
A FEDERAL ADMINISTRATIVE APPROACH TO REDISTRICTING REFORM

I. INTRODUCTION

Partisan gerrymandering is a tradition as old as redistricting itself. For more than two hundred years, the task of drawing congressional district boundaries has fallen to state legislatures, which until half a century ago exercised almost unlimited discretion over the redistricting process. Even after the rise of “one person, one vote”¹ and the enactment of the Voting Rights Act of 1965² (VRA), the ability of partisan state legislatures to manipulate the redistricting process for political gain has remained largely unchecked. The political nature of congressional line-drawing presents at least two potential problems: incumbent entrenchment and partisan bias. These problems have become increasingly acute in recent decades, an era marked by high incumbent reelection rates and increasing polarization in Congress.³ Despite growing concerns about partisan manipulations of the redistricting process, the federal judiciary appears unlikely to make serious efforts to curb partisan gerrymanders in the foreseeable future. Although partisan gerrymandering remains nominally unconstitutional, the Supreme Court’s decision in *Vieth v. Jubeliver*⁴ effectively renders partisan gerrymandering claims nonjusticiable.⁵ *Vieth* thus leaves reformers to turn to nonjudicial options to address the problem of political self-dealing during the redistricting process.

Proposed solutions run the gamut from the creation of independent redistricting commissions⁶ to popular referenda on proposed redistrict-

¹ See, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964).

² Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

³ See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623–26, 629 (2002); Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1121–23 (2007); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 51–64 (2004). Some scholars, however, see the current system as preferable to one in which incumbents are regularly replaced. See, e.g., Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 667–73 (2002).

⁴ 541 U.S. 267 (2004).

⁵ The plurality opined that partisan gerrymandering cases were nonjusticiable. *Id.* at 281 (plurality opinion). Although Justice Kennedy provided the fifth vote to dismiss the gerrymandering claim, he wrote a separate opinion leaving open the possibility of judicial review, but claimed that no administrable standard had yet been found. *Id.* at 306, 317 (Kennedy, J., concurring in the judgment).

⁶ See, e.g., Issacharoff, *supra* note 3, at 644; Ryan P. Bates, Note, *Congressional Authority To Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 338–39 (2005).

ing plans.⁷ Most of these proposals have focused on state-level action, usually through legislation or constitutional amendments, rather than through the adoption of a uniform federal standard. Although some scholars have suggested federal legislation requiring states to create independent commissions,⁸ there has been surprisingly little discussion of a larger role for the federal government in the congressional redistricting process.⁹ The reasons why this possibility has been largely ignored are easy to imagine: states have exercised nearly exclusive control over congressional redistricting since the Founding;¹⁰ state legislators may be more familiar with the idiosyncratic cultural, political, and geographic factors that may define “natural” representative districts; and, perhaps most importantly, arguments for greater federal involvement in many issues, especially elections and local representation, have proven unpopular in recent decades. Despite their initial appeal, however, these reasons do not categorically rule out a role for the federal government. In fact, limited federal involvement could ameliorate some of the most glaring partisan abuses of the redistricting process, while reserving primary control of congressional redistricting for the states.

This Note advocates the adoption of limited, selective federal oversight of congressional redistricting plans created by partisan legislatures, with an eye toward encouraging the use of independent redistricting commissions.¹¹ It suggests the creation of a federal agency authorized to review partisan redistricting at the request of a substantial minority of a state’s legislature,¹² while providing a safe harbor for states that use independent agencies to redraw district lines. Providing “opt-in”¹³ review reduces the risk of partisan gerrymandering by mim-

⁷ See, e.g., Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668–69, 699–716 (2006).

⁸ See, e.g., Bates, *supra* note 6, at 338.

⁹ See Adam B. Cox, *Designing Redistricting Institutions*, 5 ELECTION L.J. 412, 416–18 (2006) (noting that the possibility of federal administrative review has been largely unconsidered and laying out the basic advantages and disadvantages of administrative review).

¹⁰ See *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1166 (2006) [hereinafter *Voting and Democracy*].

¹¹ This proposal is limited to U.S. congressional redistricting plans. Although many of the arguments laid out below apply equally well to state redistricting plans, the power of Congress to regulate state legislative districts is less certain than is its control over federal redistricting, see, e.g., Adam Cox, Commentary, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 794–96 (2004), and will not be addressed in this Note.

¹² The review process would be similar to the U.S. Department of Justice (DOJ) preclearance procedures under section 5 of the VRA, which require covered jurisdictions — generally those with a history of discrimination — to submit changes in laws “with respect to voting” to the DOJ to ensure that the changes are not discriminatory. See 42 U.S.C.A. § 1973c (West 2003 & Supp. 2007).

¹³ This Note’s argument in favor of “opt-in” federal review of partisan redistricting plans builds on Professor Heather Gerken’s suggestion that the renewal of section 5 of the VRA include

icking divided government and forcing compromise on otherwise biased congressional maps.¹⁴ Although the courts have not been able to settle on an appropriate measure of partisan bias, Congress and the proposed agency would be free to expound one¹⁵ — and there would be nothing to stop a court reviewing an agency decision from applying the same standard.

Part II proceeds to lay out the basic problems of “partisan” and “bipartisan” gerrymanders. Part III then reviews various approaches to redistricting reform, including judicial review and independent commissions, and finds that most have failed to address partisan gerrymanders in a comprehensive way. Part IV presents a proposal for a federal redistricting commission that addresses partisan manipulations systematically, while allowing states some flexibility in selecting their redistricting procedures. It discusses which states would be subject to review, how an effective standard for partisan bias might be identified, and what form the reviewing agency might take. It also explains why the proposal’s focus on partisan gerrymanders is justified and how the proposal would nonetheless mitigate the problem of bipartisan gerrymanders. Part V concludes by briefly addressing the political advantages of focusing reform on partisan gerrymandering.

II. FRAMING THE PROBLEM

Criticism of political gerrymanders has generally focused on the dual harms of partisan bias and incumbent entrenchment. Although these two harms are not mutually exclusive, incumbent entrenchment is often attributed to “bipartisan” gerrymanders, in which two parties under divided government agree to protect their respective incumbents.¹⁶ The safe districts created by bipartisan agreements obstruct a critical function of elections: removing ineffective legislators from office.¹⁷ “Partisan” gerrymanders, by contrast, generally occur under unified state government, through which a single party maximizes its

an “opt-in” provision that would allow cities and civil rights groups to initiate DOJ review if they were unsatisfied with the redistricting deal struck with state legislators. See Heather K. Gerken, Essay, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 717 (2006).

¹⁴ KEITH KREHBIEL, PIVOTAL POLITICS 23 (1998); cf. CHARLES M. CAMERON, VETO BARGAINING 20 (2000) (explaining the role of the presidential veto in encouraging compromise); Gerken, *supra* note 13, at 710, 717. Throughout this Note, the term “divided government” is used to describe state governments in which one party controls the executive branch and another controls at least one house of the legislature.

¹⁵ See U.S. CONST. art. I, § 4, cl. 1, which allows Congress to “make or alter” state regulations concerning the election of representatives. *Id.*; see also Cox, *supra* note 11, at 794.

¹⁶ See Pildes, *supra* note 3, at 59–61.

¹⁷ See Issacharoff, *supra* note 3, at 615; Samuel Issacharoff, Surreply, *Why Elections?*, 116 HARV. L. REV. 684, 685 (2002); Pildes, *supra* note 3, at 43.

share of the state's congressional delegation. The argument that politicians draw political boundaries to improve their electoral odds has found subscribers among courts and political scientists¹⁸ and is borne out by recent high-profile examples.¹⁹

A. The Problem of the "Partisan" Gerrymander

1. *The Nature of the Harm.* — The mechanics of a partisan gerrymander are relatively simple. The party in control of the redistricting process attempts to gain as many seats as its numbers and tolerance for risk will allow. That is, the party will balance its desire to spread its supporters efficiently to gain as many seats as possible with its need to protect against changes in demographics or voting behavior that may put marginal seats at risk.²⁰ In order to maximize its electoral victories, the party in power may employ the familiar practices of "packing" and "cracking" its opponents. An efficient gerrymander seeks to spread opposition supporters thinly across many districts by "cracking" large concentrations of support, so that the cracked groups constitute a minority of voters in each district. The party in control may likewise dilute opposition support in its own districts by "packing" opponents into neighboring ones, effectively ceding a few districts to the other party but "wasting" large numbers of the opposition's supporters in a district the opposition will already win.²¹

The trouble with such a gerrymander is that it produces an electoral map that is biased in favor of one party over another. That is not to say that a map is biased simply because it fails to guarantee proportional representation; a "winner's bonus" is inherent in a system based on single-member districts.²² Instead, a map is "biased" — in the sense the term is most often used in the literature²³ — only when a particular level of support throughout the state for, say, Democrats, translates into a larger number of seats than it would for Republicans if the Republicans enjoyed the same level of support.²⁴ The problem with biased maps is that the parties can insulate themselves from changes in electoral support. If the majority of the country were living under

¹⁸ See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (plurality opinion); Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 331 (1985).

¹⁹ The 2003 redistricting scandal, in which Texas Republicans initiated a mid-decade redistricting to capture a supermajority of the state's congressional districts, typifies the problem. See *infra* p. 1846.

²⁰ See, e.g., Cain, *supra* note 18, at 321; Michael Lyons & Peter F. Galderisi, *Incumbency, Reapportionment, and U.S. House Redistricting*, 48 POL. RES. Q. 857, 859–60 (1995).

²¹ Cox, *supra* note 11, at 767–68.

²² If a party won only 51% of the vote in every district, for example, it would win 100% of the seats. See *id.* at 765.

²³ See, e.g., *id.* at 765–66.

²⁴ See *id.*

Democratic gerrymanders, for example, changes in the composition of Congress would lag when Democrats lost support, but not when Republicans did so. Thus, one might say that policy outcomes — which are partly a function of the composition of Congress — would be unfairly biased in favor of Democrats.

2. *Reasons for Concern.* — There are at least two potential problems with this understanding of the harms that flow from partisan gerrymanders. First, whether and to what extent parties can skew election outcomes is a tricky matter to prove empirically, and debates in the literature have been inconclusive.²⁵ Second, even if individual state legislatures are able to implement biased maps, some suggest that their effect is balanced out by biased plans in other states.²⁶

Despite these observations, however, there is ample evidence to suggest that partisan gerrymanders can lead to significant advantages for the party in power. The most colorful, if not empirically rigorous, evidence is anecdotal. Take, for example, the redistricting that occurred in Texas in 2003. The 2002 elections were held under a court-imposed map, redrawn after the 2000 census. The plan contained several competitive districts, and in 2002 produced a congressional delegation consisting of fifteen Republicans and seventeen Democrats.²⁷ In 2003, the newly elected Republican legislature attempted to implement a revised redistricting plan. Only after the state senate abandoned its traditional two-thirds supermajority requirement for approving such proposals and Democratic legislators fled the state in protest did the mid-decade redistricting become law.²⁸ The results were clear: in 2004, Republicans won twenty-one seats to the Democrats' eleven.²⁹ Little had changed in Texas between the implementation of these two plans except, of course, the party in control of the legislature. The reason for the unusual mid-decade revision was simple. In former Congressman Tom Delay's words, Republicans "want[ed] more seats."³⁰

The general thrust of this example is consistent with formal models of redistricting behavior³¹ and common sense. Measuring the effects of

²⁵ See *infra* p. 1847.

²⁶ See Janet Campagna & Bernard Grofman, *Party Control and Partisan Bias in 1980s Congressional Redistricting*, 52 J. POL. 1242, 1250–51 (1990).

²⁷ See Patrick Marecki, Note, *Mid-Decade Congressional Redistricting in a Red and Blue Nation*, 57 VAND. L. REV. 1935, 1937–38 (2004).

²⁸ See *id.* at 1940–42.

²⁹ *Id.* at 1942.

³⁰ *Id.* at 1939 (internal quotation marks omitted). One can find similar anecdotes present throughout the history of congressional redistricting, from the "salamander" signed into law by Elbridge Gerry in 1812, see *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (plurality opinion), to California's 1981 "Burton Plan" described in Professor Bruce Cain's classic account of partisan gerrymandering, see Cain, *supra* note 18, at 323–27.

³¹ See, e.g., Gary W. Cox & Jonathan N. Katz, *The Reapportionment Revolution and Bias in U.S. Congressional Elections*, 43 AM. J. POL. SCI. 812, 821–22 (1999).

partisan gerrymanders empirically, however, has proven somewhat less determinate. Although many scholars have found that unified partisan control translates systematically into more seats for the party in power,³² many have found the net effect to be relatively modest,³³ and some have found no such effect at all.³⁴

Perhaps the strongest argument against the concern about partisan gerrymanders is that the effects of congressional gerrymandering in the several states may balance out in the aggregate. The idea behind this critique is simply that some state legislatures are controlled by Republicans and others by Democrats — and that if either side happens to squeeze out an extra seat or two in one state, the other party will make up for it somewhere else.³⁵ Accordingly, some empirical studies have suggested that at the national level, the effects of redistricting are in fact “minimal,”³⁶ although others have observed net gains for one party, at least in some redistricting cycles.³⁷

Even if the effects of partisan gerrymandering are modest, there are still reasons to be concerned. First, the effects of biased districting plans need not be large to make a difference. A handful of seats may shift control of the House of Representatives or at least move the median member of Congress, who may play an important role in shaping policy.³⁸ Second, the assumption that gerrymanders will cancel each other out in the aggregate may be unwarranted in light of the current trend of state-by-state redistricting reforms. Even if the number of state legislatures controlled by Republicans were equal to the number of state legislatures controlled by Democrats (adjusted for the number of districts each state contains), the number of seats gerrymandered for each party may not be the same. Many states have modified their redistricting processes to prevent partisan gerrymandering.³⁹ If, for example, this trend against partisan district-drawing continues in liberal-

³² See, e.g., Cain, *supra* note 18, at 331; Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Redistricting*, 2 ELECTION L.J. 179, 200 (2003).

³³ See, e.g., Campagna & Grofman, *supra* note 26, at 1245 (describing conclusions based on data from the 1980s); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 543 (1994); Richard G. Niemi & Simon Jackman, *Bias and Responsiveness in State Legislative Districting*, 16 LEGIS. STUD. Q. 183, 199 (1991).

³⁴ See, e.g., Janet C. Campagna, *Bias and Responsiveness in the Seat-Vote Relationship*, 16 LEGIS. STUD. Q. 81, 87 (1991).

³⁵ See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 451.

³⁶ Campagna & Grofman, *supra* note 26, at 1255 (discussing the 1980 redistricting cycle).

³⁷ See Cox & Katz, *supra* note 31, at 813.

³⁸ See, e.g., KREHBIEL, *supra* note 14, at 23.

³⁹ See Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 ST. POL. & POL'Y Q. 371, 380–84 & tbl.2 (2004); see also Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1387–90 (2005).

leaning states more than in conservative ones, Republicans may gain seats through biased maps, while Democrats are stuck with more equitable redistricting plans drawn by independent commissions. Even more plausibly, if one large Democratic-leaning state, such as California, adopted redistricting reforms before several (generally smaller) Republican-leaning states,⁴⁰ the net effect would likely favor Republicans.⁴¹

Third, the effects of partisan power grabs on public confidence in the legislative system may justify reforms regardless of any actual systematic bias effects. Although this harm should not be overstated — rank partisanship is neither exclusive to redistricting nor the sole cause of the public’s lack of faith in its legislatures — there is little doubt that partisan power grabs cut against strong political norms held in common by many American voters.⁴² Such indefinite harms are seldom the basis for judicial action, but even the Supreme Court has recognized in other contexts that public confidence and perceptions of fairness are important government interests.⁴³

B. *The Problem of the “Bipartisan” Gerrymander*

In light of the supposedly modest net effects of partisan gerrymandering, many scholars have turned their attention to the issue of “bipartisan,” incumbent-protecting gerrymanders.⁴⁴ Although there is no consensus that gerrymandering causes safer seats or that bipartisan gerrymanders are more protective than the partisan variety, many scholars have worried that redistricting plans produced through political compromise may systematically advantage incumbents. This advantage, they contend, leads to less competitive elections, less turnover, and more extreme, less responsive representatives.

⁴⁰ California Governor Arnold Schwarzenegger has in fact supported significant redistricting reforms in his state, which generally leans liberal and elects Democratic state legislatures. Kang, *supra* note 7, at 677. Though the redistricting reforms were not approved, had the California proposition succeeded, the Democrats might one day have found themselves hard-pressed to achieve a disproportionate share of the state’s seats — a distortion that may be required to achieve “zero net effect” if Republican gerrymandering still occurs elsewhere.

⁴¹ Cf. Cox, *supra* note 35, at 450 (making an analogous point with regard to reforms undertaken by state courts).

⁴² Those norms, perhaps expressed most strongly by political elites, were evident in the wake of the Texas redistricting debacle. See, e.g., Adam Cohen, Editorial Observer, *For Partisan Gain, Republicans Decide Rules Were Meant To Be Broken*, N.Y. TIMES, May 27, 2003, at A24.

⁴³ Although these interests have not persuaded the Court to take action in the redistricting context, the Court’s concern with the mere “appearance of corruption” in campaign finance cases, for example, suggests that, at least in the Court’s view, public confidence in the political process is important. See *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam). The Court has also suggested that there is inherent value in the right to vote, despite the negligible effect casting a single vote has on electoral outcomes. See *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964).

⁴⁴ See, e.g., Niemi & Jackman, *supra* note 33, at 183, 199.

1. *The Decline of Competition.* — Over the last few decades, scholars have observed a troubling decline in the number of competitive congressional races.⁴⁵ Many have attributed the drop in marginal districts in part to incumbent-protecting gerrymanders — “sweetheart” deals in which both parties agree to preserve the status quo.⁴⁶ Under this theory, when the two parties are forced to compromise in drawing an electoral map — generally because of a divided legislature or an opposition governor — they do the one thing they can agree on: protect their incumbents. Indeed, incumbents often play an active role in the redistricting process, and state legislators often manipulate district lines to protect incumbents from potential challenges.⁴⁷

Yet dispute remains over whether, or to what extent, gerrymandering has caused the decline in the number of marginal districts. The literature suggests that elections not subject to redistricting, such as gubernatorial and Senate races, have also declined in competitiveness.⁴⁸ Thus, other factors, such as the rise of the candidate-centered election, the high costs of campaigns, and the extensive reliance on the “perquisites of the office,” may be to blame for incumbents’ increasing success.⁴⁹ Moreover, some scholars point out that there is still turnover in congressional races and suggest that districts are often more politically balanced than incumbents’ margins of victory suggest.⁵⁰

Regardless of whether gerrymanders caused the recent decline in competitiveness, both partisan and bipartisan gerrymanders are linked to incumbent protection. Although some researchers have offered evidence that incumbents benefit from bipartisan redistricting more than they do from partisan plans,⁵¹ others have found the effect to be nearly indistinguishable. One recent study found that there was no significant difference between incumbents’ advantage under partisan maps and those drawn to benefit incumbents without a particular partisan bias.⁵² Indeed, politically drawn maps of either kind “reduce[d] the proportion of marginal seats.”⁵³

⁴⁵ See, e.g., David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 *POLITY* 295, 295 (1974).

⁴⁶ Kang, *supra* note 7, at 667; see also Issacharoff, *supra* note 3, at 626.

⁴⁷ See Issacharoff, *supra* note 3, at 626. For anecdotal examples of bipartisan gerrymanders, see *id.* at 624–25, and David Lublin & Michael P. McDonald, *Is It Time To Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 *ELECTION L.J.* 144, 146–47 (2006).

⁴⁸ See Issacharoff, *supra* note 3, at 625–26; Persily, *supra* note 3, at 665.

⁴⁹ Persily, *supra* note 3, at 666.

⁵⁰ *Id.* at 663–64.

⁵¹ See, e.g., Lyons & Galderisi, *supra* note 20, at 857, 866, 868.

⁵² See Lublin & McDonald, *supra* note 47, at 152 n.32.

⁵³ See *id.* at 155; see also Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 *POL. GEOGRAPHY* Q. 5, 5 (1988).

2. *The Nature of the Harm.* — Whatever the cause, the basic problem of safe seats is that incumbents are insulated from a serious challenge in the general election. Indeed, some have suggested that incumbent-protecting gerrymanders have all but done away with the need for elections in certain districts.⁵⁴ That is, of course, except for the primary. But because primary voters often consist of core party members, the candidates they prefer tend to depart from the preferences of the median voter.⁵⁵ Thus, besides insulating individual members from shifts in voter support, safe districts also place electoral control in the hands of more extreme primary voters. As more districts are rendered uncompetitive, Congress becomes more polarized.⁵⁶

Some scholars correctly point out that incumbents may become more familiar with the needs of their constituents over time and, thanks to the importance of seniority within the House, better able to advocate for them.⁵⁷ However, even if experience is a legitimate electoral consideration, it need not be built into the electoral system via incumbent protection.⁵⁸ If experience is truly a valuable asset, voters in competitive races can give it proper weight.

III. ATTEMPTS TO ADDRESS THE PROBLEM

Reformers have pursued several avenues in seeking to guard against both partisan bias and incumbent entrenchment. Some opponents of politically drawn maps have attempted to enlist the help of the courts. But although the Supreme Court has ruled that partisan line-drawing may violate the Constitution, gerrymandering claims are effectively nonjusticiable in the wake of *Vieth*. Reformers have also advocated the creation of independent redistricting commissions, insulated from partisan bias and directed to ensure competition. The commissions would either impose maps on their own authority or submit them to the legislature for approval. Others have proposed countless theoretical solutions that have found only modest support in the real world.

A. Federal Judicial Intervention

In *Davis v. Bandemer*,⁵⁹ the Supreme Court held that the manipulation of district lines for partisan gain may give rise to a claim under the Equal Protection Clause, but could not agree on a standard to

⁵⁴ See Kang, *supra* note 7, at 667 (citing John Wildermuth, *Lawmakers Use Creative License in Redistricting*, S.F. CHRON., Sept. 2, 2001, at A6).

⁵⁵ See Issacharoff, *supra* note 3, at 627–28.

⁵⁶ *Id.* at 629.

⁵⁷ See, e.g., Persily, *supra* note 3, at 671.

⁵⁸ See Issacharoff, *Why Elections?*, *supra* note 17, at 687.

⁵⁹ 478 U.S. 109 (1986).

identify which gerrymanders exceeded constitutional limits.⁶⁰ In the years that followed, nearly every challenge to political gerrymanders failed.⁶¹ What little hope for reform existed under *Bandemer* was crushed in *Vieth*. The four-Justice *Vieth* plurality found partisan gerrymandering claims nonjusticiable,⁶² while the dissenters debated at least three possible standards.⁶³ Justice Kennedy, concurring in the judgment, thought such claims might be justiciable but could not identify a manageable standard for review.⁶⁴ The bottom line, it seems, is that partisan manipulations of the redistricting process are problematic — indeed, potentially unconstitutional — but the Court does not consider itself competent to separate the “fair” maps from the unfair ones.

Even though the Court appeared to throw in the towel in *Vieth*, the Justices may be willing to use other voter-protection doctrines to combat partisan gerrymandering. In *Karcher v. Daggett*,⁶⁵ the Court appeared to apply the principle of one person, one vote to address underlying partisan manipulations.⁶⁶ Similarly, in *League of United Latin American Citizens (LULAC) v. Perry*,⁶⁷ the Court cited minority vote dilution under section 2 of the VRA in overturning part of the 2003 Texas gerrymander.⁶⁸ Although it sometimes may be effective to use these doctrines to address partisan gerrymandering,⁶⁹ there is no reason to think that every partisan gerrymander will provide a neat racial or equal-numbers hook on which to base a remedy. Finally, the vast number of rejected challenges to partisan plans under *Bandemer* strongly suggests that the Court will remain unable or unwilling to provide a fully effective remedy for the foreseeable future.

⁶⁰ The Court was “not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided,” *id.* at 123, but did not identify one in the majority opinion. *See id.*

⁶¹ *See Vieth v. Jubelirer*, 541 U.S. 267, 279–80 (2004) (plurality opinion) (noting one technical exception among many cases).

⁶² *Id.* at 281.

⁶³ *See id.* at 326 (Stevens, J., dissenting); *id.* at 346–47 (Souter, J., dissenting); *id.* at 362 (Breyer, J., dissenting).

⁶⁴ *Id.* at 317 (Kennedy, J., concurring in the judgment).

⁶⁵ 462 U.S. 725 (1983).

⁶⁶ The Court has required virtually perfect equality between districts, absent a permissible justification. This standard ignores the census’s margin of error, which may well exceed the differences in question. Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 555–56 (2004). For further discussion of the Court’s use of other doctrines to combat gerrymandering, see Ellen D. Katz, *Reviving the Right To Vote*, 68 OHIO ST. L.J. 1163, 1163 (2007).

⁶⁷ 126 S. Ct. 2594 (2006).

⁶⁸ *Id.* at 2623.

⁶⁹ *See id.*

B. Independent Commissions

Long before the Court abandoned its search for manageable judicial standards, several states instituted independent commissions to redraw district lines.⁷⁰ The organizations range from nonpartisan agencies staffed by civil servants⁷¹ to bipartisan commissions featuring a (more or less) neutral tiebreaker chosen by the other members.⁷² These independent commissions may be an effective way to mitigate partisan bias and incumbent entrenchment,⁷³ especially when the plans are drawn without regard to incumbent placement and with an eye toward increasing competition.⁷⁴

Although measuring the effectiveness of independent commissions is difficult, there are signs that neutral commissions can create fairer, more competitive maps. In Iowa, for example, where the nonpartisan Legislative Service Bureau presents a plan to the legislature for its approval, “four out of five House districts were considered highly competitive in 2002.”⁷⁵ That said, the state has continued to experience low rates of incumbent turnover.⁷⁶ In Arizona, voters recently instituted a commission composed of an equal number of members of either party (who in turn choose a tiebreaker).⁷⁷ Even though Arizona’s commission has no knowledge of the locations of incumbents’ homes and is required to draw competitive districts where possible,⁷⁸ an overwhelming majority of incumbents have won by landslide margins.⁷⁹ Moreover, the nonpartisanship of the tiebreaking vote in such commissions is often questionable and has led some bipartisan commissions to produce arguably partisan plans.⁸⁰

Even if partisanship may never be eliminated entirely from the process, however, independent commissions still seem the most viable way to address both incumbent entrenchment and partisan bias. One can certainly debate the most effective commission structure or deci-

⁷⁰ See McDonald, *supra* note 39, at 381 tbl.2.

⁷¹ In Iowa, the Legislative Service Bureau proposes a redistricting plan to the legislature. If the legislature fails to adopt the first plan, the agency proposes two more in sequence, and failing those, the legislative process is used. *Id.* at 378 tbl.1 n.f.

⁷² See, e.g., *id.* at 380–84.

⁷³ See, e.g., Issacharoff, *supra* note 3, at 644.

⁷⁴ Arizona and Washington, for example, require their commissions to draw competitive districts when practical. Hawaii requires its commission to ignore the interests of incumbents. McDonald, *supra* note 39, at 384.

⁷⁵ Issacharoff, *supra* note 3, at 626.

⁷⁶ See *Voting and Democracy*, *supra* note 10, at 1169–70.

⁷⁷ See Issacharoff, *supra* note 3, at 630 n.147; McDonald, *supra* note 39, at 381 tbl.2, 383.

⁷⁸ See McDonald, *supra* note 39, at 383–84.

⁷⁹ See PROGRAM FOR REPRESENTATIVE GOVERNMENT, FAIR VOTE, REFORMS TO ENHANCE INDEPENDENT REDISTRICTING 1, http://lwvofvt.org/files/FairVote_Redistricting_Reform_Enhancements.pdf (last visited Apr. 5, 2008).

⁸⁰ See McDonald, *supra* note 39, at 382–83.

sion rules,⁸¹ but the bottom line is that independent commissions are less likely to distort the process than are partisan legislators, who will almost certainly manipulate the rules of the game to their advantage.

Accordingly, Professor Samuel Issacharoff has argued provocatively that the Court should strike down all redistricting plans drawn by self-interested partisans.⁸² Drawing on the basic tenets of antitrust law, Professor Issacharoff argues that incumbent-protecting gerrymanders are in effect collusive agreements to restrict competition. Just as the Court would not allow duopolists to engage in geographic market division, he suggests, it should not allow political parties to restrict consumer choice.⁸³ Whatever the strengths of this argument, Professor Issacharoff's conclusion — that the Court should impose a nationwide requirement of independent commissions — was likely never intended to be practical. At least one observer has suggested that essentially the same requirement could be imposed by federal statute (and in fact such bills have been introduced in Congress⁸⁴), but conceded that such a broad-based overhaul of the system was unlikely to gain support.⁸⁵ Others have advocated similar reforms on the state level, either through constitutional amendment or legislation.⁸⁶ Although such reforms seem more likely to succeed, piecemeal reforms create the risk that one party may be tied to fair districting standards in states in which it controls the legislature while the other party is free to gerrymander its strongholds.⁸⁷

C. Other Possibilities for Reform

Commentators have proposed countless other nonjudicial solutions to the gerrymandering dilemma. Some have suggested, for example, that state courts pick up the slack and reform grossly gerrymandered districts by applying state law.⁸⁸ Although there is some evidence that state courts have regulated redistricting more aggressively in recent years,⁸⁹ they certainly have not addressed the problem completely. Moreover, review by state courts may lead to inconsistent oversight,

⁸¹ See Cox, *supra* note 9, at 413.

⁸² See Issacharoff, *supra* note 3, at 601.

⁸³ See *id.* at 620.

⁸⁴ See, e.g., Fairness and Independence in Redistricting Act of 2005, H.R. 2642, 109th Cong. (2005).

⁸⁵ See Bates, *supra* note 6, at 371.

⁸⁶ See, e.g., Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 851 (1997).

⁸⁷ See *supra* pp. 1847–48.

⁸⁸ See, e.g., James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 645 (2004); *Voting and Democracy*, *supra* note 10, at 1175–76.

⁸⁹ See *Voting and Democracy*, *supra* note 10, at 1171–72.

which may be ineffective or, worse yet, lead to further distortion.⁹⁰ Professor Adam Cox and others have suggested that states simply be limited to one redistricting per decade, in order to prevent partisan opportunism and reduce the precision with which parties can allocate voters.⁹¹ More radically, Professor Michael Kang recently suggested that voters should be able to decide between two partisan electoral maps in a popular referendum⁹² — a creative solution giving rise to obvious practical concerns. The common thread among each of these proposed reforms is that they place external constraints on legislators' ability or incentives to redistrict toward partisan ends.

IV. OPT-IN FEDERAL ADMINISTRATIVE REVIEW

Proposals to address political gerrymandering have generally taken one of two tacks: taking decisionmaking authority out of the hands of partisan legislators or modifying legislators' information or incentives to shape their decisionmaking. The creation of independent commissions falls into the first category (unless, of course, their decisions are not binding). Temporal veil strategies, like once-per-decade redistricting or deferred implementation, fall into the second. Judicial review employs elements of both: courts may take redistricting out of the hands of legislators in some cases, but the threat of judicial review may itself shape legislative behavior in others.

This Note proposes "opt-in" federal review of congressional redistricting that similarly uses the threat of invalidation to shape legislative behavior.⁹³ Under this proposal, a federal administrative body would review redistricting proposals at the request of one-third of a state's largest house. If the agency should find the map to be politically biased, it would reject the map and send it back to the legislature. Either party could appeal such a decision in court. Importantly, administrative review would be reserved only for those states that continued to employ politicized redistricting methods; states with independent redistricting commissions would enjoy a safe harbor. Providing a safe harbor recognizes that independent commissions mitigate the ability of legislators to promote their party and protect their incumbents. The provision thus both encourages states to use independ-

⁹⁰ See Cox, *supra* note 35, at 450 (noting the possibility of distortion if courts in Democratic-leaning states are more aggressive than those in more Republican states).

⁹¹ See Cox, *supra* note 11, at 754–55. Professor Cox has also proposed that the implementation of redistricting plans be delayed for an election or two, once again to inject uncertainty into the process. See Cox, *supra* note 9, at 419.

⁹² See Kang, *supra* note 7, at 668–70, 704.

⁹³ Professor Cox first briefly discussed this approach in *Designing Redistricting Institutions*, *supra* note 9, at 416–18.

ent commissions and focuses administrative review on those states in which political gerrymandering is most likely to occur.

The intended effect of the proposal on state legislatures is twofold. First, the plan seeks to encourage states to adopt independent redistricting commissions. Second, it intends to shape the behavior of legislatures that decide to stay in the redistricting game. It does so by creating incentives for the majority party — particularly in a united government — to take account of the minority's preferences. By implementing a potential minority veto, the plan seeks to mimic divided government and thereby head off egregious partisan opportunism.

Although this proposal attempts to address bipartisan gerrymanders by encouraging the creation of independent commissions, it is largely aimed at partisan gerrymanders. Redistricting power grabs are political cheap shots, as unpopular with the public as with the losing party. Addressing partisan gerrymanders may therefore provide a political foothold for reformers inside the system, who can trumpet their efforts during the next election cycle and use them as a first step toward further improvements. This Part begins by addressing which states will be subject to review. It then discusses what standard will be applied to political gerrymandering claims. Finally, it describes what form the reviewing agency might take.

A. States Subject to Review

1. *Focusing Review on Political Line-Drawers.* — Criticism of political gerrymandering has focused almost exclusively on legislators. Professor Issacharoff's critique, for example, singles out redistricting plans created by self-interested legislators as per se unconstitutional. Although the Court has never gone so far, Justice Stevens has worried that if representatives owe their seats to partisan line-drawers, "the will of the cartographers rather than the will of the people will govern."⁹⁴ Partisans therefore seem more deserving of federal scrutiny when it comes to political gerrymanders.

Moreover, focusing review on redistricting plans drawn by dominant market actors is perfectly sensible from the perspective of anti-trust law. Professor Einer Elhauge, for example, has argued that courts should limit their review of partisan redistricting to those cases in which one party enjoys a monopoly over state government and has exercised its power unfairly.⁹⁵ The idea that monopolists or oligopolists should be subject to closer scrutiny when making decisions that

⁹⁴ *Vieth v. Jubelirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting).

⁹⁵ Brief Amicus Curiae of Pennsylvania Voters Joann Erfer and Jeffrey B. Albert in Support of Appellants at 17–22, *Vieth*, 541 U.S. 267 (2004) (No. 02-1580), 2003 WL 22070182 [hereinafter Elhauge Brief] (submitted by Professor Elhauge).

affect the nature of competition is far from new. While firms controlling small market shares enjoy safe harbors in some antitrust contexts,⁹⁶ for example, firms contemplating large acquisitions must provide advance notice before proceeding with the transaction.⁹⁷ As in the marketplace, the ex ante screen of administrative review would prevent courts from exercising discretion in areas in which violations are unlikely, thereby reducing the risk of overturning unobjectionable redistricting plans.

Tailoring enforcement to those states that are most likely to produce biased legislation is nothing new to election law. The VRA specifically singles out states that have historically discriminated against minorities for ex ante scrutiny of changes to voting laws.⁹⁸ In essence, Congress decided that the political processes in place in other states were not sufficiently flawed to justify administrative scrutiny. This decision both reduced the cost of review and the likelihood that non-discriminatory plans would be wrongly overturned. The same principle can be applied in the redistricting context. If states create a reasonably impartial redistricting commission, it is sensible to avoid the cost of review on the part of the federal government and the inconvenience and uncertainty on the part of the state. Just as importantly, avoiding such hardships may provide states a sufficient incentive to adopt more neutral line-drawing systems.

2. *The Distinction in Practice.* — Although the distinction between covered and uncovered states is easy to justify in theory, implementing the proposed plan will require a workable definition of an independent commission. There is ample discussion in the literature about which commission structures produce the most balanced redistricting plans,⁹⁹ and selecting the one that produces the fairest results is outside the scope of this Note. That said, some structures appear to be less partisan than others. Commissions composed of elected officials ex officio without regard to party, for example, may readily produce a biased panel. Commissions comprising an equal number of members from either party, with a neutral tiebreaker chosen by the members, may be more balanced. More subtly, commissioners selected on the basis of some outside qualifications (even if identified with a party), rather than handpicked by interested legislative actors, may

⁹⁶ See, e.g., FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 4.2 (2000) (providing a "safety zone" for collaborative enterprises comprising less than twenty percent of the market, absent extraordinary circumstances).

⁹⁷ See 15 U.S.C. § 18a (2000).

⁹⁸ See, e.g., 42 U.S.C.A. §§ 1973b, 1973c (West 2003 & Supp. 2007).

⁹⁹ See, e.g., McDonald, *supra* note 39, at 380–84; see also Persily, *supra* note 3, 674–76 (questioning the neutrality of commissions).

have not only a less partisan perspective,¹⁰⁰ but a less incumbent-biased perspective as well. Congress or the federal agency tasked with administering the system could sensibly decide on any of a number of possible definitions, but an agency with a neutral tie-breaker seems reasonably independent, as does a nonpartisan legislative agency like the one used in Iowa.¹⁰¹ Such definitions need not exclude states in which commission plans are not binding, so long as the plan adopted is one drawn by a sufficiently independent agency.

B. Identifying Partisan Gerrymanders

Perhaps the most conceptually difficult challenge facing the proposal is defining an administrable standard for identifying partisan gerrymanders. The lack of a manageable standard was, after all, the basis for the Court's decision in *Vieth* to abandon its efforts to address partisan manipulations of the redistricting process. But the Court's challenge in *Vieth* was fundamentally different from the task at hand. The Court was searching for a justiciable standard under Article I and the Equal Protection Clause of the Fourteenth Amendment.¹⁰² In short, it was asked to write constitutional law with little textual basis. As Justice Scalia pointed out, however, the Constitution's text provides a clear invitation to Congress to check partisan malapportionment through its power to "make or alter" districts.¹⁰³ Even though the Court was uncomfortable settling on a single constitutional standard, Congress may properly specify one.

If Congress decided to lay out a standard, it would certainly have plenty of choices. The dissenting Justices in *Vieth* proposed at least three possibilities. But the Court's charge was only to prevent those gerrymanders that were constitutionally deficient. Congress would be free to take a more aggressive tack in order to take account of broader conceptions of public confidence and political dignity than those available to a court attempting to justify a constitutional decision. Courts and commentators have provided numerous means of measuring partisan bias, some qualitative and some quantitative.¹⁰⁴ Although Congress could certainly attempt to specify that a certain percentage of districts be made competitive, or that the relationship between votes and seats be relatively linear, or even that district lines be drawn with-

¹⁰⁰ Arizona, for example, has instituted a list of qualifications for its commission members. See McDonald, *supra* note 39, at 384.

¹⁰¹ See *supra* p. 1852.

¹⁰² See *Vieth v. Jubelirer*, 541 U.S. 267, 271–72 (2004) (plurality opinion).

¹⁰³ *Id.* at 275 (quoting U.S. CONST. art. I, § 4, cl. 1).

¹⁰⁴ Compare Campagna, *supra* note 34, at 83 (providing a formula for calculating bias), with *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) (focusing the test for bias on "continued frustration of the will of a majority of the voters").

out regard to the location of incumbents, most of the details would likely be worked out at the agency level.

The agency would be able to issue regulations detailing its approach and publish the method it would use to calculate whether a map was biased. In addition to a quantitative estimation of the ability of the current minority to win the same number of seats as the majority given the same level of support, the agency may also look at comparisons to other states. Significant differences from states with independent commissions with respect to the underlying partisan balance within congressional districts, the proportion of competitive or contested races, or swings in the likely partisanship of the delegation, may be seen as *prima facie* cases of improper gerrymandering. At that point, the state could take the opportunity to explain the differences by pointing to traditional districting principles.

In light of the hazards of piecemeal reform, it seems that the agency would do well to look closely at the principles guiding state independent commissions. That way, those states that choose to use independent commissions would end up on a substantially equal footing with those that do not. That is not to say that all political redistricting plans must be identical to any particular “independent” map (even if anyone could say what such a map would look like); it implies only that a state legislature ought to have legitimate reasons — geographic compactness or respect for municipal boundaries, for example¹⁰⁵ — to explain departures from the basic characteristics of independent maps drawn elsewhere.¹⁰⁶

C. *The Federal Redistricting Agency*

There are several possible forms a federal redistricting agency might take, two of which are discussed below. The first model provides the greatest neutrality and would therefore provide a sensible first-choice structure for the agency. Yet, if Congress is intent on avoiding potential gridlock in light of its experience with the Federal Elections Commission (FEC), this section offers a second, less neutral but perhaps more expedient model. Either structure would improve upon the status quo and would provide more effective oversight than direct judicial review.

¹⁰⁵ See Elhauge Brief, *supra* note 95, at 21–22.

¹⁰⁶ By way of analogy, the Court has considered a state’s adherence to “traditional districting principles” in determining whether districts were drawn impermissibly on the basis of race. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993). For other reasons a reviewing agency might wish to defer to state legislative reapportionment decisions, see Persily, *supra* note 3, at 677–79.

1. *The Commission Model.* — Independent regulatory commissions are nothing new to the executive branch¹⁰⁷ and offer perhaps the strongest hope of neutrality. A commission consisting of an equal number of members from each party, much like the current FEC, could promulgate regulations roughly acceptable to both parties and adjudicate disputes by balancing the interests of each side. This model, however, runs a significant risk of gridlock. If commissioners are appointed with the understanding that they are instruments of party interests, the agency may be paralyzed by party-line votes or ignite the sort of appointment controversy that has recently embroiled the FEC.¹⁰⁸

The solution to this dilemma might be to change the way the nominees are selected to distance them from the control of party interests. A “merits”- or “qualifications”-based system involving the recommendations of independent organizations — much like the merit systems used to select nominees for state judgeships¹⁰⁹ — may help limit the appointment of partisan cronies to the commission. Although limiting the pool of nominees too far might give rise to appointment powers concerns,¹¹⁰ requiring some objective qualifications may help to attenuate the connection between commissioners and political parties and reinforce a norm of independence. The problem may also be solved by allowing commissioners to select a neutral tiebreaker, as some state commissions do.¹¹¹ Allowing commissioners to select an additional member may again raise appointment powers concerns, but if Congress could establish presidential deference to the commission’s recommendation as the norm, the President would likely seek to avoid the political cost attached to rejecting the commission’s choice.¹¹²

2. *The Executive Department Model.* — Another option would be to invest the power of review within an executive department, such as the DOJ. Unlike an independent commission, an executive agency would all but guarantee decisive results, at the cost of increased political influence on the decisionmaking process. Members of the office would consist primarily of civil service employees, who would become expert at identifying partisan manipulations of the gerrymandering

¹⁰⁷ See 44 U.S.C.A. § 3502(5) (West 2007) (listing sixteen “independent regulatory agencies” (internal quotation marks omitted)).

¹⁰⁸ See, e.g., Editorial, *The Election Watchdogs Going Missing*, N.Y. TIMES, Dec. 17, 2007, at A30.

¹⁰⁹ See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1084–86 (2007).

¹¹⁰ See *Buckley v. Valeo*, 424 U.S. 1, 135, 143 (1976) (per curiam) (holding that members of Congress could not constitutionally appoint commissioners to the FEC).

¹¹¹ See McDonald, *supra* note 39, at 381 tbl.2, 382–83.

¹¹² See David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 321 n.62 (1993).

process. Allowing the bulk of the review work to be done by career staff would also help to insulate the process from political influence. Such insulation would surely be incomplete, but perhaps it would be enough to cause controversy if an initial determination were later reversed by political appointees. The DOJ has been reviewing racial gerrymanders under the VRA for decades,¹¹³ and although some of its decisions may have been politically biased, manipulations of the review process attract unwanted media scrutiny.¹¹⁴

Even if the agency were blatantly partisan, however, it would still be an improvement on the status quo. Say, for example, that the agency is strongly pro-Democrat. Democrats in a Republican-controlled state would attempt to take advantage of the potential for review to force Republicans to draw a more Democrat-friendly map than could be justified on neutral grounds. But if the Republicans trusted neither the agency nor the reviewing court, they could simply create an independent commission to take advantage of the safe harbor, and no one would be worse off than they would have been under a neutral redistricting system. Inversely, if a Republican minority in another state seeks review by the same biased agency, it may well be denied. But that state would then have access to judicial review to ensure, at the very least, that the decision made was reasonable and not an abuse of discretion. Thus, in either case, the odds favor improvement on the status quo, even if the agency in question is aggressively partisan. With any luck, however, the agency would be less biased than this example suggests, and the gains would be that much greater.

3. *Advantages of an Agency over a Judicial Panel.* — Given the difficulty of creating a redistricting authority that is both neutral and decisive, why not simply entrust a specialized, three-judge panel to adjudicate disputes under a standard laid down by Congress? Although this solution would be an improvement over the status quo, a system based solely on judicial review would be a second-best solution.

First, federal courts, unlike administrative agencies, are unable to promulgate regulations. Even if Congress could muster a compromise on a gerrymandering reform bill, it would be unlikely to define the precise terms of the technical process of determining when a map is biased. But without the detailed standards an agency could provide, states would be unable to predict what level of bias, estimated by which mathematical measure, would be acceptable. Allowing the

¹¹³ See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439 (codified as amended at 42 U.S.C.A. § 1973c (West 2003 & Supp. 2007)).

¹¹⁴ See, e.g., Editorial, *U.S. Attorneys, Reloaded*, N.Y. TIMES, May 10, 2007, at A32 (listing a political appointee's decision to overrule career lawyers among several ethically questionable actions). That said, however, media scrutiny may not always be enough to prevent political manipulation.

courts to develop a standard in common law fashion would simply not provide a clear *ex ante* guide; the courts — from *Bandemer* through *Vieth* — have demonstrated their discomfort with propounding concrete, effective standards in this area of law and would doubtless benefit from clear regulations to interpret.

Second, taking gerrymandering cases directly to court sidesteps a potentially valuable layer of review. Agency adjudication has inherent worth in a system that values redundancy and multiple perspectives on legal issues.¹¹⁵ That is especially true when the agency has greater resources to wade through facts and conduct independent analyses.¹¹⁶

Finally, even if a court could become expert in the area of gerrymandering, the court may lack the political neutrality of a carefully composed agency. Try as they might to remain impartial, judges often bring their political ideologies into the courtroom,¹¹⁷ and the judicial appointment process provides no way to ensure a politically balanced court. To avoid masking partisan outcomes behind judicial process, it seems sensible to address the issue of partisanship openly — whether by balancing the membership of a commission or closely monitoring the actions of a plainly political agency for signs of bias.

D. Effect on the Behavior of State Legislatures

1. *Pivot Points and Partisan Compromise.* — In most states, congressional redistricting is conducted through the usual legislative process.¹¹⁸ That means that partisan bargaining takes place as in other contexts, with the two parties negotiating based on their preferences and their relative power within the lawmaking process.¹¹⁹ Under divided government, for example, the party in power in the legislature will seek to satisfy its preferences, except to the extent necessary to make its bill palatable to the governor, or to the legislators necessary to override her veto, depending on which actor's preferences are closer to those of the party. The potential veto and override vote are therefore “pivot points” in the lawmaking process and help to produce a compromise policy.¹²⁰

¹¹⁵ Cf. Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1708–09 (2008) (explaining the value of assigning vetoes to institutions with “distinctive perspectives”).

¹¹⁶ Judges' ability to appoint special masters helps to address the issues of staff and expertise, but ad hoc advisors seem unlikely to equal an office of full-time experts.

¹¹⁷ See, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? 19–22 (2006) (finding “strong evidence of ideological voting”). One prominent example is the arguably party-line vote in *Bush v. Gore*, 531 U.S. 98 (2000).

¹¹⁸ See McDonald, *supra* note 39, at 378 tbl.1.

¹¹⁹ See KREHBIEL, *supra* note 14, at 20–24.

¹²⁰ See CAMERON, *supra* note 14, at 23; KREHBIEL, *supra* note 14, at 20–24.

The ability of one-third of a state legislature's largest house to request federal review of a gerrymandered district map inserts an additional pivot point into the process. In the case of divided government in a state in which a veto override requires a two-thirds majority, the pivot point remains unchanged. Yet in a unified government in which the governor would happily sign a biased map into law, the proposal offers the minority party a "bargaining chip" in the redistricting game.¹²¹ The option of review is not a certain veto, to be sure. But defending a map against review would demand time and resources. Thus, even if the chance of a successful challenge were unclear, the threat of review would likely encourage compromise.

2. *Potential Problems with Compromise.* — The option of minority review allows the decisionmaking process of a unified state government to mimic that of a divided one. Although such a solution addresses the problem of "partisan" gerrymanders head on, it arguably runs the risk of making the problem of "bipartisan" gerrymanders worse. That is, the proposal may lead the party in power to abandon its plan to create slightly more competitive districts that distribute its supporters efficiently in favor of a bipartisan deal that protects incumbents in both parties. This concern seems unwarranted.

First, the proposal provides incentives for states to create independent redistricting commissions, which seem to be among the most promising means of increasing competition. In seeking to avoid a potentially time-consuming and uncertain process, state legislatures may well find that creating independent redistricting commissions is preferable to the uncertain prospect of gerrymandered gains. To the extent that this proposal encourages the use of such commissions, it addresses the harms flowing from both partisan and bipartisan gerrymanders. It does so, importantly, without imposing heavy-handed reforms directly on the states and without depriving them of their role in the redistricting process.

Second, empirical evidence suggests that both partisan and bipartisan gerrymanders protect incumbents to approximately the same extent. As discussed above, there is ample reason to think that both reduce competition about equally. In a partisan gerrymander, the party in power does not simply ensure that it has fifty-one percent support in as many districts as possible. Rather, it "shores up" the seats of friendly incumbents, while picking up additional districts when possible.¹²² Analysis of the most recent redistricting suggests that these partisan incumbent-protecting effects were nearly indistinguishable

¹²¹ Cf. Gerken, *supra* note 13, at 709 (arguing for an "opt-in" approach to the VRA that would provide minorities with a "bargaining chip" in the form of an opportunity to invoke VRA remedies).

¹²² See Lyons & Galderisi, *supra* note 20, at 860.

from the levels of protection reached in divided governments.¹²³ Even if bipartisan agreements in fact resulted in slightly more incumbents remaining in office, it is far from clear that the partisan scenario is preferable. In that case, one party would protect its own incumbents, and the slightly more competitive districts (skewed, of course, toward the controlling party) would come at the expense of the opposition. Thus, even if one believed that bipartisan gerrymandering resulted in slightly higher incumbent reelection rates, a more equitable partisan balance among reelected incumbents may compensate for a modest increase in incumbent reelection on the whole.

V. CONCLUSION

Perhaps the strongest criticism of this plan is that it is politically infeasible. It may simply be too much to ask of legislators to pass laws that inhibit the partisan and incumbent-protecting practices that help keep them in office. The debate over political lockups¹²⁴ — over who should define the most basic rules governing elections — centers on exactly that problem. Although courts seem the most obvious source of effective checks on self-serving legislators, the Supreme Court flatly rejected that role in *Vieth*. That decision left voters nowhere to turn but the obviously self-interested political branches. If there is to be reform, then, it must be palatable to incumbent legislators.

Focusing reform on the partisan aspects of gerrymandering provides a firmer political foothold on which to base more far-reaching reforms. Rooting out crass political opportunism is a cause that voters can rally behind, and one that reform-minded legislators can trumpet in their reelection bids. Unseating longtime incumbents, however, is a cause less likely to provoke passionate support, particularly among incumbents themselves. Thus, the proposals suggested above attempt to balance the interests of political appeal and real substantive reform. The solution, to be sure, is not a complete one. Nor is it sure to win political support. But it is no less viable than the next-best options on the table after *Vieth*, and it would constitute a meaningful step toward correcting a problem many consider an indefensible distortion of the political process.

¹²³ See Lublin & McDonald, *supra* note 47, at 146–57.

¹²⁴ See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).