the Court. Any concerns regarding fairness and maintaining an avenue for political gerrymandering claims can still be addressed by state courts. It was, after all, their legislative counterparts that created the maps.

Justification for this proposal comes from the Court's current trends, its handling of the redistricting issue, and the ability of Congress to better address this matter. First, over the past few decades the Court has had substantial opportunity to develop its jurisprudence on political gerrymandering. Instead of choosing a definitive path, the Court has remained stationary, making it known that it generally wishes to avoid political gerrymandering cases. The Court, wanting to avoid the associated political ramifications, has used this reason to refuse jurisdiction over such cases as *LULAC*.[151] Perhaps the rationale put forth in *Baker*,[152] which opened the genie's bottle, should be rethought.

To complement the Court's unwillingness to take these cases, the states' supreme courts have increased their oversight of redistricting plans.[153] The states are obviously not strangers to political gerrymandering and would be able to handle the repercussions of stripping the federal courts of jurisdiction. Moreover, Congress should focus on this issue; even members of the Supreme Court have recognized that Congress is the best political entity to deal with redistricting.[154] The courts lack a

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[149] 42 U.S.C. § 1973 (2000).

[150] *See* Sheldon v. Sill, 49 U.S. 441, 448–49 (1850).

[151] League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2611 (2006).

[152] Baker v. Carr, 369 U.S. 186, 202 (1962).

[153] *Developments in the Law*, *supra* note 33, at 1166.

[154] *See* HACKER, *supra* note 16, at 132.

popular constituency, while Congress is held directly accountable by the people.[155]

It is also important to note that the courts are inherently limited in dealing with gerrymandering. Gerrymandering claims, for the most part, have only arisen in the public's conscience because of lawsuits. The courts have been the main forum for resolving gerrymandering troubles; however, this near-exclusivity may only demonstrate a fraction of the instances of gerrymandering. Some gerrymandering claims may not have been brought before the courts due to mootness or a lack of ripeness. Additionally, other wronged parties may simply not bring litigation in the first place, further limiting the court's ability to address occurrences of gerrymandering.[156] To provide a more broad-based solution, additional action is necessary.

B. Limiting Redistricting to No More Than Two Times a Decade

Congress must strike a delicate balance concerning the number of times a state can redistrict. The bills advanced in the most recent Congress limit redistricting to just the one constitutionally-required decennial redistricting after the census. These plans allow for courts to continue using the illogical legal fiction[157] that census data collected in the first year of the decade is just as good at the end of the decade. On the other hand, Congress should not allow redistricting to be at the whim of political forces; otherwise, states will take advantage of endless redistricting opportunities, making the situation no better than it is today. Therefore, Congress should also mandate that a state, in addition to the constitutionally-required redistricting, can then redistrict a second time during the decade, but that redistricting can be no earlier than two years after the constitutionally-mandated redistricting, and no later than the ninth year of the decade.

By allowing an additional redistricting, this suggestion recognizes that the America of today is quite different from 1789. The Founders limited redistricting to once every ten years.

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[155] *See id.*

[156] *See id.*

[157] *See supra* notes 101–02 and accompanying text.

However, advances in transportation and technology have made the electorate more mobile than ever. A successful plan cannot follow the Founders' benchmark of just once a decade, but it is unnecessary to amend the Constitution and the Elections Clause. All Congress needs to do is pass legislation limiting additional gerrymanders.

At the other end of the spectrum, partisan actors still need to be checked. The recent examples in Texas and Colorado reveal that mid-decade redistricting is likely to become even more dangerous and more frequent.[158] Limiting mid-decade redistricting provides two benefits. First, partisan bias can be controlled by preventing frequent redrawing of district lines. The political actors would find it difficult to abuse the system by constantly correcting "for variations in voting behavior over time."[159] Second, partisanship can be reduced if the valve for such bitterness is closed. Election law experts have stated that there is greater opportunity for partisanship if redistricting is restricted.[160] The fair balance struck by this suggestion should help check those who abuse the system, while allowing the system to be sufficiently responsive to changes in the American electorate.

This compromise also respects federalism. As mentioned above, the Founders placed the Elections Clause in the Constitution as a balance of federalism: the states have most of the control, but the federal government can step in if the process goes awry.[161] The current system damages federalism in two ways. First, state legislatures are setting the rules of the game played by the federal government. The harm does not come from the state's ability to set these rules, but rather the reapportionment process is so politicized that it affects a constituent's ability to be represented properly in the House.[162] Second, besides hurting the federal government, mid-decade redistricting can hurt the national electorate. As Patrick Marecki wrote in 2004:

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[158] *See supra notes* 90–93 and accompanying text.

[159] A. Cox, *supra* note 22, at 770.

[160] *See* REDISTRICTING REFORM CONFERENCE, *supra* note 4, at 20.

[161] *See* U.S. CONST. art. 1, § 4.

[162] *See generally* Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196 (2004) (explaining, *inter alia,* how redistricting today is not what the Founders envisioned).

> When a state engages in mid-decade redistricting, the state legislature asserts a power over the composition of the national legislature, and unnecessarily interposes itself between the people and Congress. In other words, not only is there an injury in the non-exercise of voter choice, but there is one in the exercise of state choice as well. When a state redistricts mid-decade to skew the composition of the national legislature by favoring candidates of its dominant political party, it reflects not the citizen's preferences, but the state legislature's.[163]

Even if the suggestions put forth here are not adopted, Congress should step back into this realm to strike the proper balance of power between the federal government and the states, as well as between the legislature and the judiciary.

C. *Require New Census Data to Be Taken by the Federal Government if a State Wishes to Have an Additional Redistricting*

If states are allowed to redistrict again after the decennial census, Congress must implement additional safeguards to ensure the second redistricting actually represents the demographics of the state. Therefore, when allowing an additional redistricting, Congress should make sure that the federal government aids the states in collecting population data a second time. Currently, Public Law 94-171 requires the Census Bureau to give the states census data at the beginning of the decade for the purposes of redistricting.[164] Congress can require the Secretary of Commerce to develop a reasonable plan for the Census Bureau to work with states whenever they wish to redistrict again.

Even the Court has acknowledged that when it comes to protecting the American polity, redistricting must be undertaken with "the best census data available."[165] Today it would be beneficial to follow this observation. The voting population is difficult to analyze because it is difficult to identify voting behavior and voting groups.[166] One of the reasons that the Court has been

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[163] Patrick Marecki, *Mid-Decade Congressional Redistricting in a Red and Blue Nation*, 57 VAND. L. REV. 1935, 1972 (2004).

[164] *See* Act of Dec. 23, 1975, Pub. L. No. 94-171 (1975).

[165] Karcher v. Daggett, 462 U.S. 725, 731 (1983).

[166] *See supra* notes 130–32 and accompanying text.

unable to properly define voting groups and their behavior stems from the fact that electoral data fluctuates. Electoral data at the ward and precinct level change not only from decade to decade, but from year to year.[167] No system is perfect; however, the federal government should do all it can to assure the best data is available.

V. Conclusion

Matt Taibbi, a celebrated American journalist, recently tagged the 109th Congress as the worst in history. He depicted Congress as thus:

> These past six years were more than just the most shameful, corrupt and incompetent period in the history of the American legislative branch. These were the years when the U.S. parliament became a historical punch line . . . . In the past six years they have . . . abdicated their oversight responsibilities mandated by the Constitution, enacted a conscious policy of massive borrowing and unrestrained spending, and installed a host of semipermanent mechanisms for transferring legislative power to commercial interests.[168]

As harsh as these words may seem, similar thoughts have been echoed by pundits and scholars alike. Abdication, not delegation, has been the *modus operandi* of the last few Congresses. One area where Congress can recapture some territory is in addressing the problem of political gerrymandering. It is in Congress' interest to do so. In order to reduce these jetties that slow down the flow of democracy, Congress needs to make sure it puts forth its best efforts to quell partisanship and foster competitive districts so that the people are truly represented.

Since *Baker* in 1962, the Supreme Court has been the forum for dealing with gerrymandering, in particular political gerrymandering. The path taken by the Court, however, has not been a smooth one. Not only has the Court been unable to rule conclusively on the issue, it has enabled political actors to gerrymander their districts whenever they have the chance to do so. Such inaction on the part of the Court can only exacerbate the current political climate. Partisanship is only on the rise and with

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[167] *See* RUSH, *supra* note 131, at 38.

[168] Matt Taibbi, *The Worst Congress Ever*, ROLLING STONE, at 46 (Nov. 2, 2006).

the recent changing of the guard at the state level; the probability that there will be more political gerrymandering is high.

The suggestions advanced here are a step in the right direction toward ameliorating the status quo. The Supreme Court has had its chance to deal with the issue. Now it is time for Congress to take the reins of an issue that directly affects its operation. To do so it must prevent the federal courts from further muddying the waters. Additionally, with the Constitution as the baseline, Congress must put in place further restrictions on the frequency of redistricting so as to both reduce partisanship and respect the representational nature of the House. While not a panacea, these suggestions will certainly put Congress and American democracy back on the path toward reform.