

# Note

## Judging Partisan Gerrymanders Under the Elections Clause

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## INTRODUCTION

Twice in the last two decades, the Supreme Court has come within two votes of declaring partisan gerrymandering—the manipulation of district lines for partisan ends<sup>1</sup>—a nonjusticiable political question. Last Term, in *Vieth v. Jubelirer*, Pennsylvania Democrats challenged an alleged Republican gerrymander of the state’s congressional districts.<sup>2</sup> Four members of the Court thought the question nonjusticiable,<sup>3</sup> and one, Justice Kennedy, thought it justiciable under the Equal Protection Clause but nonetheless rejected the plaintiff’s claims.<sup>4</sup> Eighteen years earlier, in *Davis v. Bandemer*, a three-Justice plurality had held that a political group complaining of partisan gerrymandering—the Democratic or the Republican Party, as the case may be—could proceed with its equal protection claim, but only upon a showing that it had been “denied its chance to effectively influence the political process.”<sup>5</sup>

Such a test being, in effect, impossible for a major political party to meet, *Bandemer*’s promise that federal courts would be open to partisan gerrymandering claims has proven an empty one. Indeed, despite widespread belief that partisan gerrymandering impermissibly calcifies the democratic process,<sup>6</sup> complaints alleging it rarely survive motions to

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1. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1773 n.1 (2004) (plurality opinion) (citing BLACK’S LAW DICTIONARY 696 (7th ed. 1999)).

2. *Id.* at 1773.

3. *Id.* (arguing that no manageable standard exists for judging partisan gerrymandering claims).

4. *Id.* at 1797 (Kennedy, J., concurring in the judgment) (“[I]f a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants’ evidence states a provable claim under the Fourteenth Amendment standard.”).

5. 478 U.S. 109, 132-33 (1986) (plurality opinion).

6. See, e.g., Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1661 (1993) (“Before any votes are cast in representative elections, before any candidate has filed for office or begun campaigning, the political process has been ordered—generally by a political body composed of the incumbent representatives or their political allies—through the process of determining the electoral configurations in which the balloting will occur.”); Michael E. Lewyn, *How To Limit Gerrymandering*, 45 FLA. L. REV. 403, 407 (1993) (calling partisan gerrymandering “especially pernicious”); Jackson Williams, *The Courts and Partisan Gerrymandering: Recent Cases on Legislative Reapportionment*, 18 S. ILL. U. L.J. 563, 595 (1994) (“Gerrymandering can stifle debate entirely, as where incumbent legislators face no opposition at all in their ‘safe districts.’”). More than eighty percent of House incumbents running for reelection in 2002 won their races by margins greater than twenty percent. Ctr. for Voting & Democracy, Overview: Dubious Democracy 2003-2004, <http://www.fairvote.org/dubdem/overview.htm> (last updated Apr. 2, 2004). Only four out of 386 House incumbents running for reelection in 2002 lost seats to nonincumbents. *Id.*

dismiss.<sup>7</sup> Thus, even while conceding that severe partisan gerrymanders are inconsistent with democratic principles,<sup>8</sup> Justice Scalia wrote for the *Vieth* plurality that “no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”<sup>9</sup>

But a curiosity persists. While the *Vieth* plurality may be correct that the standard for judging partisan gerrymandering claims under the Equal Protection Clause has been filled with peril, the Court’s own jurisprudence potentially supports analysis of such claims under a very different constitutional provision. The central difficulty of using the Equal Protection Clause in partisan gerrymandering cases is that equal protection analysis relies on evaluating the permissibility of a given classification; unlike racial classifications, the Court does not generally view political classifications as per se impermissible.<sup>10</sup> In *Cook v. Gralike*,<sup>11</sup> however, seven members of the Court, Justice Scalia among them, backed the proposition that Article I, Section 4 of the Constitution, which grants state legislatures the power to regulate the times, places, and manner of holding elections for Congress,<sup>12</sup> limits that power to so-called “procedural regulations.”<sup>13</sup> It does not grant states the authority to “attempt[] to ‘dictate electoral outcomes.’”<sup>14</sup>

If this broad language is to be taken seriously, its reach is monumental. The *Gralike* Court had to decide whether the Missouri legislature could designate on the ballot whether congressional candidates supported a federal term limits amendment. Whether these actions represent “attempts to ‘dictate electoral outcomes’” seems a much *closer* question than whether partisan gerrymandering does so. Even ardent defenders of the practice acknowledge that in purposefully manipulating district lines, state legislators hope to dictate electoral outcomes at least as much as

7. See *Vieth*, 124 S. Ct. at 1778 n.6 (plurality opinion) (collecting nineteen cases). Embarrassingly, the only time a plaintiff prevailed under the *Bandemer* standard, when a North Carolina district court found in favor of the state Republican Party in a challenge to the state’s judicial election system, every Republican candidate in the purportedly gerrymandered superior court judge districts subsequently managed to win election—just five days after the court decision. See *Republican Party of N.C. v. Hunt*, No. 94-2410, 1996 U.S. App. LEXIS 2029 (4th Cir. Feb. 12, 1996) (per curiam). The Fourth Circuit remanded the case to the district court in light of the election results. *Id.*

8. *Vieth*, 124 S. Ct. at 1785 (plurality opinion) (stating that the plurality “do[es] not disagree with” Justice Stevens’s judgment regarding “the incompatibility of severe partisan gerrymanders with democratic principles”).

9. *Id.* at 1778.

10. See *id.* at 1798 (Kennedy, J., concurring in the judgment).

11. 531 U.S. 510 (2001).

12. The Elections Clause reads, in full, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1.

13. *Gralike*, 531 U.S. at 523 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833 (1995)).

14. *Id.* at 526 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995)).

proponents of pejorative ballot labels do.<sup>15</sup> Proponents and opponents of gerrymandering disagree only on the propriety of doing so.

Courts hearing gerrymandering cases have not generally taken judicial notice of the reviewing “standard” announced in *Gralike*—a blanket prohibition on attempts to influence the outcome of elections<sup>16</sup>—and even the wishful thinking of the academy has largely ignored the link between *Gralike* and partisan gerrymandering.<sup>17</sup> Indeed, the *Vieth* appellants themselves hardly pressed the point. Though they devoted a subsection of their merits brief to the limitations the Elections Clause imposes upon the states, they made no effort to articulate a gerrymandering standard consistent with those limitations,<sup>18</sup> instead relying primarily on the Equal Protection Clause. As Justice Scalia notes, the Elections Clause is invoked “only fleetingly” in the brief.<sup>19</sup> “It is . . . asking too much,” the brief concedes, “to expect line-drawers *never* to consider the goal of gaining partisan advantage in particular districts.”<sup>20</sup>

Another reason why the Pennsylvania Democrats may have been wary of reading too much into the Elections Clause is that a prohibition on attempts to dictate electoral outcomes may do much more than ban the

15. See, e.g., Lee Hockstader, *A Texas-Sized Brawl over Redistricting; Fleet-Footed Democrats Win Key Battle, but War Is Just Beginning*, WASH. POST, May 17, 2003, at A3 (quoting U.S. House Majority Leader Tom DeLay (R-Tex.), discussing the impetus behind a proposed gerrymander by the Republican-led state legislature (“I’m the majority leader, and we want more seats.”)).

16. See, e.g., *Session v. Perry*, 298 F. Supp. 2d 451, 459 (E.D. Tex. 2004) (“Unless and until Congress chooses to act, the states’ power to redistrict remains unlimited by constitutional text.”). *Session* addressed the question of whether the Texas legislature could redistrict mid-decade. Judge Ward did write that a state engaged in “extreme partisan gerrymandering” is able to “dictate electoral outcomes” and thus would appear to exceed its power under the Elections Clause, but he did not further say what distinguishes “extreme” from “routine” gerrymandering. *Id.* at 516 (Ward, J., concurring in part and dissenting in part). Justice Stevens mentioned the limitations imposed by the Elections Clause in his *Vieth* dissent, but only to support his claim that the gerrymander at issue violated the Equal Protection Clause. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1808 & n.26 (2004) (Stevens, J., dissenting) (writing that the Equal Protection Clause “implements a duty to govern impartially” that is “buttressed by” the holding in *Gralike* that “the Elections Clause is not a source of power to dictate electoral outcomes” (internal quotation marks omitted)). Neither Judge Ward in *Session* nor Justice Stevens in *Vieth* mentioned that *Gralike* expressly prohibits “attempts.”

17. Although Samuel Issacharoff has proposed an aggressive approach to judicial review of partisan gerrymandering claims that would render suspect all purposeful redistricting, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) (advocating a per se rule against incumbent manipulation of district lines based on analogies to insider manipulation of other competitive markets), I am aware of only one piece of scholarship that has suggested that the logic of *Gralike* compels a hard look at partisan gerrymandering of congressional districts, see Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196 (2004) (arguing from Elections Clause doctrine that state legislatures should not have the power to gerrymander).

18. See Brief for Appellants at 25-29, *Vieth* (No. 02-1580).

19. *Vieth*, 124 S. Ct. at 1792 (plurality opinion).

20. Brief for Appellants at 32.

unilateral gerrymander they challenged. It also would appear to threaten “bipartisan” gerrymanders, in which the two major parties collude to strike a districting balance calibrated to protect incumbents.<sup>21</sup> Far more alarming to the traditional liberal opponents of partisan gerrymandering,<sup>22</sup> the intent standard announced in *Gralike* may, as applied to districting, threaten racial gerrymandering as well. It may in essence amount to a declaration that the biggest flaw of the *Shaw v. Reno* line of cases,<sup>23</sup> which declared it unconstitutional for states to use race as the predominant factor in drawing district lines, was that those cases did not go far enough. No less than partisan gerrymanders, racial gerrymanders are, baldly, attempts to dictate electoral outcomes.<sup>24</sup> Couple these results with the perceived practical hurdles of expunging politics from district line drawing, and the pro-Elections Clause constituency begins to dwindle significantly.

An “attempts” standard may for these reasons be a losing argument before the Supreme Court. But if we believe that the constitutionality of manipulating district lines for partisan advantage rests solely on the claim that manageable judicial standards are unavailing, then none of these reasons should relieve conscientious commentators of the duty of exposing that claim to rigorous scrutiny. As with any argument of constitutional dimension, Justice Stevens’s argument for the *Gralike* majority, an extension of his majority opinion in *U.S. Term Limits v. Thornton*,<sup>25</sup> cannot be answered with a reflexive pragmatic response. Our common law constitutionalism requires us to extend logic and principle to their permissible limits *before* rejecting their less considered applications. Thus, this Note first asks whether the construction of the Elections Clause propounded in *Gralike* and *U.S. Term Limits* is historically accurate; second, whether applying it to partisan gerrymandering is appropriate; and, third, assuming such application is appropriate, how judges might actually go about it. Does the Elections Clause restrict states to procedural tinkering over voter registration forms and polling locations, committing them not to

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21. See *Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding the constitutionality of a bipartisan gerrymander).

22. Among the amici curiae in support of the Democrats in *Vieth* were the ACLU, the Brennan Center for Justice, Common Cause, and Public Citizen.

23. See, e.g., *Easley v. Cromartie*, 532 U.S. 234 (2001); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

24. This Note remains silent on the question of whether its proposed standard outlaws racial gerrymanders. See *infra* note 201.

25. 514 U.S. 779 (1995) (invalidating an Arkansas state constitutional amendment imposing term limits on the state’s congressional representatives, on the grounds that the amendment exceeded the state legislature’s powers under the Qualifications Clauses and the Elections Clause). The *U.S. Term Limits* Court wrote that “the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.” *Id.* at 833-34.

attempt to dictate electoral outcomes? Does the express textual commitment of oversight over such tinkering to the legislative branch—"the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators"<sup>26</sup>—limit, or perhaps even preclude, a role for judges in regulating district line drawing?<sup>27</sup> Finally, if judges do have a role to play, how, if at all, does judicial review under the Elections Clause, rather than under the Equal Protection Clause, lighten the burden of articulating a workable standard by which to police gerrymandering?

Answering these questions requires a backward look to determine what was motivating the Framers when they inserted Article I, Section 4 into the Constitution. This inquiry, which has not been conducted in the gerrymandering literature, will be the central focus of this Note. I will suggest that the *Gralike* Court's reading of the Elections Clause is accurate in its essentials. It is appropriate to view the Elections Clause as a limitation on the ability of state legislatures to manipulate the outcomes of congressional elections. The Court should focus more, however, on whether the legislature is in fact attempting to manipulate those outcomes rather than on whether its regulations are labeled as "procedural." While ascribing to the Framers an intent to eliminate partisan gerrymandering as we now know it is perhaps anachronistic, the Framers did anticipate that congressional oversight of electoral regulations would lead, through institutional checks and balances, to federal elections conducted in the spirit of republican government. Thus, the Elections Clause should be read *in pari materia* with the Guarantee Clause.<sup>28</sup> This Note concludes that although the Framers expected Congress, not judges, to police the constitutional commitment to republican values, a contemporary understanding of both the judiciary and of Congress dictates that identifying state legislative capture of federal elections falls within the judicial mandate.

The Note proceeds as follows: Part I discusses the historical roots and judicial application of the Elections Clause. It examines Supreme Court case law, discussions in and around the Philadelphia Convention, and the far more robust debates over the Clause in the state ratifying conventions. Part II briefly traces the history of partisan gerrymandering, from its English use and abuse through its common practice in nineteenth-century America, as well as the state constitutional norms that both encouraged and curtailed it. Part III applies to modern gerrymandering the "republican

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26. U.S. CONST. art. I, § 4, cl. 1.

27. See *Wesberry v. Sanders*, 376 U.S. 1, 33 (1964) (Harlan, J., dissenting) ("[U]nder § 4, the state legislatures, subject only to the ultimate control of Congress, could district as they choose.").

28. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

fairness” understanding of the Elections Clause that emerges from my discussion of its history. I first note that the recurring themes of that history parallel the themes animating the Guarantee Clause. I then suggest that the advent of national political parties tends to shift institutional competence to identify and condemn partisan gerrymanders away from Congress and toward the judiciary. I conclude Part III with a novel proposal for how the Court might effectively use its limited competence to police partisan gerrymanders, namely by using a writ of mandamus to compel Congress to fulfill its obligation under the Guarantee Clause to provide the states with a republican form of government.

## I. THE MEANING OF THE ELECTIONS CLAUSE

This Part considers the fundamental purpose behind the Elections Clause. To provide doctrinal context, it begins with a survey of the Supreme Court’s Elections Clause jurisprudence before proceeding into a historical inquiry. I consider the Constitutional Convention in Section B and the state ratification debates in Section C.

### A. *The Elections Clause in the Supreme Court*

The Supreme Court has provided relatively little guidance as to the full scope of the Elections Clause. Where it has spoken on the Clause, as often as not it has failed to do so with one clear voice.<sup>29</sup> Until *U.S. Term Limits* was decided a decade ago by a sharply divided Court, two vaguely contradictory strands of doctrine remained extant. In a line of cases beginning with *Ex parte Siebold*,<sup>30</sup> the Court had held that nothing in the Clause itself limits the ways in which either the states or the Congress may exercise their regulatory powers. *Siebold* involved the question of whether Congress had the power under Article I, Section 4 to create criminal penalties for violations of its election laws. Justice Bradley appeared to think it an easy question: Congress may regulate House and Senate elections as it pleases.<sup>31</sup> Although the *Siebold* Court had no cause to address whether the Elections

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29. Compare *Newberry v. United States*, 256 U.S. 232, 256, 256-58 (1921) (suggesting that the “natural and usual sense” of the words of the Elections Clause does not contemplate the Clause’s application to state primary elections), with *United States v. Classic*, 313 U.S. 299, 317-20 (1941) (reaching the opposite conclusion).

30. 100 U.S. 371 (1880).

31. Wrote Justice Bradley,

“*Make or alter.*” What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the State and national governments, we should not have any difficulty in understanding them. . . . [T]he power of Congress over the subject is paramount.

*Id.* at 383-84.

Clause imposed any limitations on state governments independent of congressional regulation, nothing in the opinion suggests any such limitations. Wrote Justice Bradley, "If Congress does not interfere, of course [election regulations] may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially."<sup>32</sup>

The implication that the Elections Clause is not a self-executing limitation on state legislatures was not expressly repudiated for the next 115 years.<sup>33</sup> Justice Harlan followed *Siebold* most directly in his dissent in *Wesberry v. Sanders*, in which he argued that the Constitution does not require a principle of one person, one vote in federal elections.<sup>34</sup> The Elections Clause, he wrote, "states without qualification that the state legislatures shall prescribe regulations for the conduct of elections for Representatives and, equally without qualification, that Congress may make or alter such regulations. There is nothing to indicate any limitation whatsoever on this grant of plenary initial and supervisory power."<sup>35</sup>

*Gralike* and *U.S. Term Limits* imply quite the opposite, however, holding that a state's power to regulate congressional elections is in fact limited to "procedural" regulations. This doctrinal turn results from a contestable reading of the 1932 case of *Smiley v. Holm*.<sup>36</sup> In *Smiley*, the Court decided that the regulatory power the Elections Clause conferred upon the state legislatures was not exempt from the restrictions individual state constitutions imposed on lawmaking powers.<sup>37</sup> In discussing the text of the Clause, however, Chief Justice Hughes wrote for the Court,

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to *procedure and safeguards* which experience shows are necessary in order to enforce the fundamental right involved.<sup>38</sup>

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32. *Id.* at 383.

33. *See, e.g., Classic*, 313 U.S. at 311 ("[S]ubject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.")

34. 376 U.S. 1, 20-49 (1964) (Harlan, J., dissenting).

35. *Id.* at 29-30.

36. 285 U.S. 355 (1932).

37. *Id.* at 367-68.

38. *Id.* at 366 (emphasis added).

In *Wesberry*, Justice Harlan dismissed this language as essentially dicta,<sup>39</sup> and even if Chief Justice Hughes's list is binding, it hardly seems meant to be exhaustive.<sup>40</sup> Indeed, the preface that the Elections Clause was meant to be a "complete" code seems to foreclose an *expressio unius* construction of the enumerated items. For most of its precedential life, therefore, *Smiley* has stood more for the proposition that congressional oversight of state election regulations is comprehensive,<sup>41</sup> not that its exemplary list of election regulations is itself the upper limit on state legislative power.

Justice Stevens nevertheless extracted great mileage from this list in *U.S. Term Limits* and in *Gralike*. *U.S. Term Limits* involved a challenge to a referendum amending the Arkansas Constitution to impose term limits on the state's federal congressional delegation.<sup>42</sup> Although the opinion relies principally on Article I, Sections 2 and 3, which set forth the qualifications for membership in the House of Representatives and the Senate respectively, Justice Stevens sought additional support in Article I, Section 4. Relying on the idea that any power the Elections Clause grants to the states it must also grant to Congress,<sup>43</sup> Justice Stevens called it "unfathomable" to imagine that the Framers of the Constitution would have allowed Congress to set its own qualifications.<sup>44</sup> Therefore, "[t]he Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office."<sup>45</sup> Stevens relied on only a small assortment of historical materials, namely the rhetoric of James Madison at the Constitutional Convention and Alexander Hamilton in *Federalist No. 60*.

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39. See *Wesberry*, 376 U.S. at 46 n.55 (Harlan, J., dissenting).

40. It is perhaps of interest, however, that among his other activities between stints on the Supreme Court, Chief Justice Hughes was counsel for the state of Michigan in *Newberry v. United States*, 256 U.S. 282 (1921).

41. See, e.g., *Foster v. Love*, 522 U.S. 67, 71 n.2 (1997).

42. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 783 (1995).

43. See *Ex parte Siebold*, 100 U.S. 371, 382-94 (1880) (discussing the concurrent power conferred by the Elections Clause). Because regulating federal elections is not a "reserved" power of the states, the Elections Clause is the only source of state authority over them. *But see infra* text accompanying notes 98-99 (discussing the possibility that districting is a "reserved" power).

44. *U.S. Term Limits*, 514 U.S. at 832.

45. *Id.* at 832-33. Although Justice Stevens was rightly suspicious of superficially boundless grants of congressional power, that suspicion is not controlling. If the Qualifications Clauses are inalterable of their own force, then they yield no information about the scope of the Elections Clause. That the Elections Clause is limited to "procedural" regulations may, but does not necessarily, follow from the supposition that the Framers would not have wanted to enable Congress to set its own qualifications. One logical possibility, for example, is that Congress's Elections Clause power was meant to extend beyond "procedural" regulations except to the extent that it infringed upon the Qualifications Clauses or other independent constitutional provisions. Thus the language about "procedural" regulations is essentially dicta: Justice Stevens's prudential argument does not link the Qualifications Clauses to this particular limitation on the Elections Clause.

Six years after *U.S. Term Limits*, in *Gralike*, Justice Stevens marshaled the language of *Smiley*,<sup>46</sup> but no additional historical support, to further assert that the Elections Clause, without more, forbids states from “attempt[ing] to ‘dictate electoral outcomes.’”<sup>47</sup>

Both *U.S. Term Limits* and *Gralike*, like many Elections Clause opinions before them, fail to engage comprehensively the available historical materials. To be fair, such canvassing will not necessarily prove conclusive, nor will it necessarily prove Justice Stevens wrong. I do, however, think it important to examine with some rigor the context in which the Framers of the Elections Clause were operating if we are to credit so aggressive an interpretation as *Gralike*’s. This inquiry is especially important given that the few opinions that confront the ratification debates tend to do so in the service of the view that Congress’s oversight power provides the exclusive remedy for districting abuses within the states,<sup>48</sup> a view contrary to Justice Stevens’s in *Vieth* and *Bandemer*. To wit, I devote the next two Sections to the Federal Constitutional Convention in Philadelphia and to the state ratifying conventions, in an effort to excavate as much meaning as possible from the Elections Clause.

## B. *The Philadelphia Convention and Its Aftermath*

The power to elect—or not to elect—is the power to destroy, a truism flexible enough to provide fodder to either side in the great debate over the degree of confederation the United States of America was to instantiate in 1787. Anti-Federalists could claim that federal interference in electoral regulation was a slippery slope to the end of state sovereignty, whereas Federalists could argue that the federal government, like all of the states themselves, must have ultimate control over its own composition. The Elections Clause debate, and the concurrent sovereignty solution that emerged from it, was thus a microcosm of the larger federalism debate that continues to this day.

Federal control over congressional elections proved far less controversial at the Convention than in those of the several states. The Articles of Confederation, which self-consciously instituted more a “firm league of friendship”<sup>49</sup> than a united nation, may provide some clues as to why. The Articles left no doubt as to who controlled elections to the unicameral Congress: “For the more convenient management of the general

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46. *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001).

47. *Id.* at 526 (quoting *U.S. Term Limits*, 514 U.S. at 833-34).

48. See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1775-76 (2004); *Wesberry v. Sanders*, 376 U.S. 1, 30-42 (1964) (Harlan, J., dissenting).

49. ARTICLES OF CONFEDERATION of 1781, art. III.

interests of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct . . . .<sup>50</sup> The delegates were to meet in Congress at a particular time and were to have certain term limits,<sup>51</sup> but the details of their selection were left to the states as exercises of their “sovereignty, freedom, and independence.”<sup>52</sup> This hands-off policy was part of the central dysfunction of the Articles. Virtually nothing of consequence could occur in the Congress established by the Articles without the consent of nine states.<sup>53</sup> At the same time, and during a costly war with Britain, the Articles required states to pay for their delegates to attend meetings.<sup>54</sup> It is easy to guess how this story ends. By the summer of 1787, it was obvious that the very existence of Congress could not thenceforward be subject to the whims of a small number of individual states.

Due perhaps to this concession, the Elections Clause was essentially uncontroversial at the 1787 Constitutional Convention in Philadelphia. The template for the Elections Clause appears to have been part of South Carolina delegate Charles Pinckney’s draft constitution of May 29.<sup>55</sup> Article V of that draft read as follows: “Each state shall prescribe the time and manner of holding elections by the people for the House of Delegates; and the House of Delegates shall be the judges of the elections, returns, and qualifications of their members.”<sup>56</sup> Thus the states were given power over “time and manner,” without plenary congressional oversight but with limitations on qualifications to be established by Congress itself.

There is no recorded debate over the Clause until after it emerged from the Committee of Detail on August 6 as the first section of Article VI, saying something quite different: “The times and places, and the manner, of holding the elections of the members of each house, shall be prescribed by the legislature of each state; but their provisions concerning them may, at any time, be altered by the legislature of the United States.”<sup>57</sup> The Elections Clause now appeared more to be a grant of power to Congress than to the states. Subsequent discussions provide some insight into this

50. *Id.* art. V, cl. 1.

51. *See id.* art. V, cl. 2; *see also id.* art. II (leaving multiple details explicitly open).

52. *Id.* art. II.

53. *See id.* art. IX, cl. 6.

54. *See id.* art. V, cl. 3.

55. *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, LUTHER MARTIN’S LETTER, YATES’S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF ’98-’99, AND OTHER ILLUSTRATIONS OF THE CONSTITUTION 146 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1901) [hereinafter ELLIOT’S DEBATES].

56. 1 *id.*

57. 1 *id.* at 225. The Clause allowing the House to judge the qualifications of its own members remained in the same Article, now as the fourth Section.

transformation. When the Elections Clause was considered on August 9, James Madison and Pennsylvania delegate Gouverneur Morris moved to change "each House" to "the House of Representatives."<sup>58</sup> This change was motivated by the fact that the Senate was to be chosen by the state legislatures; the language as it read thus enabled Congress to interfere in the times and places of their meetings and to disrupt their selection procedures.<sup>59</sup> Although the motion was defeated,<sup>60</sup> it would later be partially vindicated by the addition of the words "except as to the Places of chusing Senators."

Of greater substance, Pinckney and fellow South Carolinian John Rutledge moved to remove Congress's oversight power from the Clause altogether.<sup>61</sup> Several delegates spoke against the motion. Morris objected that states might engage in election fraud, and Massachusetts delegates Nathaniel Gorham and Rufus King suggested that electoral oversight power was essential to national government.<sup>62</sup> Said King, foreshadowing his arguments at the Massachusetts ratifying convention, "If this power be not given to the national legislature their right of judging of the returns of their members may be frustrated."<sup>63</sup> In other words, King viewed control over elections as inherent in the idea of sovereignty; this was an argument that appealed both to Federalists and Anti-Federalists.

The motion seems largely to have been put to rest by Madison, who defended the wording of the Clause in a lengthy speech. Madison's conception of the Clause extended beyond the practical concern over making sure electors were seated according to the laws of the land. Rather, Madison's was a story of ensuring uniformity that expressly contemplated the ability of state legislatures to influence the results of elections through ostensibly procedural regulations. Madison also gave the most comprehensive description available of what was meant by the "manner" of holding elections:

The necessity of a general government supposes that the state legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices. . . . Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives,

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58. See James Madison, Journal (Aug. 9, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 227, 239-40 (Max Farrand ed., rev. ed. 1966).

59. See 2 *id.* at 240; see also 4 ELLIOT'S DEBATES, *supra* note 55, at 70 (remarks of Richard Dobbs Spaight at the North Carolina ratifying convention).

60. 1 ELLIOT'S DEBATES, *supra* note 55, at 238.

61. 5 *id.* at 401.

62. See 5 *id.* at 401-02.

63. 5 *id.* at 402.

or all in a district vote for a number allotted to the district,—these, and many other points, would depend on the legislatures, and might materially affect the appointments. Whenever the state legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.<sup>64</sup>

On this account, congressional oversight is a check not only on state legislatures abdicating their duty to seat representatives, but also on their political maneuverings. One might argue that Madison's speech reveals a mistrust of state legislatures that is perhaps too deep to impute to the Convention generally. However, not only was the Pinckney-Rutledge motion defeated without any further recorded speeches in support, but additional language was added on a motion by George Read of Delaware to allow Congress both to alter and to *make* election regulations.<sup>65</sup> The only other changes made to the Clause in Philadelphia were cosmetic.

The Federalists knew they would not receive so free a ride in the state ratifying conventions. The Anti-Federalist propagandist Federal Farmer foreshadowed the fight to come in the states in his third letter, criticizing the Elections Clause as an invitation to self-dealing by Congress.<sup>66</sup> Through Article I, Section 4, he writes, "the general legislature may . . . evidently so regulate elections as to secure the choice of any particular description of men."<sup>67</sup> The principal concern evidenced in the letter is that Congress would be inclined to force states to hold elections at large, and thereby enable a minority of voters with concentrated interests to control a state's entire slate of representatives.<sup>68</sup>

Writing as Publius in the lead-up to what would be a contentious ratifying convention in New York, Alexander Hamilton defended the Elections Clause in *Federalist Nos. 59, 60, and 61*. Given that in the first exercise of its Elections Clause power, Congress would do the precise opposite of what was feared by the Federal Farmer,<sup>69</sup> Publius seems particularly clever when he writes of this fear, "Of all chimerical suppositions, this seems to be the most chimerical."<sup>70</sup> Publius suggests that the diversity of representation within the House would protect it from capture by any particular class of individuals: "The dissimilarity in the

64. *5 id.* at 401.

65. *5 id.* at 402.

66. See Letter from the Federal Farmer (Oct. 10, 1787), reprinted in *ORIGINS OF THE HOUSE OF REPRESENTATIVES: A DOCUMENTARY RECORD* 52, 53 (Bruce A. Ragsdale ed., 1990).

67. *Id.*

68. See *id.*

69. See Reapportionment Act of 1842, ch. 47, 5 Stat. 491 (codified as amended at 2 U.S.C. § 2a (2000)).

70. *THE FEDERALIST NO. 60*, at 367 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

ingredients which will compose the national government, and still more in the manner in which they will be brought into action in its various branches, must form a powerful obstacle to a concert of views in any partial scheme of elections.”<sup>71</sup> Publius’s central affirmative defense of the Elections Clause, the concern over self-preservation, is to be found in *Federalist No. 59*. He writes, “Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.”<sup>72</sup>

Absent from Hamilton’s discussion—and understandably so, given the audience he was trying to persuade—is Madisonian rhetoric about state legislative influence over substantive electoral outcomes. In the parlance of public choice theory, Hamilton was engaging in “costly” talk.<sup>73</sup> Because his words were those needed to win over skeptics, one might argue, they should perhaps be given more credit in the interpretive exercise than those of Madison, who could speak more ambitiously with the apparent support of the Convention behind him. We shall see, however, that it is difficult to justify so awesome and apparently limitless a power as that given to Congress in the Elections Clause without adopting at least part of Madison’s rationale.

### C. *State Ratifying Conventions*

The various debates about the Elections Clause within the state ratifying conventions each had different loci, but all were chiefly about federalism. As James Wilson observed at the Pennsylvania convention, powers over elections “are enjoyed by every state government in the United States. . . . and why should this be the only one deprived of them? Ought not these, as well as every other legislative body, to have the power of judging of the qualifications of its own members?”<sup>74</sup> It was generally conceded that any nation needed a means of self-preservation, but this reason alone did not suffice to grant plenary congressional power over elections. No fewer than six states—Massachusetts, New Hampshire, New York, North Carolina, Rhode Island, and South Carolina—passed resolutions suggesting a constitutional amendment that would limit Congress’s power under the Elections Clause to cases in which states, for

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71. *Id.*

72. THE FEDERALIST NO. 59, *supra* note 70, at 363 (Alexander Hamilton).

73. See, e.g., Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1445-46 (2003) (explaining the distinction between “cheap talk” and “costly signaling”).

74. 2 ELLIOT’S DEBATES, *supra* note 55, at 510.

whatever reason, neglected to make their own regulations.<sup>75</sup> Two of those states, Massachusetts and New Hampshire, suggested in their amendments that Congress also should be able to step in should a state “make regulations subversive of the rights of the people to a free and equal representation in Congress.”<sup>76</sup> In determining the contours of the Elections Clause, it is important to figure out what concerns motivated these amendments and ultimately what, if anything, we can take from the fact that no such language made its way into the draft Bill of Rights proposed by the First Congress.

The many state convention delegates skeptical of the Elections Clause raised two overriding and related objections. Several delegates, already predisposed to oppose the Constitution, viewed the Elections Clause as further evidence of a conspiracy to deprive the states of their rights and institute a tyrannical national government. In North Carolina, which did not finally ratify the Constitution until 1789, after George Washington had already been elected President, Anti-Federalist Samuel Spencer spoke for many when he said that the Clause “apparently looks forward to a consolidation of the government of the United States, when the state legislatures may entirely decay away.”<sup>77</sup> But as mentioned, the Framers were informed by their experiences under the Articles of Confederation. During the Revolutionary War, South Carolina’s capital had been taken over by British soldiers, preventing the state from sending delegates to Congress. Increase Sumner, a justice of the Massachusetts Supreme Judicial Court, invoked this episode during the Massachusetts ratification debates:

[I]f France and Holland should send an army to collect the millions of livres they have lent us in the time of our distresses, and that army should be in possession of the seat of government of any particular state, (as was the case when Lord Cornwallis ravaged Carolina,) and that the state legislature could not appoint electors,—is not a power to provide for such elections necessary to be lodged in the general Congress?<sup>78</sup>

The need for self-preservation, neglected during the Confederation, was too strong to leave election regulations entirely in state hands. William R. Davie of North Carolina called government without a means of self-preservation a “solecism.”<sup>79</sup> “The Confederation,” he said, “is the only

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75. See 1 *id.* at 322-30; 2 *id.* at 545; 4 *id.* at 246.

76. 1 *id.* at 322; see also 1 *id.* at 326 (demonstrating identical language in the New Hampshire proposal).

77. 4 *id.* at 51.

78. 2 *id.* at 32.

79. 4 *id.* at 60.

instance of a government without such means, and is a nerveless system, as inadequate to every purpose of government as it is to the security of the liberties of the people of America."<sup>80</sup>

A less reactionary objection was not to the grant of the power itself but to its scope. Many state delegates criticized what they saw as an avenue through which Congress might perpetuate itself in power or, echoing the fears of the Federal Farmer, institute unfair at-large voting methods in the states so as to favor particular interests. In Virginia, the staunch Anti-Federalist Patrick Henry lamented that, through the Elections Clause, Congress may provide that "[t]he elections may be held at one place, and the most inconvenient in the state; or they may be at remote distances from those who have a right of suffrage: hence nine out of ten must either not vote at all, or vote for strangers."<sup>81</sup> Samuel Spencer of North Carolina suggested that Congress "may alter the time [of choosing senators] from six to twenty years, or to any time."<sup>82</sup> "[A]s men have ever been fond of power," E. Pierce was reported to have reminded the Massachusetts convention, "we must suppose they ever will continue so."<sup>83</sup>

Perhaps. But many of these objections reflect a decidedly British understanding of political power. As William Maclaine told the North Carolina convention, "They talk as loudly of constitutional rights and privileges in England as we do here, but they have no written constitution. . . . [Here t]he legislature is to be guided by the Constitution. They cannot travel beyond its bounds."<sup>84</sup> Thus, in response to charges that Congress might use its Elections Clause power to deny suffrage, move elections to other states, or extend its members' own terms of office, proponents argued that independent constitutional provisions would prohibit these moves.<sup>85</sup> Article I, Sections 2 and 3 set the terms for the House and Senate respectively and set the qualifications for membership therein. Article V ensured that these could not be altered by congressional fiat.

To the extent that these other constitutional provisions did not constrain Congress, it was argued that the fact that members of Congress had to stand for election provided a natural check on undemocratic or otherwise tyrannical actions. In Virginia, Madison resumed his defense of the

80. 4 *id.*; see also 2 *id.* at 326 (remarks of John Jay at the New York convention) ("The obvious meaning of the paragraph was, that, if this neglect should take place, Congress should have power, by law, to support the government, and prevent the dissolution of the Union.").

81. 3 *id.* at 60.

82. 4 *id.* at 52.

83. 2 *id.* at 22.

84. 4 *id.* at 63.

85. See, e.g., 2 *id.* at 29-30 (remarks of Charles Jarvis at the Massachusetts convention); 4 *id.* at 52-53 (remarks of James Iredell at the North Carolina convention).

Elections Clause from the Federal Convention, saying that if Congress shifted the place of elections to some inconvenient locale, “the members of the government would be execrated for the infamous regulation. Many would go to trample them under foot for their conduct; and they would be succeeded by men who would remove it.”<sup>86</sup> In other words, if Congress acted improperly, the people would vote the rascals out. Or worse. Said the colorful Massachusetts convention delegate Captain Isaac Snow of the possibility that Congress might move the place of election “from Georgia to the Mohawk River,” “I stand ready to leave my wife and family, sling my knapsack, travel westward, to cut their heads off.”<sup>87</sup> And if such political “accountability” was still lacking, there was always the judiciary. Though the judiciary was not nearly as powerful then as now, North Carolina delegate John Steele suggested that, unlike under the Confederation, “[t]he judicial power of [the federal] government is so well constructed as to be a check. . . . If the Congress make laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them.”<sup>88</sup>

Steele was perhaps overly optimistic about the willingness of the federal judiciary to involve itself in matters of election regulation. But the constitutional structure offers another answer to the objection that Congress will regulate improperly. Many convention delegates noted in support of the Elections Clause that all of the unseemly regulatory powers that opponents feared Congress would exercise could also be exercised by state governments.<sup>89</sup> The key difference was that Congress, unlike state legislatures, was institutionally constructed so as to minimize the danger of abuse. Theophilus Parsons, who would later become chief justice of the Massachusetts Supreme Judicial Court, was reported to have enumerated the checks and balances in place between the House and Senate:

These two branches . . . have different constituents, and as they are designed as mutual checks upon each other, and to balance the legislative powers, there will be frequent struggles and contentions between them. . . . [I]f the federal representatives wished to introduce such regulations as would secure to them their places, and a continuance in office, the federal Senate would never consent, because it would increase the influence and check of the

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86. 3 *id.* at 408.

87. 2 *id.* at 34.

88. 4 *id.* at 71.

89. See 2 *id.* at 33 (remarks of Reverend Samuel West at the Massachusetts convention) (“What hinders our state legislatures from abusing their powers? They may violate the Constitution; they may levy taxes oppressive and intolerable, to the amount of all our property. An argument which proves too much, it is said, proves nothing.”); 4 *id.* at 61 (remarks of William R. Davie at the North Carolina convention); 4 *id.* at 63-64 (remarks of William Maclaine at the North Carolina convention).

Representatives; and, on the other hand, if the Senate were aiming at regulations to increase their own influence by depressing the Representatives, the consent of the latter would never be obtained; and no other regulations would ever obtain the consent of both branches of the legislature, but such as did not affect their neutral rights and the balance of government; and those regulations would be for the benefit of the people.<sup>90</sup>

It was thought that the House would be loyal to the people generally, whereas the fealty of the Senate would be to the state legislatures. If either were captured by aristocratic or other minority interests, the other would not consent to the resulting pernicious regulations. No such native institutional check constrained the actions of the various state legislatures.

This structural claim formed part of the argument against the amendments limiting Congress's Elections Clause power that were proposed in several state conventions. Many delegates noted that the persistent self-preservation arguments in favor of the Elections Clause did not explain why the powers it conferred on Congress had to be so robust. Noting that proponents claimed "that this power was given in order that refractory states may be made to do their duty," Phaniel Bishop was reported to have asked in Massachusetts, "[b]ut if so, sir, why was it not so mentioned?"<sup>91</sup> Because, asserted Anti-Federalist William Goudy in response to similar objections in North Carolina, "that was not the reason, in my humble opinion. I fear it was a combination against our liberties."<sup>92</sup>

In a sense, Goudy appears to have been right, for the Elections Clause should not be read merely as a prophylaxis against states' refusal or inability to send delegates to Congress. It was also a remedy for all manner of state regulations thought by the national government to be unjust or inappropriate. Parsons was reported as suggesting that the Clause was to guard against state legislatures that might "under the influence of ambitious or popular characters, or in times of popular commotion, and when faction and party spirit run high, . . . introduce such regulations as would render the rights of the people insecure and of little value."<sup>93</sup> One example of such a regulation would be "mak[ing] an unequal and partial division of the states into districts for the election of representatives."<sup>94</sup> Rufus King and Judge Francis Dana, also in Massachusetts, suggested that recent efforts by the

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90. 2 *id.* at 26-27; see also 3 *id.* at 408-09 (remarks of Madison at the Virginia convention) ("The sum of the powers given up by the people of Virginia is divided into two classes—one to the federal and the other to the state government. Each is subdivided into three branches. These may be kept independent of each other in the one as well as the other.")

91. 2 *id.* at 23.

92. 4 *id.* at 56.

93. 2 *id.* at 27.

94. 2 *id.*

Rhode Island legislature to institute representations by corporation instead of by population provided ready evidence that a state legislature may “counteract the will of a majority of the people.”<sup>95</sup> In Virginia, Madison warned a doubting James Monroe that “[s]ome states might regulate the elections on the principles of equality, and others might regulate them otherwise. . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.”<sup>96</sup> Even Pinckney, who had moved to strike the offending language at the Philadelphia Convention, defended the Elections Clause oversight power before the South Carolina convention as necessary “lest, by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really represent the people of the state.”<sup>97</sup>

Those limiting amendments that made it out of the state conventions died en route to the First Congress’s draft of the Bill of Rights. While this fact alone is not conclusive evidence that Congress’s Elections Clause power was broader than remedying a state’s refusal to seat representatives, it places a heavy burden on anyone who might argue otherwise. The Framers recognized two distinct possibilities: Not only might states not be able to seat representatives, but they might through their manipulation of election regulations do so according to decidedly nonrepublican principles. Congress, whose institutional structure limited its own abuse of the same power, could provide an effective cure to either problem.

The foregoing discussion suggests that the structure of the Elections Clause is meant to allow Congress to police state legislative affronts to republican government. On this view, Justice Stevens is correct that the Clause embodied certain normative commitments that, at the very least, disfavored state legislative control over electoral outcomes. This discussion does not, however, answer two important questions. First, may we apply the logic of these Election Clause commitments to modern partisan gerrymandering, or would doing so be anachronistic? Second, to what extent does the fact of congressional oversight preclude judicial review? The next two Parts will address these two questions in turn.

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95. 2 *id.* at 49 (remarks of Judge Dana); see 2 *id.* at 50-51 (reporting the remarks of Rufus King, who mentioned Connecticut and South Carolina as additional examples).

96. 3 *id.* at 367.

97. 4 *id.* at 303; see also 2 *id.* at 510 (remarks of James Wilson at the Pennsylvania convention) (“Let us suppose [the Elections Clause power] may be improperly exercised; is it not more likely so to be by the particular states than by the government of the United States? . . . .”); 4 *id.* at 67 (remarks of William R. Davie at the North Carolina convention) (“When aristocracies are formed, they will arise within the individual states. It is therefore absolutely necessary that Congress should have a constitutional power to give the people at large a representation in the government in order to break and control such dangerous combinations.”).

## II. THE ELECTIONS CLAUSE AND PARTISAN GERRYMANDERING

As I have mentioned, uncovering the normative commitments of the Elections Clause hardly ends the inquiry of the most importance to this Note. Although the Elections Clause is the sole *express* source of state authority over congressional elections, it may be plausible to read control over districting as something other than the power to regulate time, place, or manner of conducting elections.<sup>98</sup> On such a reading, the font of state power over districting may be the Tenth Amendment, not the Elections Clause, thereby subjecting that power to no limitations other than those embodied in independent constitutional provisions such as the Equal Protection Clause. There may be something to this view. When post-Revolutionary state constitutions discuss the “manner” of holding elections, they almost always refer to Election Day procedural matters. Should the vote be conducted by ballot or *viva voce*?<sup>99</sup> Who will collect the ballots or record the votes?<sup>100</sup> What shall be the age and property qualifications of voters?<sup>101</sup> As this Part will demonstrate, “district” lines at the time of the ratification were generally based on preexisting municipal boundaries. It was therefore assumed that states had the power—elemental to even the thinnest conception of sovereignty—to alter them.

This fact alone is not, however, dispositive. Whatever the plausibility of the view that manipulation of district borders was not originally contemplated by the language of the Elections Clause, state legislatures now control districting lines that affect the composition of Congress but have nothing whatever to do with traditional political boundaries. It will be useful, then, to cut the history into thinner slices. How did the norms governing the alteration of district boundaries in 1787 compare to the norms governing other election regulations? We have already seen that the manipulation of district lines was cited in the Massachusetts ratifying convention as an example of an unfair electoral regulation.<sup>102</sup> Determining how this practice was perceived prior to 1787, in English practice, in the colonies, and in state constitutions, can help us determine whether and how to apply Elections Clause norms to modern gerrymandering. The more disfavor visited upon the practice by these preexisting institutions, the more

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98. See Robert Alexander Schwartz, *The Nature of Consent in the American Republic: Substance or Procedure? The Elections Clause and Single-Member Congressional Districts*, 38 U.S.F. L. REV. 467 (2004) (arguing that the Elections Clause does not cover redistricting).

99. See GA. CONST. of 1777, art. XIII; MD. CONST. of 1776, art. II; MASS. CONST. pt. II, ch. 1, sec. 3, art. III; N.H. CONST. pt. II, art. XIV; N.Y. CONST. of 1777, art. VI.

100. See GA. CONST. of 1777, art. XIII.

101. See MD. CONST. of 1776, art. II.

102. See *supra* note 94 and accompanying text.

plausible a claim that the Elections Clause can be read to constitutionalize similar limitations.

The norms of interest to this inquiry are not accessible by reference to the modern gerrymander. To get at the ancestry of the practice, gerrymandering must be defined more broadly than its quotidian sense. *Black's Law Dictionary* defines political gerrymandering as “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”<sup>103</sup> This relatively technical definition is not the only available option. One could define gerrymandering in terms of the district drawer’s paradigmatic two-step of “packing” and “cracking” the expected voters of a disfavored group into districts in which their votes are ever less meaningful.<sup>104</sup> It will prove more useful for our purposes, however, to take a less nuanced approach.

The nearly exclusive association of the idea of gerrymandering with the manipulation of artificial district lines for partisan ends can be viewed as a byproduct of the Supreme Court’s one-person-one-vote requirement<sup>105</sup> and the Reapportionment Acts of 1842<sup>106</sup> and 1967,<sup>107</sup> which required single-member congressional districts based on geography. Article I, Section 2 of the Constitution, which the Supreme Court has interpreted to require proportional representation of the states within the House of Representatives, barely tolerates even a *de minimis* deviation from population equality among congressional districts within a state.<sup>108</sup> Coupled with the requirement of single-member districts, the one-person-one-vote

103. BLACK’S LAW DICTIONARY 708 (8th ed. 2004).

104. See Lewyn, *supra* note 6, at 406.

105. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (finding that unequal state districting violates the Equal Protection Clause); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

106. Reapportionment Act of 1842, ch. 47, 5 Stat. 491 (codified as amended at 2 U.S.C. § 2a (2000)). The 1842 Act was passed because allowing at-large electoral districts made it difficult for minority political parties to have any power in Congress. See ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 40-41 (1963). It also gave disproportionate influence in the House to small states, which were more likely than large states to have unified interests. See SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1157-58 (rev. 2d ed. 2002).

107. Act of December 14, 1967, Pub. L. No. 90-196, 1967 U.S.C.C.A.N. (81 Stat. 581) 633 (codified at 2 U.S.C. § 2c (2000)). The Supreme Court ruled in *Wood v. Broom*, 287 U.S. 1 (1932), that the equimember district requirements of the Reapportionment Act of 1842 had lapsed with the passage of the Reapportionment Act of 1929, which set no districting criteria. *Id.* at 6-7.

108. See *Karcher v. Daggett*, 462 U.S. 725 (1983). The *de minimis* standard applies only to federal elections. The standard for local elections is more lenient. See, e.g., *Bd. of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (“[T]he relevant inquiry is whether ‘the vote of any citizen is approximately equal in weight to that of any other citizen’ . . . .” (quoting *Reynolds*, 377 U.S. at 579)).

mandate is effectively an invitation to the party or parties controlling the state legislature to stretch district boundaries into uncouth shapes.<sup>109</sup>

But it is important for the purposes of a historical inquiry that we not let our familiarity with present statutory and constitutional constraints lead us to think of gerrymandering in terms of districts, or even in terms of malapportionment, though the two are often linked. Gerrymandering can be understood rather as *any* artificial manipulation of political boundaries for partisan ends. Although the first gerrymander is often reported as the meticulously crafted districting scheme engineered by the Massachusetts legislature and approved by the eponymous Bay State governor Elbridge Gerry in 1812,<sup>110</sup> the practice dates back much further. Indeed, any suggestion that the scheme bearing Gerry's name was the first "gerrymander" is undermined by its sophistication. Our story instead begins in England, when parliamentary representation was in its relative infancy and when "districting" had no meaning.

#### A. *English Practice*

The very first parliamentary "districts," echoing pre-parliamentary judicial and administrative divisions, were preexisting political and religious units.<sup>111</sup> They were not meant to represent individuals.<sup>112</sup> The 1295 British Parliament was called by Edward I to represent the three "great estates" of English society: the clergy, who were represented by two archbishops and various bishops, abbots, and archdeacons; the gentry, represented by earls and barons; and the citizens, represented by elected burgesses.<sup>113</sup> It has become easy to forget that "We the People" once thought of ourselves primarily as members of communities rather than as individuals; our understanding of the proper structure and overarching purpose of representative government reflects this sociopolitical reorientation. By some accounts, rather than viewing representation as an honor and a privilege, Renaissance England saw it as a tax burden and gerrymandered to avoid it. According to British historian Sir Courtenay Ilbert, "Towns often desired not to be represented, and probably made arrangements with the sheriff for this purpose."<sup>114</sup>

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109. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 103 (2000).

110. See ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 16-17 (photo. reprint 1974) (1907).

111. See COURTENAY ILBERT, *PARLIAMENT: ITS HISTORY, CONSTITUTION AND PRACTICE* 33 (new & rev. ed. 1920).

112. See *id.* at 13.

113. *Id.*

114. *Id.* at 35.

In the sixteenth century, as political representation became more valuable, the number of boroughs eligible for representation increased dramatically. Each borough and county was to send two members to the House of Commons, without regard to relative size.<sup>115</sup> So-called “rotten boroughs” were created, sometimes by fiat of local sheriffs, other times by charter at the behest of the monarch or the House of Commons. The parliamentary seats of these gerrymandered towns would either be bought by local aristocrats or doled out by powerful benefactors to proxies, enabling the Tudor kings and queens to wield more control over the legislature.<sup>116</sup> Although the practice of creating rotten boroughs died down by the end of the seventeenth century,<sup>117</sup> it was not until the Great Reform Acts of 1832 that 130 electoral units, many of them with remarkably few constituents, were finally abolished.<sup>118</sup>

Thus, even loosely equal representation was neither guaranteed nor even aspired to. It is worth asking why such obvious discrepancies in representation were tolerated. Even if democratic ideals then were far less developed than they are now, one might think that the fact that the institution of Parliament existed at all instantiates at least some expectation of individual fairness. Not so. As David Butler and Iain McLean point out, the limited expectations resulted in large part from the fact that, both historically and conceptually, towns, not individuals, were thought of as the natural units of representation.<sup>119</sup> The eroding tolerance for rotten boroughs, then, was a crude but functional fairness norm. That individual rights were not placed at a premium does not diminish the fact that a check on state power to manipulate representation was increasingly expected. It was not until a Lockean concern for individual rights took root in the political culture that individual representation itself became normatively attractive. That concern established itself most fundamentally, of course, on the other side of the Atlantic.

### B. *Early Colonial and State Practice*

As in England, the pre-Revolutionary practice in the colonies was to divide legislative representation into counties, towns, or parishes.<sup>120</sup> And as in England, population inequality was both common and expected.

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115. See David Butler & Iain McLean, *The Redrawing of Parliamentary Boundaries in Britain*, in *FIXING THE BOUNDARIES: DEFINING AND REDEFINING SINGLE-MEMBER ELECTORAL DISTRICTS* 1, 3 (Iain McLean & David Butler eds., 1996).

116. See ILBERT, *supra* note 111, at 35-36.

117. See *id.* at 36.

118. Butler & McLean, *supra* note 115, at 4.

119. See *id.* at 3-4.

120. See GRIFFITH, *supra* note 110, at 23.

Municipal boundaries often coincided with the tides of local rivers and constantly shifted when towns were threatened by indigenous peoples or otherwise drained of population.<sup>121</sup> There is evidence, however, that the late English frustration with rotten boroughs had an effect on colonial districting practices. In 1705 the Virginia House of Burgesses passed a law “providing that no county should be divided unless eight hundred tithables, or taxpayers, remained in the upper county so formed.”<sup>122</sup> Thus the invention of counties for the purpose of representation was made illegal. Early Virginia practice also provides ammunition for the view that the improper alteration of county boundaries did not necessitate an affirmative check, but rather could be left to the political process. Writing in 1710 about the popular practice of disturbing county lines for partisan advantage, Virginia Governor Alexander Spotswood said that “the voters frequently considered the attitude taken by the various candidates for the House of Burgesses upon this question of the division of old parishes. It was often the sole issue upon which the election turned.”<sup>123</sup>

Research by Elmer Griffith uncovered further purposeful manipulations of county representation and county boundary lines by the colonial assemblies of New York, North Carolina, and Pennsylvania.<sup>124</sup> These gerrymanders enabled the colonies to stack the legislature in opposition to the British monarchy, and in turn, the Crown largely shut down the practice by mid-century.<sup>125</sup> As we have seen, the colonial memory of this heavy-handedness from above haunted the state ratification debates over the Elections Clause. If British oversight was problematic, however, it was not from any love for gerrymandering, broadly conceived. “Equal” representation was well understood conceptually among the states, but examining their constitutions reveals that it just as often took the form of equality among towns, counties, and parishes as among individuals.

It is worth noting here that analogies between the U.S. Constitution and those of the several states as regards election regulation are necessarily limited. Federalism as instantiated in 1787 was a bold new idea whose contours had not yet been worked out. Whereas no state constitution granted any substantial power over state legislative elections to individual counties<sup>126</sup>—the practice had long ago been abandoned in England—it was, of course, thought natural by many in 1787 for the federal government to leave regulation of elections for Congress entirely to the states. The

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121. *See id.* at 25.

122. *Id.* at 23.

123. *Id.* at 25 (citing a letter from Governor Spotswood).

124. *Id.* at 26-29.

125. *See id.* at 28-29.

126. *But see* PA. CONST. of 1776, § 18 (giving individual counties interim power over the intracounty districting process until a proper census was taken).

question of control over the electoral process was not, among the states of the Revolutionary era, a question of *who*—who else but the legislature?—but rather a question of *how*.

Different states had different traditions with respect to the times, places, and manner of holding elections, though every state that had a constitution vested these powers in a legislative assembly.<sup>127</sup> State constitutions of the period leading up to 1787 can help us begin to answer at least two important questions that arise from the Elections Clause. First, and most holistically, what kinds of fairness norms, if any, were embedded within the language governing election regulations? Second, what procedures and checks, if any, were in place for altering the boundaries of political units? Answering these two questions can help us assess the plausibility of reading the Elections Clause as imposing any limitations on partisan gerrymandering. A prevalence of weak norms of fairness and equity in election regulation generally, and in districting regulations specifically, would undermine any claim that the Elections Clause was meant to restrict malfeasance (rather than merely nonfeasance) in state legislative regulation of congressional elections. If, on the other hand, state constitutional practice tended to favor limitations on the ability of legislators to manipulate units of representation for partisan purposes, the view that the Elections Clause provides a means of nationalizing such limitations becomes more plausible.

All of the states considered counties or other preexisting political entities as essentially indivisible units of representation, but one can categorize the state constitutions according to the strength of their proportionality norms. New York's Constitution of 1777, for example, provided that assembly representatives for each county be apportioned according to the results of a census to be conducted every seven years, such that an extra representative be provided for every one-seventieth difference in population between counties.<sup>128</sup> Massachusetts and New Hampshire, whose legislative election provisions were nearly identical to each other, both provided for one lower-house representative for every 150 "ratable" inhabitants "in order to provide for a representation . . . founded upon the principle of equality."<sup>129</sup> The Pennsylvania Constitution of 1776 contained a similar rule, though with more egalitarian pomp and less mathematical precision. Although the initial allocation of representatives was to be equal

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127. Connecticut and Rhode Island remained under their colonial charters until the nineteenth century. See 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 143 (William F. Swindler ed., 1973); 8 *id.* at 351. Connecticut's Charter of 1662 granted to the governor and six of his twelve "assistants" power over "the disposing and ordering" of elections. CONN. CHARTER OF 1662.

128. See N.Y. CONST. of 1777, art. V.

129. MASS. CONST. ch. I, § 3, art. II (amended 1836); see also N.H. CONST. pt. II (amended 1877).

as among counties (with the exception of the City of Philadelphia, which was treated as a county),<sup>130</sup> a census would be conducted every seven years to ensure representation according to the number of taxable inhabitants.<sup>131</sup> This, the document tells us, "is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land."<sup>132</sup> Had such language made its way into the U.S. Constitution, *Wesberry* would have been more easily decided, but a canvassing of the other state constitutions demonstrates that so strong a proportionality norm was the minority view at the time.

Take, for example, the other of the original thirteen states whose post-Revolutionary constitution made express provision for a regular census: South Carolina. The rule of proportionality that the census was to serve was not a headcount but rather a "property" survey. Every fourteen years, the state was to be reapportioned "in the most equal and just manner according to the particular and comparative strength and taxable property of the different parts of the same, regard always being had to the number of white inhabitants and such taxable property."<sup>133</sup> Though this provision is most obviously a concession to slaveholders, it also reflects an attitude toward representation that viewed equality among individuals more as a background consideration than as democratic dogma.<sup>134</sup> South Carolina seemed to aspire to nothing more precise than a loose accounting of the approximate proportions of whites, slaves, and acreage by parish.

A more or less laissez-faire attitude toward proportionality was prevalent in, but not confined to, slave states. The New Jersey Constitution of 1776 provided for equal representation among counties but allowed these numbers to be adjusted "at any time or times hereafter" if a legislative majority should "judge it equitable and proper."<sup>135</sup> Though such ad hoc adjustments were to be made "on the principles of more equal representation,"<sup>136</sup> they were, importantly, recommendations rather than requirements. The state constitution thus allowed for, but did not require, proportional representation of individuals. The Delaware, Georgia, and North Carolina constitutions generally gave equal representation to

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130. For the political story behind the treatment of the City of Philadelphia, see GRIFFITH, *supra* note 110, at 26-29.

131. See PA. CONST. of 1776, § 17.

132. *Id.*

133. S.C. CONST. of 1778, art. XV.

134. Note that Massachusetts and New Hampshire apportioned their senate seats, though not their lower-house seats, by taxable property. See MASS. CONST. ch. I, § 2, art. I (amended 1840); N.H. CONST. pt. II (amended 1964).

135. N.J. CONST. of 1776, art. III.

136. *Id.*

counties, with no express provisions for adjustments at all.<sup>137</sup> Virginia did so provide, but with an essentially toothless clause that did little more than guard against the rotten-borough phenomenon. Each county was to send two representatives to the House of Delegates, unless the county population decreased such that for seven straight years it had less than half the number of voters as another county, in which case it would no longer be represented.<sup>138</sup>

What can be said of these concededly divergent practices among states is that there was a recognized norm of equal representation in the lower houses of the legislatures, with differences over whether individuals, property, or communal political units such as counties were the appropriate referents. But apportionment provisions can only tell us so much about the permissible moves of election regulation. If something can be said of state constitutional limitations on the ability of the legislature to alter political boundaries or to create new districts out of whole cloth, it may affect our view of the Elections Clause.

The constitutions of Massachusetts, New Hampshire, New York, and Pennsylvania explicitly allowed the legislature to create new districts, counties, boroughs, and the like.<sup>139</sup> Although these states all had relatively strong proportionality rules, thereby preventing rotten boroughs, nothing in the language of any of their constitutions provided any further limitations on how political boundaries could be manipulated. Among states with weaker proportionality norms, the constitutions of Georgia, Virginia, and even South Carolina also (in theory) restricted the legislature's ability to create rotten boroughs, but did not otherwise mention—much less regulate—alterations of political units. The only hint, perhaps, of a suspicious view toward the manipulation of political lines lay in the constitutions of Massachusetts and New Hampshire, which required that when senate districts were changed, the assembly must “timely make [it] known to the inhabitants of the commonwealth the limits of each

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137. See DEL. CONST. of 1776, art. III; GA. CONST. of 1777, art. IV; N.C. CONST. of 1776, art. III. Georgia provided linear proportionality for newly constituted counties, whereby they would receive progressively greater representation as their number of voters increased, up to one hundred, at which point they would receive the customary ten representatives. See GA. CONST. of 1777, art. V. North Carolina granted two House of Commons representatives to each county and one each for certain towns. N.C. CONST. of 1776, art. III.

138. See VA. CONST. of 1776, para. 25.

139. See MASS. CONST. ch. I, § 2, art. I (amended 1840); N.H. CONST. pt. II (amended 1964); N.Y. CONST. of 1777, art. XII (“And be it ordained, that it shall be in the power of the future legislatures of this State, for the convenience and advantage of the good people thereof, to divide the same into such further and other counties and districts as shall to them appear necessary.”); PA. CONST. of 1776, § 9 (granting the general assembly the power to “constitute towns, boroughs, cities, and counties”).

district.”<sup>140</sup> District boundaries could be shifted, but legislators would have to be politically accountable for their decisions.<sup>141</sup> It is tempting to interpret the paucity of state constitutional provisions discussing manipulation of political lines for partisan ends as an indication that gerrymanders were wholly tolerated. Such an interpretation would be anachronistic, however, for it would presuppose of the colonists an understanding of modern gerrymanders sufficient to guard against them expressly.

More instructive, as I have mentioned, are the interstices of the constitutional texts. It is difficult to contest the conclusion that to the extent the alteration of districting lines implicates congressional representation (especially when it does not implicate municipal boundaries), such alteration falls within the ambit of the Elections Clause. Not only did Theophilus Parsons say so explicitly at the Massachusetts convention,<sup>142</sup> but this appears to be the consensus view on both the present Supreme Court and on all Courts in recent memory. What this examination of state constitutions additionally reveals is that the power over districting was unmistakably infused with a norm of equality, even if states diverged radically on what “equality” entailed. Proportionality was of interest, but not always essential. Rotten boroughs were clearly disfavored, but other manipulations of political units apparently were constrained at most by equality of population. As with other election regulations, there was an abiding sense that republican commitments should be maintained; the disagreement was over the relevant unit of concern. The federal system, however, answered this question unequivocally in 1787: For Senate elections, the unit was the state, and for House elections, it was the free male citizen.

### III. JUDICIAL REVIEW OF PARTISAN GERRYMANDERING UNDER THE ELECTIONS CLAUSE

Having established that Congress was expected to have a role in ensuring that states used their Elections Clause power only for republican ends, we are left to wonder how it should go about doing so, and whether there exists any remedy for its nonfeasance. Although we have seen that the state constitutions varied widely with respect to their baseline norms of fairness and equality in election regulations, we find a potential source of

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140. MASS. CONST. ch I, § 2, art. I (amended 1840); *see also* N.H. CONST. pt. II (amended 1964) (containing a similar provision).

141. It may be instructive to note that Massachusetts and New Hampshire were the only two states to submit their constitutions to popular ratification. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (forthcoming Sept. 2005) (manuscript at 3, on file with author).

142. *See supra* notes 93-94 and accompanying text.

uniformity elsewhere in the Constitution, in the Guarantee Clause of Article IV. This Part suggests that federal judges have the right and the obligation to attempt to articulate standards under the Guarantee Clause that serve to bind state power under the Elections Clause. It is for Congress, however, to fashion a remedy for abuses of that power.

### A. *Ensuring a Republican Form of Government*

The Guarantee Clause reads, “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”<sup>143</sup> Republican government and election regulation are, to state the obvious, intimately related. Given the concerns over improper electoral moves that animated the grant of congressional oversight power in the Elections Clause, the Guarantee Clause provides a tantalizing guidepost for congressional exercise of that power. Several of the Framers argued explicitly that the Guarantee Clause was meant to protect the states from monarchical governments.<sup>144</sup> As Madison wrote in *Federalist No. 43*, “In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations.”<sup>145</sup> The state ratifying conventions discussed the principles of republicanism far too much to fit within the scope of this Note, but James Wilson, speaking at the Pennsylvania convention, summarized the general sentiment: “The right of suffrage is fundamental to republics.”<sup>146</sup> The right is not merely instrumental to but constitutive of republicanism. As Frank Michelman writes, “Any view in which the true, primary interests of individuals are ‘exogenous’ or prior to politics is un-republican.”<sup>147</sup> This sentiment runs exactly counter to the central conceit

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143. U.S. CONST. art. IV, § 4.

144. See, e.g., 1 ELLIOT’S DEBATES, *supra* note 55, at 406 (remarking on the statements of Edmund Randolph in Philadelphia); THE FEDERALIST NO. 43 (James Madison); THE FEDERALIST NO. 85 (Alexander Hamilton).

145. THE FEDERALIST NO. 43, *supra* note 70, at 274 (James Madison).

146. 2 ELLIOT’S DEBATES, *supra* note 55, at 482; see also 3 *id.* at 367 (quoting James Madison as saying that the Elections Clause contemplates that the “general government” should provide the remedy “[s]hould the people of any state by any means be deprived of the right of suffrage”).

147. Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 27 (1986); see also Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 868 (1994) (arguing that the Guarantee Clause “is meant to protect the basic individual right of political participation, most notably the right to vote and the right to choose public officeholders”); McConnell, *supra* note 109, at 106 (arguing that a republican form of government cannot be one in which “a minority

behind gerrymandering. Any manipulation of district lines intended to influence the outcome of House elections, particularly where the Constitution has expressly committed the Senate to state legislative selection,<sup>148</sup> is necessarily nonrepublican.

A glance back at the state and federal ratifying conventions reveals a historical parallel between the Elections Clause and the Guarantee Clause that buttresses their conceptual connection, namely that both seem preoccupied with invasion. Recall Justice Sumner's worry about the inability of a state government come under attack to send a representative to the national Congress.<sup>149</sup> Both congressional oversight of election regulations and the Guarantee Clause appear to have been motivated by a fear of usurpation of the people's government. The Guarantee Clause originally appeared as the eleventh resolution of Edmund Randolph's Virginia Plan, worded as follows: "*Resolved*, That a republican constitution, and its existing laws, ought to be guaranteed to each state, by the United States."<sup>150</sup> Randolph declared that "no state . . . ought to have it in their power to change its government into a monarchy."<sup>151</sup> The resolution was endorsed unanimously on June 11, 1787.<sup>152</sup> On July 18, one month later, the Convention considered the added words "and that each state shall be protected against foreign and domestic violence."<sup>153</sup> Randolph made clear that "[t]he resolution has two objects,—first, to secure a republican government; secondly, to suppress domestic commotions."<sup>154</sup> The added language was also unanimously endorsed.<sup>155</sup>

The Supreme Court has been generally unwilling to review cases arising under the Guarantee Clause,<sup>156</sup> and in *Baker v. Carr* it particularly refused to do so in cases involving congressional districting.<sup>157</sup> What is notable about Justice Brennan's majority opinion in *Baker*, however, is not its refusal to entertain the claim under the Guarantee Clause but its resort to the Equal Protection Clause to supply the standard for decision. Proceeding

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faction maintains control, and the majority has no means of overturning it"); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 305 (1991) ("The members of a partially self-constituted legislature depend to a degree upon one another rather than upon their constituents for their tenure in office. Whatever 'representation' means, it cannot possibly mean that.").

148. U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

149. See *supra* text accompanying note 78.

150. 1 ELLIOT'S DEBATES, *supra* note 55, at 169.

151. 1 *id.* at 406.

152. 1 *id.* at 169.

153. 1 *id.* at 211.

154. 5 *id.* at 333.

155. 1 *id.* at 211.

156. The seminal case in this line is *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849) ("It rest[s] with Congress . . . to determine upon the means proper to be adopted to fulfil [the republican] guarantee.").

157. 369 U.S. 186, 218-27 (1962).

under the Guarantee Clause might have required the Court to step on the toes of Congress and would have required it to overrule a precedent more than a century old,<sup>158</sup> but attacking the districting issue was not itself beyond judicial competence. The Court has on occasion attempted to supply some content to the republican guarantee. It held in *Minor v. Happersett*, for example, that the Guarantee Clause did not require female suffrage, reasoning that most of the ratifying states did not themselves grant such suffrage.<sup>159</sup> Sixteen years later, in *In re Duncan*, Chief Justice Fuller suggested that a state would not implicate the republican guarantee so long as it was “in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law.”<sup>160</sup> In *Luther v. Borden*, the Court held that the Clause was nonjusticiable but nonetheless declared that a permanent military government would “unquestionably” be nonrepublican, “and it would be the duty of Congress to overthrow it.”<sup>161</sup> More recently, in *New York v. United States*, Justice O’Connor acknowledged the ambiguity in the Court’s cases as to whether the Guarantee Clause was justiciable but then proceeded to rule on the merits, holding that coercive Spending Clause legislation did not usurp the state legislative process so as to deny New York a republican form of government.<sup>162</sup>

This Note suggests that in judging partisan gerrymandering cases, recourse to the Guarantee Clause, deployed in the limited way I elaborate below, is preferable to no recourse at all, which is the effect of the current doctrine. The *Baker* Court enumerated six factors for defining a “political question,”<sup>163</sup> an issue insulated from judicial review because of its political nature.<sup>164</sup> When these factors are present, it is thought more sensible as a policy matter and more appropriate constitutionally for judges to allow the political process to work itself out. The Court avoided having to confront the “political question” label in congressional districting cases by deciding *Wesberry* under Article I, Section 2 rather than, as Justice Harlan had urged, under the Elections Clause.<sup>165</sup> But the tension introduced by the opposition between *Gralike* and *Vieth* forces us to re-confront the political

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158. See *Luther*, 48 U.S. (7 How.) 1.

159. 88 U.S. (21 Wall.) 162, 175-76 (1875).

160. 139 U.S. 449, 462 (1891).

161. 48 U.S. (7 How.) at 45.

162. 505 U.S. 144, 183-86 (1992).

163. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

164. See *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946) (“It is hostile to a democratic system to involve the judiciary in the politics of the people.”).

165. See *supra* note 35 and accompanying text.

question doctrine and ask whether judicial review under the Elections Clause is thereby precluded.

The first prong of the *Baker* test is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>166</sup> Certainly the Elections Clause evinces a textually demonstrable commitment of the issue of improper state electoral regulation to a coordinate branch, namely Congress. This is true whether one views state power over congressional elections as limited to “procedural” regulations or, as I suggest, to “republican” regulations. The other five considerations of Justice Brennan’s *Baker* half-dozen hardly seem more promising. An issue presents a nonjusticiable political question when the following conditions obtain:

a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>167</sup>

When judges attempt to make the difficult decisions about, say, what standards to apply to racial or partisan gerrymanders, they appear to fall squarely into just about every category of political question. No “judicially manageable” standard seems to have emerged from *Bandemer*, and the position of slightly less than half of the Supreme Court over the last half-century has been that this is precisely the reason why congressional oversight is expressly provided.<sup>168</sup> “[T]heories of effective suffrage, representation, and the proper apportionment of political power,” Justice Thomas has written, “are questions of political philosophy, not questions of law.”<sup>169</sup> As such, these questions should fall within the legislative prerogative.

Granted. But elections are different from other traditional political questions in at least one significant respect. Unlike, say, the foreign affairs

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

167. *Id.*

168. See, e.g., *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1776-78 (2004) (plurality opinion); *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O’Connor, J., concurring in the judgment); *Wesberry v. Sanders*, 376 U.S. 1, 20, 48 (1964) (Harlan, J., dissenting); *Baker*, 369 U.S. at 266-67 (Frankfurter, J., dissenting).

169. *Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring in the judgment).

decisions of the President<sup>170</sup> or the impeachment decisions of the Congress,<sup>171</sup> the manipulation of electoral outcomes threatens to eviscerate the democratic check itself, providing the people with no means of redress. This is indeed the epitome of nonrepublican government. The Framers knew this, of course, but we have seen that the accountability of Congress to the people and—given its bicameral structure—to itself informed the convention delegates' opinions of Congress's competence as the ultimate judge of election regulations.<sup>172</sup> There is reason to believe, however, that the policing of districting abuse should no longer be viewed as exclusively within congressional competence. Congress was thought to offer the best remedy for local partisan abuse because of its institutional structure. Congress could provide a check, Parsons noted at the Massachusetts ratifying convention, "without the influence of . . . commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election."<sup>173</sup>

Owing to the unforeseen rise of the national party system, however, this security plainly no longer exists. As Sanford Levinson and Ernest Young point out, the election of 1800 "exposed a glaring deficiency of the original 1787 Constitution—the assumption that there would be no party system."<sup>174</sup> That election, which ended with the House of Representatives choosing Thomas Jefferson as President over his running mate Aaron Burr, demonstrated that the Constitution did not contemplate unified party tickets in presidential races. The Framers by and large structured the Constitution's various checks and balances under the naive truism that all politics is local.<sup>175</sup>

With this context in mind, recall that one of the reasons Congress was thought free from capture is the competitive relationship between the House and the Senate. But what happens when loyalty ceases to be institution based and starts to be party based?<sup>176</sup> Capture of a state legislature by a

170. See, e.g., Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215 (1985).

171. See, e.g., *Nixon v. United States*, 938 F.2d 239 (D.C. Cir. 1991) (refusing to review the impeachment of a federal judge on political question grounds).

172. See *supra* text accompanying notes 89-90.

173. 2 ELLIOT'S DEBATES, *supra* note 55, at 27; see also THE FEDERALIST NO. 60 (Alexander Hamilton) (arguing that Congress is less vulnerable to interest group capture than the state legislatures).

174. Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 928 (2001).

175. See GRIFFITH, *supra* note 110, at 25-26 ("Political parties as organized machines, operating throughout all colonies and states, can not be said to have existed prior to the Revolution.").

176. See, e.g., William Crotty, *Democratic Ends and Political Parties in America*, in THE FUTURE OF AMERICAN DEMOCRATIC POLITICS 177, 183 (Gerald M. Pomper & Marc D. Weiner eds., 2003) (discussing the strong cohesion and partisan loyalty of political parties in Congress from a political science perspective).

political party ceases to offend so long as the same party controls the House and Senate, or so long as the opposition party is willing to compromise in exchange for future considerations. For this reason, and because gerrymanders involve the rigging of elections themselves, the regular political process is not entirely trustworthy in policing them.<sup>177</sup>

### B. *Judicial Enforcement of the Republican Guarantee*

Thus understood, there should be a role for federal judges in reviewing state regulation of congressional elections when the institutional checks are dysfunctional. As gerrymanders are presently practiced, that dysfunction takes the form both of acquiescence to incumbent-protecting gerrymanders, which redound to the benefit of every member of the House of Representatives, and partisan gerrymanders, which redound to the benefit of powerful political parties. Chief Justice Marshall wrote in *Marbury v. Madison* that “where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems exactly clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”<sup>178</sup> The words capture a principle so fundamental to the rule of law that it hardly requires restatement: Where the law defines a right and a duty, it must also provide a remedy.

Congress has a constitutional duty under the Guarantee Clause to remedy state capture by undemocratic factions through the Elections Clause. The Guarantee Clause also grants citizens of any particular state so captured a right to a republican form of government.<sup>179</sup> As in *Marbury*, the appropriate remedy would appear to be a writ of mandamus.<sup>180</sup> Traditionally, mandamus relief is directed at executive officers, to compel them to perform a ministerial duty such as the delivery of William Marbury’s judicial commission. At English common law, the writ was “directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or

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177. Justice Scalia attempts to refute this point by noting that five bills have been introduced in the House since 1980 aimed at regulating gerrymandering. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1776 (2004) (plurality opinion). Not only have none of these bills been introduced in the last fourteen years, but none have made it out of committee to the House floor. *See* H.R. 5037, 101st Cong. (1990); Congressional Districting Reform Act of 1989, H.R. 1711, 101st Cong. (1989); Redistricting Standards Act of 1983, H.R. 3468, 98th Cong. (1983); Redistricting Standards Act of 1982, H.R. 5529, 97th Cong. (1982); Fair Representation Act of 1981, H.R. 2349, 97th Cong. (1981).

178. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

179. Arguably it gives every U.S. citizen such a right. I withhold comment on the thorny standing issues raised herein.

180. *Marbury*, 5 U.S. (1 Cranch) at 173.

duty, and which is supposed to be consonant to right and justice.”<sup>181</sup> Because the state would be a party were a citizen to challenge a state legislature’s redistricting practices, the Supreme Court could hear the case under its original jurisdiction.<sup>182</sup> Although redistricting cases are presently heard by three-judge panels of federal district judges, as required by statute,<sup>183</sup> the danger of this approach for this Note’s project is that it is undisputed that Congress may at any time alter the jurisdiction of such courts.<sup>184</sup> The issuance of a writ of mandamus in a Supreme Court original jurisdiction case arguably would not require an enacting congressional statute, but rather is inherent in the equitable power given to the judicial branch as a matter of right under Article III.<sup>185</sup>

Two conditions were required for the issuance of a writ of mandamus at common law.<sup>186</sup> First, the legal right of the complaining party to the requested relief had to be clearly established; second, the writ had to be the complainant’s sole specific legal remedy.<sup>187</sup> The second of these criteria is satisfied by stipulation: The writ of mandamus would issue in a gerrymandering case in lieu of some other form of equity. No other writ or order would be legally cognizable. The first criterion—a clearly established right—appears to be the greater hurdle. It is important for our purposes, however, to note that a right may be clearly established and nonetheless involve the exercise of discretionary power.<sup>188</sup> I have argued that the Guarantee Clause and the Elections Clause protect the dyadic rights of the people both to have congressional representatives in the first place and to have their choice of representatives free of legislative manipulation. Imagine, for example, if a state were to refuse outright to send

181. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 614 (1838).

182. *See* U.S. CONST. art. III, § 2, cl. 2. Under present doctrine, the Court would not be obligated to hear the case, however. *See* *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971); *see also* 28 U.S.C. § 1251 (2000) (providing less than the full extent of original jurisdiction authorized by the Constitution by excluding from the statutory grant of original jurisdiction to the Supreme Court some suits in which a state is a party).

183. 28 U.S.C. § 2284(a).

184. *See* U.S. CONST. art. I, § 8; *id.* art. III, § 1.

185. *Id.* art. III, § 2.

186. The issuance of writs of mandamus presently falls under 28 U.S.C. § 1651(a), which purports to grant the Supreme Court and the lower federal courts the power to issue “all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The rules of the Supreme Court require a showing that “exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.” SUP. CT. R. 20(1). Neither this rule nor its attendant statute is inconsistent with the common law criteria for the issuance of the writ of mandamus.

187. HORACE G. WOOD, A TREATISE ON THE LEGAL REMEDIES OF MANDAMUS AND PROHIBITION, HABEAS CORPUS, CERTIORARI, AND QUO WARRANTO 1 (photo. reprint 1997) (Charles F. Bridge ed., Albany, N.Y., W.C. Little & Co., 3d rev. & enlarged ed. 1896).

188. *See id.* at 3 (“Although a mandamus does not lie to *control* a discretionary power, yet it will compel the *exercise* of such power in cases where it legally exists . . .”).

representatives to Congress, and Congress were to neglect to correct the error. Any objection to judicial intervention in this hypothetical situation would not take the form of an argument that the right was not clearly established. It would more likely either invoke the political question doctrine or suggest that Congress is not an appropriate respondent. Parts I and II of this Note demonstrated that protection against an intentional gerrymander is no less a constitutional duty of Congress than protection against state refusal to send representatives. One would not, therefore, argue against judicial cognizance of intentional gerrymandering by denying that it refers to a clearly established right. Thus, the two traditional criteria for the issuance of a mandamus are satisfied.

The more obvious obstacle to such a writ being issued in a redistricting case, of course, is that the duty belongs not to an executive officer or inferior tribunal but to the Congress generally. It would seem to offend the most basic principles of separation of powers for the Supreme Court to attempt to compel Congress to perform its higher-law duties.<sup>189</sup> Such an attempt would present a *Marbury* problem writ large: Just as Secretary of State Madison might have done had the Court ordered him to deliver *Marbury's* commission, Congress can always say, in effect, "You and what army?" This only emphasizes, however, that the obstacles to the issuance of common law extraordinary writs against coordinate branches of government are prudential, not per se constitutional. The fact that Congress may well ignore an order to provide a remedy to an unconstitutional gerrymander is no reason not to issue one. Rather than provoke a constitutional crisis, ignoring such an order would merely represent an exercise of Congress's political will, to be judged like all other decisions its members make: at the polls.

A writ of mandamus against a legislative body is not unheard of in the state courts.<sup>190</sup> Just two years ago, Nevada Governor Kenny Guinn successfully petitioned the Nevada Supreme Court for a writ of mandamus to compel the state legislature to fulfill its constitutional duty to fund the state's public schools.<sup>191</sup> More specifically, the court's action suspended operation of a ballot initiative requiring a supermajority for any legislation that increased public revenue, in order to break a stalemate and allow the

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189. See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("The general rule is that neither [governmental] department may invade the province of the other and neither may control, direct or restrain the action of the other.")

190. See, e.g., *Dade County Classroom Teachers Ass'n v. Legislature of Fla.*, 269 So. 2d 684 (Fla. 1972) (denying a mandamus application by schoolteachers to order the legislature to set collective bargaining standards but noting the court's jurisdiction to so intervene); *Twenty-First Judicial Dist. Court v. State*, 563 So. 2d 1185, 1193-94 (La. Ct. App. 1990) (noting the availability of a writ of mandamus to compel the legislature to fund the state court system as required by the state constitution).

191. *Guinn v. Legislature of Nev.*, 71 P.3d 1269 (Nev. 2003).

legislature to pass a school funding bill.<sup>192</sup> The court defended its decision against the charge of legislating from the bench by noting that “[r]esolution of the impasse was entirely in the hands of the legislature.”<sup>193</sup> Similarly, the writ I urge here would not infringe upon legislative discretion; it would merely enable the U.S. Supreme Court, acting as a court of equity, to do what one commentator said the Nevada Supreme Court had done in *Guinn*: “decide cases, no matter what the identity of the parties, the subject matter of the dispute, or the likely political fallout.”<sup>194</sup>

The antigerrymander writ could issue upon a finding of an attempted partisan gerrymander, drawing evidence from, for example, unexplained deviances from facially neutral districting criteria such as compactness and respect for municipal boundaries, partisan lockup of the districting process itself, public comments, or internal memoranda. In his concurring opinion in *Vieth*, Justice Kennedy wrote, “That no [workable gerrymander] standard has emerged in this case should not be taken to prove that none will emerge in the future.”<sup>195</sup> His definition of a gerrymander echoes Justice Stewart’s infamous definition of obscenity: “I know it when I see it.”<sup>196</sup> Both our intuition and our constitutional history compel the conclusion that partisan attempts to capture a state’s congressional slate by reorganizing districts according to previous voting patterns are, as even Justice Scalia appears to acknowledge, undemocratic.<sup>197</sup> In this instance, given the express commands of Article IV, the difficulty of remedying the problem should not prevent a judge from declaring one.

Objections to judicial cognizance of partisan gerrymandering—those, at least, that reach beyond the surface of the “political question” obstacle—tend overwhelmingly to focus on the inevitability and predictability of partisan effects in the drawing of district lines.<sup>198</sup> Because there are no

192. *Guinn v. Legislature of Nev.*, 76 P.3d 22, 32 (Nev. 2003) (dismissal of petition for rehearing).

193. *Id.*

194. Jeffrey W. Stempel, *The Most Rational Branch: Guinn v. Legislature and the Judiciary’s Role as Helpful Arbiter of Conflict*, 4 NEV. L.J. 518, 520 (2004).

195. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1795 (2004) (Kennedy, J., concurring in the judgment).

196. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

197. See *supra* note 8 and accompanying text.

198. See, e.g., Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 674 (2002) (“[I]t is almost impossible to design institutions to be authentically nonpartisan and politically disinterested.”); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1351 (1987) (“All rules advantage some players and disadvantage others, and almost all do so more or less systematically.”); see also Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 75 (1985) (commenting that the various proposals for “neutral” districting “are not neutral, . . . not grounded in broader principles that command general assent, and in many cases . . . are incoherent and cannot be made to work”).

politically neutral districting criteria, the argument goes, involving putatively neutral judges in the process is misguided and cannot solve any perceived problem of unfairness.<sup>199</sup> An attempt standard need not reject this argument. Even if we believe either that intentional partisan gerrymanders are no more injurious to democratic values than predictable partisan effects in districting<sup>200</sup> or that intentional gerrymandering is simply inevitable, a standard that renders unconstitutional all legislative attempts to dictate the outcome of a congressional election would not require reviewing Justices to base decisions on their personal political philosophies or to engage in unprincipled explorations into the political effects of districting schemes. Instead, they would focus on the same relatively narrow evidentiary question asked in other Elections Clause cases: Was the state legislature *attempting* to be neutral?<sup>201</sup> If not,<sup>202</sup> the legislature has violated the Elections Clause. The ultimate remedy, however, would lie not with the Court but with Congress, pursuant to an open-ended judicial order. Call it a declaratory judgment with teeth.<sup>203</sup> The imprimatur of a Supreme Court order would dramatically raise the visibility of Congress's neglect of its duty to guarantee republican government, a duty otherwise impaired by a failure of political will.

### C. *Congressional Enforcement of the Republican Guarantee*

Issuing a writ that merely orders Congress to provide a remedy rather than the Court instituting its own should significantly mitigate concerns about judicial competence to entertain political questions. Congress would be free to fashion any number of remedies. In an individual case, it could

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199. See Schuck, *supra* note 198, at 1353-56.

200. *But see* Polsby & Popper, *supra* note 147, at 313 ("It is one thing for a phenomenon to exist by necessity, and quite another for someone to distribute or redistribute it selectively.").

201. One might well ask at this point why similar logic does not apply to race-based redistricting. Indeed it may apply, though probing the question is beyond the contours of this Note. Suffice it to say that whether or not the answer is the same, the question of whether a state legislative majority that manipulates congressional district lines for the benefit of its political party constitutes "republican government" is analytically distinct from the question of whether doing so to improve the representation of racial minorities constitutes the same. See McConnell, *supra* note 109, at 116; *cf.* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (articulating a theory of judicial review whose linchpin is access to the political process).

202. Although the precise details of the standard would be left to federal common law, it is safe to assume that it would require some mitigation of the discretion of political officials in the line-drawing process. Evidence might include unexplained deviations from traditional considerations of contiguity and compactness, partisan comments by line drawers, or suspicious code used in computer models.

203. It is important to note that unlike an advisory opinion, expressly disfavored under our jurisprudence, *see* *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409 (1792), a writ of mandamus to Congress would be self-executing as a matter of law.

establish a special master or appoint an ad hoc committee to rework a state's districting scheme. It could also act affirmatively to establish an independent federal agency authorized to review district lines generally. Or it could require independent state commissions to set district boundaries according to nonpartisan principles, subject to further oversight.<sup>204</sup> Any of these solutions would advance the ball closer to what Justice Scalia and others have recognized as the democratic ideal.

My own preference is somewhat more radical, though it piggybacks on the rule that Judge Michael McConnell has concluded is most consistent with the requirements of the Guarantee Clause.<sup>205</sup> He would require that district boundaries conform to traditional political boundaries such as city and county lines, absent a compelling, nonpartisan reason. McConnell argues that before the Supreme Court's decision in *Wesberry* established the one-person-one-vote rule for federal elections, "[a]dherence to . . . traditional boundaries was, historically, the principal constraint on creative districting."<sup>206</sup> He would restore this rule, and thereby eviscerate the cultish devotion to precise mathematical equality among districts within a state.<sup>207</sup> Although McConnell's approach would not make gerrymandering impossible, it would eliminate "the grotesquely shaped districts that feature so prominently in today's maps."<sup>208</sup> Moreover, making district boundaries presumptively coextensive with familiar political divisions rather than with households prescreened for partisan bias exposes attempted gerrymanders to far more rigorous public scrutiny than any other precommitment. Whatever political check is thought to constrain partisan gerrymanders cannot function effectively so long as the line-drawing process remains a black box. Altering district boundaries that have themselves been gerrymandered would involve a one-time shakeup that would require many House incumbents to face each other in elections, but this would merely be a nonpartisan version of what already increasingly occurs on a partisan basis.<sup>209</sup>

I would go one step further than McConnell. I would additionally advocate repeal of the provision of the Reapportionment Act of 1967 requiring single-member districting.<sup>210</sup> The result would be that states

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204. See Issacharoff, *supra* note 17, at 626 (discussing Iowa's use of such commissions); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997).

205. See McConnell, *supra* note 109.

206. *Id.* at 103; see *supra* Part II.

207. See McConnell, *supra* note 109, at 107-09.

208. *Id.* at 115.

209. See, e.g., Charles Babington & Juliet Eilperin, *GOP Hopes To Expand Its Majority; 4 Democratic Veterans Lose in Texas Contests*, WASH. POST, Nov. 3, 2004, at A17 (noting that four Democratic incumbents in Texas lost, two to other incumbents, following a GOP-engineered redistricting plan).

210. See *supra* notes 106-107 and accompanying text.

would be forced to honor traditional political boundaries but would be free to fashion at-large congressional districts, subject to the constraints of the Voting Rights Act.<sup>211</sup> Allowing at-large voting would reduce the total number of opportunities for gerrymandering. Of course, the use of at-large voting traditionally has had the effect (and often the purpose) of suppressing minority votes, and so relaxing the single-member district requirement might be reflexively troubling.<sup>212</sup> However, the constraint of adherence to the Voting Rights Act would not only substantially mitigate this concern, but would also incentivize states to experiment with more creative means of aggregating votes than the present first-past-the-post system. Cumulative voting<sup>213</sup> and limited voting,<sup>214</sup> for example, both rely on at-large districts and have been touted as particularly promising ways of continuing to ensure minority representation without sinking into the *Shaw v. Reno* quagmire.<sup>215</sup> Neither of these voting methods had been invented when the Reapportionment Act of 1842 was originally passed, but they accomplish the same end.<sup>216</sup> As Justice Black said of at-large districting, “[I]t has an element of virtue that the more convenient method does not have—namely, it does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives as is essential under a free government, and it is constitutional.”<sup>217</sup>

## CONCLUSION

This Note concludes that Justice Stevens got it partly right. The Elections Clause power was not meant as a constitutional license for state

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211. Under the 1982 amendments to section 2 of the Voting Rights Act, there is a prohibition on any “standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973(a) (2000). The amended section 2 is interpreted as instantiating a disparate impact test in districting cases, among other cases. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986).

212. *See* S. REP. NO. 97-417, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 183 (discussing the use of multimember districts to dilute the black vote).

213. Under a cumulative voting system, each voter can cast as many votes as there are candidates; thus, intensity of support is rewarded. *See* ISSACHAROFF ET AL., *supra* note 106, at 1099.

214. Limited voting systems provide voters with more than one vote, but fewer votes than the total number of candidates. *See id.* at 1141.

215. *See* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 251; *supra* note 23 and accompanying text.

216. *See* Pildes & Donoghue, *supra* note 215, at 253 (“Although the concept of alternative voting systems had not been developed at that time, the principles on which it rests are the same as those behind the move away from at-large elections to districts: representative bodies ought to be broadly representative of the political community as a whole, rather than of the interests of only a bloc-voting majority.”).

217. *Colegrove v. Green*, 328 U.S. 549, 574 (1946) (Black, J., dissenting).

governments to do as they please with the machinery of congressional elections. But as my historical analysis demonstrates, the limiting principle is “republicanism,” not “process,” and the ultimate police of those limits is the Congress, not the Court. Under such limits, the constitutional sin at issue in *Cook v. Gralike*, if there was one, may not necessarily have been a violation of the Elections Clause.<sup>218</sup> Under the standard I have articulated, the plaintiff would have had to introduce evidence that the ballot labels at issue in *Gralike* were intended to dictate electoral outcomes; to call the labels defective because “nonprocedural” would be supposition.

But Justice Scalia got it only partly right as well. The evasiveness of judicially manageable means of reining in partisan gerrymandering is a function of continued operation under standards—the Equal Protection Clause, the First Amendment, the Qualifications Clauses—that do not fit the constitutional injury. Partisan gerrymandering deals its blows to political fair play, not to discrete and insular minorities. Though remedial power over the Elections Clause is appropriately exercised by Congress, that body is constitutionally required to guarantee to the states a republican form of government. To the extent that its ability to perform this duty impartially is hampered by considerations of party or self-interest, the courts have a role in securing the blessings of liberty to the citizens of the affected state and of the United States generally. They must, however, play that role mindful of the limits of their competence. That they may know undemocratic gerrymandering when they see it does not mean they can or should remedy it.

It is no secret now, nor has it ever been, that politicians are, as one commentator has remarked of men more generally, only as faithful as their options.<sup>219</sup> Those who have the power to gerrymander or otherwise disrupt the neutral operation of the political process will do so. Whether we simply tolerate their actions or rather apply the power of the general government against them is a question of our normative expectations. This Note’s inquiry into the history of the Elections Clause is meant to demonstrate that the Clause was included within the Constitution in contemplation of the danger that state legislatures might capture their congressional slates in their own interests. The Framers entrusted Congress with oversight of the

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218. I tend to agree with the concurring opinion of Chief Justice Rehnquist, which decided the case on First Amendment grounds. See *Cook v. Gralike*, 531 U.S. 510, 530-53 (2001) (Rehnquist, C.J., concurring) (“I believe that Article VIII violates the First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State.”). *But see* Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 311-12 (arguing that *Gralike* could have been decided on overarching structural principles of republicanism rather than the Elections Clause specifically).

219. See *Chris Rock: Bigger & Blacker* (HBO television broadcast, July 10, 1999).

process fully believing in the power of a kind of vertical political competition that is belied by experience. While they are not competent themselves to do away with gerrymanders, judges surely can recognize that political party dominance and bipartisan gerrymandering threaten the republican character of the nation. In such circumstances, their institutional voice may be its only hope.