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## BENIGN PARTISANSHIP

*Franita Tolson\**

*The Framers of the United States Constitution created our system of federalism based on the principle that political safeguards would protect the regulatory interests of the states from overreaching by the federal government. While many of these safeguards have since failed, others have emerged to insulate the states from an ever-expanding federal presence. One such safeguard is partisan gerrymandering, which allows states to draw legislative districts that reflect the partisan affiliation of a majority of the electorate, and in turn, send a delegation to Congress that is as ideologically cohesive as practicable. In making this argument, this Article corrects a basic misunderstanding in the political safeguards literature: that the Senate is the only chamber that the Framers constructed to protect state interests. In reality, a politically cohesive House delegation can ensure that the state's preferred policy preferences shape federal lawmaking.*

*This Article also illustrates that, in the context of congressional redistricting, the legal scholarship's sole focus on ascertaining manageable judicial standards ignores the concerns about institutional legitimacy and judicially dictated political outcomes that are exacerbated by the federalism issues in this area. Despite the absence of standards, the broader structural implications of promoting "federalism-reinforcing" gerrymandering require the Supreme Court*

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*to craft rules that encourage the use of mid-decade redistricting and at-large voting schemes; that limit the authority of independent commissions to draw redistricting plans; and that promote strong state political parties, all of which will help preserve the states' ability to utilize the federalism benefits that flow from partisan redistricting.*

## INTRODUCTION

The United States Constitution is a complex allocation of checks and balances, designed to reduce politics to competition between the branches and levels of government, and in the process, eliminate the need for political parties in our system.<sup>1</sup> Yet political parties emerged soon after ratification, rendering the checks and balances that the Framers hoped would stymie faction obsolete, and turning every aspect of our electoral system, from adopting legislation to conducting elections, into political endeavors centered on competition between the two major political parties.

Redistricting has emerged as the most political of these endeavors, in part because of a concept that received its name shortly after ratification: partisan gerrymandering.<sup>2</sup> As a country, we have struggled to control the partisanship that occurs in the redistricting process, viewing it as a boogeyman that seeks to perpetuate the power of a select few at the expense of the many. Even when the lines are drawn by a nonpartisan commission,<sup>3</sup> a special master,<sup>4</sup> the courts,<sup>5</sup> or a

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1 See THE FEDERALIST NO. 51 (James Madison) (Ian Shapiro ed., 2009); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006).

2 Generally, a partisan gerrymander is where a single party draws lines to maximize its seat share, GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 31 (2002), but even a bipartisan gerrymander, where both parties draw districts to protect incumbents, is designed to maximize each party's seat share. *Id.* at 32 ("Each party likes to have more seats rather than fewer, and each is risk averse. Each makes a strategic decision regarding how much bias and how much responsiveness its ideal redistricting plan would have and then bargains with the other in an attempt to attain or approximate that ideal."); see also BLACK'S LAW DICTIONARY 756 (9th ed. 2009) ("[A partisan, or political, gerrymander is 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.").

3 See Damon Eris, *California's Not So Non-Partisan Redistricting*, INDEPENDENT VOTER NETWORK (June 6, 2011), <http://ivn.us/2011/06/01/californias-not-so-non-partisan-redistricting/>; see also D.J. Rossiter et al., *The Partisan Impacts of Non-Partisan Redistricting: Northern Ireland 1993-95*, in 23 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 455 (1998) (arguing that non-partisan processes are conducted in a partisan manner and result in partisan outcomes).

major political party,<sup>6</sup> the process can become infected by partisan bias.<sup>7</sup>

By implication, the judicial review of partisan gerrymandering is inescapably intertwined with the political nature of the redistricting process, giving any decisions a certain taint, a “dirtiness” that is typically associated with politics.<sup>8</sup> For this reason, a plurality of the Supreme Court wants to render partisan gerrymandering claims non-justiciable,<sup>9</sup> but perhaps, as some scholars argue, we need the courts to serve as a gatekeeper of sorts, to keep the partisanship from compromising both the interests of the voters and the efficacy of the electoral system as a whole.

Despite these conflicting propositions, the question of justiciability cannot be resolved without appropriate consideration of a fact that has been overlooked by both the legal scholarship and the courts: that the process of congressional redistricting is a political safeguard that helps insulate the states’ regulatory authority from federal overreaching. The Framers devised the House of Representatives to give citizens a voice in the new government and, along with the Senate, to protect the states.<sup>10</sup> This latter role is fulfilled when states draw districts for their House delegations, allowing states to influence not only who serves, but also what policies will be promoted on the

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4 See J. Morgan Kousser, *Estimating the Partisan Consequences of Redistricting Plans—Simply*, 21 LEGIS. STUD. Q. 521, 529–31 (1996).

5 See COX & KATZ, *supra* note 2, at 60 (“[In the early reapportionment cases,] which party had a majority on the court hearing a case systematically affected the levels of bias attained by the corresponding plan . . .”).

6 See, e.g., *Texas Democrats Flee to Neighboring State to Avoid Redistricting Vote*, VOICE OF AMERICA (May 15, 2003), <http://www.voanews.com/english/news/a-13-a-2003-05-15-27-Texas-67309472.html>.

7 See, e.g., COX & KATZ, *supra* note 2, at 20 (“In plurality-rule elections, the largest vote-getting party generally gets a higher percentage of seats than votes, even when districts are established by bipartisan commissions and partisan gerrymandering is unlikely.” (emphasis omitted) (citation omitted)); ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 462 (1968) (“To be brutally frank, whether or not there is a gerrymander in design, there normally will be some gerrymander in result as a concomitant of all district systems of legislative election.” (emphasis omitted)).

8 See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

9 See *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion) (holding that *Davis v. Bandemer*, 478 U.S. 109 (1986), which found partisan gerrymandering claims to be justiciable, should be overturned because of a lack of manageable standards).

10 See *infra* Part II.

national stage.<sup>11</sup> As I have argued elsewhere, partisan gerrymandering is a safeguard of federalism because states can create safe, partisan districts pursuant to their power under the Elections Clause, and use this redistricting authority as leverage to influence their congressional delegations and in turn, federal policy, in ways favorable to their interests.<sup>12</sup> In order to properly account for this federalism interest, I offer a new perspective on the justiciability of partisan gerrymandering claims, a perspective that also has broader implications for federalism doctrine and judicial review more generally.

In this Article, I argue that the partisan gerrymandering of congressional districts is not suitable for direct judicial regulation because courts cannot adequately value its federalism benefits in the already complicated manageable standards inquiry. Nevertheless, both the courts and the legal scholarship must take heed of the fact that the federalism implications of partisan gerrymandering influence the

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11 The states' power over federal elections is considered one of the "political safeguards of federalism," which are the different structural mechanisms in the Constitution that give the states a role in the composition of the federal government and allow states to protect themselves from overreaching by the federal government. *THE FEDERALIST* NO. 45, at 236 (James Madison) (Ian Shapiro ed., 2009). As Madison noted:

Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures.

*Id.* The central provision that gives states their power over elections is the Elections Clause, which provides that "[t]he 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 [sic] Senators." U.S. CONST. art. I, § 4, cl. 1.

12 See Erik J. Engstrom, *Stacking the States, Stacking the House: The Partisan Consequences of Congressional Redistricting in the 19th Century*, 100 *AM. POL. SCI. REV.* 419 (2006) (arguing that states used gerrymandering during the nineteenth century to affect the composition of state congressional delegations and on several occasions, gerrymandering determined which party controlled the House of Representatives); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 *UTAH L. REV.* 859 (2010) (exploring the federalism implications of the states' ability, pursuant to the Elections Clause, to redistrict based on partisan considerations); see also Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 *HARV. L. REV.* 649 (2002) (arguing that partisan gerrymandering is unobjectionable because it will allow states to send an experienced and senior delegation to Congress which accurately reflects the underlying partisan composition of the electorate).

scope of judicial review with regards to other substantive areas of law. Notably, the lack of manageable standards does not deprive the Supreme Court of its responsibility to guarantee that its broader jurisprudence does not undercut the ability of states to use their constitutionally mandated redistricting authority in a federalism reinforcing way. Along these lines, the focus of this Article is less about determining whether judicial review is desirable, or ascertaining what the governing standards for partisan gerrymandering claims should be; instead, this Article seeks to redefine the role of the Court in regulating politics by taking the long view of what the structural implications of partisan gerrymandering mean for the judicial review of politics more generally.

In making this argument, this Article bridges the gap between the election law and federalism literatures, both of which tend to ignore or minimize the link between federalism as a framework for diffusing power among the dual sovereigns and the electoral rules that facilitate this process by giving the states a role in the composition of the federal government.<sup>13</sup> Recognizing this link provides a sounder theoretical basis for understanding how power is shared and distributed between the states and the federal government, and how our electoral system reinforces the connection (and competition) between the two levels of government.

The 2003 mid-decade redistricting of Texas's congressional districts provides a concrete example of the intersection between federalism and election law. After the 2000 census, Texas instituted a court-ordered redistricting plan because of a deadlock in the legislature, but in 2003, after the Republicans gained control of both houses, they re-districted both the state legislative districts and the congressional districts. The Supreme Court, in *League of United Latin American Citizens v. Perry* (hereinafter *LULAC v. Perry* or *LULAC*), held that the mid-decade character of the 2003 plan, which the plaintiffs argued was solely motivated by partisan gain, did not violate the Constitution.<sup>14</sup> Indeed, the plan was largely reflective of the fact that the Republican Party had a large majority in both the electorate and the state government by 2002; unrecognized by the Court, however, is that sending a congressional delegation that reflects this majority is a rough proxy

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13 In the federalism literature, the states' power over redistricting is erroneously discounted as a political safeguard, *see, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 226 (2000), and the election law literature simultaneously overlooks the federalism potential of redistricting in advocating for strict judicial regulation of gerrymanders, *see, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 614 (2002).

14 548 U.S. 399 (2006).

for ensuring that Texas's state interests are represented nationally.<sup>15</sup> Partisan congruence between the electorate, the state leadership, and the congressional delegation arguably has value in promoting the state's interests at the national level.<sup>16</sup>

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15 Generally speaking, much of the legal and political science literature focuses on the ambitions of officeholders in promoting policy, which implies that there are no "state interests." In reality, the "state" does have institutional interests that are separate and distinct from the ambitions of its elected officials, and I use the preferences of a majority of the voters as a rough proxy for "state interests." I have settled on this definition because of the general sense that the state exists for the benefit of its residents, elected officials work on behalf of these residents, and voter preferences therefore should be paramount. See THE FEDERALIST NO. 10, at 51 (James Madison) (Ian Shapiro ed., 2009) (arguing that the role of representative government is to "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country"). Despite their personal preferences, however, elected officials still promote the interests of the voters and of the state as an institution in advocating for policy. See JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 26 (2009) ("[A]mbitious officials within institutions generally recognize that the way to advance within the institution is to learn and internalize the interests of the institution and to promote them effectively."). See also *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (equating the views of the state with those of the majority party). I recognize that, in some situations, the preferences of the median voter rather than a majority of the electorate may be a better gauge of "state interests," but given the present state of polarization in our electorate, it is contestable whether the median voter would better capture the preferences of the electorate than a majoritarian norm. Indeed, in many cases, the preferences of the median voter and the majority of the electorate actually converge. See Elisabeth R. Gerber & Jeffrey B. Lewis, *Beyond the Median: Voter Preferences, District Heterogeneity, and Political Representation*, 112 J. POL. ECON. 1364, 1376 (2004) (arguing that a legislator's behavior is constrained by the median in their district where the district is homogeneous; where a district is heterogeneous, the legislator's behavior is dictated by party affiliation). Nonetheless, I recognize that there are limitations to relying on the preferences of the majority. See Tolson, *supra* note 12 (conceding that the federalism benefits of a gerrymander may be limited in a state where voter support is evenly split between the two parties or where there is a bipartisan gerrymander). I also recognize that relying on majoritarian norms could potentially undermine the interests of minority voters within the state, a concern that I address in Part III.B.1.a and Part III.B.1.b, *infra*.

16 See *LULAC*, 548 U.S. at 419. As Justice Kennedy observed:

Plan 1374C can be seen as making the party balance more congruent to statewide party power. To be sure, there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best. Nevertheless, a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority.

*Id.*

Thus, those debating the question of whether constitutional claims of partisan gerrymandering should be justiciable have to consider the federalism benefits that emerge from the gerrymandering of congressional districts, whether the Court can properly value this benefit, and the broader implications of promoting this type of gerrymandering in our system. The *LULAC* plurality implicitly acknowledged that there was some intrinsic value in having the state's congressional delegation mirror the distribution of power statewide but fell short of explicitly ascribing any federalism benefits to the redistricting plan.<sup>17</sup> Indeed, in the view of some of the Justices, the need for a more accurate distribution of political power did little to validate the state's partisan decision to re-redistrict mid-decade.<sup>18</sup>

Much of their recalcitrance stems from the Court's cabined view of partisan gerrymandering as solely an "election law" issue. Part I challenges this assumption and situates partisan gerrymandering in the federalism literature, which helps to reorient the discussion and better resolve the issues surrounding institutional competency and standards that have been the focal point for election law scholars. The federalism debate has been fixated on restoring the balance of power between the states and the federal government, with an equal focus on whether the Court is capable of policing the boundary between the two spheres.<sup>19</sup> This section reveals how partisan gerrymandering, as an "extra-constitutional safeguard" of federalism, can

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17 See *id.*; cf. *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (holding that proportional representation of political groups is a legitimate redistricting goal).

18 See, e.g., *LULAC*, 548 U.S. at 457–61 (2006) (Stevens, J., concurring in part and dissenting in part) (arguing that it is unlawful for a state to redraw its line for purely partisan gain when it was under no legal obligation to do so); see also *Vieth v. Jubelirer*, 541 U.S. 267, 346–355 (2004) (Souter, J., dissenting) (arguing that gerrymandering can be addressed by allowing plaintiffs to make district specific claims, an approach that would undervalue the state interests and levels of party strength that are factored into the redistricting plan in its entirety and make every district subject to constitutional challenge). Justice Breyer's approach may have some success because it looks for *minority* entrenchment, but because he assesses partisan abuse on a continuum, his test would not accurately value the federalism benefit of the plan and could result in at least some pro-federalism gerrymanders being invalidated. See *id.* at 365 (Breyer, J., dissenting). Indeed, none of the proposed tests can delineate good from bad politics. See *id.* at 299 (majority opinion) (criticizing the dissenters on this point).

19 Prominent scholars have championed the view that the Court's federalism jurisprudence should restore the original balance of power between the state and the federal government as much as practicable. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1224–28 (1993); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1738 (2005).

help shift the balance, which has long been pro-federal government, back in favor of the states.<sup>20</sup>

Part II discusses how the view of partisan gerrymandering as a federalism tool is consistent with the constitutional text and history, both of which reveal that the Senate was not the only entity that the Framers intended to protect state interests. The House is also supposed to play a role in ensuring that the states' interests are adequately represented in Congress, which is achieved through the states' authority over redistricting. States can advance these interests by sending a House delegation to Congress that is as cohesive as practicable to influence federal policy.

Part III explores how the debate over manageable standards is significantly more complicated than once assumed because of the federalism implications of partisan gerrymandering.<sup>21</sup> It concludes that, despite the absence of standards, the broader implications of this argument force the Court to reconsider its approach in at least three areas: the use of mid-decade redistricting and at-large election schemes, the delegation of redistricting authority to independent commissions, and the regulation of state political parties. In particular, increased mid-decade redistricting, like the 2003 Texas plan, could help promote the federalism benefits of gerrymandering by ensuring that the partisan affiliation of the congressional delegation continues to parallel that of the electorate. In contrast, redistricting conducted by independent commissions instead of elected officials from sufficiently independent state parties could undermine this benefit. A "nonpartisan" plan drawn by an independent commission could result in a delegation that is not optimally constructed to promote the state's interests because of the disconnect between the commission, elected officials, and the electorate. Protecting the federalism benefits of gerrymandering may require the Court to approach these substantive areas differently, even if it is unable to construct standards that regulate partisan gerrymandering directly.

#### I. PROMOTING THE "BALANCE" OF FEDERALISM: EXTRA-CONSTITUTIONAL SAFEGUARDS AND THE SCHOLARLY LITERATURE

Partisan gerrymandering sits at an uncomfortable crossroads between two substantial literatures—election law, which usually focuses on the existence of manageable standards and issues sur-

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20 The term "extra-constitutional" safeguard is borrowed from Larry Kramer, who argues that political parties are safeguards of federalism and refers to them as "extra-constitutional" institutions. See Kramer, *supra* note 13, at 224.

21 See generally Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459 (2004).

rounding justiciability,<sup>22</sup> and the political safeguards literature, the thrust of which is whether federalism issues should be subject to judicial review or left to the political process.<sup>23</sup> In *Partisan Gerrymandering as a Safeguard of Federalism*, I show that these seemingly disparate literatures have a common thread. In that piece, I argue that states can gerrymander to maximize the number of districts that mirror the partisan composition of a majority of the electorate and the majority party in the state in order to ensure that state interests are represented nationally.<sup>24</sup> In other words, the state can maximize the number of safe districts for members of the majority party in order to send a politically cohesive delegation to Congress, allowing the state to directly influence federal policy.<sup>25</sup> This observation is counterintuitive, as partisan gerrymandering is routinely lambasted in the schol-

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22 See, e.g., Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL'Y 397, 399, 419 (2005); Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 638–49 (2007); Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability after Vieth v. Jubelirer*, 73 GEO WASH. L. REV. 1166, 1174 (2005); Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth*, 3 ELECTION L. J. 626, 634–37 (2004); Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL'Y 443, 443–44 (2005); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 57 (2004).

23 See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 177 (1980); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1500 (1994); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

24 See Tolson, *supra* note 12, at 890–91 (arguing that partisan gerrymandering is a political safeguard because the network of relationships that emerge through the redistricting process—between the political parties, elected officials, interest groups, political action committees, and the partisan media—reinforce the state's partisan identity and specific policy preferences emerge that can be promoted, through gerrymandering, at the national level). This Article makes the more nuanced argument that the state's partisan identity is best reflected by a majority of the electorate as opposed to the political party in power, although they tend to overlap. See also Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219, 219 (2005) (noting that the partisan changes in the mass electorate has mirrored that which have occurred among political elites).

25 Promoting this type of partisan gerrymandering in the context of districted elections is an attempt to produce similar results one would get in an at-large voting scheme, in which a majority of voters select a majority of the representatives. In an at-large election, all of the voters vote for all of the open seats. See ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES 1776-1850* 126 (noting that when congressional representatives were elected at-large before 1842, delegations were more politically unified and were more likely to vote together).

arly literature for imposing significant democratic harms on voters.<sup>26</sup> Undeniably, there are harms that emerge from excessive partisanship, but the fact remains that “politics as usual” is an expected and integral aspect of our system.<sup>27</sup>

Partisan gerrymandering is an “extra-constitutional” safeguard of federalism that can have significant democratic benefits through the protection it affords the states.<sup>28</sup> In my earlier piece, I use the debate over the Patient Protection and Affordable Care Act of 2010 (“Affordable Care Act”) to show that the expanding scope of federal legislation incentivizes the state to use its redistricting authority to ensure that its policy preferences are represented at the federal level. The state’s ability to influence the reelection prospects of its House delegation motivates its representatives to consider the state’s interests when voting on and constructing federal policy.<sup>29</sup> In a sense, the state is part of its congressional delegation’s constituency, and the healthcare law, which passed almost exclusively along party lines, is a prime

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26 See, e.g., Ellen D. Katz, *New Issues in Minority Representation: Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 373–80 (2004); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 269–70 (2006); Jamal Greene, Note, *Judging Partisan Gerrymanders under the Elections Clause*, 114 YALE L.J. 1021, 1026 (2005); see also Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 543 (2004); Issacharoff, *supra* note 13, at 614.

27 *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (arguing that all but one justice agreed in *Vieth* that “politics as usual” is a traditional redistricting criterion); see *Vieth v. Jubelirer*, 541 U.S. 267, 275, 285 (2004) (plurality opinion) (arguing that the Framers anticipated that redistricting would be a political endeavor which is why they provided a textual remedy in the Elections Clause); see also *Crawford v. Marion Cnty.*, 553 U.S. 181, 204 (2008) (plurality opinion) (upholding voter identification law that was passed for partisan purposes because the state has an interest in protecting the integrity and reliability of the electoral process).

28 See *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (“In the tension between federal and state power lies the promise of liberty.”); cf. *Kramer*, *supra* note 13, at 269 (acknowledging that the Framers hated political parties but arguing that parties provide clear federalism benefits).

29 Tolson, *supra* note 12, at 893; see also *Health Care Vote Puts Nelson 30 Points Down in Reelection Bid*, RASMUSSEN REPORTS (Dec. 29, 2009), [http://www.rasmussenreports.com/public\\_content/politics/elections/election\\_2012/election\\_2012\\_senate\\_elections/nebraska/health\\_care\\_vote\\_puts\\_nelson\\_30\\_points\\_down\\_in\\_reelection\\_bid](http://www.rasmussenreports.com/public_content/politics/elections/election_2012/election_2012_senate_elections/nebraska/health_care_vote_puts_nelson_30_points_down_in_reelection_bid) (showing that support for Senator Ben Nelson, the only Democrat in Nebraska’s congressional delegation (both House and Senate), dropped thirty points after he voted in favor of the Affordable Care Act, contrary to the votes of the remaining members of Nebraska’s congressional delegation, the wishes of state leaders, and the desires of voters).

example of how a divided delegation can frustrate the state's preferred policy preferences.<sup>30</sup>

In this Article, I ultimately conclude that partisan gerrymandering claims may defy direct regulation because it is not clear that courts can adequately value its federalism benefit, but the inquiry does not end there; the availability of partisan gerrymandering as a federalism tool should influence the scope of judicial review with regards to other substantive areas. In making this point, however, it is important to understand what it is about federalism that mandates weak enforcement of partisan gerrymandering claims as a matter of judicial restraint and institutional credibility.

A. *Protecting Federalism through Structure: Original Safeguards and the Judicial Role*

Federalism, in both the case law and the legal scholarship, has been overwhelmingly concerned with the question of “balance,” or ensuring that each level of government stays within a defined regulatory sphere.<sup>31</sup> Part of this debate centers around how federalism is defined, which in turn affects where the line dividing the two spheres is drawn. As one commentator noted, federalism “is an arrangement in which two or more self-governing communities share the same political space,”<sup>32</sup> but what seems like a simple premise has caused incredible conceptual difficulty in both the legal scholarship and the

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30 See Tolson, *supra* note 12, at 895 (discussing how Senator Nelson had to extract concessions from party leaders in order to appease elected officials in his home state even though their preferred policy preference would have been for the state's entire delegation to vote against the health care bill).

31 See, e.g., MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* (2008); EDWARD A. PURCELL JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE* 34 (2007); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn't*, 96 MICH. L. REV. 813, 821 (1998); see also *Printz v. United States*, 521 U.S. 898, 918 (1997) (“It is incontestible [sic] that the Constitution established a system of ‘dual sovereignty.’” (citations omitted)); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (“[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”).

32 Dimitrios Karmis & Wayne Norman, *The Revival of Federalism in Normative Political Theory*, in DIMITRIOS KARMIS & WAYNE NORMAN, EDs., *THEORIES OF FEDERALISM: A READER* 3 (2005); see also DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 76–106 (1995) (focusing on the preservation of state and local institutional authority as a justification for federalism); Kramer, *supra* note 13, at 222 (“The whole point of federalism (or at least the best reason to care about it) is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking [sic].”); Michael W. McCon-

courts.<sup>33</sup> The difficulty emerges because it is virtually impossible to draw a line between the sovereignty, or final policymaking authority,<sup>34</sup> of each self-governing entity.

Drawing the line between the governing spheres of the states and that of the federal government has become an obsession because our current system reflects states that are far weaker—and a federal government that is more powerful—than the Framers intended.<sup>35</sup> Article II of the Articles of Confederation, eventually adopted by all thirteen states, expressly provided that, “Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this [C]onfederation expressly delegated to the United States . . . .”<sup>36</sup> As reflected in *The Federalist Number 32* as well as the text of the Constitution, this proposition of state sovereignty followed the states into the creation of the new nation, despite the existence of a new, more expansive federal government than that which existed under the Articles.<sup>37</sup> Indeed, the Framers hoped that by instituting structural safeguards that give the states a role in the composition of

nell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (emphasizing the “advantages of decentralized decision making”).

33 See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 15 (2010) (discussing the debate in the literature about where the core of federalism lies due to the difficulty of drawing a line between state and federal power).

34 See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 344 (1985); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1209–10 (2012). This definitional problem is why there are dual, concurrent, cooperative, and more recently, “collective action” theories of federalism in recognition of the fact that, since 1937, “dual” sovereignty has been more imaginary than real. See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001).

35 See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906, 908 (1994) (referring to our love of federalism as a “neurosis” that “conjures up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard”).

36 ARTICLES OF CONFEDERATION OF 1781, art. II.

37 See THE FEDERALIST NO. 32, at 155 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“[T]he plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”); U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

the federal government<sup>38</sup> and later, by adopting the Tenth Amendment, this would ensure that the federal government did not usurp the sovereign power that the states retained post-ratification.<sup>39</sup>

Articulating a vision of governance in which two sovereigns can coexist harmoniously has led scholars and courts to focus on why we “federated” in the first place.<sup>40</sup> As Justice O’Connor famously stated in *Gregory v. Ashcroft*, a mere six years after the Supreme Court swore off federalism questions for good:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . . [But p]erhaps the principal benefit of the federalist system is a check on abuses of government power.<sup>41</sup>

Justice O’Connor went on to conclude that, “If this ‘double security’ is to be effective, there must be a proper balance between the States and the Federal Government . . . . In the tension between federal and state power lies the promise of liberty.”<sup>42</sup>

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38 See, e.g., U.S. CONST. art. I, § 2, cl. 1; art. I, § 3, cl. 1; art. I, § 4, cl. 1 (giving states the power to choose the qualification of electors, elect Senators, and choose the time, place, and manner of elections).

39 See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (“[T]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.” (emphasis omitted) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985))).

40 See Karmis & Norman, *supra* note 32, at 8 (“Throughout much of the history of federalist thought—sometimes explicitly, sometimes implicitly—the answer to the basic question ‘Why federate?’ has been because it gives a self-governing political community the best of both worlds: the advantages of being part of a relatively small, homogenous polity, along with the advantages of being part of a stronger, more secure larger state or alliance . . . .”).

41 501 U.S. 452, 458 (1991); cf. *Garcia*, 469 U.S. at 528 (1985) (holding that federalism questions are best resolved by the political process, not the courts).

42 *Gregory*, 501 U.S. at 459. Although this Article focuses exclusively on how partisan gerrymandering helps preserve the states’ regulatory authority and contribute to maintaining the balance, it also could conceivably promote some of these other interests as well. See Tolson, *supra* note 12, at 900 (“Partisan gerrymandering [can] . . . serve as a constraint on federal power and promote[ ] several federalism interests, particularly the interest that the state has in promoting its own community values and liberty, which can become muted from undue federal influence; the interest in holding its elected officials accountable, which can similarly become blurred because of

With these lofty principles in mind, the Court held that the Age Discrimination in Employment Act did not invalidate a Missouri constitutional amendment requiring judges to retire at age 70 because this outcome would undermine “[t]he authority of people of the States to determine the qualifications of their [most important] government officials . . . [which] lies at the heart of representative government.”<sup>43</sup> Consequently, “[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”<sup>44</sup> *Gregory*’s plain statement rule illustrates that federalism is not only about outcome—or where the boundary lies—but also about process, which ensures that states actually have power in the system.<sup>45</sup>

Protecting the “balance” by focusing on federalism as a “process” has been key to understanding why there has been so much scholarly focus on the “political safeguards of federalism,” or alternatively, whether the states’ role in the composition of the federal government is sufficient, without judicial oversight, to protect their regulatory authority from federal overreaching.<sup>46</sup> The perception that many of the original safeguards have failed to protect the states’ interests has led to calls by one contingent of scholars for increased judicial review of federalism issues to account for these failures while other scholars contend that the political process is still sufficient to protect the states, failures notwithstanding.<sup>47</sup> For those who advocate for limited or no judicial oversight, the failure of the original safeguards has given rise to additional, “extra-constitutional” institutional protections that obvi-

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federal involvement in state processes; and most important, the interest the state has in preserving its sovereignty in the face of expanding federal power.”).

43 *Gregory*, 501 U.S. at 463 (citations omitted).

44 *Id.* at 460 (citations omitted).

45 *Id.* at 461 (“This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”); *see also* Gerken, *supra* note 33, at 14 (“Process federalists emphasize that power diffusion depends on preserving de facto autonomy for the states, not the de jure autonomy afforded by sovereignty. Their functional account of federal-state interactions eschews formal protections that can be enforced in court; they look to politics, tradition, inertia, and interdependence as the guarantors of state power.”).

46 Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358–59 (2001) (arguing that in order for the political safeguards to work, defenders of the states on Capitol Hill have to have notice about pending legislation that may affect their interests); *id.* at 1359 (arguing that the result in *Gregory v. Ashcroft* was about notice).

47 Compare Kramer, *supra* note 13, with John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

ate or, at the very least, reduce the need for judicial review.<sup>48</sup> For others, judicial review remains the answer because the political process is inadequate to police our system of federalism.<sup>49</sup>

One point that these camps agree on is that the original safeguards have failed *in toto*. Notably, these scholars point to the adoption of the Seventeenth Amendment, which eliminates the appointment of Senators by the state legislatures and mandates popular election, as undermining the key institutional protection for states. Moreover, the states' authority over redistricting has been diminished because federal voting rights legislation and various constitutional amendments have reduced their authority to choose the qualifications of electors unencumbered.<sup>50</sup> Other structural mechanisms that were designed to protect the states have also become weakened by changes in the economy and technological advances.<sup>51</sup>

As the next section shows, however, the political/judicial safeguards debate does not resolve *which* political safeguards—either original or otherwise—actually protect the states' regulatory authority and promote the federalism ideals articulated by the Court in *Gregory*.<sup>52</sup> Grouping the safeguards together and labeling them “a failure” tells us very little about what mechanisms are actually working to protect the states.

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48 See, e.g., Kramer, *supra* note 13 (arguing that political parties serve this function); see also *infra* note 71 and accompanying text.

49 See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 775 (1995); Yoo, *supra* note 47.

50 See, e.g., Kramer, *supra* note 13, at 226 (“What little control it may once have afforded—through, say, poll taxes or the exclusion of racial minorities—has been eradicated by five constitutional amendments (Section 2 of the Fourteenth Amendment, as well as the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments), federal voting rights legislation, and the Supreme Court’s Equal Protection cases. It is, in fact, impossible to think of anything a state could do to protect itself with this power today that would not be either unlawful or ineffective.” (citations omitted)).

51 See Lessig, *supra* note 19, at 1224–28 (arguing that these changes undermined our system of dual federalism and as a result, judicial rules promoting this system became politicized).

52 See Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 4 (2011) (describing current discourse as centering on a “stylized model of zero-sum federalism . . . which emphasizes winner-takes-all jurisdictional competition”). I posit that this notion of “zero-sum federalism” also extends to questions of whether there should be judicial review of federalism issues.

B. *Adding Nuance to the Debate: The Individual Safeguards of Federalism*

The political/judicial safeguards debate highlights that the judiciary might face challenges, some insurmountable, in resolving issues that involve the political safeguards writ large, but courts may be able to adjudicate disputes implicating a specific safeguard. For example, Larry Kramer argues that the problem with judicially enforced federalism is that courts are “poorly situated to make (or second guess) the difficult judgments about where power should be settled or when it can be shifted advantageously.”<sup>53</sup> Along these lines, the courts struggled to define the traditional governmental functions of states that are off-limits to congressional regulation after the Supreme Court’s decision in *National League of Cities v. Usury*.<sup>54</sup> Contrary to Kramer’s arguments, however, the Court has proven that it can successfully regulate federalism when it does so incrementally, rather than attempting to formulate a standard that would cover a host of issues that are not amenable to a one-size-fits-all approach.<sup>55</sup> The Court’s more mea-

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53 Kramer, *supra* note 23, at 1500 (“Judges lack the resources and institutional capacity to gather and evaluate the data needed for such decisions. They also lack the democratic pedigree to legitimize what they do if it turns out to be controversial. But most of all, courts lack the flexibility to change or modify their course easily, an essential quality in today’s rapidly evolving world.”); see also Wechsler, *supra* note 23, at 546–52, 558–59 (“[T]he existence of the states as governmental entities and as sources of the standing law is in itself the prime determinant of our working federalism.”).

54 426 U.S. 833, 852 (1976) (insulating certain “traditional governmental functions” of the states from federal regulation). Compare *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037–38 (6th Cir. 1979) (operating a municipal airport is a traditional state function immune from federal regulation), and *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978) (holding the same for licensing automobiles), and *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982) (holding the same for regulating ambulance services), with *Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir. 1977) (holding that regulation of traffic on public roads is not a traditional state function immune from federal regulation), and *Woods v. Homes & Structures of Pittsburg, Kan., Inc.*, 489 F. Supp. 1270 (D. Kan. 1980) (holding that issuance of industrial development is not a traditional state function immune from federal regulation), and *Oklahoma ex rel. Derryberry v. FERC*, 494 F. Supp. 636, 657 (W.D. Okla. 1980) (holding the same for the regulation of intrastate natural gas sales).

55 See, e.g., *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372–74 (2001) (holding the Americans with Disabilities Act invalid insofar as it abrogated the states’ sovereign immunity from suit); *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady Act that required state and local officials to execute provisions of the law); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act by distinguishing Congress’s ability to regulate economic behavior from noneconomic behavior that does not affect interstate commerce). The recent decision on the Affordable Care Act could also be characterized as an opinion illustrating judicial restraint because of institutional legitimacy con-

sured and cautious manner in its recent cases is an attempt to retain a role for judicial review in resolving federalism questions, but while respecting the limits of the judiciary identified by Kramer and others.<sup>56</sup>

Partisan gerrymandering raises many of the same problems that have cofounded the Court in its federalism jurisprudence. In this context, the Court has struggled to discern what constitutes a “fair” outcome but without constitutionally mandating proportional representation, which leads to many of the same line-drawing problems that plague its federalism case law.<sup>57</sup> Because the construction of political institutions is integral to determining the amount of power that is distributed between both levels of government and between the various political forces within our system, Kramer’s warning about the judiciary’s limitations in making the appropriate assessments about how power is divided between political institutions would seem to be especially forceful in this context.

Yet this concern about institutional competency has prompted scholars writing in the election law area to advocate, not for nonintervention, but for rules that are easily administrable by the courts.<sup>58</sup> Structuralists who advocate in favor of an approach known as the political markets theory argue that partisan gerrymandering (and in particular bipartisan gerrymanders) produce noncompetitive elec-

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cerns, leading Justice Roberts to rely on Congress’s taxing power to validate the Act, which he believed exceeded the scope of Congress’s commerce authority. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (describing the Affordable Care Act as beyond the scope of Congress’s commerce authority because the law compels individuals not already in commerce to purchase a product).

56 Kramer, *supra* note 23, at 1494–96 (conceding that judicial review is supposed to play a role in protecting federalism but arguing that there are still limits on judicial power in this area).

57 *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1364 (1987) (“[The rule established in *Davis v. Bandemer*, 478 U.S. 109 (1986), leads to proportional representation because a] court cannot determine whether and to what extent a districting plan ‘will consistently degrade a . . . group of voters’ influence on the political process as a whole’ . . . unless the court can compare the group’s post-gerrymander representation in the legislature to what the group’s ‘true’ representation would be under a ‘fair’ plan. But the latter obviously can be determined only by reference to some norm or benchmark. For a political party, that benchmark can only be its performance at the polls.” (citations omitted)).

58 *See, e.g.*, Issacharoff, *supra* note 13, at 620 (arguing that under a simple anti-trust analysis, which focuses on the importance of competitive elections for maximizing voter welfare, courts “whether using the per se or rule of reason approaches . . . would be particularly skeptical of agreements in the political market because it is in fact the ideal market for cartelization and suppression of competition”).

tions by removing voters from the process, and should be per se invalid.<sup>59</sup> For these scholars, noncompetitive elections serve as the starting point of assessing whether a redistricting plan raises constitutional concerns.<sup>60</sup> This is a pragmatic attempt to regulate gerrymandering that would render some overtly partisan plans per se unconstitutional, at least where there is a bipartisan attempt to cancel out competition, and render less biased but still partisan plans inherently suspect.<sup>61</sup> A per se rule would free the court from having to define “a baseline for what constitutes a party’s ‘proper’ share of political representation given the distribution of votes.”<sup>62</sup> This approach prioritizes the voters’ interest in a robust democracy over rules that may on their face be constitutional but have the effect of undermining democratic accountability.<sup>63</sup>

However, rendering partisan plans “inherently suspect” provides little guidance to courts trying to discern “politics as usual” from the “excessive” gerrymandering that might raise constitutional concerns.<sup>64</sup>

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59 See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649 (1998) (“[A] self-conscious judiciary should destabilize political lockups in order to protect the competitive vitality of the electoral process and facilitate more responsive representation.”); see also Issacharoff, *supra* note 13, at 601 (“[One solution is] a prophylactic per se rule that redistricting conducted by incumbent powers is constitutionally intolerable.”); Samuel Issacharoff, *Surreply: Why Elections?*, 116 HARV. L. REV. 684, 693 (2002); Katz, *supra* note 26, at 325 (“Noncompetitive districts elect officials with more extreme political views, . . . foster more polarized legislatures, [and] inhibit meaningful political participation. . . . [In contrast,] a competitive election offers to each voter . . . the opportunity to be the coveted swing voter.” (citations omitted)); Pildes, *Foreword*, *supra* note 22, at 31; Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999).

60 Issacharoff, *supra* note 59, at 684.

61 Issacharoff, *supra* note 13, at 600; Issacharoff, *supra* note 59, at 684; see also Pildes, *supra* note 22, at 59; Pildes, *supra* note 59; cf. Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1440 (2008) (arguing that courts should evaluate the legislature’s adoption of a new rule for its dominating effect, and once a certain threshold is reached, return the issue to the legislature for resolution).

62 Pildes, *supra* note 22, at 59.

63 Issacharoff, *supra* note 59, at 692–93; see also Daniel Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 764–65 (2000) (“Knowing that consumers have at most only one other real choice in elections, parties will act less responsively to voters [and] . . . will feel little need to produce the same product they would in the face of stiff competition. Instead, they may run candidates matching their own policy preferences or hard-working, though uninspiring, party loyalists.”).

64 *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (“[T]he fact that partisan districting is a lawful and common practice means that there is almost always room for an election-impeding lawsuit contending that partisan advantage was the predominant

This is particularly important here, where “politics as usual” could help states to restore some of the federalism balance that has been lost. The political markets theory’s focus on noncompetitive elections would defy this effort and lead to the invalidation of almost all federalism-reinforcing gerrymanders.<sup>65</sup> Factoring partisan gerrymandering’s federalism potential into the analysis shows us that per se rules would not work.

Treating partisan gerrymandering solely as a “federalism” issue subject to judicial review under this line of precedent is just as unsatisfactory. Despite those who advocate for a judicially enforceable federalism, it is not clear whether many of the federalism cases that the Court has resolved do more on balance to protect the states’ institutional interests than the bargaining that occurs through the political process.<sup>66</sup> In *United States v. Lopez*,<sup>67</sup> for example, the Court invalidated the Gun-Free School Zones Act, which made possession of a gun in a school zone a federal offense, on the grounds that the statute exceeded the scope of Congress’s authority under the Commerce Clause. The Court also invalidated the civil remedy provision of the Violence Against Women Act in *United States v. Morrison* on similar grounds.<sup>68</sup> Although these decisions represented the Court’s attempt to impose substantive limitations on the reach of Congress’s com-

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motivation.” (emphasis omitted)); see also Persily, *supra* note 12, at 662 (arguing that competitiveness is an elusive standard by which to determine the constitutionality of a gerrymander because, for example, “[a] bipartisan gerrymander produces seats that are potentially competitive in a primary election, and almost certainly so if an incumbent is not in the race”).

65 See Pildes, *supra* note 59, at 1615–16 (“The emphasis on political competition is both a theoretical perspective on politics and a foundation for judicial decision in cases that must be decided on the basis of some conception, implicit or explicit, of the aims of democracy. As a theoretical perspective, it might indeed cause us to reexamine longstanding political structures—often adopted before alternative possibilities were conceived, as is true of the winner-take-all versus PR ‘choice’—and ask today whether post-Founding Era alternatives would better realize the appropriate values of democracy.”). But see Persily, *supra* note 12, at 658 (noting that although bipartisan gerrymanders provide the impetus for the political markets theory, the approach would invalidate partisan gerrymanders as well).

66 Baker & Young, *supra* note 49, at 87–88 (acknowledging that there has been a “graveyard” of judicial efforts to monitor and police the boundaries of state and federal authority and contending that the failure of the Court’s dual federalism jurisprudence does not mean that “the Court is somehow institutionally incapable of fashioning *new* rules that would constrain Congress while at the same time constraining the courts”); see also Yoo, *supra* note 47, at 1370 (arguing that the Framers created a stronger federal judiciary to protect the states as states).

67 514 U.S. 549, 567–68 (1995).

68 529 U.S. 598, 613 (2000).

merce power, Congress still has significant authority under the Spending and Taxing Clauses to impose its authority on the states, and force them, under threat of financial penalty, to adopt measures similar to those invalidated in *Lopez* and *Morrison*.<sup>69</sup> It is only by controlling the composition of Congress that states can deter that body from adopting such measures.<sup>70</sup> Ensuring that the safeguards that allow the states to influence the composition of the federal government are properly working is one way in which the judiciary can effectively play the role advocated by the judicial safeguards camp, but without developing doctrine that does little to cabin congressional authority in practice.

The solution is what I refer to as a more “nuanced” version of process federalism, where the judiciary promotes those policies that strengthen the structural protections enjoyed by the states rather than attempting to police our system of federalism in its entirety.<sup>71</sup> Like

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69 See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (holding that the Patient Protection and Affordable Care Act exceeds the scope of Congress’s commerce authority but is valid under its taxing power); see also Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 762 (2003) (“As with Congress’s power to regulate the channels of interstate commerce, the nationalization of the economy and society gives the legislature’s power over the instrumentalities of interstate commerce a potentially all-encompassing reach which must be checked by the Court if its rejuvenation of states’ rights is to succeed.”).

70 Choper, *supra* note 69, at 735.

71 This approach builds on arguments currently advanced by process federalism scholars who believe that the competition between the states and the federal government will generate protections for the states but judicial review can be justified if the process breaks down. See *infra* Part III.A.1.b (using section 2 of the Voting Rights Act as a mechanism to address a specific process failure in order to protect voters). Many of these scholars first focus on a specific safeguard—either original or extra-constitutional—and then decide whether judicial review is appropriate and what form it should take. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324–25 (2001) (“[Federal lawmaking procedures] safeguard federalism by permitting designated agents of the federal government to adopt federal law only if they employ procedures that ‘impose burdens . . . that often seem clumsy, inefficient, even unworkable’ . . . but also function[ ] to preserve ‘the governance prerogatives of state and local institutions.’” (citations omitted)); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2062 (2008) (arguing that the Court can use already established administrative law principles in order to reinforce agency attentiveness to state interests); Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1718 (2007) (“By demonstrating that demands for federalization are often ineffectual and that citizens actually have powerful incentives to protect state authority, the populist safeguards theory undercuts one of the primary rationales for judicial review of federalism—the notion that citizens, left to their own devices, would grant Congress authority over myriad issues the states instead *ought* to control.”). Larry Kramer relies on similar populist safe-

the approach endorsed by Larry Kramer, this theory assumes that the extra-constitutional safeguards are working to correct the failures of the original safeguards and protect the states, but it does not eschew judicial review because the Court can play an important role in reinforcing the effectiveness of these mechanisms.<sup>72</sup>

A more nuanced approach reflects the reality of judicial decision-making—a court will never deal with an issue that implicates the entirety of our federalism. Rather, the issues will vary, ranging from questions of preemption to state sovereign immunity to constitutional structure, and some judicial decisions will have a larger impact on the working balance of our federalism than others.<sup>73</sup> In addition, our system of federalism has been modified by changes including the adoption of various constitutional amendments,<sup>74</sup> the integration of the national economy, and the rise of political parties, to name a few examples. These changes require that any potential safeguards be assessed individually in order to ascertain the appropriate judicial response. This piecemeal approach would reveal that there are some political safeguards that adequately protect the states while others require judicial reinforcement in one form or another.<sup>75</sup>

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guards to conclude that judicial review is not needed at all, and frames the responsibility of judges, at least at the time of the Founding, as enforcing duly enacted laws and avoiding constitutional questions. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 58 (2004). Kramer argues:

Just as it is not your place to punish me for violating ordinary law, so too in a regime of popular constitutionalism it was not the judiciary's responsibility to enforce the constitution against the legislature. It was the people's responsibility: a responsibility they discharged mainly through elections, but also, if necessary, by other, extralegal means.

*Id.* Unlike other scholars and the approach advocated here, however, he does not advocate for judicial review even when the safeguards fail.

<sup>72</sup> See *infra* Part III.A. Judicial review might also be appropriate because there are democratic norms that can be impermissibly sacrificed in the political process. See also *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (stating that excessive partisanship can violate the Constitution).

<sup>73</sup> See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (observing that the Supreme Court has used sub-constitutional doctrines to make incremental changes to its federalism doctrine because path dependent processes have affected its ability to deviate from its federalism precedents without sacrificing its institutional legitimacy).

<sup>74</sup> See, e.g., U.S. CONST. amend. XVII.

<sup>75</sup> See Clark, *supra* note 71, at 1325 (arguing that the Supreme Court's Commerce Clause decisions do not impact federalism as much as strictly enforcing federal law-making procedures because the Commerce Clause decisions only "police the outer boundaries of federal power—boundaries that have proven difficult to draw and enforce").

In promoting a more measured and careful study of the political safeguards, this Article attempts to determine the judicial role in promoting the structural benefits that states receive from their ability to engage in partisan gerrymandering by treating it as a federalism sub-issue. As the next section shows, there is a strong historical argument for protecting and promoting partisan gerrymandering as a political safeguard because the Framers intended that the House of Representatives play a role in protecting state interests.

## II. THE HOUSE AS THE LOCUS OF DEMOCRACY? THE SENATE AS THE VOICE OF THE STATES?: FIXING THE POLITICAL SAFEGUARDS NARRATIVE

Extra-constitutional safeguards emerged in response to a Constitution that failed to protect the states and individual citizens despite intricate checks and balances designed to disperse the personal ambition of elected officials in the interest of the public good.<sup>76</sup> Political parties became a staple soon after ratification to account for these institutional failures, but parties also represented a failure in the system itself. The Framers designed the Constitution to control faction by diffusing power horizontally across the three branches of the federal government and vertically between the federal and state governments so as to limit collusion among public officials, a design flaw that factions exploited through the party system.<sup>77</sup> Parties connected state

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<sup>76</sup> Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 43 (1985). As Sunstein observed:

The structural provisions of the Constitution attempted to bring about public-spirited representation, to provide safeguards in its absence, and to ensure an important measure of popular control. Bicameralism thus attempted to ensure that some representatives would be relatively isolated while others would be relatively close to the people. Indirect election of representatives played a far more important role at the time of ratification than it does today; the fact that state legislatures chose senators ensured that one house of the national legislature would have additional insulation from political pressure. The electoral college is another important example; it was to be a deliberative body standing apart from constituent pressures.

*Id.* (citations omitted); see also H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 892–93 (1999) (“[The Supreme Court’s failure to limit national power] seems almost inevitable [because the] framers’ chosen mechanism was to enumerate the national government’s powers, leaving all other governmental authority to the states. But the enumerated powers granted, in light of revolutionary changes in the national economy, have turned out to be broad enough to allow congressional control over almost any imaginable activity.”).

<sup>77</sup> Sunstein, *supra* note 76, at 44 (“The federal system itself was supposed to act as an important safeguard because the] different governments will control each other and ensure stalemate rather than action at the behest of particular private interests. The jealousy of state governments and the attachment of the citizenry to local inter-

and federal officials in a way that prevented the states' role in the composition of the federal government from cabining federal authority. These entities also rendered obsolete the Electoral College's intended purpose of protecting smaller states and maintaining the independence of the president by selecting electors who are committed to vote for the party's slate of candidates in advance of the election.<sup>78</sup> But over the years, parties have mediated disputes between the states and the federal government in a way that has been good for preserving state power, with political elites galvanizing their supporters through the party apparatus in response to objectionable federal policy.<sup>79</sup> So, in a sense, political parties were the first extra-constitutional safeguard, and as such, the basis for Larry Kramer's theory that they should now be treated as one of the political safeguards of federalism.<sup>80</sup>

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ests would provide additional protection against the aggrandizement of power in national institutions." (citations omitted) (internal quotation marks omitted)); *see also* Levinson & Pildes, *supra* note 1, at 2313 ("To this day, the idea of self-sustaining political competition built into the structure of government is frequently portrayed as the unique genius of the U.S. Constitution, the very basis for the success of American democracy. Yet the truth is closer to the opposite. The success of American democracy overwhelmed the Madisonian conception of separation of powers almost from the outset, preempting the political dynamics that were supposed to provide each branch with a 'will of its own' that would propel departmental '[a]mbition . . . to counteract ambition.'" (citations omitted)).

78 Levinson & Pildes, *supra* note 1, at 2323; *see also* Kramer, *supra* note 13, at 225 ("[T]he power of state legislators to pick electors could have given the states considerable leverage over the chief executive had the Electoral College stayed true to its original design. But the emergence of the popular canvass and winner-take-all rule have deprived the College of most of its significance.").

79 *See, e.g.*, Kramer, *supra* note 13, at 276 ("[I]f parties were a problem for federalism as the Founders [had] conceived it in 1788, they were also a solution. Realizing that state representatives could no longer necessarily be counted on to champion the cause of the states, Republican leaders changed strategies. They abandoned the effort to check Congress through the agency of formal state institutions and turned instead to the fledgling Republican Party—using the Virginia and Kentucky Resolutions (together with objections to high taxes, big government, weak foreign policy, corrupt finances, and the Federalists' aristocratic style) as propaganda to galvanize support in a successful national election campaign." (citations omitted)).

80 *Id.* at 282 ("The parties influenced federalism by establishing a framework for politics in which officials at different levels were dependent upon each other to get, and stay, elected. Candidates may need the parties somewhat less than they used to; state parties may be somewhat less powerful than they were formerly; but there is no doubt that political parties continue to play a crucial role in forging links between officials at the state and federal level. The political dependency of state and federal officials on each other remains among the most notable facts of American government." (citations omitted)).

After two centuries, it is beyond dispute that social, economic, and political changes have rendered obsolete other structural protections, making political parties and other stop gap measures indispensable parts of our system. The popular election of Senators, the appointment of presidential electors on a winner-take-all basis in most states, the implementation of certain threshold requirements for voter qualifications and redistricting—all of these are changes that scholars point to as evidence that the original political safeguards of federalism are archaic and irrelevant.<sup>81</sup> Yet there is a powerful counter-narrative that illustrates that the very forces that negated the original safeguards have also breathed life into new ones.<sup>82</sup> Indeed, partisan redistricting is one such “sleeping dragon,” awakened by the political and historical changes that rendered the states’ power over elections an ineffective check on the federal government.

This section discusses how the Seventeenth Amendment and the rule of population equality adopted in cases such as *Gray v. Sanders*, *Reynolds v. Sims*, and in particular, *Wesberry v. Sanders*, have allowed the partisan gerrymandering of congressional districts to become an extra-constitutional federalism safeguard and play a role similar to that which the Senate played prior to the adoption of the Seventeenth Amendment. This is contrary to the traditional narrative, which presents the Senate as the key institutional protection for the states, and the House as serving the sole purpose of representing the people.<sup>83</sup>

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81 Clark, *supra* note 71, at 1370 (“[These changes have] virtually eliminated the possibility of selection of the President in the House voting by states.”); Yoo, *supra* note 47, at 1321.

82 Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 112 (2003) (arguing that the Supremacy Clause authorizes judicial review of statutes that exceed federal power, in part because unconstitutional federal statutes contravene the principle that the state retains powers not delegated to the federal government).

83 See, e.g., Jay S. Bybee, *Ulysses at the Mass: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 504 (1997) (“The mechanism by which the states could most readily defend against federal encroachment was their representation in the Senate.”); see also Wechsler, *supra* note 23, at 547–48. But see Yoo, *supra* note 47, at 1369 (noting that the Senate was not “a perfect representative of state interests” given that it had duties that had nothing to do with the states such as its role in the treaty-making process; noting further that the absence of uniform voting among state delegations and the payment of Senators by the federal government and not the states also undermine the argument that the Framers constructed the Senate solely for the purpose of protecting state sovereignty). Yoo argues that these limitations on the Senate show that judicial review is also supposed to play a role in protecting the states; he does not focus on the role of the House. *Id.* at 1371–72.

The general sentiment is that the Framers designed the House of Representatives, subject to popular election every two years, to simultaneously represent the interests of the people while cabining the excesses of democracy. In contrast, the Senate, with the appointment of its members by the state legislatures for six-year terms, represented the institutional interests of the states.<sup>84</sup> What the legal scholarship overlooks, however, is that the Framers also anticipated that the House would be responsive to the interests of the States.

Article I, Section 2 provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.<sup>85</sup>

Even in the text, we see a caveat to total control of the House by the people: that “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” To understand the importance of this exception, note that the main provision of the text—that members are elected “every second Year by the People”—was less about any grand commitment to promoting democracy and more about controlling potential misconduct by state officials. During the Constitutional Convention, the delegates opted to mandate elections every two years instead a shorter duration because, according to one delegate, “annual elections were a source of great mischief in the States,” but the “people were attached to the frequency of elections.”<sup>86</sup> However, if the delegates were concerned about mischief at the hands of the states, and hence that is why elections for the House are not held annually, then why does this clause give states the right to choose the qualifications of electors? This is an important power that the Constitution leaves in the hands of states, even though the House is supposed to represent the people and the Framers were concerned about potential misconduct by the states. As Madison argued during the ratification debates, if the state

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84 JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 140 (Gaillard Hunt & James Brown Scott, eds., 2007) (Comments of Benjamin Franklin) (“[The] General Government [should be able to defend itself] by having an appointment of some one constituent branch of the State Governments [since the State Legislatures] by this participation in the General Government [through the Senate] would have an opportunity of defending their rights.”).

85 U.S. CONST. art. I, § 2, cl. 1–2.

86 MADISON, *supra* note 84, at 144 (Comments of Edmund Randolph) (pointing to state constitutions that had established annual elections).

legislatures could control the qualification of both the electors and the elected, then “it can by degrees subvert the Constitution.”<sup>87</sup>

One obvious reason for leaving this control in the hands of the states is that the delegates could not agree on what qualifications should be required of citizens to vote for members of the House.<sup>88</sup> But another reason to grant states significant authority over the composition of the House is because the House plays an important role in maintaining the balance of power between the state and the federal government that is often overlooked because of that body’s perceived purpose of providing a voice for the public.<sup>89</sup> In reality, the Framers’ concerns about state mischief had to be counterbalanced against the concerns that the states had about the Constitution’s creation of a new central government with potentially expansive powers. To address this latter concern, the Framers gave the states the ability to choose both the qualifications of electors and, pursuant to the Elections Clause, each Congressman’s constituency, which allows the states to indirectly influence the scope of federal policy.

Indeed, the Elections Clause highlights the tension that emerges between the states’ role in the composition of the House and the perception that the House is supposed to be “the grand depository of the democratic principle of the Govt.”<sup>90</sup> The Elections Clause provides that “[t]he 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.”<sup>91</sup>

87 *Id.* at 374.

88 *Id.* at 354 (Comments of Benjamin Franklin) (“[T]he elected [did not have] any right in any case to narrow the privileges of the electors.”); *id.* (comments of John Mercer) (“[T]he mode of election by the people [is dangerous because t]he people can not know and judge of the characters of the Candidates.” (emphasis omitted)).

89 *See, e.g.,* *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964). The Court argued that the one person, one vote principle was necessary in part because the constitutional history supported this notion that the House is supposed to represent the “people” and is therefore different from the Senate:

The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention. One principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress.

*Id.* at 10–11 (citing James Madison and George Mason).

90 *Id.* at 10 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Farrand ed., 1911) (comments of James Madison)).

91 U.S. CONST. art. I, § 4, cl. 1.

As the text illustrates, the Framers delegated plenary authority over elections to the states, but subject to certain constraints. Notably, the constraint in the Elections Clause was not “the people,” but Congress. As Alexander Hamilton pointed out in *The Federalist Number 59*, the Elections Clause is defensible because even though “every government ought to contain in itself the means of its own preservation,” if “the State legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation.”<sup>92</sup> So although the states’ power over elections is extensive, Congress’s ability to “make or alter such regulations” is essentially a veto authority over state electoral mechanisms to prevent abuse.<sup>93</sup> States can redistrict pursuant to their authority under the Elections Clause, a provision that divides power between the states and the federal government with no mention of “the people.” Hamilton’s observation about the volatile nature of elections makes their exclusion no surprise; this provision reflects the Framers’ distrust of both state governments and the ability of the people to control their representatives. Nevertheless, states have significant authority over the direction of federal law by virtue of their power to choose the qualifications of electors under Article I and to draw districts under the Elections Clause, with little input from the people on both fronts.<sup>94</sup>

Thus, the text itself stands contrary to the perception that the Framers designed the House to be insulated from state interests and therefore not serve as a safeguard of federalism similar to the Senate.<sup>95</sup> In fact, the Senate had a more limited role in protecting state interests prior to the ratification of the Seventeenth Amendment than is commonly assumed, leaving significant room for the House to serve the dual function of protecting both the states and the people.<sup>96</sup> Pre-Seventeenth Amendment, the power of state legislatures to impose binding instructions on their Senators had significantly decreased,

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92 THE FEDERALIST NO. 59, at 299, 302 (Alexander Hamilton) (Buccaneer Books 1992).

93 Tolson, *supra* note 34, at 1225–26.

94 Tolson, *supra* note 12.

95 Cf. Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 702–03 (2008) (“The Founders specifically designed the Senate to represent the states in the new federal government.”); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 920 (2003) (arguing that the House and the President serve state interests to a lesser degree than the Senate); Wechsler, *supra* note 23, at 548–552 (positing that states’ control of voter qualifications and districting allow them to use House membership to safeguard their own interests).

96 Bybee, *supra* note 83, at 505.

leaving Senators with significant discretion over policy matters.<sup>97</sup> Moreover, state legislatures had no power to recall Senators, which would have been an effective enforcement mechanism to ensure that Senators followed instructions.<sup>98</sup> The failure at the Founding to make instructions binding or institute recall mechanisms for disobedient Senators is plausible if the House, and to some extent, the states' role in the selection of the President, were also institutional mechanisms designed to give the states additional avenues to protect their regulatory interests.

In addition to the text, there is also sound historical evidence demonstrating that the House was not supposed to be immune from the policy preferences of state officials, and that this influence continued long after the states' influence over their Senators waned. Post-ratification, states instructed their House delegations on how to vote on federal policy, although these instructions were not binding to the same extent as instructions to the Senate had been.<sup>99</sup> Nonetheless, this power, when combined with their authority over elections, gave the states considerable voice with their congressional delegation.<sup>100</sup> This influence was not lost simply because House members were subject to periodic elections. Indeed, the fact that House members were up for election every two years in districts drawn by the state, as opposed to every six years in statewide elections like Senators, made it more likely that House members would be responsive to state and constituent pressures.<sup>101</sup>

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97 *Id.* at 557 (discussing how over time, there were fewer consequences for Senators who ignored instructions from state legislatures).

98 *Id.* at 505.

99 *Id.* at 518–19 & n.108 (citing a Virginia Resolution condemning Andrew Jackson's decision to remove federal funds from the Bank of the United States). The resolution provided:

*Resolved*, That our Senators be instructed, and our Representatives be requested, to adopt prompt and efficient measures to vindicate the constitution, and to redress the evils occasioned by the late unauthorized assumption of power by the President over the public moneys of the United States.

10 REG. DEB. 2840 (1834); *see also* Bybee, *supra* note 83, at 525–26 (noting that states frequently instructed their Senators and Representatives on important matters during the Founding period, which many Senators believed were binding).

100 Tolson, *supra* note 12.

101 Beginning in the nineteenth century, Congress required states to have districted elections for representatives. *See* Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491, 491 (1842). In 1901, Congress added a compactness requirement. Reapportionment Act of 1901, ch. 93, § 3, 31 Stat. 733 (1901). And in 1929, Congress established a permanent method for apportioning House seats after each Census. Reapportionment Act of 1929, ch. 28, 46 Stat. 21 (codified at 2 U.S.C. § 2a, § 22

The role of the House in protecting the states became lost in the scholarly dialogue because most of the focus has been on the Senate and how popular election undermined that chamber's role in our federal system.<sup>102</sup> Other scholars simply assumed that the Senate continued to play a state protectionist role, albeit in a more diluted form. Notably, Herbert Wechsler argued that the shift to popular election of the Senate did not diminish the Senate "as the guardian of state interests"<sup>103</sup> because its structure was still amenable to protecting these interests, even if individual Senators were no longer obligated.<sup>104</sup>

Even if Wechsler is right, however, this ignores that the Framers of the Seventeenth Amendment wanted to make the Senate immune from the control of state legislatures. In a sense, they were responding to public pressure to fix a specific problem: that the appointment of Senators by the state legislature had led to a corrupt process resulting in the election of individuals who were beholden to corporate interests. Yet many of the drafters denied that the popular election of Senators would change the balance of federalism, primarily because thirty-one states had already adopted statutes mandating direct election to address the corruption problem.<sup>105</sup> Because of this precedent, the House Committee Report on the proposed Seventeenth Amendment observed that the popular election of Senators might "change [the Senator's] relations to certain interests and certain forces within the State," but dismissed this concern, positing that "if we are to sup-

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(2006)). Beyond these requirements, congressional oversight of congressional elections was limited until the passage of the Voting Rights Act of 1965.

102 See, e.g., Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1015 (1994) (noting that the election by states restrained the growth of the federal government relative to the states).

103 Wechsler, *supra* note 23, at 548.

104 *Id.* at 547–48 ("The forty-nine votes that will determine Senate action, even with full voting, could theoretically be drawn from twenty-five states, of which the combined population does not reach twenty-nine millions, a bare 19% of all state residents. The one-third plus one that will defeat a treaty or a resolution of amendment could, equally theoretically, be drawn from seventeen states with a total population little over twelve millions, less than that of New York." (footnotes omitted)).

105 See JOSEPH L. BRISTOW, *THE DIRECT ELECTION OF SENATORS*, S. DOC. NO. 62-666, at 4–5 (1912) ("With the development during recent times of the great corporate interests of the country, and the increased importance of legislation relating to their affairs, they have tenaciously sought to control the election of Senators friendly to their interests. The power of these great financial and industrial institutions can be very effectively used in the election of Senators by legislatures, and they have many times during recent years used that power . . ."); WILLIAM WALLER RUCKER, *ELECTION OF SENATORS BY THE PEOPLE*, H.R. REP. NO. 62-2, at 4 (1911) (supporting the proposition that many of the drafters of the amendment denied that the popular election of Senators would change the balance of federalism).

pose that a State consists of all the people and of all the interests, will [the Senator] not still be its representative in every sense when his election comes from all the people of his State?"<sup>106</sup>

Contrary to these assertions, it is clear that the Seventeenth Amendment changed our system of federalism and in doing so, undermined one of the key safeguards of federalism.<sup>107</sup> According to one scholar, the amendment "loosened constraints that had previously limited the ability of the federal government to transfer wealth to organized special-interest groups."<sup>108</sup> The Seventeenth Amendment undeniably changed the states' ability to voice their policy preferences in the Senate, but it is debatable whether the Framers of the Seventeenth Amendment achieved their goal of insulating Senators from the control of the state legislatures and making them more popularly accountable. Even if they were successful, there is no indication, either in the historical record or otherwise, that the House is supposed to be similarly insulated from state power.<sup>109</sup> The drafters of the Seventeenth Amendment voiced some concerns about what the amendment would mean for Congress's authority under the Elections Clause over both Senate and House elections.<sup>110</sup> But these concerns have proven to be unfounded as the Seventeenth Amendment in no

106 RUCKER, *supra* note 105, at 3.

107 See Kramer, *supra* note 13, at 224 ("To the extent that Senators respond to popular pressure from constituents—a product of the Seventeenth Amendment's elimination of the one feature of the Senate that really might have protected states, the power of state legislators to choose Senators—the equal representation of each state distorts democratic decisionmaking."); see also Zywicki, *supra* note 102, at 1014 ("In addition to increasing the likelihood that those of high character and achievement would be chosen as senators, selection of senators by state legislatures would 'giv[e] to the state governments such an agency in the formation of the federal government, as must secure the authority of the former; and [would] form a convenient link between the two systems.'" (citing THE FEDERALIST NO. 62, at 416 (James Madison) (Jacob E. Cooke ed., 1961))). But see Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1349–50 (1996) (arguing that the direct election of Senators has greater implications for separation of powers rather than federalism); Bybee, *supra* note 83, at 536 (arguing that the original structure did not do much to protect state interests).

108 Zywicki, *supra* note 102, at 1033; see also Bybee, *supra* note 83, at 535–36 (arguing that the direct election of Senators led to the massive expansion of federal power).

109 See Tolson, *supra* note 12, at 878 ("As early as 1842, when Congress first required that representatives be elected by district, it did not give itself the duty of drawing the lines—it left this to the states.").

110 In the debate in the House over the resolution that would provide for the popular election of Senators, the following exchange took place over what affect the proposed amendment would have on Congress's authority under the Elections Clause:

way altered the states' authority under the Elections Clause over *House* elections, and by implication, left the states' relationship with their House delegations intact.

Indeed, over fifty years ago, Wechsler suggested that it “may be said, and perhaps rightly, that the situation with respect to districting . . . has little bearing on the role of Congress in preserving federalist values.”<sup>111</sup> But he ultimately concluded that he is “not so sure” that this is right because “[i]t is significant, for one thing, that it is the states that draw the districts . . . .”<sup>112</sup> The states' authority over redistricting is a powerful indicator that, despite the traditional view of the House as a representative of the people, the state legislatures still retain important control over their House delegation.<sup>113</sup>

It was not until after *Baker v. Carr*, which held that legislative malapportionment claims are justiciable under the Equal Protection Clause,<sup>114</sup> that state legislatures realized that gerrymandering could serve the interests of the states in the same way that their control over the composition of the Senate once had. Notably, *Baker* and the “one

**Mr. MARTIN of South Dakota.** The effect of the adoption of the amendment in the form proposed in this resolution would be to create the condition by which Congress would still have power to regulate the election pertaining to Members of the House and not of the Senate, would it not?

**Mr. YOUNG of Michigan.** I wish to say that I do not know . . . I think it was undoubtedly the intention of the men who framed this provision to leave that power over the election of Representatives. But I do not know whether they have done it or not.

**Mr. MARTIN of South Dakota.** It would certainly leave no power as to the election of Senators with Congress.

47 CONG. REC. 207 (1911).

111 Wechsler, *supra* note 23, at 551.

112 *Id.*

113 In 1842, Congress passed a law requiring that all congressmen be elected from districts rather than at-large in order to impose a uniform system nationwide. Moreover, small states that benefitted from using at-large rather than districted elections supported this measure in order to avoid the uniform adoption of at-large elections, particularly by larger states, which would significantly diminish the power of the smaller states in Congress. See ZAGARRI, *supra* note 25, at 130-31 (“If each state could cast its vote as a single bloc—a capability that at-large elections would give them—then the small states' votes, both individually and collectively, would dwindle into complete insignificance.”). But even with the requirement of districted elections, states can still exercise significant authority over their congressional delegations because of gerrymandering. See Tolson, *supra* note 12, at 886-87 (arguing that the 1842 Reapportionment Act did not undermine the states' ability to gerrymander); *but see* Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519 (2001) (arguing that the 1842 Reapportionment Act requiring single member districts is unconstitutional).

114 *Baker v. Carr*, 369 U.S. 186, 237 (1962).

person, one vote” cases changed the way in which states used their redistricting authority to protect their interests, and it did not turn out to be the boondoggle for democracy that many envisioned.<sup>115</sup> Commentators at the time observed that the “one person, one vote” principle of *Wesberry v. Sanders* and *Reynolds v. Sims*, which followed *Baker*, had much to commend it because “the rule clearly encapsulates in a slogan a concept that is so appealing in its expression of the egalitarian assumptions of a democratic society that it attained instant popular acceptance and legislative acquiescence,” but in reality, it is not clear what the Court actually intended to accomplish by mandating population equality.<sup>116</sup> As one scholar argued:

By framing the issue exclusively in terms of the numerical aspects of districting, the rule diverts attention from the question of what constitutional objective it is intended to achieve. If the goal is that no person’s vote can have a greater political effect than any other person’s vote, that cannot be achieved simply by assuring that a citizen lives in a legislative district that is no larger in population than any other district. Some heed must also be paid to insuring that districting plans do not deny representation to, or do not systematically underrepresent, particular social groups or interests or concerns that may be of special importance to some but not necessarily favored by those dominant in the legislature. In short, the rule of “one person, one vote” ignores the problems presented by the practice of gerrymandering.<sup>117</sup>

As state legislatures quickly realized, gerrymandering could coexist comfortably beside the one person, one vote doctrine, which alarmed numerous dissenters in cases following *Reynolds* and *Wesberry*.<sup>118</sup> But this does not have to be a matter of alarm—partisan ger-

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115 *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964) (establishing “one person, one vote” doctrine to govern malapportionment claims for state legislative districts); *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (establishing the same for congressional districts); *Baker*, 369 U.S. at 237 (finding that malapportionment claims are justiciable under the Equal Protection Clause).

116 Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 177 (1986).

117 *Id.* (footnotes omitted); see also Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 112–13 (2000).

118 See *Karcher v. Daggett*, 462 U.S. 725, 776 (1983) (White, J., dissenting) (“Although neither a rule of absolute equality nor one of substantial equality can alone prevent deliberate partisan gerrymandering, the former offers legislators a ready justification for disregarding geographical and political boundaries.”); *Reynolds*, 377 U.S. at 622 (Harlan, J., dissenting) (“Recognizing that ‘indiscriminate districting’ is an invitation to ‘partisan gerrymandering’ . . . the Court nevertheless excludes virtually every basis for the formation of electoral districts other than ‘indiscriminate

rymandering as a safeguard of federalism fits comfortably with the constitutional history, text, and the Court's doctrines.<sup>119</sup> It allows states to comply with their constitutional and statutory obligations to draw districts while protecting their governing prerogatives. States can constitutionally redistrict more frequently<sup>120</sup> which, when combined with the infrequency that Congress uses its power to "make or alter" congressional districts<sup>121</sup> and the lack of judicial solicitude of continuing federal involvement in state electoral processes,<sup>122</sup> means that partisan gerrymandering permits the House to play a role similar to the pre-Seventeenth Amendment Senate.<sup>123</sup>

### III. DEFINING A ROLE FOR THE COURTS: THE LEGAL AND STRUCTURAL IMPLICATIONS OF PRO-FEDERALISM GERRYMANDERING

The process of gerrymandering is both inherently political and ties directly into the balance of our federalism; consequently, there is a risk that, like broader issues of federalism, any standard employed by the Supreme Court to regulate gerrymandering will become politicized. As Lawrence Lessig has argued, the Court's early reliance on formalism to maintain the boundary between state and federal power made any deviation from the status quo appear political. The Court's pivot with respect to addressing the expansion of federal power brought on by the New Deal,<sup>124</sup> to resolving issues surrounding

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districting." (citing majority opinion at 578–79)); see also Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 278 (1976) ("Not only had the Court failed to develop effective checks on the practice of gerrymandering, but in pursuing the goal of population equality to the point of satiety it had actually facilitated that practice.").

119 Tolson, *supra* note 12, at 862.

120 LULAC v. Perry, 548 U.S. 399, 415 (2006).

121 Tolson, *supra* note 12, at 876.

122 Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197 (2009); see also Tennant v. Jefferson Cnty. Comm'n, 567 U.S. \_\_\_\_ (2012), available at <http://www.supremecourt.gov/opinions/11pdf/11-1184c1d3.pdf> (holding that lower courts should give more weight to the state's legitimate policy objectives in deviating from the rule of absolute population equality).

123 Prior to the Seventeenth Amendment, Senators were not as constrained as many scholars believe but were still responsive to state interests. Bybee, *supra* note 83, at 525–26. Similarly, the House also has some latitude regarding policy but they cannot afford to ignore the states. See Tolson, *supra* note 12, at 862.

124 Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 177 (1995). As Lessig noted:

Why the old categories were rendered political is a complicated story. In part it was because part of what these old limits rested upon had itself been drawn into doubt—had been rendered contestable. Not only the ideas of a

intergovernmental tax immunity in *New York v. United States*,<sup>125</sup> and to determining the scope of federal regulation of the states in *National League of Cities v. Usury* were all followed by cries of partisanship and concerns over the Court's legitimacy.<sup>126</sup> This has led Lessig to argue that, to avoid accusations of partisanship, the Court must "translate" federalism in order to preserve something from the framing balance in the current interpretive context.<sup>127</sup>

With respect to the judicial resolution of partisan gerrymandering claims, the risk of politicization is acute and likely to occur. The integration of the political economy as a result of mass political parties,<sup>128</sup> much like the integration of the national economy prompting Lessig's theory of translation, makes it difficult to draw any type of boundary between state and federal action.<sup>129</sup> Similar to its recent

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passive government in the face of crisis, and the ideas of laissez-faire, but also some of the very premises of federalism itself. What the Depression had done was render these ideas fundamentally contestable, with the result that decisions resting on one side or the other of this contest were rendered political. To draw these artificial lines to limit governmental power became artificial; the effort, political.

*Id.* (footnote omitted).

125 326 U.S. 572, 574 (1946); *see also* Lessig, *supra* note 124, at 181–82 (discussing how the rule of *McCulloch v. Maryland* extended to state immunity from federal taxation but the doctrine later fell apart because of the inability of the Court to discern when immunity was appropriate made them look political when such attempts were made).

126 426 U.S. 833, 850 (1976); *see also* Lessig, *supra* note 124, at 184 (“[T]here could be no firm line that would divide proper from improper federal regulation; the line instead was constantly shifting. And if the line was constantly shifting, then the Court couldn’t help but appear political in its shifting resolution of these federalism cases.” (footnote omitted)); Tolson, *supra* note 34, at 1216.

127 *See* Lessig, *supra* note 124, at 129 (“[Translation is] an effort to reconstruct something from the framing balance to be preserved in the current interpretative context.”).

128 Kramer, *supra* note 23, at 1528–29 (arguing that political parties undermined the original system of federalism because they disincentivized the states to be watch dogs of the federal government by connecting officials across levels of government); Lessig, *supra* note 124, at 154–55 (arguing that current interpretive efforts have to “translate federalism” by preserving something from the framing balance because the integration of the national economy makes absolute fidelity impossible since federal and state economies are connected).

129 *See* Lessig, *supra* note 124, at 129. *Compare* Baker & Young, *supra* note 49, at 96 (“[Line drawing is part of the judicial endeavor, and despite the absence of bright line rules] the perceived importance of the constitutional principle at stake has led the judiciary to develop elaborate doctrinal structures through ‘reasoned judgment,’ even though the proper shape of those structures does not jump off the face of the constitutional text and even though the doctrine has required constant elaboration, adaptation, and even revision over time.”), *with* Garcia v. San Antonio Metro. Transit

approach in its federalism case law, however, the Court can resolve at least some of the issues created by gerrymandering by incrementally changing the norms that govern the process of redistricting. In order to do so, the Court has to assess the broader implications of this federalism benefit and how it affects the Court's resolution of issues that emerge in substantive areas that have some impact on congressional redistricting. This approach is preferable to constructing a new cause of action that will ignore the benefits of gerrymandering and is unlikely to capture the harm.<sup>130</sup>

Part III.A argues that because partisan gerrymandering sits at the crossroads between two lines of precedent—election law and federalism—the difficulty of reconciling these two areas makes it virtually impossible to develop standards to directly regulate partisan gerrymandering. But the failure of direct regulation does not put an end to the questions surrounding the Court's role. As Part III.B shows, the focus on manageable standards has detracted from deeper discussions about the role that partisan gerrymandering plays in our system, a role that naturally influences questions of justiciability. Indeed, its federalism benefits implicate foundational questions about our system of government by forcing us to revisit several important questions of institutional design: whether mid-decade redistricting and at-large voting are approaches that can effectively convey voter preferences, and relatedly, whether redistricting conducted by independent commissions instead of state parties undermines the expression of these preferences. While direct judicial regulation of partisan gerrymandering may be even less desirable than previously assumed for reasons discussed below, the Court can still play a role in promoting the federalism benefits that underlie gerrymandering by resolving cases in related areas in a way that strengthens the states' ability to promote its interests through gerrymandering.

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Auth., 469 U.S. 528, 548 (1985) (“[The absence of bright lines is dispositive because we doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress’[s] Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for ‘fundamental’ elements of state sovereignty, a problem we have witnessed in the search for ‘traditional governmental functions.’”).

130 See *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1325 (S.D. Fla. 2002) (purporting to “[rely] heavily on those well-worn cases that analyzed vote dilution claims brought by racial and ethnic groups under the Equal Protection Clause” in order to construct a rule of law to govern the partisan gerrymandering claim); *O’Lear v. Miller*, 222 F. Supp. 2d 862, 863 (E.D. Mich. 2002) (“[To succeed on a partisan gerrymandering claim,] the plaintiffs must demonstrate that their interests will in fact be ‘entirely ignored’ by their representatives.” (citation omitted)).

A. *Overcoming Standards, Overcoming Law: Federalism-Reinforcing Gerrymandering and the Courts*

The Supreme Court's success in articulating standards to address malapportionment and racial vote dilution have convinced many of the justices that they can have similar success with respect to partisan gerrymandering. But what should be clear, at least if I have been persuasive, is that partisan gerrymandering is different because of its federalism benefits. In light of this, the precedents in the federalism area are obstacles to devising a governing standard for gerrymandering claims. The inquiry would have to alternate between determining whether a redistricting plan is "excessively" partisan and assessing if the gerrymander accurately distributes voter preferences in a way that best represents the state's policy positions. The bright line rules that the Court has been able to articulate in its election law jurisprudence provide little guidance to answering either of these questions. Nor do any answers lie in its federalism cases, which have evolved into context specific guides that focus on defining the outer limits of congressional power.

In the election law area in particular, the Court has long struggled with issues related to redistricting, which may help explain the current impasse over gerrymandering. In *Colegrove v. Green*,<sup>131</sup> the Court held that Illinois's failure to reapportion its congressional districts did not present a justiciable cause of action.<sup>132</sup> The Court switched gears less than two decades later, however, finding in *Baker v. Carr*<sup>133</sup> that the state's failure to reapportion its state legislative districts presented a potential Equal Protection Clause violation.<sup>134</sup> Even after the Court established the "one person, one vote" principle in *Reynolds v. Sims*<sup>135</sup> and its progeny, the doctrine was still unclear as to whether redistricting based on partisanship raised the same constitutional concerns as malapportionment.

This uncertainty persisted in part because the equipopulation principle directly contributed to increased partisan gerrymandering.<sup>136</sup> In *Gaffney v. Cummings*, the Court alluded that such claims

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131 328 U.S. 549 (1946).

132 *Id.* at 552.

133 369 U.S. 186 (1962).

134 *Id.* at 193-94.

135 377 U.S. 533, 560 (1964).

136 See *Karcher v. Daggett*, 462 U.S. 725, 785 (1983) (Powell, J., dissenting) ("[A]n uncompromising emphasis on numerical equality would serve to encourage and legitimate even the most outrageously partisan gerrymandering."); *Wells v. Rockefeller*, 394 U.S. 542, 551 (Harlan, J., dissenting) (1969) ("The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst

might be justiciable, noting that, “A districting plan may create multi-member districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed ‘to minimize or cancel out the voting strength of racial or political elements of the voting population.’”<sup>137</sup> This caveat was the first sign that the Court was willing to punish partisan gerrymandering, speculating that it would be able to ascertain when commonly used electoral forms diminished the power of mutable groups. A decade later, in *Davis v. Bandemer*,<sup>138</sup> the Court established a cause of action for partisan gerrymandering and framed “the claim [as being] that each political group in a State should have the same chance to elect representatives of its choice as any other political group,” a standard that is somewhat similar to the approach that the Court had followed in its racial gerrymandering cases.<sup>139</sup> To establish invidious discrimination based on partisan affiliation under *Davis*, a political group must show “the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole,” a standard that ultimately proved to be unworkable in practice.<sup>140</sup>

For this reason, a mere eighteen years later in *Vieth v. Jubelirer*,<sup>141</sup> a plurality of the Court held that partisan gerrymandering claims should be non-justiciable.<sup>142</sup> From Justice Kennedy’s perspective, rendering partisan gerrymandering claims non-justiciable would create legitimacy issues given the Court’s long history of intervening in this area.<sup>143</sup> Yet, he reached this conclusion by ignoring the federalism

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sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues.”).

137 *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973).

138 478 U.S. 109 (1986).

139 *Id.* at 124.

140 *Id.* at 132.

141 541 U.S. 267 (2004).

142 As Justice Kennedy observed:

It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied. Nor is it alien to the Judiciary to draw or approve election district lines. Courts, after all, already do so in many instances. A determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene.

*Id.* at 309–10 (Kennedy, J., concurring).

143 For a review of that history, see *Bandemer*, 478 U.S. at 119 (detailing the Court’s involvement in the political arena since *Baker v. Carr* to justify creating a cause of action for partisan gerrymandering).

implications of gerrymandering, an acknowledgement that would draw the Court even deeper into resolving questions about how states can best protect themselves from federal overreaching and might, therefore, require a noninterventionist approach.

Caution is required because the Court has had similar difficulty articulating bright line rules in cases dealing with the scope of Congress's authority under the Commerce Clause, leading the justices to question for a time whether judicial review of federalism cases is appropriate at all.<sup>144</sup> For example, *Maryland v. Wirtz*,<sup>145</sup> which took a broad view of Congress's power to extend the provisions of the Fair Labor Standards Act (FLSA) to state employees, was reversed less than ten years later in *National League of Cities v. Usury*,<sup>146</sup> which held that the FLSA encroached on the traditional function of the state to regulate the wages and hours of its employees. *National League of Cities* was overturned less than a decade later by *Garcia v. San Antonio Metropolitan Transit Authority*<sup>147</sup> on the grounds that the test established in the former case, which focused on protecting "traditional" state functions from federal power, had proven impossible to administer. The *Garcia* Court, over strong opposition from four justices, concluded that the failure of this test illustrated that the political process is the best protection for preserving state sovereignty from congressional overreaching.<sup>148</sup>

This series of 5-4 decisions regarding the scope of congressional authority under the Commerce Clause made the Rehnquist Court (and the Roberts Court, to some extent) more cautious going forward, particularly in light of the early precedents expanding the scope of congressional power in the years directly after the Founding and

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144 Fallon, *supra* note 73, at 478 ("[A move to overrule *Garcia* and restore the regime of *National League of Cities*] especially if by a precarious 5-4 majority—would risk making the Court look foolishly inconsistent. It also would invite derisive speculations about the Court's proneness to flip-flop with turns of the political tide and raise questions about the justices' capacity to function as relatively apolitical umpires of federal-state relations.").

145 392 U.S. 183, 184 (1968) (upholding application of the Fair Labor Standards Act to state operated schools and hospitals).

146 426 U.S. 833 (1976).

147 469 U.S. 528 (1985).

148 *Id.* at 554 ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" (citing *EEOC v. Wyoming*, 460 U.S. 233, 236 (1983))).

following the New Deal.<sup>149</sup> The Court has sacrificed its institutional and political capital because of the schizophrenia with which it has approached these cases. Its position has alternated from circumscribing congressional authority after years of expanding it, relegating federalism questions to the political process out of frustration, and then, shortly thereafter, reentering the fray again. As a result, the costs of exit are considerable because of the magnitude of the issues and the inconsistency of the Court's prior positions; as the New Deal period illustrates, the Court will, at times, switch paths, but only when faced with a threat to its legitimacy as an institution.<sup>150</sup>

To avoid losing its credibility, the Court will often retain a legal principle that is outdated and inefficient in order to avoid expending the political capital that comes with changing the rule.<sup>151</sup> In an oft-cited piece, Richard Fallon argued that rather than reversing precedent, the Rehnquist Court opted to use sub-constitutional doctrines such as Eleventh Amendment state sovereign immunity, official immunity rules, and judge-made equitable doctrines in order to indirectly advance federalism values and reshape Congress's regulatory authority.<sup>152</sup> The Court took this approach, according to Fallon, in order to

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149 Fallon, *supra* note 73, at 478 ("Rather than doubling back along the precedential path, overruling *Garcia*, and returning to *National League of Cities*, the Court has so far elected to take a different, much more modest route toward the protection of federalism values. In *New York*, it laid down the clear but limited rule that Congress may not enact legislation under Article I that singles out state legislative bodies and compels them to legislate. In *Printz*, the Court extended *New York's* noncommandeering principle to apply to state and local executive officials." (footnotes omitted)).

150 Lessig, *supra* note 19, at 1265. What this highlights is the dynamic of "increasing returns," which focuses on specific patterns of timing and sequence and increases the cost of switching from one alternative to another. According to Paul Pierson:

In an increasing returns process, the probability of further steps along the same path increases with each move down that path. This is because the *relative* benefits of the current activity compared to other possible options increase over time. To put it a different way, the costs of exit—of switching to some previously plausible alternative—rise.

Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 252 (2000).

151 Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 659 (2001) ("[P]ath dependence theory suggests that stare decisis can lead to the maintenance of a legal principle that is outdated and inefficient. Over time, as a legal principle becomes more and more entrenched, its failure to respond to changes in underlying conditions can result in increasing inefficiency.").

152 Fallon, *supra* note 73, at 431, 434 (referring to this as "precedential path dependence").

respect precedent and avoid the pitfalls that had characterized its earlier attempts to articulate bright line rules.<sup>153</sup>

Similarly, the Court's early commitments to finding a standard for partisan gerrymandering, misguided as they were, have limited its ability to entirely remove itself from this area altogether.<sup>154</sup> In a little over two decades, the Court has oscillated on the issue of justiciability, sacrificing continuity and putting its institutional legitimacy at risk.<sup>155</sup> Because of the repeated comparisons between partisan gerrymandering and the Court's past successes with the one person, one vote doctrine and the racial gerrymandering cases, the Court has effectively written itself into a corner that it cannot get out of without repeating the mistakes it has made in its federalism cases.

Because of this, the quest for manageable standards is likely to continue into the near future, but, as *Vieth v. Jubelirer* illustrates, four justices did not share Justice Kennedy's confidence about the Court's ability to articulate those standards. *Vieth* concerned the Pennsylvania congressional map, which had to adjust for a loss of two seats following the 2000 census. During redistricting, the Republican legislature drew a skewed map to penalize Democrats for adopting plans unfavorable to Republicans in other states.<sup>156</sup> In resolving the partisan gerrymandering claim, a plurality of the Court held that partisan redistricting does not raise a cognizable constitutional claim, citing the lack of manageable standards following the Court's opinion in *Davis v. Bandemer*. In so holding, the plurality relied on the constitutional text, which provides Congress with the power to "make or alter" districts when partisanship has exceeded constitutional bounds.<sup>157</sup> These justices also relied on historical evidence, noting that parties have always tried to secure power disproportionate to their actual support among the populace.<sup>158</sup> And while the plurality ultimately concluded that "excessive" partisan gerrymandering is unconstitu-

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153 *Id.* at 436 (arguing that stare decisis and fear of public backlash has led the Court to uphold cases such as *Garcia* and use alternative avenues to advance notions of state sovereignty).

154 *Vieth v. Jubelirer*, 541 U.S. 267, 311–12 (2004) (Kennedy, J., concurring in part and dissenting in part).

155 See Luis Fuentes-Rohwer, *Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence*, 43 CONN. L. REV. 1157, 1160 (2011) (arguing that courts should only resolve partisan gerrymandering claims in the most egregious circumstances because their involvement threatens their institutional legitimacy).

156 *Vieth*, 541 U.S. at 272 (plurality opinion).

157 *Id.* at 275, 285–86.

158 *Id.* at 274–75.

tional,<sup>159</sup> it did not define “excessive” and made it clear that, unlike race, excessive does not mean that a plan in which partisan motivations predominated is necessarily unconstitutional.<sup>160</sup>

*Vieth* places the Court in a difficult position. While all nine justices agreed that partisan gerrymandering is incompatible with democratic principles, the justices split on the issue of what amount of partisanship triggers a constitutional violation, and, most importantly, whether the Court is capable of determining when that level has been reached.<sup>161</sup> Part of the difficulty stems from previous cases holding that incumbent protection is a legitimate redistricting objective, and reconciling this valid and constitutional use of politics with “excessive” gerrymandering has proven to be difficult.<sup>162</sup>

The distinction between “politics as usual” as a traditional redistricting criterion and “excessive” politics as a constitutional violation has significant implications for the justiciability of partisan gerrymandering claims. The plurality suggested that the inherent difficulty in making this assessment renders gerrymandering more suitable for regulation by the political branches. Even if one disagrees with this position, however, the answer will not be found in framing partisan gerrymandering solely as a constitutional evil,<sup>163</sup> or, alternatively, as having a bright side,<sup>164</sup> both of which ignore the complex nature of gerrymandering. While simultaneously “inconsistent with democratic principles” and “ordinary and lawful,” *Vieth* implicitly acknowledges that partisan gerrymandering has some benefits that must be factored

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159 *Id.* at 279–81, 283 (discussing *Davis* and noting that although the case “involved the *ne plus ultra* of partisan manipulation,” the lack of manageable standards has led courts to deny relief in cases involving redistricting plans that embrace “extreme partisan discrimination, bizarrely shaped districts, and disproportionate results”).

160 *Id.* at 293.

161 Eight of the nine *Vieth* justices endorsed the position that partisan gerrymandering is unconstitutional only if used excessively. See *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (making this point). Justice Stevens was the only justice to suggest that all use of partisanship in districting is unconstitutional. *Vieth*, 541 U.S. at 320–21 (2004) (Stevens, J., dissenting).

162 See *LULAC v. Perry*, 548 U.S. 399, 440–41 (2006); see also *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

163 See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 783 (2005) (exploring whether there are judicially manageable standards to regulate partisan gerrymandering and “taking as a given” that excessive pursuit of partisan advantage is unconstitutional).

164 See THOMAS L. BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA 13 (2008) (arguing that competitive districts optimize the number of losers); see also Kang, *supra* note 22, at 444.

into whether the Court is equipped to assess its constitutionality.<sup>165</sup> This acknowledgment makes it difficult for the Court to proceed as it has in the past—through direct regulation.<sup>166</sup>

Moreover, once one considers some of the proposals for direct regulation made by scholars, it is not clear that these approaches would result in fewer false positives, or, in other words, invalidate gerrymanders that have federalism benefits and validate gerrymanders that are “excessive.”<sup>167</sup> Mitchell Berman, for example, argues that partisanship can be boiled down to a scalar concept that allows courts to determine if too much partisanship has permeated the process.<sup>168</sup> According to this methodology, courts would focus on what the partisan makeup of the districts would have been absent the excessive partisan redistricting as opposed to what would be a fair outcome, which is the approach that many commentators endorse.<sup>169</sup> Berman concedes “the extraordinary unlikelihood, and perhaps impossibility, of ever learning just what the legislature really would have done had it not considered partisanship,” but contends that this problem could be overcome by adopting instrumental rules that promote the counterfactual baseline understanding of excessive partisanship.<sup>170</sup>

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165 See *Cox*, 542 U.S. at 952 (Scalia, J., dissenting).

166 See *LULAC*, 548 U.S. at 400–01 (using section 2 of the Voting Rights Act to regulate partisan gerrymandering).

167 Although this Article only focuses on a couple of examples, scholars have proposed and rejected a number of ways to regulate gerrymandering. See Richard G. Niemi, *The Swing Ratio as a Measure of Partisan Gerrymandering*, in *POLITICAL GERRYMANDERING AND THE COURTS* 171, 176 (Bernard Grofman ed., 1990) (“[The test should consider] whether the swing ratio associated with a particular plan is particularly low in comparison with historical experience in the jurisdiction in question.”); see also Gary King, *Representation Through Legislative Redistricting: A Stochastic Model*, 33 *AM. J. POL. SCI.* 787, 788 (1989) (“[One possibility is to use the] district-level theoretical model of the process by which partisan electoral swings and incumbency voting modify democratic representation and partisan bias [developed here].”); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 *UCLA L. REV.* 1, 55–62 (1985) (rejecting proportionality and symmetry as potential conceptions of how votes and seats in legislative election should correlate); Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 *UCLA L. REV.* 185, 207–08 (1985) (arguing that a random district baseline would pose too many difficulties if applied by the Supreme Court).

168 Berman, *supra* note 163, at 820 (“This effort to identify the range of distinct ways in which partisanship can be intelligibly conceptualized in scalar terms . . . provides a powerful framework for critically assessing extant judicial and scholarly arguments that purport to show that the judiciary could not manageably police the practice of partisan gerrymandering.”).

169 *Id.* at 824.

170 *Id.* at 829.

Because of its focus on capturing “excessive” partisanship as measured against a counterfactual baseline, this approach makes some allowance for the beneficial use of partisanship, but it still runs into a problem of arbitrary application.<sup>171</sup> In other words, how is a court to determine the appropriate percentage by which a party can increase its electoral share without running afoul of the Constitution? In the 2003 Texas redistricting, for example, the fact that the Republicans won sixty-five percent of the congressional seats although they only obtained fifty-eight percent of the vote in statewide races might indicate “excessiveness,” or it may not.<sup>172</sup> Arguably, the counterfactual does not answer this question, nor does it explicitly take into account the federalism interest of gerrymandering, which might otherwise justify the fifty-eight/sixty-five split.<sup>173</sup> Decision rules that focus on the end result ignore the state interests that are promoted in the process of gerrymandering.

Similarly, Nicholas Stephanopoulos argues that courts can assess whether a given partisan gerrymander violates the Constitution by focusing on the degree to which certain metrics, such as race and wealth, are dispersed throughout a district.<sup>174</sup> This concept, which Stephanopoulos refers to as spatial diversity, would invalidate only the most extreme gerrymanders, which arguably can be addressed through indirect regulation without having to make a value judgment as to what a fair outcome would be.<sup>175</sup> In fact, Stephanopoulos concedes that the Supreme Court, through existing doctrine, has already done a good job of policing egregious gerrymanders that are not spatially homogenous without any formal metrics.<sup>176</sup>

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171 *Id.* at 844 (conceding that his approach is arbitrary, but noting that this is not a barrier).

172 *LULAC v. Perry*, 548 U.S. 399, 413 (2006).

173 *See* Berman, *supra* note 163, at 843 (noting the separation of powers concerns that emerge from an erroneous judicial invalidation of a challenged scheme).

174 Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1937 (2012) (outlining metrics such as race, ethnicity, age, income, education, profession, marital status, and housing in order to calculate spatial diversity scores that will enable the Court to police districts which are uneven with respect to these criteria).

175 *See, e.g., LULAC*, 548 U.S. at 400–01 (2006) (using Section 2 of the Voting Rights Act to invalidate a state’s attempt to replace a dismantled district with one that was not spatially diverse).

176 *See* Stephanopoulos, *supra* note 174, at 1909 (“The Court’s decision [in *Vieth*] to uphold Pennsylvania’s plan was also prudent since the state’s districts were not, on average, particularly heterogeneous. In [*LULAC*], likewise, the Court was probably right to prefer Texas’s old Twenty-Third District to the new Twenty-Fifth District because the former’s Hispanic population was more spatially homogeneous.”).

For the most part, the legal scholarship has been deficient in acknowledging that partisan gerrymandering has been unregulated, not only because of a lack of manageable standards, but also because partisan gerrymandering is different from the other “evils” that the Court normally encounters.<sup>177</sup> It is true that partisan gerrymandering has been used to insulate incumbents from competition, making it deserving of at least some of the criticism it receives,<sup>178</sup> but it is also a political tool that can inure to the benefit of the states and historically disenfranchised minorities.<sup>179</sup> In fact, in many cases, racial gerrymandering and partisan gerrymandering are virtually indistinguishable.<sup>180</sup>

Moreover, unlike other “evils,” partisan gerrymandering is, to some extent, self-policing, making any judicial involvement appear inherently political.<sup>181</sup> As Justice O’Connor observed in *Davis*, gerrymandering is “a self-limiting enterprise” because “overambitious gerrymander[s]” can lead to disaster at the polls where a legislative majority weakens too many safe seats in order to extend its dominance and defeat opponents.<sup>182</sup> This also weighs against its justiciability, not only because the threshold of “excessive” partisanship will rarely be

177 For a notable exception, see Briffault, *supra* note 22.

178 See, e.g., Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 506–07, 509–10 (2004); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667–68 (2001); Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1026 (2005); Issacharoff, *supra* note 13, at 614; Issacharoff & Karlan, *supra* note 26, at 543; Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 373–80 (2004); see also *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment) (noting that gerrymandering may infringe the First Amendment rights of voters); *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (noting that redistricting can produce safe districts).

179 BRUNELL, *supra* note 164.

180 See *Easley v. Cromartie*, 532 U.S. 234, 239–40 (2001) (finding that race did not predominate where the legislature utilized mostly partisan criteria); see also *LULAC*, 548 U.S. at 400 (2006) (raising partisan gerrymandering and Voting Rights Act claims); *Bush v. Vera*, 517 U.S. 952, 954 (1996) (raising partisan gerrymandering and Voting Rights Act claims); *Davis*, 478 U.S. at 110 (1986) (same).

181 See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 540 (1997) (“[T]here are limits to how much partisan advantage gerrymandering can produce [because the disadvantaged party is not entirely powerless].”). Given the inherently political nature of redistricting and its federalism benefits, the fact that it is self-policing may distinguish it from other instances in which legislators act in an anti-majoritarian way and therefore judicial review is not only justified, but required. Cf. *id.* at 534, 540 (agreeing with commentators who “doubt whether gerrymandering constitutes a very large antimajoritarian problem” but contending that it should still be justiciable because gerrymandering “has nothing to commend it—the practice is entrenchment, pure and simple”).

182 *Davis*, 478 U.S. at 152 (1986) (O’Connor, J., concurring).

reached, but also because judicial involvement may come long after the gerrymander has lost its effectiveness.<sup>183</sup>

That the Court has been stymied in developing standards to address partisan gerrymandering directly does not mean that this federalism benefit cannot be promoted through doctrines that govern other redistricting related areas of the case law. As the next section shows, the federalism benefits of partisan gerrymandering may ultimately be the tipping point for determining not only whether judicial review is desirable, but also the form that judicial review should take.

*B. The Structural Implications of Federalism-Reinforcing Gerrymandering: Reassessing the Existing Paradigm*

Because the legal scholarship and the courts have not considered the federalism benefits that emerge from partisan gerrymandering, there also has not been any measured study of how this benefit has broader implications for our electoral system. As this part shows, encouraging partisan gerrymandering to promote this interest could also mean: embracing more mid-decade redistricting by state legislatures; reconsidering the role of at-large voting schemes in our system; removing the power to draw redistricting plans from independent commissions; and developing rules that promote strong state political parties. Even if the Supreme Court is unable to develop standards to regulate partisan gerrymandering directly, its jurisprudence still can play a role in strengthening or promoting these factors as a means of protecting the federalism interest underlying partisan gerrymandering in ways I discuss below.

1. Using Mid-Decade Redistricting and At-Large Elections to Gauge Voter Preferences

One of the main criticisms of partisan gerrymandering is that it undermines the ability of voters to hold elected officials responsible for policy decisions by manipulating district lines. Mid-decade redistricting and at-large voting schemes provide an accountability mechanism that ensures that the preferences of a majority of the voters continue to be represented in the state's congressional delegation. With respect to mid-decade redistricting, the Supreme Court has held that it is not per se unconstitutional, but the Court has penalized the state for making its representatives less accountable where the state dismantled certain majority-minority districts when the representa-

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<sup>183</sup> See Berman, *supra* note 163, at 843 (noting the separation of powers concerns that emerge from an erroneous judicial invalidation of a challenged scheme).

tional preferences of the residents were inimical to those of the state.<sup>184</sup> As the Court's actions indicate, mid-decade redistricting is not about shoring up vulnerable incumbents; rather, it can help guarantee that there is partisan congruence between the congressional delegation and the voters.

Despite its potential benefits, scholars still view mid-decade redistricting with skepticism. Adam Cox, for example, has argued that there should be a temporal floor on redistricting in order to “promote[ ] beneficial uncertainty” and “randomize[ ] control over the redistricting process” so as to make it “less likely that redistricting will occur under conditions favoring partisan gerrymandering.”<sup>185</sup> Because there is value in redistricting that corrects for variations in voting behavior over time, forcing a state to adhere to a redistricting scheme that does not map onto voter preferences undermines the structural protection that states receive from their ability to gerrymander. This cost might undermine any of the benefits of reduced partisan bias that would accompany a rule limiting redistricting to once a decade, particularly since: 1) it is not clear that the process of mid-decade redistricting would be any more polarized than redistricting that occurs once a decade, and 2) some level of partisan bias at the institutional level is inevitable in ensuring that the state's delegation is an adequate reflection of voter preferences.<sup>186</sup>

In Texas, for example, the new Republican majority redistricted after decades of enduring pro-Democratic gerrymanders, and, in 2002, a court-drawn map forced Republicans to compete under a plan that did not accurately reflect their political power statewide. Notably, under Cox's definition of partisan fairness, this outcome is likely acceptable so long as there is symmetry in the votes-seats relationship between the parties under the court-drawn plan.<sup>187</sup> But in light of the arguments presented here, it is clear that the quest for partisan fairness should be decoupled from arguments in favor of eliminating mid-decade redistricting. Arguably, the court-drawn plan may have

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184 *LULAC*, 548 U.S. at 415 (2006); see also Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1198 (2007) (“One cannot gainsay the fact that the accountability function of elections is rendered ineffective if redistricters prior to the election can remove from the district the individuals most likely to vote against the representative.”).

185 Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 755 (2004).

186 See *id.* at 764, 767 n.60 (defining partisan fairness as the absence of partisan bias but noting that this conception of bias “cannot . . . be measured meaningfully at the legislature-wide level for state legislatures or at the congressional-delegation level for Congress”).

187 *Id.* at 766.

lacked partisan bias as Cox defines it, but the plan gave the Democrats more seats than they were otherwise entitled based on their statewide percentage of the vote. This introduced a different type of bias (misrepresentation of the party's actual electoral strength) that might be equally as problematic as the partisan bias, or the lack of symmetry between votes and seats, of which Cox complains. Replacing a biased pro-Democratic plan mid-decade with a biased pro-Republican plan, but one that more accurately reflects the distribution of power statewide, is less problematic than if a growing electoral minority sought to use mid-decade redistricting to entrench itself.

Allowing parties to keep a pulse on the policy and partisan preferences of voters may also justify abandoning districted elections in favor of a more controversial electoral scheme: at-large voting. At-large elections, in which all participants vote for all of the open seats,<sup>188</sup> have long been criticized as denying minorities the opportunity to elect their preferred candidate because, in the presence of racial bloc voting, white voters would always be able to elect all of the representatives.<sup>189</sup> Indeed, the factual basis for the seminal case of *Thornburg v. Gingles* was a challenge to an at-large election scheme under the renewed Voting Rights Act. However, if the House also plays a role in protecting state interests as I argue in Part II, then an at-large election may be one mechanism to ensure that the state's congressional delegation is truly representative of the policy preferences of a majority of the voters in the state.<sup>190</sup>

At-large voting may also address concerns raised by partisan gerrymandering that occurs in swing states or states with politically mod-

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188 States are required by law to have elections for Congress in single member districts, but if a state's delegation was elected in at-large election, then all voters would vote for all of the seats.

189 See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 86–87 (1986) (O'Connor, J., concurring) (“[In a single at-large election in a jurisdiction of 1000 voters of whom thirty percent are black,] white voters could elect all the representatives even if black voters turned out in large numbers and voted for one and only one candidate.”); see also *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (holding that Georgia's at-large system for electing members of the Burke County Board of Commissioners violated the Fourteenth Amendment). But see *id.* at 616–617 (“[At-large voting schemes and multi-member districts are] not unconstitutional *per se* [but can] violate the Fourteenth Amendment if ‘conceived or operated as purposeful devices to further racial discrimination.’” (citations omitted)).

190 See ZAGARRI, *supra* note 25, at 129 (discussing the controversy over redistricting during the nineteenth century and noting that proponents of the at-large method believed that it was more appropriate than districted elections because congressmen “represented the state as a community” and so “[a]ll the people in a state . . . should be able to vote for all of the state's congressmen.”).

erate leadership and voters. In these contexts, it may be difficult to distinguish federalism-reinforcing partisan gerrymandering from partisan gerrymandering that is designed to entrench an electoral minority. Nebraska, for example, has a delegation that is entirely Republican and its voters are overwhelmingly Republican and conservative. Partisan gerrymandering has obvious federalism potential in this context.

In contrast, partisan gerrymandering in swing states like Florida could have the exact opposite result where voter support is almost evenly split between the two major parties, and there is a split House delegation in which Republicans maintain a majority partially through gerrymandering. Assessing whether gerrymandering promotes the interests of the state in this type of political environment is probably impossible,<sup>191</sup> but an at-large voting scheme would be a more accurate and authentic reflection of voter preferences because a majority of the voters would elect a majority of the representatives.

At-large voting is not without risk, particularly to voters from historically disenfranchised minority groups. The primary concern raised by both increased mid-decade redistricting and at-large election schemes to select congressional representatives is that votes from these groups will be diluted, as is what occurred to Latinos in Texas during the 2003 mid-decade redistricting, or to African-Americans in Burke County, Georgia, which, until 1982, used an at-large election to select the members of its governing Board of Commissioners. There are two plausible ways to address concerns about the rights of racial minorities in both at-large and mid-decade redistricting scenarios: using an alternate voting scheme in the context of an at-large election designed to promote “authentic” minority representation and robust enforcement of statutory doctrines designed to protect minority voters, specifically section 2 of the Voting Rights Act.<sup>192</sup>

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191 An example of how the politics of swing states complicate the federalism analysis in the gerrymandering context is the fact that in 2009, Governor Crist, a Republican, supported the bailout and solicited funds for Florida although all of the Republicans in Florida’s congressional delegation voted against it. See Teddy Davis, *Florida’s Crist Hammered for Backpedalling on Obama’s Stimulus*, ABC NEWS (Nov. 5, 2009, 1:06 PM), <http://abcnews.go.com/blogs/politics/2009/11/floridas-crist-hammered-for-backpedalling-on-obamas-stimulus/>.

192 Guy-Uriel Charles defines “authentic” racial representation as an “attempt[ ] to maximize the autonomy and agency of voters” by promoting the election of a “representative . . . that is substantially the choice of the relevant electorate with minimal interference by the State.” Charles, *supra* note 184, at 1193.

a. Protecting Minority Groups: Cumulative Voting in At-Large Elections

One possible alternate voting scheme, advanced by Lani Guinier, would allow voters to cumulate their votes in a modified at-large election scenario. Unlike single member districts in which minorities are limited to exercising their political power in the districts that have been drawn for them, this approach recognizes “both the existence and intensity of minority voter preference” by allowing for potentially greater representation than that provided by single member districting, depending on the intensity of the minority group’s preferences.<sup>193</sup> In a modified at-large election,

[C]andidates would run jurisdiction-wide, but the threshold for election would be reduced from 51% to something less. In the case of a four person at-large council, the threshold for election would be 21% [which is the minimal number of votes necessary to elect a candidate]. Voters would each be given the same number of votes as open seats (four in this case) that they could distribute by their choice among the competing candidates. If black voters are a politically cohesive interest constituency, they might use all four of their votes on one candidate. In a 100 voter jurisdiction, where each black voter gave all four of her votes to one candidate, a 25% black minority could elect a representative. The intensity of their interests and their political cohesion would ensure black voters the ability to elect at least one representative.<sup>194</sup>

Under this system, African-American voters can still elect their candidate of choice despite the absence of a majority-minority “safe” district, but unlike the single member district, it avoids promoting the interests of African-Americans at the expense of political allies.<sup>195</sup> Moreover, cumulative voting in an at-large election scenario may be a more accurate gauge of the intensity of voter preferences because it permits minority groups to throw all of their votes behind a preferred candidate. This scenario would actually allow African-Americans to be a party in the political system in its entirety, whereas majority-minority districts tend to remove African-American candidates from electoral competition with whites, which can ultimately affect the degree to

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193 LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 94 (1994).

194 *Id.* at 94–95.

195 *Id.* at 95 (“The modified at-large system encourages black representation without disabling or diluting the votes of potential allies. By contrast, the single-member districting approach may require submerging Latino voters within majority-black districts or white Democratic voters within majority-white Republican districts.”).

which the political interests of African-Americans are adequately represented on the national stage through the state's delegation.<sup>196</sup>

b. Protecting Minority Groups: Section 2 of the Voting Rights Act

Cumulative voting schemes notwithstanding, increased mid-decade redistricting could have a deleterious effect on minority rights and threaten to erase any gains made by minorities in the prior election cycle. Robust enforcement of section 2 of the Voting Rights Act could prevent these groups from falling victim to the partisan extremes that redistricting often conjures in political elites. Section 2 forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color" and protects minority interests from gerrymanders that impermissibly burden the ability of these groups to elect their candidate of choice.<sup>197</sup> Since "the ability to elect one's candidate of choice" is a partisan concept in and of itself, section 2's focus

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196 *Id.* at 96. Guinier notes that because only a bare majority is needed to elect a representative in a single member district, "black voters are not encouraged to participate actively in the political process because a low turnout still benefits the incumbent." *Id.* These voters "have no mechanism to encourage representatives from the majority-white districts . . . to represent their interests." *Id.* Guinier's proposal is not the only way in which minority interests can be protected in an at-large voting scheme. As Richard Briffault points out, single transferable voting (STV) is another alternative that can protect minority interests in an at-large election:

Like cumulative voting, STV dispenses with single-member districting and returns to multi-member districts or at-large elections. But instead of allowing voters to cumulate votes behind one candidate, STV provides a preference voting system. The voter casts one ballot but can rank candidates to reflect the voter's relative preferences among them. Ranking candidates in order of preference enables votes that would be "wasted" on one candidate to be transferred to another candidate. A vote can be 'wasted' if it is 'surplus'—that is, a vote cast for a candidate who would win without it—or if it is cast for a losing candidate. STV saves 'wasted' votes by providing for their transfer to the next ranked candidate on a voter's ballot. STV thus increases the proportion of voters who vote for a winning candidate, and increases the likelihood that the voter will be represented by a legislator of his or her choosing. The vote-transfer feature of STV benefits electoral minorities, even in the face of the firm opposition of the majority.

Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 435–36 (1995).

197 See 42 U.S.C. § 1973(a) (2006). In the context of state legislative redistricting, I argue that the judicially created safe harbor, allowing states to deviate from the rule of equipopulation for policy reasons, has contributed to gerrymandering that is excessive. See also *Cox v. Larios*, 542 U.S. 947 (2004).

on race, as opposed to partisanship, is not a barrier to regulating gerrymandering that occurs for partisan, rather than racial, reasons.<sup>198</sup>

Gerrymandering that subordinates a legitimate minority interest, defined here as having a cognizable section 2 claim, to countervailing partisan considerations crosses the line into the “excessive” partisan gerrymandering that most of the justices agree would violate the Constitution.<sup>199</sup> To emphasize this point, *LULAC* was about the ability of a historically disenfranchised minority to participate and aggregate political power in a way that expressed their preferences, a right that exists under section 2 and must be balanced against the state’s authority to gerrymander. Although the Supreme Court declined to find that the plan as a whole was unconstitutional, it held that the dismantling of the majority-Latino Twenty-Fifth District violated section 2 because the legislature impermissibly subordinated the ability of the Latinos in the district to effectively aggregate their political power and elect their candidate of choice to its interest in protecting an increasingly unpopular incumbent.<sup>200</sup> The incumbent, Henry Bonilla, had been steadily losing Latino support and, during the redistricting, Republicans shifted some of the Latino voters out of the Twenty-Fifth District and added white voters to shore up his support. The Court concluded that because Latinos were set to elect the candidate of their choice pre-redistricting and had indicated their disapproval of the incumbent by not voting for him, the new plan violated section 2 because it took away their opportunity to exercise an effective vote just as they were about to use it.<sup>201</sup>

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198 See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 245–46 (2001) (suggesting that evidence of voter behavior would be sufficient to defeat a racial gerrymandering claim because such evidence would show that partisanship, not race, predominated in the drawing of district lines); *LaRoque v. Holder*, 650 F.3d 777, 784 (D.C. Cir. 2011) (noting that the federal government denied Voting Rights Act preclearance to a county’s plan to change from partisan to nonpartisan elections because the change will make it more difficult for minorities to identify Democratic candidates); see also Charles, *supra* note 184, at 1194 (“[T]he framework of the [s]ection 2 inquiry not only assumes but requires explicitly a political cohesiveness for which race is ‘the only common index.’”).

199 See Charles, *supra* note 184, at 1207 (“[One possible interpretation of the Court’s holding in *LULAC v. Perry* is that the] State intentionally discriminates against voters (of color?) where the State intentionally deprives them of an electoral benefit to which they would otherwise be entitled for reasons that are not constitutionally permissible.”); see also *id.* at 1208 (noting that the State’s intent does not have to be racial intent but can encompass a broader intent “to deprive the group of an electoral opportunity”).

200 *LULAC v. Perry*, 548 U.S. 399, 423 (2006).

201 *Id.* at 423–24, 440–41; see also Charles, *supra* note 184, at 1195 (arguing that Bonilla was arguably the “least authentic Latino representative” despite the fact that

The fact that the gerrymandering of the Twenty-Fifth District was instituted just as Latinos were set to exercise their hard won political power was dispositive in finding that the state had violated section 2 of the Voting Rights Act, despite the constitutionality of relying on partisan considerations in redistricting more generally. These considerations were clearly “excessive” when they trumped effective participation and the right of a historically disenfranchised group to successfully utilize the political process. In fact, Justice Kennedy conceded that incumbency protection, an inherently partisan consideration, can be a legitimate factor in districting, but observed that context matters:

If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed Bonilla, the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters.<sup>202</sup>

Although Latinos were able to successfully challenge the partisan dismantling of the Twenty-Fifth District under section 2, this does not mean that every minority group is guaranteed to prevail where they cannot elect their preferred candidate. *LULAC* also illustrates that, where citizens have not effectively aggregated their preferences, partisanship can trump a weak section 2 claim. The district court found that residents of the Twenty-Fourth District, an influence district where African-Americans constituted less than fifty percent of the voting age population, did not have a cognizable section 2 claim because there was insufficient evidence that they could elect their candidate of choice under the old plan.<sup>203</sup> In support of this finding, the court relied on testimony that the district was drawn for a white Democrat, Martin Frost; the fact that Frost had no opposition in any of his primary elections since his incumbency began; and the Twenty-Fourth District’s demographic similarity to another district where an African-American candidate lost when he ran against a white candidate.<sup>204</sup>

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he is Latino and was elected from a majority-Latino district because he was “demonstrably ideologically opposed to the ideological preferences of Latino voters in the region and . . . they have repeatedly repudiated him in very clear terms”).

202 *LULAC*, 548 U.S. at 441.

203 *Id.* at 443.

204 *Id.* at 444.

The Supreme Court upheld this finding in part because it was not clear that the African-Americans in the Twenty-Fourth District had obtained the same level of political power in their district as the Latinos in the Twenty-Fifth District because of the lack of viable alternatives to Frost. Frost had been the representative for many years, and he did not face any competition at either the primary or general election stage. As a result, there was no evidence that the use of partisanship in dismantling the district was “excessive” because there was no way for the Court to judge if the African-Americans in the Twenty-Fourth District genuinely preferred Frost to all others.<sup>205</sup>

Even if one disagrees with the disparate outcomes of the Twenty-Fourth and Twenty-Fifth Districts, *LULAC* remains important because the Court was able to make a plausible determination about the 2003 mid-decade redistricting plan’s effect on minority political power while respecting the overall partisan purpose of the plan, which was to ensure that the congressional delegation reflected the overall distribution of power statewide.<sup>206</sup> Section 2 is a perfect fix by no means, but at the very least, it can serve as a check on the partisanship that will accompany increased mid-decade redistricting and the use of at-large voting schemes.<sup>207</sup>

## 2. Removing Redistricting Authority from Independent Commissions

Prominent scholars have proposed that creating nonpartisan intermediate institutions would be an important way to mitigate the incumbent entrenching effects of partisan gerrymandering. Several

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205 See also Charles, *supra* note 184, at 1199 (“The challenge for the plaintiffs challenging the dismantling of District 24 is that they are asking the Court to restore an incumbent-protection gerrymander without sufficient justification.”).

206 The problem is that several of the justices gave little weight to this interest, finding that the partisanship in the plan defeats any claim of legitimacy. *LULAC*, 548 U.S. at 448 (Stevens, J., concurring in part and dissenting in part) (opinion joined by Justice Breyer).

207 Even the robust enforcement of section 2 will not completely eliminate all the potential threats to minority rights because, in many ways, *LULAC*, although it uses race to limit politics, is not a complete victory for racial representation. See Charles, *supra* note 184, at 1210 (“Had Justice Kennedy permitted Latino voters to hold on to District 25 as a majority-Latino district and add District 23 as a majority-Latino district, then [*LULAC*] could be understood as an unqualified endorsement of racial representation.”); see also Charles, *supra* note 22, at 638 (warning against the use of race to police politics). But it is certainly a start that can lead us in the direction of better representation for groups that balance dual identities in our electoral system: a political identity, which involves a common ideology, as well as a racial identity, which carries with it the burden of a legacy of discrimination.

of these scholars have argued that redistricting commissions are key to controlling the tendency toward political self-entrenchment that occurs when elites draw district lines.<sup>208</sup> Notably, Chris Elmendorf has proposed that this incumbent entrenchment dynamic can be countered by an advisory committee (“AC”) responsible for “investigating problems, drafting remedial legislation, and submitting its bills for closed-rule votes of the legislature or, in jurisdictions that recognize the referendum, a vote of the people.”<sup>209</sup> Elmendorf concedes that elected officials often have better information than voters but argues that an AC can help low information voters hold these elected officials politically accountable.<sup>210</sup>

Once one accounts for the federalism interest that emerges from gerrymandering, however, it is clear that Elmendorf’s model AC, as well as the other types of independent and nonpartisan commissions proposed in the scholarship, could deprive states of the ability to protect their interests through redistricting. The AC could undermine this function by placing redistricting in the hands of individuals who are often as politically polarized as elected officials but have less information and are less accountable to the electorate.<sup>211</sup> Indeed, low information, or rationally ignorant, voters can promote their policy preferences by using the partisan label as a shortcut in choosing their congressional representatives.<sup>212</sup> In our current system, the low-infor-

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208 See Pildes, *supra* note 22, at 277–83; see also Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. Rev. 1366 (2005); Issacharoff, *supra* note 13, at 614.

209 Elmendorf, *supra* note 208, at 1371.

210 *Id.* at 1380 (“[The AC’s authority would focus on agenda setting as opposed to regulation, and as such, would have the power to] investigate election law problems, to develop candidate reforms, and to trigger a legislative or popular vote on its reforms.”).

211 *Id.* at 1408–09 (“[The commission] might be drawn at random from the pool of former elected officials and high-level political appointees, . . . [or] by setting aside equal number of seats for members of each major party; . . . [or through an] independent nominating commission, or even in a constitutional court.”). The problem with each of these proposals is that the partisanship becomes an issue of degree rather than being removed from the process of selecting members of the commission. See also Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 333 (2007) (arguing that popular initiatives should be used to create redistricting commissions where the legislature will not act); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125, 144 (2010) (“[Elections should be run by] state election management bodies that are insulated from partisan politics.”).

212 See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574–75 (2000) (suggesting that the partisan label serves a signaling function to voters); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 636 (1996) (same); see also Christopher S.

mation voter is not without informational cues that serve as a viable alternative to delegating redistricting authority to independent commissions.

The fact that the commission can have the same partisan intent as the legislature does little to lessen the Supreme Court's burden of trying to determine when partisan gerrymandering has crossed the line into the "excessive" gerrymandering that violates the Constitution.<sup>213</sup> Moreover, even if we disregard this risk of partisanship on the grounds that Elmendorf's model AC likely will be less partisan than elected officials,<sup>214</sup> the AC will still be a somewhat partisan entity that lacks the power to directly promote the interests of the state and can countermand the state legislature's ability to do so. Indeed, in many ways, Elmendorf's model AC seems to function as another agency or branch, which could further push our system of federalism out of whack.<sup>215</sup>

For example, the AC's authority to trigger closed rule legislative votes on its proposals could undermine the state's ability to craft a cohesive legislative agenda that it can then promote through its congressional delegation. A state's congressional delegation helps the state to shape, impede, or promote the implementation of federal policy as it affects the country as a polity and the particular state. A

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Elmendorf & David Schleicher, *Districting for a Low-Information Electorate*, 121 YALE L.J. 1846, 1848 (2012) ("Having a feel for the ideology and past performance of Democrats and Republicans as a whole is usually enough to determine which candidate to support even if you know nothing about the candidates beyond their party affiliation[, but this shortcut is insufficient for primary elections]."). To be fair, because the AC would be created as a matter of state law, the state could try to craft a scheme that would address concerns about accountability and polarization, but it is unclear if the typical low-information voter would be able to discern who to hold responsible for decisions made by the AC without having the party designation to use as a shortcut. See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2010115](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010115) [hereinafter *Informing Consent*].

213 See, e.g., Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, PROPUBLICA (Dec. 21, 2011, 3:38 PM), <http://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission>.

214 See Pildes, *supra* note 22, at 80–81 (arguing that the important question is whether intermediate institutions are better at institutional design than partisan actors).

215 See Elmendorf, *supra* note 208, at 1414 ("[T]he AC should have authority to trigger closed-rule legislative votes or popular referenda on its proposals, [but such power should be limited in frequency in order to] keep the advisory body from unduly impinging on legislative agenda-setting."); see also Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953, 1015 (2007) (arguing that the AC should have authority to trigger closed-rule legislative votes or popular referenda on its proposals).

united delegation can help protect the state from federal overreaching by joining with other delegations to form a governing majority and promote interests that are specific to the state during the process of legislative decision-making.<sup>216</sup> An AC that can push its own legislative agenda could unduly interfere with this process and undermine the constitutional protections that enable states to protect themselves in this manner.

In order to protect the federalism benefits of partisan gerrymandering, at the very least, a court reviewing a redistricting plan drawn by an independent or advisory commission would have to subject the plan to more scrutiny than it otherwise would have had the plan been drawn by state legislators. But even this minor fix would require a completely different approach than courts have taken post-*Vieth*.

For example, in *Shapiro v. Berger*, the district court acknowledged that *Vieth* leaves open the possibility that some future claimant might be able to establish unconstitutional partisan gerrymandering, but that such a claim would have to “surmount two extremely high barriers” including “the lack of comprehensive and neutral principles for drawing electoral boundaries” and “the absence of rules to limit and confine judicial intervention.”<sup>217</sup> Similarly, another district court found partisan gerrymandering claims to be justiciable under the Fourteenth Amendment but applied rational basis review because of language in Justice Kennedy’s *Vieth* opinion that “[a] determination that a gerrymander violates the law must rest on . . . the conclusion that political classifications, . . . though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.”<sup>218</sup> The district court further noted that “political

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216 See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 5–6 (1988). As Merritt observed:

Some state and local governments have proven themselves formidable lobbyists and indefatigable litigants. When the Reagan administration attacked quotas and other types of affirmative action for minorities, several states and cities defended those practices in complex lawsuits. Other states cooperated with social security beneficiaries to sue the federal government for benefits denied the physically and mentally impaired. On the legislative front, state officials recently pressed federal regulators for more stringent restrictions on toxic waste sites, hazardous air pollutants, and pesticides. In both courts and Congress, therefore, states can provide a particularly organized and effective opposition to federal policies.

*Id.* (footnotes omitted).

217 *Shapiro v. Berger*, 328 F. Supp. 2d 496, 504 (S.D.N.Y. 2004).

218 *Johnson-Lee v. City of Minneapolis*, 2004 U.S. Dist. LEXIS 19708, at \*40 (D. Minn. Sept. 30, 2004) (rejecting the plaintiffs’ partisan gerrymandering claim arising from the redistricting of Minneapolis, Minnesota).

affiliation is not afforded the same protection as a suspect class or a fundamental constitutional right.”<sup>219</sup> Thus, the splintered opinions in *Vieth* have allowed courts to respond favorably to the use of partisanship but make little allowance for the fact that a plan drawn by a redistricting commission could be “unrelated to a legitimate legislative objective” in a way that undermines the legitimate use of partisanship in redistricting. Given the state of the case law, it would be difficult for a court to articulate a workable standard to review a plan drawn by independent commissions in order to ensure that the plan does not impair the ability of states to protect their interests through their authority over redistricting. Courts should opt instead to remove authority over redistricting from independent commissions altogether.

### 3. Promoting Partisan Gerrymandering’s Federalism Benefit through Strong State Political Parties

The argument against redistricting conducted by independent commissions necessarily requires that the process be left in the hands of the governing elites; a corollary of this argument is that state political parties must be sufficiently independent and autonomous in order to properly promote the state’s interests through gerrymandering. As Larry Kramer observed, political parties connect politicians at every level of government, but implicit in this observation is that elected officials at the state and national level are always on one accord and band together to promote uniform policy. Contrary to popular belief, however, state officials often develop their preferences towards federal regulation as a reaction to solving immediate problems within their own states. Consequently, there are instances in which the policy preferences of state parties are distinct from their national counterparts, and where there is conflict, the federalism benefit of partisan gerrymandering can be realized only if there is a strong state party able to withstand political pressure from the national party to conform to its policy agenda.<sup>220</sup>

Weak state parties undermine the ability of states to promote their interests through partisan gerrymandering for several reasons. First, the federal government’s willingness to delegate policymaking authority to the states is often contingent upon the partisan composition of the state government, which in turn affects the partisan composition of its House delegation and what policies the state advocates

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219 *Id.*

220 *See, e.g., Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

for at the national level.<sup>221</sup> If the national party is in the governing majority and perceives a state party as being out of line with its platform, it could refuse to delegate policymaking authority to that particular state. Only a strong state party, distinct from the national party, would be able to promote its agenda while navigating any conflicts with its national counterparts.

The partisan composition of the two levels of government also influences the extent to which resources are allocated to the states.<sup>222</sup> As such, if a state sends a delegation that is as cohesive as possible to Congress in order to further the goal of creating a political majority, then they can expect to see substantive gains at the state level if their party achieves majority status.<sup>223</sup> But these gains are arguably contingent on whether the state party is perceived as being in line with the national platform. Strong state parties are key to ensuring that the state still receives these benefits, especially when there is some variation in the policy positions between state and national parties.

Second, both of the major parties in the state have to be able to adequately respond to shifting voter preferences within the state in order to effectively promote the federalism benefits of partisan gerrymandering, which may weigh against anti-competitive electoral structures that marginalize the minor parties in the state, or alternatively, laws that unduly involve the state in the internal affairs of its political

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221 George A. Krause & Ann O'M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. ECON. & ORG. 359, 361 (2005) (“[N]ational level politicians respond directly to partisan political preferences at the state level and either consolidate or delegate policymaking authority accordingly.”). In a recent paper, Chris Elmendorf and David Schleicher argue that differentiation between state and national parties is also important to address the problem of voter ignorance, where the uniformity of party labels between state and national parties can cause voters to “base their decisions in subnational elections on what they know about the parties’ position-taking and performance at the national level.” Elmendorf & Schleicher, *Informing Consent*, *supra* note 212 at 5–6 (suggesting that this problem can be addressed by modifying party labels “to distinguish the party at different levels of government”).

222 David R. Cameron, *The Expansion of the Public Economy: A Comparative Analysis*, 72 AM. POL. SCI. REV. 1243, 1248 (1978); *see also id.* at 1251 (“[P]artisanship of government is associated with the rate of expansion.”).

223 Krause & Bowman, *supra* note 221, at 363 (“[A]n increase in the partisan balance of national electoral institutions favoring Republicans (Democrats) will result in less (greater) policy centralization or consolidation by the U.S. federal government (the top-down partisan hypothesis).”); *see also* John E. Chubb, *The Political Economy of Federalism*, 79 AM. POL. SCI. REV. 994, 1005 (1985) (“Republicans have consistently favored fewer strings, less federal supervision, and the delegation of spending discretion to the state and local governments, whereas Democrats have advocated the opposite.”).

parties.<sup>224</sup> As such, the need for strong state parties has implications for the judicial review of not only partisan gerrymandering claims but also claims involving disputes between the national political party and the state,<sup>225</sup> and to a lesser extent, the minority political party in the state and the state.<sup>226</sup> For example, where a state party and the state are at odds, particularly if the party is the minority in the state, this may indicate not only partisan gridlock, but also an attempt to weaken one state party at the expense of another.<sup>227</sup>

In contrast, where the majority state party and national party collide, deference to the state party may be warranted in order to reaffirm that they are legally and functionally a separate entity from the national party.<sup>228</sup> For example, in *Democratic Party of United States v. Wisconsin ex. rel. La Follette*, the Supreme Court held that the national Democratic Party's First Amendment rights were violated when the election laws of Wisconsin allowed non-Democrats to vote in the Democratic primary without regard to party affiliation. Because national party rules forbade delegates being chosen by anyone but registered Democrats, the Wisconsin law forced the national party to associate with individuals who were not publicly affiliated Democrats.<sup>229</sup>

In the interest of maintaining strong state parties to promote the federalism benefits of partisan gerrymandering, however, this case could have easily come out differently without sacrificing the national

224 See Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 801 (2000) (“[Excessive state interference can undermine] party leaders’ ability to broker their influence and nominate candidates that respond to the party’s electoral coalition.”); see also *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989) (invalidating state laws that prohibited political parties from endorsing candidates and that regulated aspects of their internal affairs).

225 See, e.g., *La Follette*, 450 U.S. at 107.

226 See, e.g., *Tashjian v. Republican Party*, 479 U.S. 208, 211 (1986) (invalidating Connecticut’s closed primary law on the grounds that it infringed on the Republican Party’s freedom to associate with unaffiliated voters); see also Persily & Cain, *supra* note 224, at 801 (arguing that *Tashjian* was decided correctly because, in essence, the closed primary law weakened the party by “inhibit[ing] the party’s ability to field candidates that catered to the needs of the interest groups whose support the party sought”).

227 See Persily & Cain, *supra* note 224, at 801; see also Pildes, *supra* note 22, at 102 n.298 (“[*Tashjian* is a case of] obvious self-entrenchment [in which] the party that controlled key political institutions refused to change the primary structure in a way that the outside party believed would make it more competitive.”).

228 See *LaRouche v. Fowler*, 77 F. Supp. 2d 80, 85 (1999) (“[A] state political party can at times act as a delegatee of power from its resident state [in a way that the national party cannot].”).

229 *La Follette*, 450 U.S. at 107.

party's associational interests. As Justice Powell pointed out in dissent, unaffiliated voters only associate with the party for purposes of participating in the primary; the party "remain[s] free to require public affiliation from anyone wishing any greater degree of participation in party affairs."<sup>230</sup> Ultimately, allowing unaffiliated voters to participate in the primary strengthens the state party's position for the general election, one of the few indicators that the state Democratic Party may have been on board with the open primary, even if its national arm was not.<sup>231</sup> Once we reassess this case with an eye towards increasing the strength of the state party relative to its national counterpart, it is easy to see how the Court could have come to the conclusion that the intrusion on the national party's First Amendment rights was justified. Thus, given that the position of the state party can be in tension with the preferences of the national party, from both a procedural and a policy standpoint, a strong state party is key in ensuring that the state can promote its agenda despite the pressure to conform.<sup>232</sup>

#### CONCLUSION

Partisan gerrymandering has federalism benefits that have been ignored by legal scholars and courts alike. This oversight has occurred because election law scholars tend to minimize the role of federalism in analyzing the construction of political institutions and the behavior of political actors; as a result, they propose legal rules that are inadequate to capture the dynamic at work. Similarly, federalism scholars tend to downplay the fact that the judicial review of politics has federalism implications, often approaching the issue by concluding that the states' authority over elections has played a minimal role in protecting their regulatory authority, and saying little beyond this general observation. Consequently, these literatures often talk past each other rather than utilizing the doctrinal tools available in both areas to analyze complex and multifaceted issues like gerrymandering.

Partisan gerrymandering can facilitate state-federal relations by increasing the probability that a state can send a cohesive delegation to Congress, a delegation that can effectively express the state's policy

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230 *Id.* at 129–30 (Powell, J., dissenting) (“[P]articipation in the caucuses where delegates are selected is limited to publicly affiliated Democrats.”); *cf.* *Cousins v. Wigoda*, 419 U.S. 477, 482 (1975) (holding that state law violated the Democratic Party's freedom of association).

231 *La Follette*, 450 U.S. at 130 (Powell, J., dissenting).

232 An example of this is the fact that in 2009, Governor Crist, a Republican, supported the bailout and solicited funds for Florida although all of the Republicans in Florida's congressional delegation voted against it. *See* Davis, *supra* note 191.

preferences regarding national legislation. Increased use of mid-decade redistricting and at-large voting schemes may be desirable in order to get an accurate gauge of voter preferences and hold elected officials accountable when gerrymandering occurs. Similarly, leaving redistricting in the hands of strong state parties that are distinct from their national counterparts, rather than delegating this power to independent commissions, is also key to this outcome. As the 2003 Texas redistricting illustrates, the Supreme Court cannot articulate rules that insulate federalism-reinforcing gerrymanders from erroneous invalidation, but the Court can, through related substantive areas that implicate redistricting, promote this federalism benefit so that states can protect their authority in a way that has been constitutionally mandated—through congressional redistricting.

