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## YALE LAW & POLICY REVIEW

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### The Need for State Redistricting Reform To Rein in Partisan Gerrymandering

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*As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.*

– Reynolds v. Sims, 377 U.S. 533, 562 (1964)

#### INTRODUCTION

Every ten years, as directed by the Constitution, the U.S. Census Bureau conducts an “actual Enumeration” of American residents.<sup>1</sup> Upon release of the official population numbers, U.S. congressional seats are reapportioned among the states, depending on which states have gained seats and which have lost.

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1. U.S. CONST. art. I, § 2, cl. 3.

State legislators then get to work developing new congressional and state legislative district maps to reflect both national and state-level population shifts over the past decade. In most states, redistricting generally comes down to a legislative battle like any other, requiring the input of the state's legislative bodies and the approval (or veto) of the Governor.<sup>2</sup>

Partisan gerrymandering results when the party in power in the state legislature redraws election districts to ensure the election or re-election of its own members, while decreasing the political safety of party opponents. This is largely done by "packing," moving voters from the opposition party into only a few districts, or "cracking," splitting a population that would otherwise produce a majority into minority portions of other districts. The result is a collection of "safe" districts for the representatives of the party in power and the marginalization of the opposition. In states where one party does not have sufficient control of the state legislature to push through a completely lopsided partisan gerrymander, state party leaders may instead collaborate on a bipartisan sweetheart gerrymander, ensuring that each incumbent congressperson or legislator remains safe from political challenge.

As it stands, state legislators responsible for drawing new district maps remain free to manipulate district lines for maximum partisan advantage without much fear of judicial obstruction. Though the Supreme Court established that partisan gerrymandering cases are justiciable under the Equal Protection Clause, a judicially manageable standard to regulate such gerrymanders remains elusive.<sup>3</sup> As a result, a problematic, albeit unsurprising, status quo has emerged: The overwhelming result of redistricting has been rampant self-dealing in the form of partisan gerrymandering. Instead of a system of government that provides voters the opportunity to elect their representatives, what has evolved is a flipped system that provides elected officials the opportunity to choose their constituents. This essay will provide a glimpse of what has been done, and what more we need to do, to break the pattern of partisan redistricting and realize true representative democracy.

## I. THE UNFULFILLED PROMISE OF JUSTICIABILITY

The prevailing approach in challenging partisan gerrymandering is to seek redress from the federal courts. When party leaders find themselves out of power and thus shut out of the redistricting process, they turn to the courts to demand a fair outcome. Yet the question remains whether judicial regulation of election results (as opposed to judicial regulation of election procedures) is not only appropriate, but productive.

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2. For a review of various states' redistricting processes, see *THE UNITED STATES OF AMERICA: REAPPORTIONMENT AND REDISTRICTING*, [http://aceproject.org/ace-en/topics/bd/bdy/bdy\\_us](http://aceproject.org/ace-en/topics/bd/bdy/bdy_us) (last visited May 1, 2011).

3. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

A. *The Reapportionment Revolution and the Promise of Equal Representation*

During the “Reapportionment Revolution” of the 1960s, the Supreme Court decided a series of cases that definitively established the principle that equal numbers of people deserve equal representation, or “one person, one-vote.”<sup>4</sup> Prior to this point, politicians simply chose not to redistrict as a way of keeping themselves in power, freezing districts in time. As populations shifted, however, antiquated district lines resulted in gross malapportionment and severe dilution of the voting power of individuals in overpopulated districts. The Reapportionment Revolution demanded that redistricting efforts result in substantial population equality among election districts, according to current population statistics, such that each person’s vote is weighted equally.

The Supreme Court first opened the door to legal challenges to states’ political apportionment statutes in the 1962 landmark case *Baker v. Carr*.<sup>5</sup> In *Baker*, Tennessee voters challenged the continued application of Tennessee’s 1901 Apportionment Act.<sup>6</sup> The plaintiffs contended that the use of a district map that apportioned representatives according to sixty-year-old demographics, regardless of the substantial growth and redistribution of Tennessee’s population, violated their equal protection rights under the Fourteenth Amendment “by virtue of the debasement of their votes.”<sup>7</sup> In reversing the three-judge district court panel’s decision that the subject matter of such a suit presented a non-justiciable political question, the Supreme Court noted that “the mere fact that the suit seeks protection of a political right does not mean it presents a political question.”<sup>8</sup> Justice Brennan, writing for the majority, explained that justiciability exists where “the duty asserted can be judicially identified and its breach judicially determined,” and where “protection for the right asserted can be judicially molded.”<sup>9</sup> The Court held that the right asserted in this case, though political, was nonetheless a right “within the reach of judicial protection under the Fourteenth Amendment.”<sup>10</sup>

Not long after *Baker*, the Court faced a pair of cases that pushed for elaboration on the meaning of a right to equal protection from vote dilution under both Article I, Section 2, and the Fourteenth Amendment. In *Wesberry v.*

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4. See *Reynolds*, 377 U.S. at 558 (internal quotation marks omitted) (quoting *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963)); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

5. 369 U.S. 186 (1962).

6. *Id.* at 192-93.

7. *Id.* at 192, 194 (quotation marks omitted).

8. *Id.* at 209.

9. *Id.* at 198.

10. *Id.* at 237.

*Sanders*<sup>11</sup> and *Reynolds v. Sims*,<sup>12</sup> the Court reviewed apportionment plans that disproportionately allocated representatives in the United States Congress and state legislatures, respectively. Both plans were struck down.

In *Wesberry*, Georgia voters challenged the congressional apportionment created by a 1931 Georgia statute, which resulted in Georgia's fifth congressional district having two to three times as many people as other districts in Georgia.<sup>13</sup> The Court held that the 1931 apportionment grossly discriminated against Georgia voters by contracting the value of some votes and expanding that of others.<sup>14</sup> The Court reasoned that such malapportionment contravened the constitutional mandate under Article I that representatives be chosen "by the People of the several States."<sup>15</sup> In other words, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>16</sup>

The Court reinforced the "one-person, one-vote" principle shortly thereafter in *Reynolds*, and held as a "basic constitutional standard" that state legislatures must be apportioned on a population basis.<sup>17</sup> In *Reynolds*, Alabama voters challenged the continued use of districts apportioned after the 1900 census, which, applying 1960 census figures, resulted in a majority of state legislators representing only about a quarter of the total population.<sup>18</sup> Relying on *Wesberry*'s precedent, the Court stated that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people."<sup>19</sup> The Court further elucidated: "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens."<sup>20</sup>

The Reapportionment Revolution was imperative in achieving equal representation for voters across the country. But in the fifty years since the Court established that it would protect the political right of equal voting power, the goal of litigants has shifted from seeking *quantitative* equality, in the form of *equal* representation, to seeking *qualitative* equality, or *fair* representation. In cases challenging partisan gerrymanders, the pursuit of fair representation has presented a particularly vexing problem.

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11. 376 U.S. 1 (1964).

12. 377 U.S. 533 (1964).

13. *Wesberry*, 376 U.S. at 2.

14. *Id.* at 7.

15. U.S. CONST. art. I, § 2.

16. *Wesberry*, 376 U.S. at 7-8.

17. *Reynolds*, 377 U.S. at 568 (footnote omitted).

18. *Id.* at 545.

19. *Id.* at 560-61.

20. *Id.* at 568.

B. *Partisan Gerrymandering Claims Push for Qualitative Equality*

Since the Reapportionment Revolution, congressional and state legislative districts have been drawn and re-drawn each decade to ensure that all voters have the same amount of voting power: one-person, one-vote. Meanwhile, federal courts have been tasked with delineating the constitutional limitations of those redistricting efforts. From population variance to minority representation, political leaders have relied (sometimes voluntarily, sometimes not)<sup>21</sup> on the judiciary to determine whether the latest gerrymandering scheme is permissible. The question presented in partisan gerrymandering claims is whether, under the Equal Protection Clause, the allocation of partisan representation at the state level is fair in light of the political makeup of the state.

Judicial regulation of partisan gerrymandering claims started, as redistricting cases did generally, with a determination of justiciability. In the 1986 case *Davis v. Bandemer*, the Supreme Court considered whether a purely partisan gerrymandering claim presents a justiciable case or controversy, or a nonjusticiable political question.<sup>22</sup> In *Bandemer*, Indiana Democrats had brought a claim against state officials following the 1981 redistricting of state legislative seats, alleging that the “reapportionment plans constituted a political gerrymander intended to disadvantage Democrats.”<sup>23</sup>

In considering the question of whether discriminatory vote dilution had occurred, the Court established a combination intent/effects test to determine whether the district map constituted an impermissibly partisan gerrymander: In order to prevail on a partisan gerrymandering claim, a plaintiff must show that the districts were drawn with the intent to disadvantage a political group, and that the map as drawn actually had the effect of discriminatory vote dilution.<sup>24</sup> The Court specified that the discriminatory effect prong required proof that “the electoral system is arranged in a manner that will consistently degrade a voter’s or group of voters’ influence on the political process . . . .”<sup>25</sup> But the

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21. Judicial intervention is often the result of one political party challenging a map drawn by its opposition, as occurred in many of the cases discussed in this essay. However, in cases dealing with jurisdictions covered by section 5 of the Voting Rights Act—which requires preclearance by the U.S. Attorney General or the U.S. District Court for the District of Columbia for any change in a “standard, practice, or procedure with respect to voting”—judicial review is not voluntary. 42 U.S.C. § 1973a (Supp. 2010).

22. 478 U.S. 109 (1986) (plurality opinion).

23. *Id.* at 115.

24. *Id.* at 127.

25. *Id.* at 132.

Court failed to make clear a standard by which one would prove such political unfairness in order to trigger judicial intervention.<sup>26</sup>

The implied promise of justiciability—i.e., the ability to present a partisan gerrymandering claim to a court and have the alleged injury redressed—lingered for some time without a single plaintiff successfully breaching the effects test barrier. Federal courts considered allegations of discriminatory impact arising from a variety of factual circumstances, but no cases presented sufficient proof of discriminatory vote dilution according to *Bandemer*'s effects test in order to succeed on an equal protection claim.<sup>27</sup>

The Supreme Court revisited the question of what constitutes sufficient discriminatory impact in 2004 in *Vieth v. Jubelirer*, a case arising out of Pennsylvania's redistricting efforts following the 2000 Census.<sup>28</sup> After census results left Pennsylvania with two less congressional seats than it had previously held, the Republican-dominated state legislature took up the task of drawing a new map, adopting a partisan redistricting plan allegedly as a punitive measure against Democrats for past pro-Democratic redistricting plans enacted elsewhere.<sup>29</sup> Against the resulting allegation of political gerrymandering, the Court not only failed to develop an actual, practicable standard by which to measure the political fairness—or lack thereof—of electoral outcomes, but it also turned back to the debate over the *existence* of such a standard. Though four Justices would have held that *Bandemer* was wrongly decided and that political gerrymandering claims are actually not justiciable because “no judicially discernible and manageable standards for adjudicating political gerrymandering

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26. While the Court held that partisan gerrymandering claims are justiciable under the Equal Protection Clause, *id.* at 125, the facts of this particular case were not ultimately sufficient to show discriminatory vote dilution. *Id.* at 129.

27. For example, shortly after the Court decided *Bandemer*, a court in California rejected an equal protection claim based on disproportionate political results—California Republicans had won 50.1% of the statewide vote, but only 40% (18 out of 45) of the congressional seats. *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989). Despite the disproportionate election results, the court concluded that 40% of congressional seats nonetheless still represented “a sizeable bloc that is far more than mere token representation.” *Badham*, 694 F. Supp. at 672. More recently, in 2003 the Fourth Circuit rejected a discriminatory impact argument based on the bizarreness of appearance of a district map. *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 775-76 (4th Cir. 2003). The court commented that “the fact that members of a majority have acted politically is not evidence that they have caused discriminatory effects, even if their actions are disfavored by the minority.” *Id.* at 775. Rather, as the court explained, bizarre looking congressional districts do not imply political discrimination because “all affected voters still have a congressional representative [and] cast equally weighted votes for that representative.” *Id.* at 776.

28. *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion).

29. *Id.* at 272.

claims have emerged,”<sup>30</sup> Justice Kennedy’s fifth vote for the decision to dismiss the complaint kept the promise of justiciability alive. In concurrence, Justice Kennedy noted that the fact that an appropriate standard had not emerged did not necessarily mean that no such standard could or would emerge in the future: “If workable standards do emerge to measure the[] burdens” a gerrymander imposes on representational rights, he argued, “courts should be prepared to order relief.”<sup>31</sup> While this outcome prevented the complete obstruction of judicial redress for excessive partisan gerrymanders, it muddied the judicial waters for such claims even more.

The latest word on partisan gerrymandering claims came in 2006 in the Court’s determination of the redistricting litigation out of Texas. In *League of United Latin American Citizens (LULAC) v. Perry*, the Court again sought to determine whether a judicially manageable standard had been presented by which it would be possible to measure allegations of unconstitutional partisan gerrymanders.<sup>32</sup> The plaintiffs presented two theories of discriminatory impact: First, that the mere fact of the mid-decade redistricting proved that political power was the sole motivating factor for redrawing the map,<sup>33</sup> and second, that the mid-decade redistricting effectuated a discriminatory impact based on one-person, one-vote principles because the population had shifted since the 2000 Census results were published. The Court rejected both theories, but did not revisit the more general question of justiciability.<sup>34</sup>

### C. *One Person, One Vote Standard Tightened Against Partisan Gerrymanders*

The one-person, one-vote principle developed over time into a clear body of law requiring that, in accordance with the Equal Protection Clause, all districts should have the same population to the extent practicable. The external bounds of this requirement were set out in the Court’s opinion in *Karcher v. Daggett*.<sup>35</sup> Under *Karcher*, any congressional district with a total population that deviates more than one percent from the ideal district population (the total population of the state divided by the number of districts) demands a legitimate policy justification as to each overpopulated or underpopulated district.<sup>36</sup> For

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30. *Id.* at 281.

31. *Id.* at 317 (Kennedy, J., concurring).

32. 548 U.S. 399 (2006).

33. Because redistricting must occur after each decennial Census, mid-decade redistricting is not necessary and, as such, suggests motives other than adherence to the constitutional requirement of equipopulation.

34. *LULAC*, 548 U.S. at 414.

35. 462 U.S. 725 (1983).

36. *Id.* at 740-41.

state legislative districts, the threshold difference is more flexible at ten percent, under which the state is entitled to a rebuttable presumption that the district plan was the result of an “honest and good faith effort” to reach population equality among districts.<sup>37</sup> Even where the population deviation threshold has not been violated, however, courts have demanded justifications where political manipulation is apparent.<sup>38</sup>

In the absence of a judicially manageable standard to determine when partisan bias becomes an equal protection violation, courts have in some cases tightened the constitutional reins of one-person, one-vote to reject blatant partisan gerrymanders. Two decisions in particular stand out in which excessive partisan gerrymanders were struck down on one-person, one-vote grounds. In *Vieth v. Pennsylvania*<sup>39</sup> and *Larios v. Cox*,<sup>40</sup> federal courts in Pennsylvania and Georgia, respectively, strictly applied equipopulation requirements to strike down apportionment plans that resulted in extreme partisan bias.

In 2001, Republican legislators in Pennsylvania drew a map with a population deviation of only nineteen people<sup>41</sup>—representing a difference of only 0.0029 percent from the ideal district population. In *Vieth v. Pennsylvania*, the three-judge panel reviewing the map reasoned that, in *Karcher*, the Supreme Court squarely rejected even the smallest deviation from absolute population equality. Any deviation at all was to be avoided. The panel determined that the state legislators who had drawn the map had not made a good faith effort to avoid the deviation, shifting the burden to the state to present a legitimate justification.<sup>42</sup> In defense, state legislators argued that this minor deviation was the result of a desire to avoid splitting voting precincts, a legitimate state interest. The panel was unconvinced, stating that the defense presented was “a mere

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37. *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).

38. *Karcher* itself is an example of the application of one-person, one-vote to an apparent partisan gerrymander, with Justice Stevens noting in concurrence that “the decisionmaking process leading to adoption of the challenged plan was far from neutral.” 462 U.S. at 764.

39. *Vieth v. Pennsylvania (Vieth II)*, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (three-judge court). As discussed in the first iteration of this litigation, Pennsylvania voters were nearly split along partisan lines, yet under the proposed map Democrats were likely to win only six of the nineteen congressional seats. *Vieth v. Pennsylvania (Vieth I)*, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002) (three-judge court).

40. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court), *summarily aff'd*, 542 U.S. 947 (2004). The court here found that “[w]hile Democratic incumbents who supported the plans were generally protected, Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as possible.” *Id.* at 1329.

41. *Vieth II*, 195 F. Supp. 2d at 674.

42. *Id.* at 677.



pretext.”<sup>43</sup> The panel determined that, compared with alternative maps presented during trial, the challenged plan had the least compact districts, split the most counties, and pitted more incumbents than necessary against one another.<sup>44</sup>

A similar situation occurred in the state legislative districting context in Georgia in *Larios v. Cox*. In 2001, the Georgia General Assembly enacted a state legislative apportionment plan with a total population deviation of 9.98%, just below the ten percent threshold articulated in *Daly v. Hunt*.<sup>45</sup> In *Larios*, the reviewing court noted that although minor deviations are allowed, district maps cannot withstand constitutional scrutiny if they are “tainted by arbitrariness or discrimination.”<sup>46</sup> The panel found that the population deviations were not supported by “any legitimate, consistently-applied state interests,” but were rather the result of regionalism and partisan gerrymandering,<sup>47</sup> and struck down the plan as violating the one-person, one-vote principle.<sup>48</sup> The Supreme Court summarily affirmed.<sup>49</sup>

These cases evidence courts’ willingness to subject partisan gerrymanders to increased scrutiny when they violate other constitutional mandates, such as one-person, one-vote. Even with this backstop possibility, however, state redistricting efforts remain heavily motivated by partisan agendas.

## II. PARTISAN PRIORITIES UNCHECKED

In the absence of a judicially manageable standard for federal courts to measure partisan gerrymandering, the fate of even the most egregious partisan gerrymander rises and falls on the ability of state legislators to effectively draw maps without any (other) apparent constitutional or statutory defects. Redistricters have been able to operate under the assumption that while courts *may* redress extreme partisan gerrymandering, such a reality is unlikely. In other words, as long as district maps comply with all clearly established constitutional requirements, such as one-person, one-vote requirements, and comply with statutory requirements under the Voting Rights Act, they are likely safe from federal court challenges based on partisan gerrymandering.

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43. *Id.*

44. *Id.* at 678.

45. 93 F.3d 1212 (4th Cir. 1996).

46. *Larios*, 300 F. Supp. 2d at 1338.

47. *Id.* at 1352-53.

48. *Id.*

49. *Cox v. Larios*, 542 U.S. 947 (2004).

The emergence of ever more sophisticated technology facilitating map-drawing has made it increasingly easy for redistricters to comply with clearly defined constitutional and statutory redistricting requirements. Advances in redistricting technology allow a precise calibration of districts using the most detailed and sophisticated election and demographic data ever available.<sup>50</sup> Redistricters can all but guarantee compliance with the equipopulation requirement of the Equal Protection Clause, minority representation in accordance with the Voting Rights Act, and allegiance to traditional districting principles, such as contiguity, compactness, and respect for existing local communities. But these technological advances have also made it easier for state legislators to gerrymander congressional districts for maximum partisan advantage.

With no clear judicially manageable standard, and the technological ability to produce otherwise-constitutionally sound maps, state legislators face little fear of judicial scrutiny for extreme partisan gerrymanders. The redistricting experiences in Florida, Michigan, and Texas following the 2000 U.S. Census provide compelling examples of the danger of unfettered partisan redistricting.

### *Florida*

The 2000 Census showed that population shifts over the prior decade necessitated granting two additional congressional seats to Florida, resulting in a total of twenty-five seats for the state.<sup>51</sup> The Republican-controlled legislature put together a map that paved the way for eighteen seats for Republicans and seven for Democrats.<sup>52</sup> This gave Republicans a seventy-two percent majority, despite the fact that the Florida electorate split perfectly down the middle during the 2000 presidential election.<sup>53</sup>

### *Michigan*

In 2001, Michigan Republicans had the redistricting “trifecta”: control over both chambers of the state legislature, in addition to the governorship. In an aggressive display of partisan gerrymandering, the new district map provided ten districts likely to be carried by Republicans, and only five districts likely to

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50. See Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options For Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 253 (2009).

51. U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT 2 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-7.pdf>.

52. *Candidate Listing for 2002 General Election*, FLA. DEP'T STATE, DIVISION OF ELECTIONS, <http://election.dos.state.fl.us/candidate/Index.asp> (choose “2002 Election” from the dropdown list for General Election) (last visited Apr. 22, 2011).

53. See *How To Rig an Election*, ECONOMIST, Apr. 25, 2002, available at [http://www.economist.com/node/1099030?story\\_id=1099030](http://www.economist.com/node/1099030?story_id=1099030).

be carried by Democrats.<sup>54</sup> This provided a nearly 2-to-1 advantage to the GOP, despite a clear and increasing majority of Democratic voters in Michigan.<sup>55</sup>

### *Texas*

By far the most dramatic example of partisan gerrymandering since 2000 occurred in Texas. When state legislators were unable to come up with an acceptable map after the 2000 Census results showed that Texas was to gain two seats in the House of Representatives, litigation ensued resulting in a court-ordered map.<sup>56</sup> The court-drawn map largely kept in place a congressional map that had been drawn in 1991,<sup>57</sup> and as such resulted in the reelection of all incumbents in 2002, an outcome that favored the Democrats. In 2003, however, Texas Republicans gained control of both houses of the state legislature and set out to enact a new congressional district map that would favor Republican party members.<sup>58</sup> The push to pass the new map into law became the redistricting scandal of the decade, including a dramatic twist when Democratic legislators twice fled the state *en masse* in an attempt to stop the Republicans from achieving a quorum for the vote to institute the new map.<sup>59</sup> In the end, and despite a legal challenge that made its way to the Supreme Court, the mid-decade redistricting succeeded.<sup>60</sup>

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54. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 205 (2003). The actual results were slightly less severe than expected, with six seats going to Democrats and nine going to Republicans. See *Federal Election 2002 U.S. House of Representatives Results*, FED. ELECTION COMM'N, <http://www.fec.gov/pubrec/fe2002/house1.htm#mi> (last visited Apr. 22, 2011). A map of Michigan's proposed 2001 Apportionment Plan can be found at [http://www.michigan.gov/documents/Congress01-state-E\\_43697\\_7.pdf](http://www.michigan.gov/documents/Congress01-state-E_43697_7.pdf).
55. Hirsch, *supra* note 46, at 205.
56. *LULAC*, 548 U.S. 399, 411 (2006).
57. *Id.* at 412.
58. *Id.*
59. *Dems Flee Texas To Avoid Redistricting*, USA TODAY, May 13, 2003, [http://www.usatoday.com/news/politicselections/2003-05-13-texas-lawmakers\\_x.htm](http://www.usatoday.com/news/politicselections/2003-05-13-texas-lawmakers_x.htm) (last updated May 15, 2003); *Democratic Lawmakers Flee Texas Again*, USA TODAY, July 28, 2003, [http://www.usatoday.com/news/washington/2003-07-28-texas-dems\\_x.htm](http://www.usatoday.com/news/washington/2003-07-28-texas-dems_x.htm) (last updated July 29, 2003).
60. *LULAC*, 548 U.S. at 423 (holding that the Texas legislature's decision to draw new districts mid-decade was not "sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders").

## III. STATE-LEVEL REFORMS OFFER REALISTIC, MANAGEABLE SOLUTIONS

The Court's inability to present a clear stance on partisan gerrymandering evidences the discordance of judicial management of electoral outcomes.<sup>61</sup> While those who feel partisan gerrymandering has gone too far patiently await the Supreme Court's announcement of a judicially manageable standard for partisan gerrymandering claims, state legislators across the country are engaging in another round of redistricting battles following the release of 2010 Census data. In those states whose populations have swelled the most over the last decade, new congressional seats must be created. Texas has gained four seats, Florida has gained two, and six states—Arizona, Georgia, Nevada, South Carolina, Utah and Washington—have gained one each.<sup>62</sup> Those states with the most dwindling populations are faced with the unpleasant task of removing districts, and with them, congresspersons. Ten states have lost congressional seats: Ohio and New York have each lost two; Illinois, Iowa, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, and Pennsylvania have each lost one.<sup>63</sup> It is time to realize that the prescription for these growing pains is not dependence on the courts, but rather state-level reforms that recalibrate the redistricting process toward an emphasis on the preferences of voters, not elected officials.

The judiciary must, of course, remain indefatigably committed to enforcing the equal protection of the right to vote for all citizens. As the Court recognized in *Reynolds*, “a denial of constitutionally protected rights demands judicial protection.”<sup>64</sup> Where and when “some limited and precise rationale” is found to remedy an established constitutional violation,<sup>65</sup> federal courts absolutely must provide redress. In the meantime, however, we must refrain from leaning on the courts to settle every partisan spat, or to draw a map when state legislators fail to do so. The Court hesitates to enter the political thicket partly due to the difficulty in articulating what precisely comprises an ‘unfair’ result, but also, as noted in *LULAC*, “because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance.”<sup>66</sup>

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61. See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004).

62. For a detailed review of the 2010 Census results, and the corresponding gains and losses of congressional seats, see Matt Bloch et al., *Census 2010: Gains and Losses in Congress*, N.Y. TIMES, Dec. 21, 2010, <http://www.nytimes.com/interactive/2010/12/21/us/census-districts.html>.

63. *Id.*

64. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

65. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

66. *LULAC*, 548 U.S. 399, 416 (2006).

It would be equally imprudent to wait for Congress to use its constitutional authority under the Elections Clause to regulate the redistricting process.<sup>67</sup> According to the Elections Clause, the power to regulate the time, places, and manner of holding elections for senators and representatives resides in the state legislatures.<sup>68</sup> Congress retains Article I power, however, to “at any time by Law make or alter such Regulations.”<sup>69</sup> Regulations might include the imposition of transparency measures, the establishment of concrete standards for state legislative redistricting efforts, or the articulation of a civil cause of action for partisan gerrymanders. Just this year, Representatives Jim Cooper and Heath Shuler each proposed such types of legislation that would reform the redistricting process on a national level: Representative Cooper’s “Redistricting Transparency Act” would require open hearings and a public website in each state to allow full public participation in the redistricting process.<sup>70</sup> Representative Shuler’s “Fairness and Independence in Redistricting Act” would require states to establish an independent, bipartisan commission to redraw congressional district lines.<sup>71</sup>

Congressional reform would be an ideal solution to ensure a consistent allocation of voting power nationwide, but this approach seems politically untenable. The chances that such power will be exercised at this point in time seem slim. Because of the inherent political implications of redistricting reform, it remains an unpopular topic for many partisan players. None of the bills to put constraints on gerrymandering introduced in the last two congressional sessions in the House by former Tennessee Congressman John Tanner<sup>72</sup> and California Congresswoman Zoe Lofgren,<sup>73</sup> and in the Senate by South Dakota Senator Tim Johnson,<sup>74</sup> even made it out of committee.

State government reforms, on the other hand, offer the most promising avenue toward reducing excessive partisan gerrymandering. State legislatures can improve the redistricting process by enacting processes that will allow each state’s residents to circumvent the political self-interest of partisan players. This type of reform is most possible in direct democracy states, but the opportunity is nonetheless available in other states to push the tide toward reform.

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67. U.S. CONST. art. I, § 4, cl. 1.

68. *Id.*

69. *Id.*

70. Redistricting Transparency Act of 2011, H.R. 419, 112th Cong. (2011).

71. Fairness and Independence in Redistricting Act, H.R. 453, 112th Cong. (2011).

72. Redistricting Transparency Act of 2010, H.R. 4918, 111th Cong. (2010); Fairness and Independence in Redistricting Act of 2009, H.R. 3025, 111th Cong. (2009).

73. Redistricting Reform Act of 2010, H.R. 5596, 111th Cong. (2010).

74. Fairness and Independence in Redistricting Act of 2009, S. 1332, 111th Cong. (2009).

## IV. RECENT REFORMS PROVIDE GUIDANCE

While national reform efforts have failed in the last decade, there has been some positive movement toward redistricting reform on the state level, which provides compelling examples and leadership. In Arizona in 2000, and more recently in California in 2010, voters expressed their disapproval of the political manipulation that takes place in legislative redistricting by installing independent commissions to take responsibility for drawing congressional and state legislative maps.

During the 2000 general election, the people of Arizona passed Proposition 106, a constitutional amendment “Relating to Ending the Practice of Gerrymandering and Improving Voter and Candidate Participation in Elections by Creating an Independent Commission of Balanced Appointments to Oversee the Mapping of Fair and Competitive Congressional and Legislative Districts.”<sup>75</sup> The Commission is comprised of five appointees, no more than two from any political party. The mandate of the Commission is “to administer the fair and balanced redistricting of the Congressional and Legislative districts of the State of Arizona.”<sup>76</sup>

In 2010, California voters passed a ballot initiative that extended the reach of the California Citizens Redistricting Commission (CCRC), which was originally created after the 2008 passage of the Voters FIRST Act.<sup>77</sup> The Act initially assigned responsibility to the Commission to draw state legislative districts;<sup>78</sup> the 2010 ballot initiative expanded the Commission’s scope to include congressional redistricting.<sup>79</sup> The language of the ballot initiative unequivocally voiced distaste for politicians’ ability to choose their own voters, noting that “[a]llowing politicians to draw these districts, to make them safe for incum-

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75. ARIZ. CONST. art. 4, pt. 2, § 1; AN INITIATIVE MEASURE, ARIZ. PROP. 106 (2000), available at <http://azredistricting.com/wp-content/uploads/2011/04/Proposition-1061.pdf>

76. To achieve this end, the Commission is tasked with creating congressional and state legislative districts that are of equal population, are geographically compact and contiguous, respect communities of interest, and use visible geographic features. See ARIZ. INDEP. REDISTRICTING COMMISSION, <http://2001.azredistricting.org> (last visited Apr. 22, 2011). The Commission should favor competitive districts, ARIZ. CONST. art. 4, pt. 2, § 1(14), and may not identify or consider the places of residence of incumbents or candidates, *id.* § 1(15). Party registration and voting history data are excluded from the initial phase of the mapping process, though such data may be used after the fact to test maps for compliance with the stated goals. *Id.*

77. CAL. CONST. art. 21, § 2; Voters FIRST Act, Cal. Prop. 11 (2008), available at <http://www.voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop11>.

78. *Id.*

79. CAL. CONST. art. 21, § 1.

bents, or to tailor the districts for the election of themselves or their friends, or to bar the districts to the election of their adversaries, is a serious abuse that harms voters.”<sup>80</sup>

Non-commission-based state reforms have been initiated in recent years as well. In 2010, Florida voters passed the Fair Districts Florida Initiative, replacing vague, limitless standards with concrete requirements that the legislature must satisfy when redistricting.<sup>81</sup> While this reform did not take redistricting out of the hands of the legislature, the goal was similarly to curb excessive political gerrymandering by barring the legislature from intentionally favoring one incumbent or one political party over another.<sup>82</sup> It remains to be seen how this reform will play out in the post-2010 process, but the reform is an important step toward reining in the extremely partisan strategies employed by state legislators during the redistricting process.

The common thread in these reform states is the existence of a referendum process. The availability of mechanisms of direct democracy, which allow voters to bypass self-interested politicians, is an invaluable asset when it comes to reforming congressional and state legislative apportionment.<sup>83</sup> In states without a referendum process, the road to reform is much more difficult. Even in states that have successfully experimented with redistricting contests, allowing ordinary citizens an opportunity to try to produce a fair map for their state, reform remains just out of reach.<sup>84</sup> State legislatures can be hostile environments for redistricting reform legislation because many state legislators look to draw districts for themselves. This is particularly the case in states where term limits push state legislators to look to opportunities in Congress to further their political careers.

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80. Voters FIRST Act for Congress, Cal. Prop. 20, § 2(a) (2010), available at <http://cdn.sos.ca.gov/vig2010/general/pdf/english/text-proposed-laws.pdf#prop20>.

81. FLA. CONST. art. 3, § 20; *Standards for Legislature To Follow in Congressional Redistricting 07-15*, FLA. DEP'T STATE, <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=43605&seqnum=1> (last visited May 1, 2001). These standards include the requirement that districts do not favor or disfavor any incumbent or political party; racial or language minorities must not be denied equal opportunity to participate; and districts must be contiguous, compact, and as equal in population as feasible.

82. FLA. CONST. art. 3, § 20(a).

83. For a thorough discussion of redistricting commissions passed by ballot initiative, see Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives To Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331 (2007).

84. See, e.g., *Ohio Redistricting Competition*, OHIO SECRETARY OF ST., <http://www.sos.state.oh.us/sos/redistricting.aspx>. (last visited Apr. 18, 2011).

## CONCLUSION

The gerrymandering of electoral boundaries by political officeholders is incompatible with representative government because meaningful choice is often removed from the hands of the voters. Politicians use the redistricting process to create safe districts for themselves and their party brethren, and the problem of self-interested gerrymandering has arguably gotten worse, not better. The result of partisan gerrymandering is greater incumbent protection and less electoral competition. While there are undoubtedly very good reasons why voters might choose to elect incumbents—experience, seniority, and institutional knowledge are valuable commodities in a government body as large and complex as the House of Representatives—the House is meant to be the branch of the federal government that is most responsive to changing voter preferences. The decision whether to reelect must remain in the hands of the voters. Voter choices are increasingly irrelevant in a process in which politicians decide the fate of the voters—and not the other way around. This is fundamentally inconsistent with American democratic ideals.

State reforms are essential in the drive to push away from the perils of politically-driven redistricting. These reforms provide needed examples of different approaches to redistricting, offering guidance to voters and elected officials in those states that continue to eschew reform. State-level redistricting reform, particularly in the form of independent redistricting commissions, is absolutely necessary in order to fulfill the promise of government *for* the people, *by* the people.