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# “Regulating the Political Thicket: Congress, the Courts, and State Reapportionment Commissions”

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# REGULATING THE POLITICAL THICKET: CONGRESS, THE COURTS, AND STATE REAPPORTIONMENT COMMISSIONS

*David Schultz\**

I. INTRODUCTION.....	110
II. REDISTRICTING AND COMPETITIVE ELECTIONS.....	112
A. The Declining Competitiveness of Congressional Races .....	112
B. Redistricting and Incumbency .....	114
III. THE COURTS AND PARTISAN GERRYMANDERING ....	117
A. Equal Protection and One-Person, One-Vote .....	117
B. Political Gerrymandering and Equal Protection Analysis .....	124
C. Summary .....	134
IV. ALTERNATIVE WAYS TO COMBAT PARTISAN GERRYMANDERING .....	134
A. Options for the Courts .....	134
1. Do Nothing .....	135
2. Let the State Courts Do It .....	136
3. Let the People Do It .....	137
4. Let States Create Redistricting Commissions.....	138
5. Let Congress Redistrict Itself.....	141
6. Let Congress Enact New Redistricting Standards .....	141
7. Congress Should Mandate States to Create Redistricting Commissions.....	142
V. CONCLUSION .....	145

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## I. INTRODUCTION

Whatever the 2008 congressional races may produce, if critics are correct, they were over before they started. Because of partisan gerrymandering, malapportionment, and mid-decade redistricting at the state level, the results in most races are foregone conclusions. District lines have been drawn to the advantage of incumbents and majority parties, as both seek to use the redistricting process to guarantee their reelection. If 2008 is an indication of the past, in excess of ninety percent of incumbents will return to Congress, leaving the only contested races those which are open or occupied by vulnerable first-termers.<sup>1</sup> For the vast majority of voters the opportunity to “throw the bums out” is illusionary at best. It was not supposed to be that way.

Over half a century ago, the Supreme Court rejected Justice Frankfurter’s admonition in *Colegrove v. Green*<sup>2</sup> to stay out of the political thicket of reapportionment politics<sup>3</sup> when it ruled in *Baker v. Carr*<sup>4</sup> that redistricting was a justiciable issue. From that case forward, the courts have marched ahead to promulgate “one person, one vote” as a reapportionment standard, have enforced the Voting Rights Act (“VRA”) to protect minority representation, and have even stepped into the controversies surrounding partisan gerrymandering and mid-decade redistricting, all in pursuit of more fair and competitive elections.<sup>5</sup> As the *League of United Latin American Citizens v. Perry* (“LULAC”)<sup>6</sup> decision demonstrated, however, the Court has

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1. See *infra* Part II and accompanying notes for a discussion of incumbency reelection rates.

2. 328 U.S. 549 (1946).

3. *Id.* at 556 (stating that to “sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.”)

4. 369 U.S. 186 (1962).

5. See *infra* Part II.A.

6. 548 U.S. 399 (2006).

2008]

*Political Thicket*

failed to find manageable standards to regulate partisan gerrymandering, and trusting state legislatures to draw congressional district lines has not yielded the results that many hoped.

If judicial efforts to tame the political thicket have not succeeded, what other options exist? Taking redistricting out of the hands of the state legislatures and turning it over to independent redistricting commissions is one answer.<sup>7</sup> While these commissions, such as in Iowa, hold promise, the same politics that prevent fair districting also preclude adoption of state legislation or constitutional provisions to enable these bodies. Lacking the political muscle to force legislative change, citizens will again be greeted with more gerrymandering following the 2010 decennial census. But there is an option, and that is the subject of this Article.

As a solution to the persistent gerrymandering of congressional districts at the state level, this Article calls for national legislation to mandate that states use independent commissions when they redistrict in 2011 and 2012.<sup>8</sup> The constitutional authority for this legislation resides in Congress's power under Article I, Section Four, Clause One, which gives the national government authority over federal elections.<sup>9</sup> For reasons specified in this Article, that power is broad enough to include the mandated use of independent reapportionment commissions when states redistrict their congressional lines.

The first part of this Article briefly reviews claims that congressional elections are generally not competitive as a result of redistricting. Specifically, this section looks to incumbent reelection rates as proof of this assertion. The second part reviews the generally unsuccessful efforts by the Supreme Court to police partisan gerrymandering. The third part looks to alternatives in light of the federal judiciary's failure to resolve

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7. *See infra* Part IV.A.4.

8. *See infra* Part IV.A.7.

9. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.").

this matter, and concludes that Congress's enactment of mandatory use of redistricting commissions by states is the best option for improving competitive congressional elections.

## II. REDISTRICTING AND COMPETITIVE ELECTIONS

Examination of recent congressional elections demonstrates two facts. First, incumbents are reelected at startlingly high rates, with that trend increasing after the 2001 round of congressional redistricting. Second, this incumbency protection may be significantly attributed to redistricting that has produced more safe districts for officeholders.

### A. The Declining Competitiveness of Congressional Races

According to Sam Hirsch, "The 2001-2002 round of congressional redistricting was the most incumbent-friendly in modern American history."<sup>10</sup> In describing the outcomes as a result of the 2000 elections, Hirsch points out the elections following the 2000 decennial census and redistricting produced few surprises or threats to incumbents.<sup>11</sup>

But the latest congressional redistricting apparently was different, as each party placed a premium on shoring up its most vulnerable incumbents.

Only four challengers knocked off incumbents in the November 2002 general election—a modern record low not only for a redistricting year, but for any election year. In California, none of the 50 general-election challengers garnered even 40% of the total vote. More than a third of all States—including several of the larger ones, such as Virginia, Massachusetts, Washington, and Missouri—will send to the new Congress precisely the same delegation they sent to the last Congress. Neither party gained or lost more than three seats in any State. The number of women in the 435-member House slipped from 60 to 59, the number of African-Americans held at 37, and the number of

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10. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 179 (2003).

11. *Id.* at 185.

2008]

*Political Thicket*

Latinos inched up from 19 to 22. On average, the 435 victorious candidates won a higher percentage of the popular vote than in any House election in more than half a century. For the first time since the Reapportionment Revolution of the 1960s, stasis has prevailed in a post-redistricting election.<sup>12</sup>

While the 2002 elections produced few changes in party control of seats, the election was not an isolated exception but instead highlighted a trend that has been characteristic of recent American elections.

According to Poonam Kumar, in the 2000 congressional elections almost 99% of incumbents in the House of Representatives were reelected, and “close to eighty-three percent did so with more than twenty percent of the vote.”<sup>13</sup> The entire California delegation was reelected without serious challenge.<sup>14</sup> Similarly, in the 2004 congressional elections, “more than eighty-five percent of incumbents in the U.S. House of Representatives won by more than sixty percent.”<sup>15</sup> Just nineteen of 435 races were decided by a margin of nine points or less.<sup>16</sup> Conversely, in 1996, twenty-one incumbents were defeated.<sup>17</sup> Even in 2006, a year in which Democrats took back the House of Representatives, only twenty-four incumbents lost, and they were all Republicans.<sup>18</sup>

The number of competitive seats held by incumbents has declined in the last sixty years. In the 1948 election, approximately 20-25% of the incumbent seats were considered

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12. *Id.* at 182.

13. Poonam Kumar, *Ratification of Reapportionment Plans Drawn by Redistricting Commissions*, 40 U. MICH. J.L. REFORM 653, 655 (2007).

14. Brian O'Neill, *The Case for Federal Anti-Gerrymandering Legislation*, 38 U. MICH. J.L. REFORM 683-84 (2005).

15. Kumar, *supra* note 13, at 655-56.

16. Walter M. Frank, *Help Wanted: The Constitutional Case Against Gerrymandering to Protect Congressional Incumbents*, 32 OHIO N.U. L. REV. 222, 227 (2006) (quoting Hirsch, *supra* note 10, at 182).

17. Marjorie Randon Hershey, *The Congressional Elections*, in THE ELECTION OF 1996: REPORTS AND INTERPRETATIONS 224 (Gerald Pomper, et al. eds., 1997).

18. HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2007-2008, at 55 (2007).

## CHARLESTON LAW REVIEW

[Volume 3]

competitive.<sup>19</sup> “[I]n 2000 and 2002 that number was well below 10 percent.”<sup>20</sup> Using the 2002 election as a baseline, Hirsch found that the data demonstrated more incumbency protection than previous decades.<sup>21</sup>

Overall, the trend is clear. Fewer incumbents in the House of Representatives are losing today than in the past.

## B. Redistricting and Incumbency

Several factors are offered as explanations for incumbency reelection rates. One is the significant advantage incumbents have in terms of fund-raising, both in terms of the amount of money raised and how early they start receiving donations.<sup>22</sup> Incumbents also have the advantage of name recognition and other perks of being in office that work to their reelection advantage.<sup>23</sup> However, scholars also point to redistricting and partisan gerrymandering as a powerful case of the decrease in competitive congressional elections.

Hirsch compares the election in 2002 following the 2000 census and redistricting, and found the number of incumbents defeated declined compared to similar elections following redistrictings in 1972, 1982, and 1992; the number who won narrowly also fell by fifty percent.<sup>24</sup> Hirsch attributes this decline in competitive incumbent races in the House of Representatives directly to redistricting.<sup>25</sup>

For example, if one considers seats as competitive in districts where Bush and Gore ran neck-in-neck in the 2000 presidential race, the 2002 redistricting produced nearly ten fewer

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19. The winning margin was by less than ten percentage points. David W. Brady & Jeremy C. Pope, *Congress: Still in the Balance?*, HOOVER DIGEST (2004) available at <http://www.hoover.org/publications/digest/3010031.html> (last visited Sept. 26, 2008).

20. *Id.*

21. Hirsch, *supra* note 10, at 183-84.

22. Anthony Corrado, *Financing the 1996 Elections*, in THE ELECTION OF 1996: REPORTS AND INTERPRETATIONS 135, 159 (Gerald Pomper et al. eds., 1996).

23. *Id.*

24. Hirsch, *supra* note 10, at 183.

25. *Id.* at 184.

2008]

*Political Thicket*

competitive districts.<sup>26</sup> More notably, redistricting yielded few seats pitting incumbent against incumbent; instead, lines appeared to be drawn to minimize the number of at-risk office holders, especially compared to other recent post decennial reapportionment.<sup>27</sup> As a result of that incumbency protection:

[O]f the 108 at-risk incumbents, only four suffered adverse shifts greater than two percentage points, and only one of those four survived the 2002 elections (two were defeated and one retired). By contrast, 20 at-risk Democrats and 25 at-risk Republicans benefited from similar-size shifts that made their districts *more* secure-and not surprisingly, none of them was defeated in November 2002.<sup>28</sup>

Finally, Hirsch points to “partisan bias” as another by-product of reapportionment.<sup>29</sup> Partisan bias looks at how the popular vote translates into the number of seats won by a party. If, for example, one party wins 55% of the vote, it should receive that percentage of the seats in an election.<sup>30</sup> One way to examine competitiveness is to look at whether there is party symmetry—if one party receives a certain percentage of the vote and captures “X” number of seats, would another party winning the same popular vote also capture “X” number of seats?<sup>31</sup> In examining the 2002 races, the redistricting produced asymmetrical results favoring Republicans in close races. This asymmetry is attributed to Republican gerrymandering in many states where they controlled state houses.<sup>32</sup>

In addition to Hirsch, others recognized gerrymandering as critical to the declining competitiveness of House incumbent seats. Bruce Cain, Karen McDonald, and Michael McDonald looked at the number of congressional districts where the presidential race was either won by a narrow 52-48 margin or a

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26. *Id.* at 186.

27. *Id.* at 187.

28. *Id.* at 187-88.

29. Hirsch, *supra* note 10, at 190.

30. *Id.*

31. *Id.*

32. *Id.* at 194-96.



## CHARLESTON LAW REVIEW

## [Volume 3]

wide 55-45 margin.<sup>33</sup> These narrow and wide margin races resulted in a total loss of thirty-nine seats due to redistricting from 1990 to 2002.<sup>34</sup> Meisel, Maestas, and Stone attribute to redistricting an even more subtle effect in discouraging potential candidates from challenging incumbents.<sup>35</sup> Faced with districts that potential candidates view as favoring incumbents, many are dissuaded from running for office.<sup>36</sup>

Other more anecdotal evidence also documents the impact that redistricting has on competitiveness. One example is the mid-decade redistricting of the Texas congressional districts, which produced a state delegation that only two years earlier yielded a majority of Democrats, to one that elected a majority of Republicans.<sup>37</sup> Finally, some attribute the 100% reelection rate of California House members to redistricting. As Kang reports:

After California Republicans and Democrats agreed in 2001 on a “sweetheart” bipartisan gerrymander that ensured virtually no congressional or state legislative seats would change hands, a Republican consultant boasted that the “new [redistricting] plan basically does away with the need for elections.” Such is the state of self-dealing in redistricting conducted by incumbent elected officials. As one North Carolina state senator admitted, when it comes to redistricting, “We are in the business of rigging elections.”<sup>38</sup>

In sum, scholars such as those noted above view gerrymandering as a major cause in the declining competitiveness for congressional seats. As one election law

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33. Bruce E. Cain, Karin McDonald & 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).

34. *Id.*

35. L. Sandy Meisel, Cherie D. Maestas & Walter J. Stone, *The Impact of Redistricting on Candidate Emergence*, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 31, 42-43 (Thomas E. Mann & Bruce E. Cain eds., 2005).

36. *Id.* at 36-44.

37. *Id.* at 32.

38. Michael S. Kang, *De-rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 667 (2006).

2008]

*Political Thicket*

expert put it: “[T]he redistricting process skews the overall distribution of districts, producing nothing but relatively safe districts, with the map-drawing party capturing most of those districts while conceding a smaller number to the out-party.”<sup>39</sup>

### III. THE COURTS AND PARTISAN GERRYMANDERING

If partisan gerrymandering is a problem that affects the competitiveness of congressional elections, what should be done about it? One solution has been for the federal courts to enter the fray, seeking to use their redistricting jurisprudence to root it out. Beginning with *Davis v. Bandamer*<sup>40</sup> in 1986, the Supreme Court sought to address the problem of partisan gerrymandering. However, in *Davis, Vieth v. Jubelirer*,<sup>41</sup> and *LULAC*,<sup>42</sup> the Court failed to reach an agreement on the standards to defining and ultimately resolving disputes alleging partisan gerrymandering, leaving the practice largely unregulated and beyond judicial supervision.<sup>43</sup> How the Court arrived at this position is the subject of this section.

#### A. Equal Protection and One-Person, One-Vote

The result of *Colegrove v. Green*<sup>44</sup> was that reapportionment challenges under the Fourteenth Amendment were nonjusticiable, even though in *Gomillion v. Lightfoot*<sup>45</sup> they were permitted under the Fifteenth Amendment.<sup>46</sup> In *Baker v. Carr*<sup>47</sup> the Court was asked to revisit its *Colegrove* decision, this time as an equal protection challenge, and not under the Federal

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39. Pamela S. Karlan, *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, 74 FORDHAM L. REV. 2187, 2196 (2006).

40. 478 U.S. 109 (1986).

41. 541 U.S. 267 (2004).

42. 548 U.S. 399 (2006).

43. See generally *id.*; *Vieth*, 541 U.S. 267; *Bandamer*, 478 U.S. 109.

44. 328 U.S. 549 (1946).

45. 364 U.S. 339 (1960).

46. *Id.* at 346-47.

47. 369 U.S. 186 (1962).

## CHARLESTON LAW REVIEW

## [Volume 3]

Declaratory Judgment Act as was the case in its 1946 decision.<sup>48</sup> There, the State of Tennessee had last apportioned its state legislative seats in 1901 but had not reallocated seats to reflect changes in population since that date.<sup>49</sup> As a result, between 1901 and 1960 the state's population increased from a little over two million to over three and one-half million citizens.<sup>50</sup> In addition to the population growth, the population shifted geographically, and the number of eligible voters grew approximately four-fold.<sup>51</sup> Hence, districts were of various populations, leading plaintiffs to assert a violation of the Fourteenth Amendment's Equal Protection Clause.<sup>52</sup>

The federal district court denied hearing the issue because it presented a non-justiciable dispute under *Colegrove*.<sup>53</sup> However, Justice Brennan, writing for the majority, reached a contrary conclusion, viewing the equal protection challenge as a justiciable question.<sup>54</sup> To reach that conclusion, he undertook an analysis of the Supreme Court's power under Article III of the Constitution,<sup>55</sup> seeking to define a "political question" and what types of issues the "political question" analysis resolves.<sup>56</sup> Justice Brennan rejected claims that the mere assertion of a political right constituted a non-justiciable political question.<sup>57</sup> However, the Court did argue that claims arising under the Guaranty Clause were non-justiciable.<sup>58</sup> Therefore the issue arises as to what is a non-justiciable political question?

"We have said that '[i]n determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of

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48. *Id.*

49. *Id.* at 192-93.

50. *Id.* at 192.

51. *Id.*

52. *See Baker*, 369 U.S. at 193-94.

53. *Id.* at 232.

54. *Id.* at 226.

55. *Id.* at 200-02.

56. *Id.* at 209-10.

57. *Id.* at 209.

58. *Id.*

2008]

*Political Thicket*

satisfactory criteria for a judicial determination are dominant considerations.”<sup>59</sup>

The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the “political question” label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.<sup>60</sup>

The political question doctrine was a matter of separation of powers, asking whether the constitutional text had committed the resolution of a specific issue to any particular branch of the national government.<sup>61</sup> More exactly, the Court outlined several characteristics regarding what constituted a political question:<sup>62</sup>

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious

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59. *Id.* at 210 (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939)).

60. *Id.* at 210-11.

61. *Id.* at 210.

62. *Id.* at 211-17.

## CHARLESTON LAW REVIEW

## [Volume 3]

pronouncements by various departments on one question.<sup>63</sup>

Overall, unless the Constitution clearly committed the issue to another branch for resolution, or required the Court to make a prior policy judgment, or there were no clear standards for resolving the matter, then the federal courts were not precluded from hearing the case.<sup>64</sup> In the dispute at hand, the Court did not find any of these conditions, thereby freeing the lower courts to hear the redistricting claim.<sup>65</sup> Thus, as with *Gomillion* for racial gerrymandering, malapportionment could now be addressed by the judiciary.

Left unresolved in *Baker* was the establishment of a standard by which to judge if malapportionment had occurred. If no manageable standard for resolving the claim could be found, then by the logic of *Baker*, the reapportionment controversy would still be deemed non-justiciable.<sup>66</sup> *Reynolds v. Sims*<sup>67</sup> would provide the construction of that standard. But the manageable standard in *Reynolds* did not immediately follow from *Baker*.<sup>68</sup> Following *Baker*, the Court in *Gray v. Sanders*<sup>69</sup> first struck down a voting procedure which, while counting each vote the same, weighed rural votes more heavily than those from other areas.<sup>70</sup> In this “county unit system” for voting, each county was given a unit vote equal to that of the size of its representation in the state house.<sup>71</sup> This yielded a situation where the largest counties received three unit votes and others received lesser votes.<sup>72</sup> The Equal Protection Clause is cited as the basis of the holding, indicating that such a system did not allocate seats

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63. *Id.* at 217.

64. *Id.*

65. *Baker*, 369 U.S. at 217.

66. See RICK L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 50-53 (2003).

67. 377 U.S. 533 (1964).

68. HASEN, *supra* note 66, at 53.

69. 372 U.S. 368 (1963).

70. *Id.* at 379.

71. See *id.* at 370-71.

72. *Id.* at 371.

2008]

*Political Thicket*

mathematically on the basis of population.<sup>73</sup> For example, a county that was five times as populous as another did not receive five times as many seats. Then in *Wesberry v. Sanders*,<sup>74</sup> the Court mandated that congressional districts must be of equal population.<sup>75</sup> While *Wesberry* specifically notes the equal protection claim,<sup>76</sup> the Court does not decide the case upon it, but instead upon Article I, Section Two.<sup>77</sup>

Finally in *Reynolds*, the Court articulates a manageable standard for adjudicating redistricting issues: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one-person, one-vote.”<sup>78</sup> In reaching that conclusion, the Court noted how “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”<sup>79</sup> The right to vote was diluted:

[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State’s voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area

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73. *Id.* at 379.

74. 376 U.S. 1 (1964).

75. *Id.* at 7-8.

76. *Id.* at 8 n.10.

77. *Id.* at 17. Article I, Section 2 will be the clause used in litigation to challenge congressional redistricting whereas the Equal Protection Clause will be used for state redistricting.

78. *Reynolds*, 377 U.S. at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

79. *Id.* at 562.

## CHARLESTON LAW REVIEW

## [Volume 3]

would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.<sup>80</sup>

Thus, *Reynolds* established the basic standard for reapportionment that would dominate subsequent redistricting decisions—promotion of the “one-person, one-vote” standard, as mandated under the Equal Protection Clause.<sup>81</sup> For the Court:

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.<sup>82</sup>

While one-person, one-vote was the general standard for all of its apportionment decisions, the Court subjected it to subsequent refinement and articulation. First, in *Lucas v. Forty-Fourth General Assembly of Colorado*,<sup>83</sup> the Court confronted a districting scheme similar to that found at the congressional level.<sup>84</sup> While the lower house of the Colorado legislature would be apportioned by population, the upper house, or senate, would be apportioned like the United States Senate in that geography would be a factor in the allocation of seats.<sup>85</sup> As in *Reynolds*,<sup>86</sup> the Court in *Lucas* rejected the federal analogy<sup>87</sup> under the Equal Protection Clause,<sup>88</sup> finding no logical basis for apportioning one house by population and another by a different method.<sup>89</sup>

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80. *Id.* at 562-63.

81. *Id.* at 557-58, 560, 566, 568.

82. *Id.* at 568.

83. 377 U.S. 713 (1964).

84. *Id.* at 717-19.

85. *Id.* at 717-18.

86. *Reynolds*, 377 U.S. at 571-76.

87. See *Lucas*, 377 U.S. at 736-37; DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW 234 (2004).

88. *Lucas*, 377 U.S. at 736-37.

89. *Id.* at 738-39.

2008]

*Political Thicket*

Finally, in *Avery v. Midland County*<sup>90</sup> the Court mandated under the Equal Protection Clause<sup>91</sup> that the one-person, one-vote standard be extended to local government units.<sup>92</sup>

Although one-person, one-vote was the official mathematical standard, the Court applied it differently to congressional versus state and local government seats. In *Kirkpatrick v. Preisler*,<sup>93</sup> *White v. Weiser*,<sup>94</sup> and most notably *Karcher v. Daggett*,<sup>95</sup> the Court rejected even minor deviations from the one-person, one-vote standard for congressional seats, appearing to mandate near mathematical equality.<sup>96</sup> However, in these cases the Court used Article I, Section Two of the Constitution as the basis of the decisions.<sup>97</sup> When it came to apportionment of state and local government seats, the Court seemed more willing to tolerate some variance—10% from the least to the most populous districts — if needed to prevent the division of subunits of government.<sup>98</sup>

A final question as it relates to the one-person, one-vote standard is timing. Specifically, how often must redistricting occur in order to be compliant with the *Reynolds* standard? On one side, although the Court has not ruled on this issue, several federal courts have held that while adherence to the one-person, one-vote standard is mandatory, the interests of stability and letting incumbents complete their current terms do not require immediate elections based upon new population figures obtained in the most recent decennial census.<sup>99</sup> Conversely, the Court, in

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90. 390 U.S. 474 (1968).

91. *Id.* at 480-81.

92. *Id.* at 485-86.

93. 394 U.S. 526 (1969).

94. 412 U.S. 783 (1973).

95. 462 U.S. 725 (1983).

96. STEPHENSON, *supra* note 87, at 236-37.

97. *Karcher*, 462 U.S. at 727; *White*, 412 U.S. at 790; *Kirkpatrick*, 394 U.S. at 531, 534.

98. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 740-43 (1973) (permitting the deviations under the Equal Protection Clause); *Mahan v. Howell*, 410 U.S. 315, 323-24 (1973); *Abate v. Mundt*, 403 U.S. 182, 184-85 (1971).

99. *See, e.g.*, *Political Action Conference of Ill. v. Daley*, 976 F.2d 335, 339-40 (7th Cir. 1992); *French v. Boner*, 963 F.2d 890, 892 (6th Cir. 1992) (rejecting equal protection challenges).



## CHARLESTON LAW REVIEW

## [Volume 3]

the recently decided *LULAC*,<sup>100</sup> found that the Constitution does not bar mid-decade redistricting, even when done solely for partisan motives.<sup>101</sup> Thus, states are free to redistrict more frequently than once per decade to meet the one-person, one-vote standard, but they also have some freedom beyond the decennial period to depart from the standard if promoting the stability of existing districts and letting incumbents finish terms are offered as competing interests.

Overall, the redistricting case law that arose subsequent to *Colegrove v. Green*<sup>102</sup> and *Gomillion v. Lightfoot*<sup>103</sup> was litigated under claims arising out of the equal protection law (or a similar type of logic filed under Article I, Section Two, for congressional districting), at least in terms of apportionment disputes addressing the one-person, one-vote issue. Much of the redistricting litigation brought under the VRA also raised issues similar to those arising under the equal protection litigation, especially when it came to the legality of race-based malapportionment claims.<sup>104</sup> It is safe to say, then, the Equal Protection Clause defined the legal logic and framework for apportionment controversies, including its next stage—partisan gerrymandering.

#### B. Political Gerrymandering and Equal Protection Analysis

One-person, one-vote was a redistricting revolution launched from the Equal Protection Clause. Using it as a basis for litigation may have made sense given the differential treatment alleged among voters or the racial motives that often were at the root of much malapportionment, as in *Gomillion*.<sup>105</sup> Thus, if violation of the one-person, one-vote mandate and racial

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100. 548 U.S. 399 (2006).

101. *Id.* at 457-60.

102. 328 U.S. 549 (1946).

103. 364 U.S. 339 (1960).

104. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993) (drawing parallels between Equal Protection Clause and VRA claims); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).

105. 364 U.S. at 339-40.

2008]

*Political Thicket*

gerrymandering could be actionable under the Equal Protection Clause, why could gerrymandering solely for the sake of partisan advantage not also be a constitutional violation? After all, was not the redrawing of lines to help incumbents or one particular party a practice that went all the way back to Ellbridge Gerry's day? Addressing partisan gerrymandering has been the object of three Supreme Court decisions that have done no more than muddle the issues.<sup>106</sup> In all three cases, the Equal Protection Clause was the primary constitutional hook for the litigation and perhaps for the confusion that resulted.

First, in *Davis v. Bandemer*,<sup>107</sup> a suit was brought by Indiana Democrats contesting the constitutionality of a 1981 state redistricting plan.<sup>108</sup> The specific allegation was that the plan drew legislative lines and seats in such a way as to disadvantage Democrats.<sup>109</sup> It did so by dividing up cities such as South Bend in arguably unusual ways.<sup>110</sup> The Democrats filed suit under the Equal Protection Clause of the Fourteenth Amendment, contending that these districts violated their rights as Democrats.<sup>111</sup> The district court ruled in favor of the Democrats, in part, because of evidence and testimony suggesting that the Republican Party had in fact drawn the lines in its own favor.<sup>112</sup> When the case reached the Supreme Court, a central issue was whether this was a justiciable controversy under the Equal Protection Clause.<sup>113</sup> The Court held that it was.<sup>114</sup>

To support its conclusion, the Supreme Court returned to the discussion of the political question doctrine that it had in *Baker v. Carr*.<sup>115</sup> It quoted from *Baker* its famous formulation of what a political question was, noting that unless a matter was textually

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106. See *LULAC*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986).

107. 478 U.S. 109 (1986).

108. *Id.* at 115.

109. *Id.*

110. *Id.* at 114-15.

111. *Id.* at 115.

112. *Id.* at 115-16.

113. *Id.* at 118.

114. *Id.* at 113, 119.

115. *Id.* at 121.

## CHARLESTON LAW REVIEW

## [Volume 3]

committed to another branch, required a specific type of policy determination not appropriate for the Court, or missed manageable standards for resolving the controversy, the issue could be addressed by the federal judiciary.<sup>116</sup> Finding that none of the characteristics outlined in *Baker* existed in the political gerrymandering case before it, the Court held that the matter was justiciable.<sup>117</sup> For the Court:

“Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race . . . .”<sup>118</sup>

Yet while the case was deemed justiciable, it did not uphold *in toto* the lower court’s determination that there was an equal protection violation in *Bandemer*.<sup>119</sup> Instead, the Court articulated several stipulations that had to be met to sustain a political gerrymandering claim.<sup>120</sup> First, there must be proof of intentional discrimination against one party—here, the Democrats.<sup>121</sup> Second, “a group’s electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.”<sup>122</sup> Instead, the Court stated that the political process must frustrate political activity in a systematic fashion.<sup>123</sup>

As in individual district cases, an equal protection violation

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116. *Id.* at 121-22 (quoting *Baker*, 396 U.S. at 217).

117. *Id.* at 126-27.

118. *Id.* at 123-24 (quoting *Reynolds*, 377 U.S. at 565-66).

119. *Id.* at 127-30.

120. *Id.* at 127-32.

121. *Id.* at 127.

122. *Id.* at 132.

123. *Id.*

2008]

*Political Thicket*

may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. “In this context, such a finding of unconstitutionality 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.”<sup>124</sup>

Finally, the Court contended that showing frustration or dilution of political influence in one election was also insufficient.<sup>125</sup> Instead, it would need to be shown that it took place over several elections.<sup>126</sup> In sum, to support a constitutional claim for partisan gerrymandering, the *Bandemer* Court stated that one would have to demonstrate intentional discrimination against a party that systematically frustrated and diluted his ability to influence the political process across several elections.<sup>127</sup> What emerged from *Bandemer* were perhaps the manageable standards called for in *Baker* that would allow the federal judiciary to resolve a controversy. Yet the three conditions of the case proved to be anything but manageable, and the federal courts had never invalidated a redistricting plan as a partisan gerrymander.<sup>128</sup> This led to demands for the Court to rethink the question of the justiciability of partisan gerrymandering. The Court did that first in *Vieth v. Jubelirer*.<sup>129</sup>

In *Vieth*, at issue was the constitutionality of a Pennsylvania districting plan that drew the seats for its congressional delegation after the 2000 census.<sup>130</sup> Prior to the census, the state had twenty-one representatives, but after 2000 it was only entitled to nineteen seats.<sup>131</sup> Republicans controlled both houses of the Pennsylvania legislature as well as the governor’s office.<sup>132</sup>

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124. *Id.* at 133.

125. *Id.* at 135.

126. *Id.* at 135-36.

127. STEPHENSON, *supra* note 87, at 246.

128. *Id.* at 246-47.

129. 541 U.S. 267, 271-72 (2004).

130. *Id.*

131. *Id.* at 272.

132. *Id.*

## CHARLESTON LAW REVIEW

## [Volume 3]

State Democrats contended that the district lines drawn violated Article I, Sections Two and Four, and the Equal Protection Clause, thereby constituting both a violation of the one-person, one-vote standard and, more importantly here, a partisan gerrymander.<sup>133</sup> The district court dismissed the partisan or political gerrymandering claim<sup>134</sup> (with some of the other issues addressed or resolved in other litigation in the case), and it was appealed to the Supreme Court.

In a split decision, the Supreme Court made several rulings. First, a four person plurality opinion written by Justice Scalia reviewed the history of partisan gerrymandering in the United States, concluding that such a practice went back to the early days of the republic.<sup>135</sup> Given this history, there were numerous efforts to address it.<sup>136</sup> The Court keyed in on the *Baker* discussion that judicially manageable standards or a clear rule was needed for the judiciary to resolve this controversy.<sup>137</sup>

Next, Scalia argued that the standards for addressing partisan gerrymandering in *Bandamer* had proved unworkable.<sup>138</sup> For Scalia:

Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandamer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandamer* was wrongly decided.<sup>139</sup>

Scalia begins his argument by examining Justice White's plurality opinion in *Bandamer*.<sup>140</sup> He criticized its three-prong test by contending that it was unmanageable, arbitrary, and

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133. *Id.*

134. *Id.* at 273.

135. *Id.* at 274.

136. *Id.* at 279.

137. *Id.* at 278.

138. *Id.* at 281.

139. *Id.*

140. *Id.*

2008]

*Political Thicket*

would fall into a simple proportionality test between voting percentages and seats won by a particular party.<sup>141</sup> But more importantly, in examining the employment of the test in the lower courts, the *Bandamer* opinion provided no guidance to them.<sup>142</sup>

In criticizing the standards for adjudicating partisan gerrymandering, the plurality opinion characterizes them all as a variation of intent plus effects. This characterization focused on the plaintiff's claim that predominant intent plus effect of the gerrymander should guide resolution of the case.<sup>143</sup> This predominant intent standard, as noted in the opinion, was borrowed from the racial gerrymandering litigation under the VRA and the Equal Protection Clause.<sup>144</sup> Yet the predominant intent standard is further qualified by the plaintiffs by stating that it must apply to the entire statewide redistricting plan.<sup>145</sup> This created even more problems for Scalia:

Vague as the “predominant motivation” test might be when used to evaluate single districts, it all but evaporates when applied statewide. Does it mean, for instance, that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc.—*statewide*? And how is the statewide “outweighing” to be determined? If three-fifths of the map's districts forgo the pursuit of partisan ends in favor of strictly observing political-subdivision lines, and only two-fifths ignore those lines to disadvantage the plaintiffs, is the observance of political subdivisions the “predominant” goal between those two? We are sure appellants do not think so.<sup>146</sup>

If plaintiff's test for determining intent was not bad enough, Scalia also criticizes the borrowing of the effects test from the racial gerrymandering/equal protection jurisprudence.<sup>147</sup> While race is immutable, one's politics is not, rendering it difficult to

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141. *Id.* at 282.

142. *Id.* at 282-83.

143. *Id.* at 284.

144. *Id.*

145. *Id.* at 285.

146. *Id.*

147. *Id.* at 285-86.

## CHARLESTON LAW REVIEW

[Volume 3]

ascertain if people of a specific political affiliation or stripe have been packed or cracked into or among districts.<sup>148</sup> Moreover, the plurality also states that, even if the effects of a gerrymander could be ascertained and one accepted the fact that a majority has had their political will frustrated, there would be no constitutional violation because the Equal Protection Clause does not provide for proportional representation.<sup>149</sup> What does the Equal Protection Clause provide? “It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.”<sup>150</sup> Finally, Scalia also questions how we measure the strength of a party.<sup>151</sup> Whereas one party may capture more votes in a federal race in a state, another may capture more in a state race for governor.<sup>152</sup> In addition, since legislative races are not at-large, aggregating votes in district contests may not produce a sense of who or what constitutes a majority party.<sup>153</sup> For all of these reasons, the intent plus effect standard is unmanageable.

Overall, a four-Justice plurality ruled that partisan gerrymanders were not justiciable; and therefore, in the case before it, the claims of the Democrats should be rejected.<sup>154</sup> However, five Justices agreed that the Democrats had not proved that a partisan gerrymander existed in the case before them and that this type of issue was not justiciable.<sup>155</sup> Justice Kennedy concurred that there was no partisan gerrymander here but refused to overrule *Bandemer*.<sup>156</sup> He agreed that neutral rules for resolving and adjudicating partisan gerrymanders were

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148. *Id.* at 286-87.

149. *Id.* at 287-88.

150. *Id.* at 288.

151. *Id.*

152. *Id.*

153. *Id.* at 288-89.

154. *Id.* at 290.

155. *Id.* at 292.

156. *Id.* at 306-08 (Kennedy, J., concurring).

2008]

*Political Thicket*

needed but did not agree with the majority that it would never be possible to find such rules.<sup>157</sup> This created a five-Justice plurality to reject the plaintiffs' claims. However, four dissenting Justices refused to overrule *Bandemer* and continued to make partisan gerrymanders justiciable issues.<sup>158</sup> The dissenters could not agree on what constituted acceptable or manageable standards for adjudicating a partisan gerrymander dispute.<sup>159</sup> The hope was that *LULAC* would provide that, but it did not.

*LULAC* arose out of a high-profile partisan battle in the Texas legislature that involved U.S. Representative Tom DeLay and a battle for the state legislature and its congressional delegation.<sup>160</sup> The 2000 census indicated that the state of Texas should receive two additional seats in the House of Representatives beyond the current thirty that it had.<sup>161</sup> At the time of redistricting, the Texas Republican Party controlled the state senate and governor's office, but the Democrats controlled the state house of representatives.<sup>162</sup> Unable to agree to adopt a redistricting scheme, litigation eventually led to the creation of a court-ordered one.<sup>163</sup> This plan produced a 17-15 Democratic majority in the Texas congressional delegation.<sup>164</sup> But in 2003 state elections gave Republicans control of both houses of the state legislature and control of the governor's office.<sup>165</sup> With the encouragement of Tom DeLay, and after a long struggle which included Democrats in the legislature leaving the state to avoid a special session, the state passed a new redistricting plan in 2003.<sup>166</sup>

In 2004, elections using this new plan gave Republicans 58% of the statewide vote compared to 41% for Democrats.<sup>167</sup>

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157. *Id.*

158. *Id.* at 317-18 (Stevens, J., dissenting).

159. *Id.*

160. *LULAC*, 548 U.S. at 413.

161. *Id.* at 411.

162. *Id.* at 412-13.

163. *Id.* at 413.

164. *Id.* at 412.

165. *Id.* at 411-12.

166. *Id.* at 412-13.

167. *Id.* at 413.



Republicans also captured 21 of the congressional seats to the eleven won by the Democrats.<sup>168</sup> The 2003 plan was challenged in court, claiming, *inter alia*, that it was a partisan gerrymander and that the state and federal constitutions barred a second redistricting scheme following a decennial census.<sup>169</sup> Judgment was for the appellees, but in light of the *Vieth v. Jubelirer* decision, the Supreme Court vacated and remanded.<sup>170</sup> The district court then solely considered the political gerrymandering claim and again ruled in favor of the appellees.<sup>171</sup> Before the Supreme Court were arguments that the 2003 redistricting scheme was a partisan or political gerrymander, that it violated the VRA, and that the mid-decade redistricting violated the one-person, one-vote requirement under the Fourteenth Amendment.<sup>172</sup> While the Court did find that one of the districts violated the VRA,<sup>173</sup> it rejected claims that the mid-decade redistricting violated the Constitution and ruled that the appellants had failed to state a claim upon which relief could be granted for the political gerrymander.<sup>174</sup>

Justice Kennedy, writing for yet another divided Court when it came to the partisan gerrymander claim, specifically noted that the plaintiffs' theory was that mid-decade redistricting, "when solely motivated by partisan objectives," violated the Fourteenth Amendment.<sup>175</sup> A majority of the Court rejected this claim,<sup>176</sup> stating that not every line drawn was done based on partisan objectives.<sup>177</sup> Yet even if mixed motives were not present in this case, Kennedy asserted that parties challenging a gerrymander as partisan would have to show, according to a reliable standard,

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 413-14.

173. *Id.* at 410 (finding that District 23 did violate the VRA). For the purposes of this article, the VRA claim shall not be discussed.

174. *Id.*

175. *Id.* at 416-17.

176. *Id.* at 410.

177. *Id.* at 417-18.

2008]

*Political Thicket*

how it burdened their representational rights.<sup>178</sup> The simple fact that a mid-decade redistricting scheme took place is rejected as a per se standard to show burden.<sup>179</sup> Similarly, the Court rejected the claim that a mid-decade redistricting violates the one-person, one-vote requirement if done for partisan purposes.<sup>180</sup> While Kennedy clearly stated that this decision did not revisit the justiciability of partisan gerrymandering, it rejected the tests offered in this case to define a standard for resolving disputes averring this as a claim.<sup>181</sup>

As in *Vieth*, *LULAC* produced a divided Court that failed to mend the split over partisan gerrymandering.<sup>182</sup> Kennedy wrote the opinion for the Court with various Justices concurring with parts of the decision.<sup>183</sup> The splits occurred over whether partisan gerrymanders are justiciable (five Justices agreed that they were);<sup>184</sup> whether there was a VRA violation in the drawing of District 23 (five agreed there were);<sup>185</sup> and whether there was an agreement on what constituted manageable standards for resolving a political gerrymander (Kennedy rejected the plaintiffs proposed standard, four Justices reject all standards, and four other Justices splintered over various possible standards).<sup>186</sup> *LULAC* left the Court no better off than before, despite a change in two Justices since the *Vieth* decision: four Justices saying political gerrymanders are non-justiciable, four saying they are and proposing different standards, and Kennedy in the middle saying the issue is justiciable, but still in search of a standard.<sup>187</sup> Unlike in *Vieth*, where the plurality opinion engaged in a discussion of the equal protection logic underlying the claims, little of that took place here. While in *Vieth*, Justices Kennedy and Stevens raised the possibility that these types of

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178. *Id.* at 418.

179. *Id.* at 418-19.

180. *Id.* at 420-23.

181. *Id.* at 414, 417.

182. *Id.* at 408-09.

183. *Id.*

184. *Id.* at 409-10.

185. *Id.*

186. *Id.* at 409-10; 417; 447-48; 483; 491-92; 511-12.

187. *Id.*

claims might be better suited as First Amendment challenges (and Scalia responded to that), here only Stevens briefly references this line of debate.<sup>188</sup>

### C. Summary

In its three major partisan gerrymandering cases, the Supreme Court failed to reach a consensus on how to address this practice. While not completely extracting them from the political thicket of gerrymandering, *LULAC* ends with a Court unable to act, leaving state legislatures free to redistrict to the advantage of incumbents and the political parties who dominate their chambers. Such freedom continues to give freehand to states to draw district lines in ways that thwart competitive elections.

## IV. ALTERNATIVE WAYS TO COMBAT PARTISAN GERRYMANDERING

If the federal courts have thus far been unsuccessful in rooting out partisan gerrymandering and other practices that make for less than free and competitive elections, do other options exist? This section explores them, concluding that Congress should mandate the state use of independent redistricting commissions to draw its district lines.

### A. Options for the Courts

Several alternatives exist beyond turning to the federal courts to address congressional districting. These options include doing nothing, letting state courts do it, leaving it to the people, letting states create their own commissions on their own, or ushering in congressional action via new redistricting standards. None of these options are satisfactory.

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188. *Id.* at 461-62.

2008]

*Political Thicket*

### 1. Do Nothing

One option to address partisan gerrymandering of congressional districts is to do nothing. That is to say, the current process for the redistricting of congressional lines is not broken and does not need to be fixed. Another “do nothing” response is to conclude that while the districting process is broken, the political process should fix it. We should leave it to voters to punish legislators who malapportion, or leave it to the competition and debates among the political parties to police themselves. While placing faith in the status quo is attractive, it is ultimately an unsuccessful and undesirable strategy.

First, letting voters try to fix the problem will not work for the simple reason that the malapportionment is what entrenches parties and incumbents in office, making it difficult, if not impossible, for voters to oust them. Almost by definition, this is what gerrymandering is. As the Court originally noted in its reapportionment cases of the 1960s, such as *Reynolds v. Sims*, the denial of one-person, one-vote makes it difficult for the plaintiffs to convince the legislature to rectify its wrongs.<sup>189</sup> The drawing of district lines is meant to prevent the political process from operating fairly to allow a political solution to correcting the malapportionment.

A second idea is that party competition will solve the basic problems with the political pressure of one serving to check the excesses of the other. Again, there are several weaknesses with this argument. First, political parties often team up to malapportion. This was the case in California in 2001.<sup>190</sup> In addition, for years the New York Legislature has been split, with Democrats controlling the Assembly, the Republicans the Senate.<sup>191</sup> Each house and party has effectively agreed to let one another draw lines to favor incumbents in each body. Thus,

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189. See *Reynolds*, 377 U.S. at 540.

190. Kang, *supra* note 38, at 667.

191. See, e.g., James C. McKinley, Jr., *For a Split State Legislature, Bipartisan Fiscal Problems*, N.Y. TIMES, Nov. 14, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9F03EFD81630F937A25> (last visited Sept. 26, 2008).

instead of there being party competition, party collusion has solidified power in each of the bodies.

Even if one can rely upon the major parties to check one another, collusion like that in California or New York does little to protect other third parties from gerrymandering, or to protect people of color from being disadvantaged in the redistricting process. Thus, turning to the current political process as a solution to gerrymandering has already proved ineffective, which is why the federal courts have intervened to protect minorities.<sup>192</sup>

Finally, one could also argue that state legislatures should be entrusted with the responsibility to address redistricting, the reason being that there is a long history of states enacting legislation to address malapportionment.<sup>193</sup> However, despite these laws, partisan gerrymandering persists, and it remains a conflict of interest for elected officials to draw either the districts for their own seats or to entrust them to do it for Congress. The empirical track record demonstrating their competence and fairness in this issue just does not exist.

## 2. Let the State Courts Do It

A second option is to let state courts regulate the reapportionment process. Two powerful forces bode in favor of this solution. First, in *Grove v. Emison*,<sup>194</sup> the Supreme Court ruled that state courts should be given the primary responsibility (ahead of the federal courts) in formulating district plans.<sup>195</sup> In addition, state courts appear to be demonstrating increased competence since *Emison* in rooting out the more egregious

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192. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (discussing this point and justification of judicial review when the political process or channels of political participation are closed to some).

193. James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 887-89 (2006).

194. 507 U.S. 25 (1993).

195. *Id.* at 42. See also Hirsch, *supra* note 10, at 179-80 (advocating that because the federal courts have failed to address partisan gerrymandering state courts should address it under their constitutions).

2008]

*Political Thicket*

efforts to gerrymander.<sup>196</sup> However, despite this increased competence, new pressures on state courts may make that more difficult in the future. Specifically, as a result of *Republican Party of Minnesota v. White*,<sup>197</sup> state judges have increased First Amendment rights when running for office.<sup>198</sup> Some have speculated that as a result of *White* state courts will become more politicized.<sup>199</sup> This increased politicization, especially if it is accompanied with party affiliations or endorsements, may decrease the independence and capacity of state judges to effect fair redistricting plans. In addition, some state judicial districts are also subject to districting, thereby placing judges in a position where they may be ruling on plans that include their own districts. Thus, although not discounting that state courts may have the capacity to reapportion, that capacity may be threatened down the line.

### 3. Let the People Do It

A third option is to turn the redistricting process over to the people, using ballot initiatives as an alternative to state legislatures in drawing district lines.<sup>200</sup> According to Kang, if the current problem with redistricting is politics, one cure is more politics.<sup>201</sup> That is to say, letting the real political process—people voting—approve the final plan is one way to check gerrymandering. This option also holds some appeal by taking the final decision away from legislators and putting trust in the people to ratify the lines themselves.

This option also has problems. First, not all states have provisions for initiative or referendum, and therefore it would not

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196. See generally David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L.J. 1087 (2006) (discussing state court efforts to address partisan gerrymandering).

197. 536 U.S. 765 (2002).

198. David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 1001-02 (2006).

199. *Id.* at 1007.

200. See Kang, *supra* note 38, at 667.

201. *Id.* at 668-69.

be a process immediately available to all citizens in all states. In addition, many of the problems inherent in ballot propositions—such as capacity of the public and the press to understand or comprehend a complex topic, or the inability to effect tradeoffs or modify the plan—make it questionable regarding how voters would be in reviewing and voting on a redistricting measure.<sup>202</sup> Moreover, straight majority rule on redistricting might hurt genuine minority rights, run afoul of the VRA, or still be approved even if it gerrymandered a few districts to favor incumbents, but overall received public support. Finally, in a state overwhelmingly of one political party, nothing would prevent voters from endorsing a plan that would continue to entrench their views. Overall, more politics does not necessarily seem to be the answer.

#### 4. Let States Create Redistricting Commissions

A fourth option to redistricting is to take it out of the hands of state legislatures and to turn it over to redistricting commissions. This is one popular option that has recently received significant attention.<sup>203</sup> Kubin argues that redistricting commissions provide a viable alternative to legislative and judicial efforts that have largely been devoid of fairness.<sup>204</sup> In addition, judicial efforts to address partisan gerrymandering have generally failed to provide clear mandates to guide the lower courts.<sup>205</sup>

Several additional arguments are offered for the use of commissions. First, commissions represent an alternative to the partisan politics that grips legislatures when they undertake

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202. Jeffery C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 859 (1997).

203. See, e.g., Nicholas D. Mosich, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165 (2005); Christopher C. Confer, *To Be About The People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115 (2003-04); Kubin, *supra* note 202; Kumar, *supra* note 13.

204. Kubin, *supra* note 202, at 841.

205. *Id.*

2008]

*Political Thicket*

redistricting.<sup>206</sup> Second, legislative redistricting, especially when legislators are drawing their own lines, is a conflict of interest;<sup>207</sup> it permits them to select their own constituents.<sup>208</sup> Independent commissions supposedly produce less partisan outcomes or plans.<sup>209</sup> Less partisan outcomes translate into stronger public support and legitimacy for redistricting, and mitigate the time legislatures and courts are bogged down addressing reapportionment issues.<sup>210</sup> Overall, one can presume that independent commissions probably do not eliminate all the unfairness and politics surrounding redistricting, they can nonetheless address the more egregious problems associated with legislative efforts.<sup>211</sup>

Nineteen states have adopted some form of redistricting commission.<sup>212</sup> In reviewing the institutional structure and authority of redistricting commissions, no set pattern emerges. In none of the states are the commissions constitutionally mandated; instead, they are the product of statute.<sup>213</sup> Composition of commissions also vary, with some mandating bipartisan or nonpartisan membership.<sup>214</sup> Members of some commissions are chosen by the governor, others by the legislature, and still others by some mixed form of selection.<sup>215</sup> Some commissions are given the primary task of first pass at drawing district lines, with others given more of an advisory role in suggesting plans to the legislature.<sup>216</sup> Only in Iowa does the commission seem to have significant authority to draw lines, subject to a yes or no vote by the legislature.<sup>217</sup> In some states, judicial review of plans produced by a commission is

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206. Kumar, *supra* note 13, at 659.

207. Cain, McDonald & McDonald, *supra* note 33, at 3.

208. Kumar, *supra* note 13, at 656.

209. Confer, *supra* note 203, at 123-24.

210. *Id.* at 126-33.

211. Kubin, *supra* note 202, at 849.

212. Confer, *supra* note 203, at 118.

213. Kubin, *supra* note 202, at 843-44.

214. *Id.* at 845; see Kumar, *supra* note 13, at 661.

215. Kubin, *supra* note 202, at 845-48.

216. *Id.* at 843-44; see Kumar, *supra* note 13, at 663-64.

217. Kubin, *supra* note 202, at 848.



mandated.<sup>218</sup> In addition, commissions are generally required to follow statutory criteria when drawing lines.<sup>219</sup>

Despite a plethora of models for redistricting commissions, no consensus has emerged as to what constitutes the best model. Kumar, for example, advocates the creation of commissions subject to state judicial review,<sup>220</sup> while Kubin<sup>221</sup> and Confer<sup>222</sup> advocate for nonpolitical or non-partisan commissions. Given that there are only nineteen states with commissions of varying degrees of authority to draw districts,<sup>223</sup> the empirical data on their efficacy or success in producing more competitive elections—if that is the measurement to judge the performance of these bodies—is an open question. This question might well be one of the first criticisms regarding the creation of commissions. Given that these bodies, if properly constituted as independent, would not face the same conflict of interest problems as legislatures, they might be held out as being potentially superior in their capacity to engage in districting.

There are other more fundamental problems in leaving it up to states to create their own commissions. First, less than twenty states have done so.<sup>224</sup> States may opt not to create these commissions because, in part, the same forces that make it difficult to redistrict may also preclude them from turning the task over to another body. Second, these commissions may not be independent or have the real authority to draw lines, as evidenced by some of the models that already exist. Instead, they may simply be façades which mask the real authority of districting that remains with the legislature. Finally, unless the commissions are constitutionally mandated, the dissatisfied legislature can disband them by statute or change their mandates. Thus, leaving it up to states to voluntarily create redistricting commissions is not an adequate way to address the

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218. *Id.* at 850; see Kumar, *supra* note 13, at 671-72.

219. Kubin, *supra* note 202, at 851; Kumar, *supra* note 13, at 662.

220. Kumar, *supra* note 13, at 653-54.

221. Kubin, *supra* note 202, at 872.

222. Confer, *supra* note 203, at 116.

223. *Id.* at 118.

224. *Id.*

2008]

*Political Thicket*

problems already associated with reapportionment.

#### 5. Let Congress Redistrict Itself

Another set of proposals recognize that state legislatures are unable to redistrict fairly and impartially; therefore, another institution should perform this task. Recognition of this fact is why *Baker v. Carr* declared redistricting a justiciable controversy and responsibility has generally devolved to the judiciary.<sup>225</sup> Instead of the courts entering the political thicket, why not Congress?

One option is for Congress to redistrict itself. This would take the matter out of state legislatures, which is one plus. However, the conflicts of interest in letting Congress draw its own lines are even greater than those associated with state legislatures doing it.<sup>226</sup> In addition, there might be some unfairness in letting representatives from one state decide how lines in another state should be drawn, and legislators may not be cognizant in some of the specific communities of interest found in another jurisdiction. Thus, for the same reasons why legislatures may be unsuited to draw lines, the same reasons apply to Congress directly crafting its own lines.

#### 6. Let Congress Enact New Redistricting Standards

Another possibility is allowing Congress to mandate that states follow certain criteria when drawing lines or engaging in districting. Presently, Congress does that by requiring that states create single member congressional districts.<sup>227</sup> O'Neill argues that Congress should not directly apportion its own seats,<sup>228</sup> but consistent with the principles of federalism, it should enact more anti-gerrymandering legislation.<sup>229</sup> While O'Neill is silent as to exactly what that legislation should do, he

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225. 369 U.S. at 207-09 (discussing the deprivation of rights sustained by the plaintiffs).

226. See O'Neill, *supra* note 14, at 707.

227. See 2 U.S.C. § 2c (2007); O'Neill, *supra* note 14, at 685.

228. O'Neill, *supra* note 14, at 707.

229. *Id.* at 714-15.

nonetheless specifies that it should grant each state,

[the] 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.<sup>230</sup>

The authority to enact this legislation would come from Article I, Section Four, Clause One.<sup>231</sup>

Simply articulating standards is not enough. The Supreme Court has articulated one-person, one-vote compactness, and other values to guide redistricting for nearly fifty years; those guidelines alone have not been enough to ensure that states avoid gerrymandering. Again, judicial intervention is premised upon the partisan politics of states that compromise compliance with these broader values. Thus, congressional standards plus something more is needed.

#### 7. Congress Should Mandate States to Create Redistricting Commissions

The seventh and final option is for Congress to mandate the use of independent reapportionment commissions to draw federal congressional lines, subject to prescribed criteria. In his suggested legislation, O'Neill proposes the use of these commissions, with Congress mandating that states use them when drawing congressional lines.<sup>232</sup> In addition to O'Neill's proposals, several bills have been offered in Congress to mandate the state use of redistricting commissions when drawing congressional lines.<sup>233</sup>

As noted, the power of Congress to mandate the use of reapportionment commissions by states when drawing their

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230. *Id.* at 715.

231. *Id.* at 683.

232. *Id.* at 713-14.

233. *See, e.g.*, Fairness and Independence in Redistricting Act of 2005, H.R. 2642, 109th Cong. (2005); Redistricting Reform Act of 2005, H.R. 4094, 109th Cong. (2005); Kumar, *supra* note 13, at 660.

2008]

*Political Thicket*

district lines is rooted in the Elections Clause,<sup>234</sup> in conjunction with the Necessary and Proper Clause of Article I, Section Eight. In *Oregon v. Mitchell*,<sup>235</sup> the Court invoked these two clauses to uphold a federal law setting the age for federal elections.<sup>236</sup> In *Smiley v. Holm*,<sup>237</sup> Chief Justice Hughes spoke of the power of Congress under the Elections Clause:

The subject matter is the “times, places and manner of holding elections for Senators and Representatives.” It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.<sup>238</sup>

In *Ex parte Siebold*,<sup>239</sup> the Court stated: “Congress may, if it sees fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election.”<sup>240</sup> It is this Elections Clause power that is at the basis of the federal government’s authority to regulate federal elections, including the ability to protect the process of registering to vote in federal elections<sup>241</sup> and the regulation of political contributions in federal elections.<sup>242</sup>

Assuming *Mitchell*, Chief Justice Hughes’s dicta, and the

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234. U.S. CONST. art. I, § 4, cl. 1.

235. 400 U.S. 112 (1970).

236. *Id.* at 118.

237. 285 U.S. 355 (1932).

238. *Id.* at 366.

239. 100 U.S. 371 (1880).

240. *Id.* at 396.

241. *Ex parte Geissler*, 4 F. 188, 191 (N.D. Ill. 1880); *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 351 (D. La. 1965).

242. *Buckley v. Valeo*, 424 U.S. 1, 13-14 (1976).

## CHARLESTON LAW REVIEW

## [Volume 3]

other cases are still good law (and there is no reason to think they are not), Congress appears to have ample authority to mandate state use of redistricting commissions when drawing congressional lines. Several public policy and legal principles bode in the direction of this type of legislation.

First, a federal law mandating that states use these commissions seems consistent with the text of the Elections Clause, which places primary responsibility on the states to run their elections subject to congressional regulation. Second, this approach respects the principles of federalism in asking states to redistrict.<sup>243</sup> This approach is also consistent with the general sentiment of *Grove v. Emison* that redistricting is primarily a state-first responsibility.<sup>244</sup> Third, this concept of federalism respects local officials' knowledge about political subdivisions and communities of interest that might not otherwise be understood at the national level by those who are out of state.

Mandating the use of the commissions will ensure that states adopt them. As noted above, many states presently do not employ these commissions when districting, and the same politics that produce partisan gerrymanders may preclude creation of commissions if states are left on their own. It seems unfair or odd for some states to have commissions while others do not. The unequal implementation or employment of redistricting commissions across states might be described as a form of denial of one-person, one-vote across state borders. Citizens in one state have a greater chance of their congressional district lines being drawn fairly in comparison to others.

Additionally, if the commissions are mandated by federal law, it is less likely that states can disband them if legislatures are unhappy with the results. Moreover, if state institutions create redistricting plans, they may well enjoy greater accountability and legitimacy than if created by Congress or a federal redistricting commission.

An added bonus in requiring states to use these commissions when drawing federal lines is that many states may choose or

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243. See O'Neill, *supra* note 14, at 713-14.

244. See 507 U.S. 25, 41 (1993).

2008]

*Political Thicket*

become pressured by their constituents to also use them to draw state legislative lines. Given that the principles of federalism generally preclude Congress from telling states how to run their own elections,<sup>245</sup> once a commission is in place to draw congressional lines, it may build support for use in other redistricting.

Finally, while this Article does not specify the exact features that these commissions should have in terms of structure and design, evaluation of existing state commissions suggest non-partisan, bi-partisan, or multi-partisan work better than partisan ones, and that commissions like the one found in Iowa, with criteria to follow and real authority to craft districts, is preferable to advisory bodies. As one author pointed out, while Iowa has one percent of the U.S. population, it has ten percent of the competitive congressional elections.<sup>246</sup> Perhaps this is due to its structure. If so, crafting national legislation that mandates the use of commissions that embody many of that state's features might be the starting point for creating more fair and just elections at both the federal and state levels.

## V. CONCLUSION

The United States Supreme Court has been unsuccessful in its efforts to regulate the political thicket of partisan gerrymandering. States, left to their own devices, are unwilling or unable to address the powerful political forces and conflicts of interest that prevent them from drawing fair congressional districts to ensure competitive elections for the House of Representatives. This Article argues that while many alternatives to federal court intervention exist, the most viable solution is to have Congress use its Article I, Section Four authority to mandate that states create independent redistricting commissions to draw the next and future round of congressional districts.

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245. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 117-23 (1970) (holding that Congress may not lower the voting age in state elections).

246. O'Neill, *supra* note 13, at 711-12.