

# The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting

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THE 2001–2002 ROUND OF CONGRESSIONAL REDISTRICTING was the most incumbent-friendly in modern American history, as many pundits have noted. But the new district lines not only insulated incumbents from competition. They also froze into place a key feature of the 1990s districts that has escaped the notice of the press, political scientists, and most redistricting attorneys and experts: a “distributional bias” that gives Republicans a roughly 50-seat head start in the battle for control of Congress. In combination, these two features—extreme protection of incumbents and a powerful pro-Republican bias—might prevent

Democrats from regaining control of Congress in this decade even if public opinion shifts heavily in their favor.

One leading commentator recently suggested in the *Harvard Law Review* that, so long as the choice for chief executive reflects the majority will, there may be nothing “inherently wrong with a legislature that fails consistently to reflect and transmit the changing preferences of [the] majority.”<sup>1</sup> I believe that position is wrong as a matter of both democratic theory and constitutional history. And I find it particularly unconvincing today, when the chief executive of the United States was elected without the support of a plurality of voters and his predecessor twice failed to win an outright majority.

Most of this Article is devoted to showing how and why redistricting has helped to transform the U.S. House of Representatives into a body that will no longer accurately reflect majority will. For those who believe, as did the Framers, that the House *should* respond to the majority’s changing political preferences, I conclude the Article with a few concrete suggestions for reform:

- If federal courts remain unwilling to invalidate severely partisan incumbent-protecting gerrymanders under the Federal

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<sup>1</sup> Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 671 (2002) (discussing the relationship between state-legislative redistricting and gubernatorial elections).

Constitution, state courts should do so under state constitutions.

- When the normal state political processes become deadlocked and redistricting is thrown into the courts, judges should invite empirical evidence of likely electoral outcomes and should evaluate the competing remedial maps for partisan fairness, responsiveness, and accountability, rather than relying solely on formal criteria such as compactness and respect for county and municipal lines.
- Rather than pretending to “take politics out of the process” by creating supposedly *apolitical* redistricting commissions, States should place these same overtly political concerns—partisan fairness, responsiveness, and accountability—squarely on their list of redistricting criteria and should implement them systematically and empirically.

The first part of this Article quickly recaps some pre-redistricting predictions, both political and legal, that went awry. The second part compares the election results of 2002 with those of 1972, 1982, and 1992 and confirms that 2002 was indeed anomalous in its degree of incumbent protection and noncompetitiveness. The third part shows that this anomaly was caused by redistricting, as vulnerable incumbents were systematically bolstered. It also shows that partisan patterns in federal elections have become much more consistent from office to office (*i.e.*, from President to U.S. Senator to U.S. Representative) and from election cycle to election cycle, which enables political mapmakers today to gerrymander with unprecedented efficiency.

The fourth part demonstrates that the new districts have recreated a hefty pro-Republican distributional bias by disparately “packing” and “cracking” Democratic voters. That explains the curious fact that Al Gore, who won the popular vote in the 2000 presidential contest, would have carried fewer than 200 of the 435 newly redrawn districts.

The fifth part examines different state-level characteristics and finds that the bulk of the nationwide bias was generated in four large, highly competitive States where Republicans unilaterally controlled the congressional-re-

districting process—Florida, Pennsylvania, Ohio, and Michigan. Elsewhere, Democratic redistricters fared quite well overall in 2001 and 2002, but the party’s failure in 1998 and 2000 to win the governorship or control of any state-legislative chamber in those four States raised a hurdle that could not be overcome.

The sixth part explains how the combination of incumbent protection and pro-Republican bias might make it difficult for Democrats to retake the House even if a sizeable shift in public opinion gives them clear majority support in the electorate. Finally, the seventh part explores several possible legal responses to the problems identified in this Article, rejects most of them as infeasible or unwise, and recommends three specific reforms.

#### NON-PARTISAN NON-ISSUES IN THE 2001–2002 ROUND OF REDISTRICTING

In the lead-up to the 2000 census, redistricting attorneys and experts fixated on several issues having little or nothing to do with political partisanship. Most of those issues turned out to be nonstarters.

- For the first time, the Census Bureau would simultaneously release two parallel sets of redistricting data—a traditional headcount and a data set adjusted to correct for the differential “undercounting” of certain racial and language minority groups, children, and renters. States that chose to redistrict using one data set would inevitably be hauled into court by proponents of the other data set. But that controversy was largely averted when the Bush administration refused to release the adjusted data in 2001.<sup>2</sup>
- For the first time, the Census Bureau would give Americans the option of identifying with more than one of the government’s six racial categories—generating no fewer than 63 possible combinations (or 126, when *Hispanic* and *non-Hispanic* were

<sup>2</sup> *But see Carter v. United States Dep’t of Commerce*, 307 F.3d 1084, 1086–87 (9th Cir. 2002) (ordering the release of the adjusted data after redistricting was concluded).

added to the mix). That change *did* take place, but fewer than two percent of all American adults checked more than one racial category,<sup>3</sup> and not a single redistricting case rose or fell on the newly created distinctions.

- For the first time, the combination of widespread Internet access and inexpensive redistricting software would allow political activists of every stripe to play redistricting hardball on the same field as the party bosses, leading to an explosion in the number and variety of competing plans. But in fact, redistricting remained very much a game of inside baseball.
- For the first time, state legislators who would soon be term-limited would take advantage of this once-a-decade opportunity to move up the political food chain by designing congressional districts for themselves, even at the expense of their own party's congressional incumbents. But that did not happen either, as Members of Congress almost never faced serious primary challenges from term-limited state legislators.
- For the first time, a full round of decennial redistricting would take place in the "post-Shaw" era, forcing an inevitable clash between Voting Rights Act plaintiffs seeking to expand minority (especially Latino) electoral opportunities and "Shaw-claim" plaintiffs arguing that the excessive consideration of race in redistricting violates the Equal Protection Clause.<sup>4</sup> The battle lines would pit the advocates of racial redistricting who had been so successful in the early 1990s against the advocates of colorblind redistricting who had attracted the support of five Supreme Court Justices in the mid- and late-1990s. The only guarantee, state legislators were told, was that *you will be sued, probably from both sides*. But in fact, most congressional and state-legislative plans were not challenged in court; and when they were, the courts consistently rejected race-based claims.<sup>5</sup> Minority officeholders who had been "outside the room" a decade ago were now on the inside, protecting their incumbencies every bit as effectively as white incum-

bents were, without resorting to the bizarre district configurations of the early 1990s.<sup>6</sup>

The one prediction that did turn out to be right, however, was that the close partisan divide so dramatically exhibited by the "tied" election of 2000 would play a key role in the 2001–2002 round of redistricting. As redistricting approached, the 50 state legislatures were divided right down the middle, House Republicans held a slim edge of 223 seats to 212,<sup>7</sup> neither party could nail down a reliable majority in the U.S. Senate, and the Republicans had just captured the White House by the narrowest of margins. The Nation could not have been more closely divided. Redistricting would revolve not around census adjustment or racial categories or the Internet or term limits or *Shaw* litigation—but rather around raw partisan politics.

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<sup>3</sup> See U.S. Census Bureau, "Population by Race and Hispanic or Latino Origin, for All Ages and for 18 Years and Over, for the United States: 2000" (Apr. 2, 2001), available at <http://www.census.gov/population/cen2000/phc-t1/tab01.pdf>.

<sup>4</sup> See *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Easley v. Cromartie*, 532 U.S. 234 (2001).

<sup>5</sup> For a helpful and largely (but not entirely) accurate summary of judicial action on congressional and state-legislative redistricting plans, see National Conference of State Legislatures, "Action on Redistricting Plans: 2001–02" (last updated July 17, 2002), available at <http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/action01-02.htm>. The courts struck down only one congressional plan newly enacted by a state legislature, and that ruling was based on the "one person, one vote" doctrine, not on any racial claim. See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675–78 (M.D. Pa.) (three-judge court), *appeal dismissed as moot sub nom. Jubelirer v. Vieth*, 123 S. Ct. 67 (2002).

<sup>6</sup> I do not mean to suggest that the Voting Rights Act and the *Shaw* doctrine had no effect on the districts drawn in 2001 and 2002. They did. But as a practical (not theoretical) matter, the tension between the two types of race-based claims was largely resolved once the Supreme Court handed down its decision in *Easley v. Cromartie*, 532 U.S. at 241–58, upholding North Carolina's redrawn Twelfth Congressional District.

<sup>7</sup> Throughout this Article, I count Vermont's independent Congressman Bernie Sanders as a Democrat and Virginia's formerly independent Congressman Virgil Goode as a Republican.

## THE 2002 CONGRESSIONAL ELECTION RETURNS WERE ANOMALOUS

Before comparing the 2002 election results with those of prior redistricting years, a few cautionary words are in order. This Article is being written in December 2002, just a few weeks after Election Day. Official certified returns from some States are not even available yet, so press reports often will have to suffice.<sup>8</sup> More important, it is today still impossible to view the political events of 2001 and 2002 with any historical perspective. (Recall the certainty with which analysts in the wake of Newt Gingrich's 1994 triumph predicted President Clinton's political demise.) With those caveats, we can begin the comparison.

Ordinarily, incumbents suffer from the redistricting that follows the census every decade, as old constituents they have nurtured over the years are drawn out of their districts and new, unfamiliar voters are drawn in.<sup>9</sup> But the latest congressional redistricting apparently was different, as each party placed a premium on shoring up its most vulnerable incumbents. Only four challengers knocked off incumbents in the November 2002 general election—a modern record low not only for a redistricting year, but for any election year. In California, none of the 50 general-election challengers garnered even 40% of the total vote. More than a third of all States—including several of the larger ones, such as Virginia, Massachusetts, Washington, and Missouri—will send to the new Congress precisely the same delegation they sent to the last Congress. Neither party gained or lost more than three seats in any State. The number of women in the 435-member House slipped from 60 to 59,<sup>10</sup> the number of African-Americans held at 37,<sup>11</sup> and the number of Latinos inched up from 19 to 22.<sup>12</sup> On average, the 435 victorious candidates won a higher percentage of the popular vote than in any House election in more than half a century.<sup>13</sup> For the first time since the Reapportionment Revolution of the 1960s, stasis has prevailed in a post-redistricting election.

To be sure, the 2002 election (like the previous midterm election in 1998) broke with the longstanding pattern in which the President's party normally loses House seats at midterm.

But the Republicans' success in 2002 should not be overstated: Although the direction of the shift was noteworthy, its magnitude—a six-seat net gain for the House Republicans—was smaller than the shift in 30 of the last 33 midterm elections, stretching back to 1870.<sup>14</sup>

The purpose of decennial reapportionment and redistricting is to equalize the populations of the Nation's 435 House districts so that votes cast for various candidates and political parties can more accurately be translated into congressional seats. Absent this decennial adjustment, over time the House would stagnate and become increasingly unrepresentative of the voters.

<sup>8</sup> See *Senate, House, Gubernatorial Results*, CQ WEEKLY, Dec. 14, 2002, at 3289–97.

<sup>9</sup> See Stephen Ansolabehere, James M. Snyder, Jr. & Charles Stewart III, *Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage*, 44 AM. J. POL. SCI. 17, 30 (2000) (showing that about half of the congressional incumbency advantage is lost when new constituents replace old ones).

<sup>10</sup> The 108th Congress will see a net gain of three Republican women and a net loss of four Democratic women.

<sup>11</sup> I have not included District of Columbia Delegate Eleanor Holmes Norton in the tally of African-American (or female) Representatives. Oklahoma's J.C. Watts, the only black Republican in the House, retired. The number of black Representatives remains at 37, however, because Georgia's new Thirteenth District elected freshman David Scott, an African-American Democrat. In addition, four new black Representatives replaced four old ones (in Alabama, Florida, Georgia, and North Carolina). The number of African-American Democrats representing districts where non-Hispanic whites constitute more than half the total population remained unchanged at two (Georgia's Sanford Bishop and Indiana's Julia Carson).

<sup>12</sup> Two Mexican-American Democrats were newly elected in Arizona and California, and one Cuban-American Republican was newly elected in Florida. Two of the three—California Democrat Linda Sanchez and Florida Republican Mario Diaz-Balart—are siblings of Members of Congress. These figures do not include Members of Portuguese heritage, who are eligible to join the Congressional Hispanic Caucus. None of the 22 Latinos in Congress represents a district where non-Hispanic whites constitute more than half the total population.

<sup>13</sup> See Chuck Raasch, *Competition in House Races May Be Thing of the Past*, Gannett News Serv., Nov. 29, 2002 (citing political scientist Gary Jacobson of the University of California, San Diego). Thirty-five House members ran unopposed and another 45 ran with only token third-party opposition.

<sup>14</sup> See NORMAN J. ORNSTEIN, THOMAS E. MANN & MICHAEL J. MALBIN, *VITAL STATISTICS IN CONGRESS, 2001–2002*, at 66 (2002) (Table 2-4).

TABLE 1. COMPARISON OF THE 2002 ELECTION WITH ELECTIONS FROM 1972 TO 2000

Category	<i>Average "normal" election</i> (1974–1980, 1984–1990, 1994–2000)	<i>Average post-reapportionment election</i> (1972, 1982, 1992)	2002 Election
Incumbents reelected	375	348	381
By >20 points <sup>15</sup>	297	261	338
By <20 points	78	87	43
Incumbents defeated	21	35	16
In the primary	3	13	8
In the general	18	22	8
Incumbent retirements	37	48	35
New members <sup>16</sup>	60	87	54

It is not surprising, then, that elections held in the immediate aftermath of reapportionment (such as 1972, 1982, and 1992) have generated particularly large freshman classes and have returned fewer incumbents than have other elections. On average, more incumbents retire from the House in post-reapportionment election cycles, more are defeated in primaries, more lose in the November general elections, and fewer win landslide reelections. As the last line of Table 1 shows, on average, since 1972, membership turnover has been about 45% larger in post-reapportionment Congresses, with 87 freshmen rather than 60. If anything, this tendency for greater turnover in post-redistricting election cycles had appeared to be increasing, as the 1992 elections had generated a freshman class with 110 members.

The normal pattern did not hold up in 2002. Quite the opposite: The 108th Congress (2003–2004) will have only 54 freshmen—fewer than in the typical non-reapportionment election cycle, far below the norm for a redistricting year, and less than half the 1992 figure. The number of incumbents retiring from the House, either to leave politics entirely or to run for another office such as U.S. Senator or Governor, was atypically low (35 rather than the average of 48). The number of incumbents who won narrowly in the November 2002 general elections—garnering less than 60% of the major-party vote—was less than half the usual figure for a post-reapportionment cycle (43 rather than 87).<sup>17</sup> And the number of incumbents actually defeated in the 2002 general elections was barely a third of the usual figure (8 rather

than 22)—and half of them lost because they were “paired” with another incumbent in a State that was losing seats due to reapportionment. In raw numbers, the biggest anomaly of 2002 was that 77 more incumbents than usual won with at least 60% of the major-party vote (338 rather than 261).

This lack of competition was peculiar to U.S. House elections: On the same day when barely one out of twelve House elections were being decided by ten percentage points or less, roughly half of all gubernatorial and U.S. Senate elections were that close. Of course, no one has yet figured out how to gerrymander the constituency of a governor or Senator.

As Table 1 demonstrates, viewed historically, the results of the 2002 elections would have been notably incumbent-friendly and un-

<sup>15</sup> This line of the Table tallies general elections in which the incumbent received at least 60% of the major-party vote, and the next line tallies general elections in which they won with less than 60%. Figures for 1972 to 2000 were calculated from biennial data presented in VITAL STATISTICS IN CONGRESS, *supra* note 14, at 69, 75 (Tables 2-7 & 2-12).

<sup>16</sup> The size of the freshman class is typically a bit larger than the sum of retirements and defeated incumbents because of vacancies that occur late in the election year. For example, in 2002 there were three late vacancies: Jim Traficant (D-Ohio) was expelled on July 24, Tony Hall (D-Ohio) resigned to take a United Nations post on September 9, and Patsy Mink (D-Hawaii) died on September 28. Those three former incumbents, along with the 51 incumbents who retired or were defeated, will be replaced by 54 freshmen.

<sup>17</sup> Except where I refer to “total” votes, this Article ignores votes cast for third-party or independent candidates and focuses solely on “major-party votes,” that is, votes cast for Democratic or Republican candidates.

competitive for a non-reapportionment year, much less for a post-reapportionment one. That conclusion would hold true regardless of whether I had focused solely on midterm elections (thus excluding presidential-year elections), had deleted the older data from the 1970s, or had compared post-reapportionment election years only to the election cycles immediately preceding or immediately following them. Indeed, the figures for 2002 most resemble those for 1986 and 1988, the House elections usually cited as the heyday of incumbency advantage and continuity. If the usual pattern holds, and contests become even less competitive and more incumbent-friendly in the cycles immediately following a post-reapportionment election, then the 2004 and 2006 elections may soon supplant 1986, 1988, and 2002 in the record books.

### REDISTRICTING CAUSED THE ANOMALOUS RESULTS OF THE 2002 ELECTIONS

Of course, the mere fact that election returns showed remarkable stability in 2002 does not necessarily say much about redistricting. After all, redistricting is just one of many factors (including campaign finance) that can dramatically affect election outcomes. Other factors might have caused incumbents in 2002 to run, win, and win big. One cannot reasonably conclude that redistricting actually contributed to that success rate without looking more closely at the details. I will look first at reapportionment (the decennial allocation of 435 congressional districts among the 50 States) and then at redistricting (the redrawing of district lines within a State to account for internal population shifts).

#### *Reapportionment*

Reapportionment necessarily causes a certain degree of disruption. The 2000 census, for example, dictated that 12 seats would shift from 10 relatively slow-growing States to 8 relatively fast-growing ones.<sup>18</sup> That reapportionment alone guaranteed the defeat or re-

tirement of 12 Members of Congress from the slow-growing States and the election of 12 freshmen from the fast-growing ones. Redistricting (as opposed to reapportionment) could not possibly have prevented those changes.

In the three previous reapportionments (1971, 1981, and 1991), on average nearly 16 seats had shifted, thus ensuring the defeat or retirement of at least 16, rather than 12, incumbents. So reapportionment was less disruptive in 2002 than in earlier decades. But that four-seat difference in reapportionment can hardly explain the dramatic contrast between 2002 and other post-reapportionment elections that Table 1 demonstrates.

As it turns out, redistricting does largely explain the anomaly of 2002. But to understand how redistricting strengthened incumbents, one needs a good metric for assessing baseline Democratic and Republican performance in each district under the old 2000 plan and under the new 2002 plan.

#### *A brief digression on methodology*

Recent election returns suggest that, for any given geographic area, partisan patterns in *federal* elections (for President/Vice President, U.S. Senate, and U.S. House)—but not necessarily in state or local elections—have become remarkably consistent.<sup>19</sup> Precincts that support Democratic (or Republican) presidential candidates tend to support Democratic (or Republican) candidates for Congress. This Article therefore relies on the simplest nationally uniform measure of Democratic and Republican party performance: the fraction of major-party votes cast in each congressional district for Al Gore and George W. Bush, respectively, in the

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<sup>18</sup> New York and Pennsylvania lost two seats apiece; Illinois, Ohio, Michigan, Indiana, Wisconsin, Oklahoma, Connecticut, and Mississippi each lost one. Texas, Florida, Georgia, and Arizona gained two seats apiece; California, North Carolina, Colorado, and Nevada each gained one. Cf. *Utah v. Evans*, 536 U.S. 452 (2002) (refusing to shift North Carolina's extra seat to Utah).

<sup>19</sup> See Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 POL. SCI. Q. 5, 5–13 (2001).

November 2000 presidential election.<sup>20</sup> Excluding the District of Columbia (which does not have a Representative in Congress), Gore won 50.19% of the major-party vote and Bush won 49.81%. For each of the 435 congressional districts in the 2000 plan, one can compute very accurate vote totals for Gore and Bush by simply adding up the votes cast in the counties (or, for split counties, in the precincts) within each district. For the 2002 districts, the district-level totals for Gore and Bush are slightly less accurate because most of the new districts split at least a few precincts; votes cast in each split precinct are assigned to congressional districts based on pro rata shares of the precinct's voting-age population.

Even aside from the split-precinct problem, the Gore/Bush measure is not perfect. It probably understates Democratic performance in congressional elections in rural areas, where Gore ran poorly and Bush ran well. It exaggerates Republican strength in Texas (Bush's home) and perhaps Democratic strength in Connecticut (vice-presidential candidate Joe Lieberman's home). Moreover, careful weighing of the 2000 votes cast for Ralph Nader and Pat Buchanan, the 1996 votes for Bill Clinton, Bob Dole, and Ross Perot, and the votes for various down-ballot statewide candidates in recent general elections probably could generate a somewhat more accurate (though more contestable) metric. But the Gore/Bush returns provide a uniquely straightforward tool for assessing the partisan impact of the 2001–2002 round of redistricting.

The Gore and Bush percentages proved to be powerful predictors of congressional results in 2000 and again in 2002. As I will discuss in more detail below, in the November 2002 elections 86% of all successful House candidates belonged to the same party as the presidential candidate who carried the district in November 2000—a level of consistency unmatched since the 1940s.<sup>21</sup>

The Gore/Bush results were equally impressive as a predictor of 2002's "open-seat" elections, where no congressional incumbent was on the ballot. In the 49 open-seat contests, the Gore/Bush results better predicted the 2002 congressional outcomes than did the amount

of money each party's congressional candidate spent in 2002,<sup>22</sup> or the party identification of the seat's prior occupant (where there was one).<sup>23</sup> As Table 2 shows, Republican candidates won 27 of the 29 open seats where Bush had carried at least 50.5% of the major-party vote, and Democratic candidates won 14 of the 16 open seats where Gore had carried at least 50.5% of the major-party vote. Two of the four exceptions to the rule were in Georgia (where a slew of upsets took place, ranging from top-of-the-ballot offices like Governor and U.S. Senator down to the state legislature); and the other exceptions were the two closest contests in the country, in Colorado's new Seventh District and Louisiana's Fifth District (where the

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<sup>20</sup> See *id.* (noting remarkable consistency between Gore/Bush percentages and Democratic/Republican successes in U.S. House and Senate elections). The presidential vote totals by district that I use in this Article were derived from state, county, and precinct results as compiled by the staff of the National Committee for an Effective Congress (NCEC) and are available in MICHAEL BARONE WITH RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS 2002 (2001)* (for the 2000 districts) and on NCEC's website at <http://www.ncec.org/redistricting> (for the 2002 districts). The presidential returns by district may not add up to the total statewide vote because some votes (*e.g.*, overseas and military ballots) cannot be assigned to a particular congressional district. Also, the figures for Mississippi's 2002 districts are estimated (but since none of those four districts is very competitive, any inaccuracy will not materially alter the conclusions presented here).

<sup>21</sup> See *VITAL STATISTICS IN CONGRESS*, *supra* note 14, at 78 (Table 2-16); see also *infra* Tables 3 and 4 (showing that the number of "split-ticket districts" declined from 84 in 2000 to 62 in 2002). By contrast, every presidential election from 1956 to 1996 generated between 100 and 192 split-ticket districts. See *VITAL STATISTICS IN CONGRESS*, *supra* note 14, at 78 (Table 2-16).

<sup>22</sup> According to the Center for Responsive Politics, which analyzed Federal Election Commission reports filed by mid-October 2002, the top spender in House open-seat contests won 79% of the time. See Center for Responsive Politics, "Money Is the Victor in 2002 Midterm Elections" (Nov. 6, 2002 press release), available at <http://www.opensecrets.org/pressreleases/Election2002Analysis.asp>.

<sup>23</sup> When district lines are thoroughly reconfigured, it can be difficult to identify the predecessor of a new district. With that caveat, it appears that ten open seats changed party: Democrats picked up four open seats previously held by Republicans (in Georgia, Louisiana, Maryland, and Tennessee), while Republicans picked up six open seats previously held by Democrats (two seats apiece in Michigan and Pennsylvania, and one seat each in Indiana and Ohio).

TABLE 2. OPEN-SEAT RESULTS FOR 2002

	<i>Districts where Gore &gt; 50.5%</i>	<i>Districts where Bush &gt; 50.5%</i>	<i>Districts where Bush and Gore were virtually "tied"</i>	<i>Total</i>
Democrat won	14	2	2	18
Republican won	2	27	2	31
Total	16	29	4	49

winner was not determined until a runoff was held a month after Election Day). In the four open-seat contests in districts where Bush and Gore had virtually tied in 2000, each party won two congressional seats in 2002.<sup>24</sup>

The fact that voting behavior has become so consistent across federal offices and so predictable from one election cycle to the next<sup>25</sup> is a key part of the redistricting story. It is this very predictability that allows motivated redistricters to reduce competition, efficiently protect incumbents, and—in many States—torpedo candidates affiliated with the opposition party. As I will soon show, partisan mapmakers did not hesitate to take advantage of these patterns when they had the opportunity to do so.

*Redistricting did not simply eliminate districts where Gore and Bush ran neck and neck*

Having established the validity of using 2000 presidential returns to assess the partisan strength of congressional districts, we can now return to the question whether redistricting contributed significantly to the heightened security of incumbents in the 2002 elections—contrary to the usual pattern in which redistricting tends to destabilize incumbents (Table 1). The short answer is Yes, but the reasons are not so obvious.

Because the 2002 elections were marked by a historic level of noncompetitiveness, especially for a post-redistricting year, one might expect to find a big increase in the number of districts that Gore or Bush won by landslide margins and a corresponding decrease in the number of districts where the competition was close. But that prediction turns out to be largely incorrect. Nationwide, if one focuses solely on the districts' underlying partisanship (as re-

flected in the Gore/Bush percentages), the 2002 redistricting plan contains 204 districts in which either Gore or Bush won the major-party vote by at least 20 percentage points, while the 2000 plan contained 200 such districts—a minor change. As Figure 1 shows, the 2002 plan contains roughly 9 or 10 fewer "competitive" Gore/Bush districts than did the 2000 plan—not an enormous change. And if one focuses on highly competitive districts, where neither presidential candidate prevailed by more than two percentage points, the 2002 plan actually contains 12 more such districts than did the 2000 plan. If redistricting generally benefited incumbents and suppressed competition in 2002, it must have operated on a subtler plane, with help being targeted to those incumbents who needed it most.

*Redistricting significantly strengthened "at risk" incumbents*

Upon closer inspection, redistricting did indeed benefit most incumbents who needed help. To see how, I will look first at a phenomenon that occurs only in post-redistricting elections—the "pairing" of two or more incumbents in one district. Then I will look at the normal threat that incumbents face—the risk of losing to a challenger.

Pairing of incumbents is an inevitable consequence of reapportionment. As already

<sup>24</sup> Likewise, in the open-seat congressional elections held in November 2000 and the special elections held to fill House vacancies in 2001 and 2002, the Gore/Bush results correctly predicted the outcomes 86% of the time.

<sup>25</sup> Last decade, three-quarters of all districts were won by the same party in all five House elections (1992, 1994, 1996, 1998, and 2000). See CQ'S POLITICS IN AMERICA: 2002, THE 107TH CONGRESS, at xxiii (Brian Nutting & H. Amy Stern eds., 2001).

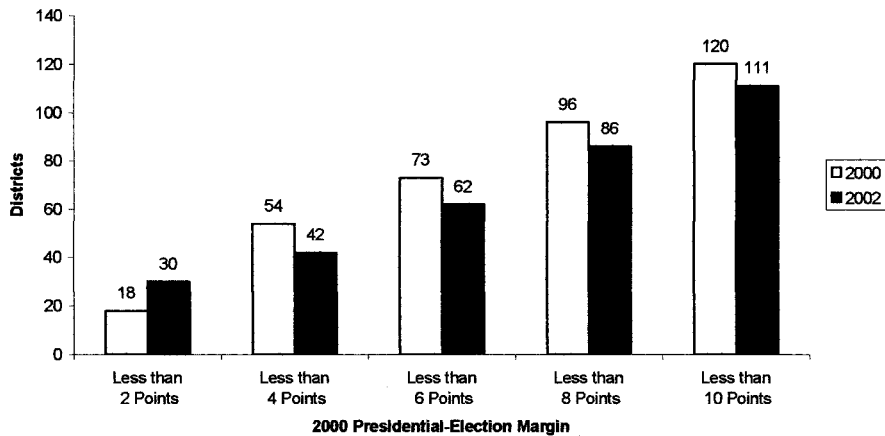


FIG. 1. Number of districts where the 2000 presidential election was close, under the 2000 and 2002 congressional redistricting plans.

noted, the 2000 census caused 12 seats to be reapportioned away from 10 States, mostly in the Northeast and Midwest. At a minimum, then, there had to be 12 pairings. In a few instances, an incumbent who had already announced his intention to retire was paired with an incumbent seeking reelection. For example, retiring Oklahoma Republican Wes Watkins was paired with fellow Republican Frank Lucas. In other instances, the pairing of two incumbents convinced one of them to retire. That happened in New York when Republican Ben Gilman and Democrat John LaFalce were both paired with Congresswomen of their own parties (Sue Kelly and Louise Slaughter, respectively). In eight districts, paired incumbents refused to throw in the towel and therefore ran against each other. There were two such pairings in Democratic primaries, two in Republican primaries, and four in the November general elections. In all four of the primary pairings, the more senior incumbent prevailed.<sup>26</sup> Seniority also prevailed in three of the four general-election pairings.<sup>27</sup>

In the 377 general-election contests featuring only one incumbent, "seniority" also mattered, as the incumbents won 373 times—an astonishing 98.9% success rate. The overwhelming majority of the 377 incumbents either were relatively invulnerable or were helped rather than hurt by redistricting.

Only 108 of the 435 incumbents were "at risk" entering the 2001–2002 round of redistricting—with "at-risk incumbents" defined here as Democrats representing Bush districts, Republicans representing Gore districts, and

other incumbents who won their last general election by less than 10 percentage points. The other 327 incumbents presumably would be relatively safe so long as redistricting did not greatly alter their constituencies. But for any at-risk incumbent, if redistricting adversely shifted the partisan composition of the district, it could mean the difference between reelection and defeat. Of the 108 at-risk incumbents, only four suffered adverse shifts greater than two percentage points, and only one of those four survived the 2002 elections (two were defeated and one retired).<sup>28</sup> By contrast, 20 at-risk Dem-

<sup>26</sup> In the Democratic primaries, 23-termer John Dingell beat 4-termer Lynn Rivers in Michigan's Fifteenth District, and 14-termer Jack Murtha beat 4-termer Frank Mascara in Pennsylvania's Twelfth District. In the Republican primaries, 5-termer John Linder beat 4-termer Bob Barr in Georgia's Seventh District, and 5-termer Steve Buyer beat 1-termer Brian Kerns in Indiana's Fourth District.

<sup>27</sup> In Connecticut's Fifth District, 10-term Republican Nancy Johnson beat 3-term Democrat Jim Maloney. In Illinois' Nineteenth District, 3-term Republican John Shimkus beat 2-term Democrat David Phelps. And in Mississippi's Third District, 3-term Republican Chip Pickering beat 2-term Democrat Ronnie Shows. But in Pennsylvania's Seventeenth District, 5-term Democrat Tim Holden garnered 51% of the vote to edge out 10-term Republican George Gekas. Although seniority was a correlate of success, it may not have been its cause. Other than the Mississippi district, which tilted heavily Republican, it may well be that the stronger—or better funded—campaigner simply prevailed in each of these matchups.

<sup>28</sup> Democrat Jim Matheson survived (barely) in Utah's Second District even though it was changed from a 62.7% Bush district to a 68.4% Bush district. As discussed below, Minnesota Democrat Bill Luther and Maryland Republican Connie Morella both lost to challengers. And California Republican Steve Horn retired.

ocrats and 25 at-risk Republicans benefited from similar-size shifts that made their districts *more* secure—and not surprisingly, none of them was defeated in November 2002.

Thus, it appears likely that incumbent-friendly redistricting did play a major role in November 2002's record-setting level of incumbent success. Incumbents who didn't need help didn't get it, but those who were vulnerable were consistently shored up by adding friendly precincts to their districts and removing unfriendly ones.<sup>29</sup>

#### *A closer look at the successful House challengers*

The 2002 House elections set a modern record for fewest successful general-election challengers—four. That is about one-fifth as many successful challengers as in a normal election year. Redistricting played a significant role in three of the four elections where challengers defeated incumbents. And in all four cases, the successful challenger belonged to the same political party as the presidential candidate who had carried the new district in 2000.

In Minnesota, Republican challenger John Kline ran against four-term Democratic incumbent Bill Luther for the third consecutive time. In 2000, Luther had won only 50.8% of the major-party vote at the same time that Al Gore lost the district by two points. In 2002, a state court significantly redrew the district, transforming it into one that Gore had lost by seven points.<sup>30</sup> Not surprisingly, Luther lost to Kline in November 2002. The margin of the 2002 contest—more than 11 points—suggests that Kline might have won in 2002 even under the old district lines, but the court-ordered map sealed his victory.

In Florida's Fifth District, five-term Democratic incumbent Karen Thurman had largely avoided serious challenges as she was reelected handily in 1994, 1996, 1998, and 2000. But in 2002, the Republican-controlled state legislature transformed her district from one where Gore had won by three-and-a-half percentage points to one where Bush had won by nearly eight points—a net swing of more than 11 points. In November 2002, Thurman lost to Republican challenger Ginny Brown-Waite by less than two points. Although Thurman did

not qualify as an “at risk” incumbent, as defined above, the Florida Legislature effectively put her at risk, and redistricting almost certainly caused her defeat.

In Maryland's Eighth District, Connie Morella, the most moderate member of the House Republican Conference,<sup>31</sup> had won reelection in 2000 by less than seven points. The Maryland General Assembly transformed her already-liberal district from one that Gore had carried by 25 points to one that he had carried by nearly 36 points. In 2002, Morella relentlessly attacked her opponent, Democratic State Senator Chris Van Hollen, for being too closely tied to the “Democratic bosses” in Annapolis who sought to unseat her by gerrymandering. She lost to Van Hollen by four points. As with Thurman, redistricting caused Morella's defeat. Of course, in both cases, if the challengers had been inept or severely underfunded, the incumbents probably would have survived.

Redistricting played little role in the fourth successful challenge of November 2002, in New York's First District. That Long Island district was not greatly altered by redistricting. Al Gore carried both the 2000 and the 2002 versions of the district by roughly 10 points. First-term Republican Felix Grucci had won the 2000 election in fluky circumstances, after a major upset in the Democratic primary handed him a weak opponent. In 2002, a much stronger Democratic candidate, Tim Bishop, defeated Grucci—a win that can be attributed in part to the underlying partisanship of the district, but not to redistricting.

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<sup>29</sup> Of course, no amount of incumbent-friendly redistricting could have fully protected incumbents against the kind of political tsunami that washed Republicans into office in 1994 and Democrats into office in 1974. But we have now seen four consecutive election cycles (1996, 1998, 2000, and 2002) exhibiting quite the opposite—a consistently and closely divided electorate.

<sup>30</sup> See *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Spec. Redistricting Panel Mar. 19, 2002), available at <http://www.commissions.leg.state.mn.us/gis/html/plans2002.html>.

<sup>31</sup> See Keith Poole, “107th House Rank Ordering as of 15 June 2002” (“The two parties are almost perfectly separated in the liberal-conservative ordering. Only [Jim] Traficant of Ohio (now in Federal prison) is to the right of the left-most Republican—[Connie] Morella of Maryland.”), available at <http://voteview.uh.edu/HOU107.htm>.

Challengers fared no better in primaries than in general elections. In 2002, only four Democratic incumbents (California's scandal-plagued Gary Condit, Alabama's Earl Hilliard, Georgia's Cynthia McKinney, and Ohio's Tom Sawyer) and zero Republican incumbents lost to challengers in their respective party primaries. Overall, only four percent of the Representatives in the 108th Congress won their initial election by defeating an incumbent in a primary.<sup>32</sup> Thus, it appears unlikely that a lack of competitiveness in general elections will be offset by heightened competition in party primaries.

### *Retirements from the House*

Of course, defeating an incumbent in a primary or general election is not the only way to drive him out of office. By a process of self-selection, vulnerable incumbents who see the handwriting on the wall often choose to run for another office (such as Senator or Governor) or to retire from elective politics altogether.<sup>33</sup> For example, in 1992, the last post-redistricting year, 65 incumbents chose to retire or seek another office rather than run for reelection in redrawn districts.<sup>34</sup>

The 2002 pattern of retirements suggests, however, that redistricting did not push out nearly as many incumbents as it had in previous decades. Only 35 incumbents retired from the House. Nine of them ran for the U.S. Senate (three of them won); seven ran for governor (four won); one ran for the Michigan State Senate (and won); and 18 retired from elective politics.<sup>35</sup> Most of the 18 who chose not to run for any office were at least 70 years old or had served at least 20 years in the House; many of them would have retired regardless of redistricting. At least 21 Representatives have left the House in every Congress since World War II, and there likely would have been at least that many retirements in 2002 even if reapportionment and redistricting had not occurred.

A handful of retirements, however, can clearly be attributed to redistricting. For example, as previously mentioned, New York's most senior Republican (Benjamin Gilman) and its second most senior Democrat (John LaFalce) retired after they were targeted to bear the burden

of the State's loss of two seats due to reapportionment. And in the "Be Careful What You Wish For" Department, Democratic redistricters successfully persuaded Republican Congressmen Bob Ehrlich and Saxby Chambliss to exit the House—only to watch them launch underdog campaigns that scored come-from-behind victories for Governor of Maryland and U.S. Senator from Georgia, respectively.

Whether one focuses on the incumbents who retired from the House, the (very few) incumbents who were defeated on Election Day, or the incumbents who sought and won reelection, it is clear that the recent redistricting had a powerful, and historically distinctive, impact. Although redistricting fatally injured a handful of House careers, in far more cases it had the opposite effect, making incumbents more secure. Contrary to the pattern established in prior post-reapportionment election cycles (see summary of data from 1972, 1982, and 1992 in Table 1), the 2001–2002 round generally bolstered incumbents and reduced the competitiveness of House elections.

That is the story that journalists, political pundits, and editorial writers all took from the 2002 elections.<sup>36</sup> But they overlooked the other

<sup>32</sup> See VITAL STATISTICS IN CONGRESS, *supra* note 14, at 77 (Table 2-15).

<sup>33</sup> See GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 140–61 (2002).

<sup>34</sup> Of course, not all of those 65 retirements can be attributed to redistricting. That number was also fed by the normal attrition caused by aging and the desire to reenter the private sector, as well as the House bank check-kiting scandal and the fact that 1992 was the last year when a retiring incumbent could legally pocket excess campaign funds.

<sup>35</sup> Six of the seven successful statewide candidacies aligned with the 2000 presidential results: Two Democrats won in States carried by Gore (Illinois and Maine) and four Republicans won in Bush States (Georgia, Alabama, South Carolina, and New Hampshire), but one Republican won in a Gore State (Maryland).

<sup>36</sup> See, e.g., Editorial, *Broken Democracy*, WASH. POST, Nov. 10, 2002, at B6 ("The magnitude of incumbency's triumph in last week's elections for the House of Representatives was so dramatic that the term 'election'—with its implications of voter choice and real competition—seems almost too generous to describe what happened on Tuesday."); Editorial, *Democracy Denied*, RICHMOND TIMES-DISPATCH, Mar. 17, 2002, at E2 ("Citizens will cast ballots in November, but their votes effectively were counted when the pols drew the lines.").

troubling feature of the 2002 districts, a topic that I will examine next.<sup>37</sup>

### THE EFFECTS OF THE 2001–2002 ROUND OF REDISTRICTING ON PARTISAN BIAS

Aside from competitiveness and effects on incumbency, another defining feature of any redistricting plan is the presence or absence of significant partisan bias. Unfortunately, even the most experienced redistricting attorneys and experts often misunderstand the term “partisan bias.”

*What is “partisan bias”?*

Intuitively, the key feature of an unbiased redistricting plan is that the political party whose candidates attract the most popular votes is rewarded with the most seats in the legislature. More broadly, an unbiased plan treats the two major parties symmetrically. If they have equal support in the electorate, they should win an equal number of seats in the legislature. Thus, a 50% vote share should translate into a roughly 50% seat share. If either party succeeds in attracting support from more than half the electorate, it should be rewarded with more than half the seats—and neither party should profit more from such success than would the other party, if the tables were turned. For example, if the Democrats would be rewarded with 60% of the seats for winning 55% of the popular vote, then an unbiased plan should likewise give Republicans 60% of the seats if *their* candidates win 55% of the vote. That is partisan fairness, in a nutshell.

Political scientists have reduced this intuitive notion to a formula for translating vote shares into seat shares. Generally, in a two-party, single-member districting system,<sup>38</sup> they assume that, under an unbiased plan, the ratio of Democratic seats to Republican seats ( $S_D/S_R$ ) should equal the ratio of Democratic votes to Republican votes ( $V_D/V_R$ ), raised to some exponential power. So  $S_D/S_R = (V_D/V_R)^n$ ,  $n \geq 1$ . (For a plan biased to favor Democrats, the entire right-hand side of the equation would be multiplied by a number greater than one; for a plan with a pro-Republican bias, the multiplier would be less than one.) If the plan is unbiased

and the exponent  $n$  (which political scientists call the “swing ratio”) is 1, the formula describes perfectly proportional representation for the two major parties: Each party can expect to get a seat share equal to its vote share. As the plan’s *responsiveness* to shifts in voting behavior increases and the exponent approaches infinity, the formula describes a winner-take-all system, roughly akin to at-large (rather than districted) elections. With extremely high responsiveness and low bias, a bare 51% majority of votes will be magnified into a 100% supermajority of seats.

Although there is plenty of room for disagreement about the descriptively or normatively “correct” value of the exponent (so long as it is greater than or equal to one), the basic formula has three good features. First, the formula demands that a 50/50 vote share generate a roughly 50/50 seat share, which seems fair. Second, the formula is symmetrical, so that neither party systematically wins a substantially larger “bonus” for capturing more than half the votes. Third, on average, a party that wins more than half the votes should win a share of seats at least proportionate to its share of major-party votes, while a less popular party should win a share of seats that is at most proportionate to its major-party vote share.

This analysis suggests a key, but often overlooked, distinction: Partisan fairness and proportional representation are by no means synonymous. An electoral system that generates proportional representation is unbiased, but an unbiased electoral system need not generate proportional representation.<sup>39</sup> For example, if

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<sup>37</sup> Since drafting this Article, I have learned of one exception: Professor Gary Jacobson has written a superb paper arguing that, despite the continued close partisan balance in the electorate, structural features of the electoral system will make it difficult for Democrats to regain a majority in either house of Congress. See Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. (forthcoming 2003).

<sup>38</sup> In a single-member districting system, each district elects one and only one member to the legislative body, so the total number of districts is identical to the size of the body.

<sup>39</sup> See generally Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540, 540–54 (1973).

TABLE 3. DISTRIBUTION OF DISTRICTS IN THE 2000 CONGRESSIONAL ELECTIONS

	<i>Gore districts</i>	<i>Bush districts</i>	<i>Total</i>
Democrats elected	168	44	212
Republicans elected <sup>40</sup>	40	183	223
Total	208	227	435

the “swing ratio” (the exponent  $n$ ) is 2, then the formula for translating votes into seats is:  $S_D/S_R = (V_D/V_R)^2$ . That formula describes an unbiased electoral system; but it is a system that will generate proportional representation only if the parties are equally strong (with 50/50 shares of votes and seats). With a swing ratio of 2, if either party attracts 51% of the vote, it would be expected to win roughly 52% of the seats; a party with 55% of the vote would expect roughly 60% of the seats; and a party with 60% of the vote would expect roughly 69% of the seats. So long as these expectations are the same for each party, the redistricting plan that generates them is unbiased. Thus, capping partisan bias is a far cry from demanding proportional representation. But that distinction has all too often been lost on redistricting novices and experts alike.

*Partisan bias in the 2000 and 2002 redistricting plans*

Partisan symmetry did not hold true in the U.S. House before the latest round of redistricting and it certainly does not hold true today. Because the Gore/Bush results were so close to a perfect tie—with Gore carrying just under 50.2% of the major-party vote in the 50 States combined—we can readily test the 2000 and 2002 plans for partisan bias.

Tables 3 and 4 break down the 435 congressional districts for the 2000 and 2002 plans, respectively, according to whether they were carried by Gore or by Bush, and whether they

elected to Congress (in 2000 and 2002, respectively) a Democrat or a Republican. What stands out about each of these two tables is the bottom row. Although in 2000 Gore got slightly more votes than Bush, Bush carried significantly more congressional districts than did Gore—and the size of Bush’s advantage widened by 20 seats after the 2001–2002 redistricting. In 2000, Bush carried 227 districts, compared with 208 for Gore; and under the 2002 plan, Bush’s figure increased to 237 and Gore’s decreased to 198. (Of course, Bush and Gore did not actually *run* in 2002. As explained earlier, I am simply looking at their vote totals in the precincts composing each of the 435 newly redrawn districts.)

These figures raise two questions:

- First, why did the pro-Republican bias increase from 2000 to 2002 (allowing Bush to carry 237 districts instead of 227)?
- Second, and more important, why are both the 2000 and the 2002 plans so heavily biased in favor of the Republicans (allowing Bush to take a solid majority of seats despite finishing second in the nationwide popular vote)?

<sup>40</sup> Although the late Democratic Congressman Norm Sisisky won the November 2000 election in Virginia’s Fourth District, I have counted that district as having a Republican Representative because it elected Republican Congressman Randy Forbes in the 2001 special election. That was the only special election in 2001 or 2002 that resulted in a partisan shift. Bush had carried the district narrowly in 2000.

TABLE 4. DISTRIBUTION OF DISTRICTS IN THE 2002 CONGRESSIONAL ELECTIONS

	<i>Gore districts</i>	<i>Bush districts</i>	<i>Total</i>
Democrats elected	171	35	206
Republicans elected	27	202	229
Total	198	237	435

TABLE 5. ROUGH APPROXIMATION OF THE SOURCES OF PARTISAN BIAS IN THE 2000 AND 2002 CONGRESSIONAL PLANS

	2000 districts	2002 districts	Change (2000 to 2002)
Baseline Gore vote	219	219	0
Malapportionment bias	+8	+0	-8
Turnout bias	+6	+3	-3
Distributional bias	-25	-24	+1
Total Gore districts	208	198	-10
Campaign effects	+4	+8	+4
Total seats held by Democrats	212	206	-6

### *Separating the three sources of partisan bias*

To answer those questions, it is necessary to further unpack what "partisan bias" means. As Professor Bernard Grofman has explained, there are three distinct sources of partisan bias: malapportionment, turnout differences, and differences in the geographic distribution of each party's vote shares.<sup>41</sup> In a two-party system, a political party supported by only half the electorate can get a good return on its votes and thereby capture well over half the legislature's seats if its strength is located disproportionately in (1) districts with relatively small total populations ("malapportionment bias"); (2) districts with relatively low turnout rates ("turnout bias"); or (3) districts that favor the party but are relatively competitive in general elections ("distributional bias"). An equally popular party whose base of support is disproportionately located in districts with large total populations, high turnout rates, and landslide general elections will fare poorly and capture well under half the legislature's seats.

The first two sources of bias—malapportionment and turnout differences—merely reflect that districts' total populations inevitably diverge over the course of a decade and that, even if they did remain the same, equality of population would not ensure that the same number of votes are cast in each district. Although either of these facts can systematically favor one political party, they are not the central focus of this Article. Only the third source, "distributional bias," flows from what we commonly think of as "partisan gerrymandering," that is, manipulating district boundaries to give one party an unfair advantage by diluting the opposition's voting strength.

Professor Grofman, building on earlier work by Professors Gary King and Andrew Gelman,

has developed a methodologically sophisticated way to calculate the magnitude of each of the three sources of partisan bias, which allows distributional bias to be singled out for closer inspection.<sup>42</sup> So far as I know, no one has yet applied that methodology to the 435 congressional districts used in the 2000 or 2002 elections.

Because of time and data limitations, I have used a similar but less sophisticated approach to calculate rough estimates for malapportionment bias, turnout bias, and distributional bias under both the 2000 plan and the 2002 plan. In Table 5, the top row of the first two columns of figures begins with the assumption that—in a truly unbiased plan—Gore's 50.2% nationwide vote share should have given him about 219 of the 435 seats (a 50.3% seat share). The next three rows contain estimates for each of the three types of bias, which collectively explain why Gore's 50.2% vote share translated into only 208 or 198 Gore districts out of 435. Finally, to arrive at the actual Democratic seat shares of 212 (in 2000) and 206 (in 2002), I factor in each party's ability to pick up congressional seats in fundamentally "hostile" districts—that is, Democratic congressional victories in Bush districts and Republican congressional victories

<sup>41</sup> See Bernard Grofman, William Koetzle & Thomas Brunell, *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16 ELECTORAL STUD. 457, 457-70 (1997); see also R. H. Brookes, *The Analysis of Distorted Representation in Two-Party Single-Member Elections*, 12 POL. SCI. (N.Z.) 158, 158-67 (1960).

<sup>42</sup> See Grofman, Koetzle & Brunell, *supra* note 41, at 461-64 (citing Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. POL. SCI. 514, 514-54 (1994)).

in Gore districts. These “campaign effects” on Table 5 are calculated by subtracting the number of Republicans representing Gore districts from the number of Democrats representing Bush districts, as shown in Tables 3 and 4. The right-hand column in Table 5 simply compares the 2000 and 2002 results; for example, the “-8” shows that, from 2000 to 2002, Democrats lost about eight seats due to changes in the size of the malapportionment bias.

Malapportionment bias favors the party whose strength is concentrated in districts with smaller total populations over the party whose strength is concentrated in districts with larger total populations. At the beginning of every new decade, the combination of reapportionment and redistricting under the strict “one person, one vote” rule (both of which are mandated by Article I of the Federal Constitution) eliminates nearly all of the malapportionment bias. But over the course of the next ten years, as districts “age” and district-size variations increase, the malapportionment bias inevitably creeps back up. In healthy economic times this bias almost inevitably favors a political party with a lower household-income base (such as Democrats) over a party with a higher one (such as Republicans). As the economy boomed in the 1990s, families that could afford better housing tended to migrate to more expensive neighborhoods. That migration caused lower-income districts, which tend to vote Democratic, to become relatively underpopulated, while higher-income Republican-leaning districts tended to become overpopulated. By 2000, 21 of the Nation’s 25 smallest districts were represented by Democrats, 20 of the Nation’s 25 largest districts were represented by Republicans, and the 2000 plan had accrued a pro-Democratic malapportionment bias of roughly eight seats.<sup>43</sup> As Table 5 shows, the reapportionment and redistricting of 2001 and 2002 eliminated that bias.<sup>44</sup> Because congressional districts cannot cross state lines, in theory some nontrivial amount of malapportionment bias could remain even after reapportionment and strict application of the “one person, one vote” rule. But in reality, the decennial processes mandated by Article I of the Constitution will almost always eliminate the vast bulk of the malapportionment bias.

Here, then, we have the answer to our first question: Why did the pro-Republican bias increase from 2000 to 2002? The bulk of that increase—indeed, the entire six-seat net loss that the Democrats suffered in November 2002—can be attributed to the correction of the population inequalities that had accrued during the 1990s. Article I of the Constitution—the source of the requirements to reapportion seats among the States and to equalize district populations within each State—mandated the elimination of a sizeable pro-Democratic malapportionment bias. Even if Democrats had completely controlled the redistricting process in all 50 States, they could not have prevented the elimination of this eight-seat pro-Democratic malapportionment bias. Had all other things been equal, the constitutionally mandated leveling of district populations would have dropped the Democratic seat share from 212 to 204.

Turnout bias is the second potential source of partisan bias. Congressional districts are drawn to equalize total population, not the number of voters. Some districts may contain more children, more noncitizens, more felons, or more citizen adults who choose not to vote.<sup>45</sup> If those districts tend to vote for one political party while high-turnout districts tend to vote for the other party, then the party that is strongest in the areas of low turnout will get a better return for its votes. That is turnout bias, sometimes referred to as the “cheap seats” phenomenon because one party generally can expend fewer votes to win a seat.

Like malapportionment bias, turnout bias also tends to favor Democrats. Although it can be quite significant in particular States, its mag-

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<sup>43</sup> Using the official 2000 census to determine the population for each of the 435 old districts and the Gore/Bush percentages to determine the partisanship of each district, the 217.5 most Republican districts contained enough population to fill just over 225 districts, while the 217.5 most Democratic districts contained only enough population to fill a bit less than 210 districts.

<sup>44</sup> Under the 2002 plan, the 217.5 most Republican districts contained enough population to fill almost 218 districts, and the 217.5 most Democratic districts contained enough population to fill just over 217 districts.

<sup>45</sup> Because the analysis here relies entirely on Gore’s and Bush’s fractions of the major-party vote, for purposes of simplicity I am effectively treating third-party voters as nonvoters, too.

nitude nationally was not too great under either the 2000 or the 2002 plan. As Table 5 shows, under the 2002 plan Democrats benefit from a three-seat turnout bias, which is down slightly from the 2000 plan.<sup>46</sup>

Distributional bias is the third source of partisan bias. Effectively, it is the bias that is “left over” after correcting for the fact that districts have different total populations and different rates of turnout. When people speak colloquially about “gerrymandering,” they are referring to the intentional creation of distributional bias. But in fact distributional bias is not always driven by purposely partisan mapmaking: It can be the almost unavoidable result of residential patterns when one party’s voters are much more geographically concentrated than the other’s. In either case, a political party will suffer from distributional bias if it wins the “landslide” districts while the other major party wins the competitive districts. The concepts here are precisely the same ones used in Voting Rights Act cases: A group’s voting strength can be diluted either by over-concentrating, or “packing,” its members into the fewest possible districts and thus effectively wasting votes that might have had a meaningful impact in neighboring districts, or by fragmenting, or “cracking,” concentrations of the group’s members and dispersing them into two or more districts where they will constitute an ineffective minority of the electorate.<sup>47</sup>

A simple, real-world example of distributional bias can be found in the November 2002 congressional results from Connecticut. Reapportionment had reduced Connecticut’s representation from six seats to five, but all six incumbents (three from each party) sought reelection. So two Democratic incumbents ran against Republican challengers, two Republican incumbents ran against Democratic challengers, and two incumbents from opposing parties squared off in the Fifth District. Statewide, the five Democratic candidates got more than 52% of the major-party vote (roughly 509,000 to 466,000), yet Republicans captured three of the five seats. That’s because the two Democratic victors won by 36 and 34 percentage points, while the three Republican victors won by 29, 11, and 8 points, respectively. As is typically the case, the party that

won the closer elections got a better return on its votes than the party that won the landslides. The Republicans had fewer surplus votes per seat won and fewer wasted votes per seat lost. In short, Republican votes were more efficiently distributed, and Democratic votes were less efficiently distributed.<sup>48</sup>

Nationwide, what Table 5 shows is that the 2000 and 2002 plans both have a roughly 24- or 25-seat pro-Republican distributional bias which swamps, several times over, any pro-Democratic turnout or malapportionment bias. A 25-seat Republican bias adds 25 seats to the Republicans’ national total and subtracts 25 seats from the Democrats’. Thus, a 25-seat distributional bias is tantamount to conceding the first 50 congressional districts to the Republicans and then having a fair fight over the remaining 385.

*Landslide districts lean heavily Democratic and relatively competitive districts lean Republican*

Again, shifting from aggregate figures to specific districts is telling. Under the 2002 plan, Bush’s best district in the United States was

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<sup>46</sup> Gore got 50.19% of the total votes cast nationwide for Gore and Bush (excluding the District of Columbia). But Gore’s average major-party vote share across the 435 new districts is somewhat higher—50.97%—because his supporters tended to be concentrated in low-turnout districts. The turnout bias is estimated here as 435 times the difference between those two percentages, which equals three seats. The same method was used to calculate the turnout bias in the 2000 plan. The latter figure was double-checked using a slightly different method of calculation that resembles the method I used to estimate the malapportionment bias (*see supra* notes 43 and 44): Under the 2000 plan, the 217.5 most Republican districts generated about 53.0% (or, stated as a fraction, almost 231/435) of the major-party presidential votes cast nationwide, and the 217.5 most Democratic districts generated about 47.0% (or just over 204/435) of the major-party presidential vote. Those figures suggest that the sum of the malapportionment bias and the turnout bias in the 2000 plan was roughly 13 or 14 districts—which confirms the estimates I obtained using the other method. I was unable to conduct the same double-check for the 2002 plan because my data set for the 2002 districts contained only Gore’s and Bush’s percentages in each district, not their raw vote totals.

<sup>47</sup> *See Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

<sup>48</sup> As Bruce Cain has correctly pointed out, the three sources of bias are not entirely independent of each other. For example, landslide districts that demobilize voters could exacerbate a plan’s turnout bias.

TABLE 6. COMPETITIVENESS OF DISTRICTS IN THE 2002 PLAN, ARRANGED BY THE PARTY AND RACE (OR ETHNICITY) OF THE DISTRICT'S REPRESENTATIVE

Category	Number of representatives	Median presidential percentage 2000	Median congressional percentage 2002
Republicans	229	57.6% Bush	69.3% Republican
Anglo	225	57.6	69.3
Minority (Latino)	4	56.5	67.7
Democrats	206	60.3% Gore	69.3% Democratic
Anglo	151	57.9	67.2
Minority	55	73.7	81.2
Black	37	77.5	84.3
Latino	18	64.7	73.6

Texas's Eighth District (represented by Republican Kevin Brady). Bush took 77.7% of the major-party vote there. By contrast, there are 27 districts in the United States where Gore took more than 77.7% of the major-party vote. In other words, the 27 most lopsided districts in the United States are all Democratic districts represented by Democratic Members of Congress.<sup>49</sup> Most of those districts are located in the New York, Los Angeles, or Chicago metropolitan areas. All but two are located in Gore States and all but two (in Manhattan and Boston/Cambridge) are "majority-minority districts," that is, districts in which minority-group members constitute more than half the population. This pattern is not new: Under the 2000 plan, the Nation's 28 most lopsided districts were all Democratic districts represented by Democratic incumbents, and they too were predominantly minority districts.<sup>50</sup>

Some of these districts may be required in order to avoid illegal minority vote dilution under Section 2 of the Voting Rights Act,<sup>51</sup> but others would likely exist even in the absence of any legal mandates. For example, New York City and Long Island, which are crammed into one corner of the State and together contain enough population to fill more than 16 of its 29 congressional districts, gave more than 73% of the major-party vote to Gore. Even the craftiest Democratic mapmaker would have difficulty drawing a districting map that did *not* pack Democrats there. Furthermore, this problem is not symmetrical: There is no Republican counterpart to New York City anywhere in the United States.

Further analysis of this asymmetry is needed. As this Article goes to press, detailed demographic and socioeconomic data for the 435 new districts (including average education and income levels and urban/suburban/rural breakdowns) are not yet available. But the districts can be simply classified by the party and race (or ethnicity) of their current Representatives. Table 6 does just that. For each category of Representatives, it shows the average percentage of the major-party vote that the Representatives' presidential candidate received in 2000 and the average percentage of the major-party vote that the Representatives themselves received in the 2002 congressional elections.<sup>52</sup> Table 6 shows that "Anglo" (that is, non-Hispanic white) Republicans, minority Republicans (of whom there are only four Latinos and zero African-Americans), and Anglo Demo-

<sup>49</sup> This figure may be an *underestimate* because Bush's best district outside of Texas, where he had a home-field advantage, gave him 76.0% of the major-party vote, and there are fully 30 districts that gave Gore more than 76.0% of the major-party vote.

<sup>50</sup> Indeed, 25 of the incumbent Democrats in these districts are precisely the same under both the 2000 and the 2002 plans. The 27 most lopsided districts under the new plan are located in New York (eight districts), California (six), Illinois (four), Pennsylvania (two), Michigan (two), Florida, Ohio, New Jersey, Massachusetts, and Maryland.  
<sup>51</sup> 42 U.S.C. § 1973.

<sup>52</sup> Table 6 uses medians rather than means, to prevent the figures from being distorted by the 80 congressional candidates who ran without major-party opposition in 2002. Also, it pools the handful of Asian-American and American Indian Members of Congress with "Anglo" (non-Hispanic white) Members, which does not materially affect the median figures.

crats tend to come from similarly competitive districts and tend to garner roughly similar fractions of the congressional vote. But minority Democrats—especially African-American Democrats—typically hail from districts that are much less competitive in general elections. Specifically, the average black Democratic Representative carried his or her district in 2002 by about 69 percentage points (84.3% to 15.7%), and that district was won by Al Gore in 2000 by (on average) about 55 points (77.5% to 22.5%). The equivalent figures for Latino Democratic Representatives are 47 and 29 points, respectively.

Clearly, the packing of Democratic voters in most (though not all) of these minority districts goes far beyond what is needed to elect minority candidates preferred by minority voters in *general* elections. Determining whether the racial, ethnic, and partisan makeup of these districts is needed to *nominate* minority candidates preferred by minority voters in the relevant *primary* elections<sup>53</sup> is a more complex question requiring a district-by-district analysis; but it is likely that most urban minority-preferred black or Latino candidates would be safer in the primary, and safer overall, if their districts contained more white Republican voters and fewer white Democratic voters.<sup>54</sup> Indeed, in some States, electoral opportunities for minority voters and candidates could have been significantly enhanced by creating more districts that are 30% to 40% minority and 55% to 60% Democratic in federal elections—but that is not the prevalent pattern under the 2002 plan, as Table 6 shows.

This much can be said with assurance: Large, heavily Democratic concentrations in urban areas make it easier for Republicans to gerrymander successfully, while the absence of similarly large, heavily Republican concentrations makes it relatively harder for Democrats to gerrymander successfully. Democrats face political and legal pressures to draw (and maintain) minority districts that are lopsidedly and inefficiently Democratic, while Republicans (whose supporters and leaders alike are much less racially and ethnically diverse) do not face equivalent countervailing pressures. For a host of reasons—ranging from normal interest-group politics to residential segregation to the interpretation (and sometimes the misinterpre-

tation) of the Voting Rights Act—Democratic mapmakers simply have fewer options and fewer pieces to move around than do their Republican counterparts. Therefore, when Democrats have unilateral control of the governorship and both state-legislative chambers and hence of the congressional-redistricting process—as they did in 2001 and 2002 in California, Georgia, North Carolina, and Maryland, among other States—they can protect minority incumbents and ensure a healthy level of representation for Democratic voters generally, but they usually cannot craft plans that generate large pro-Democratic distributional biases. By contrast, in States where Republicans unilaterally control the process, they can pack minority voters and urban white Democrats into as few districts as possible, engineer the defeat or involuntary retirement of white Democratic incumbents, and generate substantial pro-Republican distributional biases. Shortly, we will examine specific States to see whether that did indeed happen in the latest round of congressional redistricting.

Turning to the other end of the competitiveness spectrum, under the 2002 plan there are 184 districts where neither presidential candidate won by more than 15 percentage points (*i.e.*, the presidential vote was 57.5% to 42.5% or closer). In the 2000 presidential election, Bush carried 111 of those districts, and Gore carried 73; in the 2002 congressional elections, Republicans carried 113 of those districts, and Democrats carried 71. Even in these districts—by definition, the most competitive ones in the country—the presidential candidate who carried the district in 2000 and the congressional candidate who carried the district in 2002 belonged to the same political party roughly three times out of four. The problem for the Democrats is that there is another asymmetry here, since there are about 40 more Republican-leaning districts than there are Democratic-leaning districts. Most of the Bush districts gave Bush

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<sup>53</sup> Except for Cuban-Americans in Florida, the relevant primary is the Democratic primary.

<sup>54</sup> By far the best treatment of this topic can be found in Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1383–430 (2001).

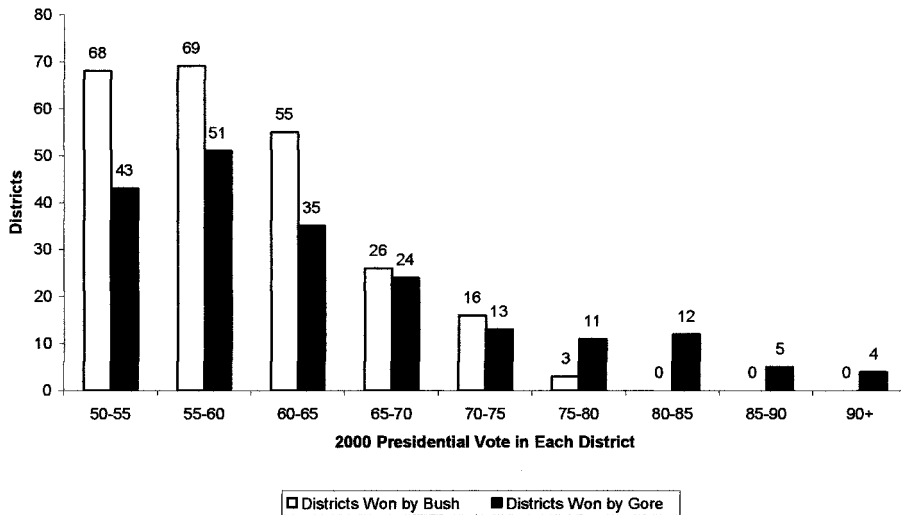


FIG. 2. Distribution of Bush districts and Gore districts in the 2002 plan.

between 50% and 60% of the major-party vote, while most of the Gore districts gave Gore between 60% and 95%. Figure 2 illustrates these asymmetries rather dramatically.<sup>55</sup>

One particularly worrisome harbinger for Democrats is that they hold most of the seats where the party of the congressional incumbent is weakest. Outside of the 184 relatively competitive districts, there are 11 Democratic Members of Congress representing strong Bush districts (mostly in relatively rural areas) but only one Republican Member of Congress representing a strong Gore district.<sup>56</sup> These 12 Members represent districts where their own party’s presidential candidate could not attract even 42.5% of the vote. Don’t expect to see all 12 of them still in Congress at the end of the decade.

So in summary: Republicans have a roughly 40-seat edge in districts where Gore and Bush were both in the running and Democrats have a nearly 30-seat edge in lopsided districts where one presidential candidate romped. That type of disparity means that Republican voters are more efficiently distributed and therefore their party profits from a very large distributional bias at the national level.

### LOCATING THE PRO-REPUBLICAN DISTRIBUTIONAL BIAS

To better understand the source, or location, of this national bias, we must look at individual

States or sets of States to identify the specific state-level redistricting plans giving rise to the national distortion. I have already flagged one potential explanation for the distortion—the presence of lopsidedly Democratic districts (and the absence of lopsidedly Republican ones). But that is far from being the only possible explanation and, as I will show, it is in fact not the most compelling one. Unchecked partisan ambition seems to play a bigger role than either the “natural” concentration of Democratic voters in large urban centers or the “artificial” concentration of minority Democrats through application (or misapplication) of the Voting Rights Act.

#### *Which types of States generated the bias?*

Rather than analyzing each State separately, I begin by grouping States according to six factors that might affect each party’s redistricting prospects: (1) whether the State’s electorate leans Democrat or Republican; (2) the presence or absence of “lopsidedly” Democratic (generally minority) districts; (3) the size of the State; (4) whether reapportionment changed the size of the State’s congressional delegation; (5)

<sup>55</sup> I thank Gary Jacobson for conceiving how best to portray the Republicans’ structural advantage in House elections. See Jacobson, *supra* note 37 (Figure 6).

<sup>56</sup> No, that is not a typographical error: In 2002, Congressman Rob Simmons of Connecticut’s Second District garnered 54.1% of the vote against a weak opponent in a district where Bush had won 42.3% of the vote in 2000.

TABLE 7. FACTORS CONTRIBUTING TO THE PRO-REPUBLICAN BIAS IN THE 2002 PLAN

<i>Categories of States</i>	<i>Number of States</i>	<i>Number of districts</i>	<i>Democratic presidential vote share 2000</i>	<i>Democratic House seat share 2002</i>	<i>Net change in Democratic House seats from 2000 to 2002</i>
<b>All States</b>	<b>50</b>	<b>435</b>	<b>50.2%</b>	<b>47.4%</b>	<b>-6</b>
Gore States	20	217	56.1%	58.1%	-3 1/2
Bush States	30	218	44.0%	36.7%	-2 1/2
<i>States with "lopsided districts"</i>	10	209	55.6%	52.6%	-5
States without "lopsided districts"	40	226	45.3%	42.5%	-1
<i>Bigger States</i>	9	223	52.3%	49.8%	-8
Smaller States	41	212	47.5%	44.8%	+2
<i>Reapportionment losers</i>	10	131	53.1%	45.0%	-7
Static States	32	150	49.2%	49.3%	+3
Reapportionment gainers	8	154	48.4%	47.1%	-2
Less competitive States	32	280	50.2%	50.4%	+3
More competitive States	18	155	50.2%	41.9%	-9
Democratic-controlled States	9	112	51.5%	57.1%	+3 1/2
Split-control States	27	206	50.4%	50.0%	-1 1/2
<b>Republican-controlled States</b>	<b>14</b>	<b>117</b>	<b>48.7%</b>	<b>33.3%</b>	<b>-8</b>

whether the State's electorate is closely divided between the two parties in federal elections; and (6) whether the governorship and both chambers of the state legislature were controlled by one political party at the time of congressional redistricting.<sup>57</sup>

Table 7 summarizes the results of this survey. For each group of States, the table shows the number of States in that group, the number of congressional districts in those States, the percentage of the major-party vote that Gore received in those States in the 2000 presidential election, the percentage of congressional districts that Democrats won in those States in the 2002 House elections, and the net change in the partisan composition of those States' congressional delegations from 2000 to 2002. The italicized rows highlight the types of States where the bulk of the pro-Republican bias is found. The key to understanding the table is to compare each party's vote share with its 2002 seat share, so the reader should focus particularly on the two columns of percentages.

In examining these results, it is important to recall that, while a 50% vote share should trans-

late into a 50% seat share under an unbiased districting scheme, there is no reason why a 55% vote share should translate into a 55% seat share, for either party. Indeed, under a single-member districting plan with two major parties and winner-take-all elections, there is typically a healthy "winner's bonus" that rewards the stronger party with a disproportionate share of the seats. So a party that gets 55% of the major-party vote can typically expect to win somewhere between 55% and 65% (or more) of the seats, while the weaker party that attracts 45% of the vote wins only 45% to 35% (or less) of the seats.

The first factor summarized in Table 7 is partisan strength in the electorate—or as the pundits would say, the "Blue States" (where Gore won) and the "Red States" (where Bush won). The two sets provide a neat natural experiment because Gore's 20 States and Bush's 30 States

<sup>57</sup> I tried grouping the States by other factors—including region (South versus non-South)—and found the results relatively unenlightening.

contain almost precisely the same population, and each candidate took about 56% of the major-party vote in his respective States. In the Bush States, Republicans in 2002 captured 63.3% of the districts, a net increase of 2½ seats and a reasonable return on Bush's 56% vote share.<sup>58</sup> By contrast, in the Gore States, Democrats in 2002 captured only 58.1% of the districts and experienced a net loss of 3½ districts. This suggests that the nationwide pro-Republican bias is at least a tad more likely to result from underrepresentation of Democrats in Gore States than from overrepresentation of Republicans in Bush States. But this factor seems less significant than the ones that follow.

The second factor is one already discussed: the presence or absence of "lopsided districts," all 27 of which are Democratic districts with Democratic Members of Congress, most of whom are African-Americans or Latinos representing majority-minority districts.<sup>59</sup> In the 40 States without any such districts, Bush carried 54.7% of the vote and in 2002 Republicans won 57.5% of the seats while gaining one seat net over the prior Congress. In the 10 States with lopsidedly Democratic districts, Gore carried 55.6% of the vote, which translated in the 2002 congressional elections into only 52.6% of the seats, as Republicans made a net gain of five seats in these States. That is not a good return for the Democratic vote share. It seems likely, then, that the inefficient "packing" of Democrats in these 27 districts harmed their party's seat share in these 10 States.

The third factor is the size of the State. Seven States have only one congressional district, so redistricting is irrelevant. Five States have only two districts apiece, so the impact of redistricting is necessarily limited there, too. (In fact, none of those States has a bipartisan House delegation.) But as the size of a State expands, the variety of available redistricting plans and the potential for partisan gerrymandering increase exponentially. Table 7 compares the 9 largest States with the 41 smallest States.<sup>60</sup> Each set has roughly the same population. In 2000, Bush won the set of smaller States with 52.5% of the major-party vote; in 2002, Republican congressional candidates carried 55.2% of the districts in those States. Republicans suffered a net loss of two seats in the smaller States. The interesting

numbers are in the larger States. There, Gore carried 52.3% of the major-party vote, yet Democratic congressional candidates in 2002 won less than half the districts. And Democrats suffered a net loss of eight seats in the larger States. This asymmetry suggests that the 2002 plan's partisan bias resides primarily in the larger States, where there was the greatest potential to manipulate district lines.

The fourth factor is reapportionment. Here, I divide the universe of States into three categories: States that gained seats due to the 2001 reapportionment; States that lost seats; and States that maintained the same number of seats as in the previous decade. Gaining or losing seats is always disruptive and opens the door for manipulation by mapmakers. In the States whose delegations did not change size, Bush carried 50.8% of the vote and in 2002 Republicans took 50.7% of the seats, a net drop of three seats from the prior Congress. In the States that gained seats through reapportionment, Bush carried 51.6% of the vote and in 2002 Republicans took 52.9% of the seats, for a net gain of two Republican seats. The noteworthy figures here are for the States that lost seats through reapportionment. There, Gore carried 53.1% of the vote but Democrats in 2002 won well under half the seats after losing seven seats net. One (but not the sole) cause of Democrats' failure in States losing seats was their weak showing in the "battle of the pairings." Three Democratic incumbents lost to Republican incumbents in the November general elections (in Connecticut, Illinois, and Mississippi), two Democratic incumbents lost to fellow incumbents in the primaries (in Michigan and Pennsylvania), and half a dozen other Democratic incumbents opted to retire from the House as a result of pairings or potential pairings (in Michigan, Pennsylvania, New York, and Wisconsin); by contrast, the reduction in

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<sup>58</sup> Table 7 is expressed in terms of Gore's percentage of the major-party vote and the Democrats' percentage of House seats. Their winning 44.0% of the vote and 36.7% of the seats therefore is identical to Bush and the Republicans winning 56.0% and 63.3%, respectively.

<sup>59</sup> As Micah Altman has correctly pointed out, this factor (unlike the other five factors) is partly endogenous.

<sup>60</sup> The nine largest States, according to the 2000 census, are California, Texas, New York, Florida, Illinois, Pennsylvania, Ohio, Michigan, and New Jersey.

seats caused by reapportionment contributed to the departure of only four House Republicans (in Indiana, New York, Oklahoma, and Pennsylvania). Even those pairing issues, however, cannot fully account for Republicans' success in the States that lost seats from reapportionment.

The fifth factor is whether the State's electorate is closely divided between the two parties in federal elections. Specifically, the 32 States where either Gore or Bush won the major-party vote by more than seven percentage points are distinguished from the 18 States where neither candidate could amass a seven-point edge. More or less, the latter 18 States are those where the presidential candidates devoted most of their time and resources in the final weeks of the 2000 campaign.<sup>61</sup> Gore took 50.2% of the major-party vote in each set of States. In 2002, Democrats gained three seats net in the 32 less competitive States and ended up taking just over half the seats. The Republican edge and the Democratic shortfall were located entirely in the 18 more competitive States, where Gore's 50.2% majority translated into only 41.9% of the seats—a nine-seat drop from the 2000 congressional results.

The sixth factor is the jackpot: which party, if any, had unified control of the state legislature and the governor's mansion when congressional lines were redrawn in 2001 or 2002. This, of course, is only a rough proxy for identifying the party that controlled redistricting and therefore had a license to gerrymander (absent any judicial intervention). A handful of States (with roughly a tenth of the Nation's 435 districts) used bipartisan or "nonpartisan" commissions to draw their congressional lines.<sup>62</sup> In some States, one party had potentially veto-proof supermajorities in both chambers of the legislature, which might have rendered irrelevant the party of the governor. In other States, regional, racial, or ideological divisions in the majority party may have made its numerical superiority illusory.<sup>63</sup> Even with all of these caveats, however, this sixth factor has by far the greatest explanatory power in locating the source of distributional bias.

Gore did only slightly better in Democratically controlled States than in split-control States, garnering 51.5% support in the former

and 50.4% in the latter. But Democrats' seat shares were far greater in States where Democrats controlled. Specifically, Democrats took only half the seats in split-control States but fully 57.1% of the seats in Democratically controlled States, capturing a net gain of 3½ seats. The results in the Republican-controlled States<sup>64</sup> were even starker: Bush got 51.3% of the vote in those States in 2000, yet in 2002 Republicans took a whopping 66.7% of the congressional seats there, while picking up eight seats net—more than the net Republican gain nationwide. In these Republican-controlled States, congressional Republicans started off strong and ended up with overwhelming majorities.

Although further research (including perhaps a multivariate analysis) is needed here, it seems likely that partisan control of redistricting was often the catalyst triggering the other salient factors listed in Table 7. When a large competitive State with dense Democratic concentrations was gaining or losing a seat or two due to reapportionment, those conditions created an *opportunity* to gerrymander. When that State's redistricting process was controlled by one political party, opportunity hooked up with motive and gave birth to bias.

#### *The impact of the 1998 and 2000 elections in four key States*

Based on the patterns summarized in Table 7, then, we can draw a few conclusions about

<sup>61</sup> Either Gore or Bush won the major-party vote by less than seven percentage points (*i.e.*, closer than 53.5% to 46.5%) in Florida, Pennsylvania, Ohio, Michigan, Washington, Tennessee, Missouri, Wisconsin, Arizona, Minnesota, Oregon, Iowa, Arkansas, Nevada, New Mexico, West Virginia, Maine, and New Hampshire.

<sup>62</sup> As it turned out, in most of these States neither party had unified control of the political branches of state government in 2001, so most are categorized on Table 7 as "split control" States.

<sup>63</sup> After trying to account for most of these caveats, the Republican Party's national redistricting team concluded that 161 new districts were in States with split control, 135 were in States with Democratic control, 98 were in States with Republican control, 34 were in States with commissions, and 7 were in at-large States, where no congressional redistricting took place. See Redistricting Department, Counsel's Office, Republican National Committee, "Redistricting Party Control: Congressional Only (2001)," available at <http://www.rnc.org/images/congonly.jpg>.

<sup>64</sup> I count Nebraska as a Republican-controlled State even though formally it has a nonpartisan state legislature.

the location of the pro-Republican distributional bias that distorts the national vote and gives Republicans a 50-seat head start in the battle for control of the House. The Democratic shortfall and Republican advantage are concentrated in large but relatively slow-growing States where Gore won by less than seven percentage points, where at least one district is lopsidedly Democratic, and where—most importantly—Republicans controlled the governorship and both houses of the state legislature at the time of congressional redistricting. Two States fit that description perfectly: Pennsylvania and Michigan. Florida and Ohio fit most of the criteria, too. Peculiarly, the four largest competitive States (where neither Gore nor Bush prevailed by more than seven percentage points)—Florida, Pennsylvania, Ohio, and Michigan—were all controlled entirely by Republicans in 2001 and 2002. Therein lies the most important story in the 2001–2002 round of congressional districting.

It is not surprising, then, that these were the only States where either party lost or gained as many as three seats (with Democrats losing three seats apiece in Pennsylvania and Michigan, and Republicans gaining three seats in Florida). Collectively, these four States began with 35 Democrats and 44 Republicans, and ended up with 26 Democrats and 51 Republicans—a remarkable outcome given that Gore carried 50.7% of the vote in these States and that half of the eight U.S. Senators are Democrats. Interestingly, with only one exception (Pennsylvania’s George Gekas), Republican maximization in these four States did not place any of the Republican incumbents in jeopardy, as each won by at least 14 percentage points. These States were also the sites of the most aggressive efforts by Democrats to have plans

invalidated as unconstitutional political gerrymanders, as I will soon discuss.

Table 8 summarizes what happened in these four States and in the rest of the country. For each group of States, the Table shows the percentage of the major-party vote that Gore received in the 2000 presidential election, the percentage of districts (under the old 2000 plan and the new 2002 plan) that Gore carried, the percentage of districts that Democratic congressional candidates won in 2000 and in 2002, and the net change in the partisan composition of the States’ congressional delegations from 2000 to 2002.

As Table 8 shows, in the other 46 States, Gore took 50.1% of the major-party vote in 2000, and Democratic congressional candidates won 50.3% of the seats (180 of 358) in 2002. These figures demonstrate that it generally is possible to draw unbiased congressional-redistricting plans. The figures for Florida, Pennsylvania, Ohio, and Michigan demonstrate that a fair result is far from inevitable.

Overall, Democrats won more than their share of redistricting battles in the courtrooms and state legislatures in 2001 and 2002. The Democratic Party’s redistricting tacticians played the hand they were dealt by the prior gubernatorial and state-legislative elections at least as effectively as did their Republican counterparts. But the Democrats were wounded, perhaps fatally, in 1998 and 2000, when the voters in Florida, Pennsylvania, Ohio, and Michigan elected (or reelected) Republican Governors, Republican State Senates, and Republican State Houses.

In the coming months and years, social scientists would do well to analyze the political, demographic, geographic, and legal roots of the partisan asymmetry described in this Ar-

TABLE 8. THE IMPACT OF FLORIDA, PENNSYLVANIA, OHIO, AND MICHIGAN

<i>Categories of States</i>	<i>Democratic presidential vote here 2000</i>	<i>Democratic presidential seat share</i>		<i>Democratic House seat share</i>		<i>Net change in Democratic House seats from 2000 to 2002</i>
		<i>2000</i>	<i>2002</i>	<i>2000</i>	<i>2002</i>	
All States	50.2%	47.8%	45.5%	48.7%	47.4%	–6
FL, PA, OH, and MI	50.7%	48.1%	36.4%	44.3%	33.8%	–8
The other 46 States	50.1%	47.8%	47.5%	49.7%	50.3%	+2

ticle. For now, however, I will take it on its face and examine the institutional consequences of partisan bias as it interacts with historically high levels of incumbent protection.

### HAS REDISTRICTING GIVEN REPUBLICANS A DECADE-LONG “LOCK” ON THE HOUSE?

We have already seen that political competition at the intra-district level was undermined by the 2001–2002 round of redistricting, as incumbents won in record numbers and by historically wide margins. But perhaps that result would be tolerable if political competition at the institutional level—that is, the battle for party control of the House of Representatives—promised to be robust and hard fought.<sup>65</sup> Unfortunately, it appears that will not be the case because the pro-Republican distributional bias severely tilts the national playing field. The combination of the 2002 plan’s large Republican bias and general lack of competitiveness may well conspire to keep Republicans in the majority and Democrats in the minority for the next five Congresses—even if, nationally, Democrats repeatedly capture more congressional votes than do Republicans. (Ironically, the low responsiveness of the 2002 plan also prevented Republicans from amassing a larger majority in the 108th Congress.)

The confluence of low responsiveness and high partisan bias presents a unique danger of institutional stasis. To see why, first imagine a plan with low responsiveness and low bias. For example, assume the plan had 200 solidly Republican districts and 200 solidly Democratic districts. Although voters in 400 of the 435 districts might be deprived a meaningful choice in the general elections, control of the House would still be determined by voters (albeit in only 35 of the 435 districts)—not by mapmakers. Conversely, if a plan had a high degree of both responsiveness and bias—say, with 150 solidly Republican districts, 100 solidly Democratic districts, and 185 truly competitive ones—the deck would be stacked against the Democrats, but they still potentially could take control of the House by running strong cam-

paigns and winning at least 118 of the 185 competitive districts. But in a system with high bias and low responsiveness, one party can develop what is effectively a “lock” on the legislature. Imagine a plan with 220 solidly Republican districts, 170 solidly Democratic districts, and only 45 truly competitive districts. Even if Democrats ran the table in the competitive districts, winning all 45, and taking a solid majority of the nationwide vote in the process, they would remain the minority party in the House with only 215 seats. Under that scenario, control of Congress is determined by the mapmakers, not the voters.

That last hypothetical does not accurately describe what happened in 2002, so we need to look at the actual figures. Although speculating about electoral politics eight or six or even two years down the road is dangerous, some basic facts give reason for Republicans to be optimistic and Democrats pessimistic. Democrats could hope to regain control of the House through any of five distinct (though potentially overlapping) strategies. But taken singly, none of them is very promising.

First, the Passive Strategy: If Democrats are patient, over the course of the decade they will slowly regain much (or perhaps all) of the eight-seat malapportionment bias that they lost in 2001–2002 as a result of reapportionment and the “one person, one vote” rule. But that will likely do no more than get them back to where they started the decade (at roughly 212 or 214 seats rather than 206); it is unlikely by itself to flip control of Congress. In any event, relying on the slow accrual of malapportionment bias would, at best, allow Democrats to control in the latter part of each redistricting decade, while ceding control to the Republicans in the earlier part of each decade—hardly a satisfying strategy.

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<sup>65</sup> Some have argued that the most relevant measure of competitiveness and entrenchment is not the competitiveness of individual districts but rather the frequency of changes in control of the legislature. See, e.g., Persily, *supra* note 1, at 656. Given that it has changed hands only once in the last 48 years, the U.S. House hardly does well by this measure, but now that the parties have roughly equal support in the electorate it seems particularly germane to consider the likelihood of partisan changeover in the next four Congresses.

Second, the Rising-Tide Strategy: Democrats may look forward to a “tide” that raises all Democratic candidates more or less across-the-board and thus allows them to win the seats that the Republicans won most narrowly in 2002. But very few Republicans won narrowly in 2002—and most of them were nonincumbents who are likely to perform much better when they benefit from their “sophomore surge” in 2004 (typically a five- to ten-point increase).<sup>66</sup> Even assuming that Democrats in 2004 retain every single seat that they currently hold, to regain a majority in the House they would have to pick up every seat that Republicans won by 7.7 percentage points or less, which would require that Democrats gain 3.9 points (and Republicans lose 3.9 points) across the board.<sup>67</sup> Global shifts of that magnitude are fairly rare. Each party has enjoyed two of them in the last 35 years: Democrats in 1974 and 1982, and Republicans in 1984 and 1994.<sup>68</sup> Of course, when one party has a great year, districts do not fall like dominoes, in perfect order by partisan past performance. But the scarcity of close Republican victories in 2002 does not bode well for Democrats in 2004 and beyond.

Third, the Cuisinart Strategy: In the course of a decade, it is certainly possible to see major partisan realignments in the electorate that scramble past patterns and thoroughly rearrange the partisan rank-ordering of congressional districts. Such a realignment might nullify, or enhance, the partisan bias and the noncompetitiveness that mark the 2002 plan today. For example, even though Gerald Ford and Ronald Reagan both ran against the same Democrat (Jimmy Carter), Ford’s performance in 1976 and Reagan’s in 1980 resulted in very different rank-orderings of the 435 congressional districts; Reagan did not simply do six points better than Ford across the board. Some Republicans believe that another scrambling of partisan allegiances began on September 11, 2001, and was clearly evident on Election Day 2002. But the Democrats’ ability to retake governorships in several of the largest Gore States (such as Illinois, Pennsylvania, Michigan, and Wisconsin) and to hang on to congressional open seats and incumbents in almost every Gore district suggests that the Republican optimism is premature, and perhaps altogether

misplaced. On the other hand, for Democrats to stake their hopes of recapturing the House on the emergence in 2004 or 2008 of a Democratic Ronald Reagan might be equally deluded.

Fourth, the Rifle Strategy: Democrats can try to pick off (or scare into retirement) most of the 27 Republican Members of Congress who currently represent Gore districts while holding on to the 35 Democratic incumbents currently representing Bush districts. Both halves of this strategy will be hard to execute. The half-dozen Members of Congress whose districts are most inherently hostile are all Democrats representing heavily Republican districts, so turnover in the split-ticket districts seems more likely to help the Republicans than to help the Democrats.<sup>69</sup> Furthermore, most of the 27 split-ticket Gore districts are found in four Northeastern States (New York, Pennsylvania, New Jersey, and Connecticut) and many are located in extraordinarily expensive media markets that will become particularly hard to blanket with television and radio advertising under the new McCain-Feingold campaign-finance regime<sup>70</sup>—a factor that may deter high-quality Democratic challengers who are not independently wealthy. And with very few exceptions, the incumbents in those Northeastern Gore districts are among the most moderate members of the House Republican Conference, making it harder (though certainly not impossible) to accuse them of being out of step with their constituents.

Fifth, the Open-Seat Strategy: Recognizing how difficult it is to defeat Republican incumbents, Democrats can focus instead on winning open seats not only in districts that Gore car-

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<sup>66</sup> In 2002 most of the close winners were Democrats.

<sup>67</sup> By contrast, even with only one third of the seats at stake, Democrats would have retained their majority in the U.S. Senate in November 2002 if they had improved their performance by only 1.2 points across the board.

<sup>68</sup> See VITAL STATISTICS IN CONGRESS, *supra* note 14, at 63 (Table 2-2).

<sup>69</sup> The six Democrats representing the strongest Bush districts are Charlie Stenholm, Ralph Hall, and Chet Edwards of Texas; Jim Matheson of Utah; Gene Taylor of Mississippi; and Earl Pomeroy of North Dakota. Bush carried all of their districts by at least 29 points, and in 1996 Bob Dole carried them all by at least 7 points.

<sup>70</sup> See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

ried but also in districts that Bush carried with less than, say, 55% of the major-party vote. (All told, there are 266 such districts.) Like the Passive Strategy, this approach requires considerable patience. In any given two-year cycle, only about a tenth of the House Republicans can be expected to retire from Congress (or die), and most of them will vacate districts that Bush carried handily.<sup>71</sup>

So, can we now conclude that redistricting has given Republicans a decade-long “lock” on the House? Probably not. Democrats in the coming decade will almost certainly hold more House seats than Republicans did during the period from 1959 to 1994 (when they vacillated between 140 and 192 seats). And some combination of the five strategies outlined above could potentially lead them back to majority control of the House. But Democrats have their work cut out for them. Merely capturing a slim majority of the popular vote nationwide will not restore their majority status in the House in this decade. To succeed, House Democratic candidates will have to expand their campaign strategies and earn support from citizens who have never previously voted for them—a task that will severely test the party’s capacity for innovation.

Furthermore, the disadvantage that Democrats suffer from the nonresponsiveness and pro-Republican distributional bias in the House will be exacerbated by a pro-Republican malapportionment bias in the Senate. Republicans today are relatively strong in the smaller States while Democrats do better in the larger States. As Table 7 shows, Bush carried 30 States to Gore’s 20, which suggests that Republicans have an inherent 60-to-40 head start in the battle for control of the Senate. For at least the next few election cycles, Republicans will benefit from a significant structural advantage in both chambers.

**REFORMING THE LAW OF  
REDISTRICTING TO DEAL  
WITH THE PROBLEMS  
RAISED BY EXTREMELY PARTISAN  
INCUMBENT-PROTECTING  
GERRYMANDERS**

The findings set forth in this Article cry out for reform. Districting plans that combine ex-

treme partisan bias with record levels of incumbency protection undermine political competition not only at the level of individual districts, where elections become foregone conclusions, but also at the institutional level, by effectively barring one political party from taking control of the legislative body even if it repeatedly garners a majority of the popular vote. But unfortunately, many of the more obvious avenues for reform either are unlikely to succeed in the foreseeable future or are downright undesirable. This part of the Article will make three concrete and realistic suggestions for how to begin fixing a system that now appears to be badly broken.

*Judicial invalidation of extremely partisan  
incumbent-protecting gerrymanders*

Perhaps the most obvious reform would be for courts to apply the federal constitutional limits on partisan gerrymandering much more aggressively. But there is little reason to think that will happen anytime soon. Although the Supreme Court’s 1986 decision in *Davis v. Bandemer* made partisan-gerrymandering claims under the Equal Protection Clause justiciable,<sup>72</sup> these claims have almost never (in Professor Gary King’s phrase) been “justished.” No districting plan for Congress or for either house of a state legislature has ever been invalidated under *Bandemer*.<sup>73</sup> In *Bandemer* itself, decided nearly 17 years ago, only two Members of the Court—Justice Powell and Justice Stevens—voted to invalidate the challenged plan.<sup>74</sup> Today, it again appears that only two of the nine Members—Justice Stevens and Justice Breyer—

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<sup>71</sup> In the 1996, 1998, and 2000 House elections, Republicans relied heavily on an Open-Seat Strategy while Democrats relied (with somewhat more success) on a Rifle Strategy. See VITAL STATISTICS IN CONGRESS, *supra* note 14, at 67 (Table 2-5) (showing the number of House seats that changed party each year through incumbent defeats and through the capture of open seats).

<sup>72</sup> See 478 U.S. 109, 118–27 (1986).

<sup>73</sup> *But cf. Republican Party v. Martin*, 980 F.2d 943, 947–49 (4th Cir. 1992) (invalidating North Carolina’s statewide system for electing trial judges, which had resulted in the election of just one Republican in 90 years), *reh’g denied sub nom. Republican Party v. Hunt*, 991 F.2d 1202 (4th Cir.) (in banc) (8-to-3 decision), *cert. denied*, 510 U.S. 828 (1993).

<sup>74</sup> See 478 U.S. at 161–85 (Powell, J., joined by Stevens, J., dissenting in part).

are prepared to invalidate extreme partisan gerrymanders. Both Justices dissented from the recent summary affirmance of a three-judge district court's judgment upholding Michigan's 2001 congressional-redistricting plan.<sup>75</sup> The Michigan litigation provides a particularly striking example of how the current state of the law has given rabidly partisan gerrymanderers the green light, causing the problems described earlier in this article. I will therefore describe the Michigan case in some detail.<sup>76</sup>

**The facts of *O'Lear v. Miller*, the Michigan gerrymandering case.** The Michigan case, *O'Lear v. Miller*,<sup>77</sup> presented a powerful fact pattern for the plaintiffs because the State's new congressional-redistricting plan will almost certainly consign Michigan's Democratic majority to minority status for the next decade. A consistent majority of voters prefer Democratic candidates in federal elections in Michigan, where Democrats have won the last three presidential contests, 9 of the last 10 U.S. Senate elections, and at least a plurality of votes cast statewide in 14 of the last 15 U.S. House elections.<sup>78</sup> But at the time of the 2001 congressional redistricting, Republicans controlled both chambers of the state legislature as well as the governorship.

The Michigan Republicans fully employed what Professor Grofman has called "the three basic tools of gerrymandering"—*packing*, *cracking*, and *kidnapping*.<sup>79</sup> As for "kidnapping," the plan they enacted in 2001 absconded with several Democratic districts: Specifically, the plan paired six Democratic Representatives into three districts, forcing them to retire from Congress or square off in Democratic primary fights. By contrast, the 2001 plan gave each of the seven Republican incumbents his own safe seat. The plan also favored Republicans in its allocation of previous constituents to incumbents' new districts. On average, 79% of the constituents in the Republican incumbents' new districts were also constituents in their prior districts, as compared to only 51% for Democratic incumbents' new districts.

Although Michigan was losing a congressional district due to reapportionment, the 2001 plan's "kidnapping" of old Democratic districts (and their Democratic incumbents) allowed it to create two open-seat districts, each designed

to elect a specific Republican candidate. One of the anointed newcomers was a member of the State Senate's redistricting committee (Thad McCotter), and the other was the State's chief elections officer (Candice Miller) and therefore the lead defendant in *O'Lear v. Miller*.

The two other basic tools of gerrymandering—"packing" and "cracking"—showed up in the districts' political composition. Although Al Gore won the State by about five percentage points, he carried only 5 of the 15 new districts. That pattern—with competitive Democratic candidates typically winning only 5 of 15 districts—was verified by Professor Allan J. Lichtman's expert analysis of the 27 most recent statewide elections. As the district court put it, "[d]espite the increasing majority of Democratic voters in Michigan, Republicans are likely to win ten of Michigan's fifteen congressional seats under the challenged plan."<sup>80</sup> In other words, the party that consistently wins the most popular support could have only half as many Representatives as the party that consistently finishes second. Professor Lichtman's analysis showed (and the November 2002 election returns subsequently verified) that even if the Democrats were to increase their statewide victory margin by 12 to 14 percentage points—

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<sup>75</sup> See *O'Lear v. Miller*, 123 S. Ct. 512 (2002). Because Justices do not ordinarily note dissents from summary affirmances, the willingness of Justices Stevens and Breyer to do so is significant. But the fact that none of the other seven Justices joined them may be much more significant.

<sup>76</sup> The following description of the facts and legal arguments in the Michigan case borrows heavily from the plaintiff-appellants' U.S. Supreme Court briefs, which I coauthored with Paul Smith, Marc Goldman, Jim Trilling, and Leondra Kruger.

<sup>77</sup> *O'Lear v. Miller*, 222 F. Supp. 2d 850 and 222 F. Supp. 2d 862 (E.D. Mich.) (three-judge court), *summarily aff'd*, 123 S. Ct. 512 (2002).

<sup>78</sup> See Clerk of the House of Representatives, *Statistics of the Congressional Elections* (biennial reports for 1974 to 2000), available at [http://clerk.house.gov/members/election\\_information/elections.php](http://clerk.house.gov/members/election_information/elections.php).

<sup>79</sup> See Bernard Grofman, *Redistricting 2000: What's Old, What's New, What Might Happen* (2001) (presentation to the National Conference of State Legislatures), available at <http://www.ncsl.org/programs/legman/redistrict/grofman1/sld003.htm>.

<sup>80</sup> *O'Lear*, 222 F. Supp. 2d at 853 (citing plaintiffs' complaint).

a shift of historic magnitude—they still would capture no more than 6 of the 15 new seats.<sup>81</sup>

Hundreds of thousands of Democratic voters were “packed” into five overwhelmingly Democratic districts, which Gore had won by landslide margins ranging from 22 percentage points to a whopping 58 points (79% to 21% in two majority-black Detroit-based districts). The State’s other Democratic voters were evenly spread, or “cracked,” among the other ten districts, where they will be stuck permanently in the minority. By contrast, Republican voters have been efficiently spread among those ten districts, in each of which they comprise a majority. Nine of those ten Republican districts are so safe that they are unlikely to generate any truly competitive general elections in the coming decade.<sup>82</sup> Thus, 14 of Michigan’s 15 districts are essentially noncompetitive.

So long as Michigan remains a competitive but Democratic-leaning State in federal elections, the 2001 plan will thwart majority rule. In each of the 27 most recent statewide elections, in the *median* congressional district, the Republican candidate ran between three and eight points ahead of his or her statewide performance.<sup>83</sup> That means that control of the State’s congressional delegation might be up for grabs if Republicans captured between 42% and 47% of the major-party vote statewide. But if Republicans win at least 47% of the vote, they will be virtually assured a majority of seats. By contrast, Democrats would need to win at least 58% of the statewide vote to assure themselves majority status in the delegation.<sup>84</sup>

The enacted plan also ran roughshod over the State’s traditional congressional-districting criteria, which are codified in a state statute. In 1999, when it was still unclear whether one party would control the 2001 redistricting process, the Michigan Legislature enacted the Congressional Redistricting Act of 1999 to constrain partisan manipulation.<sup>85</sup> The 1999 Act codified a strict hierarchy of specific formal districting criteria, giving particularly high priority to minimizing the number of county and municipal boundaries broken by congressional district lines. In the summer of 2001, Democrats in the legislature introduced an alternative redistricting plan that broke fewer county and municipal boundaries than did the Republicans’

map; the Democrats’ plan also lacked the partisan bias and noncompetitiveness that marred the Republicans’ plan. But the legislature, on nearly perfect party-line votes (with only one Republican and no Democrats defecting), adopted the Republicans’ plan. Thus, the legislature sacrificed compliance with state law for raw partisanship.<sup>86</sup>

Even more disturbing was the legislative process leading to enactment. Seizing advantage of their narrow but disciplined majorities, the Republican leaders of the Michigan Senate and House of Representatives rammed the 167-page bill containing the 2001 plan through both chambers in a matter of days. The House committee’s sole hearing ended at 11:00 p.m. on July 10 and the House then passed the bill in the middle of the night, at 2:35 a.m. on July 11. The rushed process successfully squelched

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<sup>81</sup> Professor Lichtman’s analysis also indicated that none of the nine heavily Republican districts in the 2001 plan had even a one-out-of-ten chance of going Democratic in the November 2002 elections. His predictions were validated in November, when each of the Democrats running in those districts lost by at least 17 points.

<sup>82</sup> The First District, in rural northern Michigan, increasingly leans Republican but currently has a strong Democratic incumbent, Bart Stupak. As long as his name appears on the ballot, Democrats—the majority party statewide—will likely win 6 of Michigan’s 15 seats. But if he retires from Congress within the decade, the district will probably swing into the Republican column, generating a 10-to-5 advantage for the State’s minority party.

<sup>83</sup> In a 15-district plan, the median district is the eighth most Republican and the eighth most Democratic.

<sup>84</sup> Under an unbiased plan, such as the one proposed by the Democrats in the Michigan legislature, control of the delegation would have been up for grabs if each party won between 47% and 53% of the statewide major-party vote, and neither party would have been virtually assured of majority control of the delegation unless it won at least 53% of the vote. Unlike the method used elsewhere in this Article (which generally assumes that the geographic distribution of votes in future congressional elections will bear a tight relationship to the geographic distribution of Bush votes and Gore votes in the 2000 presidential contest), the method used here effectively tested 27 different patterns of geographic distribution of the vote and found significant Republican bias under each of the 27 patterns.

<sup>85</sup> Mich. Comp. Laws § 3.63(c) (codifying the traditional criteria applied in *Good v. Austin*, 800 F. Supp. 557, 560–67 (E.D. & W.D. Mich. 1992) (three-judge court)).

<sup>86</sup> In the same bill that established the new districts, the legislature reenacted the 1999 Act’s criteria. The Michigan Supreme Court held that the twice-enacted criteria were nonbinding and unenforceable. See *LeRoux v. Secretary of State*, 640 N.W.2d 849, 860–64 (Mich. 2002).

public (and bipartisan) deliberation and led to two serious substantive errors. Specifically, one district turned out to be noncontiguous (a defect cured by amendment the next day, immediately before the legislature adjourned for the summer). And the plan as a whole violated the principle of “one person, one vote,” as 4,578 Michiganders were not assigned to *any* of the State’s 15 congressional districts. By the time the second error was discovered, the legislature was on summer recess. Sending the bill back for amendment in the fall would have opened it to precisely the kind of public scrutiny that the rushed process was designed to avoid. After several embarrassing news reports and a handful of meetings with the Republican leadership, the Secretary of the Senate opted to “fix” the mistake unilaterally. She sent the revised bill to Governor John Engler, and he signed it at 4:54 p.m. on Tuesday, September 11, 2001, about eight hours after terrorists attacked the World Trade Center and the Pentagon. Needless to say, Governor Engler’s signing made neither the evening news on September 11 nor the front page of any Michigan newspaper on the morning of September 12.<sup>87</sup>

**The legal arguments presented (and rejected) in *O’Lear v. Miller*.** Pat O’Lear and nine other Democratic voters filed suit in federal district court, alleging that the 2001 plan was a partisan gerrymander that would thwart the will of the majority of Michigan’s electorate for the next ten years, in violation of the Fourteenth Amendment’s Equal Protection Clause and of Article I, Sections 2 and 4 of the Federal Constitution. The state defendants conceded that the Michigan Legislature had acted with unconstitutionally discriminatory *intent*, but asked the district court to dismiss the complaint because it failed to allege sufficiently severe *effects*. Although the court initially found that the plaintiffs had demonstrated a likelihood of success on the merits of their partisan-gerrymandering claim, it then reversed course and dismissed the complaint with prejudice.<sup>88</sup> The U.S. Supreme Court summarily affirmed, with Justices Stevens and Breyer noting that they would have set the case for plenary briefing and oral argument.<sup>89</sup>

The *O’Lear* plaintiffs raised three legal theories in both the district court and the Supreme Court. The thrust of their argument was that, although the Constitution certainly does not mandate proportional representation, it does prohibit partisan manipulation of district lines designed to dictate electoral outcomes and to consign a political party to one-third or less of a State’s congressional seats even if that party consistently wins a majority of the popular vote statewide. Each of the plaintiffs’ three legal theories took aim at the problem from a different angle. Because the facts in the Michigan case were so strong (and in any event had to be taken as true, since the case was dismissed for failure to state a cognizable claim), the Supreme Court’s summary affirmance sends a strong message about the current state of the law. Therefore, it is worthwhile to recount the plaintiff-appellants’ three unsuccessful legal theories.

First, the *O’Lear* plaintiffs argued that Michigan’s 2001 plan violated the most sensible reading of Justice White’s opinion in *Davis v. Bandemer*.<sup>90</sup> Under that opinion, the plaintiffs argued, the Equal Protection Clause does not require proportional representation, but it does prohibit districting plans designed to thwart majority rule for an entire decade. The part of

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<sup>87</sup> See *LeRoux*, 640 N.W.2d at 856–60 (upholding the validity of the enactment even though the bill passed by the legislature on July 11 differed from the bill signed by the Governor on September 11). *But see id.* at 864–69 (Kelly, J., dissenting). All five Justices nominated by the Republican Party, but neither of the two Justices nominated by the Democratic Party, joined the majority opinion in *LeRoux*.

<sup>88</sup> See *O’Lear*, 222 F. Supp. 2d at 855–59.

<sup>89</sup> By summarily affirming the judgment below, rather than dismissing the appeal, the Court rejected the Republican intervenor-appellees’ novel argument that *Bandemer* applies only to state-legislative redistricting and that partisan-gerrymandering claims against congressional districts are nonjusticiable political questions outside the Court’s jurisdiction.

<sup>90</sup> 478 U.S. at 113–43. There is no consensus about what Justice White’s opinion really means. For a view quite different from the one presented here, see Daniel Hays Lowenstein, *Bandemer’s Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS* 64, 64–116 (Bernard Grofman ed. 1990). See generally *ELECTION LAW: CASES AND MATERIALS* 195–97 (Daniel Hays Lowenstein & Richard L. Hasen eds., 2d ed. 2001) (citing widely divergent commentaries on *Bandemer*).

the opinion that was joined by five other Justices explained that both “our general majoritarian ethic and the [Constitution’s] objective of fair and adequate representation” demand “a level of parity between votes and representation sufficient to ensure that significant minority voices are heard *and that majorities are not consigned to minority status.*”<sup>91</sup> When plaintiffs are affiliated with a State’s most popular political party, Justice White explained, “a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters.”<sup>92</sup>

Therefore, the *O’Lear* plaintiffs proposed a three-part test for unconstitutionally discriminatory effects in a partisan-gerrymandering case: (1) the likely partisan skew must be severe, handing a supermajority of the seats to one political party even if its candidates consistently receive less than half the popular vote statewide; (2) the likely duration of the skew must exceed a single election cycle and stretch on for most or all of the decade; and (3) the skew must be sufficient to strip effective control from the majority and deliver it to a minority faction. That is an extraordinarily difficult test to meet. It would almost never apply outside of politically competitive States that just happened to have one-party control of the governorship and state legislature at the time of the decennial redistricting, as Michigan did in 2001. The *Bandemer* plaintiffs certainly could not have met this test, but the *O’Lear* plaintiffs would have satisfied it, had the case gone to trial.

Second, the plaintiffs argued that Michigan violated the Equal Protection Clause when it subordinated its traditional (and codified) districting principles to the overarching goal of maximizing Republican partisan advantage. The plaintiffs contended that *Shaw v. Reno*<sup>93</sup> and its progeny helped answer the most vexing question presented by *Bandemer* claims: How partisan must a redistricting plan be before it presumptively violates equal protection? *Shaw* and its progeny suggest that the consideration of race—and likewise the consideration of political viewpoint—can be a factor in redistricting but cannot be *the* overriding factor. Under the *Shaw* doctrine, district courts routinely distinguish between primary and sec-

ondary motivations of redistricting bodies: A redistricting plan is presumptively unconstitutional if race was the *predominant* motivating factor and traditional districting principles were subordinated to that predominant factor.<sup>94</sup> If the Constitution bars a districting plan that is “‘unexplainable on grounds other than race,’”<sup>95</sup> a plan that is unexplainable on grounds other than political viewpoint also should be constitutionally suspect because the Court’s First Amendment political-patronage decisions prohibit States from classifying or discriminating against citizens on the basis of their partisan affiliation.<sup>96</sup>

The *O’Lear* plaintiffs argued that bringing the standards for judging partisan and racial gerrymandering into closer alignment would inject some refreshing candor into the field of redistricting litigation, which has suffered from a shortage of it. All too often, what are in reality partisan battles get fought out in the courts under the guise of racial controversies, using either the *Shaw* doctrine or the Voting Rights Act. Reconciling *Bandemer* and *Shaw* would reduce the incentives for racially inflammatory gamesmanship in the service of partisan goals.

Third, the *O’Lear* plaintiffs argued that enactment of Michigan’s 2001 plan exceeded the state legislature’s limited authority to regulate federal elections under Article I of the Constitution. Article I’s Elections Clause<sup>97</sup> does not give state legislatures the power to rig congressional elections and thereby thwart effective majority rule. In Article I the Framers vested the legislative power of the United

<sup>91</sup> *Bandemer*, 478 U.S. at 126 n.9 (majority opinion) (emphasis added).

<sup>92</sup> *Id.* at 133 (plurality opinion); see also *id.* at 135 (asking whether a redistricting plan “would consign the Democrats to a minority status . . . throughout the [decade]”).

<sup>93</sup> 509 U.S. 630 (1993).

<sup>94</sup> See *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

<sup>95</sup> *Shaw v. Reno*, 509 U.S. at 644 (citation omitted).

<sup>96</sup> See, e.g., *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Elrod v. Burns*, 427 U.S. 347, 372–73 (1976) (plurality opinion); *Police Dep’t v. Mosley*, 408 U.S. 92, 94–95 (1972); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

<sup>97</sup> U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for . . . 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 . . .”).

States in two chambers: the Senate, which was intended to represent the States, and the House of Representatives, which was intended to represent the People, and whose members were accordingly to be chosen “by the People of the several States.”<sup>98</sup> Under the Article I framework, the right to choose congressional representatives “belongs not to the States, but to the people,” because “the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people.”<sup>99</sup> Under recent Supreme Court precedents, the fundamental principle that the House of Representatives is to be chosen “by the People” bars States from valuing one person’s vote in a congressional election more than another’s,<sup>100</sup> from forbidding congressional candidates who have served more than two terms to appear on the ballot,<sup>101</sup> and from noting on the ballot a congressional candidate’s failure to support term limits.<sup>102</sup>

This principle that the House should be chosen “by the People” likewise should forbid States from distorting congressional district lines to dictate the outcomes of congressional elections and to favor the party that momentarily controls the legislature, at the expense of the majority of the electorate.<sup>103</sup> Citing the records of the Federal Convention, *Elliot’s Debates*, and the first volume of the *Annals of Congress*, the *O’Lear* plaintiffs demonstrated that the Framers feared that state legislators would abuse their Elections Clause authority in order to override majority rule and boost a narrow class of candidates.

Michigan’s 2001 plan violated the Elections Clause for two reasons. *First*, the plan was designed to dictate electoral outcomes in 14 of the State’s 15 congressional districts, giving Michigan voters little more than the power to ratify results already engineered by the legislature’s mapmakers. *Second*, the plan frustrates the majority will by drawing districts that jettisoned the State’s duly enacted districting criteria to maximize Republican advantage in congressional elections. The plaintiffs’ Article I theory therefore wrapped together the twin problems of noncompetitive districting and partisan bias.<sup>104</sup>

The Michigan federal district court dismissed the plaintiffs’ equal-protection claims because, aside from the 2001 plan’s severe partisan skew, the complaint had failed to allege any of three “‘other indicia’” of political powerlessness.<sup>105</sup> *First*, the plaintiffs had failed to allege that Democratic voters were being deprived of their rights to register, organize, cast ballots, and raise campaign funds, and thus the plaintiffs had not alleged that Democrats would be *completely* excluded from the political process.<sup>106</sup> *Second*, the plaintiffs had alleged only that Republican Representatives elected from strongly Republican districts would be “largely” indifferent to the interests of their Democratic constituents. To state a cognizable claim of partisan gerrymandering, the court held, plaintiffs would have to allege that these Representatives would *entirely* ignore their Democratic constituents, refusing even to listen to their views or to help them with constituent casework.<sup>107</sup> *Third*, the plaintiffs had failed to allege that Democrats have “no chance” of obtaining a more favorable districting plan ten years hence, after the next reapportionment in 2011.<sup>108</sup> The possibility that by 2011 Democrats might control one legislative chamber or the governorship suggested to the court that a “political solution” is “within reach by the next

<sup>98</sup> U.S. CONST. art. I, § 2.

<sup>99</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995).

<sup>100</sup> See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964); see also *Karcher v. Daggett*, 462 U.S. 725, 730 (1983).

<sup>101</sup> See *U.S. Term Limits*, 514 U.S. at 832–35.

<sup>102</sup> See *Cook v. Gralike*, 531 U.S. 510, 525–26 (2001).

<sup>103</sup> See *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 402–03 (D. Md. 1991) (three-judge court) (Niemeyer, J., dissenting), *summarily aff’d*, 504 U.S. 938 (1992).

<sup>104</sup> Similar reasoning could be used to invalidate gerrymandered state-legislative districting plans under the Guarantee Clause, U.S. CONST. art. IV, § 4, which guarantees to each State a “Republican Form of Government.” See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 105–07, 114–17 (2000).

<sup>105</sup> *O’Lear v. Miller*, 222 F. Supp. 2d 850, 859 (E.D. Mich.) (three-judge court) (quoting *Davis v. Bandemer*, 478 U.S. 109, 143 n.21 (1986) (plurality opinion)), *summarily aff’d*, 123 S. Ct. 512 (2002).

<sup>106</sup> See *id.* at 856–58.

<sup>107</sup> See *id.* at 857–58, 863.

<sup>108</sup> *Id.* at 858.

decade" and therefore the discriminatory effects of the 2001 plan lacked the "substantial permanency" necessary to violate the Equal Protection Clause.<sup>109</sup> The district court never explained how a partisan-gerrymandering plaintiff challenging a congressional plan could ever satisfy any of these three tests. The court's rejection of plaintiffs' Article I claim was even more sweeping: It held, contrary to Supreme Court precedent, that the Elections Clause "has no role to play" in authorizing state legislatures to redraw congressional districts.<sup>110</sup>

**The lessons of *O'Leary v. Miller*.** The fact that only two Justices wanted to note probable jurisdiction in *O'Leary* suggests that partisan-gerrymandering plaintiffs in other States will face an uphill climb.<sup>111</sup> Justice O'Connor, who has been the swing vote in many recent redistricting cases,<sup>112</sup> seems particularly inhospitable to partisan-gerrymandering claims. According to Justice Brennan's conference notes, when the Court initially met in 1985 to discuss *Bandemer*, Justice O'Connor (the only former state legislator on the Court) said that any legislative leader who failed to do what the *Bandemer* defendants had done "ought to be impeached."<sup>113</sup>

The evidence presented in this Article, however, suggests that the rationale behind Justice O'Connor's blanket rejection of partisan-gerrymandering claims may no longer be empirically valid today, even if it was in the 1980s. Her *Bandemer* concurrence, which argued that these claims should be deemed nonjusticiable political questions, assumed that partisan gerrymandering is a "self-limiting enterprise" because efforts to maximize partisan advantage will cut the margins too thin, weakening a party's safe seats and exposing its own incumbents to significantly greater risks of defeat.<sup>114</sup> As we have seen, at least at the congressional level, that assumption no longer holds: Due to proficient gerrymandering in States such as Florida, Pennsylvania, Ohio, and Michigan, extreme incumbent protection and record levels of noncompetitiveness now coexist with a huge partisan skew. Nonetheless, nothing in Justice O'Connor's opinions suggests she is prepared to abandon her pro-defendant stance on this issue.

If the federal courts remain unwilling to in-

validate even the most severely partisan incumbent-protecting gerrymanders under the Federal Constitution, then the next line of defense is state constitutional law. Because the Eleventh Amendment deprives federal courts of the power to enjoin state officials based on state-law violations,<sup>115</sup> only state courts can use state constitutional law to strike down gerrymanders. Democrats tried this tack in Pennsylvania in 2002 with no success, even though the Commonwealth's constitution contained not only an equal-protection provision but also a "free and equal elections" clause.<sup>116</sup> Of course, the beauty of a state-constitutional strategy is that each State has its own judiciary and its own body of constitutional law.<sup>117</sup>

The state-constitutional approach, however, does raise at least two problems. First, it may be difficult to convince state courts not to follow lockstep the U.S. Supreme Court's *Bandemer* jurisprudence.<sup>118</sup> Second, echoing Chief Justice Rehnquist's concurrence in *Bush v. Gore*,<sup>119</sup> defendants will argue that the Elections

<sup>109</sup> *Id.* at 856, 863.

<sup>110</sup> *Id.* at 859. *But see, e.g., McPherson v. Blacker*, 146 U.S. 1, 26 (1892); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567, 569–70 (1916); *Smiley v. Holm*, 285 U.S. 355, 363–73 (1932).

<sup>111</sup> *But see Martinez v. Bush*, 234 F. Supp. 2d 1275, 1353 (S.D. Fla. 2002) (three-judge court) (Jordan, J., concurring) ("I urge the Supreme Court to note probable jurisdiction in this case or one of the other political gerrymandering cases arising from this electoral cycle and hear oral argument."). In October Term 1988, Judge Jordan served as a law clerk to Justice O'Connor.

<sup>112</sup> *See, e.g., Bush v. Vera*, 517 U.S. 952, 990–95 (1996) (O'Connor, J., concurring); *Miller v. Johnson*, 515 U.S. 900, 928–29 (1995) (O'Connor, J., concurring); *Easley v. Cromartie*, 532 U.S. 234 (2001).

<sup>113</sup> THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 866 (Del Dickson ed., 2001) (internal quotation marks omitted).

<sup>114</sup> *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring in the judgment) (citing BRUCE CAIN, THE REAPPORTIONMENT PUZZLE 151–59 (1984)).

<sup>115</sup> *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97–125 (1984).

<sup>116</sup> *See Erfer v. Commonwealth*, 794 A.2d 325, 331–34 (Pa. 2002) (citing PA. CONST. art. I, §§ 1, 5, 26).

<sup>117</sup> *Cf., e.g., Brown v. Butterworth*, 831 So. 2d 683, 684–89 (Fla. Dist. Ct. App. 2002) (reversing the dismissal of a state-constitutional attack on Florida's new congressional map).

<sup>118</sup> *See generally* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW § 1–6, at 1–40 to 1–49 (3d ed. 2000) (describing barriers to independent interpretation of state constitutions).

<sup>119</sup> 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

Clause expressly delegates the power of congressional redistricting to “each State . . . Legislature,”<sup>120</sup> not to each State, and that the Clause therefore bars a state court from applying state constitutional law to invalidate a congressional map enacted by the state legislature.<sup>121</sup>

As a general matter, one cannot deny that the judicial invalidation of extreme partisan gerrymanders raises difficult issues of institutional competence and separation of powers.<sup>122</sup> I therefore will turn next to two interlocking reform proposals that are more limited in scope.

*Bringing overtly political considerations into the remedial stage of redistricting litigation*

Even if courts will not strike down incumbent-protecting partisan gerrymanders that States have enacted, the issues raised in this Article can still play a key role in redistricting litigation at the remedial stage. In redistricting cases, courts can reach the remedial phase under either of two very different scenarios.

First, if the State enacts a new plan that violates the Voting Rights Act, the *Shaw* doctrine, the “one person, one vote” rule, or any other legal requirement, then the court typically will enter a declaratory judgment and (time permitting) will order the State to cure the violation. If the State fails to timely enact a remedial map or if the enacted remedy is itself illegal, then the court must either draw its own plan or choose among plans submitted by the litigants.<sup>123</sup> In 2001 and 2002 this scenario was quite rare. No newly enacted congressional plans were invalidated under the Voting Rights Act or the *Shaw* doctrine, and only one (in Pennsylvania) was struck down for violating “one person, one vote.”<sup>124</sup>

Second, if a State fails to enact a new redistricting plan at all—as is particularly likely when neither party has unified control of the two legislative chambers and the governorship<sup>125</sup>—the only districting plan on the books is the one from ten years earlier, which invariably violates the stringent “one person, one vote” requirement. In that situation, the liability ruling invalidating the ten-year-old plan is uncontroversial, and the litigation proceeds directly to the remedial stage, with the court fill-

ing the legislative vacuum. Again, the court can either draw its own map or choose among those submitted by litigants. But in either event, the court will almost always have to choose among multiple maps, several of which are perfectly legal. Therefore, the court must make recourse to some “extra-legal” criteria. Typically courts have claimed to prefer maps whose districts are more compact visually or more respectful of political subdivisions (*i.e.*, with district lines falling largely on county and municipal boundaries) or more respectful of “communities of interest,” however defined.

These “formal” criteria are worthy ones, but even their most conscientious application does not ensure that the resulting map will be fair politically.<sup>126</sup> In the Michigan case, for example, plans that broke the same number of county and municipal boundaries (the key formal criterion codified in the 1999 Congressional Redistricting Act) could have generated

<sup>120</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>121</sup> The Pennsylvania Supreme Court rejected this argument in *Erfer*, 794 A.2d at 330–31.

<sup>122</sup> See Lowenstein, *supra* note 90, at 64–116.

<sup>123</sup> See generally *Upham v. Seamon*, 456 U.S. 37, 40–44 (1982) (*per curiam*); *White v. Weiser*, 412 U.S. 783, 793–97 (1973).

<sup>124</sup> See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675–78 (M.D. Pa.) (three-judge court) (invalidating a congressional plan for a 19-person total deviation), *appeal dismissed as moot sub nom. Jubelirer v. Vieth*, 123 S. Ct. 67 (2002).

<sup>125</sup> In 2001 and 2002, 16% of all congressional districts were adopted by federal or state courts rather than legislatures or commissions. See *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex. Nov. 14, 2001) (three-judge court), available at <http://gis1.tlc.state.tx.us/static/pdf/opinion.pdf>, *summarily aff'd*, 122 S. Ct. 2583 (2002); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002) (three-judge court); *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss.) (three-judge court), *prob. juris. noted sub nom. Branch v. Smith*, 122 S. Ct. 2355 (2002); *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Spec. Redistricting Panel Mar. 19, 2002), available at <http://www.commissions.leg.state.mn.us/gis/html/plans2002.html>; *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002); *Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002); *Perrin v. Kitzhaber*, No. 0107-07021 (Cir. Ct. of Multnomah Cty., Ore. Oct. 19, 2001); *Jepsen v. Vigil-Giron*, No. D0101-CV-2001-02177 (Dist. Ct. of Santa Fe Cty., N.M. Jan. 2, 2002), available at [http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/NM\\_D0101\\_CV\\_2001\\_02177\\_01-02-02.pdf](http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/NM_D0101_CV_2001_02177_01-02-02.pdf).

<sup>126</sup> See Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 88 (1985) (“The commonly held view that reliance on formal criteria such as compactness or equal population can prevent gerrymandering is simply wrong.”).

results ranging between ten-to-five Republican and six-to-nine Democratic. Indeed, in some cases, applying formal criteria while ignoring overtly political ones will generate partisan bias unintentionally.<sup>127</sup> For example, in Michigan a mapmaker who was not told where the incumbents lived could easily have “paired” four incumbents from one political party while pairing zero incumbents from the other party—hardly a neutral outcome.

A court that excludes consideration of all “political” facts might stumble into a neutral and fair map, but it would be more likely to stumble into an unfair and biased one. True neutrality cannot be consistently achieved by happenstance.<sup>128</sup>

Courts therefore should balance the usual formal criteria with overtly political considerations, grounded in empirical evidence, to assure a reasonable degree of *partisan fairness*, *responsiveness*, and *accountability*, as those terms are defined here:

- The criterion of “partisan fairness”—the most important of these three overtly political criteria—seeks to minimize distributional bias that favors one major political party over the other in a tightly competitive election year. Typically, the hallmark of a fair plan is that half the districts are more Democratic than the average district and half are more Republican.<sup>129</sup> Furthermore, disparate pairing of only one party’s incumbents (as in the Michigan case described above) usually violates the criterion of partisan fairness.
- The criterion of “responsiveness” seeks to ensure the creation of a healthy number of competitive districts, so that the composition of the State’s congressional delegation will shift in direct response to significant changes in voters’ preferences. If one party or the other is likely to win at least 60% of the vote in *every* district, only an unprecedented political tidal wave would put any of the seats in play; such a plan would lack responsiveness. Furthermore, to avoid undermining the criterion of partisan fairness, responsiveness should be symmetrical: For example, a five-point

gain in voter support should be as valuable for one major party as for the other.<sup>130</sup>

- The criterion of “accountability” (or “minimizing voter disruption” or “least change”) attempts, within the constraints established by the other criteria, to maximize the number of citizens who will retain the opportunity to vote for incumbents who have served them well and against incumbents who have served them poorly. By minimizing voter disruption in this way, the new plan helps to hold the representatives accountable to the represented. Although “accountability” (or “minimizing voter disruption”) may sound like a euphemism for incumbency protection, the concepts are in fact quite distinct: Pure incumbency protection typically involves substantial voter disruption, as redistricters “swap” precincts along the borders separating incumbents of opposite parties in order to make the Democratic incumbents’ districts more Democratic and the Republican incumbents’ districts more Republican. Those kinds of maneuvers undermine, rather than enhance, accountability.

<sup>127</sup> See Micah Altman, *Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders*, 17 POL. GEOGRAPHY 989, 1000–06 (1998) (suggesting that compactness standards help Republicans because it is more difficult for Democrats to gerrymander than for Republicans to gerrymander, when the same compactness standard is applied to both).

<sup>128</sup> See ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 19 (1968) (“Politically uninformed districting solely on the basis of symmetry, compactness, and population equality, with the aid of computers, can only lead to chance goodness or badness, or to a bad plan which is the product of hidden special motives cloaked in the guise of population considerations alone.”).

<sup>129</sup> Or, to put it differently, the partisan composition of the median district should closely resemble that of the mean district.

<sup>130</sup> In States (unlike Michigan) where one party routinely wins a strong majority of the vote, that party might capture *all* the seats under a technically unbiased, highly responsive plan—leaving the other major party completely unrepresented, which may be perceived as unfairly stifling minority voices. See J. Morgan Kousser, *Estimating the Partisan Consequences of Redistricting Plans—Simply*, 21 LEGIS. STUD. Q. 521, 535 (1996).

The Texas congressional plan ordered into effect by a three-judge federal district court in 2001 provides a nice example of how these criteria can work together.<sup>131</sup> One barometer of partisanship frequently cited in the Texas litigation was the average of all contested statewide elections held in the most recent midterm year, in 1998. Under the court-drawn plan, the average district was roughly 56% Republican and 44% Democratic using that barometer, and the Republicans held a slight edge with 17 districts being more Republican than average and 15 districts being more Democratic than average. Thus, the partisan bias in the court's plan was fairly low. Although different areas of Texas experienced dramatically different population growth in the 1990s, the 2001 plan also minimized voter disruption and fostered accountability, as 78% of all Texans remained in the same district as their incumbent Member of Congress. That helped three Democratic incumbents in relatively Republican districts (Congressmen Charlie Stenholm, Ralph Hall, and Chet Edwards) and one Republican incumbent in a relatively Democratic district (Henry Bonilla) to win reelection in November 2002, thus protecting the seniority of Texas's congressional delegation while empowering centrist, independent, split-ticket voters. Three of those four candidates got less than 52% of the total vote in November 2002, and all four victories depended in part on "crossover" support from voters who more often than not prefer the opposite party's candidates.

As with any set of multiple redistricting criteria, the three overtly political criteria of partisan fairness, responsiveness, and accountability sometimes work at cross-purposes. For example, when a ten-year-old map contains a significant partisan skew, it may be impossible to maximize both partisan fairness and accountability because reducing or eliminating the old map's bias will necessarily require significant redrawing of the districts which, in turn, will reduce the number of voters who could vote for or against their incumbent Members of Congress. But when a court is thrust into a quasi-legislative role in the wake of a political deadlock, the best approach is one that balances these three overtly political crite-

ria with the traditional formal criteria of contiguity, compactness, and respect for political subdivisions and definable communities of interest. That balanced approach is most likely to generate a map that is fair to all—Republicans and Democrats, incumbents and challengers, satisfied and dissatisfied voters.

The need for balance, fairness, and political transparency has been heightened by the Supreme Court's seminal 1993 decision in *Grove v. Emison*.<sup>132</sup> The *Grove* Court unanimously held that state-court litigation ordinarily must take priority over federal-court litigation challenging the same districting plan.<sup>133</sup> State judges, unlike federal judges, are often elected officials and in many States are nominated by political parties. In some States, they even run on a partisan ballot in the general election. When an elected state judge must choose one remedial redistricting plan over another, any assertion that the decisionmaking process was "politics-blind" will encounter heavy skepticism. It is better for judges—especially those subject to electoral pressures—to admit candidly that redistricting is an unavoidably political process and then to explain why the plan they chose is politically fair, citing empirical evidence that was vetted in open court.

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<sup>131</sup> See *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex. Nov. 14, 2001) (three-judge court), available at <http://gis1.tlc.state.tx.us/static/pdf/opinion.pdf>, summarily *aff'd*, 122 S. Ct. 2583 (2002). Detailed data on the court-ordered plan can be found at the Texas Legislative Council's website. See "Texas Congressional Districts for 2002 Elections as Ordered by Eastern District of Texas, Federal Three-Judge Panel, November 14, 2001: Plan 01151C," available at <http://gis1.tlc.state.tx.us/static/pdf/planc01151r.pdf>.

<sup>132</sup> 507 U.S. 25 (1993).

<sup>133</sup> *Id.* at 32–37; see also Brian Hauck, Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 887–90 (2001). Although *Grove* involved both state-legislative and congressional districts, a Mississippi congressional-redistricting case pending before the Supreme Court as this Article goes to press raises the question whether the Elections Clause of Article I limits the applicability of *Grove* when congressional districts are at stake. See *Branch v. Smith*, 122 S. Ct. 2355 (2002) (noting probable jurisdiction of *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002) (three-judge court) (holding that the Elections Clause prohibited a Mississippi state trial court from ordering a congressional plan into effect)).

*Placing partisan fairness, responsiveness, and accountability at the forefront of a State's redistricting criteria*

Just as courts engaged in the remedial stage of redistricting litigation should put great weight on overtly political considerations such as partisan fairness, responsiveness, and accountability, so too should state redistricting authorities, whether they be legislatures or bipartisan redistricting commissions. State redistricting criteria not enshrined in state constitutions are generally not legally enforceable, and in my experience they provide little real constraint when one political party completely rules the redistricting process. But in States that have bipartisan commissions or split legislatures or partisan divides between the legislature and the governor, tightly drafted redistricting criteria can have a major impact.

For example, the three criteria described above—partisan fairness, responsiveness, and accountability—were taken almost verbatim from the playbook of the tie-breaking member of the 2001 bipartisan commission that redrew New Jersey's state-legislative districts, Princeton political scientist Larry M. Bartels.<sup>134</sup> Unlike New Jersey's separate bipartisan commission for congressional redistricting—where the tie-breaking member was largely irrelevant because both sides were content with a sweetheart deal that would leave undisturbed a seven-to-six Democratic majority in the State's congressional delegation—in the state-legislative context neither party was willing to cede majority status to the other, so Professor Bartels had to exercise his tie-breaking authority. Early in the commission's proceedings, Professor Bartels made it clear that he would choose whichever legal plan best complied with the three criteria described above, placing a particularly strong emphasis on partisan fairness. After forcing each side to make significant concessions, he ultimately chose a plan that elected in November 2001 a tied State Senate (with 20 Democrats and 20 Republicans) and a narrowly Democratic General Assembly (with 44 Democrats and 36 Republicans)—an accurate reflection of the statewide vote tallies for each party's candidates. Nearly half the districts (18 of 40) generated competitive contests in 2001,

with the winner getting less than 60% of the major-party vote in the general election.

At the same time, Professor Bartels's approach led him to recognize that there was a concentration of overwhelmingly Democratic (and heavily minority) precincts in and around Newark that, if kept together in the fewest possible districts, would inevitably create a pro-Republican bias in the statewide map. By unpacking that concentration and spreading those voters among four districts rather than three, the plan Professor Bartels adopted not only avoided a substantial partisan skew, but also led to the election of record numbers of African-Americans, Latinos, and Asian-Americans to the New Jersey Legislature in November 2001.

These results would never have been attained if one political party had unilaterally controlled the process. Nor could the bipartisan commission have attained these results if its tie-breaking member had opted to "take politics out of the process," ignore political data, and rely exclusively on formal criteria such as compactness.<sup>135</sup> Only by methodically studying recent voting patterns throughout the State and by listening closely to Democratic and Republican commissioners alike could Professor Bartels gather the knowledge necessary to create a truly balanced map.<sup>136</sup>

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<sup>134</sup> See Sam Hirsch, *Unpacking Page v. Bartels: A New Redistricting Paradigm Emerges in New Jersey*, 1 Election L.J. 7, 10–11 (2001) (citing Professor Bartels's descriptions of the criteria he used in choosing a new plan).

<sup>135</sup> Interestingly, one of the most eloquent advocates of this "anti-politics" approach today is former Congressman Dan Rostenkowski. See Dan Rostenkowski, *Take Politics Out of Redistricting*, CHICAGO SUN-TIMES, Nov. 10, 2002, at 33 ("I have a long-standing bias against good-government nonpartisan institutions because I believe it is healthy for politicians to fight it out—and ultimately compromise—on the policy choices we face. But I've reluctantly decided that [redistricting] is one situation where my general rule simply doesn't work."); see also David J. Garrow, *Ruining the House*, N.Y. TIMES, Nov. 13, 2002, at 29 ("There is one solution: control over redistricting must be taken away from politicians whose goal is to minimize competitive democratic elections and maximize the number of safe seats for their party.").

<sup>136</sup> See DIXON, *supra* note 128, at 20 ("[I]t is not possible to depoliticize apportionment simply by depoliticizing the instrument that does the apportionment work, and/or by truncating the data considered by such instrument.").

The New Jersey Apportionment Commission has succeeded over the last three decades not only because it gives both major parties equal representation (something they would not usually have if the legislature ran the process), but moreover because its tie-breaking members have taken an overtly political—but consciously balanced—approach to the inherently political task of redistricting. As Professor Bartels’s predecessor, Dean Donald E. Stokes, put it, the commission “allows the practical political wisdom of the parties to flow into the redistricting process while constraining the process to meet clear tests of the public interest.”<sup>137</sup> That is a model that all States would do well to emulate.<sup>138</sup>

A synergy exists between the latter two recommendations in this Article—bringing overtly political criteria into the States’ redistricting processes and into the courts’ remedial-stage redistricting litigation. In States where neither party has unilateral control over redistricting, the decision whether to reach across the aisle and seek compromise is all too often based on calculations about whether litigation triggered by a deadlock would be heard by “friendly” or “unfriendly” judges. Implicit in these calculations is a belief that “friendly” judges can always find a way to justify choosing a favorable map and “unfriendly” judges can always find a way to do the opposite. As long as judges are free to justify their choice of one remedial map over another solely by reference to malleable, ostensibly apolitical criteria such as visual compactness or respect for “communities of interest,” that belief is not unfounded.<sup>139</sup> But if, in the future, judges are expected to hear extensive expert testimony about empirical election results and to select a map that minimizes partisan bias and fosters responsiveness and accountability, their discretion will be substantially bounded, so the choice of forum may not loom so large and the prospect of reaping a windfall by litigating before a friendly court may seem more remote. Thus, leaders of both major parties will have greater incentives to compromise around a consensus plan with relatively low partisan bias.<sup>140</sup>

## CONCLUSION

The Framers had a vision for the United States House of Representatives. It was to stand apart from the Senate, the Presidency, and the Supreme Court as our one truly majoritarian national institution, as the body most responsive to popular sentiment, with no intermediary between it and the people. It is not a mistake that Representatives were given two-year terms while other federal officials were given four years or six or life tenure. The Framers named it the House of Representatives for good reason.

But today, a handful of congressional and state-legislative leaders pursuing a narrow partisan and ideological agenda are threatening to transform what should be our most dynamically democratic institution into something sclerotic and skewed. The 2001–2002 round of congressional redistricting—which combined a decade-old (but previously unnoticed) Repub-

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<sup>137</sup> Donald E. Stokes, *Is There a Better Way to Redistrict?*, in *RACE AND REDISTRICTING IN THE 1990s*, at 345, 345 (Bernard Grofman ed., 1998); see also *id.* (“[New Jersey’s method of state-legislative redistricting lies] somewhere between the British and Commonwealth practice of assigning the task to neutral commissioners who are notably short on practical wisdom and the American practice of leaving the drawing of boundaries to the ordinary political process, with results that are notably short on public interest.”).

<sup>138</sup> One mechanism for instituting New Jersey-style reforms in the face of legislative intransigence is through the popular initiative. Cf. DIXON, *supra* note 128, at 333–40, 613–14 (describing the genesis of the 1966 constitutional amendment creating the New Jersey Apportionment Commission). Efforts to pass redistricting initiatives should commence early in the decade, before it becomes apparent in each State which political party will benefit from a more evenhanded process.

<sup>139</sup> Compare *McClure v. Secretary of the Commonwealth*, 766 N.E.2d 847, 849–57 (Mass.) (refusing to enforce a state-constitutional provision requiring respect for political subdivisions), *cert. denied*, 123 S. Ct. 569 (2002), with *Stephenson v. Bartlett*, 562 S.E.2d 377, 392–98 (N.C.) (giving an extraordinarily energetic reading to a similar state-constitutional provision), *stay denied*, 122 S. Ct. 1751 (2002).

<sup>140</sup> For the view that the disease diagnosed in this Article requires stronger medicine than I am willing to prescribe, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) (proposing the invalidation of all “purposeful” redistricting plans drawn by partisan operatives); see also Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684 (2002) (responding to Professor Persily’s critique of this proposal).

lican bias with a newly heightened degree of incumbent protection—has brought us one step closer to government under a United States House of Unrepresentatives.

There is no simple cure for this ailment. But “politics-blind” redistricting will no more cure partisan vote dilution than “colorblind” redistricting will cure minority vote dilution. At some point, state courts and even the U.S. Supreme Court may recognize the need to intervene and strike down severely partisan incumbent-protecting gerrymanders. In the meantime, a two-barreled strategy of encouraging remedial courts and state redistricting bodies alike to consider overtly political factors no less than formalistic ones provides the best solution realistically available. Inherently political issues revolving around party and incumbency have always been, and will always

be, central in redistricting. They are best brought into the light, where political players can debate them empirically and (relatively) honestly, rather than through proxy wars over compactness or respect for city or county lines or, most disturbingly, race.

Without exception, redistricting insiders today fully appreciate the importance of political party affiliation. Now those who wish to constrain them must do the same.

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