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COMMENTARY

PARTISAN FAIRNESS AND REDISTRICTING POLITICS

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Courts and scholars have operated on the implicit assumption that the Supreme Court's "one person, one vote" jurisprudence put redistricting politics on a fixed, ten-year cycle. Recent redistricting controversies in Colorado, Texas, and elsewhere, however, have undermined this assumption, highlighting the fact that most states are currently free to redraw election districts as often as they like. This essay explores whether partisan fairness—a normative commitment that both scholars and the Supreme Court have identified as a central concern of districting arrangements—would be promoted by a procedural rule limiting the frequency of redistricting. While the literature has not considered this question, scholars generally are pessimistic about the capacity of procedural redistricting regulations to curb partisan gerrymandering. In contrast, this essay argues that a procedural rule limiting the frequency of redistricting will promote partisan fairness by introducing beneficial uncertainty in the redistricting process and by regularizing the redistricting agenda.

Last spring brought a sudden shock to the ritual of redistricting politics. Breaking the routine of decennial redistricting, Colorado decided to redraw its congressional districts less than fifteen months

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after its post-2000 census congressional districting scheme went into effect.[1] Simultaneously, Texas Republicans introduced legislation to redraw their newly minted congressional districts. Democratic legislators fled Texas twice in an attempt to block passage of the redistricting legislation, but eventually they were forced to return.[2] When they did, the Republican majority pushed through its redistricting bill.[3] These events may have opened the floodgates: New Mexico and Oklahoma Democrats initially threatened to retaliate against the actions in Texas by revising their districts to favor Democrats,[4] Georgia Republicans are considering changes to that state's congressional districts,[5] and there are reports that other states may mount the re-redistricting bandwagon as well.[6]

These events have undermined the assumption, common in voting rights jurisprudence and scholarship, that redistricting occurs

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[1] *Compare* Avalos v. Davidson, No. 01 CV 2897, 2002 WL 1895406, at *1 (D. Colo. Jan. 25, 2002) (establishing districts based on 2000 census) *with* Act of May 9, 2003, ch. 247, 2003 Colo. Sess. Laws 352 (revising districts established in *Avalos*). *See also* T.R. Reid, *G.O.P. Redistricting: New Boundaries of Politics?*, WASH. POST, July 2, 2003, at A4; Michael Riley, *Dems Blast Plan to Alter Congressional District Lines*, DENVER POST, May 5, 2003, at 6B.

[2] More than fifty Democratic members of the Texas House of Representatives fled to Oklahoma for the final few days of the spring legislative session. *See* David Barboza & Carl Hulse, *Texas' Republicans Fume; Democrats Remain AWOL*, N.Y. TIMES, May 14, 2003, at A17. When the Governor called a special session, eleven of the twelve Democrats in the State Senate then fled to New Mexico to deprive that chamber of a quorum. *See Democrats On The Run, Again*, N.Y. TIMES, July 29, 2003, at A18. Six weeks later, after one of the senators returned to Texas and deprived the remaining ten of their quorum-busting power, the senators all returned to Texas. *See* Ralph Blumenthal, *State Senate Democrats Return to Texas*, N.Y. TIMES, Sept. 12, 2003, at A18.

[3] *See* Act of Oct. 13, 2003, ch. 2, 2003 Tex. Sess. Law Serv. 3 (Vernon). As a result of the redistricting plan, the Republican Party may pick up as many as seven seats. *See, e.g.*, Edward Walsh, *Redrawing Districts Raises Questions: No Precedent Seen for GOP Efforts*, WASH. POST, Oct. 26, 2003, at A4. The plan was subsequently cleared by the Justice Department pursuant to its authority under Section 5 of the Voting Rights Act. *See* Dan Eggen, *Democrats Won't Get Justice Memo: Texans Say Document Could Embarrass GOP*, WASH. POST, Jan. 22, 2004, at A23. In addition, a three-judge federal court rejected myriad legal challenges leveled against the redistricting plan. *See* Session v. Perry, 298 F. Supp. 2d 451, 457 (E.D. Tex. 2004), *petition for cert. filed* (U.S. Mar. 31, 2004) (No. 03-9644).

[4] *See* Reid, *supra* note 1.

[5] *See* Rhonda Cook, *GOP Fights Redistricting in U.S. Court*, ATLANTA J.-CONST., Jan. 6, 2004, at B3; Rhonda Cook, *GOP Pushes Redistricting As Next Issue*, ATLANTA J. CONST., July 28, 2003, at B1.

[6] *See* Juliet Eilperin, *Politics: Deciding Where to Draw the Lines*, WASH. POST, Aug. 20, 2003, at A6 (reporting that Ohio Republicans are considering revisions to congressional district lines drawn in that state following 2000 census); David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1 (noting that Democrats are "dropping hints about taking the redistricting battle to big game territory: Illinois and California").

on a fixed ten-year cycle.[7] The general root of this assumption, *Baker v. Carr*[8] and its progeny, did partially regularize the timing of the redistricting process. In cases following *Baker*, the Supreme Court held that election districts had to adhere to the principle of "one person, one vote."[9] To enforce this principle, the Court imposed an upper limit on the timing of redistricting, requiring districts to be redrawn following each census;[10] and it backed up this temporal ceiling by authorizing federal courts to refashion districts when states failed to act.[11] Undiscussed in the case law and commentary, however, is the fact that this regulation of redistricting timing is partial; courts have never held that federal constitutional law imposes a complementary *limitation* on the frequency of redistricting.[12] While a handful of states prohibit mid-decade redistricting as a matter of state law,[13] the recent events demonstrate that the general absence of a temporal floor on the redistricting cycle leaves most states free to redistrict as frequently as they wish.

The sudden shift in the political norms governing redistricting raises the question whether the general absence of a procedural rule limiting the frequency of redistricting should be cause for concern. Certainly the Democrats in Texas wish that their state legislature was legally prohibited from redistricting more than once per decennial cycle. Crass partisan wishes aside, however, would such a rule pro-

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[7] For examples of this assumption, see DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 43–44 (1992), which notes that the Supreme Court's one person, one vote cases regularized redistricting "so that almost all levels of government down to the local school districts are on a ten-year cycle."

[8] 369 U.S. 186 (1962).

[9] *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (holding that Article I, Section 2 of Constitution requires congressional districts to adhere to principle of one person, one vote); *see also infra* notes 31–34 and accompanying text.

[10] *See infra* note 36.

[11] *See infra* note 37.

[12] Challengers to Texas's new redistricting plan argued that the Federal Constitution does prohibit states from redrawing congressional districts more than once each decennial census cycle, but a three-judge federal court rejected the plaintiffs' arguments. Session v. Perry, 298 F. Supp. 2d 451, 458–68 (E.D. Tex. 2004), *petition for cert. filed* (U.S. Mar. 31, 2004) (No. 03-9644).

[13] *See infra* Part III.A (surveying existing state regulation of redistricting timing). The Colorado Supreme Court recently struck down that state's re-redistricting legislation on that ground. *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1226 (Colo. 2003) (holding that Article V, Section 44 of Colorado Constitution "not only requires redistricting after a federal census and before the ensuing general election, but also restricts the legislature from redistricting at any other time"), *petition for cert. filed sub nom.* Colo. Gen. Assembly v. Salazar, 72 U.S.L.W. 3506 (U.S. Jan. 28, 2004) (No. 03-1082).

mote more politically fair districting arrangements? Both scholars and the Supreme Court have identified partisan fairness as a central concern of redistricting.[14] The Supreme Court held in *Davis v. Bandemer*[15] that partisan gerrymandering claims are justiciable under the Equal Protection Clause;[16] likewise, commentators are in general agreement that partisan gerrymandering is harmful, and that partisan fairness is an important attribute of districted election systems.[17] When judged from the perspective of political fairness, however, procedural redistricting rules have not fared well. Specifically, scholars often argue that procedural redistricting rules—including the existing temporal ceiling on the redistricting process—do little to curtail, and sometimes even exacerbate, the problem of partisan gerrymandering.[18]

This essay explores whether such skepticism is warranted with respect to a procedural rule that the literature has never considered—a temporal floor on redistricting. It concludes that it is not. Examining, for simplicity, a procedural limitation on the frequency of redistricting that prohibits redistricting more than once each decennial

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[14] For purposes of this essay, I use the terms "political fairness" and "partisan fairness" interchangeably.

[15] 478 U.S. 109 (1986).

[16] *Id.* at 123–27. For earlier arguments by individual Justices that partisan gerrymandering claims should be cognizable under the Constitution, see, for example, Karcher v. Daggett, 462 U.S. 725, 744 (1983) (Stevens, J., concurring) ("[P]olitical gerrymandering is one species of single vote dilution that is proscribed by the Equal Protection Clause."), and *id.* at 787 (Powell, J., dissenting) (arguing that injuries resulting from political gerrymandering "may rise to constitutional dimensions"). The constitutional treatment of partisan gerrymandering claims is before the Supreme Court again this Term. Last June, the Court noted probable jurisdiction in *Vieth v. Jubelirer*, 123 S. Ct. 2652 (2003), in which the plaintiffs claim that Pennsylvania's congressional redistricting plan constitutes an unconstitutional partisan gerrymander. *See* Vieth v. Pennsylvania, 241 F. Supp. 2d 478, 484–85 (M.D. Pa. 2003) (dismissing partisan gerrymandering claim).

[17] *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 601–11 (2002) [hereinafter Issacharoff, *Political Cartels*]; Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1646–47 (1993) [hereinafter Issacharoff, *Judging Politics*]; Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1716 (1993); *see also* POLITICAL GERRYMANDERING AND THE COURTS, at viii (Bernard Grofman ed., 1990); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 112–13 (2000); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1330 (1987). *But see* Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563, 575–78 (1989) (arguing there is "no demonstrable harm" associated with partisan gerrymanders); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. REV. 1, 74–75 (1985) (arguing that redistricting should be viewed as any other political contest).

[18] *See infra* Part I.

cycle,[19] the essay argues that two principal features of such a temporal floor should curb the effects of partisan gerrymandering. First, the delay between redistrictings imposed by such a rule promotes beneficial uncertainty in the redistricting process. This uncertainty should lower levels of bias by causing the effects of partisan gerrymanders to erode over time. Second, the limitation on redistricting frequency partially randomizes control over the redistricting process. This randomization makes it less likely that redistricting will occur under conditions favoring partisan gerrymandering.

This essay proceeds in three parts. Part I introduces partisan fairness as a central concern of redistricting jurisprudence and scholarship, and surveys the general critique that process-based redistricting regulations are ineffective at preventing partisan gerrymandering. Part II then explains how, contrary to this general critique, a lower temporal bound should serve to curb the effects of partisan gerrymandering. Part III concludes by exploring which institutions—states, Congress, or federal courts—could impose a temporal floor on federal and nonfederal redistricting.

I
THE CRITICISMS OF PROCEDURAL REDISTRICTING REGULATIONS

The reapportionment revolution sparked by *Baker v. Carr*[20] and its progeny secured one kind of fairness in districted elections. In those cases, the Supreme Court constitutionalized the now-famous principle of "one person, one vote" and held that election districts must have roughly equal populations to comply with that principle.[21] But population fairness was not the only kind of fairness that the Court was attempting to promote. From *Baker* forward, the Court also has been concerned with political fairness—that is, fairness between different partisan groups of voters.[22] The promise of the Court's equipopulation requirement[23] was that it also would promote

[19] I refer to such a rule throughout this essay as a bar on "interim redistricting" or "off-cycle redistricting."

[20] 369 U.S. 186 (1962).

[21] *See infra* notes 29–34.

[22] I define partisan fairness in more detail in Part II. For purposes of this essay, when I refer to "partisan gerrymanders" I mean only redistricting that introduces partisan unfairness into a districting arrangement. Partisan fairness is not, of course, the only kind of fairness at stake in redistricting generally or in the Supreme Court's voting rights jurisprudence in particular. *See, e.g.*, White v. Regester, 412 U.S. 755, 765–66 (1973) (holding that Constitution entails commitment to racial fairness in districting arrangements). Nonetheless, this essay is concerned only with partisan fairness.

[23] *See infra* note 33 and accompanying text.

political fairness by thwarting the efforts of redistricters to fashion partisan gerrymanders. And more recently, the Court in *Davis v. Bandemer* formally constitutionalized its concern for partisan fairness in redistricting, holding that claims of partisan gerrymandering are cognizable under the Equal Protection Clause.[24]

Like the Court, many legal scholars and political scientists are in general agreement that partisan fairness is a normatively desirable feature of districted elections.[25] Nonetheless, scholars are uniformly critical of the Court's efforts to promote political fairness. *Davis v. Bandemer*'s test for partisan gerrymandering has been criticized as imprudent, unenforceable, or both.[26] More important for present purposes, scholars also have roundly criticized the reapportionment revolution's process-based regulations as ineffective at promoting partisan fairness.[27] In fact, there is general pessimism about the ability of process-based regulations (judicially imposed or otherwise) to thwart partisan gerrymandering efforts. Unconsidered by this literature, however, are the partisan consequences of a temporal floor on the redistricting process.

Redistricting regulations can be thought of as falling loosely into three categories: process-based regulations, outcome-based regulations, and institution-selecting regulations. Process-based regulations are those that require existing redistricting authorities to adhere to certain procedural or form-related requirements when they undertake redistricting. Examples of such rules include an equipopulation requirement, a requirement that districts be redrawn following each decennial census, a requirement that districts be compact or conform to local political boundaries where possible, and so on. Outcome-based regulations are those that directly test districting outcomes against some metric of fairness, such as partisan fairness or racial fairness. Institution-selecting rules determine the persons or institutions empowered to engage in redistricting. Rules shifting redistricting authority from the state legislative process to bipartisan or "nonpartisan" commissions are the most common of this type.[28]

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[24] 478 U.S. 109, 123–27 (1986). As I noted above, the Supreme Court this Term is reviewing a partisan gerrymandering case for the first time since *Bandemer*. *See* Vieth v. Jubelirer, 123 S. Ct. 2652 (2003) (noting probable jurisdiction); *supra* note 16; *infra* notes 188–190 and accompanying text.

[25] *See supra* note 17. This essay takes as a premise of its argument the position that political fairness in redistricting is normatively desirable; it does not rehearse the arguments in favor of this position.

[26] *See infra* note 49.

[27] *See infra* notes 38–52 and accompanying text.

[28] This taxonomy is useful, but it certainly does not represent the only way that one could categorize redistricting regulations. For another approach, see, for example,

The Supreme Court's reapportionment revolution imposed several constitutional process-based constraints on redistricting politics. In *Baker v. Carr*,[29] the Court for the first time held that challenges to the constitutionality of legislative districting schemes are justiciable under the Equal Protection Clause.[30] Subsequent cases imposed three specific constraints. First, the Court in *Reynolds v. Sims*[31] and *Wesberry v. Sanders*[32] required that state legislative and congressional district plans adhere to the principle of one person, one vote—a principle that the Court interpreted to require that legislative districts contain roughly equal numbers of people.[33] This equipopulation requirement evolved to require greater population precision in federal districts than nonfederal districts, but the general requirement applies nonetheless to essentially all legislative districting schemes today (save the United States Senate).[34] Second, the Court required that election districts be redrawn periodically in order to comply with the equipopulation requirement.[35] In practice, this requirement of periodic adjustment quickly became a rule requiring that districts be

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Issacharoff, *Judging Politics*, *supra* note 17, at 1647, which divides redistricting regulations into ex post and ex ante rules. Moreover, the rough classification I employ is not analytically precise. Many rules that appear to fall naturally into one category can be easily recast into another. For example, the Supreme Court's prohibition on partisan gerrymandering, generally thought of as an outcome-evaluating regulation, can be reconceptualized as an institution-selecting rule, because it transfers to the judiciary the final authority to determine the partisan-based validity of redistricting plans. Relatedly, the equipopulation rule is an outcome-evaluating regulation to the extent that one is interested in the inherent value of having equipopulous districts, but is a process-based rule to the extent one is interested in the partisan fairness of districting outcomes. As a matter of convention, the equipopulation requirement, compactness requirements, and the like are treated as process-based constraints precisely because the literature focuses principally on the capacity of these rules to promote political fairness (and, relatedly, because the literature is skeptical of the inherent value of constraints like compactness).

29 369 U.S. 186 (1962).

30 *Id.* at 208–37. Prior to *Baker v. Carr*, a plurality of the Court had ruled that such challenges constituted nonjusticiable political questions. *See* Colegrove v. Green, 328 U.S. 549 (1946); *see also, e.g.*, South v. Peters, 339 U.S. 276 (1950).

31 377 U.S. 533 (1964).

32 376 U.S. 1 (1964).

33 *See Reynolds*, 377 U.S. at 577–81; *Wesberry*, 376 U.S. at 7–9, 18.

34 *See* White v. Regester, 412 U.S. 755, 763 (1973) (noting that congressional districts are subject to stricter numerical standards than are state legislative districts); Avery v. Midland County, 390 U.S. 474, 476 (1968) (applying one person, one vote principle to local governments); *cf.* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 730 (1973) (exempting special-purpose district from equipopulation requirement). While the equipopulation requirement applies to nearly all legislative districts, this essay is specifically concerned only with state legislative and congressional redistricting. It does not discuss local redistricting practices.

35 *See Reynolds*, 377 U.S. at 583.

redrawn following each census.[36] Third, the Court empowered federal courts to fashion district maps in cases where states failed to redistrict in a timely manner following the decennial census.[37]

The procedural incidents of the equipopulation doctrine—the decennial redistricting requirement backed by the threat of judicial intervention—partially regularized the redistricting process. Where many states previously redistricted only when the legislature decided to do so, congressional and state legislative district lines now had to be redrawn following each census. As I noted at the outset, however, the one person, one vote jurisprudence did not fully regularize redistricting. Under this doctrine, states currently remain free as a matter of federal constitutional law to redistrict more frequently than once per decennial census cycle. And with a few notable exceptions that I discuss in Part III, states are also free to do so under state law.

The equipopulation rule itself has been widely criticized for addressing only the problem of numerical equality and ignoring alto-

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[36] It is interesting to note that *Reynolds* itself did not lay down a rule that states must redistrict immediately following each census. In fact, *Reynolds* did not even hold that decennial redistricting was constitutionally mandatory; rather, the Court held that the failure to redistrict decennially would raise a presumption of unconstitutionality. *See id.* at 583–84 ("Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. . . . [W]e do not intend to indicate that decennial reapportionment is a constitutional requisite . . . . But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."); *see also infra* Part III.C. Later cases have assumed, however, that the release of new decennial census data invalidates districts drawn using data from the previous census. *See, e.g.*, Arrington v. Elections Bd., 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) (holding that existing districts become unconstitutional upon release of new decennial census data); *see also* Georgia v. Ashcroft, 539 U.S. 461, 123 S. Ct. 2498, 2516 n.2 (2003) ("After the new enumeration, no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years."); Karlan, *supra* note 17, at 1726 ("Once the decennial census figures are released, virtually every existing apportionment scheme becomes instantly unconstitutional because of a decade of population shifts."); Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 878 (2001) ("The 2000 census, like each prior census, will indicate not only changes in overall population size but also changes in population distribution. . . . These population shifts will render federal, state, and local district maps unconstitutional under the 'one person, one vote' requirement of *Reynolds v. Sims*.").

[37] *See* Scott v. Germano, 381 U.S. 407, 409–10 (1965) (per curiam) ("[I]n the event a valid reapportionment plan . . . is not timely adopted [the District Court] may enter such orders as it deems appropriate . . . ."); *see also* Growe v. Emison, 507 U.S. 25, 33–37 (1993) (discussing circumstances in which federal courts can undertake reapportionment). The Court has made clear, however, that federal courts must refrain from intervening until it is clear that the state will otherwise not have a valid plan in place in time for the next election. *Id.* at 33–35; *see also Germano*, 381 U.S. at 409 (requiring district court to "stay[ ] its hand" unless state failed to redistrict "within ample time to permit such plan to be utilized in the [upcoming] election"). *See generally* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 258–61; Note, *supra* note 36.

gether other problems of representational fairness—including partisan fairness.[38] While the doctrine has substantially equalized the populations of legislative districts throughout the country, it does not directly prohibit redistricting authorities from gerrymandering district lines in a way that unfairly favors one political party and disfavors another.[39] It is true that the doctrine formally cabins legislative discretion by requiring districts to be drawn with equal populations—a fact that the Supreme Court initially appeared to think would defeat partisan gerrymandering efforts.[40] Despite this initial optimism, however, legal scholars and political scientists have uniformly argued that the Court was wrong to believe that the equipopulation rule would promote partisan fairness in redistricting.[41] The requirement that districts be drawn with equal populations does little to restrict the districting possibilities available to those in charge of the redistricting

[38] Justice Harlan emphasized this point in his dissent in *Reynolds*, 377 U.S. at 622–24 (Harlan, J., dissenting) ("Recognizing that 'indiscriminate districting' is an invitation to 'partisan gerrymandering,' . . . the Court nevertheless excludes virtually every other basis for the formation of electoral districts other than 'indiscriminate districting.'"); *see also* Wells v. Rockefeller, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting) ("The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort."); *cf.* Lucas v. Colo. Gen. Assembly, 377 U.S. 713, 748–51 & n.12 (1964) (Stewart, J., dissenting) (arguing that exclusive focus on numerical equality ignores many factors necessary to ensuring fair representation). This potential shortcoming of the reapportionment revolution also has been a recurring theme in voting rights scholarship for the past several decades. *See, e.g.*, Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1419–21, 1437–38 (2002); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1608 (1999); Robert J. Sickels, *Dragons, Bacon Strips and Dumbbells—Who's Afraid of Reapportionment?*, 75 YALE L.J. 1300, 1300 (1966).

[39] *See, e.g.*, Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 553 (1994) ("[A]s most political scientists recognize, population equality guarantees almost no form of fairness beyond the numerical equality of population.").

[40] *See Reynolds*, 377 U.S. at 578–79 (describing indiscriminate districting as "an open invitation to partisan gerrymandering"); Issacharoff, *Judging Politics*, *supra* note 17, at 1648 ("As conceived by the Supreme Court in the 1960s, the reliance on numerical standards of apportionment was to serve three purposes. . . . Third, the existence of objective measures would defeat attempts to gerrymander districting schemes . . . ."); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 175 (rev. 2d ed. 2001) (making similar argument); *cf.* PHILIP MUSGROVE, THE GENERAL THEORY OF GERRYMANDERING 57 (1977) ("[I]t was expected that the elimination of population disparities would by itself remove most of the partisan advantage to be gained from districting."). The Supreme Court also suggested at the time that other process-based rules might help limit partisan gerrymandering. *See Reynolds*, 377 U.S. at 581 ("[A] State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.").

[41] *See, e.g.*, GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 27 (2002); Issacharoff, *Judging Politics*, *supra* note 17, at 1645–46.

process.[42] As the next Part describes in more detail, it is theoretically straightforward to draw district boundaries that enclose equal populations while still biasing the districting map in favor of one political party or another.[43] Moreover, the increasing availability of computerized redistricting in the 1970s and 1980s made this theoretical possibility easy to accomplish in practice.[44] Even the Court has acknowledged more recently that rigid adherence to numerical equality has not guaranteed other forms of fairness.[45] And beyond the conclusion that the equipopulation rule is ineffective at ensuring political fairness, Richard Engstrom and others have argued that the Court's reliance on the one person, one vote standard might actually promote partisan gerrymandering.[46]

To be sure, the equipopulation rule's focus on numerical equality does not preclude the possibility that the one person, one vote jurisprudence writ large will promote political fairness in redistricting. The jurisprudence does impose additional procedural restrictions on redistricting politics: It partially regularizes the timing of redistricting

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[42] *See* MUSGROVE, *supra* note 40, at 52, 57; Karlan, *supra* note 17, at 1705–06; Sickels, *supra* note 38, at 1300.

[43] *See infra* Part II.A.2.

[44] *See* Issacharoff, *Judging Politics*, *supra* note 17, at 1654; Karlan, *supra* note 37, at 256; Karlan, *supra* note 17, at 1706 ("Advances in the technology of districting, particularly the increasing use of computers, made it quite feasible to comply with the requirement of equipopulous districts while continuing to eviscerate the political strength of identifiable groups of voters."). *See generally* Michelle H. Browdy, Note, *Computer Models and Post-*Bandemer *Redistricting*, 99 YALE L.J. 1379 (1990) (discussing different ways computers can be used in redistricting process).

[45] *See* Karcher v. Daggett, 462 U.S. 725, 733 (1983) ("The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has."); Gaffney v. Cummings, 412 U.S. 735, 748–49 (1973) (concluding that fair and effective representation "does not depend solely on mathematical equality among district populations" and that "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement"); *see also* Davis v. Bandemer, 478 U.S. 109, 113 (1986) (implicitly acknowledging shortcomings of equipopulation requirement by finding justiciable separate constitutional claim against partisan gerrymandering); *cf. id.* at 168 (Powell, J., concurring in part and dissenting in part) ("[E]xclusive or primary reliance on 'one person, one vote' can betray the constitutional promise of fair and effective representation by enabling a legislature to engage intentionally in clearly discriminatory gerrymandering."); *Karcher*, 462 U.S. at 752 (Stevens, J., concurring) (noting that "mere numerical equality is not a sufficient guarantee of equal representation" because "it protects groups only indirectly at best").

[46] *See* Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 278–79; McConnell, *supra* note 17, at 103–04; *see also* HOWARD A. SCARROW, PARTIES, ELECTIONS, & REPRESENTATION IN THE STATE OF NEW YORK 104–05 (1983); Issacharoff, *Judging Politics*, *supra* note 17, at 1654–56 & n.60 (citing such arguments).

by requiring political authorities to undertake redistricting following each census, and it changes the effect of legislative deadlock by authorizing courts to refashion district lines when the political branches fail to do so. It is possible that these procedural rules—either by restricting the redistricting options available to political actors or by altering the political dynamics of redistricting—could reduce the potential for political unfairness in redistricting.

Nevertheless, scholars have for the most part concluded that these complementary procedural rules are ineffective constraints on partisan gerrymandering. According to these scholars, the requirement that district lines be revised regularly does nothing to ensure political fairness at the time when redistricting occurs.[47] As with critiques of the equipopulation rule, criticism of the decennial redistricting requirement and the judicial intervention it entails sometimes goes beyond the argument that those rules are ineffective at promoting political fairness in redistricting: Pam Karlan, for example, has suggested that the procedural incidents of the redistricting revolution may actually *increase* the opportunities for parties to capture the redistricting process and use it to achieve politically or racially motivated ends.[48]

These critiques of the Supreme Court's one person, one vote jurisprudence are part of a larger line of criticism against various process-based forms of redistricting regulation. The common complaints are that such regulations miss the point by failing to focus on important aspects of fairness in redistricting, and more specifically that, from the perspective of political fairness, they are ineffective at curbing partisan gerrymandering.[49] As with the equipopulation

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[47] *See, e.g.*, Karlan, *supra* note 17, at 1726–37.

[48] *Id.* at 1708, 1726–37; *see also* Karlan, *supra* note 37, at 256. Professor Karlan argues that one person, one vote jurisprudence creates a race to the courthouse, where possibilities for forum shopping and the availability of favorable, discretionary judicial remedies make it possible for political actors to capture the redistricting process. *See* Karlan, *supra* note 17, at 1726–37.

[49] *See, e.g.*, BUTLER & CAIN, *supra* note 7, at 149–50 (noting that supposedly neutral procedural restrictions create substantial "potential for mischief in the name of neutrality"). By focusing on the critiques of process-related redistricting regulations, I do not mean to suggest that the other categories of regulation are free from criticism. Far from it. There is general agreement among legal scholars, for example, that the outcome-based constitutional prohibition against partisan gerrymandering set forth by the Supreme Court in *Davis v. Bandemer* has been a miserable failure. *See, e.g.*, Issacharoff, *Political Cartels*, *supra* note 17, at 604–05. There is also a consistent thread of criticism leveled against institution-selecting rules. Nathaniel Persily and others have argued that shifting redistricting authority from state legislatures to bipartisan or independent commissions will do nothing to change the partisan nature of the redistricting process, and will, if anything, serve only to submerge those partisan disputes and mislead the public about the partisan nature of the process. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses:*

requirement and its procedural incidents, critics contend that such regulations are ineffective at promoting political fairness because it is theoretically possible and often practically simple for redistricters to comply with the process-based requirements while still introducing substantial partisan unfairness into a districting scheme.[50] This is true of traditional district compactness requirements,[51] contiguity mandates, requirements that districts preserve local political boundaries,[52] and rules that districts conform to natural geographic features. Moreover, because these process-based limitations frequently conflict with one another in implementation, imposing them on redistricting authorities can actually empower those authorities to pursue partisan ends under the guise of balancing the competing procedural interests.

Thus, much modern redistricting scholarship is knit together by the consistent refrain that process-based redistricting regulations are ineffective at promoting districts that are fair to both major parties. A

The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649, 673–79 (2002); *see also* Alfred Balitzer, The Commission Experience: Studies of Non-legislative Approaches to Redistricting, at iii (1980) (unpublished working paper, on file with the Rose Institute, Claremont McKenna College) (arguing that "effort to mask redistricting behind the façade of independent commissions has produced hypocrisy and has often intensified the political struggle—although hiding it from the eyes of the electorate").

[50] Some process-related rules do escape this criticism because they deprive redistricters of information that the redistricters would need to engage in purposeful partisan gerrymandering. Such rules include requirements that political registration data and election data be withheld from redistricting authorities. These information-depriving rules, however, are subject to several other criticisms. One is a practical objection: It is difficult to see how, in practice, one could keep relevant political information from redistricting authorities. Much of that data is public, and redistricting authorities are required by federal voting rights law to consider certain racial data that contains substantial political information. Even putting aside these practical concerns, scholars often criticize information-depriving rules for merely replacing intentional political unfairness with random (and potentially more severe) political unfairness.

[51] *See, e.g.*, Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 527–31 (1993) (surveying state-imposed compactness requirements and concluding that they have been ineffective as constraints on redistricting). There is some evidence that more quantitative (rather than traditional) compactness standards developed by political scientists can better cabin legislative discretion, *see, e.g.*, Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 332–34 (1991), though this may be less true now that computer districting programs enable redistricters to create large numbers of potential districts, *see* Pildes & Niemi, *supra*, at 538 & n.178 (noting that commentators disagree over whether compactness can be effective constraint on gerrymandering). Compactness requirements also are frequently criticized on the ground that they introduce systematic partisan and racial biases into district plans. *See, e.g.*, MUSGROVE, *supra* note 40, at 53; Lowenstein & Steinberg, *supra* note 17, at 23–25. *See generally* BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 35–38 (1984) (demonstrating that compact districts do not accurately reflect partisan strength in electorate).

[52] *See* Lowenstein & Steinberg, *supra* note 17, at 34.

few political scientists recently have challenged this conventional wisdom. Gary Cox and Jonathan Katz, for example, have criticized the view that *Reynolds*'s decennial districting requirement and its associated rules of judicial supervision have had no significant effect (or a detrimental effect) on the practice or effects of partisan gerrymandering.[53] Cox and Katz argue that, in the 1960s, these process-based rules changed the political dynamics of redistricting in a way that helped eliminate the pro-Republican bias that had existed in congressional districting at that time.[54] While the work of these political scientists suggests that closer investigation of timing and process-oriented redistricting rules is sorely needed, and that the general critique of such regulations may be at least partly wrong, the possibility of a frequency limitation on redistricting remains entirely unexamined.

II
PROMOTING PARTISAN FAIRNESS THROUGH PROCEDURAL REGULATION

Should we view a lower temporal bound on redistricting with the skeptical attitude typically taken towards process-oriented redistricting rules? This Part argues that we should not: A limitation on the frequency of redistricting should promote partisan fairness in districting arrangements. To show why this is so, Part II.A first elaborates on the meaning of partisan fairness. Part II.B then describes the two features of the rule prohibiting interim redistricting that promote such fairness: the uncertainty-inducing aspects of the rule and the rule's agenda-setting aspects. After explaining how these features limit the power of state legislatures to enact effective gerrymanders, Part II.C considers potential countervailing effects that might cut against the benefits of a temporal floor.

Before turning to this discussion, I should note one caveat. My aim is not to determine the optimal period for redistricting. Selecting a theoretically "optimal" length for the redistricting cycle would require making a number of normative judgments and empirical determinations that exceed the scope of this essay. And in practice, picking the best period would depend crucially on which institutions were to be involved in the redistricting process. My aim is different: I argue that, given the existing institutional framework within which redistricting currently proceeds in the United States—where redis-

[53] COX & KATZ, *supra* note 41, at 5–6; Gary W. Cox & Jonathan N. Katz, *The Reapportionment Revolution and Bias in U.S. Congressional Elections*, 43 AM. J. POL. SCI. 812, 812–13 (1999).

[54] COX & KATZ, *supra* note 41, at 5–6, 66–105.

tricting must already occur once per decade (following the release of the census) and where legislatures typically have initial responsibility for drawing district lines—a rule prohibiting states from revising their districts more than once per decennial census cycle would be beneficial.

A. Partisan Bias and Political Gerrymanders

To see how a ban on interim redistricting might promote partisan fairness, it is necessary first to define partisan fairness more precisely. This Section defines partisan fairness as the absence of partisan bias in a districting scheme, and then explains how a party in control of the redistricting process would go about gerrymandering district lines to introduce partisan bias.

1. Defining Partisan Fairness

Partisan fairness can mean many things. One might equate political fairness with proportional representation and conclude that election systems are politically fair only when they guarantee proportional representation.[55] Or one might contend that districted election systems can be politically fair only when self-interested, partisan legislators do not have a hand in drawing their own election districts. These forms of fairness may well be important, but adopting them requires challenging central features of the present redistricting system. Removing partisan actors from the redistricting process would require rejecting the Supreme Court's frequent suggestion that redistricting is principally the responsibility of state legislatures and arguing for the invalidation of the redistricting practices of nearly every state.[56] Committing to partisan fairness as proportional representation requires even more: first, that one adopt an understanding of political fairness that is quite controversial as a matter of democratic theory; second, that one reject America's system of districted elections, because proportional representation is deeply inconsistent with that system.[57]

[55] At the opposite end of the spectrum, one could argue that a pure winner-take-all system is most fair. There are also many possibilities between these endpoints.

[56] *See, e.g.*, Growe v. Emison, 507 U.S. 25, 34 (1993) ("'[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body . . . .'") (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)); Connor v. Finch, 431 U.S. 407, 414–15 (1977) ("'[L]egislative reapportionment is primarily a matter for legislative consideration and determination . . . .'") (quoting Reynolds v. Sims, 377 U.S. 533, 586 (1964)). For an argument that the Court should invalidate all districting schemes created by partisan actors, see Issacharoff, *Political Cartels*, *supra* note 17, at 601, 645–48.

[57] For an explanation of this inconsistency, see *infra* notes 58–60 and accompanying text.

There is, however, a more limited understanding of political fairness that is normatively less controversial and that is consistent with districted elections and legislative control of the districting process. Partisan fairness on this account is simply the absence of partisan bias, where partisan bias is the degree to which the electoral system makes it easier for one party (and harder for the other) to translate its votes into seats.

The structure of an electoral system helps determine how votes translate into seats—that is, the way in which the partisan composition of the legislature reflects the partisan preferences of voters. This point is perhaps easiest to understand by considering first a pure system of proportional representation. Because the partisan composition of the legislature in such a system is, by definition, proportional to the partisan preferences of the electorate, the seats-votes relationship is linear. If Democrats garner 10% of the vote, they receive 10% of the seats; 20% yields 20%, and so on. If one were to plot the translation of votes to seats for a system of proportional representation, the seats-votes curve would be linear with a slope of one.

The single-member-district plurality (SMP) voting system that is prevalent in the United States almost never leads to a linear seats-votes curve. Instead, the winner-take-all feature of each district typically leads to a system-wide "winner's bonus." The party that receives a majority of the vote (in a two-party system) generally gets a greater percentage of seats than it does votes. To see why this is so, consider the limiting case in which each party receives the same vote share in every district. The party that receives a slim majority (say, 51%) will win *every* seat, because the party receives that same majority in every seat. In practice, of course, parties do not receive the same vote share in every district. Still, there is generally a system-wide winner's bonus, leading the seats-votes curve for an SMP system to be S-shaped, with each party receiving a seat bonus when it obtains more than 50% of the vote.[58] (Figure 1 provides an example of such a curve where each party receives the same winner's bonus, and includes for reference the

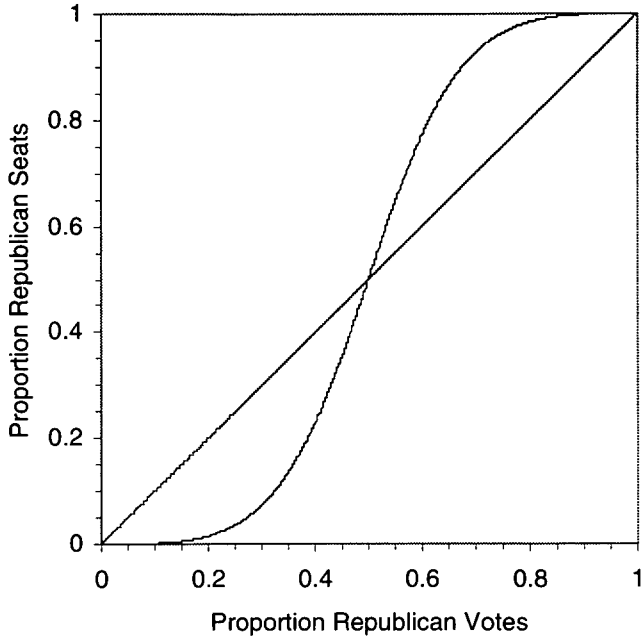
[58] Formally, the relationship between seats and votes in a single-member-district plurality (SMP) system typically is described in the redistricting literature according to the following formula, which is based on the classic "cube law":

$$\left(\frac{s}{1-s}\right)=\left(\frac{v}{1-v}\right)^3$$

Here "s" denotes the share of legislative seats for a party and "v" represents the vote share for that party. It is important to note that the law is empirical, not deductive or deterministic. Moreover, the exponent is simply a measure of responsiveness present in any given districting plan, and so will not be the same in different contexts. *See* COX & KATZ, *supra* note 41, at 34; Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1253 (1987).

linear seats-votes relationship of a system of proportional representation.) While such a system does not approximate proportional representation, it can remain unbiased in the sense that votes for each party will, under certain circumstances, translate into seats in the same fashion.

FIGURE 1



Partisan bias, then, is represented not by nonlinearity but by asymmetry in each political party's translation of votes to seats.[59] Asymmetry in the votes-seats relationship makes it easier for one party to win seats than the other. In an unbiased system, each party receives the same number of seats for a given fraction of votes. If 53% of the vote for Democrats translates into 60% of the seats going to that party, then the Republicans should also capture 60% of the seats if they garner 53% of the vote. In a system biased in favor of Democrats, however, Democrats would get more seats than

[59] Although the absence of partisan bias can be easily expressed at a conceptual level, measuring bias is not nearly as straightforward. *See* King & Browning, *supra* note 58, at 1252. The political science literature employs a number of different methodologies for measuring this feature of districting plans, and there are disagreements about the advantages and shortcomings of various measures.

Republicans for the same vote share.[60] Defining partisan fairness as the absence of partisan bias, rather than as a deviation from a linear seats-votes relationship, usefully separates the concern for partisan unfairness from disputes over representational theory. This makes it possible to identify unfair partisan advantage in a districting plan without committing to proportional representation.[61]

2. *Gerrymandering to Create Partisan Bias*

With an understanding of partisan bias in hand, it is easy to see how parties in control of the redistricting process can introduce partisan bias into a districting scheme. Partisan gerrymandering is made possible by a jurisdiction's political geography—that is, by the uneven spatial distribution of voters with varying political loyalties. If Republican and Democratic voters were distributed perfectly evenly throughout a state, election district boundaries would have no effect on electoral outcomes.[62] In reality, however, the partisanship of voters is not evenly distributed. Urban centers tend to favor Democrats, wealthy areas tend to favor Republicans, and so on. Innumerable factors, including demographic, cultural, and historical dynamics, produce spatial concentrations and dispersions of voters with varying political interests and loyalties.[63]

Redistricters can take advantage of this lumpy distribution by drawing district lines to include or exclude pockets of voters in a way that systematically favors one political party. To bias a districting plan in favor of Republicans, for example, redistricting authorities "pack"

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[60] This conception of partisan bias does put to one side the argument that partisan bias cannot, or should not, be measured meaningfully at the legislature-wide level for state legislatures or at the congressional-delegation level for Congress. Measuring partisan gerrymanders at these institutional levels is common in both the jurisprudence and the literature, however, so I adopt that perspective here. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 127 (1986) (evaluating state legislative gerrymandering claim on statewide basis); Vieth v. Pennsylvania, 241 F. Supp. 2d 478, 484–85 (M.D. Pa. 2003) (incorporating partisan gerrymandering discussion from Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 539–40 (M.D. Pa. 2002), which evaluated congressional partisan gerrymandering claim on statewide basis), *prob. juris. noted sub nom.* Vieth v. Jubelirer, 123 S. Ct. 2652 (2003).

[61] Thus, it is incorrect to suggest, as some have, that the concept of a partisan gerrymander can or should be understood only by reference to the concept of proportional representation. *See, e.g.*, *Bandemer*, 478 U.S. at 155–59 (O'Connor, J., concurring in judgment); Schuck, *supra* note 17, at 1357; *cf.* SCARROW, *supra* note 46, at 103–05 (suggesting that partisan fairness in districting should be measured by reference to rough proportionality, but then acknowledging concept of winner's bonus).

[62] Of course, such a system would also constitute a perfect winner-take-all arrangement; the party that received a majority of votes would win every seat.

[63] For a discussion of the fact that single-member-districted elections disadvantage overly dispersed and overly concentrated minorities relative to a system of proportional representation, see DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS 25–39, 99–103, 134–37 (1967).

and "crack" voters who tend to support Democrats. Packing Democratic voters into a small number of districts where they constitute large super-majorities ensures Democratic victories in those districts but lowers the total number of seats Democrats capture by increasing the number of wasted Democratic votes—that is, votes cast for Democrats that are either unnecessary or insufficient to win a seat.[64] Cracking, the complement of packing, similarly wastes Democratic votes by splitting blocks of Democratic voters into a number of districts where Republican voters will predominate. By maximizing the number of wasted votes for the other party and minimizing the number of wasted votes for itself, a party in control of redistricting distributes its votes more efficiently, and thereby biases a districting plan in its favor.[65]

One product of this strategy, of course, is that the predicted margin of victory in the favored party's seats generally will be lower than the predicted margin in the disfavored party's seats.[66] This feature of partisan gerrymanders, commonly referred to as the seats-security tradeoff, is important to understanding the likely effect of a temporal floor on redistricting.

To see the seats-security tradeoff more concretely, consider a hypothetical world in which the partisanship of voters is known and fixed. In order to maximize bias in this world, a party in control of redistricting would spread its voters thinly so that those voters constituted a bare majority in the maximum possible number of districts.[67] But in the real world, where voters' partisan preferences are not fixed and are often difficult to predict, such a plan would be far too risky. A party that spreads itself too thinly among its districts risks substantial losses at the polls if its predictions about voting behavior turn out to

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[64] Issacharoff, *Judging Politics*, *supra* note 17, at 1661–62 & nn.97 & 99; Polsby & Popper, *supra* note 51, at 303–04; Schuck, *supra* note 17, at 1341.

[65] *See* CAIN, *supra* note 51, at 148 ("[T]he way that a party secures an unfair advantage is by maximizing the ratio of its efficient seats to the other party's inefficient seats. Efficiency in this sense means lessening, and inefficiency means increasing, the number of wasted votes."); Schuck, *supra* note 17, at 1341. For a more technical discussion of how one theoretically maximizes a gerrymander in this way, see MUSGROVE, *supra* note 40, at 8–28.

[66] *See* CAIN, *supra* note 51, at 148–49 ("The efficient distribution [of votes to seats] may involve making previously safe seats riskier. . . . [I]t is a crucial impediment to a partisan gerrymander."); *see also* DAVID R. MAYHEW, CONGRESSIONAL REPRESENTATION: THEORY AND PRACTICE IN DRAWING THE DISTRICTS, *in* REAPPORTIONMENT IN THE 1970s, at 249, 277 (Nelson W. Polsby ed., 1971) (explaining that partisan gerrymander increases marginality of controlling party's districts). For an example of the seats-security tradeoff in practice, see CAIN, *supra* note 51, at 87–89, which discusses the security tradeoffs that Republicans predicted Democrats would have to make to engage in partisan gerrymandering in California in 1981.

[67] *See* Issacharoff, *Judging Politics*, *supra* note 17, at 1662.

be imperfect. For that reason, a party in control of redistricting must balance the potential seat pickup of a plan against the risk that its current seats will become less secure.[68]

B. *The Potential Benefits of a Temporal Floor on Redistricting*

Restricting the frequency with which states can redistrict should promote lower levels of partisan bias and reduce the likelihood that a political party will be able to establish a long-term partisan lock-up of the political process. This claim may initially seem implausible. After all, it is commonly argued that procedural redistricting regulations are ineffective at curtailing partisan gerrymanders. As this Section explains, however, both the uncertainty-inducing and control-randomizing aspects of a legally enforced temporal floor on redistricting should reduce the severity and frequency of partisan gerrymanders.[69]

1. *Uncertainty and Delay*

A rule limiting the frequency of redistricting promotes beneficial uncertainty in the redistricting process. Redistricting is generally an uncertain enterprise because it is difficult to predict how voters will behave in future elections. Some useful predictions are of course possible. Were they not, the practice of partisan gerrymandering would not exist—or, at least, gerrymandering efforts would be entirely ineffective. While redistricting authorities can make some predictions about voting behavior, however, the accuracy of those predictions

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[68] For more theoretical discussions of the tradeoffs that risk averse parties make in the face of uncertainty, see COX & KATZ, *supra* note 41, at 35–38; MUSGROVE, *supra* note 40, at 28–35; Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 POL. GEOGRAPHY Q. 5, 5–12 (1988).

[69] It is important to point out that, even putting the question of partisan gerrymandering to one side, there are reasons one might favor a temporal floor. It is possible, for example, that limiting the frequency of redistricting might cut costs—both political and economic—by preventing the further erosion of the legitimacy of the redistricting process and by preventing the possibility that a cycle of redistricting retaliation will ensue. *See supra* note 4 and accompanying text. Relatedly, prohibiting frequent redistricting battles may free up legislative agenda space for other pressing issues. There also may be representational advantages to curtailing the frequency of redistricting. A prohibition on interim redistricting could arguably strengthen constituent-representative ties—touted by some as a principal benefit of districted elections—by preventing constituents from being moved frequently from district to district. While these other arguments are not the focus of this essay, I should note that there are some difficulties associated with them. For one thing, measuring and evaluating the political and financial costs of more frequent redistricting is an extremely difficult task. Moreover, the inter-election constituent-representative connection—as opposed to the intra-election connection—is not an uncontroversial representational good; arguments in favor of that connection frequently are linked with various competition-reducing, incumbency-protecting rules, the benefit of which is highly contested. *See, e.g.*, Issacharoff, *Political Cartels*, *supra* note 17, at 611–30 (criticizing anticompetitive redistricting practices).

decreases as one moves further in time from the point of prediction. This uncertainty has two related effects in a world where redistricting authorities are prohibited from redrawing district maps more than once each decade. First, increasing uncertainty and variability in voting behavior over time makes it likely that the effect of a partisan gerrymander—particularly an egregious one—will gradually fade out. As a corollary, prohibiting redistricting authorities from redrawing districts multiple times during a single decennial cycle prevents those authorities from adjusting district lines to correct for variations in voting behavior over time. This precludes those in control of districting from optimizing partisan bias over time.[70]

As explained above, producing a partisan gerrymander requires drawing district lines to increase the efficiency of votes for one party and decrease the efficiency of votes for the other. To do this, however, redistricters must be able to identify partisan groups of voters in order to favor one group and disfavor the other. Determining the partisanship of voters presents two problems, one conceptual and one empirical.

The concept of a partisan "group" of voters is somewhat fuzzy. In order to conclude that voters with a certain partisanship have been disadvantaged by the redistricting process, one must decide how to define the partisan identity of a given voter. But several different definitions are available. Partisanship might be defined by reference to certain indicators of party identification or loyalty, such as party registration. Alternately, partisanship might be defined solely by reference to voting behavior. Moreover, to the extent that a measure of partisanship is endogenous to districting arrangements or other election day conditions, one might disagree that the measure actually describes partisanship in a way that is meaningful for purposes of evaluating the partisan fairness of a districting scheme.[71]

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[70] One way to conceptualize this aspect of a limitation on the frequency of districting is as a temporal veil of ignorance. The rule deprives redistricting authorities at time t_1 of information that they need to determine what districting scheme will maximize their advantage at time t_2 (or over the period from t_1 to t_2). As a formal matter, the veil of ignorance analogy is imprecise. As Rawls described it, a veil of ignorance is a device that deprives a person of information about her own position in the future. *See* JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999). In contrast, the temporal floor on redistricting deprives redistricters of information about the position (or rather behavior) of other people in the future. *See generally* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001) (discussing different ways in which veil of ignorance rules introduce uncertainty). Despite the formal distinction, the mechanisms have the same sort of effect.

[71] For such an argument, see MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE?: PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR 126–30 (1993).

These conceptual concerns aside, the slipperiness of partisan identity points to the more practical problem that redistricters face—that individual and group voting patterns are not consistent, cohesive, or fully coherent across different contexts or over time.[72] Myriad factors lead voters to behave differently, and unpredictably, over time. These factors can be grouped loosely into two large categories: candidate-centered and party-related. Candidate-centered factors include all of the district-specific conditions under which an election takes place; they include the effects of incumbency, of the retirement of an incumbent, of the quality of a particular incumbent or challenger, and so on. Party-related variability, on the other hand, reflects changes in partisan voting behavior that are not related to candidate-centered effects, but instead reflect changes in individual voters' attachments to the different political parties.[73]

Thus, as popular candidates come and go, as a party's fortunes change across a region or with respect to a certain population, and as other factors shift the political landscape, the partisan voting behavior of voters also changes. This is true both for individual voters and for groups of voters distributed around a state. Accordingly, the spatial concentrations and dispersions of votes for each party will shift over time. As a result, initial predictions about partisan voting behavior become less and less accurate as time passes. Regardless of the types of information on which redistricting authorities choose to rely to predict voting behavior—be it political registration data, previous election-returns data, demographic data, or some combination of the above[74]—the extent to which patterns of partisan voting behavior deviate from that predicted will increase over time.[75]

The increasing variance between voting predictions and voting behavior can undermine, over time, the political advantage that initially results from a partisan gerrymander. A party in control of the redistricting process initially obtains that advantage by increasing the efficiency of its seats while decreasing the efficiency of the other

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[72] *Cf.* BUTLER & CAIN, *supra* note 7, at 9 (noting that "[i]n an era in which party loyalty has been steadily declining, it is hard to predict whether a change in district composition will necessarily lead to a change in partisan composition"); Richard H. Pildes, *Is Voting Rights Law Now at War With Itself?: Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1529–39 (2002) (documenting decline in racially polarized voting in South).

[73] *See generally* RUSH, *supra* note 71, at 43–49, 68 (discussing different mechanisms that might affect voting behavior).

[74] For redistricting purposes, many states supplement census data (which contains information about total population, voting age population, race, ethnicity, gender, income, education, and other things) with voter registration data and returns from a variety of previous elections. *See* BUTLER & CAIN, *supra* note 7, at 58.

[75] *See* MUSGROVE, *supra* note 40, at 29–30.

party's seats. By definition though, efficiency here is a function of the expected margin of victory in different seats. This is why partisan gerrymanders are conventionally understood to involve a trade-off between seats and security: In order to introduce bias and augment its seat share, a party often must trade away some reelection safety by making its districts more marginal.[76] The crucial point is that this greater marginality makes those districts more vulnerable to uncertainty. The smaller the expected margin of victory in a seat, the greater the probability that, over time, growing differences between voting behavior and redistricters' predictions about that behavior will alter the outcome of an election for that seat. As time passes, upsets are more likely to occur in districts held by the party favored in the last round of redistricting than in districts held by the disfavored party.

The effects of partisan gerrymanders are therefore likely to erode over time—particularly the effects of gerrymanders that introduce a high degree of bias into the system. This is not to say, of course, that such erosion will always occur. There are certainly instances in which it is possible for a party to gerrymander a districting map without making any significant sacrifice in the security of its own seats.[77] There are also surely situations in which changes in voting behavior over a decade favor the party that controlled redistricting, regardless of the fact that the redistricting scheme initially rendered its seats less secure. But while the passage of time will not always reduce the effects of partisan gerrymandering, the effects of asymmetrical district marginality make it likely to do so as a general matter.

History provides many examples of instances where redistricters' predictions of voting behavior have been inaccurate over time, undermining the intended effects of a new districting scheme. Consider, for example, the eponymous gerrymander. In 1812, the Jeffersonian legislature of Massachusetts orchestrated a redistricting that split a county in order to dilute the voting strength of the Federalists. The resulting district, which resembled a salamander, was described as a "gerrymander" in honor of the Jeffersonian governor Elbridge Gerry, who signed the redistricting bill into law. Though the new district was designed to prevent the Federalists from winning in the next election, the Jeffersonians' plan backfired. In the very next election a

[76] There is evidence that parties do in fact trade safety for seats when they control the redistricting process. *See, e.g.*, COX & KATZ, *supra* note 41, at 51–65; Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s*, 54 J. POL. 565, 569 (1992).

[77] For a theoretical discussion of the extent to which this is possible, see COX & KATZ, *supra* note 41, at 37–38.

Federalist won, having been elected by voters who were supposed not to be supporters of the Federalists.[78] Of course, predictions about voting behavior are generally not so wrong as to immediately produce the exact opposite of the intended outcome.[79] The immediate unraveling of the partisan gerrymander in Elbridge Gerry's Massachusetts does illustrate, however, the uncertainty inherent in partisan redistricting.

Such rapid reversals aside, there are ready examples of the undoing of a partisan gerrymander over the course of a decade. Take New York in the 1970s, for example. Following the 1970 census, Republicans controlled the redistricting process. The result, according to Howard Scarrow, was a partisan gerrymander that produced a strong anti-Democrat bias in the 1972 state assembly and senate elections.[80] But the effect of the gerrymander was short-lived:

> The most startling story told by the projections, however, is that . . . changing voting patterns completely undid the careful work of the Republican cartographers. By 1974 the Assembly districting scheme had become virtually completely unbiased, and beginning in 1976 it turned against the party which designed it. . . . In the Senate, too, the effect of gerrymandering wore off . . . .[81]

To be sure, Scarrow's conclusions are not entirely unassailable. The methodology that he uses to estimate partisan bias in each election, for example, has some shortcomings.[82] Still, the experience in New

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[78] For a general discussion of the 1812 gerrymander in Massachusetts, see, for example, ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 62–87 (1907).

[79] *See generally* COX & KATZ, *supra* note 41. If voting behavior were so radically unpredictable and changes in voting patterns occurred quickly and regularly, attempts at partisan gerrymandering would inevitably be futile. For another example of such a rapid reversal, however, consider the post-1980 congressional districts drawn in Indiana. There, a "Republican partisan gerrymander managed to turn a 6-5 Democratic advantage into a 7-3 Democratic margin." BUTLER & CAIN, *supra* note 7, at 10; *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 164 (3d ed. 2001) (discussing same unintended results of post-1980 Indiana Republican gerrymander).

[80] SCARROW, *supra* note 46, at 108. *See generally* Howard A. Scarrow, *The Impact of Reapportionment on Party Representation*, *in* REPRESENTATION AND REDISTRICTING ISSUES 223, 223–36 (Bernard Grofman et al. eds., 1982) (analyzing effect of New York State Assembly and Senate redistricting in 1970s).

[81] SCARROW, *supra* note 46, at 108.

[82] Scarrow estimates bias by calculating hypothetical seat-vote curves for each election throughout the 1970s. *Id.* at 105–06. This measure of partisan bias has some weaknesses. *See* Richard G. Niemi & Patrick Fett, *The Swing Ratio: An Explanation and an Assessment*, 11 LEGIS. STUD. Q. 75, 80–82 (1986). Moreover, Scarrow's results suggest that the New York Assembly (though not the Senate) actually became biased in favor of the Democrats later in the decade. *See* SCARROW, *supra* note 46, at 108. This result makes clear that the passage of time can undermine a party's efforts to lock-up the political process by means of a partisan gerrymander, but it also suggests that the passage of time will not always lower the absolute level of partisan bias.

York provides some additional evidence that the instability of voting behavior can undermine the effect of partisan gerrymanders over the course of a decade.

Other, more systematic empirical work provides additional support for the conclusion that the effect of partisan gerrymanders tends to be ephemeral. Richard Niemi and Laura Winsky's account of the effects of congressional districting in the 1970s and 1980s provides perhaps the most direct evidence. Examining the 1970 and 1980 rounds of congressional redistricting, Niemi and Winsky asked two questions: first, whether partisan control of redistricting affected the results of the post-redistricting elections; second, whether those election effects were durable. Analyzing nationwide congressional election returns from throughout the 1970s and 1980s, they concluded that partisan control does lead to an initial partisan advantage.[83] They found, however, that this initial partisan advantage "typically disappears completely" over time, though "it tends not [to] do so immediately."[84] With respect to congressional districting in the 1980s, for example, they concluded that "the initial advantage of each party was held for three successive elections, though there is evidence of a progressive weakening. By 1988, the advantage disappeared altogether, with each party's greatest relative gain coming in states controlled by the other."[85]

Again, I should note that one can draw only tentative conclusions from Niemi and Winsky's work. There continues to be disagreement in the political science community about which measures of partisan bias are meaningful and accurate. There is also some potentially countervailing evidence in the literature. Gelman and King, for example, have presented more mixed evidence on the persistence of the effects of partisan gerrymandering.[86] Further empirical work on the durability of partisan gerrymanders would therefore be useful. As an initial matter, however, evidence appears to support this essay's theoretical prediction that the effect of partisan gerrymanders will erode over time.

If the uncertainty of voting behavior over time limits the permanence of partisan gerrymanders, then restricting the frequency of redistricting will promote lower levels of partisan bias in two related ways. First, such a restriction will straightforwardly lead levels of bias

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[83] Niemi & Winsky, *supra* note 76, at 568–69.

[84] *Id.* at 571.

[85] *Id.* at 570.

[86] *See generally* Gelman & King, *supra* note 39 (presenting evidence suggesting that partisan effects of redistricting may be more persistent, but conceptualizing partisan effects in way quite different than do Niemi and Winsky).

to decay over the period between redistrictings.[87] As a complement, the restriction will prevent parties in control of the redistricting process from frequently adjusting district boundaries to shore up their control in districts where their margin of victory has eroded or is otherwise dangerously slim.[88]

The recent interim redistricting controversy in Colorado provides a partial example of the legislative adjustments that a prohibition on off-census-cycle redistricting could prevent. The Colorado congressional districts drawn in the wake of the 2000 census produced an extremely competitive election. In Colorado's seventh congressional district, Republican Bob Beauprez beat Democrat Mike Feeley by a mere 121 votes—the smallest margin of victory in any congressional election in 2002.[89] In response, the Republican-controlled state government decided to redraw the seventh district following that election in order to make it safer. Less than sixteen months after the post-census redistricting plan took effect, the legislature passed a new redistricting plan that added more than 20,000 likely Republican voters to the seventh district.[90] The Republican governor promptly signed the bill into law.[91]

In Texas, interim redistricting efforts may also have been driven in part by a concern about eroding party control over the course of the decade. The demographics of the state are shifting rapidly, with the

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[87] Uncertainty, of course, also may lead some parties in control of the redistricting process to forgo additional partisan advantage in order to retain a certain level of seat safety. For a discussion of party strategy in the face of uncertainty, see MUSGROVE, *supra* note 40, at 29.

[88] Or, to put it differently, the prohibition prevents parties from optimizing a partisan gerrymander over time by regularly shifting district lines.

[89] Beauprez received 81,789 votes, and Feeley received 81,668. *See* OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST FOR THE 2001 COORDINATED, 2002 PRIMARY, 2002 GENERAL, at 99, *available at* http://www.sos.state.co.us/pubs/elections/2002_abstract.pdf (last modified Aug. 7, 2003). The seventh district was designed to be competitive by the federal court that drew Colorado's post-2000 districts after the legislature deadlocked. *See* Avalos v. Davidson, No. 01 CV 2897, 2002 WL 1895406, at *7 (D. Colo. Jan. 25, 2002) (noting that, as drawn by the court, "[c]ongressional district seven should be a 'competitive' district").

[90] Act of May 9, 2003, ch. 247, 2003 Colo. Sess. Laws 352. In addition, the Republican redistricting bill shored up the third district, which was also fairly competitive under the redistricting plan drawn by the state court in 2002. *See* John C. Ensslin & Karen Abbott, *Challenges Ahead: Redistricting Appeal Could Require Long, Expensive Court Fight*, ROCKY MOUNTAIN NEWS (Denver), May 8, 2003, at 32A.

[91] As explained earlier, the Colorado Supreme Court recently invalidated the redistricting legislation on state constitutional grounds. *See supra* note 13; People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1226 (Colo. 2003) (holding that Article V, Section 44 of the Colorado Constitution "not only requires redistricting after a federal census and before the ensuing general election, but also restricts the legislature from redistricting at any other time"), *petition for cert. filed sub nom.* Colo. Gen. Assembly v. Salazar, 72 U.S.L.W. 3506 (U.S. Jan. 28, 2004) (No. 03-1082).

percentage of Hispanic voters in the state rising rapidly. At least one commentator has suggested that concern about the electoral consequences of this population growth partly fueled Republican desires to redraw congressional districts that were less than two years old: "The Republicans are reading the tea leaves and saying well, we think this is inexorable, we better act now before the scales tip and this demographic breaks against us."[92]

In short, limiting the frequency of redistricting should help lessen the effects of partisan gerrymandering and prevent parties from combating their eroding advantage. In this way, a temporal floor on the redistricting process will promote, if only in part, the self-limiting aspect of partisan gerrymandering that is a product of the seats-safety tradeoff. Justice O'Connor emphasized this self-limitation when she dissented from the Court's conclusion in *Davis v. Bandemer* that constitutional challenges to partisan gerrymandering were justiciable. She stressed that, "[i]n order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risk of defeat . . . . [A]n overambitious gerrymander can [therefore] lead to disaster for the legislative majority . . . ."[93] As the preceding discussion shows, however, this self-limitation is much weaker where parties are free to redistrict frequently. Because the uncertainty that drives the limitation is a function of time, a restriction on the frequency of redistricting should help ensure that the self-limitation is more real than apparent.

2. *Randomization and Agenda Regularization*

There is a second, related feature of a rule limiting redistricting to a once-a-decade activity that should also promote lower levels of partisan bias. Such a frequency limitation, taken in conjunction with the existing temporal ceiling on the redistricting process, would further regularize the timing of redistricting. By taking agenda-setting power away from state political actors and partially randomizing control over the redistricting process, this regularization should lessen the likelihood that redistricting will occur under conditions favoring partisan gerrymandering.[94]

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[92] Todd J. Gillman, *GOP Draws a Line in the Land*, DALLAS MORNING NEWS, June 8, 2003, at 12A (quoting Antonio González, president of William C. Velásquez Institute); *accord id.* ("'Now is the last great opportunity for the Republicans to maximize gains . . . [by 2010] you just won't have enough to work with.'") (quoting Dr. Richard Murray, political scientist at University of Houston).

[93] Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring in judgment).

[94] In contrast to the previous discussion, which focused on the temporal effects of partisan gerrymandering and on the redistricting calculus of a party in control of the decennial redistricting process, this section focuses on the control that parties-in-government actually

As political scientists have noted, the severity of partisan gerrymanders (or, to be more precise, the extent of partisan bias produced by redistricting) is a function of the degree to which one political party or the other controls the redistricting process.[95] In most states, redistricting is accomplished through the ordinary legislative process.[96] There are a variety of different possible configurations of control over that process, stemming from the fact that all states but one have bicameral legislatures,[97] as well as from the fact that most states grant the governor a veto over ordinary legislation.[98] A party-in-government can thus control one, two, or all three of these branches of the legislative process.[99]

The extent to which a party-in-government can secure its preferred redistricting outcome from the legislative process depends on the party's degree of control over that process. Given that parties prefer, all other things equal, redistricting outcomes that bias the district map in their favor, one would expect the extent of partisan bias produced by the redistricting process to depend on whether redistricting takes place under unitary or divided control. This prediction has been confirmed in practice. Gary Cox and Jonathan Katz, among others, have shown that the degree of partisan bias produced by redistricting is a function of the partisan control of state government.[100] When a party has unitary control over redistricting, the resulting district map tends to be more biased than a map drawn under divided control.[101]

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have over the redistricting process, as well as what that control means for when off-census-cycle redistricting is most likely to occur.

[95] *Cf.* COX & KATZ, *supra* note 41, at 31–43 (explaining that degree of bias produced by redistricting is in part function of extent to which one party controls state government).

[96] As noted above, however, some states delegate redistricting authority to bipartisan or nonpartisan commissions. *See supra* text accompanying note 28; *see also infra* note 151 (providing examples of states that shift state legislative districting to commissions).

[97] Nebraska has a unicameral legislature. *See* NEB. CONST. art. III, § 1.

[98] At least one state specifically denies its governor a veto over redistricting legislation. *See* N.C. CONST. art. II, § 22. Relatedly, some state constitutions provide that a simple majority of the legislature can override a gubernatorial veto. *See, e.g.*, ALA. CONST. art. V, § 125; ARK. CONST. art. VI, § 15; KY. CONST. § 88.

[99] "Control" over a branch of the state legislature can sometimes mean more than simply constituting a majority of that branch; cloture requirements or other supermajority voting rules sometimes make effective control more difficult. *See, e.g.*, CONN. CONST. art. III, § 6 (requiring vote of two-thirds of membership of each legislative house to pass redistricting legislation). Control is also complicated by the fact that a party-in-government is seldom completely cohesive.

[100] *See* COX & KATZ, *supra* note 41, at 31–50.

[101] Note that the lower levels of bias produced by divided governments are the product of two processes: bargaining between the parties where the parties do eventually reach agreement, and less-biased judicial redistricting where the state parties deadlock. *See* BUTLER & CAIN, *supra* note 7, at 107–11.

This conclusion is important because redistricting outside the decennial cycle is more likely than post-census redistricting to occur under unitary control. Redistricting following the census occurs under partially randomized conditions of control. States redistrict at that time because they must do so in order to bring their districting maps into compliance with the one person, one vote mandate; they are not redistricting by choice. Because states do not control the timing of decennial redistricting,[102] political parties cannot manipulate redistricting timing in an effort to ensure that they control the line-drawing process.[103] Consequently, control over decennial redistricting is partially randomized. As a result, decennial redistricting will frequently take place under divided control—a circumstance that, as noted above, favors lower levels of partisan bias.

In the absence of a rule requiring redistricting, states are unlikely to redraw district lines unless their governments are under unitary control. This is because one party can block redistricting in situations of divided control.[104] That party need only prevent the assent of one arm of the legislative process in order to block the enactment of redistricting legislation.[105] History bears out the fact that redistricting is far

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[102] States generally must redistrict between the time that federal census data becomes available and the primary season for the next general election. *See* Growe v. Emison, 507 U.S. 25, 35–37 (1993) (noting that "the District Court would have been justified in adopting its own plan if it had been apparent that the state court . . . would not develop a redistricting plan in time for the primaries"); *cf.* Reynolds v. Sims, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."). *But cf.* French v. Boner, Nos. 91-5811, 91-5875, 1991 WL 151016, at *1 (6th Cir. Aug. 8, 1991) (permitting city council election under obsolete districts where census data became available only few months before scheduled date for election); ME. CONST. art. IV, pt. 1, § 2 (requiring that state's house districts be redrawn by "[t]he Legislature which convenes in 1983 and every tenth year thereafter"); *id.* art. IV, pt. 2, § 2 (requiring same for senate districts). The Census Act, 13 U.S.C. §§ 1–401 (2000), requires that census population data be provided to states for redistricting purposes no later than April 1 of the year following the census. *See* 13 U.S.C. § 141(c) (2000).

[103] Of course, this does not preclude the possibility that parties will expend resources in order to increase the likelihood that they will control at least one branch of state government in order to influence post-census districting outcomes. *See* BUTLER & CAIN, *supra* note 7, at 2 (noting that "Republicans in the 1990 elections put extra resources into the gubernatorial races in Florida, Texas, and California, hoping to block the Democrat-controlled legislatures from enacting partisan redistrictings").

[104] As the Framers noted with respect to the structure of the federal government, dividing legislative authority among several institutions generally makes it more difficult to pass legislation. *See, e.g.*, THE FEDERALIST NO. 73 (Alexander Hamilton). That point is, of course, a corollary to the point that the degree of control over the legislative process is related to the extent to which one party can secure preferred outcomes from that process.

[105] In states where the upper legislative house has a supermajority voting rule of some kind, the minority party need not even constitute a majority in any part of state government to deadlock the legislative process.

less likely to occur when control of the state government is divided.[106] This fact is also confirmed by current practice: Even now, when constitutional law spurs states to undertake redistricting following each census, the legislative process sometimes deadlocks in states that are under divided control, leading a court to fashion district lines itself.[107] Deadlock is much less likely in states under unitary control immediately following the decennial census.

Off-census-cycle redistricting—which is a matter of legislative choice—is therefore likely to happen only when a state's government is under unitary control.[108] Accordingly, the interim redistricting process is more likely than the decennial districting process to take place under circumstances favoring high levels of bias. A rule prohibiting redistricting more than once each decade prevents this result.[109] By fully regularizing redistricting timing, such a rule strips state parties-in-government of the power to set the redistricting agenda. This makes it less likely that districting plans will be drawn under conditions of unitary control, which in turn should curtail the effects of partisan gerrymandering.[110]

In addition to showing how a procedural rule that prohibits redistricting outside the decennial cycle should curtail partisan gerrymandering, the preceding analysis demonstrates that it would be a mistake to adopt a rule that some of the political actors in the recent redis-

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[106] *See* Erik J. Engstrom, How Party Competition Constructs Democracy: Strategic Redistricting and American Electoral Development, ch. 3, at 8 (2003) (unpublished Ph.D. dissertation, University of California, San Diego) (on file with author) ("Between 1840 and 1940, only twice did a state, unprompted by a [change in the number of that state's congressional seats], redistrict when there was divided partisan control.").

[107] This is, in fact, precisely what occurred in both Texas and Colorado following the release of the 2000 census data. *See* Keller v. Davidson, 299 F. Supp. 2d 1171, 1174 (D. Colo. 2004) (Colorado); Halbfinger, *supra* note 6 (Texas).

[108] The interim redistricting controversies in Colorado and Texas bear out this point—both states are under unitary Republican control. To be precise, it is possible that, for risk-averse parties, there are potentially mutually beneficial changes to district lines that the parties could agree to even under conditions of divided government. *See* COX & KATZ, *supra* note 41, at 39–41. Such a bargain, however, would likely increase bias (while reducing responsiveness), so the possibility of such a bargain does not undermine the principal point that off-cycle redistrictings are more likely to occur under conditions that favor high levels of bias than post-census redistrictings.

[109] This conclusion also points out why it is especially beneficial to impose a temporal floor that is identical to the temporal ceiling. Any temporal floor will take away some agenda-setting authority from the more powerful party-in-government, but a temporal floor that butts up against the temporal ceiling strips the state of all agenda-setting authority by fully regularizing the redistricting cycle.

[110] In some ways, a prohibition on interim redistricting is therefore a randomization rule not unlike those suggested intermittently in the political science literature. *See, e.g.*, Gelman & King, *supra* note 39, at 554 (suggesting that "alternating, or randomly assigned, control of redistricting" would help reduce level of partisan bias over time).

tricting fights have argued for. In Texas, Governor Perry and other Republicans suggested publicly that while decennial redistricting should be the norm, an additional round of redistricting is imperative where a court rather than the state legislature has drawn the initial post-census district map.[111] As a legal matter, Governor Perry and others have suggested that federal law obligates the state *legislature* to redraw congressional districts and that the legislature is not relieved of this duty by the fact that a court has already fashioned constitutional district lines.[112]

The Texas Republicans' legal argument is flat wrong. Federal law does not obligate state *legislatures* to redistrict following each census. While the one person, one vote jurisprudence does require that legislative districts be redrawn following the decennial census to correct for demographic changes, it nowhere suggests that only districts drawn by state legislatures can satisfy the constitutional requirement. To the contrary, the Supreme Court's case law specifically authorizes federal courts to redraw district maps that states fail to update.[113] In other words, the one person, one vote standard is internally indifferent to the institutional source of district lines; all that matters is that election districts be revised regularly in compliance with the equipopulation principle.

That is not to say that constitutional law is entirely unconcerned with which institution undertakes redistricting. The Court has repeatedly emphasized that redistricting is primarily the responsibility of each state.[114] This principle requires that federal courts give states the

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[111] *See* R.G. Ratcliffe, *Both Sides Believe Time is Their Ally*, HOUSTON CHRON., Aug. 17, 2003, at 1A (quoting interview with Governor Perry).

[112] *See* Halbfinger, *supra* note 6 ("[Texas Republicans, including Governor Perry] say that although the Constitution requires the legislature to draw district boundaries, the current map was drawn by a panel of federal judges."). This legal argument in favor of off-cycle redistricting has been made by other Republicans, including Tom DeLay. *See, e.g.*, Ed Quillen, *Gerrymander Could Backfire on GOP*, DENVER POST, May 11, 2003, at 6E (Colorado Senator John Andrews); *see also* Carl Hulse, *Tom DeLay Stars in Texas Donnybrook*, N.Y. TIMES, May 15, 2003, at A26; Joshua Micah Marshall, *Oh That's Classic*, TALKING POINTS MEMO, Aug. 18, 2003 (quoting DeLay as saying that Texas state legislature has federal constitutional obligation to redraw Texas's congressional districts because court drew post-2000 census district lines), *at* http://talkingpointsmemo.com/aug0303.html.

[113] *See, e.g.*, Growe v. Emison, 507 U.S. 25, 36–37 (1993); Reynolds v. Sims, 377 U.S. 533, 586–87 (1964); *cf.* Baker v. Carr, 369 U.S. 186, 237 (1962) (holding justiciable claim that legislative reapportionment violated Equal Protection Clause, even though relief in future cases would likely involve judicial fashioning of constitutional district lines); *id.* at 259–61 (Clark, J., concurring) (suggesting that appropriate remedy would be for courts to revise unconstitutional district lines).

[114] *See, e.g.*, *Growe*, 507 U.S. at 33–35; Chapman v. Meier, 420 U.S. 1, 27 (1975); White v. Weiser, 412 U.S. 783, 794–95 (1973); Scott v. Germano, 381 U.S. 407, 409 (1965) (per curiam); *Reynolds*, 377 U.S. at 586–87. The Court has not been particularly explicit about

opportunity to redistrict before drawing district lines themselves. But the requirement that federal courts defer in the first instance to states does not entail the conclusion that only state legislatures are empowered to redistrict, or that a legislature is obligated to undertake redistricting even after another institution already has drawn valid districts. Rather, the redistricting jurisprudence simply provides a sequence for the redistricting process, leaving redistricting initially to states and limiting federal courts to a backup role.[115] (And importantly, the term "state" in this case law specifically includes the state judiciary, not just the state legislature.[116]) Nothing in the redistricting jurisprudence mandates the legislative redrawing of valid districts fashioned by a state or federal court.

Legal unpersuasiveness aside, it would be a bad idea, from the perspective of preventing partisan gerrymandering, to permit or promote interim redistricting in situations where a court drew a state's post-census district lines. Court-ordered redistricting plans are generally the product of legislative deadlock, and deadlock most frequently occurs where the state government is under divided control.[117] For this reason, as well as because courts (particularly federal courts) tend to be less partisan than other actors involved in redistricting, districting plans drawn by courts following legislative deadlock are likely to have low levels of bias. In contrast, legislative revision of a court-fashioned plan is almost certain to occur only, as it did in Colorado

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which constitutional basis leaves to states the primary authority for redrawing their congressional and state legislative districts. *See, e.g.*, *Growe*, 507 U.S. at 32 (suggesting "federalism and comity" as bases); *id.* at 34 (suggesting that Article I, Section 2 of Constitution supports principle); *Reynolds*, 377 U.S. at 586 (setting forth principle without providing specific basis for it). While Article I, Section 4 of the Constitution seems a likely constitutional basis for federal court deference in the congressional redistricting context, *see* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); *infra* notes 145–148 and accompanying text, the Court does not appear ever to have relied on that basis.

115 *See Growe*, 507 U.S. at 33; *Germano*, 381 U.S. at 409.

116 *See Growe*, 507 U.S. at 34; *Germano*, 381 U.S. at 409.

117 This is not always true because, unlike federal courts, state courts are free as a matter of federal law to undertake redistricting without waiting to see whether the state legislative process produces a districting plan. Nonetheless, state law sometimes requires state courts to defer to the legislative process (either temporally or altogether), and state courts usually defer even when not clearly required to do so by state law. *See, e.g.*, LeRoux v. Sec'y of State, 640 N.W.2d 849, 863 (Mich. 2002) ("[C]ourts should only intervene when the Legislature has failed to perform its [redistricting] function in a constitutional manner."); Mauldin v. Branch, No. 2002-CA-00146-SCT, 2003 WL 22966144, at *3–*4 (Miss. Dec. 18, 2003) (holding that state courts have no power ever to redraw congressional districts because state law vests that power exclusively in legislature).

and Texas, under conditions of unitary control that favor higher levels of partisan bias.[118]

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In short, a temporal floor on redistricting promotes political fairness by augmenting the uncertainty inherent in the redistricting process and by partially randomizing political control over that process. This does not mean that prohibiting redistricting more than once each decennial census cycle is sufficient to prevent all normatively objectionable levels of political unfairness in redistricting systems; nor will it necessarily prevent every instance of gerrymandering that the Court might find objectionable under the constitutional standard it articulated in *Davis v. Bandemer*. Nonetheless, this procedural restriction should have an important dampening effect on partisan gerrymandering. This conclusion is important both for its own sake and because it highlights the need to pay careful attention to the ways in which the procedural regulation of the redistricting process may affect the political fairness of districted elections.

C. The Potential Collateral Effects of Limiting Redistricting Frequency

A rule prohibiting redistricting more than once each decade could potentially give rise to a few costs. The first (and most obvious) potential downside is that a frequency limitation might increase partisan fairness at the expense of the one person, one vote principle. A second potential concern is that a temporal floor might lead to less competitive elections. This Section explains why neither of these concerns is well-founded.

1. Demographic Change and the Principle of One Person, One Vote

While the Supreme Court requires states to create equipopulous districts following each census, those districts do not remain equipopulous throughout the decade. Due to demographic changes, dis-

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[118] *Cf.* COX & KATZ, *supra* note 41, at 38–50 (presenting proof of analogous point in context of pre-*Baker* redistricting outcomes). Note that a rule prohibiting interim redistricting except where post-census district lines are drawn by the judiciary could also have perverse effects on the incentives for legislators to bargain in the initial round of redistricting. In a state under divided control, a party anticipating that it might gain complete control of the legislative process following the next election cycle would be less likely to bargain over initial post-census district lines if its power to revise those lines were contingent upon the initial lines having been drawn by a court rather than by the legislature. *Cf.* Halbfinger, *supra* note 6 (suggesting that Texas Republicans refused to bargain in post-2000 census round of redistricting because they expected that state legislature was about to swing to Republican control).

tricts inevitably deviate from population equality as time passes. One potentially negative effect of a limitation on the frequency of redistricting is that it would prohibit frequent refashioning of district lines to correct these deviations.[119]

While this implication of a temporal floor on redistricting is important to acknowledge, it is likely to be of little practical or normative significance. First, there are legal reasons why, even absent a limitation on the frequency of redistricting, states are unlikely to adjust district lines throughout the decade to equalize district populations. To correct for population shifts throughout a decade, a state would need information about those shifts. Accordingly, it would need to redraw district lines using data from something other than the federal decennial census. As a matter of federal law, it is unclear whether states could rely on other such data to draw districts. While the text of the Constitution does not require states to use the decennial census for redistricting purposes,[120] the Supreme Court has held that redistricting, at least for Congress, must be undertaken with "the best census data available" in order to comply with the "Constitution's ideal of equal representation."[121] The Court has never confronted the question of what constitutes the best available census data as a consti-

[119] To be clear, this concern is not a constitutional one. As I pointed out earlier, the Supreme Court only attempts to guarantee one person, one vote at the time of the census, not throughout the decade. *See* Georgia v. Ashcroft, 539 U.S. 461, 123 S. Ct. 2498, 2516 n.2 (2003) ("When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population. But before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned."); Karcher v. Daggett, 462 U.S. 725, 732 (1983) (acknowledging that "the well-known restlessness of the American people" means that census data quickly becomes outdated, but requiring redistricting only based on census data); *Reynolds*, 377 U.S. at 583 ("[A]lthough undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period . . . we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment . . . .").

[120] Article I, Section 4 does appear to require that members of Congress be apportioned among the states on the basis of the decennial census, but it does not speak to redistricting. Federal statutory law also speaks only to apportionment: As interpreted by the Court, the Census Act prohibits the use of sampling in the census for purposes of apportioning seats among the states. *See* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 339–40 (1999) (interpreting 13 U.S.C. §§ 1–401). Federal statutory law does not limit the data sources on which states can rely for state legislative or congressional redistricting.

[121] *Karcher*, 462 U.S. at 731; *see also* Kirkpatrick v. Preisler, 394 U.S. 526, 532 (1969) (noting that Missouri had failed to minimize population variances between districts in part because it had "relied on inaccurate data in constructing the districts"). In the context of state legislative redistricting, the Court stated soon after *Reynolds* was decided that "the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured." Burns v. Richardson, 384 U.S. 73, 91 (1966).

tutional matter,[122] but it is conceivable that the Court would not permit states to rely on extrapolations from the decennial census or other sources of interim population information.[123] That said, such a holding would be odd, given that the Supreme Court in *Reynolds* took pains not to prohibit states from redistricting more than once every ten years.[124]

Regardless of the status of federal law, however, many states have constitutional or statutory provisions that require them to use federal decennial census figures for all districting.[125] For these states, revising district lines throughout a decade to achieve population equality would be a pointless exercise because they would have to rely on the same census figures for each revision—that is, unless they simultaneously repealed or modified their constitutional or statutory provisions to permit the use of extrapolated census figures or other updated demographic information.

Even putting aside the ways in which existing legal regulation of the redistricting process might preclude more frequent boundary adjustment to correct for population shifts, there is little reason to think that the costs of precluding such adjustment are sufficiently great to forego the benefits of a temporal redistricting floor. History and present practice demonstrate that states have little inclination to undertake redistricting in order to correct for demographic shifts. Before the Supreme Court constitutionalized the requirement of regular redistricting, states frequently declined to adjust district boundaries to compensate for stark population shifts.[126] This was true even

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122 *See* Nathaniel Persily, *2000 Census Data: New Format and New Challenges*, *in* THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY 1, 14 (Nathaniel Persily ed., 2000).

123 *See* BUTLER & CAIN, *supra* note 7, at 56 (noting Supreme Court's skepticism of use of data other than federal census, and that state using projected data "would open itself up to legal challenge").

124 *Reynolds*, 377 U.S. at 584 ("And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable.").

125 *See, e.g.*, N.J. CONST. art. IV, § 2 ("The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States . . . ."); N.Y. CONST. art. III, § 4 ("[T]he federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring . . . .").

126 *See, e.g.*, ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 84 (1968) ("A survey in 1960 showed that 12 state senates and also 12 lower houses had not been reapportioned for thirty years or more."); *see also Reynolds*, 377 U.S. at 569–70 ("At the time this litigation was commenced, there had been no reapportionment of seats in the Alabama Legislature for over 60 years."); Wesberry v.

though forty-one states had constitutional or statutory provisions requiring the reallocation of legislative seats every ten years.[127] These legal requirements were simply ignored.[128] Moreover, there is no evidence that the reapportionment revolution changed anything. Since *Baker v. Carr*, no state has voluntarily revised its state legislative or congressional districts between the decennial districting cycle in order to provide greater population equality. Even in the recent interim redistrictings that took place in Colorado and Texas, the state legislatures based the revised district lines on the same 2000 census figures used for the initial post-census redistrictings.[129] Consequently, the trade-off between population equality and partisan fairness that a redistricting floor potentially imposes is nonexistent in practice.

Of course, if merely permitting states to adjust districts more frequently to correct for population inequalities has no effect, the federal government or the states could require, rather than just permit, more frequent redistricting in order to correct for population shifts. Thus, one could argue that it is best to compare a world in which more frequent redistricting is prohibited with a world where such redistricting is required, rather than simply *permitted* by the absence of a frequency limitation.[130] Which rule is preferable depends to a great extent on whether the goal of obtaining strict population equality or curbing partisan gerrymandering is more important. While this choice is in part a normative one, it is a choice about which there is general agreement in the literature. The legal and political scholarship on redistricting and representation consistently concludes that, as both a theoretical and practical matter, the promotion of politically fair districting is more important than perfecting population equality.[131]

Sanders, 376 U.S. 1, 2 (1964) (noting that Georgia's congressional districts had last been redrawn in 1931).

127 *Reynolds*, 377 U.S. at 583.

128 *See, e.g.*, Chapman v. Meier, 420 U.S. 1, 5 (1975) ("An apportionment effected by Laws 1931 was in effect for over 30 years despite the mandate of § 35 of the Constitution that apportionment be effected after each federal census.") (citation omitted); *Reynolds*, 377 U.S. at 540 ("[T]he last apportionment of the Alabama Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially.").

129 *See* Act of May 9, 2003, ch. 247, 2003 Colo. Sess. Laws 352; Act of Oct. 13, 2003, ch. 2, 2003 Tex. Sess. Law Serv. 3 (Vernon).

130 There are, or have been, a few states that have required more frequent redistricting. *See Reynolds*, 377 U.S. at 583 n.65 (noting that, according to Report of the Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures 56 (1962), constitutions of seven states either required or permitted reapportionment more frequently than every ten years).

131 *See, e.g.*, McConnell, *supra* note 17, at 112, 131–34; *cf.* Gerken, *supra* note 38, at 1437 (criticizing Court's treatment of strict population equality as an "end unto itself rather than a means for achieving a well-functioning democracy"); Pildes, *supra* note 38, at 1608 (criti-

2. *Partisan Bias v. Electoral Responsiveness*

One also might criticize a limitation on the frequency of redistricting on the ground that it simply trades lower partisan bias for reduced electoral responsiveness. In an SMP electoral system, partisan bias is correlated with electoral responsiveness—where electoral responsiveness is the degree to which the partisan composition of the legislature responds to partisan changes in voting behavior over time.[132] In order to introduce partisan bias into a districting scheme, the party in control of redistricting generally is forced to make districts that it controls less secure and therefore more responsive to changes in the voting behavior of the electorate.[133] Because both bias and responsiveness are normatively significant, a redistricting regulation that lowers bias is not necessarily an improvement if it simultaneously lowers responsiveness.

A limitation on the frequency of redistricting, however, does not just trade increased partisan fairness for reduced electoral responsiveness. Instead it makes the trade-off between bias and responsiveness more real: A floor on redistricting makes it more difficult to secure simultaneously the same level of bias and unresponsiveness that could be obtained in the absence of the floor. This is because the expected margin of victory that a party must build into a seat to make it safe in the next election is less than the margin that it must build in to make the seat safe over the course of a decade. Thus, to achieve the same level of nonresponsiveness (safety) that it could in the absence of a frequency limitation on redistricting, a party generally will have to lower the initial level of bias. Reciprocally, to achieve the same level of initial bias, the party generally must accept greater responsiveness (and less seat security) over the course of the decade.

Political parties in control of the redistricting process inevitably must make decisions about how to balance the goal of introducing partisan bias against the goal of creating safe—that is, nonresponsive—districts. But assuming that legislators' level of risk aversion

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cizing Court's push towards perfecting population equality in *Karcher v. Daggett* on ground that "the organizational and structural stakes in certain contexts of rights claims dwarf the individual interests asserted"). In fact, highlighting the potential trade-off between normative commitments to population equality and political fairness raises another question not considered in the current literature: whether decennial redistricting is too frequent.

132 *See* Gelman & King, *supra* note 39, at 543. This correlation stems from the fact that a party must increase the marginality of its districts in order to introduce bias into the system. *See supra* Part II.A.2. This increased marginality makes those districts more competitive (in the sense that expected margins of victory are smaller) and, as a result, more responsive to changes in voter partisanship.

133 As noted earlier, this is because the party must increase the marginality of its districts. *See supra* Part II.A; *see also* COX & KATZ, *supra* note 41, at 37–38.

stays the same, limiting the frequency of redistricting should lower the level of partisan bias without affecting the level of responsiveness. And even if the legislators' feelings about the relative importance of bias and safety did change, a temporal floor on redistricting should lower the aggregate level of bias and safety. Thus, one need not commit to a particular relationship between these two electoral features in order to justify such a floor.

D. Regulatory Irrelevance?

Finally, there is the question of whether a legally imposed temporal floor on redistricting is necessary. Since *Baker v. Carr*'s progeny first required redistricting following each census, it appears that no state has successfully undertaken the interim revision of valid congressional or state legislative districts—that is, until last spring.[134] One might ask, therefore, whether the off-cycle redistricting efforts in Colorado and elsewhere are an aberration that needs no regulatory response. Relatedly, one might ask why, if interim redistricting can increase the power of partisan gerrymanders, the practice did not occur in the first several districting cycles following *Baker*.[135]

It is extremely difficult, of course, to predict whether a new political dynamic marks an emerging practice or merely an anomaly. There are reasons to suspect, however, that off-census cycle redistricting is unlikely to disappear as a possible state practice. The interim redistricting battles began last year in Colorado and Texas, but

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[134] *See* Juliet Eilperin, *GOP's New Push on Redistricting*, WASH. POST, May 9, 2003, at A4; Hulse, *supra* note 112; *see also* Fred Brown, *Three Days of Bad Precedents*, DENVER POST, May 11, 2003, at 6E. Redistricting more than once each decade did occur earlier in the country's history, however, particularly in the latter part of the nineteenth century. *See* Engstrom, *supra* note 106, ch. 3, at 2, 7, 32–34 (2003) (noting that "Ohio, for example, redistricted seven times between 1878 and 1892"); *see also* Kris Axtman, *Redistricting: The Wars Get More Frequent*, CHRISTIAN SCI. MONITOR, May 29, 2003, at 2 (stating that more frequent redistricting occurred in Washington in 1950s and Ohio in 1880s).

[135] One also might ask whether the political parties could effectively curtail the practice of interim redistricting, without legal regulation, by engaging in tit-for-tat retaliation whenever one of the parties undertakes interim redistricting. *See generally* JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 264–66 (1994) (explaining parameters of tit-for-tat game). At least one crucial reason why tit-for-tat retaliation is extremely unlikely to work is that a party usually will not be able to retaliate (at least in the near term) when the other party engages in interim redistricting. As explained above, such redistricting is likely to occur only when one party has unified control over the state legislative process. But if one party has such control and engages in interim redistricting, it is unlikely that all three branches of the state legislative process will shift into the hands of the other party in short order. With respect to state legislative redistricting, this shift in control of the legislative process is made even less likely by the fact that the legislature is drawing district lines that help determine its own composition. Consequently, the bias that interim redistricting introduces further lowers the likelihood that the party disfavored by the redistricting will quickly be able to gain complete control of the legislative process in order to retaliate.

it appears that they may spread to other states. Georgia Republicans have stated that they favor redrawing that state's fresh congressional districts.[136] Republicans in Ohio also have indicated that interim redistricting may be in the offing.[137] And now that the possibility of more frequent district revision is part of the political landscape, it seems unlikely that parties will forget about the advantages that they can gain from the practice.[138]

Moreover, the previous absence of interim redistricting does not undermine this possibility. As with predicting the future, explaining the past is not an easy task. Even a quick look back, however, suggests a few reasons why more frequent redistricting may not have emerged more quickly in the post-*Baker* world, and why the practice may well continue. First, the Democratic Party's previous dominance in the House of Representatives may have made interim redistricting much less attractive in the past. From the time of the reapportionment revolution through the early 1990s, Democrats regularly enjoyed wide margins of control over the House.[139] Under those conditions, any seats gained through interim redistricting would have done little to alter the balance of power in Congress. Today, however, the Republican Party has only a very thin margin of control in the House.[140] Given the relative partisan parity in the House, interim redistricting now offers a much greater potential payoff. The six or seven seats that commentators predict the Republican Party will gain as a result of re-redistricting in Texas, for example, may be crucial to that party's efforts to retain control over Congress in the next few election cycles.

Second, it may simply be that it took time for political actors to become attuned, following the reapportionment revolution, to the potential benefits of redrawing legislative districts more than once per decennial census cycle. Similar sorts of time lags have occurred with respect to other aspects of election regulation. The use of soft money

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136 *See supra* note 5 and accompanying text.

137 *See supra* note 6.

138 *Cf.* Halbfinger, *supra* note 6 (noting that "amped-up partisanship . . . could soon make redistricting battles a recurring feature of the political landscape . . . reviving the 19th century practice of redrawing political maps every time a legislature changed hands"); John William, *Redistricting Fight Spilling Over*, HOUSTON CHRON., May 16, 2003, at A36 ("Democrats argue that [Tom] DeLay is setting the precedent for continual efforts to gain advantage in the U.S. House through redistricting every time party control changes in the state legislature.").

139 *See* CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 1095–96 (5th ed. 2000) (listing division of power in House over time).

140 *See* OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 2003/2004, at 34 (rev. 2003) (stating that House is currently composed of 229 Republicans, 205 Democrats, and one Independent).

by political parties to fund issue ads, for example, arguably has been permissible since *Buckley v. Valeo*.[141] Not until the mid-nineties, however, did the Democrats and Republicans seize on this possibility and broadcast tens of millions of dollars worth of such ads.[142]

Finally, the appearance of off-census cycle redistricting may be evidence of greater party discipline. The interests of incumbents and political parties diverge to some extent when it comes to redrawing district lines.[143] Incumbents typically want their districts preserved wherever possible, and they generally want whatever changes are made to increase the safety of their seats. It is in the party's interest, however, to trade off some seat security for the possibility of winning greater control of the legislature. Greater party discipline might thus enable a party to pursue off-cycle redistricting efforts that otherwise would be blocked by self-interested incumbents. Recent events provide some anecdotal evidence that the national Republican Party has played a significant role in prodding state interim redistricting efforts. Tom DeLay, a Republican congressman from Texas, reportedly spearheaded the redistricting effort in Texas and played a central role in fashioning that state's new districting plan.[144] Moreover, several reports suggest that White House adviser Karl Rove helped coordinate the district revision process in Colorado, Texas, and possibly Ohio, with an eye toward shoring up the Republican Party's hold on the House of Representatives in the 2004 election.

These suggestions are, of course, a bit speculative, and it is well beyond the scope of this essay to explain fully the emergence of the new political dynamic prompting off-cycle redistricting efforts. Nonetheless, there are reasons to suspect that last year's flurry of interim redistricting is not just an anomaly.

III
THE POTENTIAL INSTITUTIONAL SOURCES OF A TEMPORAL FLOOR ON REDISTRICTING

While a limitation on the frequency of redistricting may have

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141 424 U.S. 1 (1976).

142 *See generally* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620 (2000).

143 *See* COX & KATZ, *supra* note 41, at 18–19.

144 *See* Jeffrey Toobin, *The Great Election Grab; When Does Gerrymandering Become a Threat to Democracy?*, NEW YORKER, Dec. 8, 2003, at 63–64; Dave McNeely, *Redistricting Ground Swell is Missing*, AUSTIN AM. STATESMAN, Apr. 24, 2003, at B1 (noting that DeLay supposedly engineered map). Early reports also indicated that some Republican members of the Texas state legislature were not in favor of revising that state's fresh congressional districts, further suggesting that party discipline played a role in advancing the efforts. *See* McNeely, *supra*.

beneficial effects, there remains the question of whether and how such a restriction could be imposed on the congressional and state legislative redistricting process. This Part first discusses the existing landscape of redistricting regulatory authority for the states and Congress. It then speculates about whether federal courts could plausibly prohibit interim redistricting as a matter of federal constitutional law.

A. The States

States have authority to limit the frequency of redistricting for both state legislative and congressional elections. In fact, some states already have. Examining these existing regulations, however, suggests a few reasons why states might not be particularly effective at fully regularizing the timing of their own redistricting processes.

That states have initial authority to regulate their nonfederal elections is unsurprising, given our federal structure. As a constitutional matter, states also have some authority to control the timing of congressional redistricting. Article I, Section 4 of the Federal Constitution (typically referred to as the Elections Clause) grants states initial authority to regulate virtually all aspects of congressional elections. That section provides: "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."[145]

While it might be possible to argue that redistricting rules somehow do not constitute regulations of the manner of elections, both history and case law make clear that the Election Clause's initial grant of authority to states includes the power to regulate redistricting. During the Constitutional Convention, for example, Madison stated that the Elections Clause would leave it up to states to decide in the first instance

> [w]hether the electors [for members of the House of Representatives] 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; shd [sic] all vote for all the representatives; or all in a district vote for a number allotted to the district . . . .[146]

The debates in the ratifying conventions contain similar statements indicating that state authority under Article I, Section 4 included the

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[145] U.S. CONST. art. I, § 4.

[146] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240 (Max Farrand ed., 1911), *quoted in* Wesberry v. Sanders, 376 U.S. 1, 32 (1964) (Harlan, J., dissenting).

power to regulate congressional districting.[147] And founding-era history aside, subsequent Supreme Court cases repeatedly assume that redistricting regulations constitute time, place, or manner regulations of elections, emphasizing that the regulation of congressional redistricting is principally the responsibility of states.[148]

With respect to both state legislative and congressional elections, therefore, states have initial authority to regulate redistricting. Like other areas of state regulatory authority, of course, state power is potentially subject to federal restrictions—both constitutional and statutory. As a constitutional matter, there is nothing that would prohibit states from limiting redistricting efforts for state legislative or congressional elections to a once-a-decade activity. On the statutory side, the same is true. While the federal government currently regulates several aspects of the redistricting process,[149] it does not directly regulate redistricting timing, and nothing in existing federal regulations is likely to be construed as preempting or prohibiting state efforts to bar interim redistricting. As things stand, therefore, states are free to impose a temporal floor on redistricting.

A small number of states have already exercised their authority to impose a temporal floor, limiting state legislative or congressional redistricting to a once-a-decade process.[150] These states differ, however, in the form and degree of regulation they impose. First, states differ about the legislative districts to which the limitation applies. Some states limit the frequency of redistricting only with respect to state legislative districts,[151] while others do so with respect to both

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147 *Wesberry*, 376 U.S. at 34–42.

148 *See, e.g.*, Growe v. Emison, 507 U.S. 25, 33–35 (1993); Chapman v. Meier, 420 U.S. 1, 27 (1975). Branch v. Smith, 538 U.S. 224, 226 (2003), represents the most recent example of the Court's assumption that districting regulations are within the ambit of Article I, Section 4. That case concerned the meaning of a federal statute that regulated certain aspects of congressional redistricting. While the Court split several ways over how to interpret the statute, no member of the Court questioned the federal government's authority under Article I, Section 4 to pass redistricting rules. Given that states' initial authority under that section is identical in scope to Congress's supervisory authority, *Branch* reinforces the conclusion that states have initial authority to control congressional redistricting.

149 *See infra* Part III.B.

150 *See infra* notes 151–152.

151 Ten states appear to have constitutional provisions that explicitly prohibit interim revision of their state legislative districts, *see* ALA. CONST. art. IX, §§ 198, 200; CONN. CONST. art. III, § 6; HAW. CONST. art. IV, §§ 1, 2; MASS. CONST. amend. art. CI, § 2; MONT. CONST. art. V, § 14; N.M. CONST. art. IV, § 3; N.C. CONST. art. II, §§ 3, 5; OHIO CONST. art. XI, §§ 1, 6; PA. CONST. art. II, § 17, and at least three states appear to have statutory provisions that do the same, *see* DEL. CODE ANN. tit. 29, § 805 (2003); TENN. CODE ANN. §§ 3-1-102, -103 (2003); WASH. REV. CODE § 44.05.030 (2004). In addition to prohibiting interim redistricting, four of these states – Arizona, Hawaii, Montana, and Pennsylvania – vest redistricting authority exclusively in redistricting commissions. *See* ARIZ. CONST. art.

state legislative and federal congressional districts.[152] Second, states differ in the legal source of the temporal floor: The limitation is constitutional in some states but statutory in others.[153] Beyond these important distinctions, states also differ in how clearly they impose a temporal floor on redistricting. Some states do so explicitly. Alabama, for example, provides that:

> [t]he members of the house of representatives shall be apportioned by the legislature among the several counties of the state . . . which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.[154]

For other states, however, the existing statutory and constitutional framework is less clear.[155]

While a handful of states do prohibit the redrawing of state legislative or congressional districts more than once each decade, existing state practices highlight a few reasons why states may be less effective than one would hope at restricting the frequency of redistricting. First, some states that prohibit interim redistricting do so by statute rather than through constitutional prohibition. In such states, there are no restrictions prohibiting the state government from repealing the frequency limitation through the ordinary legislative process. These statutory limits, therefore, do not constitute legislative precom-

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IV, pt. 2, § 1; HAW. CONST. art. IV, §§ 1, 2; MONT. CONST. art. V, § 14; PA. CONST. art. II, § 17.

152 Four states appear to have constitutional provisions expressly prohibiting interim revision of federal congressional districts, *see* ARIZ. CONST. art. IV, pt. 2, § 1; CONN. CONST. art. III, § 6; HAW. CONST. art. IV, §§ 1, 2; MONT. CONST. art. V, § 14, and at least two states have statutory provisions that do the same, *see* TENN. CODE ANN. § 2-16-102 (2003); WASH. REV. CODE § 44.05.030 (2004). Each of these six states also prohibits the mid-decade revision of state legislative districts. *See supra* note 151.

153 *See supra* notes 151–152.

154 ALA. CONST. art. IX, § 198; *see also* CONN. CONST. art. III, § 6 ("The assembly and senatorial districts and congressional districts as now established by law shall continue until the regular session of the general assembly next after the completion of the taking of the next census of the United States.").

155 Colorado presents one particularly relevant example. Article V, Section 44 of the Colorado constitution provides that "[w]hen a new apportionment shall be made by Congress, the general assembly shall divide the state into congressional districts accordingly." COLO. CONST. art. V, § 44. While this provision does not expressly limit the frequency of redistricting, the state supreme court recently held that the state constitution does implicitly prohibit interim redistricting. People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1237–40 (Colo. 2003), *petition for cert. filed sub nom.* Colo. Gen. Assembly v. Salazar, 72 U.S.L.W. 3506 (U.S. Jan. 28, 2004) (No. 03-1082). California presents a historical example. In 1983, a ballot proposition was introduced in California to redraw the state's congressional districts. A state court ruled that the state constitution prohibited redistricting more than once each census cycle, despite the fact that the constitution contained no express textual prohibition. *See* Legislature v. Deukmejian, 669 P.2d 17, 24–25 (Cal. 1983) (en banc).

mitments in a formal sense, because they do not bind the action of the legislature in the future.[156] It is true, of course, that such laws still may effectively prevent future legislatures from undertaking more frequent redistricting by increasing the legislative effort required to accomplish off-cycle redistricting.[157] Moreover, it may be that a state legislature could formally entrench a statutory temporal floor by prohibiting its repeal by ordinary legislation— though most courts today appear to presume that such legislative entrenchment is prohibited.[158] Despite these possibilities, the existing statutory regulations may not be particularly effective at limiting the frequency of redistricting.[159]

Moreover, states that impose a temporal floor on state legislative districting seldom prohibit off-cycle redistricting with respect to federal congressional districts. This is unsurprising, given the fact that states do not regulate congressional districting to the extent that they regulate state redistricting.[160] The reasons for the differing degrees of regulation are not entirely clear. It may be that the state legislature's conflict of interest seems more immediate in the state redistricting context and that this perceived conflict leads to more pervasive regulation. (The history of redistricting practices, however, belies the contention that party-centered self-dealing disappears when this formal conflict is removed.) It may also be that congressional redistricting receives less attention because it is not intimately connected to the structure and functioning of the state government: The rules regu-

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156 *See* Issacharoff, *Judging Politics*, *supra* note 17, at 1665–66. For a more theoretical discussion of precommitment strategies, see JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1979).

157 *See generally* ELSTER, *supra* note 156, at 39 (defining precommitments to include actions that make more difficult particular future action but do not preclude possibility of that action); Issacharoff, *Judging Politics*, *supra* note 17, at 1665–66 (describing precommitments as "the creation of prearranged impediments that retard rather than preclude the capacity to alter a preconceived plan").

158 *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 872 (1996). For competing arguments about the validity of the anti-entrenchment principle, compare Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002), with John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003), and Stewart E. Sterk, *Retrenchment and Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003).

159 Texas provides an example of the potentially weak disciplinary effect of rules that the legislature may overturn. The Texas Senate has historically abided by an informal agreement that a two-thirds vote of the members is necessary to take up legislation. In the recent redistricting fight, however, the president of the Senate, Lieutenant Governor David Dewhurst, suspended the two-thirds rule. *See* Session v. Perry, 298 F. Supp. 2d 451, 458 (E.D. Tex. 2004), *petition for cert. filed* (U.S. Mar. 31, 2004) (No. 03-9644).

160 For example, a number of states that have transferred the authority to redraw state legislative districts to bipartisan or nonpartisan commissions have not done so for congressional districts. *See* Persily, *supra* note 49, at 681–83.

lating state redistricting efforts frequently are found in sections of the state constitution or code that are devoted to the details of the state legislative institutions, suggesting that these institutions, and the rules that govern them, simply have greater salience for state governments. Regardless of the reasons for states' relative inattention to the problems of congressional districting, the fact remains that states are less likely to limit the frequency of congressional redistricting.

B. Congress

Like the states, Congress clearly has authority to prohibit the revision of congressional districts more than once a decade. The Elections Clause grants Congress supervisory authority to "make or alter" regulations governing the time, place, and manner of congressional elections.[161] The federal government has used this authority to regulate congressional redistricting since 1842, when Congress passed a law requiring that states elect members of the House of Representatives from districts, rather than from the state at large.[162] Today, Congress regulates several aspects of congressional districting, imposing a general requirement of districted congressional elections and elaborating the circumstances under which at-large elections are permissible.[163] Courts have never questioned that these regulations constitute a valid exercise of Congress's authority under Article I, Section 4.[164]

Although Congress has clear constitutional authority to regulate the timing of congressional redistricting, its authority to regulate this aspect of state legislative districting is less certain. Article I grants Congress regulatory authority only with respect to congressional elections. Accordingly, Congress would have to look to another constitutional source of congressional authority in order to regulate

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[161] U.S. CONST. art. I, § 4; *cf. supra* text accompanying notes 145–148 (noting that Article I, Section 4 grants states initial authority to enact such regulations).

[162] *See* Act of June 25, 1842, § 2, 5 Stat. 491 (corresponds to 2 U.S.C. §§ 2a–2c (2000)); *see also* Wesberry v. Sanders, 376 U.S. 1, 42 (1964) (Harlan, J., dissenting) (noting that Congress first exercised its authority to regulate congressional elections in Act of June 25). The requirement was later dropped, reinstated, and modified, at one time including a requirement that congressional districts be equipopulous. *Id.* at 42–43.

[163] *See* 2 U.S.C. §§ 2a–2c (2000). In fact, the plaintiffs in the Texas litigation argued that § 2c implicitly prohibits redistricting more than once each decennial cycle. *See Session*, 298 F. Supp. 2d at 464 ("Plaintiffs assert that . . . [f]irst, in § 2c Congress revoked the power granted to state legislatures by the Elections Clause and delegated a far more limited power. Second, they urge that § 2c allows redistricting once after the decennial census. As a result, they urge that when *Balderas* [redistricted the state following the 2000 census], the judgment effectively 'used up' the redistricting power delegated to the states through § 2c.") (alteration in original). The court rejected this contention. *See id.* at 464–66.

[164] *See* Branch v. Smith, 538 U.S. 254, 266–70 (2003); *supra* note 148.

nonfederal redistricting. The most plausible source of such authority is Section 5 of the Fourteenth Amendment. Section 5 grants Congress authority to enforce the provisions of the Fourteenth Amendment. In 1965, Congress invoked its Section 5 authority to enact the Voting Rights Act,[165] the most prominent and comprehensive instance of federal regulation of state election practices (including redistricting).[166] The Supreme Court subsequently upheld several provisions of the Act as valid exercises of Congress's Section 5 authority—even though the Court had previously concluded that the state practices regulated by those provisions did not violate the Fourteenth Amendment.[167] Although the Court's conception of Section 5 power in those decisions is somewhat unclear, the Court appeared willing to defer to Congress's judgment about the necessity of broad prophylactic measures to protect the rights guaranteed by the Fourteenth Amendment.[168]

More recently, however, the Court has dramatically restricted Congress's Section 5 power. In *City of Boerne v. Flores*[169] and its progeny, the Court held that Congress may enforce the Fourteenth Amendment only as the Supreme Court itself has interpreted it.[170] In addition, the Court held that Section 5 legislation is permissible only to the extent that there is "congruence and proportionality" between the statute's enforcement mechanisms and the Court-defined violations of the Fourteenth Amendment that the statute seeks to pre-

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165 Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973–1973p (2000).

166 *See* South Carolina v. Katzenbach, 383 U.S. 301, 315–16 (1966) (describing "complex scheme of stringent remedies" provided by Act). The Voting Rights Act is also an exercise of Congress's power to enforce the Fifteenth Amendment. *See id.* at 324–27, 337.

167 *Compare* Oregon v. Mitchell, 400 U.S. 112, 118 (1970) (upholding provision of Voting Rights Act Amendments of 1970 that imposed five-year ban on literacy requirements for voters) *and* Katzenbach v. Morgan, 384 U.S. 641, 643–47 (1966) (holding that Section 5 of Fourteenth Amendment conferred power on Congress to enact section 4(e) of Voting Rights Act, which prohibited enforcement in some circumstances of New York law requiring English literacy as condition of voting), *with* Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 50–54 (1959) (holding that North Carolina's English literacy requirement for voters did not violate Fourteenth or Seventeenth Amendment). Relatedly, the Court upheld some provisions as appropriate exercises of Congress's analogous power to enforce the Fifteenth Amendment. *See* City of Rome v. United States, 446 U.S. 156, 173–78 (1980); South Carolina v. Katzenbach, 383 U.S. at 327–37.

168 *Cf.* Karlan, *supra* note 37, at 255 ("*Mitchell* and *Gingles* effectively overruled, on statutory grounds, the Court's [prior] constitutional rulings regarding participation and aggregation rights.").

169 521 U.S. 507 (1997).

170 *See id.* at 518–19, 527 ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."); *see also* Bd. of Trs. v. Garrett, 531 U.S. 356, 365 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000).

vent.[171] While the precise content of this standard is uncertain and subject to extended debate,[172] it is clear that the doctrine accords little deference to Congress's legislative judgments. Accordingly, the constitutionality of Section 5 legislation turns much more today on the Court's judgment about the unconstitutionality of existing state conduct than on Congress's judgment about the extent to which federal legislation will help secure constitutional rights.

C. *The Federal Courts*

If states may be unlikely to regulate congressional districting timing, and Congress's capacity to prohibit the interim revision of state legislative districts turns principally on how federal courts view that practice, then one must ask how those courts should evaluate instances of off-cycle redistricting. Could federal courts plausibly prohibit interim redistricting on constitutional grounds?

No provisions of the federal Constitution appear to be directly concerned with the timing of either congressional or state legislative redistricting.[173] Any attempt to locate a clear constitutional *norm* against interim redistricting is therefore likely to fail. Nonetheless, the Court's partisan gerrymandering jurisprudence may provide some support for a constitutional *rule* prohibiting interim redistricting. Since *Davis v. Bandemer*, partisan gerrymandering claims have been

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171 *Id.* at 520.

172 For description and criticism of the Court's current interpretation of Section 5, see Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001).

173 In the legal challenges to Texas's recent interim redistricting, the plaintiffs argued that both Article I, Section 4 (the Elections Clause) and Article I, Section 2, Clause 3 (the Census Clause) of the Constitution implicitly prohibit the interim redistricting of congressional districts. *See* Session v. Perry, 298 F. Supp. 2d 451, 458, 461–62 (E.D. Tex. 2004), *petition for cert. filed* (U.S. Mar. 31, 2004) (No. 03-9644). As I explained above, the Elections Clause delegates to states initial authority to develop procedures governing congressional elections. *See supra* Part III.A. It provides: "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 (emphasis added). The Texas plaintiffs argued that, because the clause provides that Congress can make laws regulating elections "at any time," states cannot—and specifically, that the restriction somehow limits states to drawing congressional districts only once each decade, immediately after the release of the census. *Session*, 298 F. Supp. 2d at 459. As the three-judge panel explained, this argument is quite a stretch as a matter of constitutional interpretation. *Id.* at 459–61. The Census Clause argument has similar shortcomings. The plaintiffs argued that the Census Clause, by requiring that Representatives be apportioned "according to their respective numbers" and then providing for an enumeration every 10 years, somehow limited states to redistricting once each decade. *Id.* at 461–62. The court concluded that this argument also is in considerable tension with constitutional text, history, and existing jurisprudence. *Id.* at 462–63.

cognizable under the Equal Protection Clause.[174] The Court has made clear, therefore, that partisan fairness in one form or another is of constitutional concern. And as the discussion in Part II demonstrates, prohibiting interim redistricting will promote partisan fairness. One possibility, therefore, is that a rule prohibiting interim redistricting might be explained or justified as part of the Court's anti-partisan gerrymandering jurisprudence. Whether such an explanation or justification is possible turns in part on the precise nature of the constitutional norms at stake in that jurisprudence. But it does not turn solely on the context of constitutional norms; it hinges also on an understanding of courts' institutional capacities to enforce those norms.[175]

Davis v. Bandemer leaves considerable uncertainty on both of these fronts. In that case, in which Indiana Democrats challenged the state legislative districts that were drawn by the Republican-controlled legislature on the ground that the districts constituted an unconstitutional partisan gerrymander, a majority of the Court held that such claims are justiciable under the Equal Protection Clause.[176] Beyond the issue of justiciability, however, the Court agreed on little. The plurality and concurring opinions reveal deep disagreements about what constitutional norms partisan gerrymanders might violate, as well as about how the Court should develop a doctrine to test for the existence of gerrymanders that violate those constitutional norms.[177] Even within the individual opinions there is considerable ambiguity and ambivalence about these matters. In fact, most members of the *Bandemer* Court are far clearer about what elements should not be a part of any partisan gerrymandering jurisprudence than about what elements should be a part. Several members of the Court, for example, were deeply concerned about the possibility of reading into the Equal Protection Clause any norm that entailed some sort of commitment to proportional representation.[178] A number of Justices also emphasized that the Constitution should not be inter-

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[174] 478 U.S. 109, 113 (1986).

[175] *See infra* text accompanying notes 192–194.

[176] *See Bandemer*, 478 U.S. at 124–25, 143.

[177] On the merits, the Court split three ways. Justice White's plurality opinion concluded that the plaintiffs had not made a sufficient showing of unconstitutionality. *Id.* at 113, 127–43 (White, J., joined by Brennan, Marshall, and Blackmun, JJ.). Justice Powell disagreed, concluding that the plaintiffs had proven the existence of an unconstitutional partisan gerrymander. *Id.* at 161–85 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part). Justice O'Connor's opinion did not reach the merits because she concluded that the case should be held nonjusticiable. *Id.* at 144–161 (O'Connor, J., joined by Rehnquist, J. and Burger, C.J., concurring in judgment).

[178] *See id.* at 130, 132 (plurality opinion); *id.* at 145, 147, 155–59 (O'Connor, J., concurring in judgment); *id.* at 169 n.7 (Powell, J., concurring in part and dissenting in part).

preted in a fashion that called into question the constitutionality of districted elections.[179] Relatedly, a majority of Justices were extremely attentive to the difficulty of developing a rule for identifying unconstitutional partisan gerrymanders that would not be wholly indeterminate and, at the same time, that would not indirectly advance some value—such as proportional representation—that these Justices believed was not entailed by a proper interpretation of the Constitution.[180]

The result of this uncertainty is that neither the plurality opinion's test for unconstitutional gerrymanders (which essentially requires plaintiffs to demonstrate that they have been "shut out" of the political process[181]) nor the various opinions' discussions of the Equal Protection Clause identifies coherently the relevant constitutional norms or provides guidance about the extent to which the doctrine is driven by institutional concerns.[182] Nor have subsequent partisan gerrymandering cases in the lower courts clarified matters. Because the evidentiary hurdle adopted by the *Bandemer* plurality has proved in practice to be an insurmountable one, no post-*Bandemer* court has struck down a districting scheme as an unconstitutional partisan gerrymander.[183] The uniform, and typically summary, rejection of partisan gerrymandering claims by lower courts has prevented the case-by-case development of a fuller understanding of the constitutional norms at stake in such cases. In addition, the status of constitutional law concerning partisan gerrymandering is all the more uncertain at present because the Supreme Court is reconsidering its partisan gerrymandering jurisprudence this Term for the first time since *Bandemer*, having recently heard argument in a case concerning whether Pennsylvania's new congressional districts constitute an unconstitutional partisan gerrymander.[184]

Despite the considerable uncertainty in contemporary partisan gerrymandering jurisprudence, there are some important connections between the values promoted by a rule prohibiting interim redis-

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[179] *See id.* at 130 (plurality opinion); *id.* at 159–60 (O'Connor, J., concurring in judgment).

[180] *See id.* at 133 (plurality opinion); *id.* at 145, 147–48, 155–57 (O'Connor, J., concurring in judgment).

[181] *See id.* at 139 (plurality opinion).

[182] *See id.* at 139–43 (plurality opinion); *id.* at 153–55 (O'Connor, J., concurring in judgment).

[183] *Cf.* ISSACHAROFF ET AL., *supra* note 40, at 866 (describing *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992), as only case since *Bandemer* in which court has found that plaintiff stated valid partisan gerrymandering cause of action).

[184] Vieth v. Pennsylvania, 241 F. Supp. 2d 478, 484–85 (M.D. Pa. 2003) (incorporating partisan gerrymandering holding from *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 539–40 (M.D. Pa. 2002)), *prob. juris. noted sub nom.*, Vieth v. Jubelirer, 123 S. Ct. 2652 (2003).

tricting and the values and concerns that make brief appearances in *Bandemer*. As the discussion in Part II demonstrates, a rule prohibiting interim redistricting would curtail the power of partisan gerrymanders by lowering system-wide levels of partisan bias and, importantly, by lessening the likelihood of partisan lock-up of the political process—one of the specific concerns animating both the plurality opinion in *Bandemer* and Justice O'Connor's concurrence.[185] Moreover, it would do so without reading into the Equal Protection Clause two values that a majority of the Justices in *Bandemer* clearly disavowed: a preference for proportional representation and a hostility toward districted elections. In theory, partisan fairness can be conceptualized in ways that do not entail a commitment to either of these values, and in practice a rule prohibiting mid-decade redistricting is perfectly consistent with the existing institutional framework of winner-take-all districted elections.

Perhaps as important, a rule prohibiting mid-decade redistricting appears consistent with the Court's conception of its institutional limitations in partisan gerrymandering cases. In *Bandemer*, the Justices joining the plurality opinion were clearly concerned about the Court's ability to accurately identify unconstitutional partisan gerrymanders.[186] Relatedly, they were obviously worried about the Court's ability to craft a partisan gerrymandering doctrine that would not be hopelessly uncertain and difficult to administer.[187] In practice, both of these concerns seem well founded. Judicial efforts to identify partisan gerrymanders after the fact have been a miserable failure in the post-*Bandemer* world. The Court's inability to craft a workable evidentiary standard in *Bandemer* has left the prohibition against partisan gerrymandering essentially unenforceable,[188] and several Justices of the Court suggested in the *Vieth* oral argument that the Court is simply incapable of developing standards to measure unconstitutional partisan gerrymanders after the fact.[189] At the same time, however, the

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[185] *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 135–36 (plurality opinion); *id.* at 152 (O'Connor, J., concurring) (suggesting that one reason judicial intervention was unwarranted was that "there is good reason to think that political gerrymandering is a self-limiting enterprise").

[186] *See id.* at 133 (plurality opinion); *id.* at 145, 147–48, 155–57 (O'Connor, J., concurring in judgment).

[187] *See id.* at 133 (plurality opinion); *id.* at 145, 147–48, 155–57 (O'Connor, J., concurring in judgment).

[188] *See supra* note 183.

[189] *See* Oral Argument at 22–24, Vieth v. Jubelirer, 124 S. Ct. 595 (2003) (No. 02-1580) (statements of unidentified Justices).

uncertain content of the standard set forth in *Bandemer* provides a ready vehicle for litigation.[190]

In contrast, a rule prohibiting (or presuming the unconstitutionality of) interim redistricting does not share such stark evidentiary and administrative shortcomings. It does not require the Court to make difficult empirical judgments about the political fairness of particular districting arrangements. And like the complementary decennial redistricting requirement, which is often lauded for its administrability (if for little else),[191] a temporal floor is straightforward to enforce. Its easy administrability would leave little room for judicial discretion, eliminating the concern of some that judicial discretion in political process cases increases opportunities for both partisan adjudication and partisan capture of the litigation process. Moreover, the simple structure of a prohibition against off-cycle redistricting might well lower levels of litigation by delineating cleanly the boundaries of acceptable redistricting timetables.

In light of the relevant institutional capacities and propensities, a constitutional doctrine prohibiting mid-decade redistricting might represent one sensible way of promoting the constitutional values at stake in partisan gerrymandering cases. It is true, of course, that the prohibition on mid-decade redistricting is "prophylactic" in that it rests in part on institutional judgments about the ability of courts to enforce constitutional norms and does not turn only on a "true" interpretation of those norms.[192] But as David Strauss and others have pointed out, constitutional doctrine is not rendered illegitimate by virtue of its being prophylactic in this sense.[193] As a matter of current constitutional law, prophylactic rules are pervasive: Many constitutional doctrines are at least partly the product of judicial efforts to craft workable rules that promote the relevant constitutional values in the institutional context of constitutional adjudication, rather than being simply entailed by a "true" interpretation of the relevant consti-

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[190] *See id.* at 3–4.

[191] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 121 (1980).

[192] *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190–95 (1988) (defining prophylactic rules in this way). Relatedly, the rule is "prophylactic" in the sense that it might prohibit some instances of redistricting that do not violate the constitutional norm at issue and permit some instances that do violate the constitutional norm. *Cf.* Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 1 n.2, 25 (2001) (setting out several possible definitions of prophylactic rules).

[193] *See* Strauss, *supra* note 192, at 195; *see also* David A. Strauss, Miranda, *The Constitution, and Congress*, 99 MICH. L. REV. 958, 963 (2001) (explaining that Constitution often "does not ordain any particular institutional mechanism" for ensuring adherence to relevant constitutional norm).

tutional provisions.[194] In fact, prophylactic rules are part and parcel of the existing constitutional doctrine regulating the timing of redistricting.[195] In *Reynolds v. Sims*,[196] the Court established a temporal ceiling on the redistricting process by holding that a state's failure to redistrict at least once each decade would render its districts "constitutionally suspect."[197] This presumption of unconstitutionality, which gradually evolved into a rule requiring redistricting following each census,[198] was expressly justified by the Court on the respective institutional capacities of legislatures and courts to promote the constitutional value of maintaining equipopulous districts.[199] Accordingly, the prophylactic nature of a judicial prohibition on interim redistricting would not be foreign to existing redistricting regulations.[200]

In light of the uncertainty surrounding the Court's partisan gerrymandering jurisprudence, the foregoing discussion is necessarily somewhat provisional. The discussion does make clear, however, that the fact that the Constitution does not appear to be specifically concerned with the timing of redistricting is not itself sufficient to render

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194 *See, e.g.*, Caminker, *supra* note 192, at 25–26. The structure of existing constitutional law underscores a more fundamental point: There is no meaningful distinction between "prophylactic" rules and "ordinary" constitutional rules in the sense that many constitutional rules that are considered "ordinary" are in fact prophylactic. *Id.*

195 Moreover, in related contexts scholars have recently suggested that the Court either has used or should use prophylactic rules to regulate certain aspects of the redistricting process. *See* Issacharoff, *Political Cartels*, *supra* note 17, at 641–48 (arguing that Court should prophylactically invalidate all district maps drawn by partisan actors); Melissa L. Saunders, *Reconsidering* Shaw*: The* Miranda *of Race-Conscious Redistricting*, 109 YALE L.J. 1603 (2000) (arguing that Shaw doctrine is best understood as prophylactic rule).

196 377 U.S. 533 (1964).

197 *Id.* at 583–84.

198 *See supra* note 36.

199 *See Reynolds*, 377 U.S. at 583–84.

200 Moreover, the prophylactic nature of a judicial prohibition on redistricting undermines the concern that such a rule would forever fix the temporal cycle of the redistricting process as a matter of federal constitutional law, preventing future redistricting reforms that might be inconsistent with this constitutional rule. A judicial prohibition, even a constitutional one, would not necessarily prevent states or Congress from enacting other mechanisms to promote partisan fairness, even if those mechanisms permitted or even required redistricting more than once each decennial cycle. Suppose, for example, that Congress decided to police interim redistricting for partisan unfairness by implementing a pre-clearance procedure similar to that under Section 5 of the Voting Rights Act for all instances of interim redistricting. The procedure might require states that wanted to redraw their districts outside of the decennial census cycle to seek a declaratory judgment from the D.C. Circuit that the plan was not designed largely as a partisan gerrymander. Nothing would prevent the Court from concluding that this mechanism was an effective substitute for its rule prohibiting all interim redistrictings, and that the judicial rule therefore was no longer warranted. Reaching such a conclusion would not require the Court to reject its earlier interpretation of the Equal Protection Clause. Rather, it would require only that the Court adjust its doctrine to reflect institutional changes to the redistricting process. *See* Caminker, *supra* note 192, at 22–25.

a rule prohibiting interim redistricting unjustifiable as a matter of constitutional law.

CONCLUSION

Shifting political norms have undermined the conventional assumption that redistricting is a once-a-decade activity. There is reason to be concerned about this change: Redistricting outside the decennial census cycle is likely to occur under conditions favoring partisan gerrymandering, and the ability to revise district maps throughout a decade makes it easier for a party in control of the redistricting process to lock-up the political process to its own advantage.

A limitation on the frequency of redistricting can prevent these potential ill effects. By amplifying the uncertainty inherent in the gerrymandering calculus, and by partially randomizing control over the redistricting process, such a limitation can promote lower levels of partisan bias. More generally, the beneficial effects of this process-based redistricting regulation highlight the need for more careful attention to the consequences of other process-based regulations on the political fairness of districted elections.