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PARTISAN GERRYMANDERING AS A SAFEGUARD OF FEDERALISM

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I. INTRODUCTION

In 1954, Herbert Wechsler argued that congressional statutes that encroach on state power should not be subject to judicial review because the states' role in the composition of the federal government is sufficient to protect the institutional interests of the states from federal power.¹ Writing almost fifty years later, Larry Kramer agreed with Wechsler's basic point, but observed that these structural safeguards do little to protect the governing prerogatives of the states.² These mechanisms do not explain the continued success of American federalism, according to Kramer, because mediating institutions such as political parties and public interest organizations link politicians at every level of government and undermine the federalism originally envisioned by the Founders.³ These institutions destabilized the political competition between the levels of government that the Founders had hoped would protect the states from being consumed by the federal government.⁴ Kramer concluded that, despite this link between politicians at every level of government, the decentralized American party system provides a solution to the problem of mass politics that deprives Wechsler's argument of much of its force—that political parties protect the states by making national party officials politically dependent on state and local party organizations.⁵

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¹ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546, 558–59 (1954) (“[T]he existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism . . .”).

² Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223–25 (2000).

³ See *id.* at 275.

⁴ *Id.* at 269 (“As political parties began tentatively to form during the Washington Administration, national leaders reached out for support to leaders at the state and local level. The ‘natural’ fault line between state and federal officials was soon bridged by cross-cutting attachments based on ideology and party affiliation, and the most important anticipated source of protection for states was promptly rendered ineffective.”).

⁵ *Id.* at 278; see also Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1527–46 (1994) (arguing that although the Founders’ original design failed, other

In a similar vein, I argue that partisan gerrymandering is a product of our political system that can also protect the states from federal overreaching. All redistricting conducted by state legislatures is partisan in that the lines are drawn based predominantly on political considerations, but “partisan gerrymandering” is generally considered to be *true* partisan bias in redistricting,⁶ achieved through a combination of dispersing and concentrating voters either within or across districts (or more colloquially, cracking and packing).⁷ Both commentators and courts view partisan gerrymandering in a manner that is at times politically naïve and at others, anachronistic and atextual. It was not until the Supreme Court’s decision in *Vieth v. Jubelirer* that a significant number of the justices recognized that partisan gerrymandering can be both malignant *and* benign which, according to a plurality of these justices, makes it beyond the reach of judicial review.⁸

While scholars have attacked the *Vieth* plurality’s nonjusticiability holding on numerous grounds, they have not sufficiently addressed this idea that partisanship can be a constitutional good, discussed favorably as such in several Supreme Court

mechanisms emerged to protect state interests including decentralized political parties and the states’ role in the administration of federal law).

⁶ Partisan bias is “the difference between the seat share a party with exactly 50 percent of the vote wins and the seat share that it should win if both parties were treated equally by the electoral rules, (i.e., a seat share of 50 percent).” Thomas Brunnell & Bernard Grofman, *The 1992 and 1996 Presidential Elections: Whatever Happened to the Republican Electoral College Lock?*, 27 PRESIDENTIAL STUD. Q. 134, 135 (1997). Thus, “[partisan] bias is the (dis)advantage in seat share above/below 50 percent received by a given party that wins 50 percent of the vote.” *Id.*; see also Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1251–52 (1987) (“Partisan bias introduces asymmetry into the seats-votes relationship, resulting in an unfair partisan differential in the ability to win legislative seats: the advantaged party will be able to receive a larger number of seats for a fixed number of votes than will the disadvantaged party.”).

⁷ See, e.g., *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 471–72 (2006) [hereinafter *LULAC*] (Stevens, J., dissenting) (“[T]he plan guarantees that the Republican-dominated membership of the Texas congressional delegation will remain constant notwithstanding significant pro-Democratic shifts in public opinion.”). The term “gerrymander” emerged in 1812 after Elbridge Gerry, then governor of Massachusetts, and the Federalist legislature drew a district that looked like a salamander. See ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 17 (1907).

⁸ See 541 U.S. 267, 329–31 (2004) (Kennedy, J., concurring in plurality opinion). Eight justices in *Vieth* recognized that partisan gerrymandering is unconstitutional only if used excessively. See *id.* at 326. Prior to *Vieth*, only Justice O’Connor and Chief Justices Rehnquist and Burger had argued that partisan gerrymandering plays an important role in our democracy. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O’Connor, J., concurring) (“The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level.”).

decisions both before and after *Vieth*.⁹ And none have taken this a step further to conclude that partisan gerrymandering, as a species of partisanship, may be constitutionally desirable. Several scholars have certainly considered whether partisan gerrymandering is as harmful to democracy as commonly believed,¹⁰ and at least one commentator has argued that partisan gerrymandering violates federalism principles.¹¹ But the scholarly literature has failed to fully consider the argument that partisan gerrymandering might function as a political safeguard of federalism.¹²

Commentators have overlooked this aspect of partisan gerrymandering because the Elections Clause,¹³ which gives states the power to draw districts for

⁹ See, e.g., *LULAC*, 548 U.S. at 415–16; *Gaffney v. Cummings*, 412 U.S. 735, 751–53 (1973).

¹⁰ See, e.g., Nathaniel Persily, *The Place of Competition in American Election Law*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 171, 174 (Michael P. McDonald & John Samples eds., 2000) (arguing that noncompetitive districts “could be biased in favor of the political extremes” just as “competitive districts could be biased in favor of the moderate median voter” and competitive elections, like their noncompetitive counterparts, “might alienate voters who think their vote does not matter” because competitive elections have “higher costs and acrimony . . . with their guarantee that close to half of the electorate will have voted for the loser”); Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 43 (2008) (arguing that the “idea that partisan gerrymandering undermines popular sovereignty” is unconvincing because “[a]lthough the legislature’s design of the districts surely affects who may get elected, the legislature does not, and cannot, control what the voters do within those districts. As candidates know all too well, the voters decide their fate, not the mapmakers”).

¹¹ Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196, 1198 (2004).

¹² Some scholars have relied on the relationship between the state and federal governments as a source of potential remedies for partisan redistricting. See generally, e.g., James Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643 (2004) (arguing that state constitutional rulings on partisan gerrymandering can influence the federal constitutional structure of the electoral process because state constitutions have specific provisions regulating the apportionment process that the federal constitution lacks); Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626 (2004) (suggesting that federal courts should look at whether states have adopted redistricting commissions as evidence of whether there is an emerging social consensus against partisan redistricting).

¹³ The Elections Clause states: “The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1. Several Supreme Court decisions have discussed congressional redistricting as part of the states’ power under the Elections Clause. See, e.g., *Smiley v. Holm*, 285 U.S. 355, 371 (1932); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 568–69 (1916). Congress has also recognized this power. See *Reapportionment Act*, Ch. 5, 37 Stat. 14 (1911) (repealed 1929) (providing for the

their congressional representatives, became an ineffective safeguard due to the rise of political parties.¹⁴ Moreover, scholars did not consider redistricting a viable means of protecting the regulatory interests of the states because it occurred too infrequently to constrain federal power.¹⁵ Yet the increasing polarization of the two major political parties and the rise of mid-decade redistricting have renewed the ability of redistricting and in particular, partisan gerrymandering, to play a federalism-reinforcing role.¹⁶

This Article contends that the relationship between state and federal officials that arises through the redistricting process is an important component of federalism because it has the potential to protect the states' regulatory authority and increase their capacity for self-government in the face of expanding federal power. When states gerrymander congressional districts pursuant to their power under the Elections Clause, they are in fact furthering the federalism embodied in the Clause when the gerrymandering results in the election of congressional representatives that are responsive to state interests.¹⁷ The process of redistricting involves politicians at every level—local, state, and federal—supporting the mutual reciprocity between the branches to which Kramer attributes the success of American federalism.¹⁸ And although Congress' constitutional ability to "make or alter such regulations" gives it veto power over state redistricting, this power rarely has been used and does little to curb state authority in this area. As a result,

redistricting of congressional districts by each state). Congress has not used its power under the Elections Clause to stem the flow of partisanship into the process; however, bills have been proposed to this effect. *See* S. 143, 102d Cong. (1991); S. 2595, H.R. 5037, 101st Cong. (1990); S. 1727, H.R. 1711, 101st Cong. (1989); H.R. 3468, 98th Cong. (1983); H.R. 5529, 97th Cong. (1982); H.R. 2349, 97th Cong. (1981).

¹⁴ Kramer, *supra* note 2, at 269 ("The 'natural' fault line between state and federal officials was soon bridged by cross-cutting attachments based on ideology and party affiliation, and the most important anticipated source of protection for states was promptly rendered ineffective.").

¹⁵ See, for example, Wechsler, *supra* note 1, at 549–50.

¹⁶ The Court has exalted the various benefits of federalism, with justifications ranging from protecting individual rights and democracy, to shielding the sovereign authority of the states from federal overreaching. *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (arguing that federalism "increases opportunity for citizen involvement in democratic processes"); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (arguing that federalism protects individual rights); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1984) (arguing that states must be free to govern within the realm of authority left to them under the Constitution without judicial interference); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states are laboratories for democracy and make optimal policy choices for their electorate). This article focuses on one benefit in particular—the ability of the states to protect their regulatory authority from the national government in our federalist system—and the benefit of protecting individual liberty to a lesser extent.

¹⁷ For present purposes, I do not claim that this argument has any bearing on state legislative redistricting or bipartisan gerrymandering.

¹⁸ Kramer, *supra* note 2, at 278–79.

congressmen who rely on the state legislatures to draw their districts have an incentive to be responsive not only to their electorate, but also to state and local interests more generally while governing because state officials wield a tremendous amount of power over the prospect of reelection.

The likelihood that states will use their redistricting authority to obtain substantive policy gains at the federal level is increasingly plausible due to fundamental changes in the relationship between the two spheres of government in recent years. These changes stem from the massive expansion of federal power, most notably through the Troubled Asset Relief Program (TARP)¹⁹ and the American Recovery and Reinvestment Act of 2009 (the bailout).²⁰ Through these programs, the federal government purchased assets from troubled financial institutions and bailed out bankrupt corporations, leading many critics to charge that the government nationalized the private sector without any hope of achieving true economic recovery.²¹

Those state leaders who oppose government spending or other controversial federal policies like TARP and the bailout can use the states' redistricting power to influence federal policy indirectly. Gerrymandering helps the states to increase the electoral prospects of majority party candidates so as to send an ideologically cohesive delegation to Congress to oppose or support controversial federal programs. Given the constitutionality of mid-decade redistricting,²² a state now has the ability to redistrict at will and can use this influence to maneuver its House delegation towards its policy preferences. Because the state is a partisan entity, gerrymandering ensures that the state's policy preferences have an optimal chance to become law—preferences that are often ideologically parallel to, and coextensive with, the platform of the majority political party in the state.

Historically, the states have influenced their House delegations—and by implication, federal policy—through constituent instructions, although the use of instructions fell out of favor by the late nineteenth century.²³ Instructions played a considerable role throughout the Constitutional Convention—in the drafting of Article V, in votes for and against the document as a whole, and in voting on the Bill of Rights during the First Congress.²⁴ Following ratification, states continued to utilize constituent instructions to compel their delegates to vote for policies that

¹⁹ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

²⁰ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

²¹ Matthew Jaffe, *Critics: TARP Has Failed to Halt Foreclosures or Job Losses*, ABC NEWS (Sept. 24, 2009), <http://abcnews.go.com/Business/government-watchdog-extremely-taxpayers-recoup-tarp-money/story?id=8654889&page=1>.

²² *LULAC*, 548 U.S. 399, 415 (2006).

²³ See Kris Kobach, *May "We The People" Speak?: The Forgotten Role of Constituent Instructions in Amending The Constitution*, 33 U.C. DAVIS L. REV. 1, 38–41, 56, 58 (1999).

²⁴ *Id.* at 56.

were favorable to the states' interests.²⁵ The states' redistricting power can serve a similar function in modern society.

Contrary to much of the literature, this Article does not address whether there are judicially manageable standards to resolve partisan gerrymandering claims, nor does it embrace the view that partisan gerrymandering is never detrimental. Instead, this Article focuses on the potential for partisan gerrymandering to be a positive force in our democracy. Part II discusses the Supreme Court's decision in *Vieth v. Jubelirer* and the Court's departure from its view of partisanship, and in particular, partisan gerrymandering as an unmitigated evil. Part II also explores how *Vieth* has opened the door for revisiting the concept of partisanship in redistricting, and how later decisions validating mid-decade redistricting have increased the possibility that partisan gerrymandering can serve as a political safeguard. Part III argues that the Elections Clause serves as a textual anchor to support the constitutionality of partisan gerrymandering as a safeguard of federalism. Nothing in the Clause explicitly prohibits partisan considerations in redistricting; moreover, Congress has never exercised its power under the Clause to directly stem the flow of partisanship into the process. Part IV considers the constitutional structure, which similarly supports the idea that partisan gerrymandering can be federalism reinforcing. Furthermore, this section argues that the link between state and federal officials that arises through redistricting, when combined with the strength of political party ties, allows the state to send an ideologically cohesive delegation to Congress in order to protect their regulatory interests.

The Article concludes that the overall growth and expansion of the federal government in the last nine years will lead the states to utilize their redistricting power going forward to ensure that their interests are both reflected in federal policy and protected from federal power.

II. "THE FRAMERS ANTICIPATED THIS:" PROTECTING FEDERALISM THROUGH REDISTRICTING

A. Reinforcing the Concept of "Benign" Partisanship: *Vieth v. Jubelirer*

In *Vieth v. Jubelirer*, a plurality of the Supreme Court held that partisan gerrymandering claims are nonjusticiable. More importantly, these justices argued that the Framers of the Constitution *anticipated* that political entities would structure the districts and, presumably, that the manipulation of district lines would

²⁵ *Id.* at 52–53 (“Although the Articles of Confederation contained no explicit provisions regarding the right to instruct delegates on either constitutional matters or routine statutory matters, the right was assumed by state legislatures. Such an assumption was natural, given the long history of constituent instructions in America and the fact that state legislators were themselves routinely instructed by their constituents.”).

take place in our democracy.²⁶ Notably, eight of the *Vieth* justices agreed that partisan gerrymandering is unconstitutional *only if used excessively*.²⁷

In holding that partisan gerrymandering claims presented a nonjusticiable political question, the plurality did not indicate whether its equivocation on the harm from gerrymandering stemmed from any beliefs about its perceived federalism value. In fact, the political question doctrine is generally characterized as being an issue of separation of powers rather than federalism; since the Court refrains from deciding an issue that it believes is best resolved by the political branches usually because it cannot develop criteria that would allow for judicial resolution.²⁸ The *Vieth* plurality introduced a federalism angle to the analysis by examining how the Court's involvement would impact the redistricting relationship between the states and Congress.²⁹ This discussion arose in part because the justices realized the futility of framing the issue as one of equal protection (or as a violation of any other individual right) even though previous cases had hinted at the potential for an explicit textual remedy to address gerrymandering.

In *Gaffney v. Cummings*, for example, the Court rejected an argument that Connecticut's redistricting scheme diluted the political power of certain groups, but noted that overtly partisan plans still have the potential to "create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'"³⁰ The Court fleshed out this idea of invidious political discrimination in *Davis v. Bandemer*, which established a cause of action for partisan gerrymandering under the Equal Protection Clause and framed "the claim [as being] that each political group in a State should have the same chance to elect representatives of its choice as any other political group."³¹ To establish invidious discrimination based on partisan affiliation under *Davis*, a political group must show that "the electoral system is

²⁶ *Vieth v. Jubelirer*, 541 U.S. 267, 275, 285 (2004) (explaining that "[t]he Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics," given that the "Framers provided a [textual] remedy for the problem" of a party attempting to gain power disproportionate to its numerical strength).

²⁷ See *id.* at 285–86; *id.* at 307 (Kennedy, J., concurring in judgment); *id.* at 344 (Souter, J., dissenting), *id.* at 355 (Breyer, J., dissenting); see also *Cox v. Laiores*, 542 U.S. 947, 952 (Scalia, J., dissenting) (explaining that in *Vieth*, "all but one of the Justices agreed that [partisan gerrymandering] is a traditional [redistricting] criterion, and a constitutional one, so long as it does not go too far").

²⁸ See *Baker v. Carr*, 369 U.S. 186, 210 (1962); see also *Luther v. Borden*, 48 U.S. 1, 42 (1849) (holding that only the political branches can determine whether a state has a republican form of government).

²⁹ See *Vieth*, 541 U.S. at 288–89, 300–01.

³⁰ 412 U.S. 735, 751 (1973) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

³¹ *Davis v. Bandemer*, 478 U.S. 109, 124 (1986) (citing *White v. Regester*, 422 U.S. 935 (1975), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971)).

arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."³² In the years between *Davis* and *Vieth*, however, only one court was able to resolve a case of partisan gerrymandering under that standard.³³

It is not until *Vieth* that we get a fuller picture of why judicial regulation in this area has been unsuccessful. The case itself involved a Fourteenth Amendment challenge to a map drawn by the Republican dominated Pennsylvania legislature after the state lost two seats in the House of Representatives following the 2000 census. Prominent national figures in the Republican Party pressured the General Assembly to draw a skewed map to penalize Democrats for adopting plans unfavorable to Republicans in other states.³⁴ Much of the *Vieth* decision focuses on the lack of manageable standards following the Court's 1986 *Davis* opinion, but several other aspects of the decision speak to the Court's larger jurisprudence on the use of partisanship.

First, the *Vieth* plurality took a different approach than *Davis* by treating the issue as whether partisan gerrymandering can ever be constitutional rather than focusing specifically on the negative effects of gerrymandering. In many ways, *Vieth* is more consistent with cases decided prior to *Davis* than *Davis* itself. In earlier cases, the Court acknowledged that avoiding contests between incumbent representatives and respecting existing political subdivision boundaries during redistricting are legitimate policies that might justify some variance in the size of districts.³⁵ Similarly, the *Vieth* justices recognized, that "politics as usual," in the words of Justice Scalia, is a "traditional criterion and a constitutional one, as long as it does not go too far."³⁶ More recently, a majority of the Court, in *League of United Latin American Citizens (LULAC) v. Perry*, held that incumbent protection can, in some circumstances, serve as a legitimate political consideration in

³² *Id.* at 132.

³³ *Republican Party of N.C. v. Martin*, 980 F.2d 943, 955 (4th Cir. 1992).

³⁴ *Vieth*, 541 U.S. at 272.

³⁵ *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Reynolds v. Sims*, 377 U.S. 533, 578–79 (1964) ("Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."); *see also* *Bush v. Vera*, 517 U.S. 952, 964 (1996) ("[W]e have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal." (quoting *Karcher*, 462 U.S. at 740)); *White v. Weiser*, 412 U.S. 783, 791 (1973) ("[T]he fact that 'district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.'" (citing *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966))).

³⁶ *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J. dissenting) (citing *Vieth*, 541 U.S. 267 (2004)); *see also* Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 58 (2004) ("[T]he problem of partisan gerrymandering arises precisely because the Court has never taken the view that partisan motives in redistricting are per se unconstitutional. The Court has considered that view untenable and undesirable—and Justice Kennedy agrees").

redistricting beyond avoiding contests between incumbents.³⁷ Justice Kennedy, writing for himself on this point, went even further and argued that a state's decision to redistrict so that its House delegation reflects the political party's share of the statewide vote is legitimate.³⁸ Thus, there has been a consensus by a majority of the justices that some use of partisanship in redistricting, beyond incumbency protection, is constitutional.

Second, in addition to broader judicial acceptance of partisanship in redistricting, the Court's decision to limit liability under the *Shaw v. Reno* line of cases has led it to reassess the role of politics in redistricting altogether. In *Shaw*, the Supreme Court held that drawing districts based primarily on racial considerations violated the Equal Protection Clause of the Fourteenth Amendment.³⁹ Eight years later, in *Easley v. Cromartie*, a case in which the Court also analyzed the use of race in redistricting, the Court avoided imposing liability on the state under *Shaw* and its progeny on the grounds that political considerations, rather than race, predominated in the drawing of district

³⁷ *LULAC*, 548 U.S. 399, 440–41 (2006) (“If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters.”). Justice Kennedy was joined by four other justices in this portion of the opinion. *Id.*; see also *Easley v. Cromartie*, 532 U.S. 234, 239–40 (2001) (finding that racial criteria did not predominate where the legislature redistricted in such a way as to “(1) [to] cur[e] the [previous district’s] constitutional defects’ while also ‘(2) drawing the plan to maintain the existing partisan balance in the State’s congressional delegation’” by drawing the new plan “‘(1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts.’” (quoting *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 413 (E.D. N.C. 2000)) (alternation in the original)).

³⁸ *LULAC*, 548 U.S. at 419 (“To be sure, there is no constitutional requirement of proportional representation, and equating a party’s statewide share of the vote with its portion of the congressional delegation is a rough measure at best. Nevertheless, a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority.”). Chief Justice Roberts and Justice Alito joined Justice Kennedy’s disposition of the partisan gerrymandering issue, but it is not clear if they endorse this rationale. See *id.* at 492–93 (Roberts, Chief J., concurring in part and dissenting in part); *id.* at 511–12 (Scalia, J., concurring in part and dissenting in part). Justice Souter and Ginsburg, while not joining this portion of Justice Kennedy’s opinion, agreed with Justice Kennedy that “a legislature’s decision to override a valid, court-drawn plan mid-decade is [not] sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders” that run afoul of the rule of one person, one vote. *Id.* at 423.

³⁹ *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (finding that a reapportionment scheme “so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race” violates the Equal Protection Clause); see also *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that strict scrutiny is triggered when “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district”).

boundaries.⁴⁰ In essence, the Court created a partisan safe harbor for race-based redistricting that undermined its ability to treat partisan gerrymandering as the unmitigated evil envisioned by the *Davis* Court. *Easley* represented a judicial sanction of partisan intent in redistricting, even in districts where race and partisanship overlap.⁴¹

Finally, *Vieth* created a textual and originalist justification for partisan gerrymandering. The plurality relied on the Elections Clause which, according to the justices, anticipated that politics will play a role in the redistricting process and consequently provided Congress with the power to “make or alter” such districts if partisanship has exceeded constitutional bounds.⁴² The constitutional structure was also dispositive here—the Court treated the Elections Clause as an exclusive grant of authority to the political branches over redistricting. For all practical purposes, the *Vieth* plurality adopted Justice Frankfurter’s view in *Colegrove v. Green*: that the Elections Clause “has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility.”⁴³

Consistent with the plurality’s conception of partisan gerrymandering as “politics as usual” and therefore having a place in our democracy, partisan gerrymandering could also have a potential federalism value that might explain the *Vieth* plurality’s reluctance to prohibit it outright. This is a different view of partisan gerrymandering than that generally taken by the legal scholarship, which has either focused on characterizing the harm from partisan gerrymandering or

⁴⁰ 532 U.S. at 243. The Court noted the “extraordinary caution” that district courts must use “to avoid treading upon legislative prerogatives,” and concluded that no constitutional violation could be found if plaintiffs failed to show that race, rather than politics, predominately accounted for the redistricting results. *Id.* Moreover, the Court did not mention *Bandemer*, or suggest that there were constitutional limitations on politically driven redistricting. See also Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 633 (2002) [hereinafter Issacharoff, *Political Cartels*]; Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 253 (2009).

⁴¹ Compare *Easley*, 532 U.S. at 242, 246–47 (noting that evidence of blacks constituting even a supermajority in one congressional district, while amounting to less than a plurality in a neighboring district, is insufficient to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference), with *Bush v. Vera*, 517 U.S. 952, 968 (1996) (rejecting the idea that partisanship can excuse an impermissible reliance on race). See also *League of United Latin Am. Citizens v. Clements*, 884 F.2d 185, 188–89 (5th Cir. 1989) (making a distinction between losses based on race or color and mere defeat at the polls).

⁴² *Vieth v. Jubelirer*, 541 U.S. 267, 275–76 (2004).

⁴³ *Colegrove v. Green*, 328 U.S. 549, 554–56 (1946) (holding that the malapportionment of congressional districts is a matter to be left to Congress and not the courts).

alternatively, debated whether judicial review is appropriate.⁴⁴ In this literature, partisan gerrymandering has been criticized for imposing “structural” and “democratic” harms that should be redressable by courts.⁴⁵ Many scholars argue that it is undemocratic because it deprives voters of meaningful participation and choice, and it introduces excessive partisanship into the electoral system.⁴⁶ For structuralists, in particular, the harm from gerrymandering is “not so much that of discrimination or lack of a formal ability to participate individually, but that of constriction of the competitive processes by which voters can express choice.”⁴⁷

⁴⁴ See, e.g., Alexander & Prakash, *supra* note 10, at 55–57; Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 397, 407–10 (2005); Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1131–39 (2005) (reviewing RICHARD H. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003)) (arguing that First Amendment analysis “has been met almost reflexively with swift and utter condemnation by leading election law scholars”); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1212–13 (2003) (contending that a First Amendment analysis might be appropriate when it addresses the political activity of racial minorities); Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After Vieth v. Jubelirer*, 73 GEO. WASH. L. REV. 1166, 1178 (2005); Hasen, *supra* note 12, at 626; JoAnn D. Kamuf, “Should I Stay or Should I Go?”: *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 FORDHAM. L. REV. 163, 204–11 (2005) (arguing that the First Amendment may in fact provide a viable alternative to equal protection analysis of partisan gerrymanders); David Schultz, *The Party’s Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U. L. REV. 1, 30–36 (2007); Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1026 (2005); Robert A. Koch, Note, *A Wolf in Sheep’s Clothing: Gaffney and the Improper Role of Politics in the Districting Process*, 39 U. MICH. J.L. REFORM 99, 109 (2005); see also sources cited *infra* notes 45, 46, 48.

⁴⁵ See, e.g., Issacharoff, *Political Cartels*, *supra* note 40, at 614; Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymandering*, 153 U. PA. L. REV. 541, 543 (2004); Michael S. Kang, *When Courts Won’t Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1096–1100 (2007).

⁴⁶ See Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 179 (2003) (arguing that the districts created following the 2000 census “not only insulated incumbents from competition,” but that they also froze in place “a ‘distributional bias’ that gives Republicans a roughly fifty-seat head start in the battle for control of Congress,” which “might prevent Democrats from regaining control of Congress in this decade even if public opinion shifts heavily in their favor”); Issacharoff, *Political Cartels*, *supra* note 40, at 601–11 (arguing that partisan redistricting frustrates the will of the voters and hampers the accountability of the government to the electorate). But see Michael Kang, *Electoral Redistricting and the Supreme Court: The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 443, 464–68 (2005) (arguing that offensive gerrymandering, which is intended to make reelection more difficult for the opposition party, is not all bad because it decreases the electoral security of incumbents of both parties).

⁴⁷ Issacharoff, *Political Cartels*, *supra* note 40, at 600.

Partisan gerrymandering also undermines state neutrality in governing, some contend, because it virtually guarantees the election of more polarizing and less accountable elected officials.⁴⁸

In this vein, the *Vieth* plurality conceded that excessive partisan gerrymandering is a problem, but it placed the issue outside of the realm of the judiciary. As is clear from both the legal scholarship and the *Vieth* opinion, partisan gerrymandering is not amenable to analysis under just one (or two) constitutional provisions, nor is a remedy readily apparent on its face.⁴⁹ In fact, the justices have relied on multiple constitutional provisions, most notably the First and Fourteenth Amendments, in trying to articulate the harm.⁵⁰ Despite these attempts, however, the Court has been clear that legislatures may consider

⁴⁸ See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 783 (2005); Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1199 (2007); Adam Cox, Comment, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 755–63 (2004); Yasmin Daewood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1423–26 (2008); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 702 (1998); Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL'Y 91, 94–96 (2000); Samuel Issacharoff, *Surreply: Why Elections?*, 116 HARV. L. REV. 684, 693 (2002); Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 759 (2000); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999); see also *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting) (“The concept of equal justice under law requires the State to govern impartially.”).

⁴⁹ See *Vieth*, 541 U.S. at 288 n.9 As Justice Scalia observes:

The Constitution also does not share appellants’ alarm at the asserted tendency of partisan gerrymandering to create more partisan representatives. Assuming that assertion to be true, the Constitution does not answer the question whether it is better for Democratic voters to have their State’s congressional delegation include 10 wishy-washy Democrats (because Democratic voters are “effectively” distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts). Choosing the former “dilutes” the vote of the radical Democrat; choosing the latter does the same to the moderate. Neither Article I, § 2, nor the Equal Protection Clause takes sides in this dispute.

Id.

⁵⁰ See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *Davis v. Bandemer*, 478 U.S. 109, 121–27 (1986). But see Issacharoff, *Political Cartels*, *supra* note 40, at 608 (“If the gravamen of the harm of gerrymandering lies in the inability of a majority of the whole body to govern, the continued attempt to restrict the voting rights inquiry to simply an individual claim must be doomed.”). Justice Breyer, in particular, has relied on this approach in asserting that partisan gerrymandering raises constitutional concerns. See *Vieth*, 541 U.S. at 360–61 (Breyer, J., dissenting) (discussing the “democratic harm” of unjustified entrenchment).

partisanship and gerrymander without running afoul of either provision because the subjective nature of the “harm” (i.e., some group is *always* disadvantaged whenever district lines are drawn) makes it difficult to conceptualize when a partisan gerrymander has reached unconstitutional levels.

Most importantly, none of these approaches have been able to command a majority because there is not a consensus among the justices (or scholars) that partisan gerrymandering is responsible for the harms in our electoral system commonly attributed to it, specifically the lack of political competition and the election of less accountable and more polarized officials.⁵¹ Indeed, as should be apparent thus far, much of the analysis of gerrymandering is conducted without consideration of whether it can be beneficial to the democratic process. To fill this gap, this Article focuses on the potential salutary aspects of gerrymandering. The next section lays the groundwork by arguing that mid-decade redistricting has made it possible for gerrymandering to serve as a viable federalism safeguard.

B. Redistricting as a Federalism Constraint

Federalism limits the federal government to acting in accordance with its enumerated powers and allows the states to act where power has not been delegated.⁵² The gerrymandering of congressional districts by state representatives is a potential constraint on federal power—but one that complements, rather than undermines, the notion of dual sovereignty inherent in our Constitution. The power

⁵¹ See, e.g., MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR 124–25 (2000) (studying political behavior in Massachusetts and Connecticut and noting that despite redistricting, “there were marked shifts from year to year in the partisan bias,” and this was true even when “the political environment [was] stable (that is, the incumbents [were] reelected)”; see also ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 41–42 (1968) (discussing how a “Madisonian theorist” would be suspicious of electoral systems that tend to overrepresent majorities, such as winner-take-all systems); Gary C. Jacobson, *Competition in U.S. Congressional Elections*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 27, 43 (Michael P. McDonald & John Samples eds., 2000) (noting that the low turnover in the House has “multiple, mutually reinforcing causes” and the “favorite culprit of many critics, the creation of safe (lopsidedly partisan) districts via gerrymandering . . . is a relatively small part of the story”).

⁵² *Printz v. United States*, 521 U.S. 898, 919 (1997) (“Residual state sovereignty was also implicit, of course, in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment’s assertion that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (“[W]ithin the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be.”).

that states have over redistricting promotes the federalism interest that states have in their own sovereign authority, and also recognizes that the states are in the best position to allocate political power amongst its citizens and define their relationship with the federal government.⁵³ Most important, states can use their redistricting power under the Elections Clause to influence federal policy as it relates to the state as a sovereign entity. Yet until now, this power has been largely overlooked as a federalism constraint because of the infrequency of redistricting and federal intervention through statutes like the Voting Rights Act.⁵⁴

Although the Elections Clause is a federalism provision,⁵⁵ the infrequency of the process is one reason Herbert Wechsler discounted redistricting as a potential means of protecting the states. Wechsler argued that the states are the primary source of positive law and play an indispensable role in the composition of the federal government, both of which protect the states from Congress. These protections, according to Wechsler, render judicial enforcement of the textual limits on the power of the national government unnecessary.⁵⁶

Wechsler believed that redistricting could only minimally protect federalism because Congress has the ability to alter state redistricting plans which it has used, for example, to require single member districts. In contrast, Jesse Choper argued that the House, although not as much of a factor for state representation as the Senate, is still “a factor” given “the constitutional requirement that each state have at least one representative in the House” and the “opportunities for state legislatures to influence the selection of congressmen through their authority to draw district lines.”⁵⁷ Indeed, Choper took Wechsler’s argument even further by

⁵³ *New York v. United States*, 505 U.S. 144, 181 (1992) (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” (citation omitted)). For more on this, see *infra* Part IV.B.

⁵⁴ *Kramer*, *supra* note 2, at 226–27.

⁵⁵ *States draw districts in the first instance*, and Congress retains a veto power. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 805 (1995) (finding that the Elections Clause is an “express delegation[] of power to the States to act with respect to federal elections”); *Grove v. Emison*, 507 U.S. 25, 34 (1993) (“[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.”); see also *Lance v. Dennis*, 444 F. Supp. 2d 1149, 1156 n.9 (D. Colo. 2006) (discussing the history of the Elections Clause); *Greene*, *supra* note 44, at 1030 (“The Elections Clause debate, and the concurrent sovereignty solution that emerged from it, was thus a microcosm of the larger federalism debate that continues to this day.”); William J. Phelan, *Political Gerrymandering After LULAC v. Perry: Considering Political Science for Legislative Action*, 32 SETON HALL LEGIS. J. 89, 94 (2007) (“[T]he Founders saw the Elections Clause as a balance of federalism: the federal government controls the *amount* of representatives that come to Washington, but the several states choose the *manner* in which they are chosen.”).

⁵⁶ Wechsler, *supra* note 1, at 544–46.

⁵⁷ JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 177 (1980).

divesting the judiciary of any responsibility of resolving issues of state sovereignty.⁵⁸

Choper's argument that state representation is achieved in part through congressional redistricting is certainly bolstered by the judicial sanction of mid-decade partisan gerrymandering, which undermines the argument that redistricting cannot be a constraint on federal power because the process happens so infrequently. In *LULAC*, a majority of the justices rejected the claim that a legislature's decision to redistrict mid-decade is *prima facie* evidence of an unlawful partisan gerrymander.⁵⁹ In *LULAC*, as well as in other cases, the Court relied primarily on the constitutional text, which places the obligation of drawing districts on the states, first and foremost, and Congress, secondarily, although the federal courts have often intervened when the legislature could not agree on a plan.⁶⁰ Given the structural and textual preference for redistricting to be handled by the political branches, however, the justices concluded that "if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act."⁶¹

The constitutionality of mid-decade redistricting, combined with the increasingly contentious fights the process generates, requires congressmen to be more vigilant about their electoral prospects than ever before for a number of reasons. First, even if a congressman wins by a large margin in one election, he has no assurance that the margin will carry over to the next election.⁶² The scholarly

⁵⁸ *Id.* at 175 ("The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates 'states rights' should be treated as nonjusticiable.").

⁵⁹ *LULAC*, 548 U.S. 399, 423 (2006) (Kennedy, J., Souter, J., & Ginsberg, J.) (finding that the legislature's decision to redistrict mid-decade did not violate one person, one vote principles); *id.* at 492 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part) (agreeing that appellants have not identified a reliable standard for identifying an unconstitutional partisan gerrymandering); *id.* at 511–12 (Scalia, J. & Thomas, J., concurring in part and dissenting in part) (arguing that partisan gerrymandering claims are nonjusticiable).

⁶⁰ *Id.* at 414 (Kennedy, J.); *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004); *see also* *Branch v. Smith*, 538 U.S. 254, 258–59 (2002) (noting federal intervention is appropriate where the state court failed to pass a properly precleared redistricting plan prior to the state deadline); *Grove v. Emison*, 507 U.S. 25, 34 (1993) (noting that sometimes federal judicial intervention may be appropriate, but the Constitution "prefers *both* state branches to federal courts as agents of apportionment"); sources cited *supra* note 55.

⁶¹ *LULAC*, 548 U.S. at 416.

⁶² *See, e.g.,* James Garand, *Electoral Marginality in State Legislative Elections, 1968–86*, 16 LEGIS. STUD. Q. 7, 7–10 (1991) (arguing that incumbents from state legislative districts who win by large margins may still be electorally vulnerable in the next election); Gary Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives 1952–82*, 31 AM. J. POL. SCI. 126, 136–39 (1987) (arguing that the cutoff point between safe and marginal congressional seats may need to be increased because current margin of victory no longer guarantees future success); *see*

literature clearly shows that an incumbent's current margin of victory is not a good indicator of future prospects; thus, incumbents cannot afford to ignore their constituents despite the availability of gerrymandering.⁶³ Mid-decade redistricting, when combined with changes in national political tides, unexpected political scandals, and congressional retirements, adds another element of uncertainty to the mix for incumbents.

Because the process is far from predictable, it is erroneous to believe that incumbents are always in favor of the reconfiguration of their districts. For instance, incumbents may seek to retain a particular constituency or donor within their district who could possibly be removed during redistricting. Moreover, the new district will be filled with unfamiliar voters who, based on their prior voting practices, may be willing (but are not necessarily certain) to vote for the incumbent. In other words, there is no guarantee that these voters, even if they identify with the same party as the incumbent, will fall in line come Election Day.

Thus, incumbent-protecting gerrymanders notwithstanding, most incumbents do not win reelection because of redistricting.⁶⁴ As a result, a congressman has an incentive to respond to whatever elements, either within or outside of his district, state or federal, that will increase his chances of reelection and his party's chances

also Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 660 (2002) ("Even admitting, as one must, that redistricting by partisan officials allows them to skew the outcomes of elections, self-interested gerrymanders do not remove elections' 'after-the-fact capacity to vote [incumbents] out of office.'").

⁶³ Stephen Ansolabehere et al., *The Vanishing Marginals and Electoral Responsiveness*, 22 BRIT. J. POL. SCI. 21 (1992). These authors note that:

Whatever the reasons, an incumbent's margin in the previous election is not as good an indicator of prospects in the next election as it once was. Thus, the electoral uncertainty facing incumbents has increased. Consequently, they are going home more frequently, allocating increasing resources to the district and in myriad ways 'working' their constituencies.

Id. at 27; see also GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 205 (2000) (noting that despite the perceived increase in the incumbency advantage, incumbent's electoral safety did not increase; rather, the perceived increase in incumbency advantages resulted from the coordination of weak incumbent departures and strong challenger entries occurring as a product of regular reapportionment); Rush, *supra* note 51, at 62 ("Intuitively, we would expect strongly Republican constituencies to remain so from one election to the next. However, in reality we find the strongly Republican constituencies can rapidly turn into strongly Democratic ones (and vice versa) if given the opportunity.").

⁶⁴ DAVID BUTLER & BRUCE CAIN, *CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES* 13 (1992); see also Jeffery J. Mondak, *Competence, Integrity, and the Electoral Success of Congressional Incumbents*, 57 J. POL. 1043, 1056 (1995) (examining the "impact of competence and integrity on an incumbent's electoral success").

for majority status in the House. This requires a continuous relationship between the congressman and his state counterparts not just on policy, but also in the construction of the representative's district. A favorable gerrymander will not lead an incumbent to shirk his duties to his constituency because of the inherent uncertainty of the process.⁶⁵

Second, while gerrymanders often inure to the benefit of incumbents, ambitious state legislators also draw seats with an eye towards a future run for office. Many of these individuals have congressional aspirations; thus, they seek to draw not only a district that will allow the current incumbent to win, but also one in which they can win at a later date.⁶⁶ Congressional representatives, therefore, have to think of their own ambitions and also the potentially conflicting ambitions of their state counterparts.

Third, midyear elections may change the party in power in state legislative bodies, which may then seek to institute a new redistricting plan at the behest of their congressional counterparts.⁶⁷ In Texas, for example, Republicans gained

⁶⁵ See GARY JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 8–9 (7th ed. 2009) (noting that partisan gerrymanders are “easier to calculate than to carry out” because arrangements “that might add to a party’s share of seats often conflict with other political necessities, particularly the protection of incumbents unwilling to increase their own electoral risks to improve their party’s collective welfare,” and moreover, voters “often frustrate partisan schemes”); *id.* (discussing the 1982 Republican gerrymander of Indiana in which all of the Democratic incumbents who sought reelection won despite attempts to gerrymander their districts; by the end of the decade, Democrats had an 8-2 majority of the state’s congressional delegation.); see also BUTLER & CAIN, *supra* note 64, at 9–10 (discussing a New York state redistricting plan intended to give control of the state legislature to the Republicans, which backfired in the wake of Watergate, allowing Democrats to ultimately gain control of both houses); Persily, *supra* note 10, at 173 (“Partisan gerrymanders may decrease competition for control of legislative chambers, for example, but they may increase the competitiveness of many individual districts where the majority party has spread its supporters too thin.”).

⁶⁶ *Larios v. Cox*, 300 F. Supp. 2d 1320, 1336 (N.D. Ga. 2004) (striking down a Democratic-leaning redistricting plan in Georgia; notably, the decision relied on testimony that “passing a congressional plan is an extraordinarily political process because so many legislators have aspirations of being elected to Congress and, therefore, have an interest in crafting a district they consider politically desirable”); see also Michael Berkman & James Eisenstein, *State Legislators as Congressional Candidates: The Effects of Prior Experience on Legislative Recruitment and Fundraising*, 52 POL. RES. Q. 481, 485 (1999) (“Experienced candidates from both parties are more risk adverse, running much more often for open seats where the chances of losing are lower.”). The fact that state legislators are far less likely to compete with an incumbent representative for his or her seat and would rather wait for a seat to open up shows that redistricting is more about cooperation than competition.

⁶⁷ See *LULAC*, 548 U.S. 399, 409–10 (2006); *Vieth v. Jubelirer*, 541 U.S. 267, 272–73 (2004) (finding that redistricting plans passed at the urging of national party figures were a retaliatory measure against recent pro-Democrat redistricting in other states); see generally BUTLER & CAIN, *supra* note 64, at 93 (noting that state legislative leaders craft a

control of both houses of the state legislature in 2003 and, at the behest of national party officials, enacted a new congressional redistricting map in 2004, despite the fact that a federal court had already instituted a redistricting plan following the 2000 census.⁶⁸ Similarly, a state court drew a new map of Colorado following the 2000 census because the legislature could not agree on a plan. However, after the 2002 elections, the Republican Party became the majority party in Colorado and replaced the court-ordered plan with a new plan that eliminated the one remaining competitive seat, making the seat safely Republican.⁶⁹ The increasing frequency of partisan redistricting, therefore, has forced representatives to be more vigilant about their electoral prospects.

Extensive federal involvement in state electoral processes offers little comfort to congressional representatives. Indeed, such involvement has led to arguments that states have, at best, limited control over congressional redistricting. As Part III will show, however, Congress has rarely exercised its power to “make or alter” such districts outside of laying down minimum criteria for the states to follow regarding compactness, contiguity, and single member districting.⁷⁰ Instead, expansive civil rights legislation has served this role, and with the passage of the Voting Rights Act of 1965, some states have significantly less power over redistricting than they once did.⁷¹ Nevertheless, recent Supreme Court cases limiting the reach of some of these legislative provisions indicate that the Court is no longer amenable to expansive federal power over state electoral processes.⁷² Nor has this legislation stopped states such as Texas, which is covered by the Voting Rights Act, from engaging in partisan redistricting mid-decade. As the

redistricting plan after “extensive consultation with some or all incumbent congressmen, interested legislative incumbents, and critical interest groups.”).

⁶⁸ *LULAC*, 548 U.S. at 412 (upholding mid-decade plan against a challenge under the U.S. Constitution).

⁶⁹ See *Salazar v. Davidson*, 79 P.3d 1221, 1226 (Colo. 2003) (finding that the Colorado legislature violated state law when it replaced a court-ordered redistricting plan with a mid-decade plan of its own).

⁷⁰ See *infra* Part III; see also *BUTLER & CAIN*, *supra* note 64, at 91 (“Apart from laying down the general principles for allotting seats to states, Congress has seldom interfered with the redistricting process.”).

⁷¹ See 42 U.S.C. § 1973 (2006).

⁷² See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511 (2009) [hereinafter *NAMUDNO*] (raising constitutional concerns about the continuing validity of section 5 of the Voting Rights Act because it “authorizes federal intrusion into sensitive areas of state and local policymaking,” which “imposes substantial ‘federalism costs’” in part because it makes distinctions between similarly situated sovereigns); *Riley v. Kennedy*, 553 U.S. 406, 424–28 (2008) (finding preclearance under section 5 of the Voting Rights Act unnecessary for a voting law brought into effect by the invalidation of its predecessor); *LULAC*, 548 U.S. at 446 (rejecting an expansive interpretation of the VRA that would have, in the plurality’s view, “unnecessarily infuse[d] race into virtually every redistricting, raising serious constitutional questions”).

Court retreats from its broad view of federal power in this area, redistricting has emerged as a way to protect the states in a way previously unconsidered.⁷³

III. THE LEGITIMACY OF PARTISAN GERRYMANDERING: EXAMINING THE CONSTITUTIONAL TEXT AND HISTORY

Contrary to assertions in the scholarly literature, the Elections Clause arguably serves as a textual anchor to support, rather than counter, arguments about the constitutionality of gerrymandering.⁷⁴ The states' redistricting power under the Clause is broad enough to support the constitutionality of partisan gerrymandering, at least to the extent that such gerrymandering is necessary to reinforce the sovereignty of the states. According to some commentators, however, the states' power under the Clause does not include "the power to regulate congressional elections with the aim and effect of artificially insulating members of Congress from electoral competition."⁷⁵ In reality, the federalism aspect of the

⁷³ BUTLER & CAIN, *supra* note 64, at 91 ("[B]asic procedures and normal politics of redistricting are still protected by the principle of state sovereignty."). The preclearance provisions of section 5 of the Voting Rights Act of 1965 and the vote dilution provisions of section 2 are constraints on state power, but section 2 is useful in constraining partisanship only where partisanship and race tend to overlap and the constitutionality of section 5 has been questioned in recent years. See *NAMUDNO*, 129 S. Ct. at 2508–10. State constitutions are now the only real constraint on mid-decade redistricting. BUTLER & CAIN, *supra* note 64, at 43 (discussing a 1984 California ballot initiative that would have redistricted mid-decade but was found to violate the California Constitution, which limited redistricting to once per decade).

⁷⁴ For a contrary position, see Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 269–70 (2006) ("The Elections Clause does not grant state legislatures the power to manipulate congressional elections for impermissible reasons. This limitation on the grant of power is necessary to protect the affirmative right 'of the People' in Article I, Section 2, to choose their Representatives." (footnotes omitted)); Note, *supra* note 11, at 1210 (arguing that the Elections Clause prohibits states from gerrymandering and "[c]ourts should look for evidence of state legislative overreaching into the province of the national legislature—evidence that states have transformed their power to regulate the times, places, and manner of elections into the power to dictate electoral outcomes by favoring or disfavoring classes of candidates"); see also Brief for Samuel Issacharoff et al. as Amici Curiae in Support of Appellants at 9, *LULAC*, 548 U.S. 399 (2006) (Nos. 05-204, -254, -276, -439) ("The Elections Clause, like the Qualifications Clauses at issue in *Term Limits*, does not empower the states (or Congress) to design congressional districts in a way that 'would lead to a self-perpetuating body to the detriment of the new Republic.'") (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.10 (1995)).

⁷⁵ See Michael P. McDonald & John Samples, *The Marketplace of Democracy: Normative and Empirical Issues*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 1, 8 (Michael P. McDonald & John Samples eds., 2000); see also Greene, *supra* note 44, at 1026 (arguing that the Elections Clause is a limitation on the ability of state legislatures to manipulate the outcomes of congressional elections).

Clause demands that states have flexibility to exercise their influence through redistricting, which is consistent with both the text and the Framers' view that delegating this expansive power to the states would constrain the power of the national government.

First, nothing in the text of the Clause suggests that partisan gerrymandering is per se illegal. This is notable because the Court has often interpreted the Clause in light of what it does not prohibit, with several justices suggesting that unless there is an explicit prohibition, then the practice should be sustained.⁷⁶ The Elections Clause specifically states that "the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof."⁷⁷ The states' ability to draw congressional districts has been considered, both historically and according to the case law, as part and parcel of the states' power to choose the *manner* of elections. As early as 1842, when Congress first required that representatives be elected by district, it did not give itself the duty of drawing the lines—it left this to the states.⁷⁸ In *Smiley v. Holm*, the Court reaffirmed that states did indeed have the power to redistrict under the Elections Clause, noting that, since shortly after the adoption of the Constitution, the uniform practice "has been to provide for congressional districts by the enactment of statutes with the participation of the Governor."⁷⁹ Moreover, Congress explicitly recognized this power, in the Court's view, by according to the states a method of establishing districts through state legislative power.⁸⁰

⁷⁶ See *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) ("[N]either Article I, § 2, nor the Equal Protection Clause, nor . . . Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."); *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932) ("[T]here is nothing in article I, § 4, which precludes a State from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."); see also *Vieth*, 541 U.S. at 325 n.11 (Stevens, J., dissenting) (criticizing the plurality for assuming that if a practice does not explicitly violate the Bill of Rights, the Court has no proper basis for striking it down); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 687 (1996) (Scalia, J., dissenting) (arguing that the Court has "no basis for proscribing as unconstitutional practices that do not violate any explicit text of the Constitution and that have been regarded as constitutional ever since the framing").

⁷⁷ U.S. CONST. art. I, § 4, cl. 1.

⁷⁸ Nicolas Flores, *A History of One-Winner Districts for Congress*, Chapter 3: The 1842 Apportionment Act (unpublished thesis, Stanford University), available at <http://www.fairvote.org/library/history/flores/apportn.htm#Debate> (last visited June 30, 2010).

⁷⁹ 285 U.S. at 370; *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569–70 (1916) (holding that an act requiring that a state be redistricted according to state law rather than by the state legislature is constitutional under the Elections Clause).

⁸⁰ *Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (interpreting the word "legislature" in the Elections Clause to mean that redistricting plans are legislative activity that must be adopted in accordance with state law in order to become binding which, in this case, requires passage by the legislature and approval by the governor); *Smiley*, 285 U.S. at 371

Although partisan gerrymandering is a form of redistricting long accepted as part of the “manner” of holding elections, there has been renewed criticism of partisan redistricting because of recent Supreme Court decisions finding that the Founders intended the states’ power under the Elections Clause to apply to passing only procedural, rather than outcome determinative, regulations of congressional elections. These cases—*Cook v. Gralike*⁸¹ and *U.S. Term Limits v. Thornton*⁸²—held that the states’ attempt to dictate political outcomes through their Elections Clause power was unconstitutional because the Clause only granted states the ability to enact procedural mechanisms for holding congressional elections.⁸³ Thus, pursuant to these precedents, partisan gerrymandering would seem to be a questionable exercise of the states’ power under the Elections Clause because it can be outcome determinative.

This principle is necessarily limited, however, because potentially all electoral rules can be outcome determinative. For example, although Hawaii is no longer a one-party state, for a long time its ban on write-in ballots, its onerous ballot access laws, and its requirement that primary voters choose only one ballot for all offices ensured continued Democratic dominance in the state.⁸⁴ When viewed in their totality, these rules functioned (and were intended to function) in an outcome-determinative manner. There is also something inherently suspect about the state’s attempt to inject itself into the electoral process in a nonneutral way just as the voter is poised to make his choice.⁸⁵ In contrast, the partisanship in the redistricting

(discussing section 4 of the 1911 Reapportionment Act which provided for the election of representatives “by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof”).

⁸¹ 531 U.S. 510, 525–26 (2001) (holding that negative ballot notations next to the names of state candidates for federal office was not a permissible time, place and manner regulation under the Elections Clause, but rather an attempt to dictate substantive electoral outcomes).

⁸² 514 U.S. 779, 836–38 (1995) (holding that a state’s attempt to impose term limits on congressional and senate candidates violated the Qualifications Clauses).

⁸³ See *Cook v. Gralike*, 531 U.S. at 523 (“As we made clear in *U.S. Term Limits*, ‘the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.’” (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995))). It is undisputed that states have the power to draw congressional districts pursuant to their power under the Elections Clause and such power, in order to remain consistent with *Cook*, must be viewed as a procedural regulation. Only Justice Stevens extrapolates a requirement of state neutrality from the Elections Clause; the *Vieth* plurality and the other opinions do not even mention *Cook* or *U.S. Term Limits*. *Vieth v. Jubelirer*, 541 U.S. 267, 333 n.26 (2004) (Stevens, J., dissenting).

⁸⁴ Issacharoff & Pildes, *supra* note 48, at 672 (“The ban on write-in votes prevents this disaffection from coalescing behind a specific alternative candidate to the choice of the Democratic Party.” (citing *Burdick v. Takushi*, 504 U.S. 428 (1992))).

⁸⁵ See *Cook*, 531 U.S. at 531 (Rehnquist, C.J., dissenting) (arguing that the ballot notations are invalid because the “State injects itself into the election process at an

process arguably occurs at a noncritical point, given that intervening events—such as political controversies, national tides, and even voting day weather—can all have some effect on the voter's decision-making process. Partisan redistricting raises fewer concerns than ballot notations or term limits because, despite the composition of district lines, the voter still has an opportunity to express his choice without overt state interference.

Moreover, much of the historical record relied on by the *Thornton* and *Cook* Courts favorably discusses state electoral rules that can be outcome determinative in a manner similar to gerrymandering.⁸⁶

Most important, at least five of the *Vieth* justices implicitly rejected the view that partisan gerrymandering is prohibited by either *Cook* or *Thornton* by explicitly recognizing that redistricting can influence outcomes and conceding that this form of redistricting is constitutional up to a certain threshold.⁸⁷ Indeed, the *Vieth* plurality, omitting any mention of either decision, cited to the Elections Clause for the proposition that “the Constitution clearly contemplates districting by political entities” because the Framers allowed states to draw the districts in the first instance and anticipated that partisan considerations would come into play.⁸⁸

Second, Congress has not used its veto power in the Clause to restrict gerrymandering. Congress's constitutional power to “make or alter” state

absolutely critical point—the composition of the ballot, which is the last thing the voter sees before he makes his choice,” and such notations thus violate the First Amendment).

⁸⁶ See *U.S. Term Limits*, 514 U.S. at 833. The Court noted that:

During the Convention debates, for example, Madison illustrated the procedural focus of the Elections Clause by noting that it covered “[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; *should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district.*”

Id. (emphasis added) (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240 (M. Farrand ed. 1911)); see also *Cook*, 531 U.S. at 523–24.

⁸⁷ *Vieth*, 541 U.S. at 285; see also *id.* at 358, 360 (Breyer, J., dissenting) (noting that the “legislature’s use of political boundary-drawing considerations ordinarily does *not* violate the Constitution’s Equal Protection Clause,” and acknowledging that, since single member districts are the norm, “political considerations will likely play an important, and proper, role in the drawing of district boundaries”).

⁸⁸ *Id.* at 285; see also *LULAC*, 548 U.S. 399, 414, 417 (2006) (under the Elections Clause, states have the primary role in apportioning districts for their congressional colleagues and the state has acted constitutionally even where “the legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority”). See generally Pildes, *supra* note 36, at 50–51 (“[S]tate action that would be impermissible viewpoint discrimination in other domains is inevitable in the construction of democratic institutions [because s]tates must choose the forms through which representation will occur [and] . . . must inevitably act on the basis of substantive visions of the kind of democratic politics they seek to encourage.”).

regulations is open-ended language that is generally regarded as providing a check on state power, and conceivably could have been used to address gerrymandering.⁸⁹ Although there was little discussion of the Clause during the convention of 1787, John Rutledge and Charles Pinckney offered an amendment that would give states, and not Congress, the final say over legislative redistricting.⁹⁰ The amendment was ultimately rejected, but the states were still uneasy with Congress having what essentially amounted to a veto power over their redistricting plans. For example, in ratifying the Constitution in 1789, the State of Massachusetts adopted the following resolution:

Resolved, That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a full and equal representation in Congress, agreeably to the Constitution.⁹¹

South Carolina passed a similar resolution during its convention and further directed its elected delegates “to exert their utmost abilities and influence to effect an alteration of the Constitution conformably to the foregoing resolution.”⁹² Likewise, one of the amendments proposed by New York upon its ratification of the Constitution on July 26, 1788 reads as follows:

That the Congress shall not make or alter any regulation in any State, respecting the times, places, or manner of holding elections for Senators or Representatives, unless the Legislature of such State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and then only until the Legislature of such State shall make provision in the premises: provided, that Congress may prescribe the time for the election of Representatives.⁹³

The ability of the states to choose the “manner, time, and places of holding the elections” was viewed by a significant segment as being “forever inseparably

⁸⁹ *Vieth*, 541 U.S. at 275–76 (“[O]pposition to the ‘make or alter’ provision of Article I, § 4—and the defense that it was needed to prevent political gerrymandering—continued to be voiced in the state ratifying debates.”).

⁹⁰ JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 371 (Gaillard Hunt & James Brown Scott, eds. 2007).

⁹¹ CONG. GLOBE, 27th CONG., 2D SESS. app. at 348 (1842).

⁹² *Id.*

⁹³ *Id.*

annexed to the sovereignty of the several States . . .” and as such, should be “exclusive of the interference of the General Government.”⁹⁴

As a result, there is incredible uncertainty about the extent and scope of Congress’s authority to “make or alter” state regulations. Congress itself has been clear that there are federalism limits to its oversight of state redistricting and the Court, with some exceptions, has largely agreed. In *Ex Parte Siebold*, the Court held that “make or alter” in the Clause is not a “declaration that the regulations shall be made either wholly by the state legislatures or wholly by Congress,” so in the absence of congressional regulation, state regulations are valid and binding.⁹⁵ Neither the *Siebold* nor *Vieth* Courts questioned Congress’s ability to displace state regulations under its Elections Clause authority for whatever reason it may see fit.⁹⁶ Yet the federalism implicit in the Clause, as well as the historical record, both indicate that the states were meant to be partners in our system of government in many respects, subordinate only in those areas where power had been delegated exclusively to the federal government.⁹⁷ And perhaps the fact that the Clause

⁹⁴ *Id.* (statements from South Carolina ratification proceedings). The last law to actually require that districts be contiguous, compact, and equally populated was passed in 1911. *History of Creating Congressional Districts*, FAIRVOTE ARCHIVES, <http://archive.fairvote.org/?page=1724> (last visited Sept. 8, 2010). There were subsequent laws, but none really designed to stem the flow of partisanship into the redistricting process. *See id.* In 1929, Congress passed a law that allowed House seats to be reallocated to account for shifts in population, but dropped requirements of compactness, contiguity, equal population, and single member districting. *Id.* In 1967, following the passage of the Voting Rights Act of 1965, Congress passed a law that prohibited at-large and multi-member elections by states with more than one House seat. *Id.*

⁹⁵ 100 U.S. 371, 383–85 (1880).

⁹⁶ *Id.* at 384 (arguing that the power of Congress over the subject is “paramount” because “[i]t may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to ‘make or alter.’”); *Vieth v. Jubelirer*, 541 U.S. 267, 276–77 (2004). For a recent example, see *McConnell v. FEC*, 540 U.S. 93, 244–46 (2003) (holding that Congress did not exceed its authority under the Elections Clause in enacting the Bipartisan Campaign Reform Act of 2002, which makes it illegal under federal law to engage in fundraising conduct that would be legal in some states).

⁹⁷ *See Ex Parte Siebold*, 100 U.S. at 383 (noting that although Congress’s power is paramount, whether it is making regulations or altering them determines the scope of its power because “[i]f it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject”); *see also* *United States v. Classic*, 313 U.S. 299, 330 (1941) (Douglas, J., dissenting) (arguing that there has to be a clear mandate that Congress intended to exercise its Elections Clause power, not because its power to do so was absent, but rather because Congress had exercised its Elections Clause authority so infrequently and states have broad authority over elections); *Wood v. Broom*, 287 U.S. 1, 8 (1932) (because Congress did not reenact provisions of the 1911 Reapportionment Act that imposed requirements of compactness, contiguity, and equal population for congressional

envisions concurrent, as opposed to exclusive, authority is what has given Congress pause in exercising its “make or alter” power.

Historically, Congress had to tread lightly when exercising its powers vis-à-vis the states. The notion of “dual sovereignty” and the states’ necessary role in the composition of the central government was one of the selling points used in the Federalist Papers to urge ratification. In Federalist 45, James Madison argued that a central government would not be despotic and tyrannical in part because:

Without the intervention of the State Legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislatures.⁹⁸

Similarly, Alexander Hamilton viewed the Elections Clause as essential to the constituent relationship between the federal government and the states and, as such, defensible on the grounds that “every government ought to contain in itself the means of its own preservation.”⁹⁹ He acknowledged, however, the risk that comes in giving the states the power to control the methods by which members of the House are elected:

[W]ith regard to the Federal House of Representatives, there is intended to be a general election of members once in two years. If the State legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation; which might issue in a dissolution of the Union, if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election.¹⁰⁰

districts, the Court refused to read these requirements into the 1929 Act, which is silent as to these issues).

⁹⁸ THE FEDERALIST NO. 45, at 234 (James Madison) (Clinton Rossiter ed., 1961) (“State Governments may be regarded as constituent and essential parts of the Federal Government; whilst the latter is nowise essential to the operation or organization of the former.”). With the passage of the Seventeenth Amendment, Senators are no longer elected by the state legislatures, which leaves the House as the only legislative body in which state legislatures can exercise substantial control. See U.S. CONST. art. I, § 2, cl. 2; *id.* amend. XVII. I take up the issue of the Seventeenth Amendment in Franita Tolson, *Revisiting the Judicial Safeguards of Federalism: Partisan Gerrymandering and the Politics of Judicial Review* (Dec. 10, 2010) (unpublished manuscript) (on file with author).

⁹⁹ THE FEDERALIST NO. 59, at 299 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁰⁰ *Id.* at 302.

While the Framers understood that the Elections Clause gave the states great power, this was seen in some respects as one of the steps needed to get the states to acquiesce in the creation of a central government.¹⁰¹ The Clause is important for establishing that the states are to play a substantial role in the composition of the federal government. While this power is not exclusive, it is extensive and was intended to permit the states to influence how federal power is exercised.¹⁰²

There is also other historical evidence that Congress's power under the Elections Clause has, in practice, been quite limited because of federalism concerns. For example, even though many states already had districted elections by the mid-nineteenth century, the 1842 Reapportionment Act mandating such elections was viewed with suspicion and triggered significant outrage and allegations of federal overreaching.¹⁰³ Under the Act, Congress reallocated the number of seats within the House pursuant to its power under Article I, Section 2, which requires that "Representatives . . . be apportioned among the several states . . . according to their numbers . . ."¹⁰⁴

The Act read in pertinent part:

And be it further enacted, That in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts, composed of contiguous territory, equal in number to the number of Representatives to which said State may be entitled; no one district electing more than one Representative.¹⁰⁵

The controversy arose because the federal reapportionment bill not only mandated a particular electoral scheme for congressional elections but also fixed the number of representatives in the House. This directly affected the membership of the Electoral College, so the implications were quite far-reaching if states were denied

¹⁰¹ *Id.*

¹⁰² *Id.* at 301 (conceding that the states have the power to destroy the national government through the time, place and manner provision, but arguing that to exclude the states from having a role in the organization of the national government would have "been interpreted into an entire dereliction of the federal principles; and would certainly have deprived the State Governments of that absolute safeguard, which they will enjoy under this provision").

¹⁰³ CONG. GLOBE, 27th Cong., 2D SESS. app. at 348 (1842) (statement of Rep. Clifford of Maine) (suggesting that Congress can only exercise its power pursuant to Article I, Section 4 if the states, "by design or accident," fail to elect representatives).

¹⁰⁴ Apportionment pertains to how many congressional seats each state should have; whereas, redistricting concerns how the boundaries within each state should be drawn, but the two are closely connected. BUTLER & CAIN, *supra* note 64, at 43 ("[T]he task of drawing new congressional district boundaries occurs in two phases. The first is the apportionment of congressional seats to the fifty states, and the second is the adjustment of congressional district boundaries within the states after the initial state allocation has taken place.").

¹⁰⁵ CONG. GLOBE, 27TH CONG., 2D SESS. app. at 348.

representatives because of the ratio selected by Congress for apportioning seats. And given that states can either gain or lose seats because of reapportionment, the ramifications of the ratio for redistricting are apparent—it could mean the difference between an open seat and two incumbents facing off in the same district since the states were prohibited from electing their representatives at large under the 1842 Act.

Significantly, the controversy was not phrased in terms of mere politics or representation; rather it was seen as a struggle for power between the states and the federal government. The 1842 Reapportionment Act was, according Rep. John G. Floyd of New York, “not a question between the district system and election by general ticket; but it is a question between the General and the State Governments.”¹⁰⁶ By 1842, only seven out of twenty-six states then in the Union elected their representatives at large,¹⁰⁷ but the debates were peppered with concerns and arguments over the federalism implications of the act.

The push for nationwide uniformity in congressional elections gained considerable momentum in 1842 precipitated by events that took place in Alabama.¹⁰⁸ Its Democrat-controlled legislature switched from district to at-large elections, and the Democrats secured all five of the delegation’s seats in 1841.¹⁰⁹ The Whigs argued that the at-large election system that the Democrats used in Alabama signaled a national trend away from districted elections, and their fears caused other representatives “to worry that the large states might begin utilizing this electoral system [at-large elections] in an effort to form their own bloc within the House,” thereby overwhelming the smaller states.¹¹⁰

Despite the fact that only a small minority of states utilized at-large districts, the Whigs’ arguments were so persuasive that the Reapportionment Act of 1842 generated extensive and heated debate about principles of federalism and minority representation.¹¹¹ These principles often emerged in the form of references (both explicit and implicit) to the slavery issue and concerns about the disproportionate power of the Senate as compared to the House.¹¹²

¹⁰⁶ *Id.* app. at 320.

¹⁰⁷ Nicolas Flores, A History of One-Winner Districts for Congress, Chapter 3: The 1842 Apportionment Act (unpublished thesis, Stanford University), *available at* <http://www.fairvote.org/library/history/flores/apportn.htm#Debate> (last visited June 30, 2010).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*; see also CONG. GLOBE, 27TH CONG., 2D SESS. app. at 409 (1842) (statement of Sen. Allen) (noting the “tendency of all political power is towards concentration” and an increase in representation in the House would ensure that all “interests are secured and guarded”).

¹¹² CONG. GLOBE, 27TH CONG., 2D SESS. app. at 410 (statements of Rep. Allen and Sen. Buchanan) (discussing whether an increased House size will impact the influence of the Senate).

For example, Congressman Allen accused Senator Calhoun of trying to decrease the size of the House by pushing for a larger ratio so as to mitigate the effect that the increasing split of public support over the slavery issue had on the House.¹¹³ Others were more explicit in their remarks about the effects of the slavery question on the House as compared to the Senate, noting that the size of the House must account for the fact that the deliberation in the branch is susceptible to being sidetracked by the passions of the people:

Because, for a considerable time past, there has been more than usual excitement throughout the country upon various political questions; and this excitement is naturally imparted to the popular branch of the Legislature, producing angry discussion and excited feeling; and, notwithstanding the high character which undoubtedly exists . . . their proceedings scarcely deserve the name of legislation.¹¹⁴

For others, a smaller House simply reflected that the states are the primary sources of positive law and Congress should play a much more limited role, even with regards to exercising those rights the Constitution has delegated to it:

That the country is vast, none will pretend to deny; but after all, the legitimate duties of Congress under the Constitution are confined to but a few subjects. . . . The people look to their State Governments for all the legislation of a municipal character. . . . [T]he preservation and peace of this Union require that Congress should never extend their powers by construction, and should interfere with State legislation as little as possible.¹¹⁵

Thus, the issues surrounding the 1842 Reapportionment Act involved the propriety of *imposing* the districting system on the states, which was viewed by many as another effort by Congress “to encroach upon the rights and sovereignty of the

¹¹³ *Id.* app. at 409–10. Here, Congressman Allen argued:

Everyone knows that, for the last eight or ten years, the public mind has been deeply agitated upon questions of the highest moment to the liberties of the country. I do not say that any blame on this account lies at this or that man’s door. I speak of the fact merely; and of the additional fact, that the same state of feeling which pervades the public mind has displayed itself among the Representatives of the people of the United States in Congress assembled

Id. app. at 409.

¹¹⁴ *Id.* app. at 437 (statement of Sen. Archer).

¹¹⁵ *Id.* app. at 411 (statement of Sen. Buchanan).

States.”¹¹⁶ The idea that congressional power extended to controlling gerrymandering was not even considered, much less discussed.

The discussions regarding the 1862 reapportionment bill further reflected these concerns about state sovereignty. Several representatives noted that some states, including Missouri and New Hampshire, refused to redistrict following the passage of the 1842 Reapportionment Act and elected their representatives at large, but all were still admitted to the House of Representatives.¹¹⁷ The 1862 bill suffered a similar fate as its 1842 counterpart and was criticized prior to its passage as “compel[ling] that which has already been adopted by the different States” and “put[ting] an additional obstacle in the way of the admission of members from those States where very great difficulties will exist in the districting.”¹¹⁸

By 1901, much of the debate surrounding reapportionment had graduated from questioning whether Congress had the power to go beyond determining what the appropriate ratio should be and imposing other redistricting criteria on the states¹¹⁹ to debating whether Congress should make Section 2 of the Fourteenth Amendment operative against those states that disenfranchised by law significant segments of their electorate.¹²⁰ As a result, many of the same federalism concerns arose during the debates surrounding the 1901 Reapportionment Act—namely, whether the House had the authority to determine if a state-drawn district was compact¹²¹ or contiguous,¹²² and, even if states were disenfranchising their residents, whether the House was competent to provide a remedy.¹²³ According to one House committee report, Congress did not have the power to “determine the boundaries of Congressional districts, or to revise the acts of a State Legislature in fixing such boundaries,” because:

¹¹⁶ *Id.* app. at 436 (statement of Sen. McRoberts) (arguing that the Framers “would hardly think it possible that this could be the same General Government which [they] assisted to frame fifty-three years ago . . . [one which] assumes to dictate to the Legislatures of the States what they *shall* do in regard to their election laws”).

¹¹⁷ CONG. GLOBE, 37TH CONG., 2D SESS. 3117 (1862) (statements of Rep. Clark and Rep. Henderson); *see also* JACOBSON, *supra* note 65, at 8 (noting that in modern times, if compactness and contiguity were ignored by mapmakers, such requirements would not be enforced).

¹¹⁸ CONG. GLOBE, 37TH CONG., 2D SESS. 3117.

¹¹⁹ 34 CONG. REC. 599 (1901) (statement of Rep. Littlefield).

¹²⁰ *Id.* at 601–02 (statement of Rep. Shattuc).

¹²¹ *Id.* at 606; *see also* CONG. GLOBE, 42D CONG., 2D SESS. 692–93 (stating that districts should contain “as nearly as possible an equal number of inhabitants”).

¹²² *Id.* at 648 (statement of Rep. Kitchin) (stating that the requirement that districts be compact and contiguous are unconstitutional because “Congress has no power to direct the States as to the manner in which they shall divide their districts” and once Congress apportions Representatives among the several states, “the powers of Congress are at an end”).

¹²³ *Compare id.* at 611 (statement of Rep. Linney) (answering this question in the affirmative), *with id.* at 648 (statement of Rep. Kitchin) (arguing that unless a state violates the Fifteenth Amendment, Congress has no power to reduce a state’s representation pursuant to Section 2 of the Fourteenth Amendment).

To do so would be to put into the hands of Congress the ability to disenfranchise, in effect, a large body of the electors. It would give Congress the power to apply to all the states, in favor of one party, a general system of gerrymandering. It is true that the same method is to a large degree resorted to by the several states, but the division of political power is so general and diverse that notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results.¹²⁴

After the 1920 census, Congress could not even agree on a reapportionment bill, resulting in the only decade in which there was no congressional reapportionment.¹²⁵

Thus, what we have is a Clause largely concerned with maintaining the balance of federalism between the two spheres of government, and a legislative history reflecting suspicion and doubt about congressional efforts to alter the states' traditional power over redistricting beyond apportioning the number of representatives to which each state is entitled. From the founding until the mid-1960s, the relationship between Congress and the states over redistricting tended to play out this theme.

IV. THE LEGITIMACY OF PARTISAN GERRYMANDERING: REINFORCING FEDERALISM THROUGH THE CONSTITUTIONAL STRUCTURE

In *Davis v. Bandemer*, Chief Justice Burger questioned the Court's ability to provide a remedy for partisan gerrymandering, which he termed a "perceived injustice."¹²⁶ Justice O'Connor similarly doubted whether true inequity results from gerrymandering, noting that our "sound and effective government"

depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change. The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term.¹²⁷

¹²⁴ BUTLER & CAIN, *supra* note 64, at 24.

¹²⁵ *Id.* at 20.

¹²⁶ 478 U.S. 109, 144 (1986).

¹²⁷ *Id.* at 145.

Partisan gerrymandering is indeed just that—a tool that the parties have at their disposal to ensure sound and effective government. This is counterintuitive, given the criticisms often leveled at gerrymandering, but its federalism overtones suggest it can do much to reinforce the idea of a limited federal government. It can serve this purpose because: 1) the states' redistricting power links officials in separate spheres of government; and 2) this link, when combined with the loyalty commanded by the political party structure, allows the state to send an ideologically cohesive House delegation to Congress to influence federal policy.

One widely acknowledged problem with Wechsler's thesis is that he discounted the rise of national political parties,¹²⁸ which further the coordination between branches required for an effective gerrymander. He also underestimated the importance of the redistricting process to our system of federalism, which he could not have foreseen given that the big issue fifty years ago was malapportionment and the states' failure to redistrict. Larry Kramer, who acknowledged that "subsequent experience and later developments have robbed [Wechsler's] analysis of much, if not all, of its force,"¹²⁹ compensated for the shortcomings in Wechsler's argument by incorporating political parties into the political safeguards thesis. Kramer argued that federalism is protected, not by the formal constitutional structure, but rather by a myriad of informal political institutions—most notably political parties.¹³⁰ While Kramer's theory has its flaws, the costs of limiting judicial review, in his view, "are probably less than those likely to follow from aggressive judicial interference in politics."¹³¹ Consequently, Kramer disputed that judicial review is necessary to protect federalism—or that the original safeguards are sufficient to do so either—instead, the larger political structure provides the necessary checks.¹³²

In many ways, this Article also takes a holistic approach to federalism, looking for institutional constraints where appropriate, but it departs ways in significant respects by expanding this literature to encompass partisan gerrymandering. In the next section, I expand on Kramer's thesis by discussing not only how political parties play an important role in our system of federalism, but also how the local nature of politics and the controversial expansion of federal power contribute to the ability of partisan gerrymandering to serve a federalism

¹²⁸ Wechsler acknowledged that the national parties have played a part in undermining the role of the states in the composition of the federal government, but believed that states are still "constituent and essential parts of the federal government." Wechsler, *supra* note 1, at 546 (quoting THE FEDERALIST NO. 45, at 288 (James Madison) (Lodge ed. 1888)). He did not view the rise of the parties as playing a role in reinforcing as opposed to undermining the states' role, which was where Larry Kramer picked up the mantle.

¹²⁹ Kramer, *supra* note 2, at 218.

¹³⁰ *Id.* at 219; see also DIXON, *supra* note 51, at 46–47 ("Federalism undoubtedly has played a major role in the long-continued decentralized structure of the American political party system.").

¹³¹ *Id.*

¹³² See Kramer, *supra* note 2, at 219–20.

reinforcing role by forcing cooperation and coordination between the two branches of government. Given the rise of mid-decade redistricting, as well as the historical and textual support for the constitutionality of gerrymandering, I contend that the role of redistricting is no longer minimal in protecting the states' interests. Because of the organizational and structural framework of mass politics, as well as an almost evenly split electorate, partisan gerrymandering can have significant influence on our system of federalism going forward.

*A. Partisan Gerrymandering Forces Cooperation and Coordination
Between Competing Branches of Government*

Partisan gerrymandering can function as a political safeguard because of the network of relationships that emerges through the redistricting process; relationships that extend beyond the congressmen and state legislature to encompass the state itself. The case law does not take this network into account. Rather than focus on the groups competing for power and the corresponding effect this competition has on our governing institutions, the law assesses redistricting in terms of its effect on the individual rights of voters or on the power of political minorities—a focus which inevitably leads to the conclusion that redistricting is of little significance to federalism.¹³³ This narrow view tends to usually elicit only the negative impacts of partisan gerrymandering, which is why the approach taken by the *Vieth* plurality is so notable.

Understanding the relationship between partisan gerrymandering and federalism requires scholars and judges to move beyond looking at how the process of redistricting has evolved over the last few decades and instead recognize the connections between the spheres of government, or more specifically, the extended party network as reinforced by our decentralized system of government.¹³⁴ The extended party network includes the political parties, elected officials, interest groups, political action committees, and the partisan media.¹³⁵ The state is the foundation of the network and takes on the partisan identity of its

¹³³ See generally *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (discussing First and Fourteenth Amendment approaches for regulating partisan gerrymandering); see also *Kramer*, *supra* note 2, at 226–27 (“[F]ederal statutes and Supreme Court decisions have mopped up any lingering significance for federalism that [the redistricting] power might once have had.”).

¹³⁴ Gregory Koger et al., *Partisan Webs: Information Exchange and Party Networks*, 39 BRIT. J. POL. SCI. 633, 636 (2009) (arguing that a party “is broadly defined to include its candidates and officeholders; its formal apparatus; loyal donors, campaign workers and activists; allied interest groups; and friendly media outlets”).

¹³⁵ *Id.* at 636–37. Out of the entities mentioned in the text, only media outlets are likely to go across the ideological spectrum in soliciting information; the remaining entities are a part of a polarized party network that refuses to trade information across the spectrum. See *id.*

majority party, which seeks to use the machinations of the state in order to implement its policy preferences.¹³⁶

For this reason, the dead heat between the parties nationally in terms of popular support has had a substantial impact at the state level. One byproduct of the political stasis is that close competition at the national level and an increasing ideological divide between the two major parties has resulted in a more pure, ideological “product” at the state level, where the level of partisanship is intensified because the policy differences between the two parties are more salient.¹³⁷ For example, the national debate and discord over abortion has led several conservative states to adopt restrictive abortion bans, some of which arguably run afoul of the Supreme Court’s decision in *Roe v. Wade*¹³⁸ but reflect the pro-life sentiments of state legislatures and their electorates ready to challenge the “liberal” holding of the *Roe* case.¹³⁹ Similarly, Republicans and Democrats have differing views on economic issues, particularly the federal deficit, federal

¹³⁶ Numerous studies have inferred the ideology of political and judicial actors based on their partisan affiliation; it is unclear why, under the same rationale, the ideology of the state should not be inferred from its majority party. See, e.g., CASS SUNSTEIN, ARE JUDGES POLITICAL? (2005) (exploring how political affiliation affects judges’ decisions); Lee Epstein et al., *The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear*, 43 TULSA L. REV. 651, 670–71 (2008) (using the ideology of the appointing president as a baseline for whether a justice is conservative or liberal); Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the “Affirmance Effect” on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 368 (2005) (measuring the relative ideology of the circuit courts by the party of the appointing president); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 221, 240–43 (1999) (analyzing various empirical studies connecting party identification with judicial ideology and concluding that political party affiliation “is a dependable measure of ideology in modern American courts”); see also *Vieth*, 541 U.S. at 332 (Stevens, J., dissenting) (“Elected officials in some sense serve two masters: the constituents who elected them and the political sponsors who support them. Their primary obligations are, of course, to the public in general, but it is neither realistic nor fair to expect them wholly to ignore the political consequences of their decisions.”).

¹³⁷ See generally Laura Stoker & M. Kent Jennings, *Of Time and the Development of Partisan Polarization*, 52 AM. J. POL. SCI. 619 (2008) (arguing that the electorate is more polarized because of the increasing ideological divide and differences in opinion between the Democrats and the Republicans). See also Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219, 219 (2005) (noting that politicians “are more likely to support their party and oppose the other party today than at any time since the 1950s,” and that “partisan change in the mass electorate has indeed mirrored that which has occurred among elites.”).

¹³⁸ See 410 U.S. 959 (1973) (holding that the liberty under the Due Process Clause of the Fourteenth Amendment encompassed a woman’s decision to have an abortion).

¹³⁹ Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. TIMES, Mar. 6, 2006, at A1 (discussing abortion bans in South Dakota and Mississippi).

income taxes, and unemployment, which is also reflected at the state level.¹⁴⁰ For example, the seven states that impose no state income tax—Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming—were, with the exception of Washington, either Republican or Republican-leaning as of the 2004 presidential election.¹⁴¹

The presence of an ideologically pure, clearly-defined political product¹⁴² might therefore give one state a policy advantage as it competes with other states to satisfy its citizens' preferences and obtain scarce federal resources, although on some level, state politics will still reflect national trends.¹⁴³ One recent example of this trend is the success of Democrat Barack Obama in Virginia during the 2008 presidential election, a state which overwhelmingly elected Republicans for its statewide offices in 2009. Prior to the 2008 election, Virginia had not swung in favor of a Democratic candidate for president since 1964, and although Obama was successful and Democrats made gains in recent elections, the local political climate still slightly favored the Republicans.¹⁴⁴ Indeed, the Democratic candidate for Governor, Craig Deeds, tried to paint himself as a rural, small town individual more closely aligned with Virginia as a whole and not just the Northern Virginia, Washington, D.C. suburbs.¹⁴⁵

Similar to Virginia, most states are not a microcosm of the divide in American society; rather, they largely reflect local politics, with national politics occasionally filtering in, particularly when a divisive issue is being debated nationally.¹⁴⁶ Because of overlapping constituencies, however, addressing both state and national

¹⁴⁰ Frank Newport, *Sharp Differences in Partisan Views of Economic Problems*, GALLUP (June 26, 2009), <http://www.gallup.com/poll/121262/sharp-differences-partisan-views-economic-problems.aspx>.

¹⁴¹ Election Results, CNN.COM, <http://edition.cnn.com/ELECTION/2004/pages/results/president/> (last visited Sept. 9, 2010); see *State Individual Income Taxes*, FED'N OF TAX ADM'RS, Feb. 2010, available at http://www.taxadmin.org/fta/rate/ind_inc.pdf.

¹⁴² The courts have recognized the existence of an ideological product that political parties "sell" to their voters. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581–82 (2000) (noting that the forced inclusion of unwanted individuals in political party processes might change the ideological product, and therefore affect the electorate's ability to hold party leaders accountable at the ballot box).

¹⁴³ See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 775 (1995) ("If social tastes and preferences differ and if states are allowed to exist and take those differences into account in passing laws, then the states will compete with one another to satisfy their citizens' preferences for public goods.").

¹⁴⁴ Interview by Madeline Brand & Melissa Block, Hosts, All Things Considered, NPR News, with Jeff Shapiro, Political Reporter, Richmond Times-Dispatch *Virginia Governor's Race Examined* (Aug. 6, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=111629568>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (noting that Republican Bob McDonnell focused mostly on national issues in campaigning against his Democratic opponent because of the controversy surrounding health care).

issues requires coordination across the different levels of government, coordination that is facilitated in part by the redistricting process. Redistricting takes place within an expansive party network that encompasses not only the governing mechanisms of the state and Congress, but also the organizational infrastructure of the political party. Almost all candidates depend on the two major political parties to get into office and once there, to broker deals and develop and influence policy. According to Larry Kramer,

[t]he parties influenced federalism by establishing a framework for politics in which officials at different levels were dependent upon each other to get, and stay, elected. Candidates may need the parties somewhat less than they used to; state parties may be somewhat less powerful than they were formerly; but there is no doubt that political parties continue to play a crucial role in forging links between officials at the state and federal level. The political dependency of state and federal officials on each other remains among the most notable facts of American government.¹⁴⁷

An oft overlooked aspect of these relationships is that the polarizing nature of local politics allows the state to protect its interests from federal encroachment by either commanding loyalty from its elected officials through the party apparatus or threatening to sanction nonconforming individuals through the electoral process.¹⁴⁸

Because the state can impact the reelection prospects of its congressional delegation, regardless of the delegation's partisan composition, the state is best seen as part of the constituency that the delegation must appease to stay in office, a concept that is important for understanding why partisan gerrymandering can be used to protect state regulatory authority. The states' power over redistricting incentivizes its congressional delegation to consider the states' interests when the delegation votes on federal policy.

Traditionally, the historical characterization of "constituency" is primarily one of interest groups and those who live within the congressman's district and have the same partisan identification, and typically excludes the partisan state. This exclusion stems in part from the idea that the Equal Protection Clause requires the state to act as a neutral entity that governs impartially, a theme which has become a reoccurring thread in the case law.¹⁴⁹ For this reason, the view of the state as both a

¹⁴⁷ Kramer, *supra* note 2, at 282.

¹⁴⁸ See discussion of Senator Ben Nelson and healthcare *infra* notes 154–162.

¹⁴⁹ Justice Stevens is a notable advocate of this position. See *LULAC*, 548 U.S. 399, 447 (2006) (Stevens, J., concurring in part and dissenting in part) (arguing that Texas' mid-decade plan violated the state's duty to govern impartially); *Cox v. Larios*, 542 U.S. 947, 951 (2004) (Stevens, J., concurring) (stating that district lines drawn based on partisan considerations violate the state's duty to govern impartially); *Vieth v. Jubelirer*, 541 U.S. 267, 318 (2004) (Stevens, J., dissenting) ("The concept of equal justice under law requires the state to govern impartially."). Other justices have also espoused the view that the Equal Protection Clause requires states to govern impartially. See *Davis v. Bandemer*, 478 U.S.

partisan constituent, as well as the end goal that the partisan network strives to conquer, has not had significant traction in constitutional law.¹⁵⁰ The judicial focus has been on the intent or the motive animating legislative actors or the collective legislative body, as opposed to the influences that cause the government to act in a manner consistent with the policy preferences of political organizations.¹⁵¹

To be more precise, however, we must accept that while state policy often coincides with the wants and desires of a particular constituency within the congressman's district, political party platforms often trump district level preferences, and are at times indistinguishable from the policy of a particular

109, 166 (1986) (Powell, J., concurring in part and dissenting in part); *Harris v. McRae*, 448 U.S. 297, 348 (1980) (Blackmun, J., dissenting). Justice Stevens has, on occasion, been able to command a majority for this view. *See Lyng v. Castillo*, 447 U.S. 635, 642–43 (1986) (holding that the statutory distinction in the Food Stamp Act between parents, children, and siblings does not implicate a state's duty to govern impartially); *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (holding the Equal Protection Clause requires states to govern impartially, but does not prevent the state from according parents different legal rights).

¹⁵⁰ *See, e.g.,* *Clingman v. Beaver*, 544 U.S. 581, 581–82 (2005) (finding that a state law limiting party primaries to registered party members is constitutional because the state—as opposed to the major parties in the state—has an interest in preserving parties as “viable and identifiable interest groups” and guarding against “party raiding”); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (arguing that “a State, or a court, may not constitutionally substitute its own judgment for that of the [Political] Party” without recognizing that the State itself is a political entity (internal quotation marks omitted)). *But see* *Morse v. Republican Party of Va.*, 517 U.S. 186, 204–11 (1996) (treating changes to the internal activities of the state Republican Party as a change to state voting practices and therefore requiring preclearance under section 5 of the Voting Rights Act); Issacharoff & Pildes, *supra* note 48, at 673–74 (criticizing the Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992), for failing to recognize the partisan nature of the state); *see also* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920 (2005) (“The behavior of government institutions depends upon some combination of the interests of the officials who comprise them and the constituents these officials represent.”).

¹⁵¹ Michael Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 160 (2005) (“Party leaders possess intimate access to state governments and can leverage its lawmaking authority to produce party regulation that gives them advantages over rival leaders.”); Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1754–55, 1758 (1993) (“[U]nlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from *within* the government.”).

state.¹⁵² This is best illustrated by the fact that approximately 70% of the governing party's platform will be implemented during their time of majority control.¹⁵³

A recent example of state-as-constituent is conservative Democratic Senator Ben Nelson's agreement to provide the sixtieth vote in support of the Senate version of the health care bill, insulating the bill from an expected Republican filibuster and virtually ensuring its passage.¹⁵⁴ Notably, he decided to vote in favor of the bill after extrapolating concessions from party leaders that would change the Medicaid reimbursement rate for Nebraska.¹⁵⁵ Dave Heinman, the governor of Nebraska, sent a letter to Nelson urging him to vote against the prior version of the bill because of the increased costs to the state as a result of the Medicaid program.¹⁵⁶ After negotiating with party leaders, Nelson was able to leverage his vote in exchange for the federal government's agreement that it would pay 100% of Nebraska's portion of the costs to expand Medicaid in the state whereas other states would have to pay 2.2% of the costs to extend the program to their uninsured residents.¹⁵⁷

Although Dave Heinman is a Republican and Ben Nelson is a Democrat, Nelson is known to be quite conservative on a wide range of issues, given that Nebraska is a state that tends to tread Republican.¹⁵⁸ Their relationship is indicative of the problems states face from a divided delegation. Nebraska's House delegation and its other U.S. Senator are Republicans, all of whom voted against

¹⁵² See generally Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1265 (1987) ("The propensity of a state to be biased toward the Republicans or Democrats has generally been explained by relative party strength.").

¹⁵³ GERALD M. POMPER, PASSIONS AND INTERESTS: POLITICAL PARTY CONCEPTS OF AMERICAN DEMOCRACY 44 (1992) (noting that the party platforms—typically close to 70%—are fulfilled in one way or another).

¹⁵⁴ This was, of course, prior to Republican Scott Brown's victory in the Massachusetts Senate race, which destroyed the Democrats' filibuster proof majority in the Senate. See Jim Acosta et al., *Brown Wins Massachusetts Senate Race*, CNN.COM (Jan. 19, 2010, 10:39 PM), <http://www.cnn.com/2010/POLITICS/01/19/massachusetts.senate/index.html>.

¹⁵⁵ Patricia Murphy, *Health Care Breakthrough: Ben Nelson Will Vote for Health Reform*, POL. DAILY (Dec. 19, 2009), <http://www.politicsdaily.com/2009/12/19/ben-nelson-i-intend-to-vote-for-health-care-reform/print/>; see also Brian Montopoli, *Ben Nelson Airing Ad Defending Health Care Vote*, CBS NEWS (Dec. 30, 2009, 4:49 PM), <http://www.cbsnews.com/blogs/2009/12/30/politics/politicalhotsheet/entry6039036.shtml>.

¹⁵⁶ Murphy, *supra* note 152.

¹⁵⁷ *Id.*

¹⁵⁸ Nelson is pro-life, and besides funding for Medicaid, he was able to get Senate democrats to change language in the bill concerning the funding of abortions. David D. Kirkpatrick & Robert Pear, *For Abortion Foes, a Victory in Health Care Vote*, N.Y. TIMES, Nov. 8, 2009, at A1. See also Tom Diemer, *Sen. Ben Nelson: Conservative Democrat Not Switching Sides* (Aug. 3, 2010), POLITICS DAILY, <http://www.politicsdaily.com/2010/08/03/sen-ben-nelson-conservative-democrat-not-switching-sides/>; Montopoli, *supra* note 155.

the health care bill.¹⁵⁹ Nelson, a conservative Democrat, is a clear outlier among the congressional delegation from his home state. Cognizant of this, Nelson threatened to vote against the bill unless certain conditions were met that would appease his Republican counterparts.¹⁶⁰ Had Nelson been a Republican, however, he would have voted against the bill in its entirety. While he still responded to at least some of the demands of the Republican state leadership, his partisan affiliation ultimately carried more weight.

Thus, the state has an interest in ensuring that it has a cohesive one-party House delegation not only to distinguish itself from neighboring states by having a distinct viewpoint in Congress (in Nebraska's case a united stand against health care reform), but more importantly, to further its policy goals and minimize the risk of schism that comes from a divided delegation. As is apparent from Nelson's dealings with Nebraska's Republican leadership, the states' policy goals often coincide (or are indistinguishable from) the policy goals of the party that controls the state.¹⁶¹ Nelson, therefore, had to navigate intrastate politics, since he is the only Democrat in a congressional delegation from a state that is against the Obama Administration's health care plan, which explains the concessions he was able to extract for his vote in favor of the health care bill. However, Nelson's eventual capitulation is itself indicative of the strength of the party apparatus and explains why the state has an interest in sending a cohesive, as opposed to split, delegation to Congress.

Political scientists have long argued that party affiliation, rather than personal or constituency preferences, is the single largest predictor of congressional roll call voting, which is why Nelson's decision to support healthcare reform is not that surprising.¹⁶² Party affiliation has a greater impact on congressional roll call behavior than do either the congressman's constituency or the electoral competitiveness of his home district because policy objectives have to be accomplished through the party system.¹⁶³ Voting on major policy issues in

¹⁵⁹ Jon Azpiri, *Who Voted For Health Care Bill? Complete Results From House Vote* (Nov. 8, 2009), NOWPUBLIC, <http://www.nowpublic.com/world/who-voted-health-care-bill-complete-results-house-vote-2511676.html>; *Representative Offices*, U.S. HOUSE OF REPRESENTATIVES, http://www.house.gov/house/MemberWWW_by_State.shtml#top (last visited Nov. 12, 2010); *Senators of the 111th Congress*, U.S. SENATE, http://www.senate.gov/general/contact_information/senators_cfm.cfm?State=NE (last visited Nov. 12, 2010).

¹⁶⁰ See *supra* note 155 and accompanying text.

¹⁶¹ See Catherine R. Shapiro et al., *Linking Constituency Opinion and Senate Voting Scores: A Hybrid Explanation*, 15 LEGIS. STUD. Q. 599, 607 (1990) ("A central tenet of the two-constituency model [geographical constituency and intrastate party constituency] is that the policy preferences of a senator's party constituency will affect her or his voting record."). In the context of congressional districts, this analysis easily translates to the representative's geographic district and its intra party constituency within the district.

¹⁶² James M. Snyder, Jr. & Tim Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 AM. J. POL. SCI. 193, 194 (2000); see also sources cited *supra* note 151.

¹⁶³ Charles S. Bullock III & David W. Brady, *Party, Constituency, and Roll-Call Voting in the U.S. Senate*, 8 LEGIS. STUD. Q. 29, 39–40 (1983). Although this study looks at

Congress tends to fall along the liberal-conservative divide and other variables have significantly less influence on the outcome of the votes.¹⁶⁴ The strength of party loyalty is explained by the fact that congressmen vote based on their desire for higher office or to maintain their positions, neither of which is usually attainable outside of the party structure.¹⁶⁵ States can channel this ambition in its favor through its redistricting power because the strength of party affiliation is affected most directly by the nature of the congressman's district, or rather, the composition of his reelection constituency.¹⁶⁶ So while traditional notions of representative democracy view the elected official as a mouthpiece for his constituency, in reality, we have a vast decentralized party apparatus that commands loyalty from its elected representatives in order to implement the party's policy preferences, both within the states' regulatory regime and in Congress.¹⁶⁷ And if state legislators are willing to build safe districts for their majority party representatives, those congressmen will be unlikely to vote the

senate voting, much of its analysis can be applied to congressional districts. See KEITH. T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* 227–32 (1997); Robert K. Fleck & Christopher Kilby, *Reassessing the Role of Constituency in Congressional Voting*, 112 PUB. CHOICE 31, 45 (2002). See generally W. WAYNE SHANNON, *PARTY, CONSTITUENCY, AND CONGRESSIONAL VOTING* (1968) (examining voting behavior and cohesion in light of representatives' constituencies).

¹⁶⁴ See POOLE & ROSENTHAL, *supra* note 163, at 227–32; Fleck & Kilby, *supra* note 163, at 32. As Fleck and Kilby point out, occasionally otherwise conservative or liberal representatives might be swayed by their constituents to side with the opposition on a specific issue, which is why both party affiliation and intraparty constituency are important factors here and indicate why the state has an interest in ensuring as much overlap in these two things as possible. *Id.* at 33.

¹⁶⁵ JOSEPH SCHLESINGER, *AMBITION AND POLITICS: POLITICAL CAREERS IN THE UNITED STATES* 19 (1966). See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (3d ed. 1950) (arguing the threat of potential challenge and the electorate's ability to remove the officeholder induces responsiveness); Paul Brace, *Progressive Ambition in the House: A Probabilistic Approach*, 46 J. POL. 556, 557 (1984) (discussing ambition theory and noting that the "actions a politician takes today are assumed to be oriented toward the electorate whose support is needed in the next election").

¹⁶⁶ Snyder & Groseclose, *supra* note 162, at 194.

¹⁶⁷ Professors Snyder and Groseclose noted that the party effect declined from the 91st to the 99th Congresses because of a decline in the party's ability to enforce discipline from its members due to a lack of resources. *Id.* But the parties have become significantly more polarized in the last eight years. See, e.g., Andy Barr, *GOP Mulls Stripping Dede of Top Post*, POLITICO (Nov. 6, 2009), <http://www.politico.com/news/stories/1109/29251.html> (noting a Republican candidate for a N.Y. District congressional seat was threatened with the loss of a leadership position for her election-eve endorsement of her Democratic opponent); Ben Smith, *DNC Targets 32 Republicans on Health Care Vote*, POLITICO (Nov. 9, 2009), http://www.politico.com/blogs/bensmith/1109/DNC_targets_33_Republicans_on_health_care.html (noting the DNC will run ads against Republicans who voted against health care, but hail from districts that voted in favor of President Obama in the 2008 election).

policy preferences of their geographic constituencies when these preferences directly contradict the interests of either the state or the party.¹⁶⁸

The increasing strength of state party organizations in the last two decades after a decline from the mid-twentieth century to the 1990s has also contributed to the deference that representatives show to their home states.¹⁶⁹ Much of the state party's strength lies in the areas of candidate recruitment, grassroots campaigning, and prior to the Bipartisan Campaign Finance Reform Act of 2002 (BCRA),¹⁷⁰ fundraising. In the area of candidate recruitment, the state party has established itself as a bona fide talent scout of candidates for both state and federal office. According to two studies, one-third of potential congressional candidates and one-half of all state legislative candidates reported that they were contacted first by state party leaders.¹⁷¹ The ties between the state parties and candidates for national office are, more or less, established at the very beginning of the candidate's career and are facilitated through the party apparatus.

One notable example of the link between state parties and candidates for federal office is the 2002 elections, where Georgia Republicans managed to pull off an impressive win at almost every level of government, thanks in part to the well-planned, last minute canvass organized by the chair of the state party, Ralph Reed. As a result of Reed's efforts, voters elected Republicans to the governor's seat (for the first time in more than 100 years) and also defeated the Democratic U.S. Senator, as well as the Democratic leaders in both houses of the state legislature.¹⁷² State parties, long considered the stepchildren of the national parties, still play an important role in ensuring that national candidates are elected to office.

It is therefore impossible to have a federal body completely insulated from state interests and unrealistic to expect representatives to ignore either local

¹⁶⁸ The strength of constituent preferences is heavily disputed in the political science literature, and it is doubtful that such preferences would hold up where constituent preferences and the preferences of state leaders conflict. See, e.g., L. Marvin Overby, *Assessing Constituency Influence: Congressional Voting on the Nuclear Freeze, 1982–1983*, 16 LEGIS. STUD. Q. 297, 297 (1991) (arguing that constituency preference appears to decline in importance over the life of an issue although it does have some impact in framing the issue in a way that contributes significantly to its final disposition).

¹⁶⁹ MARJORIE RANDON HERSHEY, *PARTY POLITICS IN AMERICA* 262 (2005).

¹⁷⁰ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 89 (codified in scattered sections of 2 U.S.C.).

¹⁷¹ GARY F. MONCRIEF, PEVERILL SQUIRE & MALCOLM E. JEWELL, *WHO RUNS FOR THE LEGISLATURE?* 41 (2001) ("Almost 70 percent of candidates said they discussed their possible candidacy with local party officials; about half said they talked with state party officials, legislative leaders, and locally-elected officials."); L. Sandy Maisel, *American Political Parties: Still Central to a Functioning Democracy?*, in AMERICAN POLITICAL PARTIES: DECLINE OR RESURGENCE? 112–13 (Jeffrey E. Cohen, Richard Fleisher & Paul Kantor eds., 2001) ("More than one in three of the named potential candidates and one in seven of the state legislators representing voters in the sampled congressional districts were first contacted by local party officials about running for the House.").

¹⁷² HERSHEY, *supra* note 169, at 51.

concerns or the very state institutions that helped to launch their careers.¹⁷³ To some extent, the personal relationships between these officials have played some role in making congressmen responsive to local concerns.¹⁷⁴ Considering the extent of these networks and the strategy employed by elected officials to ensure their reelection, redistricting is a way for the state to make certain that “state” policies, as opposed to district policies, triumph by minimizing the competing influences within a congressman’s district.¹⁷⁵

B. Realizing the Federalism Potential: How Partisan Gerrymandering Can Help States Protect Their Regulatory Interests

Partisan gerrymandering connects state and federal officials through the partisan web of decentralized political parties. There are federalism benefits that flow from an ideologically cohesive House delegation that can protect the states’ regulatory interests in Congress. Moreover, given that the Elections Clause is a federalism provision that allows for broad state authority, it does not preclude the partisan manipulation of lines especially if the gerrymandering itself is federalism reinforcing. The question remains whether partisan gerrymandering can serve as a genuine political safeguard. The answer is not clear, particularly because doubts persist about whether there are any effective political safeguards to begin with.

Any scholar seeking to expand the political safeguards thesis must contend with arguments disputing the ability of the various checks within our system to be an effective constraint on federal power, at least acting independently of judicial review.¹⁷⁶ Some scholars have persuasively argued that certain structural mechanisms within our current system have compensated for defects in the

¹⁷³ See Ansolabehere et al., *supra* note 63, at 22 (“[T]he localization and insulation of House elections multiplies the difficulties in constructing coalitions in support of national policy.”).

¹⁷⁴ See generally Kramer, *supra* note 2, at 279 (“A member of Congress, even a President, will need to help state officials either as a matter of party fellowship or in order to shore up the willingness of state officials to offer support in the future; the same thing is true in reverse. The whole process is one of elaborate, if diffuse, reciprocity: of mutual dependency among party and elected officials at different levels; of one hand washing the other. It is this party-fostered system of mutual dependency that explains the success of American federalism despite the historical absence of judicial protection and the failure of other constitutional devices meant to protect state institutions.”).

¹⁷⁵ MORRIS FIORINA, REPRESENTATIVES, ROLL CALLS AND CONSTITUENCIES, 92–98 (1974) (noting the heterogeneity of a representative’s constituency affects his or her voting behavior); see also Shapiro, *supra* note 161, at 604 (“[T]he differences in the voting records of senators from mixed-party delegations are two to four times greater than those of senators from single-party delegations.”).

¹⁷⁶ For arguments that judicial review is required, see generally Saikrishna B. Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism*, 73 U. COLO. L. REV. 1363 (2002); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

original federalism design. Gillian Metzger, for example, has argued that the Supreme Court uses administrative law in order to limit congressional regulatory authority indirectly by emphasizing the importance of complying with administrative procedures and requiring “reasoned” decision making by federal agencies prior to displacing state authority.¹⁷⁷

Similarly, Bradford Clark has argued that unconventional federal lawmaking in violation of the separation of powers principle invades the rights of states and violates principles of federalism because the Constitution requires strict adherence to federal lawmaking procedures in order to protect state authority.¹⁷⁸ The Supremacy Clause recognizes the “Constitution,” “Laws,” and “Treaties” as the supreme law of the land, and requires that they be adopted pursuant to the lawmaking procedures of Articles V and VII; Article I; and Article II, respectively.¹⁷⁹ This, according to Clark, ensures that exclusive lawmaking authority is vested in those charged with being sensitive to state prerogatives, or in other words, subject to “the political safeguards of federalism.”¹⁸⁰

Partisan gerrymandering has a similar ability to serve as a constraint on federal power and promotes several federalism interests, particularly the interest that the state has in promoting its own community values and liberty, which can become muted from undue federal influence; the interest in holding its elected officials accountable, which can similarly become blurred because of federal involvement in state processes; and most important, the interest the state has in preserving its sovereignty in the face of expanding federal power.¹⁸¹ First,

¹⁷⁷ Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2053–62 (2008) (arguing that the court has been using administrative law in a state protective manner that simultaneously respects the substantive scope of Congress’s regulatory powers).

¹⁷⁸ Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1430–38 (2001) [hereinafter Clark, *Separation of Powers*]; see also Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 112 (2003) (arguing that the Supremacy Clause authorizes judicial review of statutes that exceed federal power, in part because unconstitutional federal statutes contravene the principle that the state retains powers not delegated to the federal government).

¹⁷⁹ Clark, *Separation of Powers*, *supra* note 178, at 1331–32.

¹⁸⁰ *Id.* at 1342–46 (“The states’ original role in selecting the federal officials who are responsible for adopting ‘the supreme Law of the Land’ provided a significant check on the exercise of federal power. Multiple veto gates and supermajority requirements standing alone create significant obstacles to federal lawmaking. Placing these devices in the hands of entities designed to be responsive to state prerogatives made it even less likely that the federal government would adopt laws objectionable to the states.”).

¹⁸¹ These are values that both the Court and commentators have acknowledged underlie our system of federalism. See, e.g., *New York v. United States*, 505 U.S. 144, 168 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[T]he principal benefit of the federalist system is a check on abuses of government power. ‘The constitutionally mandated balance of power between the States

interference from the federal government may inhibit states from giving voice to the liberty interests of its citizens: Since political parties are the mechanisms through which citizens express their preferences, there is always the risk that federal intervention in state or party matters will inhibit the articulation of these preferences. In *Morse v. Republican Party*, for example, the Court found that the state Republican Party's decision to change its fee structure violated the Voting Rights Act because the Justice Department did not preclear the change, which had the potential to be used in a discriminatory fashion.¹⁸² There was no allegation, however, of racial discrimination in voting in the case.¹⁸³ Rather, candidates often paid the registration fee of voters who pledged to support them. Thus, the registration fee was part of the larger deliberative scheme and exchange between voters and candidates in choosing the party nominee, and federal intervention distorted the deliberative process by failing to appreciate the individual's bargaining power on the other side of the transaction.

Similarly, the creation of districts is often the product of compromise and debate between state and party officials, interest groups, and voters. The districts invalidated in the *Shaw* line of cases, for example, were some of the most integrated in the country, undermining the alleged harm that, from the Court's perspective, arises when the state relies on race to create districts.¹⁸⁴ These districts were also the product of legislative compromise that reflected the discrete interests of minority voters, voters who the legislative process have previously overlooked. Most important, many of these districts were created in order to comply with federally imposed requirements regarding the appropriate level of minority representation, requirements left intact following *Shaw*.¹⁸⁵ Partisan gerrymandering

and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 573 (1985) (“[S]tate sovereignty is a fundamental component of our system of government”); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 77–80 (2001); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1448–50 (1995); Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 998 (2001) (stating that political accountability is a value of federalism); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525 (1995) (noting that the underlying benefits of federalism include limiting tyranny by the federal government, enhancing democracy by providing governance that is closer to the people, and providing laboratories for experimentation); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 320–22 (1997).

¹⁸² 517 U.S. 186, 201 (1996).

¹⁸³ *Id.* at 216.

¹⁸⁴ See *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

¹⁸⁵ Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 779 (1998) (“The cases compel black and Hispanic politicians to have recourse to the federal executive and judicial branches in order to pursue their representational goals, by severely restricting their opportunity to compete on an equal basis with other groups in the politics of redistricting.”).

allows political forces to fight it out at the state level, in the interest of avoiding sometimes conflicting state and federal interests, and gives the state room to prioritize the preferences that its citizens may have about aggregating their votes.¹⁸⁶

Most important, partisan gerrymandering helps states protect their regulatory authority. Although federalism, as discussed in the legal scholarship, typically pertains to preventing federal encroachment of the states' regulatory authority, rather than promoting the ability of national figures to be responsive to local interests,¹⁸⁷ the ability of states to influence their representatives through redistricting can actually help states to protect their regulatory authority in the era of big government.¹⁸⁸

Unlike much of the political safeguards literature, I am not advocating for less federal regulation because this may be contrary to state interests.¹⁸⁹ Nor am I

¹⁸⁶ This is not to say that partisan gerrymandering *always* works in favor of voters, although it often does, *see* Persily, *supra* note 62, at 650. Unlike other scholars, I do not focus on the impact of partisan gerrymandering on voters, but rather how it relates to the ability of states to govern as sovereigns. I believe that there are federalism benefits of partisan gerrymandering related to this, benefits which allow states to account for voter preferences and, by implication, protect voters. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (stating that our federalist system "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry").

¹⁸⁷ Kramer, *supra* note 2, at 222 ("The whole point of federalism—or at least the best reason to care about it—is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking."); *see also* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987) (focusing on the preservation of state and local institutional authority as a justification for federalism); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 76–106 (1995) (same).

¹⁸⁸ Kramer, *supra* note 2, at 222.

[Wechsler] conflates two rather different concerns, only one of which ultimately matters to advocates of federalism: ensuring that national lawmakers are responsive to geographically narrow *interests*, and protecting the governance prerogatives of state and local *institutions*. So far as I am aware, no one defends federalism on the ground that it makes national representatives sensitive to private interests organized along state or local lines. Rather, federalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices.

Id.

¹⁸⁹ *See, e.g.,* Adam C. Smith, *Gov. Charlie Crist Takes Heat from Republicans for Supporting Stimulus Package*, ST. PETERSBURG TIMES, Feb. 13, 2009, at B1; Letter from Deval Patrick, Governor, Mass., et al., to President Barack Obama (Feb. 3, 2009), *available at* http://flarecovery.com/_resources/browse/file/2.3.2009_Potus_Fed_Stimulus_Letter.pdf

referring the state's ability to extract more pork from Congress.¹⁹⁰ What I am referencing is the ability of states to have a voice in the making of federal policy, which directly affects their ability to govern. States are concerned about the direction of federal policy and its impact on state power because of recent controversies over health care, the federal budget, the wars in Afghanistan and Iraq, and numerous other issues. The states can use their redistricting authority to influence federal policy in a way that expands their capacity for self-government and protects their regulatory authority through the composition of their House delegation.¹⁹¹ Because changes in policy correlate to district composition, the state can utilize their redistricting power to shape federal policy.¹⁹² The delegation can vote against expansions of federal power, veto policies that are contrary to the states' regulatory interests, or alternatively, vote in favor of policies that help states to govern without conceding too much authority to the federal government.

(letter to the President of the United States from various Democratic and Republican governors supporting the American Recovery and Reinvestment Act).

¹⁹⁰ Although earmarks are not the focus here, the ability to obtain them is certainly important to many states. In 2009, the amount of earmarks and pork barrel spending did not decrease despite the economic fallout, with members of Congress requesting funding for 9,939 pet projects with a projected worth of 11.8 billion and 221 anonymous projects worth 7.8 billion. CITIZENS AGAINST GOV'T WASTE, 2009 CONGRESSIONAL PIG BOOK SUMMARY (2009). Many of these projects serve only a local or special interests but the money supplements state budgets, allowing for more discretionary spending and affecting the overall allocation of resources to its residents.

¹⁹¹ Questions regarding the scope of national authority are not as critical as they once were; rather, the focus is now on ways in which states can assert their sovereignty in the face of this expansion. See generally Ernest Young, *Ordering State-Federal Relations Through Federal Preemption Doctrine: Executive Preemption*, 102 NW. U. L. REV. 869, 870 (2008) ("As the constitutional limits on national action fade into history, the primary remaining safeguards for state autonomy are political, stemming from the representation of the states in Congress, and procedural, arising from the sheer difficulty of navigating the federal legislative process."); see also Metzger, *supra* note 177, at 2028 (arguing that the Supreme Court is unwilling to find that Congress has exceeded its authority on federalism grounds and instead relies on administrative law to protect the states). Similarly, I assert that partisan gerrymandering can serve as an alternate vehicle to protect the regulatory authority of the states.

¹⁹² Long ago, political scientists detailed the effects of apportionment on roll call voting in the House of Representatives, noting the policy changes in Congress after the Supreme Court handed down its decisions requiring equipopulation and decennial redistricting. See Ira Sharkansky, *Voting Behavior of Metropolitan Congressmen: Prospects for Changes with Reapportionment*, 28 J. POL. 774, 776 (1966). Later studies substantiate that, as a congressman's district becomes more liberal or conservative, politicians respond by moving in the proper direction. See Amihai Glazer & Marc Robbins, *Congressional Responsiveness to Constituency Change*, 29 AM. J. POL. SCI. 259, 270-71 (1985); see also David W. Brady & Naomi B. Lynn, *Switched-Seat Congressional Districts: Their Effect on Party Voting and Public Policy*, 17 AM. J. POL. SCI. 528, 531 (1973) (arguing that freshmen congressmen from districts that switched parties provided the strongest support for policy changes in the House).

The assumption is, of course, that the state will create “safe” seats in order to send majority party representatives to Congress to promote its policy views—and where one party controls the redistricting process, this is usually the case.¹⁹³ One exception is when a state weakens safe majority party seats as a part of a strategy to protect new representatives elected from marginal districts, or to weaken the opposition.¹⁹⁴ A state’s willingness to weaken a safe seat in the quest for more seats tends to work against the electoral interests of the affected congressional representatives, making them more beholden to the state in order to protect their seat.¹⁹⁵ This is certainly less true if a state passes a plan that is a bipartisan gerrymander, but generally speaking, the states’ interest in sending a particular type of legislator to Congress will, more often than not, rise and fall on the partisan affiliation of the majority party in the state. The ideal mechanism for promoting the election of majority party legislators is through a combination of safe partisan districts and marginally safe districts that allow the majority party to use its votes efficiently to send as many majority party legislators to Congress as possible.¹⁹⁶ Creating safe districts as a mechanism for ensuring an ideologically cohesive delegation is especially compelling given the growing polarization among American voters.¹⁹⁷

The organization of Congress lends itself to this interpretation by requiring bloc voting to implement legislation.¹⁹⁸ Given this and other institutional constraints, most proposed legislation fails to make it out of committee to the House floor. Congressional committees and subcommittees do most of the

¹⁹³ Alan Abramowitz, Brad Alexander & Matthew Gunning, *Don’t Blame Redistricting for Uncompetitive Elections*, 39 PS: POL. SCI. & POL. 87, 87 (2006) (“In the 2000 House elections 96% of safe Democratic districts were won by Democrats, and 91% of safe Republican districts were won by Republicans.”).

¹⁹⁴ Indeed, this has led at least one commentator to opine that this is the “bright side” of gerrymandering. See Kang, *supra* note 46, at 459–61; see also Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 553–54 (1994).

¹⁹⁵ Donald Ostdiek, *Congressional Redistricting and District Typologies*, 57 J. POL. 533, 542 (1995).

¹⁹⁶ See Gary W. Cox & Jonathan N. Katz, *Gerrymandering Roll Calls in Congress, 1879–2000*, 51 AM. J. POL. SCI. 108, 108 (2007) (“The literature on gerrymandering suggests that the party controlling redistricting in a particular state has both the motive and the opportunity to rig the translation of votes into seats in its own favor, producing what is technically called partisan bias. The literature on agenda power suggests that the party controlling the agenda in a particular Congress has both the motive and the opportunity to rig the translation of votes into decisions in its own favor—again producing partisan bias.”).

¹⁹⁷ Abramowitz et al., *supra* note 193, at 88 (arguing that House districts have become less competitive in part because “Americans . . . increasingly liv[e] in communities and neighborhoods whose residents share their values and they are increasingly voting for candidates who reflect those values,” which also explains the “growing partisan divergence among congressional districts”).

¹⁹⁸ *Id.*

legislative work, in part to encourage specialization by congressmen in specific policy areas, but also to provide opportunities for congressmen to perform favors for constituents and supporters.¹⁹⁹ For those bills that make it out of committee and are put to a vote before the full House, adherence to the party line is par for the course, and detractors face serious penalty from their respective parties.²⁰⁰ The institutional structure of Congress therefore favors cohesive delegations because of the committee structure, in which plum assignments are valued due to the rent that can be extracted for constituents and the state, and because once bills make it out of committee, their passage usually comes through a party line vote.²⁰¹

Thus, sending a cohesive House delegation to Congress is an alternative justification for federalism that ties directly to protecting the states' regulatory authority.²⁰² While there is a legitimate concern that federal interests may be

¹⁹⁹ JACOBSON, *supra* note 65, at 183–85; Scott A. Frisch & Sean Q. Kelly, *Self-Selection Reconsidered: House Committee Assignment Requests and Constituency Characteristics*, 57 POL. RES. Q. 325, 331, 335 (2004) (noting that while members of the House have “multiple motivations (reelection, good policy and influence in the House) that shape their behavior,” there is significant evidence that “individual members will seek committee assignments that are consistent with some dominant interest within their district”).

²⁰⁰ See Rick Klein, *Steele to Republicans Who Support Obama: “We’ll Come After You,”* ABC NEWS: THE NOTE (Nov. 5, 2009, 1:03PM), <http://blogs.abcnews.com/thenote/2009/11/steele-to-republicans-who-support-obama-well-come-after-you.html> (reporting on Republican National Committee chairman Michael Steele’s comment that “candidates who live in moderate to slightly liberal districts” will face consequences if they cross the line and abandon conservative principles by voting for President Obama’s policies).

²⁰¹ See, e.g., Franklin G. Mixon, Jr. & Rand W. Ressler, *Loyal Political Cartels and Committee Assignments in Congress: Evidence from the Congressional Black Caucus*, 108 PUB. CHOICE 313, 325–26 (2001) (“[T]he Congressional Black Caucus demonstrates the characteristics of a well-functioning political cartel in that the degree and uniformity to which it supports the leadership and party (Democratic) surpasses that of non-CBC Democratic legislators. This loyalty is then employed by Democratic House leaders through the placement of CBC members on important committees”); see also David C. Coker & W. Mark Crain, *Legislative Committees as Loyalty-Generating Institutions*, 81 PUB. CHOICE 195, 196 (1994) (arguing that “the preferences of Congressional leaders disproportionately influence the fate of legislation” with the end result being that “the voting behavior on the more important [congressional] committees . . . closely conform[s] to that of the leadership, reflecting the influence of those leaders on the committee appointment process, or on the members of such committees after appointment, or both.”); Persily, *supra* note 62, at 671 (“[A] state has a truly compelling interest in sending the most senior delegation to Washington that it can. Power in the House of Representatives—committee chairmanships, party and House leadership positions—falls largely along lines of seniority. Because senior incumbents are able to serve their state in ways that freshmen cannot, a state that threatens its incumbents threatens its own interests.”).

²⁰² For an opposing view, see Kramer, *supra* note 2, at 222 (“[T]here is no reason to believe that the constellation of local interests that captures or shapes the views of national representatives will be the same as that which would otherwise prevail in a state or local

subordinated to state interests if congressional delegations are beholden to their states,²⁰³ states do not always have a way to access federal resources outside of utilizing their congressional delegations. Moreover, the reality is that local issues are heavily influenced by national trends, and this will keep national interests central to congressional decision-making.²⁰⁴ Indeed, it is possible for the competing interests to coexist on some level. Many problems affect each locale differently, and how a representative votes on a “national” issue may have uniquely local consequences, which the representative must consider in order to appease his constituents. Finally, the idea of federalism is to prevent the centralization of political power—increasing the accountability of federal officials to their “home institutions” is one way of decentralizing political power at the federal level.²⁰⁵

Despite this, states probably do not want to completely limit the exercise of federal authority because of their dependency on federal funds, but for this same reason, having some influence over the direction of federal policy has become paramount. States have to adeptly manage the political waters, especially in this economy where most state governments are contending with budget shortfalls and relying heavily on the federal government to pay state employees, keep state agencies open, and keep state programs operating.²⁰⁶ Many state constitutions

lawmaking body.”). As this section shows, this aspect of Kramer’s argument has very substantial and important limitations.

²⁰³ James Madison seemed to have the opposite fear in THE FEDERALIST 46, where he opined that those who become members of the federal government “will generally be favorable to the States” and “will be likely to attach themselves too much to local objects,” which seemed to be one of the problems that plagued the Articles of Confederation; but in Madison’s view, this does not undermine the federal government because it has the ability to “embrace a more enlarged plan of policy than the existing government may have pursued,” and that “it will partake sufficiently of the spirit of both [federal and state interests], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.” THE FEDERALIST NO. 46, at 240 (James Madison) (Clinton Rossiter ed., 1961).

²⁰⁴ See Kramer, *supra* note 2, at 222.

²⁰⁵ See generally THE FEDERALIST NO. 46, at 239 (James Madison) (Clinton Rossiter ed., 1961) (arguing that the goal of the Constitution was to ensure that “the members of the federal [government] will be more dependent on the members of the State governments, than the latter will be on the former . . . [and that] the prepossessions of the people, on whom both will depend, will be more on the side of the State governments, than of the federal government”).

²⁰⁶ See Elizabeth McNichol, Phil Oliff & Nicholas Johnson, *Recession Continues to Batter State Budgets: State Responses Could Slow Recovery*, CTR. ON BUDGET AND POL’Y PRIORITIES (July 15, 2010), available at <http://www.cbpp.org/files/9-8-08sfp.pdf> (“[T]he shortfalls for 2009 and 2010 and most of the shortfalls for 2011 have already been closed through a combination of spending cuts, withdrawals from reserves, revenue increases, and use of federal stimulus dollars. States’ fiscal conditions remain extremely weak this year—fiscal year 2011—even as the economy appears to be moving in the direction of recovery.”); John Paul Mitchell, *46 of 50 States Could File Bankruptcy in 2009–2010*,

require states to have a balanced operating budget, necessitating the use of federal funds in order to do so.²⁰⁷ Federal social welfare programs notwithstanding, the average citizen is now dependent upon the federal government to an unprecedented degree because of the inability of state governments to provide needed social welfare programs due to budget cuts.²⁰⁸

When the federal government attempts to fill gaps left because of market failure, there is usually a decrease in state power because of increased federal intervention, designed to impose costly regulations on the business sector and limit the states' ability to regulate business and enact economic policies within their own borders.²⁰⁹ But the most recent economic downturn is not a normal situation. Nine years ago, at the time Larry Kramer wrote his seminal piece, it was unthinkable that the federal government would own a stake in some of the largest corporations in this country, it was unimaginable that Wall Street would fail given the precautions taken since the Great Depression, and it was incomprehensible that a \$700 billion dollar bailout of both state governments and private entities would be necessary.²¹⁰ Given these developments, unconventional checks are required to ensure the balance of power between the two spheres of government.

In the past, the states were modestly proactive in protecting themselves in the face of growing federal power. Besides utilizing the constitutional structure, they

FREEDOM ARIZ. (Jan. 30, 2009), <http://freedomarizona.wordpress.com/2009/01/30/46-of-50-states-could-file-bankruptcy-in-2009-2010/>. Combined budget gaps among states over the next two years are projected to be 300 billion. McNichol et al., *supra*.

²⁰⁷ *State Balanced Budget Requirements*, NAT'L CONFERENCE OF ST. LEGISLATURES, <http://www.ncsl.org/issuesresearch/budgettax/statebalancedbudgetrequirements/tabid/12660/default.aspx> (last updated Apr. 12, 1999).

²⁰⁸ See Jeffrey M. Jones, *In U.S., Trust in State Government Sinks to New Low*, GALLUP (Sept. 10, 2009), <http://www.gallup.com/poll/122915/trust-state-government-sinks-new-low.aspx> ("[T]he recession's effects may have also helped to spark a dramatic downturn in trust in state government, as governors and legislators across the country try to make up for lost revenue from declining tax receipts, at a time when demand for social programs is increasing.").

²⁰⁹ See generally Lyndsey Layton, *A Vigorous Push from Federal Regulators*, WASH. POST, Oct. 13, 2009, at A1 ("With much of Washington focused on efforts to revamp the health-care system and address climate change, a handful of Obama appointees have been quietly exercising their power over the trappings of daily life. They are awakening a vast regulatory apparatus with authority over nearly every U.S. workplace, 15,000 consumer products, and most items found in kitchen pantries and medicine cabinets."); *Stimulus-Package Battle Continues in Congress: Bank Bailout Plan Set to Debut This Week*, JUTIA GROUP (Feb. 9, 2009), <http://jutiagroup.com/2009/02/09/stimulus-package-battle-continues-in-congress-bank-bailout-plan-set-to-debut-this-week/> ("As the worst financial crisis since the Great Depression continues to worsen, decades of deregulation and the growing independence at the state level are being reversed as a deteriorating national economy forces the federal government to increasingly take on responsibilities that no other institution has the power or resources to handle.").

²¹⁰ McNichol et al., *supra* note 206 ("In total, 48 states have addressed shortfalls in their budgets for fiscal year 2010, totaling \$192 billion or 29 percent of state budgets.").

influenced federal policy by forming political organizations and lobbying Congress. Following the unprecedented expansion of the federal government during the New Deal era, for example, state and local officials established several associations to lobby Congress. From all accounts, these organizations have given the states considerable leverage and influence in the federal government.²¹¹

Deregulation in the 1980s gave states more regulatory power and authority than it had in a generation. The unprecedented financial downturn, however, has led the states to turn to the federal government for more financial help; the difference this time is that the states have more tools available to protect their regulatory authority, particularly by leveraging their redistricting power over their House delegation. In light of Supreme Court precedent, which is fractured and inconclusive at best, redistricting remains one way in which the states can still influence federal policy.

V. CONCLUSION

This Article lays the groundwork for what I hope will be further research on how various aspects of political networks can be federalism-reinforcing. There are a few caveats worth noting. I recognize that the redistricting power has the potential to be used for the personal gain of individual congressmen; what I assert is that it also has some potential to be used to protect the states' regulatory authority, especially in light of recent controversies over the economy and health care.²¹² Even if gerrymandering is a tool that political parties use instrumentally, one of the externalities of such use is that it reinforces the state-federal divide. Nor does this prohibit elected officials from appreciating the broader uses of gerrymandering more generally which, given increasing federal power, may be likely going forward. After all, no district is drawn in isolation, and various considerations go into the creation of a redistricting map.

Another potential concern is that because of the difficulties in separating the desires of the "state" from that of the "party," the state benefits from at least some of the policies implemented and preferred by party elites. Further study is needed to uncover the network of relationships between national and state parties in order

²¹¹ See Kramer, *supra* note 2, at 285 n.272 (describing the associations established by state and local officials in the post-New Deal era including "the Council of State Governments, the National Governors Association, the National Conference of State Legislators, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, and the International City Management Association," and also noting that "[m]any commentators credit these organizations with having considerable power and influence in Congress" (citing Deil S. Wright, *Revenue Sharing and Structural Features of American Federalism*, 419 ANNALS 100, 110–11, 113 (1975))).

²¹² We should also hesitate to assert that elected officials are more likely to work towards their own ends at the expense of constituent or state interests. See generally Levinson, *supra* note 150 (arguing that the ambition of individual officials should not be used to predict government behavior because democratic political structures channel ambition in ways that prevent empire building by these officials).

to determine if the federalism-reinforcing potential of partisan gerrymandering has been realized, but this Article is a necessary and important step in that direction.

Finally, I recognize that making congressmen accountable to states rather than the people who elect them can blur electoral accountability, but it is my belief that this is already happening. Our federal officials have to answer to dual constituencies; the idea that the state is not one of these interest groups is a legal fiction, and sometimes the “people” speak best through their state legislatures.

