
NOTES

POLITICAL GERRYMANDERING 2000–2008: “A SELF-LIMITING ENTERPRISE”?

It is nearly time to break out the maps again. In a couple of years, state legislatures, redistricting commissions, and eventually courts will sit down to redraw the districts in which candidates will run for the next decade, and those lines are likely to be drawn more carefully than ever to favor one or both of the major political parties.¹ The final election before redistricting is looming, and the money pouring into state legislative campaigns shows that the parties are taking the threats and opportunities of political gerrymandering very seriously.²

There seems to be general agreement among pundits and editorial boards that political gerrymanders are bad, but the issue has failed to excite the voting public. And when parties and voters disadvantaged by the lines have turned to the courts for relief, they have largely been rebuffed, at least when their complaints do not also raise claims of race-based line-drawing.³ Despite the Supreme Court’s holding in *Davis v. Bandemer*⁴ that political gerrymandering claims were justiciable, lower courts failed to come up with a workable test for when political gerrymandering is constitutionally prohibited.⁵ The Court distanced federal courts further from political gerrymandering claims in *Vieth v. Jubelirer*,⁶ in which the Court addressed such a claim for the first time since *Bandemer* and held it nonjusticiable.⁷

Vieth was greeted by many observers with disappointment and dire predictions of the continued rise of political gerrymandering.⁸ The hand-wringing was especially severe because the case was decided just

¹ See Kathy Kiely, *Ruling May Incite Redistricting Battles*, USA TODAY, June 29, 2006, at 5A (quoting then-Representative Rahm Emanuel as predicting that political gerrymandering is “going to be on steroids this time”).

² One state government observer wryly noted that this was “the kind of money that only enters legislative politics when redistricting is approaching.” Posting of Josh Goodman to Ballot Box, <http://ballotbox.governing.com/2008/10/you-know-the-de.html> (Oct. 16, 2008, 14:17).

³ See, e.g., *Bush v. Vera*, 517 U.S. 952, 964 (1996).

⁴ 478 U.S. 109 (1986).

⁵ SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 836 (3d ed. 2007) (“[*Bandemer*] served almost exclusively as an invitation to litigation without much prospect of redress.”).

⁶ 541 U.S. 267 (2004).

⁷ Justice Scalia’s four-member plurality would have overruled *Bandemer* and held political gerrymandering claims nonjusticiable, *id.* at 281 (plurality opinion), while Justice Kennedy, in his decisive concurring opinion, “agree[d] with the plurality that” the particular complaint in *Vieth* should be dismissed but held out the possibility of a future judicially manageable standard, *id.* at 306 (Kennedy, J., concurring in the judgment).

⁸ See, e.g., Editorial, *Democracy Takes a Hit*, N.Y. TIMES, Apr. 29, 2004, at A24; Editorial, *The Court Punts*, WASH. POST, May 1, 2004, at A20.

months after Texas Republicans succeeded in pushing through a new, heavily gerrymandered congressional map in 2003. Two years later, when the Court in *LULAC v. Perry*⁹ found no constitutional harm in that map,¹⁰ concern over political gerrymanders reached a new high.¹¹

By contrast, one person who was probably not terribly troubled by the outcome in the Texas case was Justice O'Connor, who had left the Court by then but had joined the plurality in *Vieth*. She had also authored a concurrence in *Bandemer*, where she voiced early on the argument that all political gerrymandering claims should be held nonjusticiable.¹² But Justice O'Connor's skepticism in *Bandemer* went deeper than justiciability. In a passage frequently cited since 2000, she claimed that courts need not intervene in political gerrymandering disputes because political gerrymanders tend to sort themselves out:

[T]here is good reason to think that political gerrymandering is a self-limiting enterprise. In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious. . . . There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves.¹³

The scope of this claim goes beyond gerrymanders of the type at issue in *Bandemer*, those favoring one party over the other. Indeed, Justice O'Connor implied that gerrymanders worked out "by the parties themselves" are part of the solution, not part of the problem.

Reaction to Justice O'Connor's opinion in *Bandemer* since 1986 has been divided. While most courts are content to say that political gerrymandering claims fail under *Bandemer* and wash their hands of the

⁹ *League of United Latin Am. Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006).

¹⁰ *See id.* at 2612 (opinion of Kennedy, J.) ("[A]ppellants have established no legally impermissible use of political classifications.").

¹¹ *See, e.g.*, Ellen D. Katz, *Reviving the Right To Vote*, 68 OHIO ST. L.J. 1163, 1182 (2007) (arguing that "partisan gerrymanders abound, many extreme in nature, and perhaps none as remarkable as the one challenged in *LULAC* itself," and that "partisan gerrymandering has become a pervasive and ever-expanding enterprise" (footnote omitted)); Steve Chapman, Op-Ed., *The Court to Democracy: Drop Dead, Citizens*, CHI. TRIB., July 2, 2006, § 2, at 7; Editorial, *Democracy's Bad Week*, ST. LOUIS POST-DISPATCH, July 2, 2006, at B2; Editorial, *Texas Massacre*, BOSTON GLOBE, June 29, 2006, at A14.

¹² Like Justice Scalia, Justice O'Connor argued that to find a constitutional violation in such gerrymanders is to establish a constitutionally suspect requirement of proportional representation. *See Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment); *cf. Vieth*, 541 U.S. at 287-88 (plurality opinion).

¹³ *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring in the judgment) (citations omitted) (citing BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 151-59 (1984)).

dispute, at least one court has adopted her reasoning.¹⁴ Some election law scholars, too, have agreed that political gerrymandering is inherently self-limiting.¹⁵ Pundits have also weighed in: Pew Research Center president Andrew Kohut argued that the 2006 Democratic wave “was strong enough to obviously move a lot of seats and overcome safe-seat redistricting.”¹⁶ And two weeks after the 2008 election, journalist and *Almanac of American Politics* coauthor Richard E. Cohen made another supportive argument: “The election results since 2002 offer a reminder that House district lines that initially seemed favorable to one party can become less predictable in the midst of broader political changes or the appeal of individual candidates.”¹⁷

Other commentators, however, have rejected Justice O’Connor’s argument. Redistricting litigator Sam Hirsch wrote in 2003 that the outcome of the post-2000 redistricting “suggests that the rationale behind Justice O’Connor’s blanket rejection of partisan-gerrymandering claims may no longer be empirically valid today.”¹⁸ Three years later, former Department of Justice Civil Rights Division head Gerald Hebert agreed: “Despite the ‘tidal wave’ that allowed Democrats to wrest control of the House of Representatives from Republicans for the first time since 1994, the undemocratic effects of blatant political gerrymandering were alive and well.”¹⁹ Finally, citing the 2003 Texas re-redistricting, Professor Ellen Katz agreed that “things have not turned out quite as Justice O’Connor predicted.”²⁰

Despite this attention to Justice O’Connor’s claim, no commentator has looked systematically at whether the claim has held true over a given period of time. This Note aims to add to the body of research by testing seven redistricting schemes passed after the 2000 census.

¹⁴ See *Henderson v. Perry*, 399 F. Supp. 2d 756, 771 (E.D. Tex. 2005) (quoting *Bandemer*, 478 U.S. at 152 (O’Connor, J., concurring in the judgment)).

¹⁵ See, e.g., Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 776 (2004); Daniel H. Lowenstein, *Vieth’s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL’Y 367, 379 (2005).

¹⁶ *NewsHour with Jim Lehrer* (PBS television broadcast Nov. 8, 2006) (transcript available at http://www.pbs.org/newshour/bb/politics/july-deco6/voterreasons_11-08.html).

¹⁷ Richard E. Cohen, *Redistricting Does GOP No Favors*, NAT’L J. ONLINE, Nov. 20, 2008, http://www.nationaljournal.com/election2008/el_20081120_7633.php.

¹⁸ Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 210 (2003).

¹⁹ Posting of J. Gerald Hebert to Campaign Legal Center Blog, http://www.clcblog.org/blog_item-99.html (Dec. 20, 2006).

²⁰ Katz, *supra* note 11, at 1182. In a separate critique, several commentators have suggested that mid-decade gerrymanders throw the continuing validity of the self-limiting enterprise idea into doubt. See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 846–48 (2005); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 275–76 (2006). The fact that a gerrymander was created mid-decade, however, does not affect this Note’s analysis, which suggests that a gerrymander could be at least partially corrected in a single election.

Part I examines this evidence in detail. Part II concludes that whether a political gerrymander will be self-limiting depends greatly on what kind of political gerrymander it is. The evidence from this decade, at least, suggests that courts and commentators have erred in focusing their concern on political gerrymanders that enhance slight advantages and disadvantages between two more or less equally powerful parties. More attention and sharper judicial scrutiny are warranted for two more damaging types of gerrymanders: those that attempt to push a clearly stronger party's advantage to the limit, and those in which both parties cooperate in an attempt to lock in temporary advantages and disadvantages and keep their own incumbents in office.

I. THE MAPS AND THE STORIES BEHIND THEM

Before examining the results of the post-2000 gerrymanders in detail, it is important to address two methodological issues: selection of test cases and the problem of baselines.

Of the fifty states and myriad local jurisdictions that conduct redistricting, this Note examines only seven statewide congressional redistricting plans.²¹ Five of these are from states that saw their congressional redistricting plans challenged as unconstitutional political gerrymanders between the 2000 census and the Supreme Court's decision in *Vieth*: Florida, Maryland, Michigan, Pennsylvania, and Texas.²² Because these are the plans that courts would have adjudicated if they were in the business of adjudicating political gerrymanders, they seem a logical starting place to begin evaluating whether political gerrymanders really are a "self-limiting enterprise." The remaining two plans were not challenged in court but are examples of another distinct type: bipartisan gerrymanders.

The first five districting schemes can be divided into two main groups for purposes of evaluating the success of the alleged political gerrymander. The relevance of the distinction is simple: one group is plausibly self-limiting, and the other is not. The first group consists of

²¹ Of course, other states could be and were accused of creating political gerrymanders after the 2000 census. For example, Ohio's congressional makeup was initially quite lopsided compared to the state's even division between the parties in recent statewide elections; Republicans had a 12-6 edge following the 2002 election. MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS 2008*, at 1271 (2007) [hereinafter BARONE & COHEN, 2008 ALMANAC]. Most of the states not included here, however, face some obstacle to partisan gerrymandering at the congressional level: for example, they may be too small, they may already have a single-party delegation, they may do their redistricting by commission, or they may be obstructed from partisan gerrymandering by the laws governing racial gerrymandering.

²² Each of these suits was ultimately unsuccessful; the one in Pennsylvania was the suit that rose to the Supreme Court in *Vieth*. Federal lawsuits were also filed against a gerrymander in Georgia, but because the results of that gerrymander largely duplicate the results in others of its kind, it is not discussed in detail.

cases where both parties are strong in the state and regularly contend for majority status in statewide and presidential elections. In these cases, a political gerrymander results from the fact that, despite the normal back-and-forth of power between the parties in the state, one party happens to be in control of the state's mechanism for redistricting at the time redistricting occurs. Florida, Michigan, and Pennsylvania exemplify this type of big party vs. big party gerrymander. Ultimately, this Note argues that this is the only group that the self-limiting principle can plausibly address.

The second group consists of cases in which one party is demonstrably stronger in the state, regularly winning all or the vast majority of statewide elections. In these cases, a political gerrymander results from the dominant party using its control over redistricting to give the weaker party even fewer U.S. House seats than it might normally expect to control based on statewide performance. Maryland is an example of this kind of gerrymander. The gerrymander in Texas, meanwhile, is a variation of this group: a transitional gerrymander, in which the previous small party (the Republicans) abruptly displaced the previous big party (the Democrats) and redistricted mid-decade.

In addition to these five maps, this Note examines two maps that were not challenged in court: those of California and Illinois. These are examples of a third group, bipartisan gerrymanders, in which both parties make a deal to solidify their incumbents by drawing the lines to combine as many supporters of the same party as possible.

These seven maps represent a reasonable sample of modern political gerrymanders. Even assuming, however, that these are representative of the three major types of political gerrymanders, it is still difficult to evaluate the success of a political gerrymander without some baseline of what electoral results would look like without the gerrymander. The problem is that, with frequent statewide elections and wide variations in a party's performance, no such baseline exists. Such problems with establishing a baseline supported the Supreme Court's decision not to reach the merits of the case in *Vieth*.²³

This Note does not attempt, as some scholars have, to use statistics to establish a baseline.²⁴ Indeed, an attempt to define and assess a gerrymander using statistics alone would immediately run into prob-

²³ See *Vieth v. Jubelirer*, 541 U.S. 267, 288–90 (2004) (plurality opinion).

²⁴ Even scholars who have attempted to quantify the effects of political gerrymandering acknowledge the problems inherent to the task. See, e.g., Richard G. Niemi, *The Swing Ratio As a Measure of Partisan Gerrymandering*, in *POLITICAL GERRYMANDERING AND THE COURTS* 171, 176 (Bernard Grofman ed., 1990) (proposing a statistical measure but conceding that “there is no agreed-upon ‘zero-point’ from which to measure deviations”).

lems that Justice Scalia identified in *Vieth*.²⁵ Instead, the Note attempts to discern the goals of the politicians and the parties who controlled or influenced the way the maps were drawn, and then to assess whether those goals have been achieved over the past four election cycles. Statistics play an important part in this assessment, but the qualitative aspect — the story of how a map was drawn and how it affected individual politicians — is essential to identifying a political gerrymander and figuring out whether it has succeeded.

Finally, because this case-by-case approach lacks the precision of a statistical model, two things should be clear at the outset. First, not every election presents the opportunity to evaluate political gerrymanders. The 2006 and 2008 elections, however, were in many ways perfect test cases for Justice O'Connor's argument because in each case the political tide shifted decisively against a party that had gerrymandered in several states. If the "levees of politically gerrymandered congressional districts"²⁶ held against these two waves, it would cast great doubt on Justice O'Connor's argument. By contrast, if the post-2000 levees were breached, it would lend substantial evidentiary support to the self-limiting enterprise claim, with the important qualification that it still took a rare succession of wave elections to overcome the lines.²⁷

Second, certain misleading outliers and false positives should be identified and peeled away from the results. For example, the defeat of an incumbent mired in scandal or sitting in a district that had been trending the other party's way for years does not say much about the ability of a general shift in mood to overwhelm a gerrymander.²⁸ The question, then, is this: when the voters wanted to "throw the rascals out,"²⁹ without any underlying demographic shift, and with the purpose of holding the incumbents accountable for their policies rather than for a scandal, were they able to do so?

²⁵ See *Vieth*, 541 U.S. at 288–90 (plurality opinion). For example, what is the "proper" share of seats for each party? And could a party's failure to earn that share simply indicate weaker candidates or other factors not involving unfairness of the map?

²⁶ Hebert, *supra* note 19.

²⁷ See Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1122 (2007) (comparing the 2006 election to past elections and concluding "not that a change of power cannot happen, only that it takes historic shifts in voter preferences for it to occur").

²⁸ These misleading cases were more common in 2006, see BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 28 ("[Democrats] backed candidates where Republicans seemed susceptible to charges of encouraging a 'climate of corruption' . . ."), especially because Democrats by 2008 had already picked off much of the low-hanging fruit, see *id.* at 29 (noting that, after 2006, "[o]nly 8 House Republicans represented districts that were carried by John Kerry").

²⁹ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 622–23 (2002) (quoting G. BINGHAM POWELL, *ELECTIONS AS INSTRUMENTS OF DEMOCRACY* 47 (2000)).

A. *Big Party vs. Big Party*

1. *Florida.* — When it came time for the Republican-dominated state legislature and Republican Governor Jeb Bush to redraw the congressional map two years after the debacle of 2000, the state lived up to its unfortunate reputation in the area of elections. In 2000, Florida had sent fifteen Republicans and eight Democrats to the U.S. House of Representatives. Two years later, following redistricting, it sent eighteen Republicans and just seven Democrats, a net shift of four seats in the Republicans' favor with seemingly impregnable defenses protecting the strengthened Republican majority.³⁰ Nevertheless, both major parties were highly competitive in the state: Democrat Lawton Chiles had been governor just a few years earlier, both U.S. senators were Democrats, and, of course, Florida had shown in the 2000 election just how evenly matched the two parties were.³¹

The Republicans' goals for the congressional map were simple and relatively modest: shore up endangered incumbents and draw the two new districts earned through reapportionment to elect Republicans. Across the state, they moved Democratic voters from marginal Republican districts into already safe Democratic districts.³² This solidified the positions of certain Republican incumbents, including Ric Keller, who grabbed Republicans in exchange for Democrats around Orlando, and Mark Foley, who dropped dangerous Democratic areas in infamous Palm Beach County.³³ The most drastic change was to protect Clay Shaw, who in 2000 had won a nailbiter in his strongly Democratic South Florida district. In that district, Republicans "raised the Bush 2000 percentage . . . from 39% to 48% — the biggest increase in any Florida district."³⁴ Each of these incumbents cruised to reelection in 2002.³⁵

Republicans also shifted some counties in northwestern Florida, displacing incumbent Democrat Karen Thurman from her home base in Gainesville and giving Republican state senator Ginny Brown-Waite a relatively clear path to a safe seat.³⁶ They also succeeded in their efforts to make Florida's two new districts Republican, in each case taking just enough Republicans and just enough Democrats to

³⁰ See MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 2004, at 379 (2003) [hereinafter BARONE & COHEN, 2004 ALMANAC].

³¹ MICHAEL BARONE & RICHARD E. COHEN WITH CHARLES E. COOK JR., *THE ALMANAC OF AMERICAN POLITICS* 2002, at 362–63 (2001) [hereinafter BARONE & COHEN, 2002 ALMANAC].

³² BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 396, 414–15, 434, 436.

³³ *Id.* at 407–08, 426.

³⁴ *Id.* at 440.

³⁵ *Id.* at 406, 426, 440.

³⁶ *Id.* at 400–01.

create an approximately 55% Republican district, one around Orlando and the other in the fast-growing exurbs of Miami.³⁷ It did not hurt that the Orlando district was “tailored to [Florida House] Speaker Tom Feeney” and the Miami district “for [Mario] Diaz-Balart”;³⁸ these two state representatives went on to win the new seats in 2002.³⁹ Finally, Republicans molded a district in the southwestern part of the state that was perfect for Katherine Harris, the Florida Secretary of State and the Democrats’ 2000 archnemesis charged with using her position to ease George W. Bush’s path to the presidency.⁴⁰ “Paybacks can be sweet,” one Florida Democrat said.⁴¹

Democrats quickly noticed that the congressional map was tilted against them. “The problem with this map,” one Democratic state senator earnestly complained, “is that it is designed to elect as many Republicans as possible.”⁴² In *Martinez v. Bush*,⁴³ state and local Democratic officials challenged the map in federal court as a political gerrymander. The challenge failed: relying on the Supreme Court’s racial gerrymandering jurisprudence,⁴⁴ a three-judge panel rejected the claim because the plaintiffs failed to show that voters in the gerrymandered districts would always vote the same way. Although framed in terms of the political cohesiveness requirement of *Thornburg v. Gingles*,⁴⁵ this was precisely the complaint that Justice Scalia would express in *Vieth* two years later. In a separate state court suit, which the Florida Constitution requires the Attorney General to bring,⁴⁶ the Florida Supreme Court declared the map facially valid because no party had demonstrated that it had a discriminatory effect on an identifiable political group.⁴⁷

³⁷ *Id.* at 445–47, 448–49.

³⁸ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 450.

³⁹ BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 445, 447.

⁴⁰ *Id.* at 419.

⁴¹ Gary Fineout, *State Lawmakers Make Harris Happy*, SARASOTA HERALD-TRIB., Mar. 20, 2002, at BS5 (quoting Ryan Banfill, Democratic Party spokesman) (internal quotation marks omitted).

⁴² S.V. Date, *Redistricting Plan Already Under Fire from Democrats*, PALM BEACH POST, Mar. 23, 2002, at 20A (quoting State Sen. Ron Klein) (internal quotation marks omitted). Klein went on to defeat Shaw in 2006. BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 443.

⁴³ 234 F. Supp. 2d 1275 (S.D. Fla. 2002).

⁴⁴ *Id.* at 1325. Specifically, the court applied the three-prong test for claims of racial gerrymandering under *Thornburg v. Gingles*, 478 U.S. 30 (1986), requiring the plaintiffs to show that the minority group in a challenged district was geographically compact, politically cohesive, and regularly stifled by majority bloc voting. *Martinez*, 234 F. Supp. 2d at 1334 (citing *Gingles*, 478 U.S. at 50–51).

⁴⁵ 478 U.S. 30.

⁴⁶ See FLA. CONST. art. III, § 16(c).

⁴⁷ See *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819 (Fla. 2002). A later as-applied suit was dismissed. See *Fla. Senate v. Forman*, 826 So. 2d 279 (Fla. 2002).

For the first two cycles, the Republicans' gerrymander held firm. Ric Keller earned 65% and 61% of the vote;⁴⁸ Mark Foley earned 79% and 68%.⁴⁹ The two new congressmen were untouchable: Feeney won 62% and Diaz-Balart 65% in 2002; both were unopposed in 2004.⁵⁰ But both of those elections were elections where voters felt good about Republicans — they reelected Jeb Bush as governor by a large margin in 2002 and endorsed President George W. Bush's reelection in 2004.⁵¹

The self-limiting enterprise claim would be given a sterner test in 2006, a much more Democratic year. Democrats won Mark Foley's district, after Foley resigned in disgrace because of the congressional page scandal, and Clay Shaw's district, which even in revised form proved too Democratic for Shaw to hold in a wave election.⁵² Yet both of these seats arguably fit within one of the unconvincing pickup categories: Foley's seat fell due to scandal and Shaw's due to an existing Democratic drift.⁵³ There was a palpable sense that the map had contained what would otherwise have been a Democratic surge.⁵⁴

Two years later, in another Democratic year, Keller and Feeney also went down in defeat. Several other Republican incumbents, however, avoided the same fate, and Mark Foley's Democratic replacement lost in a cloud of scandal, following in his predecessor's footsteps.⁵⁵ After the 2008 election, then, the Florida congressional delegation had evened somewhat from its 18–7 peak in 2002 to a 15–10 Republican advantage. In all, though Republicans felt some blowback in 2008, the state's elections since 2000 provide only some support for Justice O'Connor's claim.

2. *Michigan.* — As in Florida, Republicans controlled the state government (and hence the redistricting process) when it came time to redraw Michigan's districts in 2001. But whereas Florida's population had grown massively and the question was who would reap the gains, Michigan had barely grown in the past ten years and was due to lose a congressional seat in the 2000 reapportionment.⁵⁶ In Michigan, then, the question was who would be left in the cold. Fortunately for Republicans, population drops in the Detroit–Ann Arbor area put De-

⁴⁸ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 408.

⁴⁹ *Id.* at 428; BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 426.

⁵⁰ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 446, 449.

⁵¹ *Id.* at 382, 384.

⁵² *Id.* at 428–29, 443.

⁵³ BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 441.

⁵⁴ William March, *Democrats Swipe 2 Congressional Seats*, TAMPA TRIB., Nov. 8, 2006, at 1 (“The anti-Republican wave that could put Democrats in control of Congress for the first time since 1994 lapped into Florida as a ripple Tuesday, not reaching as high as the party had hoped.”); *see also* Hebert, *supra* note 19.

⁵⁵ Perry Bacon Jr., *Democrats Win 18 More House Seats*, WASH. POST, Nov. 6, 2008, at A41.

⁵⁶ BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 809.

mocrats squarely in the line of fire.⁵⁷ Michigan Republicans were also more ambitious than their counterparts in Florida. In the 2000 election, Democrats won nine of Michigan's sixteen congressional seats. Two years later, their numbers had been reduced to six of fifteen, shifting a 9–7 advantage to a 9–6 deficit.⁵⁸

The Republicans' first goal was to use the state's loss of a congressional district to take out one of the Democratic incumbents. The unlucky member, Lynn Rivers, saw her district combined with the district south of Detroit belonging to fellow Democrat John Dingell, the longest-serving member of the House. Rivers put up a spirited fight, but the outcome was assured the moment her home base of Ann Arbor was placed in the same district as Dingell's.⁵⁹

The rest of the significant changes were straightforward. Democrats were packed into Dingell's and Sander Levin's suburban Detroit districts, which in turn sent Republican reinforcements into the marginal districts of Joe Knollenberg and Mike Rogers.⁶⁰ Republicans also jammed together Democratic strongholds in the east into one district with a Democratic super-majority,⁶¹ leaving enough Republicans elsewhere to hand David Bonior's seat to the Republican secretary of state, Candice Miller,⁶² and another Democratic seat to state senator Thad McCotter, who essentially drew his own seat as vice-chairman of the state senate redistricting committee.⁶³ Bonior saw the writing on the wall and ran unsuccessfully for governor, a fairly astonishing result for the sitting Democratic whip and a sixteen-year House veteran.⁶⁴

Coincidentally (or not), soon-to-be Representative Miller was also the official in charge of elections in Michigan, which made her one of the defendants in *O'Lear v. Miller*,⁶⁵ a lawsuit filed by Democratic voters in 2002 alleging unconstitutional political gerrymandering in the Michigan congressional map. Miller argued that there was no unconstitutional political bias in a map that would, in a matter of months, give her a seat in Congress. The court agreed and dismissed the lawsuit. Although it acknowledged that the Democratic voters were an identifiable political group, the court echoed Justice O'Connor's self-limiting enterprise claim in holding that the plaintiffs needed to show frustration of that political group in more than one election, especially

⁵⁷ BARONE & COHEN, 2002 ALMANAC, *supra* note 31, at 776.

⁵⁸ BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 809.

⁵⁹ *Id.* at 854–55; see also Deb Price, *Rivers Says Foe's Clout Defeated Her*, DETROIT NEWS, Aug. 8, 2002, at 9A.

⁶⁰ BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 809, 845, 853.

⁶¹ *Id.* at 829.

⁶² *Id.* at 841.

⁶³ *Id.* at 843.

⁶⁴ *Id.* at 809.

⁶⁵ 222 F. Supp. 2d 850 (E.D. Mich. 2002).

“in a competitive state — like Michigan — where a moderate shift in voting trends could result in majority status for the minority party.”⁶⁶

The Michigan political gerrymander held up even better than the Florida gerrymander did for the first two elections. Despite the fact that the districts drawn to elect Republicans were somewhat less secure, they had been drawn carefully enough that both new members won convincingly in 2002 and in 2004, and none of Michigan’s other House seats changed hands either.⁶⁷ In the Democratic wave of 2006, the gerrymander bent but did not break: McCotter prevailed with 54%, Knollenberg with 52%, Rogers with 55%, and a new member, Tim Walberg, with 50%.⁶⁸ It took a second wave in 2008 to unseat two of the Republican incumbents who had benefited from gerrymandered districts, as Knollenberg and Walberg lost to Democratic challengers.⁶⁹ This reversed the partisan balance in the delegation to an 8–7 Democratic advantage as the 2010 redistricting approaches — a slightly better record for Justice O’Connor, but with some Republicans still benefiting from the gerrymander despite two successive waves.

3. *Pennsylvania.* — With a congressional delegation that has shifted from a 12–7 Republican advantage to an 11–8 Democratic edge since the map was adopted, Pennsylvania would seem to present the best case yet for Justice O’Connor’s claim that the vagaries of politics will cure overzealous gerrymandering. In 2002, however, it looked as though Republicans in the state legislature had drawn the perfect map. “They told the people of Pennsylvania to go to hell,” said a Democratic state senator. “This is a political map to last 10 years.”⁷⁰

Pennsylvania lost not one but two seats in the 2000 reapportionment, giving Republican line-drawers an even greater opportunity to eliminate Democratic seats. The targets were especially tempting because, as in Michigan, there had been dramatic population decline in some heavily Democratic areas.⁷¹ It was immediately clear that one of Philadelphia’s three solid Democratic districts would be divided up, and incumbent Bob Borski’s district was chosen.⁷² Many argued that the loss of Borski, a longtime member with the top minority spot on the Transportation Committee, would cost the region millions in trans-

⁶⁶ *Id.* at 856.

⁶⁷ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 829, 861, 863.

⁶⁸ *Id.* at 853, 855, 858, 863.

⁶⁹ CNN Election Center 2008, State Election Results: Michigan, <http://www.cnn.com/ELECTION/2008/results/state/#MI> (last visited Feb. 8, 2009).

⁷⁰ Thomas Fitzgerald, *GOP Finds Agreement on Proposal for Districts*, PHILA. INQUIRER, Jan. 3, 2002, at B1 (quoting State Sen. Robert Mellow) (internal quotation marks omitted).

⁷¹ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1375.

⁷² *See id.* at 1376.

portation funding.⁷³ Moreover, losing Borski meant losing a guaranteed seat: even if Democrats did eventually make up the loss, it would come at a high cost in time and money they otherwise would not have had to spend. A similar fate befell veteran Bill Coyne in the other declining Democratic population center of Pittsburgh, where Republicans combined two Democratic seats into one.⁷⁴

Throughout the process, line-drawers paid as much attention to how the lines fit individual politicians as to how they fit geographical communities. By packing Democratic voters into one district, the map created a new, snaking suburban Pittsburgh district, drawn “with [Republican state senator Tim] Murphy in mind.”⁷⁵ Despite the fact that Murphy’s district only leaned Republican on paper, the district was tailored so well for Murphy that Frank Mascara, who had represented parts of the new Republican district, chose instead to run against fellow incumbent Democrat John Murtha in the packed Democratic district and lost the primary in a landslide.⁷⁶

Back east, meanwhile, Republicans split incumbent Democrat Tim Holden’s district in two, leaving him with an unpleasant choice: run in a new central Pennsylvania district, even more Republican than his old district and favoring another incumbent, Republican George Gekas; or run in a new, multifingered district west of Philadelphia, more favorable to a Democrat on paper but drawn specifically for a Republican state senator, Jim Gerlach.⁷⁷ Holden chose to run in the central district, and (to the surprise of many) won the seat that was designed to eliminate him. But Gerlach was narrowly elected in the new district, meaning the Republicans’ gambit resulted in a draw.⁷⁸

Elsewhere in the state, Republicans shored up their incumbents, packing Democrats into a Scranton/Wilkes-Barre district to make a safer seat for newly elected Republican Don Sherwood and exchanging Democrats for Republicans to solidify Melissa Hart’s and Phil English’s northwestern districts.⁷⁹ Other Republican incumbents, including Curt Weldon in Delaware County, Jim Greenwood in Bucks County, and Pat Toomey in Bethlehem-Allentown, saw only moderate changes to their competitive districts, leaving more Republicans to spread around elsewhere but spreading them fairly thin.⁸⁰

⁷³ See Thomas Fitzgerald, *New Pa. Districts May Cost Region*, PHILA. INQUIRER, Jan. 4, 2002, at A1.

⁷⁴ BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 1398.

⁷⁵ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1430.

⁷⁶ BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 1392–93.

⁷⁷ *Id.* at 1376, 1406.

⁷⁸ *Id.*

⁷⁹ See *id.* at 1369, 1372, 1387, 1390.

⁸⁰ See *id.* at 1377, 1379, 1381–82, 1400–01.

There were a few signs of the kind of overconfidence among Republicans that Justice O'Connor claimed would thwart such plans,⁸¹ but Democrats generally seemed resigned. Despite pessimism about the success of a legal challenge,⁸² a federal suit did go forward and eventually reached the Supreme Court in *Vieth*. The district court in that case, like many others, dismissed the political gerrymandering count for failure to state a claim because the plaintiffs had failed to show that the map had a discriminatory effect on their political group as required by *Bandemer*.⁸³

The map proved effective at first: 2002 and 2004 saw the gerrymander hold (with the exception of Democrat Holden's unexpected victory), even as Republican incumbents Greenwood and Toomey retired.⁸⁴ Things did not go as well for the map-drawers in 2006, as Republicans lost four seats.⁸⁵ Looking at the districts that flipped, however, the results are not convincingly in Justice O'Connor's favor.

Don Sherwood's loss in a heavily Republican district can immediately be pared off as the result of Sherwood's personal scandal.⁸⁶ The defeat of Curt Weldon, too, was due in large part to personal controversy.⁸⁷ More convincing evidence for those who argue that gerrymanders are surmountable were the losses of Melissa Hart and Greenwood's replacement, Mike Fitzpatrick.⁸⁸ No personal problems dogged these Republicans, and even in their marginal districts they had been comfortably elected two years earlier.⁸⁹ Yet, as in other gerrymandered states, Democrats' glee was tempered by the feeling that but for the unfair lines they would have gotten more.⁹⁰ After all, Jim Gerlach had survived in his personalized district, and the shored-up Phil English had held on too.⁹¹

⁸¹ See Fitzgerald, *supra* note 70 (reporting Republican officials' confidence that a rightward trend in the state would continue and that Republicans would continue to be elected even in districts with a Democratic registration advantage).

⁸² See *id.* ("I don't think a challenge to this plan . . . would work." (quoting Democratic State Rep. Mike Veon) (internal quotation marks omitted)).

⁸³ See *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 484–85 (M.D. Pa. 2003) (per curiam); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 547 (M.D. Pa. 2002).

⁸⁴ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1376, 1405, 1423.

⁸⁵ *Id.* at 1376.

⁸⁶ See *id.* at 1409–10.

⁸⁷ See *id.* at 1402–03.

⁸⁸ See *id.* at 1396 (attributing Hart's loss to Democratic parts of her district); Brian Callaway, *Fitzpatrick Concedes to Murphy*, MORNING CALL (Allentown, Pa.), Nov. 9, 2006, at B1 (suggesting that Fitzpatrick lost because of Republican overreaching).

⁸⁹ See BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1395, 1403.

⁹⁰ See, e.g., Todd Mason, *Democrats Big in the 'Burbs*, PHILA. INQUIRER, Nov. 9, 2006, at B6 (noting that Democrats were able to "expand their beachhead in the burbs," but failed to "sweep moderate Republicans from power").

⁹¹ See BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1393, 1399.

In 2008, Democrats struck another blow against the Republicans' gerrymander as English was finished off by a stronger Democratic opponent, increasing the Democrats' margin to 12-7.⁹² English's defeat, like Hart's and Fitzpatrick's in 2006, was a point for Justice O'Connor in that he did not lose due to scandal or demographic shift. However, Gerlach and Murphy both survived, and the anatomy of Gerlach's narrow victory is a strong counter to the self-limiting principle. In 2008, as in 2006, Gerlach ran up a large margin in his home base, enough to overwhelm the Democratic advantage in other parts of the district.⁹³ This was exactly what the redistricters, looking at the map in 2002 with Gerlach in mind, had hoped and believed would happen. What initially looked like a strong case for the self-limiting principle presents much more equivocal results on closer inspection.

B. Big Party vs. Small Party

1. *Maryland.* — Republicans are not the only ones who can draw an effective political gerrymander, and closely divided states are not the only places where lines can be manipulated for partisan gain. Unlike Pennsylvania, Florida, or Michigan, the political landscape in Maryland heavily favors Democrats. Concentrations of Democratic voters in Baltimore and in the D.C. suburbs far outweigh the areas of Republican strength. Maryland's representatives in government reflected that Democratic dominance in 2000: Democrat Parris Glendening was governor and Democrats held strong majorities in the state legislature.⁹⁴ On the federal level, both U.S. senators were Democrats, but due to the crossover appeal of Republican incumbents Bob Ehrlich and Connie Morella, Democrats entered redistricting in Maryland with control of only four of the state's eight congressional seats.⁹⁵

The Democrats' new map made Democratic representation in the House delegation reflect typical statewide performance and then some. Morella's base was Montgomery County, a heavily Democratic suburb of Washington that nonetheless reelected her because of her political moderation and history of constituent service.⁹⁶ The new map cut half of Montgomery out of her district and replaced it with areas whose voters had no cross-partisan loyalty to Morella.⁹⁷ Other moves resulted in Ehrlich's district changing from a 55% Bush district to a 57%

⁹² CNN Election Center 2008, State Election Results: Pennsylvania, <http://www.cnn.com/ELECTION/2008/results/state/#PA> (last visited Feb. 8, 2009).

⁹³ CNN Election Center 2008, County Results: Pennsylvania 06, <http://www.cnn.com/ELECTION/2008/results/county/#PAH06p1> (last visited Feb. 8, 2009).

⁹⁴ BARONE & COHEN, 2002 ALMANAC, *supra* note 31, at 705-06.

⁹⁵ *Id.* at 707-09.

⁹⁶ *Id.* at 728-29.

⁹⁷ BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 764-65.

Gore district.⁹⁸ Ehrlich wisely decided to pursue other opportunities, winning the governor's race in 2002, while Morella tried her luck but was defeated by Democrat Chris Van Hollen.⁹⁹ "The die was cast," she sighed afterward.¹⁰⁰ Her vanquisher has since risen to become "one of the barons of Capitol Hill,"¹⁰¹ worth much more to the Democrats than a simple vote in the House. For the Republicans, on the other hand, losing Morella's and Ehrlich's seats meant the further marginalization of a party already on the outs in the state.

A single plaintiff, local politician Bob Duckworth, challenged one aspect of the map as an unconstitutional political gerrymander in a 2002 lawsuit. The federal district court dismissed his complaint.¹⁰² On appeal, the Fourth Circuit held that dismissal was appropriate because Duckworth's complaint was "devoid of pleadings that allege facts sufficient to prove actual discriminatory effect" as required by *Bandemer*.¹⁰³ A year later, Duckworth was trounced by Democrat Ben Cardin in a run for Congress under the new map.¹⁰⁴

The gerrymander has been a complete success. Since 2002, none of the state's Democratic incumbents has earned less than 60% of the vote.¹⁰⁵

2. *Texas*. — Texas is a state like Maryland where one party is dominant over the other. Unlike Maryland, however, the dominant party changed in the past decade when Republicans seized control of the state. The most infamous of the gerrymanders challenged in court this decade, Texas's 2003 map is a variant of the big party vs. small party gerrymander, a transitional gerrymander intended to solidify gains made independently of the district lines.¹⁰⁶

The state's 2002 redistricting, which was essentially an incumbent-protection gerrymander, was the product of a divided state government and a federal court that approved the map in the interest of preserving the influence of the state's voters through reelection of its

⁹⁸ *Id.* at 750–51.

⁹⁹ *Id.* at 740.

¹⁰⁰ Jeff Barker, *Morella Reflects on 16 Years in House*, BALT. SUN, Nov. 7, 2002, at 18A (quoting Morella) (internal quotation marks omitted).

¹⁰¹ Barbara Matusow, *Can a Nice Guy Finish First?*, WASHINGTONIAN, June 2008, at 50.

¹⁰² See *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543 (D. Md. 2002).

¹⁰³ *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 777 (4th Cir. 2003).

¹⁰⁴ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 768.

¹⁰⁵ *Id.* at 766, 768, 770, 773, 779, 781; CNN Election Center 2008, State Election Results: Maryland, <http://www.cnn.com/ELECTION/2008/results/state/#MD> (last visited Feb. 8, 2009).

¹⁰⁶ Georgia Republicans adopted a similar transitional gerrymander in 2005 when they seized control of the full state legislature for the first time since Reconstruction. As in the other cases of a big party vs. small party gerrymander, none of the Republican incumbents who benefited from the gerrymander has lost since its adoption, and they do not appear likely to lose anytime soon.

powerful longtime incumbents.¹⁰⁷ After taking over the state House in 2002, Republicans set out to replace that map with one of their own.

Democratic legislators did all they could to stop the re-redistricting, even fleeing Texas to deny a quorum for a vote.¹⁰⁸ Nevertheless, the map was eventually adopted in a special session; Democrats, perhaps sobered by the fact that state Republicans had called on the U.S. Department of Homeland Security to chase after them the first time,¹⁰⁹ did not flee again and allowed the map to pass over their objection.¹¹⁰

The first election under the new map, in 2004, resulted in a wild swing in the makeup of the congressional delegation: a 17–15 Democratic advantage became a 21–11 Republican supermajority.¹¹¹ The gains came easily — all the redistricters had to do was remove the Democratic incumbents' homes from the areas they represented. The difficulty that most Democratic incumbents faced was statistically comparable to what they faced before the change.¹¹² But what the statistics did not show was that these Democrats' home bases were now attached to new and unfriendly sets of Republican voters and the districts were often tailored to a handpicked Republican opponent. A swaggering e-mail written by one Republican congressman's legislative counsel emphasized that personal considerations were front and center for the line-drawers:

Chet [Edwards] loses his Killeen-Fort Hood base in exchange for conservative Johnson County They will not like the fact he kills babies, prevents kids from praying and wants to take their guns. State Rep. Arlene Wohlgemuth (R), come on down, you are the next congressman from Texas.¹¹³

Republicans went out of their way to eliminate some Democratic districts. Democrats had held four Houston-area districts; by packing two of them to the brim with Democratic voters, Republicans obliterated a third one — the district that replaced it went 62% for Bush in 2004.¹¹⁴ Elsewhere, House Democratic Caucus chair Martin Frost's

¹⁰⁷ See *Balderas v. Texas*, No. 6:01CV158, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex. Nov. 14, 2001). The state's two new House seats, which it gained in the 2000 reapportionment, went to Republicans.

¹⁰⁸ Lee Hockstader, *GOP Plan Prompts a Texas Exodus*, WASH. POST, May 13, 2003, at A1.

¹⁰⁹ See Philip Shenon, *Report Finds No Wrongdoing in Search for Texas Lawmakers*, N.Y. TIMES, June 17, 2003, at A19.

¹¹⁰ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1534.

¹¹¹ *Id.* at 1532.

¹¹² Compare the Bush percentages in BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 1521, 1544, 1557, with those in BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1546, 1583, 1589.

¹¹³ Edward Walsh, *GOP Report Feeds Furor over Texas Redistricting*, WASH. POST, Oct. 11, 2003, at A1 (quoting e-mail from Joby Fortson, Legislative Counsel to U.S. Rep. Joe Barton, to Republican congressional aides) (internal quotation marks omitted). Edwards managed to defeat Wohlgemuth narrowly in 2004.

¹¹⁴ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1564, 1566, 1587, 1615.

district straddling Dallas-Fort Worth was torn to pieces. Parts of it now lie in five districts, all represented by Republicans.¹¹⁵ As the legislative aide's e-mail put it, Frost's district "simply disappear[ed]."¹¹⁶

The 2003 gerrymander has been highly effective. Republicans did lose two seats in 2006, but these were not the result of Republican overreaching — one was Tom DeLay's open seat, which went to the Democrats after DeLay was indicted and resigned,¹¹⁷ and the other was Henry Bonilla, whose district the Supreme Court held violated the Voting Rights Act and ordered redrawn to create a Hispanic (and Democratic) majority.¹¹⁸ In 2008, DeLay's old seat returned to the Republicans, and all Republican incumbents won despite the strong Democratic year.¹¹⁹ As with Jim Gerlach's win in Pennsylvania, the geographical breakdown of the close races in 2008 showed that the Republicans' gerrymander worked just as they had intended.¹²⁰

C. Party and Party vs. Voters

All seven of the post-2000 gerrymanders challenged as unconstitutional fall into one of the two preceding groups. But there is a third group of political gerrymanders whose effects have proven even more difficult to overcome: bipartisan, incumbent-protection gerrymanders.

1. *Illinois*. — When Democrats took control of the Illinois state government in 2002, they had an opportunity to do their own mid-decade redistricting and counter some of the blows that Republicans had landed to their electoral prospects in other states. Instead, a bipartisan deal struck a year earlier held out against the proposed change and has held firm ever since.

In 2000, Illinois was due to lose a member of Congress.¹²¹ Because control of redistricting was then split between a Republican governor and state senate and a Democratic state house, the most likely result was that a court would draw the lines, an "unpalatable" outcome for both parties because of its unpredictability.¹²² To avoid that possibility, Republican U.S. House Speaker Dennis Hastert and Democratic congressman Bill Lipinski teamed up and "concocted a new plan" sacrificing Democrat David Phelps but strengthening every other incum-

¹¹⁵ Compare BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 1505 (map of original District 24), with BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1529 (new map).

¹¹⁶ Walsh, *supra* note 113.

¹¹⁷ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 1598.

¹¹⁸ See LULAC v. Perry, 126 S. Ct. 2594 (2006).

¹¹⁹ CNN Election Center 2008, State Election Results: Texas, <http://www.cnn.com/ELECTION/2008/results/state/#TX> (last visited Feb. 8, 2009).

¹²⁰ See Alan Bernstein, *10 Ways the Election Affected Harris County Politics*, HOUSTON CHRON., Nov. 10, 2008, at A1.

¹²¹ See BARONE & COHEN, 2004 ALMANAC, *supra* note 30, at 503.

¹²² See *id.*

bent.¹²³ A few hundred thousand Republicans this way, a few hundred thousand Democrats that way, and the Illinois legislature had a plan that both parties could accept.¹²⁴

It helped that the plan produced a 10–9 Democratic advantage in the delegation, which came close to mirroring the state’s Democratic lean in 2000. Compared to the states discussed in sections I.A and I.B, Illinois probably falls somewhere in between — the Democrats now have a pronounced advantage in statewide elections, but the state’s Republicans stand a better chance in state elections than, say, Maryland’s Republicans or Texas’s Democrats.¹²⁵ It is all the more significant, then, that the Illinois bipartisan gerrymander has been just as stable as the big party vs. small party gerrymanders. Indeed, only one incumbent has lost since the plan eliminated David Phelps in 2002.¹²⁶

2. *California.* — If Illinois’s uncompetitiveness is surprising, it is nothing short of astonishing that, with fifty-three congressional seats, California, the nation’s most populous state, has seen only two incumbents lose in the last eight years, with both losses arguably resulting from personal controversies. As in Illinois, a bipartisan gerrymander is at work. Democrats controlled redistricting in 2001, but two factors counseled against overreaching: the difficulty of splicing concentrated Democratic districts in Los Angeles and the Bay Area, and the fear of gridlock if Democrats could not garner enough support for their map, throwing the process to the courts and potentially imperiling a handful of seats.¹²⁷

The result of the California Democrats’ refusal to push a big party vs. small party gerrymander was an incumbent-protection gerrymander that put all other incumbent-protection gerrymanders to shame. Cognizant that failing to play along meant putting one’s district on the chopping block, incumbent members of Congress submitted to the bipartisan plan and were rewarded accordingly. The state employed Michael Berman, a Democratic strategist and redistricting guru who “thinks, dreams, and breathes the lines,”¹²⁸ and who eventually created a map that protected incumbents against everything except themselves. Indeed, the only incumbents to lose under the map were Democrat Gary Condit, who was defeated in a 2002 primary in the midst

¹²³ *Id.*

¹²⁴ See BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 532.

¹²⁵ See *id.* at 530.

¹²⁶ See *id.* at 532, 543–90; CNN Election Center 2008, State Election Results: Illinois, <http://www.cnn.com/ELECTION/2008/results/state/#IL> (last visited Feb. 8, 2009).

¹²⁷ The court-drawing concern was acute because California law required a two-thirds majority of the legislature to adopt a districting plan; disadvantage Republicans too severely, and Democrats risked giving up the power they had. See SPENCER OVERTON, STEALING DEMOCRACY 20 (2006).

¹²⁸ *Id.* at 21 (quoting the *Orange County Register*) (internal quotation marks omitted).

of an investigation into his involvement in the disappearance of intern Chandra Levy, and Republican Richard Pombo, who lost narrowly in 2006 after multiple allegations of corruption.¹²⁹ A few Republicans had closer calls in 2008, but the gerrymander helped them to hold on.¹³⁰ Democrats fared much better: other than the Democrat who beat Pombo in 2006 (and thus held a district that was supposed to be safely Republican), the lowest Democratic win percentage was 65%.¹³¹

3. *Why Not Sue?* — Bipartisan gerrymanders, then, seem to be the most dangerous kind. How could they have gone unchallenged? Two obstacles stand in the way of any legal challenge to a bipartisan gerrymander: *Bandemer* itself, and *Gaffney v. Cummings*,¹³² another Supreme Court opinion written thirteen years earlier. In *Bandemer*, as the courts that rejected claims of political gerrymandering in the 2000s stated again and again, the Court required both a discriminatory intent to harm an identifiable political group and an actual discriminatory effect on that group. When the group that is being harmed (due to utterly uncompetitive elections) is all of the voters in a state, the claim for political gerrymandering in *Bandemer* fails before any consideration is given to particular lines. This simply is not the kind of equal protection harm that the Court envisioned when it said it could contemplate a justiciable political gerrymandering claim. Indeed, the holding in *Bandemer* that political gerrymandering claims are justiciable relied on the Court's ability to analogize them to racial gerrymandering claims,¹³³ which in turn depend on the existence of a discrete, identifiable group that is suffering discrimination.

However, the Court's failure to envision constitutional harm in a bipartisan gerrymander was clear as early as *Gaffney* in 1973. Although the Court had previously suggested that political gerrymanders might be vulnerable under the Fourteenth Amendment,¹³⁴ it declared decisively in *Gaffney* that this vulnerability did not extend to bipartisan gerrymanders. Rehearsing familiar arguments about the impossibility of drawing district lines *without* taking politics into account, the Court stated that the legislature's attempt to draw as fair a map as

¹²⁹ BARONE & COHEN, 2008 ALMANAC, *supra* note 21, at 195, 212–13.

¹³⁰ See CNN Election Center 2008, State Election Results: California, <http://www.cnn.com/ELECTION/2008/results/state/#CA> (last visited Feb. 8, 2009). *But see* Posting of Allan Hoffenblum to Fox & Hounds Daily, <http://foxandhoundsdaily.com/blog/allan-hoffenblum/how-gop-hung-ca-congressional-seats-2008> (Jan. 12, 2009) (showing that President Obama carried the presidential vote in eight California districts held by Republicans, suggesting their future vulnerability).

¹³¹ CNN Election Center 2008, State Election Results: California, *supra* note 130.

¹³² 412 U.S. 735 (1973).

¹³³ *Cf.* Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 549–50 (2004).

¹³⁴ *Gaffney*, 412 U.S. at 751 (citing earlier cases).

possible between the two parties was a constitutionally unobjectionable attempt to reach “political fairness.”¹³⁵ The Court’s endorsement of bipartisan gerrymanders in *Gaffney* was so strong, in fact, that Justice O’Connor’s *Bandemer* concurrence argued that *Gaffney* should conclusively settle *Bandemer* because bipartisan gerrymanders were no different from the big party vs. big party gerrymander at issue in *Bandemer*.¹³⁶ The courts, in short, are simply not worried about bipartisan gerrymanders.

II. WHO IS RIGHT?

In March 2009, with Democrats still gloating over their nearly eighty-seat majority, Sam Hirsch’s 2003 prediction that partisan gerrymanders “may well conspire to keep Republicans in the majority and Democrats in the minority for the next five Congresses”¹³⁷ was evidently too pessimistic. Likewise, the results of the 2008 election call into doubt Gerald Hebert’s warning that the Democrats’ impressive gains in 2006 proved rather than disproved the effectiveness of the Republicans’ gerrymanders. In Michigan, Florida, and Pennsylvania, states that Hebert argued “reveal[] the grip that gerrymandering has on congressional elections,” Republican incumbents thought to be protected by gerrymanders tumbled — even Tom Feeney, whom Hebert had specifically named.¹³⁸

Was 2008 then the final vindication for Justice O’Connor? Not exactly. To assess fully whether there is truth in Justice O’Connor’s argument, we need to keep in mind the losses that had causes other than the line-drawing party’s spreading itself too thin.¹³⁹ In 2006, those “other” losses were substantial. The obvious examples among the gerrymandered states discussed in this Note are Don Sherwood (and perhaps Curt Weldon) in Pennsylvania, Mark Foley’s open seat in Florida, and Tom DeLay’s open seat in Texas. Another batch of the seats Democrats picked up in 2006 were, like Clay Shaw’s district, simply the last step in a gradual drift toward the Democrats that would have occurred eventually anyway.

Setting aside these districts, we return to the question whether voters who clearly wanted a change in leadership were able to get one. Looking at the 2006 and 2008 elections, the two elections in which voters most clearly wanted a change, the results are decidedly mixed. Disenchanted voters in Michigan, Pennsylvania, and Florida had some

¹³⁵ See *id.* at 752–54.

¹³⁶ See *Davis v. Bandemer*, 478 U.S. 109, 154–55 (1986) (O’Connor, J., concurring in the judgment).

¹³⁷ Hirsch, *supra* note 18, at 202.

¹³⁸ See Hebert, *supra* note 19.

¹³⁹ See *supra* p. 1472.

success, tossing out Republican incumbents who, unlike Tom DeLay and Mark Foley, had not committed what pundits call a “fireable offense.” Voters threw out these incumbents in districts that had been drawn to help the incumbents win, and apparently did so simply because they disliked the incumbents’ policies.

But the results were not all good for Justice O’Connor. In the same big party vs. big party states where some of the Republican gerrymanderers’ overreaching came home to roost in 2006 and 2008, other Republican incumbents survived in districts that also seemed spread too thin. Likewise, in the big party vs. small party states, the gerrymanders held. California and Illinois voters continued to have no real choice at all. It seems clear that, even if redistricting litigators like Hirsch and Hebert overstated the enduring strength of the post-2000 maps, the self-limiting enterprise model does not adequately explain the success or failure of modern political gerrymanders. Why not?

The cases described in this Note suggest three important shortcomings. First, the self-limiting enterprise claim fails to take account of individual politicians. Redistricters do not look at a state’s demographics and statewide voting history and imagine in the abstract how many seats they can squeeze out of it. They look at specific existing districts, specific incumbent legislators, and specific potential candidates of each party, and then draw the map with those personal, district-by-district considerations in mind. The self-limiting model takes no account of the fact that, for example, Pennsylvania Republicans could draw ostensibly competitive seats that would nevertheless consistently elect Tim Murphy and Jim Gerlach, even in wave years.

Second, the model ignores the effects of incumbency generally. A candidate only has to be elected in a marginal district once before gaining the money, attention, and power that come with incumbency. This makes it much easier for the line-drawer to push the envelope without overreaching — get your candidate in under the roughly competitive lines, then sit back as she wins reelection despite evolution of the district’s political makeup over the rest of the decade. This gerrymander-reinforcing incumbency effect was particularly pronounced after the Republicans’ strong performance in the 2002 election, which allowed them to enjoy the full benefits of their gerrymanders early and then shield themselves with incumbency when leaner times came. Likewise, the model fails to account for the effect of *losing* incumbents. Once eight-term incumbents Bob Borski, Connie Morella, and David Bonior were gone, their parties lost not just faceless votes for the party leadership, but also the benefits of longtime incumbency. When the time comes for the parties to mount serious challenges to make up those losses, they will have to do so with unknown, inexperienced candidates rather than well-known and well-liked incumbents.

Worst of all, the self-limiting enterprise model fails to show any explanatory power for what seem to be the most dangerous political ger-

rymanders. Big party vs. small party gerrymanders, based on examples from post-2000 districting, are much less susceptible to overreaching — these are, after all, put in place by dominant parties that are simply looking to push their dominance a little further. And Justice O'Connor's claim fares much worse with incumbent-protection gerrymanders, which makes sense given that her opinion in *Bandemer* seemed not to recognize that an incumbent-protection gerrymander is a political gerrymander at all. Indeed, she described "bipartisan" apportionment in a positive light as the antithesis of a "partisan apportionment" and a "cure[] by the people or by the parties themselves" of the "evil" of political gerrymandering,¹⁴⁰ a view consistent with *Gaffney*.

Fair as they may seem, bipartisan gerrymanders still fix a particular moment's political reality in lines that last for ten years. Under Justice O'Connor's reasoning, this should be even more troublesome than gerrymanders that overreach: even the strongest waves of 2006 and 2008 barely budged the bipartisan gerrymanders. With respect to the key question of whether the voters in these districts have the ability to "throw the rascals out," the answer is a resounding no.

If the self-limiting enterprise model thus fails to address or even to acknowledge the worst form of political gerrymandering, then Justice O'Connor and *Gaffney* have it backward. This Note has demonstrated that big party gerrymanders at least leave open the possibility of self-correction, but bipartisan gerrymanders make the idea fanciful. Indeed, in a bipartisan gerrymander, the security of the map actually *increases* as the line-drawers become more audacious. Yet in *Bandemer*, Justice O'Connor assumed that bipartisan gerrymanders are acceptable and argued that other political gerrymanders are no different.¹⁴¹ And though the plurality opinion did distinguish (as this Note does) between bipartisan gerrymanders and party vs. party gerrymanders, it alerted courts to look out for the wrong culprit.

It is true that the Supreme Court's political gerrymandering jurisprudence remains a confusing and inhospitable mess, and this Note does not attempt to supply a manageable standard where the Court has twice failed. But if the legitimacy of our system of representation comes from the voters' ability to "throw the rascals out" — and this Note assumes that it does — then we need to shift our focus. If we can begin by identifying the right problem, we might get on the road to the right solution.

¹⁴⁰ *Davis v. Bandemer*, 478 U.S. 109, 152 (1984) (O'Connor, J., concurring in the judgment). One federal judge ruling on the Florida gerrymander followed Justice O'Connor's lead in this regard. See *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1349 (S.D. Fla. 2002) (Hinkle, J., concurring).

¹⁴¹ *Bandemer*, 478 U.S. at 154 (O'Connor, J., concurring in the judgment) ("A bipartisan gerrymander employs the same technique, and has the same effect on individual voters, as does a partisan gerrymander.").