Cracking, Packing, and Shacking: Resolving Gerrymandering Disputes at the Ballot Box?

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The recent decade has been marked by bitter partisan disputes across the nation. The contentious 2000 presidential election between then Governor George W. Bush and Vice President Albert A. Gore was perhaps the zenith of partisan division. Though the national media is typically enraptured with national contests, every ten years state legislatures gather to distort the lines of congressional and local legislative districts, a practice that has received more judicial scrutiny in recent years.¹

In 2000 for example, Republican state legislators carved up congressional districts in Pennsylvania in hopes of establishing a thirteen to six advantage.² Pennsylvania has favored Democratic Presidential candidates every year since 1992.³ Meanwhile, in Georgia, Democrats sought to establish a decade-long hold on their statewide majority; they attempted to consolidate power by drawing some of the most contorted and detached congressional districts in the nation.⁴ State Democratic leaders sought to achieve an eight to five advantage over Republicans, who had steadily gained strength in the outlying suburban counties that ring Atlanta.⁵

But as Alexis de Tocqueville observed, “scarcely any political question arises in the United States that is not resolved, sooner or later into a judicial question.”⁶ Indeed, when most voters go to the polls, it is their hope that they will be the final arbiters of democracy, not the courts.

However, entrenched politicians now have the aid of sophisticated computer software that allows

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¹ U.S. CONST. art. I, § 2 (providing that “The actual Enumeration shall be made within three Years after the first Meeting of Congress of the United States, and within every subsequent Term of Ten Years, in such a Manner as they shall by Law direct”).
⁴ BARONE 2004, supra note 2, at 454.
⁵ Id.
⁶ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (Francis Bowen trans., Vintage Books 1945) (1835).
them to carve up congressional districts with precision. Congressional districts are supposed to be compact and contiguous but they now stretch for hundreds of miles, spawning tentacles that reach out into distant parts of the state, gathering up the necessary votes to ensure that the entrenched party can consolidate political power until the next round of redistricting.\textsuperscript{7}

Understandably, the minority party has not been keen on permitting this practice to continue unabated. Aggrieved parties have taken attempts at gerrymandering to the courts; since 1986, in \textit{Davis v. Bandemer},\textsuperscript{8} political parties have aired their disputes there. Yet judges are unsure as to how to resolve the problem.

The courts have struggled with evaluating claims of partisan gerrymandering during the past twenty-two years, and judges have developed a number of different judicial standards. Those who argue that partisan gerrymandering claims are unfair and must be remedied solely through judicial constructions routinely provide assertions without facts. Since 1920, voters in oddly tailored districts have voted against politically protected incumbents.\textsuperscript{9} Electoral history has shown that courts are far less effective than voters at divining standards to address political gerrymandering.

This comment will illustrate that even though extreme political gerrymandering is an inherently undemocratic process, voters have routinely rejected politically protected incumbents at

\textsuperscript{7} See BARONE 2004, \textit{supra} note 2, at 450, 454 (illustrating that Georgia’s 13th Congressional district was a model of the perfect gerrymander). Democrats designed the district with four distinct tentacles that stretched into eleven metro Atlanta counties. In addition, the 11th Congressional district, as originally drawn, reached out into at least seventeen counties in central and western Georgia.

\textsuperscript{8} \textit{Davis v. Bandemer} 478 U.S. 109, 110 (1986).

\textsuperscript{9} MICHAEL J. DUBIN, \textit{PARTY AFFILIATIONS IN STATE LEGISLATURES} 11 (McFarland & Company, Inc. 2007) (illustrating historic partisan divisions in the state legislatures in all fifty states) [hereinafter DUBIN]; Party Divisions of the House of Representatives (1789 to Present), http://clerk.house.gov/art_history/house_history/partyDiv.html (last visited Mar. 31, 2007) (showing partisan divisions in the House of Representatives through the recent 2006 congressional elections) [hereinafter Party Divisions]. Since 1920, there have been nine redistricting cycles. Traditional thinking would favor the party drawing the lines to benefit the most from post-redistricting elections, yet this is not the case. In every cycle but two (1980 and 2000), the party with control of the redistricting process at the state-level has lost seats in Congress, an average of 38.7. For example, in 1990, when Democrats controlled thirty states legislatures to six Republican controlled states, Democrats still managed to lose nine seats in Congress.
the ballot box. Thus, the impact of gerrymandering is typically short-lived. Rather than litigate the matter in courts, which has been fruitless for establishing workable judicial standards, legislators should adopt non-partisan redistricting panels, such as those in Arizona and Iowa. In addition, several bills in Congress could redress the evils of partisan gerrymandering.

Part I of this paper provides a historical framework of gerrymandering. It traces gerrymandering to its roots during the colonial period, when attempts were made to gerrymander James Madison out of his seat. Focus will be paid to the initial attempts to force geographic gerrymandering claims into the courts, and the landmark decision in *Baker v. Carr*.

Part I will conclude with a review of the first political gerrymandering cases, and the various standards that fractured majorities on the Court use to adjudicate gerrymandering claims. Part II examines the views of scholars and judges who believe that political gerrymandering is a justiciable question. The dissenting opinions in *Davis v. Bandemer* and *Vieth v. Jubelirer* will be reviewed. Part III addresses the actual election data and concludes that while partisan congressional districts have an initial effect on results, politically entrenched incumbents are often voted out of office before the next round of redistricting. Election data from 1920 to present will be examined, as well as recent gerrymandering efforts in Pennsylvania, Georgia, and Texas. Part IV will conclude with suggestions for adopting non-partisan redistricting panels in the states. Legislators should cede power to non-partisan bodies to remove the stain of political gerrymandering from American

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politics. In addition, Part IV will address current congressional legislation that could be adopted to limit partisan gerrymandering in the states. Part V will offer concluding remarks.

Part I: Historical Roots of Partisan Gerrymandering

“Ask not for whom the line is drawn; is it drawn to avoid thee?”

Scholars and historians have debated the initial roots of gerrymandering, some dating the process back to England. Gerrymandering is defined as “[t]he practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” The American lineage of this practice dates back to the colonial period.

Gerrymandering is a term derived from the fusion of the word salamander and former Massachusetts Governor Elbridge Gerry. During the 1812 redistricting process, Governor Gerry was involved in drawing a district that was so misshapen one commentator remarked that it resembled a salamander. Another commentator, doubtless with a sense of humor, noted that it was more akin to a Gerrymander. Since 1812, the term has been established in American political lexicon, and it appears that every ten years, legislators attempt to out-gerrymander Governor Gerry.

Surprisingly, Governor Gerry was not the first politician to tinker with legislative boundaries. It is rumored that Patrick Henry attempted (unsuccessfully) to gerrymander James

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16 *See* COURTENAY ILLBERT, *PARLIAMENT: ITS HISTORY, CONSTITUTION AND PRACTICE* 33 (new and rev. ed. 1920) (detailing the ancient process of drawing district lines in England).
17 BLACK’S LAW DICTIONARY 696 (7th ed. 1999).
20 *Id.*
21 *Id.*
Madison out of the first Congress. Indeed, in 1710, Virginia governor Alexander Spotswood remarked, “voters frequently considered the attitude taken by the various candidates for the House of Burgesses upon this question of the division of old parishes.” In the abstract, most voters understand that one can contort district lines to achieve electoral success, but how exactly does this ancient practice work today?

Gerrymandering can be divided into three methods, often used by legislators in forty-three states. The practices of “cracking,” “packing,” and “shaking” are routinely used to ensure that the incumbent or potential challenger is secure from normal electoral fluctuations.

“Cracking” is the process of dividing neighborhoods or geographic localities that typically have one political preference, to lessen the localities influence over elections. In other words, cracking is a “technique in which a geographically concentrated political or racial group that is large enough to constitute a district’s dominant force is broken up by district lines and dispersed throughout two or more districts.”

For example, Georgia’s 11th Congressional District is located in the state’s northwest corner and is reliably conservative, giving President Bush 65% of the vote in 2000, and 71% in 2004. However, the district as originally drawn in 2002 did not consolidate the conservative majorities in northern Georgia. Instead, the district took a sliver of the northwest corner and slithered its way south, picking up Democratic constituencies along the way toward Atlanta. Viewing the district,

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22 See W. Rives, Life and Times of James Madison 655, n. 1 (reprint 1970) (examining gerrymandering efforts in early colonial history). If the father of the Constitution had been successfully gerrymandered out of his seat, perhaps legislators would have addressed the problem earlier, rather than allow the practice to continue for several hundred years.


24 The last round of redistricting included seven states that are represented by only one member of Congress; thus, the state is the legislative boundary.


27 See Barone 2004, supra note 2, at 486.

28 Id.
an observer might think it was the path General Sherman took for his march through Atlanta. The
district stretches into the northern part of Atlanta over one hundred miles away from northwest
Georgia.29

Conversely, “packing” involves concentrating a group into as few districts as possible.
Packing involves efficient vote distributions. If one group packed Republican voters into a district
by contorting district lines to ensure that 80% of the district would vote Republican, there would
be fewer Republicans in neighboring districts. This practice, though achieved in a bi-partisan
fashion, was illustrated in Connecticut during the last round of redistricting.

Due to population shifts Connecticut lost one congressional district and had only five
remaining during the 2002 election.30 Two of the five districts (1st and 3rd) were liberal districts,
giving the Democratic Presidential candidate an average of 61% of the vote in 2000, and 58% of
the vote in 2004, respectively.31 The other three districts had roughly an even partisan
distribution, giving no more than 54% for either Presidential candidate in the last two contests.32
These three districts allowed Republicans to compete, and after redistricting Republicans won
three of the five seats.33

“Shacking” is a relatively new and even more devious practice that involves drawing district
lines to exclude the residence of the incumbent or potential challenger.34 This practice demands

29 Id.
30 See BARONE 2004, supra note 2, at 332.
31 MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2006 357, 363 (Charles
32 MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2008 349-356 (Charles Mahtesian
ed., National Journal Group 2007) [hereinafter BARONE 2008]. Despite the effort of bipartisan packing, only one
Republican remains in Connecticut. Representative Nancy Johnson of Connecticut’s 5th district was defeated in
2006; Representative Rob Simmons of Connecticut’s 2nd district was defeated as well.
33 See BARONE 2004, supra note 2, at 332.
34 See Samuel Issacharoff & Pamela S. Karlan, Where to Draw the Line?: Judicial Review of Political Gerrymanders,
that the incumbent either move his residence into the newly drawn district, or otherwise run in the relatively foreign district.\textsuperscript{35}

Republicans used shacking during a recent 2006 mid-decade redistricting.\textsuperscript{36} John Barrow represented Georgia’s 12th district, which stretched from Athens to the Atlantic Ocean.\textsuperscript{37} Barrow lived in Athens, Georgia, a college town with liberal leanings.\textsuperscript{38} Republicans redrew the district to exclude Barrow’s residence.\textsuperscript{39} After redistricting, he resided in the nearby 10th Congressional District, which gave President Bush 65\% of the vote.\textsuperscript{40} Barrow chose to move his home and run in the old 12th district; but despite his “shaking,” Barrow still managed to defeat his Republican opponent, Max Burns.\textsuperscript{41}

Though some voters might think that this process is illegal, all three are permitted under federal law. The only requirement that remains today is the single-member requirement.\textsuperscript{42}

A. Republican Form of Government?

Most complaints over gerrymandering derive from its undemocratic nature. For litigants, fashioning the proper procedural posture took some time.\textsuperscript{43} Article IV of the Constitution offers some initial hope for challenging an undemocratic practice: “The United States shall guarantee to every State in this Union a Republican Form of Government…”\textsuperscript{44} Courts were reluctant to apply this clause to political disputes.

\begin{thebibliography}{10}
\bibitem{35} Id.
\bibitem{36} BARONE 2008, supra note 32, at 457.
\bibitem{37} Id. at 490.
\bibitem{38} Id.
\bibitem{39} Id.
\bibitem{40} Id. at 486.
\bibitem{41} Id. at 490.
\bibitem{42} 2 U.S.C. § 2(c) (West 2006).
\bibitem{44} U.S. CONST. art. IV, § 4.
\end{thebibliography}
In *Luther v. Borden*, a dissident named Martin Luther challenged Rhode Island’s archaic system of government that derived many laws from a royal charter dating back to 1663. Luther argued that Rhode Island’s previous system violated the Republican Form of Government Clause in Article IV.

Viewing the issue as a political question not suitable for judicial scrutiny, the Court chose not to review Luther’s petition. Chief Justice Taney held, “It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters of in a State….” As for the Republican Form of Government Clause, Taney viewed it as purely a political concern: “[I]t rests with Congress to decide what government is the established one in a State…. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.” For those seeking redress of political wrongs, the Supreme Court was not willing to employ Article IV as the means of redress.

Almost one hundred years later, another plaintiff would attempt to use the Republican Form of Government Clause, this time in an attempt to correct mal-apportioned district lines. In *Colegrove v. Green*, Kenneth Colegrove sued Illinois officials over district lines that “lacked compactness.” Predictably, the Court held that Article IV offered no relief. The Court wrote, “To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket…. Violation of the great guaranty of a republican form of government in

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45 Luther v. Borden, 48 U.S. 1, 3 (1849).
46 *Id.*
47 *Id.* at 22.
48 *Id.* at 41.
49 *Id.*
50 *Id.* at 42.
51 See *Colegrove v. Green*, 328 U.S. 549, 549 (1946) (holding that Article IV of the Constitution would not redress partisan gerrymandering claims).
52 *Id.* at 550.
53 *Id.* at 556.
States cannot be challenged in the courts.” Thus, the Supreme Court effectively buried any chance that a gerrymandered map would be struck down under Article IV of the Constitution.

B. The Rise of the Equal Protection Clause

The genesis of current political gerrymandering litigation has its roots in the famous case of *Baker v. Carr.* In *Baker*, a 1901 Tennessee law apportioning members of the General Assembly had been virtually ignored and the lines remained almost stagnant for decades. As the 20th Century transformed the United States from a mostly rural nation into an urban and suburban one, the old lines severely debased the votes of urban residents. The previous lines heavily favored rural districts, but given the population had shifted to urban centers like Nashville and Memphis, rural voters had proportionally more strength in the General Assembly, even though they were a minority statewide.

Instead of invoking Article IV once again, the plaintiffs rested their hopes on the Equal Protection Clause of Fourteenth Amendment. Justice Brennan, writing for the Court, was finally willing to hold gerrymandering claims constitutional. He wrote, “The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties.” According to the majority, because the votes of urban residents counted less than rural voters, the former were denied due process. Though this might be a political question between urban and rural legislators, the Supreme Court carved out an exception under the

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54 *Id.*
56 *Id.*
57 *Id.* at 256.
58 *Id.* at 195.
59 *Id.* at 207-08.
Fourteenth Amendment demanding that redistricting procedures conform to a one-person, one-vote standard.\textsuperscript{60}

The value of \textit{Baker v. Carr} as a truly landmark Supreme Court case cannot be overstated, but it is \textit{Baker}’s predictive value that allows it to influence modern gerrymandering jurisprudence today. To aid subsequent courts, Justice Brennan explicated six factors:

[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 a nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\textsuperscript{61}

These six factors laid the groundwork for disputes involving Congress and the President, and more importantly, political gerrymandering cases. Without \textit{Baker v. Carr},\textsuperscript{62} future courts would have little guidance on how to address political questions. But as recent history has proven, these factors have not been enough to establish judicial consistency.

C. Political Gerrymandering on Trial

In \textit{Davis v. Bandemer},\textsuperscript{63} the Supreme Court examined an Indiana state legislative map that allegedly favored Republicans. In the first election under the new map, Democrats garnered 51.9\% of the vote in state House races, yet won only forty-three out of one hundred possible seats.\textsuperscript{64} On

\begin{footnotes}
\footnotetext{60}{See Baker, 369 U.S. at 242 (holding that legislative districts must contain roughly equal populations).}
\footnotetext{61}{Id. at 217.}
\footnotetext{62}{Id.}
\footnotetext{63}{\textit{Bandemer}, 478 U.S. at 109.}
\footnotetext{64}{Id. at 115.}
\end{footnotes}
the Senate side, Democrats received an even larger share, 53.1% of the statewide vote, yet only
won thirteen of the twenty-five seats up for election.\textsuperscript{65}

Democrats sued alleging that the reapportionment violated the Equal Protection Clause.\textsuperscript{66}
Justice White, writing for a plurality of the Court, held that the redistricting plan was
constitutional.\textsuperscript{67} He noted that the mere fact that a plan makes it more difficult for a political party
to win seats does not alone constitute discrimination under the Equal Protection Clause.\textsuperscript{68}

Justice White then fashioned a new test intended to serve some prophetic value. As White
held, one election alone was not enough to prove constitutional violation.\textsuperscript{69} A plaintiff must show
two elements: intent and effect.\textsuperscript{70} The Court could discern that the intent of the new district lines
was to maximize the Republican vote, but the effect of the political gerrymander was not
evident.\textsuperscript{71} As White wrote, “[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.”\textsuperscript{72} This test proved to be a high hurdle for
plaintiffs to climb.

Justice Sandra Day O’Connor, joined by Chief Justice Warren Burger and Justice William
Rehnquist, took the view that political gerrymandering was a non-justiciable political question.\textsuperscript{73}
Justice O’Connor complained that political preferences are hard to measure in elections.\textsuperscript{74} She
wrote that political parties are dominant groups in elections, unlike “discrete and insular

\begin{flushleft}
\textsuperscript{65} \textit{Id.} \\
\textsuperscript{66} \textit{Id.} \\
\textsuperscript{67} \textit{Id.} at 131. \\
\textsuperscript{68} \textit{Id.} at 132. \\
\textsuperscript{69} Bandemer, 478 U.S. at 111. \\
\textsuperscript{70} \textit{Id.} \\
\textsuperscript{71} \textit{Id.} \\
\textsuperscript{72} \textit{Id.} at 133. \\
\textsuperscript{73} \textit{Id.} at 144. \\
\textsuperscript{74} \textit{Id.}
\end{flushleft}
minorities,“75 and “the Court has offered no reason to believe that they [political parties] are incapable of fending for themselves through the political process.”76 For O’Connor, the judiciary should concern itself with remedying wrongs perpetrated against minorities, not well-funded political parties who can raise vast sums of money and compete nationwide.

Justice O’Connor then concluded, “[W]hile membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party.”77 In other words, although there are still Yellow Dog Democrats and straight-ticket Republican voters, a large segment of the United States votes for both parties from election to election, and even during elections.78 For example, a recent Pew Research Center Poll of over five thousand respondents revealed that a plurality of Americans, 37%, identify themselves as independents.79 In addition, in the 2000 Presidential election, there were eighty-six congressional districts that voted for a House member of one party while casting a majority of the vote for the Presidential candidate of the opposing party.80 In 2004, there were fifty-nine such “turnover” districts.81 In sum, political preferences simply do not warrant protection from the courts. Partisan proclivities are an ephemeral characteristic and not as entitled to equal protection as groups that have suffered a history of discrimination and still have few voices in the halls of government.

76 Bandemer, 478 U.S. at 151.
77 Id. at 156.
78 See generally RICKY F. DOBBS, YELLOW DOGS AND REPUBLICANS: ALLAN SHIVERS AND TEXAS TWO-PARTY POLITICS 3 (Texas A&M University Press 2005) (defining the term Yellow Dog Democrat). “Yellow Dog Democrat” is a term used to describe partisan Democrats. If a voter is a Yellow Dog Democrat, then if given a choice between a yellow dog and a Republican, then the voter would choose the yellow dog.
81 Id.
The dissent in *Bandemer* lived in the historic fiction that the state treats all political parties equally, and should do the same during redistricting. Justice Lewis Powell wrote, “When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.”\(^{82}\) It was clear to the dissent that partisan motivations influenced the political process of drawing lines, and one election was sufficient.\(^{83}\)

**D. Gerrymandering in the 21st Century**

As the 2000 Presidential election contest ended, state legislators across the nation sought to increase the partisan divide in the United States by carving up districts in their favor. In Pennsylvania, Republicans sought to turn their thin eleven to ten congressional majority into a thirteen to six advantage, far greater than recent statewide percentages for Republican Presidential candidates.\(^{84}\)

In Georgia, Democrats found themselves in the minority (at the federal level) after the 1994 and 1996 Republican landslides.\(^{85}\) Democrats drew some of the most politically artistic districts in the nation in their attempt to garner an eight to five advantage.\(^{86}\) Given the supposed stakes of being left in the minority for a decade, litigation ensued.\(^{87}\)

In *Vieth v. Jubelirer*,\(^{88}\) a consolidated case from aggrieved Republicans in Georgia and Democrats in Pennsylvania, the parties urged the Court to use the Equal Protection Clause to overturn the skewed district maps.

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\(^{82}\) *Bandemer*, 478 U.S. at 166.  
\(^{83}\) *Id.* at 170.  
\(^{84}\) *Barone* 2004, *supra* note 2, at 1350.  
\(^{86}\) *Barone* 2004, *supra* note 2, at 450.  
\(^{87}\) See Vieth, 541 U.S. at 267 (holding that redistricting plans in Pennsylvania and Georgia were justiciable, but did not violate the Fourteenth Amendment).  
\(^{88}\) *Id.*
Writing for the plurality, Justice Scalia mirrored the rationale in Justice O’Connor’s previous gerrymandering cases.\textsuperscript{89} He wrote, “[N]o 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 Bandemer was wrongly decided.”\textsuperscript{90} However, only three other justices agreed.\textsuperscript{91}

Scalia noted that race and political preferences were inherently different, and partisan leanings are hardly immutable.\textsuperscript{92} He wrote, “[A] person’s politics is rarely as readily discernable-and never as permanently discernable-as a person’s race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.”\textsuperscript{93} Indeed, for Scalia and the plurality, the Equal Protection Clause was never meant to protect political proclivities, which are not readily apparent. Minorities on the other hand, suffer persistent discrimination and are easily identifiable to policymakers, thus the need for strict scrutiny. However, Justice Kennedy did not agree in full, and was not ready to close the door on political gerrymandering.\textsuperscript{94}

Though Justice Kennedy joined the opinion, holding that Georgia Republicans and Pennsylvania Democrats had not yet suffered an Equal Protection Clause violation, he was not willing to hold political claims non-justiciable.\textsuperscript{95} Kennedy stated, “I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”\textsuperscript{96} Although eighteen years had passed without finding a workable standard to evaluate claims of partisan gerrymandering,

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\textsuperscript{89} Id. at 281.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 267.
\textsuperscript{92} Id. at 287.
\textsuperscript{93} Vieth, 541 U.S. at 287
\textsuperscript{94} Id. at 306.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\end{flushright}
and Justice Kennedy was unable to conceive of such a standard, he held out hope that a court would someday create a workable test.

Part II: Addressing the Dissenters: Immutability and Impartiality

The fractured dissent exemplifies why political gerrymandering should be non-justiciable. Instead of unifying around a single theory for reviewing partisan claims, the dissent provides several different frameworks.

Justice Stevens dissented and pronounced a simple but impractical standard for evaluating gerrymandering. Stevens opined, “In my view, when partisanship is the legislature’s sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.” However, as Baker v. Carr illustrates, impartiality and neutrality are not mentioned as constitutional guarantees, nor are they factors mentioned in Baker to ensure political parties are heard in courts. Justice Stevens’ opinion exists under the fiction that partisanship has been a recent occurrence. This is not the case. As courts have noted, political considerations enter into virtually every debate in state legislatures. To invalidate a map whenever impartiality is cast aside in favor of politics ignores reality and generations of case law.

Justice Stevens even cited Romer v. Evans to support his claim of impartial governing. However, Romer dealt with impermissible discrimination against gays in Colorado. Though the Supreme Court has not yet held that gays are a suspect class entitled to strict scrutiny, most scholars would agree that gays in Colorado have been subject to a history of discrimination and are a political minority in the state. In contrast, Democrats and Republicans have marshaled

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97 Id. at 318.
98 Id.
100 Vieth, 541 U.S. at 317; Romer v. Evans, 517 U.S. 620, 620 (1996).
101 Romer, 517 U.S. at 620.
millions of voters to their cause and are able to raise vast sums of money. Justice Stevens diminishes the importance of strict scrutiny when he compares discrimination against powerful political parties to groups that have been subject to a history of discrimination.

What Justice Stevens and the dissenters omit in their analysis of political gerrymandering is the extent to which bipartisan efforts subvert the democratic process and idealistic notions of impartiality and fairness. For example, Justice Stevens writes, “A legislature controlled by one party could not, for instance, impose special taxes on members of the minority party, or use tax revenues to pay the majority party’s campaign expenses.”

A review of the legislative record reveals that this process does occur in a bipartisan fashion. For example, in 2007 the Senate voted to fund the Democratic and Republican National Conventions in 2008 with $100 million in taxpayer funds. Of course, if Democrats somehow forced Republicans to pay for their convention expenses, then an immediate challenge would ensue; however, since the parties colluded, issues of standing likely preclude any court review.

In addition, the dissenting Justices fail to mention the effects of bipartisan gerrymandering in other states. The prominent cases have all involved partisan claims, but both parties routinely conspire to frustrate the majority of voters. For example, in Vieth, Justice Souter explicated a five-factor test for discerning whether political gerrymandering claims should be upheld. First, the plaintiff would have to claim to be a member of a political group. Second, the plaintiff would need to show that the legislature ignored traditional concepts of redistricting, namely compactness and contiguity. Third, one would need to calculate a correlation coefficient between “the district’s deviations from traditional districting principles and the distribution of the population of

102 Vieth, 541 U.S. at 337.
104 Id. at 347-50.
105 Id. at 347.
106 Id. at 347-48.
his group.” 107 Fourth, the plaintiff would need to conceive of a “hypothetical” district that adheres to traditional districting principles. 108 Finally, one must show that the gerrymandering was intentional. 109 presumably, this is easier to prove since most legislative records are rife with evidence of intent.

What was not addressed in Justice Souter’s Gordian knot solution to political gerrymandering is why he could not apply these standards to bipartisan efforts to entrench incumbents. For example, California has fifty-three congressional districts, and because of bipartisan efforts to ensure lawmakers from both sides remain in office, legislators drew district lines to ensure each party would have a relative stronghold. 110

California’s 23rd Congressional District, for example, has been called the “Ribbon of Shame.” 111 It stretches over two hundred miles north of Los Angeles, and is never more than five miles wide. 112 In some spots, the district is as narrow as a football field. 113 One paper editorialized that the district “is so narrow in some spots that a big tide cold submerge it.” 114 Yet, because both parties are satisfied with the current power structure, no complaint is filed.

Applying Justice Souter’s intricate five-factor test to California’s 23rd Congressional District, it appears it would fail to survive scrutiny. 115 First, it would be simple to establish that Republicans represent a politically cohesive group and deserve a compact and contiguous district that unites nearby residential neighborhoods into one district. Instead, voters in Oxnard,

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107 Id. at 349.
108 Id.
109 Id. at 350.
110 BARONE 2004, supra note 2, at 155.
112 Id.
113 Id.
114 Id.
115 Vieth, 541 U.S. at 347-50.
California are combined with voters near Monterey County.\footnote{BARONE 2004, supra note 2, at 155.} Thus, the 23rd likely violates the first two factors of Justice Souter’s test.\footnote{Vieth, 541 U.S. at 347-49.} Third, Justice Souter cited Pennsylvania’s 6th district, “as a dragon descending on Philadelphia.”\footnote{Id. at 349.} As the “Ribbon of Shame,” the 23rd can take rightful title as one of the most gerrymandered districts in the nation.\footnote{Gerrymander Gauntlet, supra note 111.} Fourth, it would be easy for plaintiffs to conceive of a hypothetical district that unites areas near Santa Barbara and Oxnard. Finally, a hypothetical lawsuit would need to show intent of the legislature to gerrymander the district lines. This would require a search of the legislative record. According to \textit{The Almanac of American Politics}, “In February 2001 Berman [an architect of California redistricting] met with five House Republicans…. They agreed on the outline of a deal: Democrats would protect all incumbents, strengthen the Condit seat and take the new seat created by reapportionment.”\footnote{BARONE 2004, supra note 2, at 156.} Judging alone by the shape of most of the districts, an objective observer would find the lines immediately suspect.

In conclusion, Justice Souter’s dissent ignores the political reality across the nation. Members of both parties literally make a living by securing their political lives through favorable district maps. But, the data does not always confirm the typical view that political gerrymandering is successful.

Part III: Contrarian Data: Voters Address Political Gerrymandering

A typical understanding of gerrymandering suggests that it is an effective way of securing political power; in a few cases, it is. If pressed, both national parties would be more than happy with the responsibility of redrawning the congressional districts in forty-three states.\footnote{Seven states have only one representative; thus, the state boundaries represent the district lines.} But data

\begin{footnotes}
\footnote{BARONE 2004, supra note 2, at 155.}
\footnote{Vieth, 541 U.S. at 347-49.}
\footnote{Id. at 349.}
\footnote{Gerrymander Gauntlet, supra note 111.}
\footnote{BARONE 2004, supra note 2, at 156.}
\footnote{Seven states have only one representative; thus, the state boundaries represent the district lines.}
\end{footnotes}
reveals that while the process has the initial effect of producing slight partisan gains, such advantages typically dissipate with time, and are all but erased after two to three election cycles.

For example, during the last redistricting cycle, Republicans in Pennsylvania sought to secure a thirteen to six advantage over Democrats.\footnote{122} They failed. In 2002, the first election after redistricting, Republicans were only able to garner twelve seats.\footnote{123} After two elections the GOP’s twelve to seven edge disappeared into an eleven to eight Democratic advantage.\footnote{124} Democrats were able to wrest Pennsylvania’s 4th, 7th, 8th, and 10th districts from Republicans even though, on average, these districts gave President Bush 53\% of the vote in 2004.\footnote{125} Republicans had an incumbent advantage, higher fundraising totals ($10.6$ million to $8.1$ million),\footnote{126} and favorable geography, but were still unable to hold these seats.

In Georgia, Democrats sought to ensure an eight to five majority over Republicans.\footnote{127} To accomplish this, they drew arguably the most artistic congressional districts in the nation. Despite these efforts, in 2002, Democrats retained only five seats after redistricting.\footnote{128} Republicans unexpectedly won majorities in Georgia’s 11th and 12th districts.\footnote{129} Four years later, Republicans attempted to return the favor and redraw the state’s map.\footnote{130} Though the districts were more compact, Representative John Barrow was forced to run in a newly drawn 12th district that no longer included his residence in Athens, Georgia.\footnote{131} Representative Jim Marshall of Georgia’s 3rd Congressional District was also weakened.\footnote{132} In spite of these
efforts, both Marshall and Barrow won.\textsuperscript{133} Gerrymandering has failed to produce significant gains for either party in Georgia.

Texas provides another example of the failure of local geography to predict future elections. In 2003, Republicans finally gained control of the Texas legislature.\textsuperscript{134} With Governor Rick Perry now leading a unified government, Republicans sought an unprecedented mid-decade redistricting that would increase their congressional delegation of fifteen (compared to seventeen for Democrats) to twenty-two or twenty-three.\textsuperscript{135} Initially, their efforts were successful, as Republicans increased their congressional numbers to twenty-one.\textsuperscript{136} Republicans did fail to oust Representative Chet Edwards (President Bush captured Edwards’ district with 70\% of the vote).\textsuperscript{137}

Just two years later, data reveals that Republicans were not entirely successful during redistricting.\textsuperscript{138} Though they still had an advantage over Democrats, the 2006 election decreased the Republican majority to a nineteen to thirteen advantage.\textsuperscript{139} Ironically, Democrat Nick Lampson captured Texas’ 22\textsuperscript{nd} district;\textsuperscript{140} the architect of the 2004 redistricting effort, Tom Delay, formerly held the seat.\textsuperscript{141}

Though the disappointing results for Republicans and Democrats in these three states provide a recent snapshot by which to judge the failure of political gerrymandering, an historical framework is needed to establish how generally ineffective the process is at frustrating voters’ intent.

\textsuperscript{133} Id. at 481, 490.
\textsuperscript{134} BARONE 2006, supra note 31, at 1575.
\textsuperscript{135} Id. at 1576.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1625.
\textsuperscript{138} See generally League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (holding that Texas’ mid-decade redistricting was constitutional, but ruling that the 23rd district violated the Voting Rights Act). The Court chose not to revisit previous justiciability arguments.
\textsuperscript{139} BARONE 2008, supra note 32, at 1534.
\textsuperscript{140} Id. at 1597.
\textsuperscript{141} Id.
There have been nine redistricting cycles since 1920.\[^{142}\] In each of these cycles, a majority of the redistricting has taken place in state legislatures across the country. Traditional reason would hold that the party controlling the redistricting process would have a distinct edge. However, the data contradicts this thinking.

In 1920, Republicans controlled twenty-nine state legislatures; Democrats controlled only twelve.\[^{143}\] In Congress, Republicans held 302 seats the session before redistricting.\[^{144}\] After redistricting, the Republicans lost seventy-seven seats, despite their control of the process.\[^{145}\]

The 1930 cycle revealed an even more pronounced decline for the party in power. Once again, Republicans controlled the state legislatures, by a margin of twenty-four to sixteen.\[^{146}\] In Congress the GOP held a narrow majority of 218 seats.\[^{147}\] Following redistricting, Republicans lost an unprecedented 101 seats.\[^{148}\] Granted, the United States was in the midst of the Great Depression and an electoral upheaval was imminent. But this substantiates the notion that geography alone cannot predict future elections. The personal character of the incumbent, recessions, unpopular wars, and electoral capriciousness are some of the many factors that enter into voters’ calculations.

Republicans have not been the only party to suffer from electoral change, in spite of partisan maps. Even with computer software and detailed census data, Democrats were not able to translate partisan gerrymandering into electoral success. In the early 1990s, when the electoral gains of the Reagan Revolution had long faded, Democrats controlled thirty state legislatures, to

\[^{142}\] U.S. CONST. art. I, § 2 (stating, “The actual Enumeration shall be made within three Years after the first Meeting of Congress of the United States, and within every subsequent Term of Ten Years, in such a Manner as they shall by Law direct”). The Constitution mandated redistricting after the census in 1920, 1930, 1940, 1950, 1960, 1970, 1980, 1990, and 2000 (for a total of nine).

\[^{143}\] Dubin, supra note 9, at 11.

\[^{144}\] Party Divisions, supra note 9.

\[^{145}\] Id.

\[^{146}\] Dubin, supra note 9, at 11.

\[^{147}\] Party Divisions, supra note 9.

\[^{148}\] Id.
only six for the GOP (the most pronounced partisan advantage in over seventy years).\textsuperscript{149} Before redistricting, in 1990, Democrats controlled 267 seats.\textsuperscript{150} After redistricting Democrats lost nine seats in Congress.\textsuperscript{151}

An historical view reveals that gerrymandering can have unintended consequences. In every redistricting process but two since 1920, the party in power has lost an average of 38.7 seats in Congress.\textsuperscript{152} The majority party only managed to translate control of the process to additional seats during the 1980 cycle, and the most recent 2000 cycle.\textsuperscript{153} In both instances, an economic recession and war substantially altered the mid-term election calculus.

Political scientists who have studied the process have also concluded that partisan gerrymandering produces only marginal gains. Richard G. Niemi and Laura R. Winsky studied redistricting during the 1970s and 1980s.\textsuperscript{154} They concluded that the minimal gains derived from partisan gerrymandering often dissipated as the decade progressed.\textsuperscript{155} They wrote that bipartisan gerrymandering was favored during the 1970s over the partisan process of cracking, packing, and shacking, since extreme gerrymandering could result in more marginal districts for incumbents which could later be lost.\textsuperscript{156} They noted, “In absence of one-party control, the theoretical trade-off between security and seats is perhaps most often resolved in favor of security, consistent with a process of bipartisan gerrymandering.”\textsuperscript{157} During the 1970 cycle, Democrats did control the state

\begin{footnotesize}
\textsuperscript{149} DUBIN, supra note 143, at 11.
\textsuperscript{150} Part Division, supra note 9.
\textsuperscript{151} Id.
\textsuperscript{152} Id.; DUBIN, supra note 9, at 11; author’s calculations.
\textsuperscript{153} Party Divisions, supra note 9; DUBIN, supra note 9, at 11; author’s calculations.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 571.
\textsuperscript{157} Id.
\end{footnotesize}
legislatures by a twenty-three to sixteen margin, yet their congressional majority declined by thirteen seats in Congress.\textsuperscript{158}

Niemi and Winsky found similar trends during the 1980 cycle.\textsuperscript{159} They wrote, “In fact, one might say the initial advantage disappeared with a vengeance, because in 1980 Democrats picked up seats in Republican-controlled states in spite of Republican vote gain, and in 1988 the Republicans reversed the tables in Democratic-controlled states.”\textsuperscript{160} The conclusion of Niemi and Winsky is the primary reason why courts should declare political gerrymandering non-justiciable. Under previous judicially invented tests, an effect must be shown in order to warrant an equal protection analysis by the courts, but as Niemi and Winsky found, it is virtually impossible to prove an electoral effect because the minority party has already eroded much of the initial partisan gain.\textsuperscript{161}

Niemi and Alan I. Abramowitz conducted an exhaustive study of redistricting during the 1990s and concluded that it had little net national effect.\textsuperscript{162} To the contrary, although Democrats controlled the process in a majority of the states, Republicans made their largest gains in Democratic strongholds.\textsuperscript{163} Niemi and Abramowitz found, “When Democrats were in control, however, the Republicans gained nearly double the ratio of seats to votes…. It was in states controlled by Democrats that Republicans were most successful in picking up seats relative to their gain in votes.”\textsuperscript{164} The electoral gains of 1994 substantiated this conclusion, just two years after redistricting, when Republican took over fifty-two seats in the House of Representatives.\textsuperscript{165}

\begin{footnotes}
\item[158] Party Divisions, \textit{supra} note 9; DUBIN, \textit{supra} note 9, at 11.
\item[159] NIEMI & WINSKY, \textit{supra} note 154, at 571.
\item[160] \textit{Id.}
\item[161] \textit{Id.}
\item[163] \textit{Id.} at 814.
\item[164] \textit{Id.}
\item[165] BARONE 1996, \textit{supra} note 85, at xxiv.
\end{footnotes}
Niemi and Abromowitz concluded, “The general conclusion is that districting has a relatively small effect on partisan representation.”

Most Supreme Court justices have somehow managed to ignore these findings.

Part IV: A Judicial Role?

Since 1986 the Court has entered into the debate between warring political parties over the shape of district lines. The Court did so based on the premise that political gerrymandering deprived minority parties of certain voting rights. Professor Michael Klarman referred to this phenomenon as “cross-temporal entrenchment,” which “occurs when a political majority draws districts that enable it to maintain majority status even if the party’s supporters later become a minority within the state.”

But, as the evidence reveals, gerrymandering has had a limited effect on political minorities, and in some instances, it can have the unintended effect of benefitting the minority party.

So what role should the courts play in evaluating political gerrymandering? None. The plurality was correct in Vieth to hold that partisan proclivities were ephemeral. And since partisan affiliation is not a suspect class deserving of strict scrutiny, courts should avoid the impulse to referee political fights. However, even though the courts should not be the proper arbiters of gerrymandering disputes, there are other ways to redress undemocratic maps. States have long recognized that gerrymandering poses certain threats to democracy. Many states have preempted judicial intervention by adopting non-partisan solutions to gerrymandering. Future efforts at reforming the political process should take place in the political branches, not in courts.

A. State Efforts to End Gerrymandering

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166 *Id.* at 811.
169 *Vieth*, 541 U.S. at 267.
Several states (Arizona, Hawaii, Idaho, Iowa, Maine, Montana, New Jersey, and Washington) have already taken legislative steps to remove the political influence from redistricting by adopting non-partisan panels to draw new lines.\textsuperscript{170} Rather than rely on bipartisan gerrymandering or overtly partisan attempts to draw skewed district lines, these states recognize that competitive elections foster a strong and engaging democracy where candidates must seriously compete each election cycle. In addition, Colorado has constitutionalized redistricting principles that include compactness and contiguosity, though partisan concerns still creep into the process.\textsuperscript{171}

Arizona and Iowa provide two of the most vivid examples where retail politics occur every election. In Arizona, four of the eight congressional districts are considered competitive.\textsuperscript{172} In 2006, Democrats were able to capture two districts from the GOP.\textsuperscript{173}

Similarly, Iowa has four districts (of five) that are considered competitive.\textsuperscript{174} Iowa’s 1st, 2nd, 3rd, and 4th districts gave no more than 55\% to either presidential candidate in 2004.\textsuperscript{175} Democrats were able to defeat Republicans in Iowa’s 1st and 2nd districts in 2006,\textsuperscript{176} and Democrat Leonard Boswell (3rd district) narrowly won re-election with 52\% of the vote.\textsuperscript{177}

States across the country have recognized the evils of gerrymandering and have taken the initiative to correct the process. Gerrymandering is not an issue beyond state legislative control, but an issue perfectly suited for local concerns. As gerrymandering and corrupt career politicians

\textsuperscript{170} ARIZ. CONST. art. IV, pt. 2 § 1; HAW. REV. STAT. § 25-2 (1993); IDAHO CODE ANN. § 72-1506 (2006); IOWA CODE § 42.4(5) (2003); ME. REV. STAT. ANN. tit. 21-A, §§ 1206, 1206-A (2006); MONT. CODE ANN. § 5-1-115 (2003); N.J. CONST. art. II, § 2; WASH. REV. CODE. § 44.05.090 (1994).

\textsuperscript{171} See Gene R. Nichol, Jr., The Practice of Redistricting, 72 U. Colo. L. Rev. 1029, 1030 (2001) (stating, “To put numbers on it, I would say the process in the Colorado legislature last time was 100 percent political, and the process in the Colorado Reapportionment Commission was about 98 percent political”).

\textsuperscript{172} See BARONE 2008, supra note 32, at 91 (illustrating that Arizona’s non-partisan process produced four congressional districts that are roughly evenly divided between the two major parties).

\textsuperscript{173} Id.

\textsuperscript{174} Id. at 628.

\textsuperscript{175} Id. at 639, 641, 644, 646.

\textsuperscript{176} Id. at 639, 641.

\textsuperscript{177} Id. at 643.
raise public awareness, the desire for more redistricting reform across the country should increase. If states are too slow to correct the problem, congressional options are available as well.

B. Congressional Legislation

Several pieces of legislation have been introduced recently that would address gerrymandering. However, since true redistricting reform is a potential threat to some lawmakers in well-tailored districts, the move to reform the process is slow. Representative John Tanner of Tennessee has introduced, H.R. 543, the Fairness and Independence in Redistricting Act of 2007. This bill would provide several remedies to extreme gerrymandering: The act prohibits mid-decade redistricting and requires the establishment of local independent redistricting commissions; if a plan is not devised, the state’s highest court selects a plan, or a U.S. district court. H.R. 543 makes great strides toward ending partisan gerrymandering.

In addition, Representative Zoe Lofgren of California has introduced H.R. 2248, the Redistricting Reform Act of 2007. H.R. 2248 would also prevent mid-decade redistricting, provide for bi-partisan redistricting commissions, and allow the state’s highest court or a U.S. district court to intervene if a plan is not enacted. However, H.R. 2248, like H.R. 543, does provide a significant role for the courts in drawing district lines. H.R. 2248 also provides a right of action for any party aggrieved by a violation of the law, throwing more gerrymandering suits into the courts.

Legislation in Congress to reform the redistricting process has the spirit of true reform, but future legislation must remove any judicial influence from the realm of purely political

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179 Id.
181 Id.
gerrymandering.\textsuperscript{184} Unless Congress and the states provide for independent non-partisan commissions, this partisan bickering will continue for decades.

V. Conclusion

The Court has been involved in political gerrymandering disputes for over twenty-two years. It is time for this relationship to end. As evidence reveals, voters routinely change the partisan composition of congressional districts, even when extreme gerrymandering is present. Geography is hardly the sole component of electoral success in a nation with high interstate migratory patterns. Character, policy positions, wars, and economic recession are all weighty factors when voters go to the polls. Instead of fruitless litigation, bipartisan gerrymandering and partisan gerrymandering should be addressed through the legislative process rather than the courts.

\textsuperscript{184} Courts should still adjudicate efforts to gerrymander on the basis of race, and attempts at violating the one-person, one-vote standard.