Essay

The Meaningful Vote Commission: Restraining Gerrymanders with a Federal Agency

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If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[1]

Introduction

Federalist No. 51 could provide some guidance as America heads into the 2010 redistricting cycle. The states will once again draw new maps for electing members of Congress and, without auxiliary precautions, the states will once again fail to control themselves, using those maps to rig elections. And the odds of effective judicial review are lower than ever, because the Supreme Court twice this decade[2] failed

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1 THE FEDERALIST NO. 51, at 118 (James Madison) (New York, J. & A. McLean 1788).

2 League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399 (2006) (plurality opinion); Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).

to create a workable standard for reviewing political gerrymanders.[3] The time for judicial review has passed. Congress should create an agency to review political gerrymanders, empower that agency to protect democratic structures, and grant it the right to adjudicate disputes over maps. The agency should, in turn, promulgate rules that recognize the irreducible minimum of a meaningful vote: the ability to influence the outcome of an election.

This Essay begins by summarizing the doctrinal difficulties that plague judicial review of partisan gerrymandering. Part I concludes that the Supreme Court was right to abandon judicial remedy and to call on Congress for a solution. Part II sets forth the merits of creating a federal agency that reviews maps and requires maximum competition. Finally, Part III of this Essay addresses counterarguments to a competition-oriented approach.

I. Doctrinal Confusion and Political Questions

In *Vieth v. Jubelirer*,[4] Justice Scalia threw in the towel on behalf of the Court, holding partisan gerrymandering claims to be nonjusticiable under the political question doctrine.[5] Justice Scalia marshaled an impressive array of arguments—a volume matched only by its flourish—to prove the absence of a manageable standard.[6] His objections are rooted in two interrelated aspects of partisan gerrymandering: the lack of a coherent doctrine to define the injury and the impossibility of providing a remedy without making a fundamental policy judgment.

A. Doctrinal Incoherencies

By now, it is pretty much passé to state that the Court lacks a solid conception of the injury at stake in redistricting disputes. Schol-

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3 Gerrymandering is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." BLACK'S LAW DICTIONARY 312 (3d pocket ed. 2006). Gerrymandering maximizes the number of districts in which the gerrymanderer has a majority, either by "cracking" opposition voters into several districts in which they form minorities or by "packing" those voters into one supermajority district so that they form minorities in neighboring districts. *See Vieth*, 541 U.S. at 286 n.7 (plurality opinion).

4 Vieth v. Jubelirer, 541 U.S. 267 (2004).

5 *See id.* at 281 (plurality opinion) ("[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable . . . ."). The *Vieth* plurality failed to pick up a fifth vote two years later. *See LULAC*, 548 U.S. at 511–12 (Scalia, J., concurring in part and dissenting in part).

6 *Vieth*, 541 U.S. at 281–305 (plurality opinion).

ars from the left[7] to the right[8]—and Associate Justices of similar diversity[9]—have opined at length about the failings of current constitutional doctrines to describe, identify, and remedy the harm caused by the vote-rigging of maps. A brief summary of the available options shows why the question so vexes the Court.

Equal Protection/Individual Rights. The Supreme Court first committed to tending the political thicket that is gerrymandering in *Baker v. Carr*.[10] The *Baker* plaintiffs challenged Tennessee's refusal to redistrict despite dramatic population shifts that had left the state's legislative maps grossly malapportioned.[11] Unfortunately, sixteen years earlier the Court had held such a claim to be a nonjusticiable political question.[12] Justice Brennan thus faced what turned out to be a fateful decision: whether to overrule that precedent or to distinguish it.[13] Justice Brennan distinguished. The previous case had been

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7 *See, e.g.*, Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733 (1998) ("If, as Justice Holmes trenchantly claimed, law is simply a prediction 'of what the courts will do in fact,' then there really isn't ascertainable 'law' governing the allocation of political power and legislative seats. Or perhaps more accurately, there *is* law, but it resembles Newton's Third Law of Motion more than the United States Code." (citation omitted)).

8 *See, e.g.*, Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 104 (2000) ("[T]he Court adopted a legal theory for addressing [malapportioned maps] that was wrong in principle and mischievous in its consequences.").

9 *Compare Vieth*, 541 U.S. at 281 (Scalia, J., plurality opinion) ("Eighteen years of judicial effort with virtually nothing to show for it justify" holding that "political gerrymandering claims are nonjusticiable . . . ."), *and id.* at 309 (Kennedy, J., concurring) ("There are . . . weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run."), *with id.* at 318 (Stevens, J., dissenting) ("[W]e have not reached agreement on the standard that should govern partisan gerrymandering claims."), *and id.* at 345 (Souter, J., dissenting) ("Since this Court has created the problem no one else has been able to solve, it is up to us to make a fresh start.").

10 Baker v. Carr, 369 U.S. 186 (1962). *Baker* followed the Court's first foray into redistricting, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). There, the Alabama legislature redrew the city limits of Tuskegee, Alabama, to prevent blacks from voting in city elections. *Id.* at 340. Because the map removed voters from municipal elections altogether, the Court did not need to define a meaningful vote; the Court had to say only that votes were denied and the Fifteenth Amendment thus violated. *See id.* at 346–47 ("In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction . . . *unequivocal withdrawal of the vote* solely from colored citizens." (emphasis added)). It was not until *Baker*, however, that the Court began regulating the dilution—rather than the denial—of votes.

11 *Baker*, 369 U.S. at 187–95.

12 *See* Colegrove v. Green, 328 U.S. 549, 556 (1946). The only significant difference between the two cases is that *Colegrove* concerned congressional districts, *id.* at 550, and *Baker* concerned state legislative districts, *Baker*, 369 U.S. at 187–88.

13 *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 872 (1994); McConnell, *supra* note 8, at 105–07.

brought under the Guarantee Clause,[14] and such cases would remain nonjusticiable,[15] but malapportionment cases brought under the Equal Protection Clause,[16] like this one, would not.[17]

The Court thus entered into the enterprise of defining a meaningful vote bound to its equal protection jurisprudence, a doctrine that focuses on individual rights and injuries.[18] Once equal protection was adopted, it led inexorably toward the adoption of the one-person/one-vote principle, which prohibits vote dilution by requiring that every vote be equally weighted.[19] The Court later expanded the vote-dilution doctrine to cover maps that diluted the relative voting strength of minorities through the use of multimember, or at-large, districts, but these cases were uncomfortable fits.[20] They required the Court to confront the question of whether groups have a right to proportional representation—and, assuming they do not, how to draw a line between (1) a group's right to a chance to elect its candidate of choice and (2) its right to succeed in electing that candidate.[21] At this point, the Court reached the limits of the Equal Protection Clause.[22]

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14 U.S. CONST. art. IV, § 4.

15 *See Baker*, 369 U.S. at 217–26.

16 U.S. CONST. amend. XIV, § 1.

17 *See Baker*, 369 U.S. at 226–28.

18 *Cf.* Vieth v. Jubelirer, 541 U.S. 267, 288 (2004) (plurality opinion) ("[The Constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.").

19 Reynolds v. Sims, 377 U.S. 533, 568 (1964).

20 *Compare* Whitcomb v. Chavis, 403 U.S. 124, 149, 150 n.30, 163 (1971) (White, J.) (upholding a racially discriminatory map where there was evidence that the dominant party, not preferred by blacks, nominated black candidates), *with* White v. Regester, 412 U.S. 755, 766 (1973) (White, J.) (invalidating a racially discriminatory map where there was evidence that "the political processes leading to nomination and election were not equally open to participation by the group in question"). Cases following *Whitcomb* and *White* adopted a totality-of-the-circumstances analysis in which the map itself was seldom the determining factor. *See* Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 407 (2005) ("The representational harm in these cases comes not so much from gerrymandering alone as from the totality of public and private actions that together exclude racial minorities from equal access to the political process.").

21 *See Whitcomb*, 403 U.S. at 154–55 ("The mere fact that one interest group or another . . . has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.").

22 *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 606–09 (2002). These outer limits were breached in the *Shaw* cases. In applying the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006), the Court found a statutory injury where (1) a map does not give minorities the opportunity to elect their candidates of choice in proportion to their share of the population, and (2) if sufficient racial-bloc voting patterns and population density exist to allow a remedy. *See* Shaw v. Hunt, 517 U.S. 899 (1996); Johnson v. De Grandy, 512 U.S. 997, 1007–08, 1011 (1994); Shaw v. Reno, 509 U.S. 630 (1993);

Expanding the doctrine to partisan gerrymanders proved even more challenging.[23] That a map is racially discriminatory can be proved only by first showing that a politically cohesive racial group lives in a compact geographic area.[24] No similar statistical predicate is available in the partisan context, where party preferences are mutable and fickle, and geographic patterns are widely variant.[25] Without that predicate, it is nearly impossible to show that a party is unable to effectively exercise its vote, and any claim that a political group's voting strength is impermissibly diluted treads dangerously close to an argument for proportional group representation.[26] Beyond equal access to an equally weighted vote, the Equal Protection Clause and an individual-rights theory of the injury cannot define a meaningful vote; if every vote in a state is subject to the same vote-rigging map, there is no equal protection violation.

Equal Protection/Group Rights. The failings of individual-rights theory led a number of scholars to suggest that groups have the right to an undiluted vote. Professor Heather Gerken calls this as an "aggregate right," arguing that the injury cannot be identified or measured without reference to the whole group.[27] On this view, a meaningful vote requires (1) the ability to aggregate one's vote with others in the group, and (2) the opportunity for minority groups to influence the outcome of elections.[28]

Thornburg v. Gingles, 478 U.S. 30, 49–51 (1986). But the Court also said, paradoxically, that if a map is drawn with excessive focus on race in an effort to comply with that statute, that effort itself can trigger strict scrutiny. This and related questions arose in the saga of North Carolina's 1990 redistricting, which went before the Court four times. *See* Easley v. Cromartie, 532 U.S. 234 (2001); Hunt v. Cromartie, 526 U.S. 541 (1999); *Hunt*, 517 U.S. 899; *Reno*, 509 U.S. 630. For more on these cases, see generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

23 Not even Justice Brennan, whose *Baker* opinion created the vote-dilution doctrine, was initially willing to entertain partisan gerrymandering claims. *See* Karcher v. Daggett, 462 U.S. 725, 727, 744 (1983); *see also* Issacharoff, *supra* note 22, at 608. Justice Brennan later joined the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), which held such claims to be justiciable, *id.* at 143 (plurality opinion), and which the *Vieth* plurality sought to overturn, *Vieth*, 541 U.S. at 305–06 (plurality opinion).

24 *See supra* note 22 (discussing the elements of an injury under the Voting Rights Act of 1965).

25 *See* Briffault, *supra* note 20, at 405.

26 *Id.* at 405–07; *see also Vieth*, 541 U.S. at 288 (plurality opinion) ("Deny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle.").

27 *See* Gerken, *supra* note 22, at 1681–89.

28 *See id.* at 1677–81.

There are serious impediments to this approach, too. Professor Gerken houses her aggregate-rights thesis within the basic structure of the Equal Protection Clause[29]—but the *Vieth* plurality did not see any such group rights within that framework.[30] And there are good reasons why the Court rejects the group-rights approach. In order to build electoral structures (such as district maps) around groups, the government must first decide which groups matter; then, the government must make assumptions about what individuals within those groups believe, how they order their preferences, and how they form coalitions with other groups. The initial decision would necessarily violate the First Amendment, the Equal Protection Clause, or both. Then, the assumption-making process—also called essentialization[31]—runs counter to individualist ideology and is repugnant to certain members of the Court.[32] Professor Gerken herself recognizes this limitation.[33] She suggests that a procedural approach might be adapted to promote group involvement without engaging in essentialization, but ultimately concedes that "courts cannot remedy the aggregate harm of dilution *without* indulging in some assumptions about the political preferences of" groups.[34]

First Amendment. Justice Kennedy[35] and Justice Stevens[36] have suggested a First Amendment approach to gerrymandering. This doctrine bridges the individual- and group-rights gap, because the First Amendment specifically protects the right to associate.[37] Further, the First Amendment generally prohibits the government from discriminating against individuals or groups on account of political affiliation.[38] Unfortunately, it is unclear how the doctrine could advance the

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29 *See id.* at 1665.

30 *See Vieth*, 541 U.S. at 288 (plurality opinion) ("[The Constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.").

31 *See* Gerken, *supra* note 22, at 1693.

32 *See, e.g.*, Holder v. Hall, 512 U.S. 874, 906 (1994) (Thomas, J., concurring in the judgment) ("[O]ur voting rights decisions are rapidly progressing toward a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race.").

33 Gerken, *supra* note 22, at 1731.

34 *Id.* at 1731–32.

35 *Vieth*, 541 U.S. at 314–16 (Kennedy, J., concurring in the judgment).

36 *LULAC*, 548 U.S. 399, 461–62 (2006) (Stevens, J., concurring in part and dissenting in part).

37 *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment); *see also* NAACP v. Alabama, 357 U.S. 449, 460 (1958).

38 *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 372–73 (1976) (plurality opinion).

ball past that point. The Court, when using strict scrutiny, allows First Amendment rights to be burdened for compelling reasons if the law is narrowly tailored.[39] Thus, the Court would need either to declare all politically minded gerrymanders per se invalid or to articulate what constitutes a compelling government interest and a narrowly tailored law.[40] The Court has been crystal clear in refusing the former,[41] and the latter requires the Court to define permissible districting goals.[42]

The Court's inability to define permissible districting goals has been the problem all along,[43] and the First Amendment provides no guidance on the point.[44] Is a map that protects a river basin at the expense of both compactness and political subdivisions, but that also packs Republicans into a supermajority district, narrowly tailored? How much partisan packing and cracking is acceptable when done in the name of compactness? And how can incumbent protection be a compelling government interest at all, when it intentionally tramples the political rights of challengers? Unlike simple malapportionment cases, where the Court quickly developed the one-person/one-vote standard, these questions have no simple mathematical answer.[45]

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39 *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) ("Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." (internal quotation marks omitted)).

40 *See* Briffault, *supra* note 20, at 408–09; *see also* David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U. L. REV. 1, 2 (2007).

41 *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 258 (2001); Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

42 *See* Briffault, *supra* note 20, at 408–09. *But see* Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1131–40 (2005) (reviewing RICHARD H. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (2003)); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 *passim* (2003).

43 *See* McConnell, *supra* note 8, at 108 ("In the early [malapportionment] cases, the Court held merely that differences in population required rational justification. But this lenient standard almost immediately proved inadequate.").

44 Briffault, *supra* note 20, at 409; *cf.* Vieth v. Jubelirer, 541 U.S. 267, 296 (2004) (plurality opinion) ("*How much* disregard of traditional districting principles? *How many* correlations between deviations and distribution? *How much* remedying of packing or cracking by the hypothetical district? *How many legislators* must have had the intent to pack and crack—and *how efficacious* must that intent have been (must it have been, for example, a *sine qua non* cause of the districting, or a *predominant* cause)?").

45 *See Vieth*, 541 U.S. at 290 (plurality opinion) ("[R]equiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon."); Briffault, *supra* note 20, at 406 n.56 (describing the shortcomings of symmetry—the requirement that the map give either major party the same number of seats for the same percentage of the statewide vote—as a mathematical measure); Adam B. Cox, *Designing Redis-*

Structural Harm/Representative Government. A great deal of recent commentary focuses on the structural nature of the gerrymandering injury.[46] The harm, the argument goes, is not due to any discrimination against a person or group but stems from having the representative system undermined by undemocratic electoral structures.[47] The use of a vote-rigging map—whether it protects a particular party or incumbents in general—inhibits popular control over the government and reduces the government's responsiveness to the voters.[48]

The structural-harm theory fails because the Court has no role in designing representative structures.[49] It polices the boundaries of federalism and the separation of powers and enforces the election mechanisms prescribed by the Constitution and by Congress; beyond that, the Court has no apparent authority to define representative government.[50] Such an attempt would be exactly the type of judicial guesswork that the current Court so frequently decries.[51]

Even the *Vieth* plurality, despite holding gerrymandering nonjusticiable, did not deny that gerrymandering causes a constitutional injury.[52] But advocates have proposed no fewer than four theories of that injury—trying Equal Protection, First Amendment, and structural theories to guide judicial analysis—and yet no manageable standard has been discovered. And each theory fails for fundamentally the same reason: they all require unguided policy choices that are properly left to the political branches.

B. Political Questions Are for Political Branches

The foregoing tour of constitutional doctrines left each stop without a satisfactory method of identifying and remedying gerrymander-

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tricting Institutions, 5 ELECTION L.J. 412, 417 (2006) (describing the unsuitability of symmetry (here called "partisan bias") as a judicial tool).

46 *See, e.g.*, Issacharoff, *supra* note 22, at 600; McConnell, *supra* note 8, at 103–04.

47 Issacharoff, *supra* note 22, at 600.

48 *Id.* at 622–23, 629–30.

49 *See* Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 687–88 (2002).

50 Indeed, picking among competing democratic models is such tricky business that the Court declines to do so even where it has clear authority. *See* Chemerinksy, *supra* note 13, at 872 (discussing the Court's refusal to decide Guarantee Clause claims).

51 *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 295 (2004) (plurality opinion) ("This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms.").

52 *See id.* at 292 ("The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.").

ing harms. The Equal Protection Clause provided no definition of the meaningful vote to which we are entitled, the First Amendment provided no guidance on tailoring the permissible goals of redistricting, and structural-harm theories provided no textual launching point to ground the Court's endeavors. Each of these doctrines comes up short because that next step requires fundamental policy judgments about the nature of democracy. What is a meaningful vote? How much partisanship in districting is too much, and what considerations might justify it? When is majority rule undermined to the point of offending the Constitution? These questions lack judicially discoverable answers. So, Justice Scalia must be right: under the political question doctrine, these questions should be answered by the politically accountable branches.[53]

The traditional bases of districting illustrate this point nicely. Arguments for justiciability almost invariably rest on the assumption that fair maps follow the traditional bases of districts: compactness and contiguity, respect for political subdivisions and communities of interest, and incumbent protection.[54] Thus, for example, the equal protection approach proposes that if a map can be explained by traditional bases, that explanation rebuts a charge of discriminatory intent.[55] But there is no obvious reason why a map that breaks up a community of interest for the sake of compactness should be allowed under the Equal Protection Clause, but a map that does so for the sake of politics should not. The only plausible distinction would be to call political distinctions a suspect classification subject to heightened scrutiny. Any such holding requires the judgment that districts designed to match voters to representatives based on ideological beliefs are democratically suspect, and districts designed to match voters to representatives based on demographics are not. That statement is debatable at the very least,[56] and it constitutes a rather bold policy judgment.

Thus, equal protection jurisprudence fails to define the gerrymandering injury not only because, as Part I.A argues, the doctrine is incoherent when applied to this context, but also because it cannot define the injury without first defining the content of a meaningful vote. This need to resolve fundamental policy questions plagues all the other at-

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53 *See id.* at 278–81 (defining "nonjusticiable claims" as those "entrusted to one of the political branches" and holding political gerrymandering to be a nonjusticiable claim).

54 *See, e.g.*, *id.* at 322, 334 (Stevens, J., dissenting); *id.* at 345, 348 (Souter, J., dissenting); *id.* at 359–60 (Breyer, J., dissenting).

55 *See, e.g.*, *id.* at 347–48, 351–53 (Souter, J., dissenting).

56 *Cf. id.* at 356–57 (Breyer, J., dissenting) (extolling the virtues of a party-based political system).

tempts to define the gerrymandering injury, too. They cannot do the job without first deciding a question best left to politically accountable branches—that is, a political question.

We have seen, then, that the Supreme Court lacks a coherent doctrine with which to identify partisan gerrymanders. Similarly, any remedy to political gerrymanders necessarily requires nonjudicial policy judgments. Justice Scalia included in *Vieth* an implicit call for Congress to act.[57] This Essay echoes that call. Congress should exercise its authority under the Federal Election Clause[58] to create a federal agency to review congressional redistricting. For purposes of this Essay, this agency will be called the Meaningful Vote Commission.

II. The Meaningful Vote Commission

The Meaningful Vote Commission would prescreen congressional maps. Each state with more than one congressional district would be required to submit its map to the Commission for approval, and the Commission would ensure[59] that every district be as competitive as reasonably possible.[60] In large, competitive states like Florida and Ohio, this standard would require every district to be a virtual tossup, because such maps can be reasonably drawn.[61] In other states, like Utah, "as competitive as reasonably possible" would necessarily amount to something less than a tossup. But in all multidistrict states, the Commission would engage in a case-by-case inquiry to ensure that competitiveness is reasonably maximized. Any map that passed the Commission's review would be immune to litigation unless a federal court of appeals first found the Commission's stamp of approval to be arbitrary or capricious. The Commission would have the discretion, when rejecting a map, to allow the state to try again or to petition a federal court for a court-drawn map.

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57 *See id.* at 304–05 (plurality opinion).

58 U.S. CONST. art. I, § 4.

59 The Commission's mandate would be tertiary: both the one-person/one-vote rule and the Voting Rights Act would take higher priority.

60 For a review of the statistical difficulties in defining competitiveness, see Briffault, *supra* note 20, at 406 n.56; Cox, *supra* note 45, at 417. The statistical measurements of competitiveness that the Commission might adopt are beyond the scope of this Essay, except inasmuch as such fine-tuning of policy is uniquely within the competence of agencies rather than courts or legislators. *Cf.* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.6 (4th ed. 2004) (outlining the debate for and against aggressive judicial review of agency action).

61 For administrative ease, the Commission could create a safe harbor. Any state that draws a map in which all districts are inside some statistical level of competitiveness chosen by the Commission could be exempted from the Commission's as-competitive-as-reasonably-possible inquiry.

By requiring that congressional districts be as competitive as reasonably possible, the Commission would draw from the best ideas in redistricting reform while leaving the worst behind. Among the extensive literature on redistricting reform, by far the most prevalent theory is that redistricting should be taken out of the hands of partisan legislators.[62] As Professor Adam Cox has pointed out, though, there is a broader menu of regulatory options available for controlling decisionmakers: (1) vesting decisionmaking authority with a different entity, (2) limiting the options or information available to decisionmakers, or (3) providing independent review of the decisions.[63] The scholarly focus on nonpartisan or bipartisan redistricting commissions falls in the first category, but there are countervailing reasons why redistricting should be left to legislators.[64] The proposal in this Essay—a federal agency that enforces a competition-based rule—draws from the latter two tools.

A. Limiting the Decisionmaker's Options and Information

The federal government already places two option-limiting constraints on congressional districts: the one-person/one-vote rule,[65] and a federal statute that requires single-member districts.[66] But given the sophisticated mapping tools available, neither requirement significantly constrains the ability to draw partisan maps.[67] No federal law[68] uses the indirect method of limiting a decisionmaker's options: limiting their information through the use of a veil of ignorance. A veil rule "subject[s] the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision."[69] By withholding the information necessary to make a self-interested decision, veils coerce decisionmakers into making egalitarian decisions.[70]

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62 *See, e.g.,* Issacharoff, *supra* note 22, at 647–48; Note, *A Federal Administrative Approach to Redistricting Reform*, 121 HARV. L. REV. 1842, 1844 (2008).

63 Cox, *supra* note 45, at 413.

64 *See infra* Part III.A.

65 Reynolds v. Sims, 377 U.S. 533, 558 (1964).

66 2 U.S.C. § 2c (2006).

67 *See* Cox, *supra* note 45, at 414.

68 Some states do limit access to information. *See* MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2008, at 630 (2007) (describing the Iowa redistricting process, in which the nonpartisan Legislative Services Bureau is prevented from considering political data).

69 Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001).

70 *See* Cox, *supra* note 45, at 415, 416 n.11. Veils of ignorance are derived from the work of John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999). To understand Rawls's veil, suppose that a self-interested person has a choice of two worlds to enter. One

A competitive-district mandate functions as both a direct limit on the available options and a veil that limits information. First, it takes a broad swath of available maps off the table by requiring mapmakers to choose from only those maps that are competitive. Second, it deprives would-be gerrymanderers of the one piece of information they need most: the probable electoral results of the map. Because the districts are tossups, the electoral results are unknowable. The competitive-district mandate injects enough uncertainty that the decisionmakers would feel compelled to advance their self-interest through other methods.[71] The traditional bases of redistricting—compactness, respect for political subdivisions, communities of interest, and the rest—would, to the extent they facilitate meaningful representation, communication, and constituent service, become the most productive tools for designing self-interested districts.

B. Independent Review of the Decision

After-the-fact review enforces external standards and negates the incentive to violate those standards: a mapmaker will not draw a map that is certain to be rejected by the reviewer.[72] Redistricting is already subject to independent review to a degree: most of a state's citizens have standing to challenge any given congressional map under the one-person/one-vote doctrine,[73] and in recent decades at least a third of all maps were drawn by or under order from a federal judge.[74] But claims of partisan gerrymandering are effectively guaranteed to fail.[75] Thus, judicial review, as a practical matter, is available only for racial-dilution claims under the Voting Rights Act;[76] as a result, partisan claims get wedged into racial lawsuits, with the clearest victim being coherent jurisprudence.[77] Moreover, the current system—which

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world has fabulous wealth, but that wealth is concentrated in the hands of relatively few, and the rest of the world is destitute. The other world has enough wealth to be comfortable and no economic disparity. If the self-interested person could pick where in either world to land, he would presumably choose to be wealthy in the first world; if that person is denied the knowledge about where in the world he will be, his risk-averse nature will drive him to pick the egalitarian world. *See id.*

71 *See* Cox, *supra* note 45, at 415–16 (arguing that changing the options and information available to decisionmakers ultimately alters their beliefs and desires).

72 *Cf.* LAUGHLIN MCDONALD & DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT 4–9, 22–25 (2006) (describing enforcement actions under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (2006), and their effect).

73 Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1718–19 (1999).

74 *See id.*

75 *See* Vieth v. Jubelirer, 541 U.S. 267, 279–80 & n.6 (2004) (plurality opinion).

76 *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006).

77 *See* Issacharoff, *supra* note 22, at 630–41.

promises but does not deliver a remedy to partisan gerrymandering—minimizes the incentives for other government actors to intervene.[78]

The Meaningful Vote Commission would replace judicial review with a review mechanism that actually works. Agencies are not limited by the political question doctrine; they are politically accountable, policy-setting entities.[79] They have more flexibility and room for creativity than courts.[80] By employing a workable standard that expressly governs partisan maps, an agency can eliminate the incentive to cram a partisan-gerrymandering claim into a racial-gerrymandering lawsuit. Finally, by assuming primary responsibility for congressional maps, the agency can reduce the amount of litigation and the real costs of review.[81]

The Meaningful Vote Commission and its competitive-district mandate would take the most self-interested options off the table and, by depriving the mapmakers of information about future election results, force mapmakers to make more egalitarian decisions. The administrative agency approach would replace today's inadequate and confused judicial review with a centralized and coherent system. The Commission would thus remedy the harm of vote-rigging gerrymanders without taking the ultimate authority for drawing maps away from political actors.

III. The Flawed Arguments Against Competition

Not everyone believes that partisan redistricting is a problem or that making districts more competitive would be an improvement. Professor Nate Persily penned the leading text in defense of the status quo, in which he argues that our democratic system is designed to protect values other than competitiveness and that a variety of normative reasons justify letting self-interested politicians control the redistricting process.[82] This Part first addresses Professor Persily's points about

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78 *Vieth*, 541 U.S. at 304–05 (plurality opinion).

79 Cox, *supra* note 45, at 416–17.

80 *Id.*; *cf. Vieth*, 541 U.S. at 278 (plurality opinion) ("[J]udicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

81 *Cf.* Cox, *supra* note 45, at 417–18 & n.22 (describing the costs of review).

82 Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 668–73 (2002). Professor Persily also argues that the system is more competitive than it appears. *Id.* at 653–64. To illustrate Professor Persily's points, consider California's congressional map. California has fifty-three congressional districts, and the map is drawn to favor incumbents. BARONE & COHEN, *supra* note 68, at 151. In the four elections following redistricting, only one seat flipped from one

why—in his words—the foxes should be allowed to guard the henhouses. It then addresses his broader structural questions about competition and democracy.

A. Let the Hens Choose Their Own Foxes

Professor Persily argues, by way of an apt anecdote, that there is value in letting political actors draw election districts. He has redrawn maps as a court-appointed special master; in one such map, he

> moved an uninhabited swamp from one legislator's district to another's. The now-swampless legislator argued that the change would disrupt certain environmental projects that he helped initiate and wanted to see through to completion. The move of this area obviously had no identifiable political or partisan effect. The result, however, could have a tangible public-policy effect.[83]

As this anecdote is intended to show, legislators have superior knowledge of both the governmental needs of the neighborhoods they represent and the probable effects of a change in district lines. Thus, from a governance standpoint, legislators are the best-equipped entities to draw district maps—regardless of their self-interested pathologies.[84]

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party to the other. *See* Debra Bowen, Cal. Sec'y of State, Statewide Election Results—Elections and Voter Information—California Secretary of State, http://www.sos.ca.gov/elections/elections_elections.htm (last visited Apr. 15, 2010) (providing results of votes for each district since redistricting by both name and party). A chart compiling and illustrating the referenced data is available at http://en.wikipedia.org/wiki/United_States_congressional_delegations_from_California (last visited Apr. 15, 2010). In 2008, thirty-nine of the winning candidates received over sixty percent of the vote; in forty-eight districts, the victor won by over ten points. *See* Debra Bowen, Cal. Sec'y of State, Statement of Vote: Nov. 4, 2008, General Election 8–9 (2008) [hereinafter Bowen, General Election], *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf. Professor Persily would argue that these statistics understate the competitiveness of the races because eleven of the districts (over one-fifth, a healthy turnover for six years) were represented by a different person in 2009 than in 2003. *See* Persily, *supra*, at 654–66 & figs.1–2B. Professor Persily further argues that the national competitiveness during this period—in which control of the House of Representatives shifted from Republicans to Democrats—indicates that the House remains competitive at the macro level. *See* Persily, *supra*, at 656. Last, Professor Persily would argue that these apparently safe incumbents are subject to strong competition in primary (rather than general) elections. *See id.* at 661–62. Here, however, California does not illustrate the point: only one incumbent had a competitive primary in 2008, and it was a district that also had a competitive general election. *See* Bowen, General Election, *supra*; Debra Bowen, Cal. Sec'y of State, Statement of Vote: 2008 Statewide Primary Election, June 3, 2008 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_primary_june/us_reps08primary.pdf.

83 Persily, *supra* note 82, at 678 & nn.94–95.

84 *Id.* at 671–73, 677–79.

Professor Persily is right on this point, and this Essay's proposed remedy is designed to maximize the advantage of this institutional competence. The competitive-district mandate not only leaves mapmaking authority in the hands of the legislature, but also forces legislators to focus their self-interest on governance[85]—which is precisely what Professor Persily claims is responsible for high incumbency rates[86] and precisely the point of holding legislators accountable to the voters through meaningful elections to begin with.

Professor Persily also argues that states have an interest in congressional seniority.[87] Thus, the tendency of self-interested and partisan legislators to protect their federal compatriots redounds to the benefit of the state and should not be discouraged. On this point, Professor Persily is only half correct. Of course states have an interest in seniority—but there is no reason why voters cannot be trusted to choose when other considerations are paramount. To argue that a state should build seniority by minimizing electoral competition is to argue that the state should usurp the voters' authority to set normative priorities. Even in competitive districts, as Professor Persily notes, incumbents have significant advantages;[88] there is no reason why incumbents should use a map that rigs the outcome rather than make the advantages-of-seniority argument to the voters.

B. A Little Volatility Might Do Us Good

Professor Persily also has a broader normative disagreement with requiring competitive districts. He argues that the American system promotes proportionate representation, clear choices, and decisive outcomes.[89] Looking to the California congressional delegation, for example,[90] Professor Persily would argue that democracy is well served in various ways. The delegation, which is sixty-four percent Democratic, provides proportionate representation for California, which voted sixty-one percent for Barack Obama.[91] Because most districts are politically homogenous, most voters are represented by someone they voted for.[92] Moreover, stable elections lead to stable

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85 *See supra* note 71 and accompanying text.

86 Persily, *supra* note 82, at 670–71.

87 *Id.* at 671.

88 *See id.* at 666–67.

89 *See id.* at 668–69.

90 *See supra* note 82.

91 BARONE & COHEN, *supra* note 68, at 151; BOWEN, GENERAL ELECTION, *supra* note 82, at 8; *see also* Persily, *supra* note 82, at 668.

92 *See* Persily, *supra* note 82, at 668. By contrast, in competitive elections, close to half of

government.[93] Thus, Professor Persily would argue that democracy is not threatened by the California gerrymander, under which fifty-two of the state's fifty-three seats have remained with the same party through four elections.[94]

All of these arguments are derived from the political theory of the economist Joseph Schumpeter. Schumpeter saw democracy not as a deliberative process through which voters weigh policy preferences and pick the most appropriate candidate, but rather as a simple referendum through which voters express satisfaction or dissatisfaction with the status quo.[95] Moreover, because voters are unlikely to compromise on firmly held convictions, elections serve to assuage losers by telling them that they are not in the majority.[96] The dominant competing theory of democracy is the deliberative-process theory of John Dewey.[97] Under this theory, voters (to a varying degree, perhaps) do have informed policy preferences, and elections are a process of deliberation and discussion through which majoritarian policy is forged.[98]

Schumpeter's theory is used to defend electoral structures that provide clarity and stability, such as single-member districts and the two-party system.[99] Dewey's theory is used to defend electoral structures, such as multimember districts and cumulative voting, that provide more accurate representation but require complex coalition governments.[100] Placed on this spectrum, Professor Persily argues that the American system is designed to promote Schumpeterian values and that partisan gerrymandering strengthens such results by facilitating stability and clarity.[101]

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all voters end up "losing" and being represented by someone for whom they did not vote. A map that maximizes competition also maximizes the number of "losers." *See id.*

93 *See id.* at 673 ("Modern Madisonians might argue that a small dose of legislative entrenchment . . . is a moderating force on a system that might otherwise be responsive to fleeting majoritarian pressures.").

94 *See supra* note 82.

95 *See* David Schleicher, *"Politics as Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 177–79 (2006).

96 *Id.* at 181–82.

97 RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 130–31 (2003).

98 *See id.*

99 *See* Vieth v. Jubelirer, 541 U.S. 267, 356–59 (2004) (Breyer, J., dissenting); Schleicher, *supra* note 95, at 168–69, 183, 191.

100 *See* Schleicher, *supra* note 95, at 177–78, 190–91. For a review of cumulative voting, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1137–41 (3d ed. 2007).

101 *See* Persily, *supra* note 82, at 670–71.

But even under a Schumpeterian view of democracy, elections must mean something. Indeed, it is Schumpeter more than Dewey whose theory depends upon electoral competition.[102] Voters must be convinced that the election matters before they can register their verdict on the status quo or be assuaged by losing to the majority. In an absolute sense, of course, no vote ever changes any election unless the election is decided by a single vote.[103] But voters react to their perceptions of elections: the more competitive the race and the higher the stakes of the outcome, the more likely a voter will participate.[104] Voters show up for competitive races despite the fact that no individual voter has a realistic opportunity to change an election directly. Rather, they show up because individual voters are socially connected to others and recognize that they can effect change by working with those others to sway the outcome.[105]

It is one thing to say that electoral structures should promote stability and clarity; it is quite another to say that the outcomes should be preordained. Under Schumpeterian theory, no less than any other, democracy requires the opportunity for voters to influence the outcome of elections.[106] Any districting scheme that frustrates these goals undermines the fundamental function of democracy, regardless of the normative theory of democracy one adopts.[107] By requiring congressional districts to be as competitive as reasonably possible, Congress can ensure that each voter perceives an opportunity to influence an election and therefore has an incentive to participate. The marketplace of ideas then becomes a marketplace with engaged consumers.

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102 *See* Schleicher, *supra* note 95 *passim* (discussing Schumpeterian democracy as a leading normative justification for competitive elections).

103 *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260–76 (1957) (articulating the "paradox of voting"). Political science and economics journals have debated the meaning of Downs' paradox for decades. For a collection of articles, see Gerken, *supra* note 22, at 1678 n.52.

104 *See* MARK N. FRANKLIN, VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945, at 100–11 (2004); Jason Marisam, *Voter Turnout: From Cost to Cooperation*, 21 ST. THOMAS L. REV. 190, 205–25 (2009). For a comprehensive survey of nonvoters that delves into the causes of low turnout, see League of Women Voters, Alienation Not a Factor in Nonvoting, http://www.lwv.org/AM/Template.cfm?Section=Home&template=/CM/HTMLDisplay.cfm&ContentID=2188 (last visited Apr. 15, 2010).

105 *See* FRANKLIN, *supra* note 104, at 202; Marisam, *supra* note 104, at 212.

106 *See* POSNER, *supra* note 97, at 130; *see also* Issacharoff, *supra* note 49, at 685.

107 *See* Issacharoff, *supra* note 22, at 615; *see also* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 *passim* (1994) (arguing that throughout the Founding, Antebellum, and Civil War eras, the term "Republican Government" was understood to mean that, despite representative institutions, the power to alter or abolish the government resided with the populace).

Conclusion

Democracy—the form of government built on the idea that the people are sovereign and the government is their servant—is undermined when government actors seek to insulate themselves against the will of the voters. It is one thing for the elected representatives to create electoral structures, like single-member districts and first-past-the-post voting, that favor stability over representation. It is quite another for partisan actors to rig the outcomes of elections. Political gerrymandering is not amenable to judicial review and the Supreme Court is right to decline to intervene. But a remedy is necessary.

A federal agency would provide a national, consistent system for limiting gerrymandering. A rule that districts should be as competitive as reasonably possible would provide the necessary incentives for mapmakers to focus on appropriate forms of governance and representation as they draw districts. Most important, a Meaningful Vote Commission would guarantee to each citizen a meaningful opportunity to engage in that democracy.