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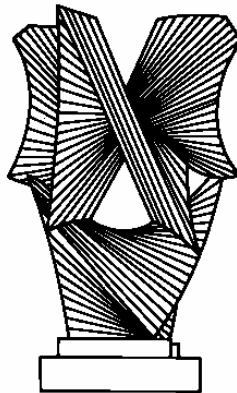
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## PARTISAN GERRYMANDERING AND DISAGGREGATED REDISTRICTING

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## PARTISAN GERRYMANDERING AND DISAGGREGATED REDISTRICTING

Adam B. Cox<sup>†</sup>

Should federal courts police partisan gerrymandering? This question has lurked in the background of voting rights cases ever since the Supreme Court first waded into the political thicket in *Baker v Carr*.<sup>1</sup> For nearly two decades the Court has been explicitly divided over the answer to the question, and commentators have been similarly split. Despite these deep divides, however, both courts and commentators are united on one point—that congressional gerrymanders and state legislative gerrymanders should be treated identically by courts. Both constitutional jurisprudence and legal scholarship have uniformly assumed that these two types of gerrymanders pose the same problems and are subject to the same solutions.

This past Term the Supreme Court entrenched this assumption in constitutional doctrine when it decided *Vieth v Jubelirer*.<sup>2</sup> *Vieth*, a partisan gerrymandering case from Pennsylvania, represented the Court's first crack at resolving the question whether federal courts should police partisan gerrymandering since a fractured Court said "yes" eighteen years ago in *Davis v Bandemer*.<sup>3</sup> The Court treated *Vieth* as a referendum on *Bandemer*. And over the disagreement of four justices, it reaffirmed *Bandemer*'s basic holding that federal constitutional challenges to partisan gerrymandering are justiciable.<sup>4</sup> In a strange omission, however, not one of the five opinions in *Vieth* mentioned a central distinction between *Bandemer* and *Vieth*—that the former concerned a challenge to state legislative

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<sup>1</sup> 369 US 186 (1962).

<sup>2</sup> 124 S Ct 1769 (2004).

<sup>3</sup> 478 US 109 (1986).

<sup>4</sup> Justice Scalia, announcing the judgment of the Court dismissing the plaintiffs' claims, argued for a plurality that *Bandemer* should be overturned. See *Vieth*, 124 S Ct at 1792 (plurality). But five members of the Court refused to overrule *Bandemer*'s justiciability holding. See *id* at 1795 (Kennedy concurring); *id* at 1799 (Stevens dissenting); *id* at 1815 (Souter, joined by Ginsburg, dissenting); *id* at 1822 (Breyer dissenting).

districting, while the latter involved a challenge to congressional districts.<sup>5</sup> No justice questioned whether this difference had any normative or constitutional significance. Nor has any commentator.

This article challenges the conventional view that federal congressional and state legislative political gerrymanders are functional equivalents.<sup>6</sup> To the contrary, these two types of gerrymanders raise quite distinct conceptual, normative, and constitutional questions. The differences make clear that the Court was wrong to treat *Vieth* as a referendum on *Bandemer*. Moreover, these differences create unique—and unrecognized—challenges for courts trying to police partisan gerrymandering in the federal congressional context.

Part I elaborates the analytic difference between state and congressional redistricting and shows that the courts and commentators have been inattentive to this basic conceptual point. When a court evaluates a gerrymandered state legislative districting plan, it can assess the districting plan that helps determine the composition of the entire state legislature. For this reason, the court can locate the harm of the partisan gerrymander at the institutional level of the state legislature itself.<sup>7</sup> In contrast, when a court evaluates a single state’s congressional districting plan, the most that the court can conclude is that the state’s *congressional delegation* has been manipulated in favor of one political party or the other. In other words, evaluating the potential political gerrymander of a single congressional districting plan in isolation prevents a court from identifying the harms, if any, that stem from the manipulation of the composition of Congress as a whole. Instead, the harm must be located at the institutional level of the state congressional delegation or individual congressional districts.<sup>8</sup>

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<sup>5</sup> Compare *Bandemer*, 478 US at 113, with *Vieth*, 124 S Ct at 1773.

<sup>6</sup> Throughout this article, I use “congressional” to refer only to the national legislature. For that reason, I often will not explicitly note that congressional districts are “federal.”

<sup>7</sup> This is exactly how the Supreme Court framed its inquiry in *Bandemer*; it evaluated the state legislative districting plan from a statewide perspective, rather than attempting to locate district-specific injuries. See *Davis v Bandemer*, 478 US 109, 127 (1986) (noting that the claim “made by the appellees is . . . that the apportionment discriminates against Democrats on a statewide basis,” and stating that “although the statewide discrimination asserted here was allegedly accomplished through the manipulation of individual district lines, the focus of the equal protection inquiry is necessarily somewhat different from that involved in the review of individual districts”).

<sup>8</sup> In *Vieth*, the plaintiffs asserted that the injury of congressional gerrymandering stemmed from Pennsylvania’s drawing districts that biased the state’s congressional delegation in favor of the Republican party. Even if Democrats won a majority of the statewide vote, the plaintiffs alleged, they would win only a

Part II explains that this feature of congressional redistricting poses a problem because the conventional arguments about why partisan gerrymanders are harmful generally describe harms that turn on the structure of representation in Congress *as a whole*—not on the consequences of redistricting for a small subset of seats within Congress. For this reason, judicial review that focuses only on a single state’s redistricting plan cannot hope to identify the presence of these injuries. Moreover, as Part III shows, alternative theories of partisan gerrymandering’s harm are unlikely to solve this problem. The alternatives also generally focus on Congress as a whole. And while expressive harms or purpose-based theories of injury (and perhaps other theories that are completely disconnected from the actual electoral consequences of redistricting) could escape this nationwide institutional perspective, such theories would cut deep against the grain of the Court’s longstanding and correct recognition of the inevitable role that partisan advantage-seeking plays in redistricting. In short, therefore, the way in which federal courts review congressional partisan gerrymandering claims today—examining individual states’ redistricting plans in isolation—makes it impossible for courts to identify the presence or absence of the harms commonly thought to flow from partisan gerrymanders.

Part IV asks what this shortcoming of contemporary judicial review means for the capacity of courts to curtail the ills of congressional partisan gerrymanders. With respect to *Vieth* itself, the analytic structure of congressional gerrymanders shows that the approaches to policing partisan gerrymandering advocated by individual justices in the case miss the mark. If the harms of congressional partisan gerrymanders can be identified only by reference to Congress as a whole, the efforts by members of the Court to identify such harms within the current delegation-centric structure of judicial review are doomed to fail. This leaves courts with three options: they can restructure judicial review so that courts can evaluate the combined consequences of every state’s congressional redistricting; they can abandon any effort to directly identify the *existence* of harms caused by congressional partisan gerrymanders and instead develop prophylactic rules that reduce the *risk* that state redistricting efforts will together produce a nationwide

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minority of the state’s congressional seats. It was this delegation-level bias, they argued, that violates the Equal Protection Clause.

harm; or they can give up on policing partisan gerrymanders in the context of congressional redistricting.

Various coordination problems among the states and within the judiciary make the first option implausible as a practical matter. The second option is theoretically attractive: judicial intervention at the state level can reduce the risk of congress-wide injuries. Theoretical niceties aside, however, the practical attractiveness of this option depends on the answers to under-explored questions—such as how likely it is that the effects of individual states’ redistricting plans accumulate to produce congressional-level harms. And if judicial intervention is warranted, the disaggregated nature of congressional redistricting affects how courts should structure state-level review and calls into question some popular proposals for jurisprudential reform.

### **I. THE DISAGGREGATED NATURE OF CONGRESSIONAL REDISTRICTING**

Congressional and state legislative gerrymanders raise quite distinct analytic, normative, and constitutional questions. But both courts and legal commentators have largely overlooked this point, typically analyzing state and congressional redistricting in the same fashion. This oversight is perhaps understandable: the process of congressional and state legislative redistricting is facially identical in most states, and this similarity makes it easy to miss a critical structural distinction between the two—that state legislative redistricting plans affect the composition of the entire legislature, while congressional redistricting plans affect the composition of only a subpart of the legislature. As the following Parts will show, however, this difference has substantial implications for the theory and practice of judicial oversight of partisan redistricting.

In order to identify the important analytic difference between state legislative and congressional redistricting, it is necessary first to understand the way in which these types of redistricting are very much the same. In both instances, the state government has initial authority to draw the boundaries for all of the legislative districts in the state.<sup>9</sup> With

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<sup>9</sup> While the focus of this article is on districted elections, it is important to note that legislative representatives can be selected through a number of different mechanisms. These mechanisms differ in many dimensions: in whether voters cast ballots for parties or candidates; in how many votes are allotted to each voter; in how votes are aggregated to determine a winner; and so on. See Gary Cox, *Making Votes Count: Strategic Coordination in the World’s Electoral System* (Cambridge 1997). Despite the existence of myriad possibilities, the single-member district plurality voting election structure is by far the most common in the United States. Federal law requires that it be used for all congressional elections, see note

respect to state legislative districts, the state’s authority to draw district lines is inherent in state sovereignty and reserved in the federal Constitution. (The authority is, of course, subject to numerous federal constitutional and statutory constraints.) States obviously do not have inherent sovereign authority to fashion *federal* congressional districts,<sup>10</sup> but Article I, Section IV of the Constitution delegates this authority initially to states. That Clause, typically referred to as the Elections Clause, provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”<sup>11</sup> The Supreme Court has consistently interpreted the Clause as conferring congressional districting authority on states.<sup>12</sup> And while the Clause gives Congress the power to supersede state regulations of congressional elections, Congress has not used this power to divest states of redistricting authority.<sup>13</sup>

Thus, the process for state legislative and federal congressional redistricting is superficially identical in many respects. In each instance the state—typically through its ordinary legislative process—carves up the state’s territory into a number of districts sufficient to select the total number of representatives to be elected statewide. But this sameness of process disguises an important difference: in the state legislative context, the state is drawing district lines for the entire legislative assembly; in the congressional context, however, the state is drawing district lines for only its own congressional

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13, and nearly every state uses this election structure (or a close variant) for state legislative elections as well.

<sup>10</sup> Consider *United State Term Limits, Inc v Thornton*, 514 US 779 (1995).

<sup>11</sup> US Const Art I, § 4.

<sup>12</sup> See, for example, *Growe v Emison*, 507 US 25, 33–35 (1993). See also Adam B. Cox, *Partisan Fairness and Redistricting Politics*, 79 NYU L Rev 751, 791 & n 148 (2004). Founding-era history also supports the conclusion that the Election Clause’s initial grant of authority to states includes the power to regulate redistricting. See *id* at 790.

<sup>13</sup> Congress has used this power to require that states elect their congressional representatives from single member districts. See 2 USC § 2c (“In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . .”). See generally *Branch v Smith*, 538 US 252 (2003) (discussing 2 USC § 2c). Congress first enacted the single-member district requirement in 1842. See Act of June 25, 1842, § 2, 5 Stat 491 (corresponding to 2 USC §§ 2a-2c). The requirement was later dropped and reinstated, and at one time included an additional requirement that congressional districts be equipopulous. See Cox, 79 NYU L Rev at 794 n 162 (cited in note 12).

delegation—that is, for only a subpart of Congress as a whole. Another way to put this is that the process for redistricting each state legislature is consolidated, while the process for redistricting Congress is disaggregated.

The disaggregated nature of congressional redistricting fundamentally alters the analytic structure of judicial review of congressional partisan gerrymandering claims.<sup>14</sup> When a court evaluates a claim that a state legislative districting plan constitutes an impermissible partisan gerrymander, it is assessing the districting plan that helps determine the composition of the entire state legislature. For this reason, the court can locate the harm of the partisan gerrymander at the institutional level of the state legislature itself. Or, to put it slightly differently, the court can adopt a systemwide account of the harm caused by the partisan gerrymander. When a court evaluates a single state’s congressional districting plan, however, the most that the court can conclude is that the state’s *congressional delegation* has been manipulated for partisan ends.<sup>15</sup> In other words, evaluating the potential political gerrymander of a single congressional districting plan in isolation prevents a court from identifying harms that stem from the manipulation of the composition of Congress as a whole. Instead, the harm must be located at the institutional level of the state congressional delegation or some lower level.

In light of the Supreme Court’s existing partisan gerrymandering jurisprudence, one would have expected the Court to have noticed this crucial distinction in the *Vieth* litigation. Prior to *Vieth*, the Supreme Court had adjudicated a partisan gerrymandering claim on only one occasion—in *Davis v Bandemer*.<sup>16</sup> *Bandemer* concerned a state legislative redistricting plan; the plaintiffs in that case alleged that Indiana’s state

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<sup>14</sup> The focus in this article is exclusively on partisan gerrymandering, but the article’s analysis is relevant to other types of gerrymandering claims as well.

<sup>15</sup> As I explain later, there are several ways in which district lines might be manipulated for partisan ends. They might be manipulated to bias the composition of the delegation in favor of one political party or the other, to reduce the competitiveness of seats held by either party, or in some other fashion.

<sup>16</sup> 478 US 109 (1986). The Court had summarily affirmed a number of other partisan gerrymandering cases that came to the Court on direct (rather than certiorari) review, but *Bandemer* was the Court’s only previous partisan gerrymandering opinion. In *Bandemer* the Court had held that partisan gerrymandering claims were justiciable under the Equal Protection Clause. *Id.* at 127. But the Court set forth such an exceedingly stringent (or maybe even incoherent) standard for demonstrating unconstitutionality that no partisan gerrymandering claims brought since *Bandemer* had been successful. See Cox, 79 NYU L Rev at 796–98 (cited in note 12). Consider also Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy* 866 (rev 2d ed 2002).



legislative redistricting scheme constituted an unconstitutional partisan gerrymander.<sup>17</sup> To evaluate the claim, the plurality opinion in *Bandemer* examined the effect of the redistricting plan on the structure of representation in the entire legislature.<sup>18</sup> It was at the institutional level of the legislature as a whole, rather than at some lower institutional level such as individual districts, that the plurality sought to identify the injury of partisan gerrymandering. In contrast to *Bandemer*, *Vieth* concerned an alleged congressional partisan gerrymander; the *Vieth* plaintiffs alleged that the congressional districts drawn in Pennsylvania following the 2000 census were politically gerrymandered.<sup>19</sup> Because the case concerned an alleged congressional partisan gerrymander, the *Vieth* Court was precluded from adopting the analytic perspective that the plurality had applied in *Bandemer*—it did not have the option of identifying the harm of partisan gerrymandering at the institutional level of the legislative assembly.

Surprisingly, none of the opinions in *Vieth* mention this fact or appear to recognize that *Bandemer* might pose different questions than does *Vieth*.<sup>20</sup> The Court split five ways in *Vieth*. Writing for a plurality of four, Justice Scalia concluded that *Bandemer*'s justiciability holding had been in error; claims of partisan gerrymandering, he wrote, present nonjusticiable political questions.<sup>21</sup> Justice Kennedy concurred in the judgment upholding the dismissal of the plaintiffs' claims, but he did not agree with the plurality that partisan gerrymandering claims should be nonjusticiable.<sup>22</sup> Justices Breyer,

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<sup>17</sup> *Bandemer*, 478 US at 115.

<sup>18</sup> See *id.* at 127 (noting that the claim “made by the appellees is . . . that the apportionment discriminates against Democrats on a statewide basis,” and stating that “although the statewide discrimination asserted here was allegedly accomplished through the manipulation of individual district lines, the focus of the equal protection inquiry is necessarily somewhat different from that involved in the review of individual districts”).

<sup>19</sup> *Vieth*, 124 S Ct at 1773. *Vieth* arose out of Pennsylvania's congressional redistricting following the 2000 census. Republicans controlled the state's redistricting process and produced a district map that, according to Democrats' claims, ensured Republicans would capture a supermajority of the congressional seats even if the party captured only a minority of the statewide congressional votes. See Brief for Appellants, *Vieth v Jubelirer*, No. 02-1580, \*2 (filed Aug 29, 2003) (available on Lexis at 2002 US Briefs 1580). Democrats sued in federal court, contending that the redistricting scheme violated the Constitution. See *Vieth v Pennsylvania*, 188 F Supp 2d 532 (MD Pa 2002); *Vieth v Pennsylvania*, 241 F Supp 2d 478 (MD Pa 2003).

<sup>20</sup> Nor, perhaps surprisingly, did the litigants (in particular, the defendants) bring up this potentially important distinction between the two cases.

<sup>21</sup> *Vieth*, 124 S Ct at 1778.

<sup>22</sup> *Id.* at 1793 (Kennedy concurring in the judgment). Instead, Kennedy concluded (somewhat bizarrely) that the plaintiffs' claims should be dismissed because he could not think of a workable standard for evaluating their partisan gerrymandering claim. See *id.* at 1796–97. He expressed hope that such a standard

Ginsburg, Stevens, and Souter dissented in three opinions, each opinion concluding that the district court was wrong to dismiss the plaintiffs' claims—and each opinion suggesting a different test for identifying the existence of an impermissibly harmful partisan gerrymander.<sup>23</sup> Despite the extremely fractured nature of the Court's decision, the justices were in agreement on one score: each saw *Vieth* as a referendum on the Court's earlier decision in *Bandemer*. None of the justices appears to have thought that there would be any reason to treat the partisan gerrymandering claim leveled against the state legislative plan in *Bandemer* differently than the claim leveled against the congressional redistricting at issue in *Vieth*.<sup>24</sup>

Largely without discussion, the justices in *Vieth* simply adopted either a delegation- or district-specific perspective of the harm caused by partisan gerrymanders.<sup>25</sup> Only Justice Kennedy hinted at the possibility of a legislature-wide perspective. Near the close of his opinion, he suggested that it may be misleading to try to identify impermissibly “excessive” partisan gerrymanders by focusing on each state delegation in isolation. As

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would eventually be found, and it was this optimism that led him to conclude that it was too soon to hold partisan gerrymandering claims nonjusticiable. *Id.* at 1794–96. As Justice Scalia pointed out, however, it is a bit difficult to see how Justice Kennedy's conclusion about the current absence of an administrable standard is much different than a finding of current nonjusticiability. *Id.* at 1792 (plurality). And if they are different, it is tough to see why a plaintiff's claim should be dismissed simply because the *court* cannot decide on the appropriate standard for evaluating the plaintiff's claim.

<sup>23</sup> Justice Stevens drew on the *Shaw v Reno* line of racial redistricting cases to develop his proposed test. He argued that legislative purpose should be the touchstone of the partisan gerrymandering inquiry: a legislative district has been unconstitutionally politically gerrymandered, he concluded, if partisanship was the predominant motive for the design of the district. See *id.* at 1808–13 (Stevens dissenting). Justice Souter drew on Title VII and Voting Rights Act litigation to construct his favored inquiry, arguing that the concept of vote dilution should guide courts in partisan gerrymandering cases. See *id.* at 1817–19 (Souter dissenting). Justice Breyer argued that partisan gerrymandering jurisprudence should focus on preventing unjustified minority entrenchment. See *id.* at 1825–27 (Breyer dissenting).

<sup>24</sup> See *Vieth*, 124 S Ct at 1773 (plurality) (framing the question as “whether our decision in *Bandemer* was in error,” without acknowledging that *Bandemer* might be importantly different than *Vieth*); *id.* at 6 (Kennedy concurring) (treating *Bandemer* as posing the same justiciability question as *Vieth*). This oversight is perhaps more understandable for some justices than others. Justice Stevens, for example, clearly adopted a district-centric purpose analysis for evaluating partisan gerrymandering claims. Because he chose to locate the injury of partisan gerrymandering at the district level, it made sense to treat congressional and state legislative districting as posing the same question. But even Justice Stevens apparently saw state-level analysis the only alternative to his district-centric perspective; he too omitted the possibility of adopting a legislature-wide perspective. See *Vieth*, 124 S Ct at 1779–80, 1805–07 (Stevens dissenting).

<sup>25</sup> See *Vieth*, 124 S Ct at 1828–29 (Breyer dissenting) (adopting a statewide perspective); *id.* at 1817 (Souter dissenting) (suggesting that a statewide perspective is important but focusing first on individual districts); *id.* at 1799, 1805 (Stevens dissenting) (adopting a district-level perspective). Justice Stevens goes so far as to suggest that the Court's racial gerrymandering jurisprudence overruled *Bandemer*'s statewide focus and required that all questions of fairness in redistricting be resolved at the district level—whether racial, political, or some other sort of fairness is at issue. *Id.* at 1805.

an illustration, he described the cumulative effect of several hypothetical districting plans: “In one State, Party X controls the apportionment process and draws the lines so it captures every congressional seat. In three other States, Party Y controls the apportionment process. It is not so blatant or egregious, but proceeds by a more subtle effort, capturing less than all the seats in each State. Still, the total effect of Party Y’s effort is to capture more new seats than Party X captured. Party X’s gerrymander was more egregious. Party Y’s gerrymander was more subtle. In my view, however, each is culpable.”<sup>26</sup> While Justice Kennedy is vague about what conclusions should follow from the possibility that partisan gerrymanders may either accumulate or cancel out across several states, his example does implicitly acknowledge the possibility that a congressional delegation-centric perspective may be inadequate to identify certain harms that might flow from partisan gerrymanders.

Like the Court, the substantial commentary about *Vieth* has also been inattentive to the important analytic differences between *Vieth* and *Bandemer*.<sup>27</sup> Legal commentators have widely criticized the Court for continuing, or perhaps even exacerbating, the jurisprudential muddle that has existed since *Bandemer* was handed down eighteen years ago.<sup>28</sup> But none has criticized the Court’s decision to treat congressional and state legislative districting as the same. To the contrary, legal scholarship appears to have uniformly overlooked the analytic significance of the disaggregated nature of

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<sup>26</sup> *Vieth*, 124 S Ct at 1798 (Kennedy concurring).

<sup>27</sup> Lower courts have also been inattentive to the distinction, regularly applying *Bandemer* in the congressional context without discussion. See, for example, *O’Lear v Miller*, 222 F Supp 2d 850, 853–59 (ED Mich 2002) (employing *Bandemer* to evaluate Michigan’s congressional districts, and adopting a state-wide, delegation-specific perspective). Moreover, on at least one occasion a lower court expressly refused to treat congressional partisan gerrymandering claims differently than state legislative ones. See, for example, *Badham v Eu*, 694 F Supp 664, 668 (ND Cal 1988). Consider also *Anne Arundel County Republican Central Committee v State Admin. Bd. of Election Laws*, 781 F Supp 394, 399 & n 7 (D Maryland 1991) (noting that *Bandemer* “address[ed] a challenge to the partisan redistricting of the Indiana legislature, not to congressional redistricting,” but nonetheless applying *Bandemer* to evaluate the constitutionality of Maryland’s congressional redistricting scheme).

<sup>28</sup> See, for example, Heather Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U Pa L Rev 503 (2004); Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U Pa L Rev 541 (2004). When the Supreme Court noted probable jurisdiction in *Vieth*, most observers predicted that this meant the Court would clarify partisan gerrymandering jurisprudence by either reaffirming the justiciability of partisan gerrymandering claims and supplying a more workable standard for adjudicating such claims, or by overruling *Bandemer* and holding that partisan gerrymandering claims present nonjusticiable political questions. Instead, the Court fractured so badly that it was not able to head down either of these paths.

congressional redistricting.<sup>29</sup> The scholarship suffers from the same blind spot that afflicts the Court in *Vieth*.

## II. PARTISAN GERRYMANDERING’S HARMS: THE CONVENTIONAL ACCOUNTS

While the literature has treated partisan gerrymandering claims in the state legislative and congressional contexts as interchangeable, the dominant accounts of why partisan gerrymanders are harmful cannot be squared with this undifferentiated treatment. The disaggregated nature of congressional redistricting makes it impossible for a court evaluating one state’s congressional redistricting scheme to identify injuries that stem from the manipulation of the legislative assembly as a whole. But the central contemporary accounts of partisan gerrymandering’s harms—the partisan bias account and the anticompetition account—conceptualize those injuries at the legislature-wide level. They do not explain why the partisan manipulation of a small subset of seats within the legislature is harmful, independent of what happens to other seats. Consequently, a court reviewing a congressional redistricting plan for these injuries cannot determine—at least within the current structure of redistricting litigation—whether that plan does or does not cause an injury.<sup>30</sup>

### A. *The Partisan Bias Account*

One central contemporary account of the injury caused by partisan gerrymanders identifies the harm as the introduction of partisan bias. Theories of partisan bias condemn districting arrangements that make it easier for one party than the other to convert votes cast in its favor on election day into legislative seats.<sup>31</sup> The injury occurs, in other words, when one party can capture a greater share of seats in the legislature than the other party

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<sup>29</sup> See, for example Gerken, 153 U Pa L Rev at 505-10 (cited in note 28) (arguing that *Vieth* involves “structural” rather than “individual rights” claims and contending that those claims need to be resolved at the *state* level, rather than the individual voter or district level). In this year’s Harvard Law Review Foreword, Richard Pildes does hint at the potential significance of congressional redistricting’s disaggregated nature. See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 Harv L Rev 28, 73 (2004) (“Unlike a state house or senate, in which majority control of representation translates into majority control of governance, majority control of a congressional delegation translates into no value other than fair representation itself . . .”). The Foreword continues to argue, however, that “[t]he baseline for measuring whether, and to what extent, unfair partisan gerrymandering has occurred must be statewide.” *Id.*

<sup>30</sup> In describing these accounts of the harmfulness of partisan gerrymandering, I do not mean to defend the idea that partisan bias, anticompetitive effects, or both are harms that we should be trying to prevent. Rather, my claim is simply that these notions of harm, whatever their appeal as normative principles, are typically conceptualized as systemwide injuries produced by redistricting.

<sup>31</sup> For a detailed explanation of partisan bias, see Gary King, *Representation Through Legislative Redistricting: A Stochastic Model*, 33 Am J Pol Sci 787 (1989).

for a given level of electoral support. For example, if Democrats garner 53% of the vote and thereby capture 60% of the seats in the legislature, then in an unbiased system the Republicans will also capture 60% of the legislative seats if they garner 53% of the vote. If the Republicans were to capture a greater seat share in this situation—say 70%—the system would contain partisan bias in favor of the Republicans.<sup>32</sup>

Because partisan bias is a function of how votes translate into a party's share of seats in a legislative assembly,<sup>33</sup> partisan bias in congressional districting cannot be identified by evaluating one state's congressional redistricting plan in isolation. Whether an effort to gerrymander one state's congressional districts for political gain actually introduces partisan bias into the composition of Congress can be determined only by reference to what has happened to the congressional districts in other states as well. Congressional gerrymanders in different states may tend to accumulate in a way that introduces partisan bias in Congress—or they may cancel each other out—but there is no way to determine this by examining one congressional districting plan in isolation.

Of course, one could say that partisan bias exists whenever one party can capture more seats in a *congressional delegation* than the other party for a given level of electoral support in the state. But it is not clear why we should care about partisan symmetry in a small subset of the legislature's districts. The partisan distribution of legislative power, which is what the bias account is concerned with, is a function of how many seats each party holds (to be more precise, its seat share) in the legislative assembly as a whole.<sup>34</sup> The seat share of each party in Congress is obviously connected to the composition of each congressional delegation, but those delegations are, for these purposes, in some sense arbitrary subparts of the legislative institution. The bias account's concern about

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<sup>32</sup> Note that this account of partisan fairness requires only symmetry, not proportionality, in the translation of votes into seats. An absence of partisan bias is perfectly consistent with the presence of a system wide "winner's bonus"—that is, with the party that garners a majority of the vote capturing a larger majority of the legislative seats. Thus, this sort of fairness does not call into question the single-member districted electoral structure used in congressional elections, even though single member districts typically lead to a winner's bonus.

<sup>33</sup> For statements in the scholarship to the effect that the concept of partisan bias is defined with reference to the legislature as a whole, see, for example, Gary King, *Electoral Responsiveness And Partisan Bias in Multiparty Democracies*, XV Legis. Stud. Q. 159, 160 (1990); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Districting*, 2 Election L J 179, 190 (2003).

<sup>34</sup> See, for example, Andrew Gelman and Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am Pol Sci Rev 541, 543–46 (1994).

the distribution of party power in the legislature does not provide any reason why one would care about the existence of partisan bias in such a subpart, except to the extent that such bias influenced the level of bias in the system as a whole.

The fact that partisan bias in congressional redistricting cannot be identified at the state level means that one cannot evaluate congressional and state legislative redistricting in the same way so long as the partisan bias is the injury that one is trying to identify.<sup>35</sup> Nonetheless, case law and legal scholarship sometimes apply the concept of partisan bias to congressional redistricting plans that affect the composition of only individual congressional delegations—without appearing to recognize that the theory underlying the concept does not explain why partisan bias in a state’s congressional delegation is undesirable.<sup>36</sup>

Justice Breyer appears to make just this error in *Vieth*. He argued in that case that the Court should police the congressional redistricting process in order to prevent “unjustified entrenchment.”<sup>37</sup> Breyer defined entrenchment as “a situation in which a party that enjoys only minority support among the populace has nonetheless continued to take, and hold, legislative power.”<sup>38</sup> The central feature of this entrenchment injury—the idea that the harm occurs when a party that receives a minority of the vote can capture a majority of the seats—is a close variant of the bias injury. As with partisan bias, the concern is that one party can translate its votes into legislative seats more efficiently than the other party: on Breyer’s definition one party can capture a majority of the seats with a minority of the votes, but the other party would by definition capture less than a majority of the seats were it to receive a minority of the vote.<sup>39</sup> Breyer identified the democratic

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<sup>35</sup> This does not mean, of course, that it is impossible to intervene at the state level to police national partisan bias. Rather, it means only that a court cannot determine whether the Congress contains partisan bias by examining a single state’s congressional redistricting plan in isolation. I discuss in Part IV the possibility that courts might be able to intervene at the state level to control national partisan bias even if they cannot directly identify its presence or absence.

<sup>36</sup> See Cox, 79 NYU L Rev at 767 n 60 (cited in note 12) (noting that the jurisprudence and legal literature commonly focus on partisan bias at the congressional delegation level).

<sup>37</sup> *Vieth v Jubelirer*, 124 S Ct 1769, 1825 (2004) (Breyer dissenting).

<sup>38</sup> *Id.*

<sup>39</sup> In fact, this demonstrates that the point about partisan bias can be generalized to any theory under which partisan gerrymandering’s injury is a function of how votes translate into a seat share of legislative power. Consider, for example, the position that partisan fairness in districting should be defined by reference to proportional representation. This idea of partisan fairness is quite different from a prohibition on partisan bias, and it requires that one commit to a different concept of representation. But proportional representation is like partisan bias in one important respect. Both are a function of the relationship between

harm of unjustified entrenchment as flowing from the principle of majority control of legislative bodies: “[I]t would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, [would violate the principle that legislatures] should be bodies which are collectively responsible to the popular will.”<sup>40</sup> This principle of majoritarianism, he concluded, condemns “entrenchment where the House of Representatives or similar state legislative body is at issue.”<sup>41</sup> But while Breyer grounded his theory of harm in the principle of majority control of legislative bodies, he applied the concept to the congressional redistricting plan at issue in *Vieth*—despite the fact that it would be impossible to tell by examining that plan whether there was unjustified minority entrenchment in the House of Representatives.<sup>42</sup>

### *B. The Anticompetition Account*

A second central account of the injury caused by partisan gerrymandering identifies the harm as the reduction of electoral competition. This account of gerrymandering’s harm is grounded on the legal theory of political competition that Samuel Issacharoff and Richard Pildes have elaborated in recent years.<sup>43</sup> Their work draws on existing competition-based accounts of democracy in the political science literature,<sup>44</sup> along with an analogy to antitrust doctrine, to suggest that courts should use constitutional law to

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votes and seat share in the legislature. As a result, neither can be identified by examining the votes-to-seats relationship for a small subset of the legislative assembly.

<sup>40</sup> *Id.* at 1825 (internal quotation marks omitted).

<sup>41</sup> *Id.*

<sup>42</sup> The plaintiffs in *Vieth* appear to make a similar mistake. They argue that Pennsylvania’s redistricting plan causes a constitutionally cognizable harm because it enables a Republican minority to capture a majority of the state’s congressional delegation. See Brief for Appellants, *Vieth v Jubelirer*, No. 02-1580, \*3 (filed Aug 29, 2003) (available on Lexis at 2002 US Briefs 1580) (arguing for judicial intervention where partisan manipulation of district lines “reaches the point where one political party guarantees itself a solid majority of seats, even if [that party] wins only a minority of the votes”). But they argue that this consequence of the districting plan constitutes a cognizable harm because it violates principles of legislative majoritarianism. See *id.* at \*22 (“[A] biased map designed to transform a voting minority into a legislative majority is . . . a clear violation of the principle of electoral equality . . .”) (emphasis added). See also *id.* (quoting *Reynolds v Sims* for the proposition that a majority of voters should be able to control the composition of the majority in the legislature).

<sup>43</sup> See, for example, Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan L Rev* 643 (1997); Richard H. Pildes, *A Theory of Political Competition*, 85 *Va L Rev* 1605 (1999).

<sup>44</sup> See, for example, Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (Harper 1942); Richard A. Posner, *Law, Pragmatism, and Democracy* (Harvard 2003). See also Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 *Election L Q* 685 (2004) (reviewing *Law, Pragmatism, and Democracy*).

invalidate legal rules that are designed to reduce the competitiveness of political markets.<sup>45</sup> In a recent piece in *Harvard Law Review*, Issacharoff applied this theory and its antitrust analogy to the redistricting process.<sup>46</sup> He argued that partisan gerrymandering is harmful where it leads to a “constriction of the competitive processes by which voters can express choice,” and he contended that courts should intervene to prevent this harm.<sup>47</sup>

Whether the anticompetition account of the harm of partisan gerrymandering embodies a legislature-wide institutional perspective turns on how the account answers the question: competition for what? Must every seat be competitive? Every congressional delegation? Or is the account concerned with the legislature as a whole? Perhaps surprisingly, it turns out that this question gets largely ignored when the anticompetition account is employed against partisan gerrymandering.<sup>48</sup> Unlike the partisan bias account,

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<sup>45</sup> I say somewhat elliptically that the theory is concerned with regulations of the political process that are “designed” to reduce competition because the theory is a bit vague about whether it is concerned with: (1) legal rules that depress competition, regardless of the reasons for those legal rules (although the reasons might in some cases be evidence of the actual effect of the rules); (2) legal rules that are adopted for the reason of depressing competition, regardless of the actual effect of the rules on competition; or (3) legal rules that are both adopted for the reason of depressing competition and have the effect of doing so. Different theories of political philosophy and constitutional law could underwrite any one of these variants, and it is difficult to read Pildes’s and Issacharoff’s political markets approach as clearly endorsing one of these possibilities to the exclusion of the others. That said, I will treat the anticompetition account as ultimately concerned with the actual anticompetitive consequences of particular electoral rules. (I discuss in Part III the implications of injury theories that are completely disconnected from electoral consequences.) This is the conventional understanding of the account in both the legal and political theory literature, and Issacharoff appears to focus on actual electoral consequences when he applies the anticompetition idea to political gerrymandering. See, for example, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv L Rev* 593, 622 (2002) (focusing on “whether the parties are forced to compete for the votes of the electorate . . . and are in a deep sense accountable to changes in the preferences of the electorate . . . on this view, the competitiveness of elections emerges as a central guarantee of the integrity of democratic governance”); id at 600 (describing partisan gerrymandering’s injury as the “constriction of the competitive processes by which voters can express choice”); id at 615 (arguing for focus on ensuring the existence of an “appropriately competitive electoral process”). Consider also Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 *Colum L Rev* 274, 280–81, 299, 308–09 (2001) (describing the “functional” anticompetitive account as concerned with ensuring the “proper level of competitiveness in the political marketplace,” suggesting that the theory’s application to a particular regulatory practice should turn on the existence or absence of empirical evidence that the practice actually disables competition). To the extent Issacharoff focuses on the reasons (or purposes) underlying redistricting legislation, it seems to be because he sees these reasons as proxies for (or evidence of) the actual anticompetitive effects of redistricting plans. See Issacharoff, 116 *Harv L Rev* at 626 (cited above).

<sup>46</sup> Issacharoff, 116 *Harv L Rev* 593 (cited in note 45).

<sup>47</sup> Issacharoff, 116 *Harv L Rev* at 600 (cited in note 45).

<sup>48</sup> This ambiguity itself has gone unnoticed in the literature. The most common criticism of Pildes and Issacharoff’s theory is that it does not answer the question “How much competition?”—that is, that the theory leaves unspecified (in a way that the bias account does not) the baseline from which a court would measure distortions in the system. See, for example, Richard L. Hasen, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 *Stan L Rev* 719, 724–28 (1998); Bruce E.



which expressly adopts a legislature-wide institutional perspective, descriptions of the anticompetition account have been inattentive to the question of institutional perspective.<sup>49</sup>

Given the seeming ambiguity of the anticompetition account, one might think that the account is perfectly consistent with any of the available institutional perspectives. If that were true, then in the context of congressional gerrymandering the account could be read as concerned with protecting electoral competition in individual districts, in state congressional delegations, or in Congress as a whole. And if the injury could be identified by reference to congressional delegations or individual districts, congressional partisan gerrymanders would not necessarily pose different challenges for courts than state legislative gerrymanders. Nonetheless, while anticompetition effects could be identified from any of the institutional perspectives described above, the theory driving the account is actually quite difficult to square with anything other than the legislature-wide perspective. Like the bias account, the anticompetition account's underlying theory of harm does not justify concern for the consequences of redistricting for individual congressional delegations in isolation.<sup>50</sup>

Certain features of districted elections make it very difficult to reconcile the anticompetition account with an institutional focus on individual districts or congressional delegations. As I noted above, the anticompetition account is grounded in the idea that competitive pressure is necessary to make a legislative institution *as a whole*

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Cain, *Garrett's Temptation*, 85 Va L Rev 1589, 1600–03 (1999). But see Richard H. Pildes, *A Theory of Political Competition*, 85 Va L Rev 1605 (cited in note 43) (responding to this criticism). This objection is, in my view, overblown and in any case is not relevant to my point here.

<sup>49</sup> Issacharoff never explicitly specifies the object of competition when he argues that congressional partisan gerrymanders should be policed to protect competition. In some places, he does suggest a legislature-wide institutional perspective. For example, his emphasis on the responsiveness of the legislative assembly as a whole to shifts in electoral preferences suggests such a perspective. Issacharoff, 116 Harv L Rev at 615 (cited in note 45). Moreover, Issacharoff relies extensively on evidence about the current nationwide competitiveness of congressional races to support his claim that political gerrymanders have produced detrimental anticompetitive effects. *Id.* at 623–24. He highlights the large fraction of congressional seats that are uncompetitive, and suggests that it is the size of this fraction, and not the fact that any individual congressional seat is uncompetitive, that gives rise to the harm. But elsewhere he relies on evidence that is more consistent with a focus on congressional delegations rather than Congress. *Id.* at 623, 625.

<sup>50</sup> As with partisan bias, this conclusion does not mean that it is impossible to intervene state-by-state to police national anticompetitive effects. See note 35. See also Part IV (discussing the possibility of state-by-state intervention). It does mean, however, that courts cannot identify the existence of the anticompetitive harms by examining any individual state's redistricting plan in isolation.

responsive to the will of the electorate. It is true that one way to ensure the responsiveness of the legislative assembly would be to guarantee that every individual legislator is responsive by requiring high levels of interparty competition for every seat. But single member districted elections are largely incompatible with a rule that requires competitive elections in every district. First, as a practical matter it will often be difficult or impossible to draw all districts to be competitive. Where a state leans heavily in favor of one party, for example, it is impossible for the general elections in every congressional district to be competitive. Likewise, in places where there are large, geographically compact, politically homogenous groups of voters, there may be no reasonable redistricting arrangement that is capable of carving up these pockets of partisan voters into seats that produce competitive general elections.<sup>51</sup>

Even where districts could be drawn that would make elections in every district competitive—perhaps in some states that are closely divided between the parties, for example—democratic theorists generally agree that it would be a very bad idea to draw districts that produced only close races. If every district were highly competitive, the system would have two features that these theorists often argue are undesirable: first, the system of representation would be extremely volatile; second, it would begin to approach a pure winner take all system, where the party that captured a slim majority of the statewide vote could easily capture nearly all of the state’s seats.<sup>52</sup> While such a result is not *necessarily* a bad thing, there is no suggestion in the literature that partisan gerrymandering’s injury is that it does not create a sufficiently winner-take-all system of representation, and Issacharoff expressly disclaims the idea that this is the anticompetition injury that concerns him.<sup>53</sup> Accordingly, he acknowledges that the

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<sup>51</sup> I say “reasonable” because it is technically possible to divide any bloc of partisan voters, so long as one is willing to ignore entirely any interest in drawing districts that are contiguous, compact, etc.—that is, so long as one is willing to abandon any connection between districted elections and physical geography.

<sup>52</sup> In the limiting case where each party captures the same vote share in every district that it captures system-wide (the districts-as-microcosms condition), the electoral structure creates a pure winner-take-all system. The party that captures of majority of the system-wide vote will capture every legislative seat. Drawing lines to produce competition in every district increases the probability of this result.

<sup>53</sup> See Issacharoff and Karlan, 153 U Pa L Rev at 574 (cited in note 28). Consider also Issacharoff, 116 Harv L Rev at 628 (cited in note 45) (“No districting scheme could (or should) aspire to recreate the exact partisan balance of the state or jurisdiction as a whole [because] [t]he resulting legislature would replicate the winner-take-all feature of at-large elections . . .”).

anticompetition account does not operate at the district level; it is perfectly consistent with the account, he concludes, for some individual districts to be noncompetitive.<sup>54</sup>

The fact that it is difficult to make sense of the anti-competition harm at the level of individual districts makes it hard to understand at the congressional delegation level as well. As Issacharoff notes, “[t]he normal distribution of populations across 435 congressional districts will yield a range of districts, from those that are highly competitive and will likely elect centrist candidates or swing from election to election between the two major parties, to those that are more politically homogenous and will gravitate toward the poles of the political spectrum.”<sup>55</sup> Once we agree that a perfectly healthy system of congressional representation can contain a number of noncompetitive seats, however, one would need -- in order to defend a delegation-specific perspective for the anticompetition harm -- an independent justification of why it is undesirable to lump a number of those noncompetitive seats in one congressional delegation. The existing literature contains no account of why it might be undesirable for noncompetitive seats to be clustered closely together as a matter of geography. (And, in fact, there is some empirical evidence that such clustering is a natural tendency for districting in the United States.) Moreover, even if one had a theory about why such geographic clustering was a problem, one would still need to explain why it would make sense to privilege, for purposes of identifying such clustering, the subparts of the legislative institution constituted by each state’s congressional districts over subparts of the legislative institution defined in some other fashion. Needless to say, an explanation of this is also absent from the existing literature.

In short, therefore, the anticompetition account of the injury caused by partisan gerrymandering is most sympathetically understood as concerned with the system-wide effect on legislative responsiveness of anticompetitive districting practices. As such, the injury can only be identified by understanding the electoral consequences of redistricting for congressional representation as a whole. The injury cannot be identified by examining one state’s congressional redistricting scheme in isolation.

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<sup>54</sup> See Issacharoff and Karlan, 153 U Pa L Rev at 574 (cited in note 28).

<sup>55</sup> Id.

### III. THE POSSIBILITY OF DELEGATION-SPECIFIC HARMS

Perhaps an alternative account of the harmfulness of partisan gerrymandering can salvage the delegation-specific focus of congressional gerrymandering cases. In this Part, I will discuss a few possibilities. The first is what I will call the polarization account. While this injury theory might seem initially appealing, it turns out to have the same structure as the bias and competition accounts discussed above: the injury is typically conceptualized at the level of the legislative assembly and it is difficult to explain why polarization within a single congressional delegation would be cause for concern. Thus, this alternative account of the harm that flows from partisan gerrymanders does not underwrite the courts' identical treatment of congressional and state legislative political gerrymanders. Second, I will discuss the possibility of rehabilitating the congressional-delegation-specific focus by shifting away from the first-order electoral consequences of redistricting and toward the reasons underlying redistricting legislation. Such a shift in perspective can save the focus on individual congressional redistricting plans, but it can do so only by ignoring the inevitable role partisanship plays in the redistricting process and by abandoning the focus on the actual electoral consequences of redistricting legislation. Last, I will explore the possibility of saving the delegation-specific focus by conceptually disaggregating the major political parties into separate state groups. Disaggregating the parties, however, does nothing to shift the focus of the conventional injury accounts away from the legislature as a whole.

#### A. *The Polarization Account*

One possible alternative account of harm is that we might be concerned that partisan gerrymanders will lead to more polarized congressional delegations—that is, that such gerrymanders would systematically eliminate centrist legislators, both Democrat and Republican, even if they did not introduce bias or decrease competition.<sup>56</sup> Despite the

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<sup>56</sup> Sam Issacharoff and Pam Karlan have recently suggested that polarization represents one of the harms caused by partisan gerrymandering. See Issacharoff and Karlan, 153 U Pa L Rev at 574 (cited in note 28) (“The perverse consequence of the incumbent gerrymander is that it skews the distribution politically by driving the center out of elected office at the legislative level.”). Consider also Samuel Issacharoff, *Collateral Damage: The Engendered Center in American Politics*, 46 Wm & Mary L Rev 415, 427–28 (2004) (arguing that partisan gerrymandering eliminates the mechanisms that “pull partisan impulses back toward the electoral center”); Issacharoff, 116 Harv L Rev at 628–29 (cited in note 45) (“If each district can potentially be gerrymandered to render it uncompetitive, the result is to create strong incentives toward polarization as the parties become more susceptible to partisan homogeneity . . .”). To be clear, however, Issacharoff and Karlan appear to be suggesting a slightly different argument than the one

superficial appeal of this account, it suffers from two shortcomings. First, the link between partisan gerrymandering and increased polarization is not as clear as is frequently suggested. More important, to the extent such gerrymanders produce polarization, it is polarization of the structure of representation in the legislature as a whole that is a concern, not polarization in any individual district or small subset of the legislative assembly. In other words, this theory of democratic injury shares the same structure as the partisan bias and anticompetition injuries.

Whether partisan gerrymanders lead to the selection of more ideologically extreme legislators is difficult to determine both theoretically and empirically. In part, it depends on the type of partisan gerrymander that a state undertakes. Political gerrymanders are often divided into two types: partisan and bipartisan.<sup>57</sup> Partisan gerrymanders are those in which one political party draws district lines that favor it and harm the other party. In contrast, bipartisan gerrymanders are those in which both parties agree to draw district lines that make each party more secure, without necessarily favoring one party over the other.<sup>58</sup> While the distinction between these two types of gerrymanders is somewhat crude, it can be made more precise by treating partisan gerrymanders as those that introduce *bias* into the system and bipartisan gerrymanders as those that reduce the *competitiveness* (or responsiveness) of the system.<sup>59</sup> In practice, political gerrymanders are often a hybrid of these two types.<sup>60</sup> Nonetheless, distinguishing between bias effects

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I describe above. They hint (and Issacharoff states more directly in another recent article) that the degree of polarization may be correlated with a lack of accountability to changes in the electorate's political preferences. See Issacharoff and Karlan, 153 U Pa L Rev at 574 (cited in note 28); Issacharoff, 46 Wm & Mary L Rev at 425 (cited in note 56) ("As a result [of polarization], the elected representatives are increasingly removed from the population's preferences and unaccountable to changes in the desires or views of the electorate."). In other words, they link the polarization idea with the anticompetition idea. At least in theory, however, these concepts need not be linked: Congress can become more polarized without become less responsive to shifts in electoral preferences.

<sup>57</sup> See, for example, David Butler and Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* 9–11 (Macmillan 1992).

<sup>58</sup> See Gary W. Cox and Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* 31 (Cambridge 2001).

<sup>59</sup> Of course, this typology is itself somewhat crude. Under certain conditions, a party in control of the redistricting process might seek to maximize its seat share by increasing responsiveness. See Cox and Katz, *Elbridge Gerry's Salamander* at 33 (cited in note 58).

<sup>60</sup> For a formal description of the redistricting process that models the relationship between bias and responsiveness under different contexts, see Cox and Katz, *Elbridge Gerry's Salamander* at 31–43 (cited in note 58).

and competition effects is crucial to assessing the claim that partisan gerrymanders lead to a more polarized legislative body.

There is little reason to think that partisan gerrymanders—that is, gerrymanders that introduce bias in favor of one party—will have a systematically polarizing effect on the composition of a state’s congressional delegation. In order to introduce bias into a districting arrangement, redistricting authorities take advantage of the fact that voters of different partisanship are not distributed evenly around the state.<sup>61</sup> This uneven distribution makes it possible to draw district lines that affect the expected partisan composition of different districts. To bias a districting plan in favor of Republicans, for example, redistricting authorities “pack” and “crack” voters that tend to support Democrats. Packing Democratic voters into a small number of districts where they constitute large super-majorities ensures Democratic victories in those districts but reduces the total number of seats Democrats capture by increasing the number of wasted Democratic votes—that is, votes cast for Democrats that are either unnecessary or insufficient to win a seat. Cracking, the complement of packing, similarly wastes Democratic votes by splitting blocks of Democratic voters into a number of districts where Republican voters will predominate. By maximizing the number of wasted votes for the other party and minimizing the number of wasted votes for itself, a party in control of redistricting distributes its votes more efficiently, and thereby biases a districting plan in its favor.

While introducing bias into a congressional delegation in this fashion will change the expected partisan composition of each district, it will not necessarily increase the extent to which the composition of the delegation is polarized. As the above explanation demonstrates, in order to increase bias the party in control of redistricting generally has to spread itself more thinly across seats that it hopes to win (in order to lower the number of wasted votes cast in its favor). But the ideological polarization of an individual representative is often thought to be related to how much interparty competition there is for the representative’s seat: safe seats produce more polarized representatives because, by definition, the median voter in a district that is closely divided between the two major parties is more centrist than the median voter in a district dominated by one party. Thus,

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<sup>61</sup> If voter partisanship were evenly distributed, the placement of district lines would have no effect.

depending on what one thinks the favored party's districts would look like absent the existence of a partisan gerrymander, it may be that representatives elected from many of the favored party's districts will be *less* polarized than they otherwise would have been. While the representatives elected from the packed disfavored party's districts will likely be more polarized (because those districts are likely to be dominated by supermajorities of voters from the disfavored party), it is difficult to know whether the end product of the gerrymander will be to increase or decrease the aggregate level of polarization within the congressional delegation.

In contrast, bipartisan gerrymanders should predictably lead to greater polarization in congressional delegations. Such gerrymanders aim to increase the number of safe, noncompetitive seats, and as explained above these less competitive seats are likely to produce more polarized legislators. Thus, whether political gerrymanders actually have a polarizing effect depends on the type of partisan manipulation undertaken. Nonetheless, because bipartisan gerrymanders should polarize representation (and, more to the point, because most partisan gerrymanders reflect an effort both to introduce bias and to depress competition), this obstacle is not fatal to the polarization account.

Even if congressional political gerrymanders do lead to polarization within congressional delegations in some contexts, however, one would need an independent normative account of why the polarization of a state's congressional delegation was harmful. The central difficulty with developing such an account is that one immediately runs into the same problem encountered in Part II: existing discussions of the consequences and concerns flowing from the polarization of representation typically focus on the risk of polarization in the legislature as a whole. Thus, shifting the focus from bias or competitiveness to the potential harm of polarization likely does not solve the central problem that plagues the conventional harm accounts; like those accounts, the polarization account describes a potential electoral consequence of redistricting that is typically conceptualized at the institutional level of the legislature, rather than at the level of some subset of the legislature.

The reasons for the legislature-wide focus are the same ones we have already seen. Scholars are interested in the concept of polarization because they care about the relationship between the composition of the electorate and the overall structure of

representation in legislative institutions. This focus leads naturally to a systemwide institutional perspective. In addition, it is difficult to see how the concept of polarization could have much purchase at lower institutional levels. The polarization account is difficult to square with a district-level perspective for the same reason as the anticompetition account: districted elections tend to produce (and are often considered desirable because they produce) different levels of interparty competition in different districts. As a result, it is too much to expect that every district will produce fairly centrist legislators. And as with the anticompetition account, once one abandons the district-level inquiry, it is difficult to explain why it would matter if a few districts that produced ideological legislators were in close geographic proximity. For this reason, discussions of polarization typically measure and evaluate polarization at the level of the legislature as a whole. Because the polarization account adopts a legislature-wide perspective, the polarizing effect of one state's congressional gerrymander can only be determined by reference to what happens in other states. Thus, this account of partisan gerrymandering's harm cannot save the delegation-specific focus.

As with bias and competition, it is plausible that polarization caused by congressional political gerrymanders will accumulate across states and thereby increase the level of polarization in Congress. This would not salvage the delegation-specific polarization injury, but it would create the possibility of a Congress-wide injury that courts could attempt to remedy by intervening on a state-by-state basis. I discuss in Part IV the potential judicial strategy of intervening at the congressional delegation level to police a legislature-wide injury. My central point here is only that the polarization account does not justify judicial efforts to *identify* the injury by examining a single state's congressional rejecting scheme.

I should note, however, that intervening to prevent Congress as a whole from becoming more polarized would still require a theory about why greater polarization in Congress is harmful. One possibility is that such polarization is harmful because it alters the policy choices that Congress enacts. It is not clear, however, exactly how greater polarization will alter the content of the laws that Congress enacts. The effects of greater polarization on the legislative dynamics of Congress are quite complex. A median voter model of legislative behavior might predict that polarization would have no effect on



legislative outcomes, because greater polarization would simply increase the dispersion of legislators without altering the position of the median legislator. In contrast, more deliberative models of congressional behavior might predict that greater polarization would lower the quality of deliberation, resulting in different legislative outcomes. In any event, even if one could demonstrate that polarization altered outcomes, one would need to explain why the outcomes produced by the more polarized Congress are worse. After all, a certain degree of polarization might help curb certain deliberative pathologies that can affect group decision-making.<sup>62</sup> Moreover, the idea that the ideological positions of legislators should mirror the ideological positions of voters represents an implicit commitment to a certain conception of representation and a certain set of theories about how democratic decisionmaking should best be structured to produce good outcomes.<sup>63</sup> The question of how representation of centrist attitudes should be traded off against representation of more extreme viewpoints in a legislative assembly is simply not subject to an easy answer.<sup>64</sup>

My point is not to argue that polarization is unproblematic or affirmatively good. Rather, I just mean to question the easy assumption—an assumption no doubt facilitated by the pejorative connotation to the term itself—that any polarizing effect of congressional gerrymandering is harmful.<sup>65</sup> More fundamentally, polarization, like

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<sup>62</sup> See, for example, Cass Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 Yale L J 71, 74, 109–10, 114–15 (2000) (explaining that, when groups of like-minded individuals deliberate, they may “predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies”). See also Heather Gerken, *Second-Order Diversity and Democracy*, 118 Harv L Rev (forthcoming 2005). Polarization, which increases the difference between the viewpoints of those engaged in deliberation may, of course, also lead to deliberative pathologies. See Sunstein, 110 Yale L J at 104–05. The point is just that one would need to know more to determine whether increased polarization would be better or worse in particular congressional decisionmaking contexts.

<sup>63</sup> See generally Hanna F. Pitkin, *The Concept of Representation* (Univ California 1967).

<sup>64</sup> Note also that it may be a mistake to analyze the polarization of a legislative assembly like Congress in isolation. Polarization in Congress might be counteracted by other voter behavior within our democratic decisionmaking structure. There is evidence, for example, that increased polarization may strengthen public support for divided government, which can moderate the effects of polarization between the parties or within one institution of the legislative process. See Gary Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in Jon R. Bond and Richard Fleisher, eds., *Polarized Politics: Congress and the President in a Partisan Era* 28–29 (Cong Quarterly 2000) [hereinafter *Polarized Politics*].

<sup>65</sup> For the claim that it is harmful or bad for elected officials to be more polarized than the “population as a whole,” see Issacharoff, 46 Wm & Mary L Rev at 423–25 (cited in note 56). As I indicated above, it is a bit unclear whether Issacharoff is concerned with polarization itself or with the possibility that increased polarization will reduce the responsiveness of representatives to constituent preferences. See note 56. For some skepticism about this connection, see Richard Fleisher and Jon R. Bond, *Polarized Politics: Does It*

partisan bias and anticompetitive effects, is a potential democratic harm that is consistently conceptualized at the institutional level of the legislature. The polarization account therefore does not save the effort to identify partisan gerrymandering's harm at the level of individual congressional delegations.

### *B. The Illegitimate Purpose Account*

Another way to rehabilitate the possibility that partisan gerrymandering produces meaningful delegation-specific injuries is to move away from the first-order electoral consequences of such gerrymanders and to focus instead on the process by which redistricting plans are produced.<sup>66</sup> Perhaps the most plausible process-based account of partisan gerrymandering's harm is the illegitimate purpose account. On this view, partisan gerrymanders are harmful because it is simply impermissible for the government to undertake redistricting for the *purpose* of partisan gain.<sup>67</sup> This account salvages the possibility of a court determining whether an alleged congressional political gerrymander is harmful without paying attention to any other state's congressional redistricting.<sup>68</sup> (After all, if the harm of partisan gerrymandering does not turn on the electoral consequences of the redistricting plans, then there would be no need to evaluate the combined consequences of every state's congressional redistricting plans in order to determine whether the plans produced an injury.) It would also justify the Court's decision in *Vieth* to review alleged congressional and state legislative partisan gerrymanders in the same way.

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*Matter?*, in *Polarized Politics* at 193 (cited in note 64) (“There is little evidence to support a claim that members of Congress have become less responsive to constituent preferences.”).

<sup>66</sup> While it might seem easy to describe this shift as a shift from consequentialist to anti-consequentialist theory, it is imprecise to describe the conceptual boundary in this fashion. A theory that does not focus on the direct electoral consequences of redistricting can still be consequentialist; it just does not turn on one particular consequence—the effect of the redistricting plan on the aggregation of votes. Consider Matthew Adler, *Rights Against Rules: The Moral Structure of the American Constitution*, 97 Mich L Rev 1 (1998) (laying out a consequentialist account of constitutional law that focuses on the reasons for government action). For example, consider the possibility that a purposeful but completely ineffectual effort to gerrymander a state's legislative districts would lead the public to see the political process as somehow less legitimate and thereby skew their incentives to participate. The injury would be rooted in the public's perception of the redistricting purpose, but the harm could be understood in consequentialist terms as a function of the changes in political participation that resulted from the loss of perceived legitimacy.

<sup>67</sup> Justice Stevens proposed just this conception of harm in *Vieth*. See *Vieth v Jubelirer*, 124 S Ct 1769, 1808–13 (2004).

<sup>68</sup> To be precise, this theory does not require reference to *any* set or subset of districts because its focus is on the process through which a state produces its districts, rather than on the districts produced by that process.

There are a variety of theories of constitutional law that might underwrite the position that partisan gerrymandering's harm turns on the reasons for redistricting rather than on the direct electoral consequences of redistricting.<sup>69</sup> While the illegitimate purpose account can therefore supply a coherent explanation of partisan gerrymandering's harms that avoids the difficulties stemming from the disaggregated nature of congressional redistricting, the account remains conclusory. It asserts that partisan gain (or perhaps bipartisan entrenchment) is an impermissible reason for action in the redistricting context, but it does not justify that assertion.<sup>70</sup>

In fact, there is reason to think that would be extremely difficult to justify the conclusion that partisan gain is an impermissible reason for action in the redistricting context -- that is, unless one was prepared to invalidate every redistricting plan enacted by a legislature.<sup>71</sup> So long as legislatures are principally responsible for redrawing districts in this country, partisan advantage-seeking will be an inevitable component of redistricting. The Supreme Court has repeatedly recognized this fact,<sup>72</sup> and in *Vieth* nearly every member of the Court rejected the notion that proving partisan purpose itself could be enough to demonstrate that a redistricting plan constituted an unconstitutional

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<sup>69</sup> See, for example, Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup Ct Rev 95 (providing a political process-based account of why governmental decisions should be unconstitutional when they are motivated by illegitimate purposes); Richard H. Pildes and Elizabeth S. Anderson, *Expressive Theories of Law: A General Restatement*, 148 U Pa L Rev 1503, 1531 (2000) (arguing that the government should be prohibited from undertaking actions for certain morally impermissible reasons because "state action should be wrong . . . when it expresses impermissible valuations, without regard to further concerns about its cultural or material consequences"); Adler, 97 Mich L Rev 1 (cited in note 66) (arguing that constitutional rights should be understood to be "rights against rules"—that is, as prohibitions on the government infringing upon certain interests for impermissible reasons, rather than as shields protecting certain actions from government regulation). To be clear, these theories do not always equate the reasons for government action with legislative purpose as it is conventionally understood. See, for example, Pildes & Anderson, 148 U Pa L Rev at 1524-25 (making clear that their concern is with the social meaning of government action). For present purposes, however, these distinctions are not important.

<sup>70</sup> For an argument that partisan gain is a perfectly acceptable goal in the redistricting process, see Daniel H. Lowenstein and Jonathan Steinberg, 33 UCLA L Rev 1, 73-75 (1986).

<sup>71</sup> Moreover, one cannot bootstrap electoral consequences into this theory by arguing that it makes sense to prohibit partisan purpose on the ground that partisan purpose is likely to be accompanied by partisan effects. If reasons for action are really just a proxy for expected effects, the theory collapses back into the theories discussed in the previous part that were concerned with the electoral consequences of redistricting. To treat reasons (or purpose) as a proxy for effect requires that one identify the "effect" about which one cares, which simply reintroduces the problem of choosing an institutional level from which to identify those effects.

<sup>72</sup> See, for example, *Davis v Bandemer*, 478 US 109, 128-29 (1986). See also *Gaffney v Cummings*, 412 US 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences.").

political gerrymander.<sup>73</sup> Only Justice Stevens suggested that purpose alone should be the touchstone of the inquiry: he argued that where “the predominant motive of the legislators who designed [a district] . . . was a purpose to discriminate against a political minority, that invidious purpose should invalidate the district.”<sup>74</sup>

To be fair, Justice Stevens does not appear to advocate invalidating every district drawn in part with an eye to the partisan consequences of redistricting. Instead, he concludes that a district should be unconstitutional only where political discrimination was the “predominant motive” of the legislators.<sup>75</sup> Stevens borrows the “predominant motive” test from the *Shaw v Reno*<sup>76</sup> strand of the Supreme Court’s racial redistricting doctrine—the one other area of redistricting jurisprudence where the Court has stated that redistricting arrangements might be impermissible by virtue of the reasons that they were enacted, regardless of the effects of the redistricting schemes.<sup>77</sup> In *Shaw* and its progeny, the Court concluded that districts drawn for the predominant purpose of segregating voters by race are unconstitutional.<sup>78</sup> The electoral consequences of the district lines challenged in *Shaw* litigation are doctrinally irrelevant to their constitutionality.<sup>79</sup> But not

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<sup>73</sup> See *Vieth*, 124 S Ct at 1785–86 (plurality); id at 1796–97 (Kennedy concurring); id at 1817–19 (Souter, joined by Ginsburg, dissenting); id at 1823–25 (Breyer dissenting). See also *Davis v Bandemer*, 478 US 109, 127, 130 (1986) (holding that the plaintiffs were required to show both discriminatory purpose and effect in order to demonstrate the existence of an unconstitutional partisan gerrymander).

<sup>74</sup> *Vieth*, 124 S Ct at 1810 (Stevens dissenting); id at 1799 (“In my view, when partisanship is the legislature’s *sole motivation* . . . the governing body cannot be said to have acted impartially.”); id at 1801 (suggesting “purpose as the ultimate inquiry”); id at 1804 (“State action that discriminates . . . for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decision-maker’s duty to remain impartial.”); id (“Thus, the critical issue in both racial and political gerrymandering cases is the same: whether a single non-neutral criterion controlled the districting process to such an extent that the Constitution was offended.”). Consider also *Cox v Larios*, 124 S Ct 2806, 2808 (2004) (Stevens concurring).

<sup>75</sup> *Vieth*, 124 S Ct at 1810.

<sup>76</sup> 509 US 630 (1993).

<sup>77</sup> *Vieth*, 124 S Ct at 1802-04.

<sup>78</sup> See *Miller v Johnson*, 515 US 900, 915–16 (1995).

<sup>79</sup> Because the *Shaw* injury focuses on legislative motivations, it is conceptually distinct from a vote dilution claim; in fact, the *Shaw* plaintiffs specifically declined to allege that their voting power had been reduced by the voting scheme. See *Shaw*, 509 US at 641 (“In their complaint, appellants did not claim that the General Assembly’s reapportionment plan unconstitutionally ‘diluted’ white voting strength.”). See also Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 Cal L Rev 373, 399 n 116 (2004). That said, *Shaw* itself hints that the origins of the doctrine may have been connected to Justice O’Connor’s concern drawing a district principally on the basis of race would affect the political dynamics within that district. See *Shaw*, 509 US at 647–48 (discussing possible representational harm).

every redistricting scheme drawn with race in mind is automatically invalid under the *Shaw* doctrine; only those districts drawn with race as a predominant purpose.<sup>80</sup>

While requiring that partisan gain be the “predominant purpose” does alleviate slightly the concern that the illegitimate purpose account would render unconstitutional every redistricting plan drawn by a legislative assembly, it introduces other significant problems. Perhaps the most serious is that it is extremely difficult to figure out how a court can distinguish between cases where partisanship simply plays a role in the redistricting process and cases where partisan gain is the “predominant purpose.” This problem has plagued the *Shaw* jurisprudence from its outset. In fact, many commentators have argued that this difficulty renders *Shaw*’s predominant motive test completely unworkable, or perhaps even theoretically incoherent.<sup>81</sup>

Even if these difficulties could be overcome, a purely purposive account of partisan gerrymandering’s harms runs counter to the predominant thrust of most contemporary redistricting scholarship, which focuses more and more today on functional, structural approaches to the constitutional regulation of the political process.<sup>82</sup> For example, such a functional approach appears to be at the heart of the Pildes and Issacharoff’s antitrust theory of political process regulation. That approach seeks to “invert the focus of constitutional doctrine from the foreground of rights and equality to the background rules that structure partisan political competition”—that is, to focus attention on the actual electoral consequences of rules that regulate the political process.<sup>83</sup> As I described above, Issacharoff has argued that this functional focus should guide partisan gerrymandering jurisprudence, with courts invalidating redistricting schemes that are likely to have anticompetitive effects on political representation. And in other areas legal scholars have advocated a similar focus on electoral consequences: Nathaniel Persily, for example, has defended political party autonomy in primary elections on the ground that such autonomy

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<sup>80</sup> In other words, purpose is treated as a continuous variable, rather than as a dichotomous variable.

<sup>81</sup> See, for example, Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L J 2505 (1997); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 Cumb L Rev 287 (1996). See also *Bush v Vera*, 517 US 952, 1059-62, 1069-71 (1996) (Souter dissenting).

<sup>82</sup> Of course, this contemporary trend is by no means limited to the political process domain of constitutional law.

<sup>83</sup> Pildes and Issacharoff, 50 Stan L Rev at 648 (cited in note 43).

preserves political competition.<sup>84</sup> While these approaches are certainly not logically incompatible with reason-for-action based approaches that do not focus on electoral consequences,<sup>85</sup> they do highlight the extent to which this alternative conception of injury is atypical in the literature today.

In short, while the illegitimate purpose account of partisan gerrymandering's harm does make it possible to rehabilitate the attempts in *Vieth* to identify the injuries of congressional partisan gerrymandering by reference to individual states, moving towards such an account would require a fairly substantial about-face in both the academy and the courts. It would also likely call into question the constitutionality of nearly every districting plan in the country.

### *C. Defining Partisan "Groups"*

Finally, one might try to save *Vieth*'s focus on individual congressional delegations by contesting the definition of the relevant governing groups. Up to this point, I have focused principally on the effects of redistricting for the electoral prospects of the two major parties—Democrats and Republicans. This focus is common in the literature. One might claim, however, that it is wrong to treat Democrats and Republicans as monolithic groups. Perhaps it is more appropriate to disaggregate the political parties state by state. Treating the parties in each state as distinct would make it possible for a court in one state to compare the relative effects of a redistricting plan on the political parties in that state without reference to the treatment of other states' parties. For example, a court could evaluate a single state's congressional redistricting plan to determine whether the plan contained partisan bias in favor of one state party or the other. By definition, it might seem, this would solve the disaggregation problem and restore the delegation-specific focus.

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<sup>84</sup> Nathaniel Persily, *Toward A Functional Defense of Political Party Autonomy*, 76 NYU L Rev 750, 752 (2001).

<sup>85</sup> It is possible, for example, to be concerned both about the structural consequences of a law as well as its expressive significance. Richard Pildes, for example, appears to hold both commitments. He is a principle advocate for policing expressive harms in the constitutional regulation of the political process, see, for example, Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich L Rev 483 (1993), and is also concerned about policing laws that have anticompetitive effects on the political process, see, for example, Pildes and Issacharoff, 50 Stan L Rev at 644–52 (cited in note 43).

This is all true so far as it goes. But there are two substantial difficulties with this line of argument. First is the problem that the same criticism could be leveled against the claim that a state-level focus is appropriate. Republicans or Democrats from any single state are far from monolithic, so this line of argument runs the risk of an infinite regress, the conclusion of which is that there is no way of talking sensibly about partisan groups—or at least that the institutional level from which one defines such groups is arbitrary.

The threat of a regress shows that there is no “natural” institutional level from which partisan representation must always be defined.<sup>86</sup> In part, this point reinforces the central thesis of this article, which is that it is a mistake for courts or scholars to unquestioningly adopt a state-level institutional perspective for evaluating the partisan consequences of congressional redistricting. My point, however, is not to develop a comprehensive theory about how to define the boundaries of partisan groups in all circumstances. Nor is my point that the focus of congressional redistricting must necessarily be on national, rather than local representation. My modest point is simply that the existing accounts about why we should care about partisan gerrymandering define the injuries that they identify by reference to characteristics of the system as a whole.

More important, the delegation-specific focus cannot be saved by redefining the relevant partisan groups because it is the theory of injury, and not the scope of the relevant partisan groups, that determines the appropriate institutional level of focus. Even if it is correct that the best account of partisan groups would disaggregate those groups into state-party units, such disaggregation is not sufficient to support the claim that the injuries caused by congressional gerrymandering are delegation specific. Consider, for example, the conventional injury of partisan bias. This account of redistricting is concerned with the effect of redistricting on the relative ability of parties to translate electoral support into power in the legislative assembly. Defining the parties as state party units rather than as national parties does not change this focus; it just increases from two

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<sup>86</sup> For a general theoretical argument that voters should care about the composition of legislative assemblies, rather than the composition of some subpart of such assemblies, see Jean-Pierre Benoit & Lewis A. Kornhauser, *Assembly-Based Preferences, Candidate-Based Procedures, and the Voting Rights Act*, 68 S Cal L Rev 1503 (1995).

to one hundred the number of (major) parties whose legislative power is at issue. In other words, disaggregating the parties would, on the partisan bias account of injury, increase the number of dimensions in the bias calculation, rather than decreasing the institutional level of inquiry.<sup>87</sup> Certainly, one would care about whether Democrats from Texas were disadvantaged relative to Republicans from Texas in their ability to translate electoral support into power in Congress. But one would also care about whether Democrats from Texas were disadvantaged relative to Democrats from Michigan in this respect.<sup>88</sup> For that reason, a court evaluating Texas's redistricting scheme would still need to refer to Michigan's districting scheme, as well as the districting arrangement in every other state, in order to determine whether the system contained partisan bias. Disaggregating the parties does not, therefore, define away the institutional-level problem.

#### IV. RETHINKING VIETH

The Court's approach to the central justiciability question in *Vieth* was therefore misguided. The justices in *Vieth* disagreed sharply about the answer to question whether claims of congressional partisan gerrymandering should be justiciable. But they all approached the question in roughly the same fashion: nearly all of the justices focused exclusively on whether a test could be developed that would identify the constitutional harms flowing from an individual state's putative congressional partisan gerrymander.<sup>89</sup> As I have shown, this approach is unlikely to succeed. To the extent that the harm of congressional gerrymanders can only be identified from a legislature-wide institutional

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<sup>87</sup> For one explanation of how bias can be calculated in multiparty settings where there are more than two parties, see King, XV Legis Stud Q at 161–67 (cited in note 33).

<sup>88</sup> In the post-Founding period, when the major parties were not the same across states, there was just this sort of inter-state conflict between the power of parties from small and large states. Small states tended to use at-large congressional elections during this period, while large states used districted elections. The different electoral procedures affected the composition of the states' congressional delegations, because while the minority party tends to be overwhelmed in an at-large election, it stands a greater chance of success in districted elections. Thus, during this period the "small states sent more politically unified delegations to Congress than did large states. . . . [And because the small states' more unified delegations tended to vote more frequently] as a bloc, they exercised an influence disproportionate to their numbers in the lower house." Rosemarie Zagari, *The Politics of Size* 126–27 (1987). This difference between small and large states led to repeated efforts in Congress to require districted elections throughout the country. See *id.* at 128–31. In 1842, Congress finally adopted such a requirement, which remains on the books today. See 2 USC § 2c.

<sup>89</sup> The one partial exception is Justice Kennedy, who appeared to acknowledge that the aggregate consequences of congressional redistricting in several states might be relevant to the constitutional inquiry. See text accompanying note 26. While his opinion in *Vieth* has been perhaps the most widely derided, therefore, it may be the only opinion that points towards the shift in institutional perspective that the Court needs to make if it is to successfully police congressional partisan gerrymanders.



perspective, the Court will inevitably fail if it tries to pin the injury on individual congressional redistricting plans.<sup>90</sup>

If the Court were to adopt a nationwide perspective in congressional partisan gerrymandering cases and give up on its efforts to figure out whether individual states' congressional redistricting schemes did or did not produce constitutionally cognizable harms, it would be left with three options: develop tests to directly measure the harm of congressional gerrymanders at the legislature-wide level; give up on trying to develop criteria for measuring the harm directly and focus instead on developing constitutional rules that reduce the *risk* that state redistricting efforts will combine to produce a Congress-wide injury; or abandon judicial review of congressional partisan gerrymanders altogether.

The first option is wholly impractical. Federal courts would have an extremely difficult time testing for Congress-wide harms, because doing so would require courts to evaluate every state's congressional redistricting plan simultaneously. Such an approach would be thwarted by a number of serious coordination problems both among courts and within the states that produce congressional redistricting plans. For these reasons, a shift towards risk-based regulation is a more attractive option. Federal courts can, in theory, reduce the risk of Congress-wide injuries by intervening at the state level. But the possibility that courts can intervene state by state to police congressional partisan gerrymanders does not mean that decisions about justiciability and doctrinal structure can remain identical for state legislative and congressional redistricting. To the contrary, the disaggregated nature of congressional redistricting leads to unique justiciability questions

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<sup>90</sup> Note that I am arguing only that courts should approach congressional and state legislative partisan gerrymanders differently because the former present special problems for any effort to *identify* the existence of the relevant constitutional injury. There is, of course, another reason why it might be that courts should treat these two types of gerrymanders differently: one type might pose a greater constitutional danger than the other because of the different political contexts in which they occur. For example, it might be that courts should police state legislative redistricting more closely because it involves self-interested state legislators drawing *their own* districts, while congressional redistricting does not. As I have noted elsewhere, the perception that state legislative redistricting presents a more direct conflict of interest may explain in part why more states have stripped their legislatures of authority over state legislative redistricting than over congressional redistricting. See Cox, 79 NYU L Rev at 793 (cited in note 12). See also *id.* (questioning whether this distinction makes much sense in the contemporary political climate, where there is evidence of strong national political party influence over state parties in the redistricting arena). But this different set of potential reasons for distinguishing between state legislative and congressional redistricting (which are also overlooked by the Court), are not the focus of this article.

and has important practical implications for how judicial review of congressional gerrymanders will have to differ from the review of state legislative gerrymanders.

*A. The Impracticality of Nationwide Review*

Federal courts probably cannot develop tests to identify directly the existence of congress-wide harms produced by congressional gerrymanders. Doing so would require either that many courts coordinate their review of redistricting plans, or that an individual court review every state's redistricting plan simultaneously—neither of which is a particularly plausible option.

Congressional partisan gerrymandering lawsuits have historically been framed as challenges to a single state's redistricting plan.<sup>91</sup> Unsurprisingly, courts in such litigation have focused only on the redistricting scheme before them.<sup>92</sup> As the above discussion makes clear, however, if federal courts continue this practice they will be incapable of identifying the presence of any legislature-wide injuries produced by the decennial congressional redistricting process. That harm can be identified only by reference to the districting plans of all other states in addition to the state whose redistricting plan the court is evaluating. Under the current judicial practices for reviewing redistricting schemes, therefore, federal courts will not be capable of identifying the injuries that have been the primary focus of the partisan gerrymandering literature.

Although partisan gerrymandering litigation is not currently structured to enable courts to evaluate legislature-wide injuries caused by congressional redistricting, this does not mean that such review is impossible. Courts could modify their review of partisan gerrymandering claims in an effort to identify such injuries. (Or, to put it from the perspective of litigation strategy, lawyers could reframe their partisan gerrymandering challenges.) In order to evaluate congressional redistricting plans for Congress-wide injuries, courts could do one of two things: First, one court could evaluate every state's congressional redistricting plan simultaneously to determine whether the plans, in the aggregate, biased the composition of Congress, depressed competition, or caused some other injury to the structure of representation in Congress as a whole. Alternatively, multiple courts could coordinate their review of individual states' redistricting plans in

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<sup>91</sup> See, for example, *Martinez v Bush*, 234 F Supp 2d 1275 (SD Fla 2002); *Badham v Eu*, 694 F Supp 664 (1988). See also note 27.

<sup>92</sup> See, for example, cases cited in notes 27, 91.

some fashion that would permit each court to review only one state's plan while ensuring that the conclusions drawn about each state's plan were aggregated to determine whether the plans in combination caused an impermissible harm.<sup>93</sup>

The second possibility seems extremely farfetched. There are currently no mechanisms that would facilitate that sort of complex coordination between Article III courts. The first possibility seems superficially more plausible, but in practice it would present substantial problems as well. The evidentiary complexity of the task itself might tax judicial competence. Under the conventional injury accounts, for example, a court would have to evaluate the redistricting plans from all fifty states in order to determine whether congressional redistricting around the country had introduced partisan bias or anticompetitive effects.

Sheer complexity aside, simultaneously evaluating the congressional districts from every state poses its own set of coordination problems. The difficulty arises because different states' congressional districting plans are not created at the same time and do not remain stable over time. Although states are required to redraw their congressional districts following the release of each census,<sup>94</sup> states undertake the task of redistricting at somewhat different times.<sup>95</sup> (At least one state—Maine—does not revise its district lines until more than two years after the census.)<sup>96</sup> Moreover, the redistricting plans that states initially adopt are often challenged under the Voting Rights Act, the federal Constitution,

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<sup>93</sup> Note that review of congressional redistricting does not present the same kind of coordination problem that often arises when a decentralized judiciary regulates a national activity—or, to be more precise, any activity that extends across multiple judicial districts. There, the difficulty is caused by the disaggregated nature of judicial review and can be solved by consolidating judicial review in one body, either initially (as with statutory rules that force all legal challenges to certain statutes into the district court for the District of Columbia) or on appeal (as with the Judiciary Act's rules of appellate jurisdiction that give the Supreme Court final say over most questions of federal law). With respect to congressional redistricting, however, the difficulty is caused by the disaggregated nature of the government action being reviewed, not by the disaggregated nature of the judicial system.

<sup>94</sup> See *Georgia v Ashcroft*, 539 US 461, 489 n 2 (2003); *Reynolds v Sims*, 377 US 533, 583–84 (1964). See also Cox, 79 NYU L Rev at 758 n 36, 801 (cited in note 12) (explaining that this requirement originated as a presumption and grew into an apparently prophylactic requirement).

<sup>95</sup> States ordinarily must redistrict in time to have a new districting plan in place for the first round of elections following the release of the Census. See *Grove v Emison*, 507 US 25, 35–37 (1993). See also Cox, 79 NYU L Rev at 758 n 37, 778 n 102 (cited in note 12).

<sup>96</sup> Maine Const Art IV, pt 1, § 2 (“The Legislature which convenes in 1983 and every 10th year thereafter shall cause the State to be divided into districts for the choice of one Representative for each district.”); id Art IV, pt 2, § 2 (“The Legislature which shall convene in the year 1983 and every tenth year thereafter shall cause the State to be divided into districts for the choice of a Senator from each district, using the same method as provided in Article IV, Part First, Section 2 for apportionment of Representative Districts.”).

state law, or some combination of all three. The districts are thus often in flux, which would introduce substantial uncertainty into any attempt to evaluate every states' congressional redistricting scheme simultaneously: at any point, one or more districting schemes could be either invalidated or revised, further complicating the efforts of a court to evaluate the state plans in the aggregate. And unfortunately, this difficulty cannot be avoided simply by delaying review of partisan gerrymandering claims until other legal challenges are resolved, because litigation over a state's redistricting scheme has been known to stretch over the course of the entire decade.<sup>97</sup> Solving this problem, therefore, would require radically revising the entire contemporary redistricting regulatory structure.

Finally, either of the two above approaches poses an additional problem at the remedial stage of litigation. Even if one of the approaches made it possible for a court (or courts) to identify the existence of a legislature-wide harm caused by the partisan gerrymandering of congressional districts, there would remain the question of how to remedy that harm. Because each state's redistricting plan would have contributed to the harm, it would be incoherent to conclude that only state X or Y was the cause of the injury and therefore that only state X or Y should have its redistricting plan invalidated. Joint causation precludes the possibility of easily assigning blame to any particular state. Relatedly, it would often be possible to remedy the harm in a number of different ways, each of which would require revising the districts in a different state or set of states.<sup>98</sup> Accordingly, there would be no obvious way to figure out which states' plans to invalidate or revise at the remedial stage of litigation. And absent a theory about how to make this choice, the decision would be essentially arbitrary.

#### *B. Risk-based Regulation and State-Level Review*

While courts are unlikely to be able to simultaneously evaluate the effect of multiple congressional redistricting plans, this does not necessarily mean that *Vieth's* justiciability holding was wrong and that courts should get out of the business of policing

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<sup>97</sup> See, for example, *Hunt v Cromartie*, 121 S Ct 1452 (2001). Moreover, there are additional reasons that delay might be disfavored. Perhaps most obviously, delay might mean that elections would be conducted under gerrymandered congressional redistricting maps that were later determined to cause an impermissible harm.

<sup>98</sup> Heather Gerken has identified a similar dilemma in the context of racial vote dilution litigation. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv L Rev 1663, 1700–02 (2001).

congressional partisan gerrymanders. The question remains whether courts can police the nationwide harms of congressional gerrymandering by intervening state by state. If this is possible, then the prescription that would follow from recognizing the disaggregated nature of congressional redistricting would be that the Court should shift its focus -- away from *Vieth*'s effort to develop a test for directly measuring the harms of congressional gerrymanders, and toward an approach that reduces the risk that individual states' redistricting plans combine to produce cognizable harms.

In theory, courts can reduce the risk of Congress-wide injuries through state-by-state intervention. Whether they can do so in practice is another matter, precisely because of the differences between state legislative and congressional redistricting.<sup>99</sup> First, whether intervention is worthwhile in the congressional context turns on questions that are irrelevant in the state context—such as whether the effects of congressional redistricting in each state tend to combine to produce nationwide harms or, instead, tend to cancel out. Perhaps more important, the disaggregated nature of congressional redistricting has implications for how judicial intervention should (and should not) be structured -- beyond the preliminary question whether judicial intervention is at all warranted. In particular, some doctrinal rules courts might use to police state legislative gerrymanders would not be effective at policing congressional gerrymanders and might even make matters worse.

*1. The theoretical possibility of risk-based regulation*

State-by-state judicial intervention can in theory reduce the possibility of the legislature-wide injuries described by the conventional accounts of partisan gerrymandering's harms. Consider, for example, the partisan bias account of injury. As a theoretical matter, it is clear that judicial intervention at the state level could reduce the probability that a significant level of bias would accumulate across state plans (so long as judicial intervention actually had the effect of reducing partisan bias in congressional delegations). Imagine, for example, that without judicial intervention each state's redistricting process produces some variable amount of state-level bias in favor of one party or another. There is some probability that these state-level biases will accumulate to

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<sup>99</sup> Given the extent to which the Supreme Court has struggled to supply a coherent partisan gerrymandering jurisprudence, setting judicial review of congressional gerrymanders on more solid footing would itself represent an important step forward.

produce an objectionable national level bias, rather than essentially canceling out. The greater the average amount of bias generated by each state, the greater the probability of getting an unacceptable level of national bias.<sup>100</sup>

Thus, if courts could reduce the amount of bias in each state’s plan from some positive amount to zero, judicial intervention would essentially eliminate the possibility of impermissible national bias.<sup>101</sup> Of course, producing this outcome would require perfect policing by courts—an unlikely scenario. Even absent perfect policing, however, judicial intervention can lower the likelihood that an unacceptable level of bias will accumulate.<sup>102</sup> So long as courts reduce the level of bias in each state congressional plan in some relatively uniform fashion,<sup>103</sup> they will decrease the probability that the state-level biases will accumulate into an unacceptable level of national bias.<sup>104</sup>

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<sup>100</sup> This is because the higher levels of bias in each state will stretch out the distribution of bias across states. The fatter this distribution, the higher the statistical likelihood that aggregating across states will yield a high level of national bias. To see this more clearly, consider the skinny limiting case—where every state’s bias equals zero. In that case, there is no chance that the state-level biases will accumulate to produce a national-level bias.

<sup>101</sup> See note 100.

<sup>102</sup> For an example of a risk-based regulatory approach that should lower the likelihood of high levels of national bias, consider Cox, 79 NYU L Rev 751 (cited in note 12) (discussing a prohibition on states redistricting more than once per decennial redistricting cycle).

<sup>103</sup> The caveat “relatively uniform” is necessary because if courts differ dramatically in how effective they are at lowering bias in congressional delegations then it is not clear that judicial intervention in every state will lower the likelihood of partisan bias in Congress. To see this, take the extreme case in which only one or two courts were at all effective at policing bias in congressional delegations. “Successful” intervention in one or two states may be worse than no intervention at all. See text accompanying notes 113–118.

<sup>104</sup> The same analysis holds for the anti-competition injury described in Part II. It might be tempting to argue that the analysis of anticompetitive effects should be different on the ground that such effects, by their nature, will only accumulate (rather than cancel out) across districts. After all, one might argue, the effects are *anticompetitive*—never *pro*-competitive. But such an argument engages in definitional sleight of hand. The fact that the literature does not talk about a baseline for competition in the same way that it does a baseline for partisan bias does not mean that there is no baseline; it just means that the baseline is unspecified. Accordingly, the aggregation of competition-based effects can in theory be modeled in the same way as bias effects, with some state plans favoring competition and some disfavoring it in the same way that some states plans favor Democrats while some disfavor them (by favoring Republicans). It may be true, of course, that no state plans favor competition—though more would need to be said about the appropriate competitiveness baseline in order to determine this. Even if this is true, however, the question remains whether the state-by-state effects accumulate to produce an objectionable Congress-wide anticompetitive effect. The distribution of state plans around the baseline will affect our predictions about the likelihood of this occurring (in the same way that our predictions about the possibility of bias accumulating would be different if we were told that the Democrats controlled the redistricting process in all fifty states), but the basic question remains the same.

## 2. *The practice of risk-based regulation*

While courts can use state-by-state intervention to police congressional gerrymanders, this does not mean that partisan gerrymandering jurisprudence can continue to be the same for both state legislative and congressional redistricting. State-by-state intervention to police congressional partisan gerrymanders will have to differ from intervention to police state legislative gerrymanders.

First, whether judicial intervention is worthwhile in the congressional context turns on questions that are irrelevant in the state legislative context. Judicial intervention can in theory lower the probability that state redistricting schemes combine to produce Congress-wide injuries. But if that probability is low in the first place, judicial intervention becomes less appealing.<sup>105</sup> Moreover, intervention is less attractive if state-by-state intervention can only reduce that probability by a small amount. Without knowing anything about the likelihood that harm will accumulate or about the extent to which courts can reduce this likelihood, therefore, we cannot meaningfully evaluate the value of judicial intervention.

Thus, the correctness of *Vieth*'s ultimate conclusion that courts should continue to police congressional partisan gerrymanders turns importantly on the answer to empirical questions—about how likely it is that injuries will aggregate substantially, and how likely it is that courts will improve the situation. These questions are under-explored. With respect to the partisan bias account, for example, the legal literature rarely asks whether state-by-state manipulation regularly leads to substantial levels of national partisan bias. While the political science literature has engaged the question a bit more directly, it is somewhat divided on the answer. For many years empirical work on this question reported “relatively moderate partisan effects state by state, which cumulate into even smaller net national effects.”<sup>106</sup> More recent work, however, raises the possibility that state-by-state effects can aggregate to produce substantial national effects.<sup>107</sup>

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<sup>105</sup> There is, of course, always the problem of setting threshold above which system-wide bias should be considered substantial or unacceptable. But this difficulty is present whether one seeks to police partisan bias at the delegation- or Congress-wide level. Therefore, the debate about what degree of deviation from partisan symmetry the system should accept without intervention is orthogonal to the question of which institutional level is the appropriate one from which to evaluate partisan symmetry.

<sup>106</sup> See, for example, Cox and Katz, *Elbridge Gerry's Salamander* at 21 (cited in note 60); accord id at 21 (“The view now prevailing in the literature is that redistricting is unlikely to produce any net partisan gains at the national level . . . .”); Butler and Cain, *Congressional Redistricting* at 8 (cited in note 57)

The question of what courts should do in the face of this uncertainty—until better evidence is available—turns on a variety of institutional concerns that are well beyond the scope of this paper.<sup>108</sup> The important point, however, is that these questions about the risk-based approach all bear on whether it is even worth regulating congressional partisan gerrymanders. But they are irrelevant to this threshold determination in the state legislative context.

Beyond the question whether intervention is warranted, the disaggregated nature of congressional redistricting alters the type of state-level intervention that will be effective at policing congressional gerrymanders. Courts will not necessarily be able to apply identical doctrinal rules in the state legislative and congressional context, because some doctrinal rules that might work in the state legislative context simply will not work in the congressional context. An example of such a rule is the one that Justice Breyer proposed in *Vieth*. Breyer proposed that the Court invalidate redistricting plans that improperly enabled a minority of voters to capture a majority of the state’s seats.<sup>109</sup> He selected this rule to preserve legislative majoritarianism.<sup>110</sup> As I explained earlier, the rule does preserve legislative majoritarianism when it is applied to state legislative gerrymanders, but it does not directly protect that principle when it is applied to congressional gerrymanders.<sup>111</sup> In the congressional context, the rule only directly ensures majority control of an individual congressional delegation. And while it is perhaps easy to think that applying this rule, state by state, to congressional redistricting would have the indirect effect of preserving legislative majoritarianism in Congress, it would not. Striking down congressional plans that allowed a minority of voters in the state to capture control of the delegation would not have the cumulative national effect of guarding

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(noting that “the electoral system has little or no systematic partisan bias and that the net gains nationally from redistricting for one part over the other are very small”).

<sup>107</sup> See Cox and Katz, *Elbridge Gerry’s Salamander* at 51–54 (cited in note 58) (providing evidence that congressional redistricting produced a substantial pro-Republican bias in Congress before the reapportionment revolution in the 1960s). See also Hirsch, 2 Election L J at 190–195 (cited in note 33) (arguing that the last round of congressional redistricting argued produced a nationwide bias in favor of the Republicans of something like twenty-five seats).

<sup>108</sup> For an extended discussion of judicial decisionmaking in the context of uncertainty, see Adrian Vermeule, *Judging Under Uncertainty: An Institutional Account of Legal Interpretation* (unpublished manuscript).

<sup>109</sup> See *Vieth v Jubelirer*, 124 S Ct 1769, 1825 (2004) (Breyer dissenting). See also text accompanying notes 37–42.

<sup>110</sup> See *Vieth*, 124 S Ct at 1825. See also text accompanying notes 37–42.

<sup>111</sup> See text accompanying note 42.



against the possibility that a minority of voters nationwide could control a majority of seats in Congress.<sup>112</sup> If the Court were to adopt Breyer’s goal of preserving legislative majoritarianism, therefore, it should not attempt to advance that goal by applying Breyer’s rule in both contexts.

There are, of course, some rules for state-level intervention that might work well in both the state legislative and congressional contexts.<sup>113</sup> Even with respect to such rules, however, courts have to be attentive to an additional coordination problem in the congressional context that is not present in the state legislative context. The idea that state-by-state intervention can substitute in some cases for simultaneously assessing every state’s redistricting plan depends crucially on reviewing courts’ adopting the same rules for intervention and then applying those rules in roughly the same fashion. In other words, the possibility of risk-based regulation is contingent on the reviewing courts’ coordinating around a set of rules to apply when they review congressional redistricting.<sup>114</sup> For federal courts this would require that myriad lower courts speak with a fairly uniform voice—which may be possible only on an overly optimistic view of federal courts.<sup>115</sup> And in the absence of effective coordination, the nonuniform application of the rules in federal courts could make an otherwise attractive risk-based regulatory strategy ineffectual or counterproductive.<sup>116</sup>

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<sup>112</sup> An electoral minority can capture a majority of seats within a particular jurisdiction where two conditions obtain: the presence of partisan bias and the existence of a (relatively) closely divided electorate. In order to reduce the possibility of minority control in the congressional context, therefore, courts would need a rule that designed to lower the national level of partisan bias. But applying Breyer’s rule state by state would not do this. It would only strike down biased plans in states where the electorate was closely divided. Other states, however, might contain much larger levels of bias but be valid under his rule, either because the state was not closely divided or because the bias favors an electoral majority rather than the electoral minority. For example, a congressional redistricting plan in which partisan bias made it possible for a small electoral *majority* to capture essentially all of the seats in the state would be sustained under his proposed rule.

<sup>113</sup> As I mentioned above, a rule prohibiting redistricting more than once each decade might be such a rule.

<sup>114</sup> This is a different coordination problem than the one discussed in Part IV.A. That section was concerned with the difficulty courts would have coordinating their *review* of congressional redistricting in order to assess the combined effects of every state’s congressional redistricting scheme. If courts adopt a risk-based regulatory strategy they will not have to coordinate their review. But they will have to coordinate around a set of doctrinal rules.

<sup>115</sup> See Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretation and the Fallacy of Division*, J of Contemp Legal Issues (forthcoming 2005).

<sup>116</sup> This conclusion also highlights a potential cost of adopting the approach that Justice Kennedy appears to favor in *Vieth*. Kennedy expressed hope that greater lower court experimentation in partisan gerrymandering cases could help courts tease out workable rules for policing partisan gerrymanders.

In addition, this coordination problem highlights an overlooked shortcoming of one of the most popular post-*Vieth* reform proposals. Following the Supreme Court's refusal in *Vieth* to police partisan gerrymandering more vigorously, a number of commentators have called on state courts to interpret their state constitutions to endorse more aggressive judicial oversight of partisan redistricting.<sup>117</sup> These commentators have uniformly assumed that state court oversight is a good substitute for federal court intervention. But state courts may be inferior in the context of congressional redistricting. If the success of state-by-state intervention depends on there being a uniform, nationwide rule for such intervention, then the piecemeal adoption of congressional partisan gerrymandering doctrines by different state courts might be ineffective. (Such intervention might be ineffective either because it is adopted in only a limited number of states, or because different states adopt markedly different rules for intervention.)

In fact, the decision by any given state court to read its state constitution to endorse broad oversight of congressional partisan gerrymanders could potentially even exacerbate the problem. If a state court in a large, predominantly Democratic state stepped in and disarmed the legislature's capacity to engage in congressional partisan gerrymandering, that court might inadvertently facilitate pro-Republican bias if the courts in large Republican-dominated states chose not to interpret their state constitutions in the same fashion.<sup>118</sup> Thus, the existing commentary on *Vieth* oversimplifies when it treats state court intervention as a simple fix for federal court impotence in congressional gerrymandering cases.

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During this period of experimentation, the different strategies applied to congressional redistricting by isolated lower courts may well be ineffective—even if the strategy itself is sound—simply because strategy is applied only to a small number of redistricting plans. This does not mean that experimentation is unwarranted; the benefits of experimentation might be sufficient to justify the approach. It does suggest, however, that in the midterm this strategy may do little to lower the risk that congressional partisan gerrymanders combine to harm the structure of representation in Congress.

<sup>117</sup> See, for example, James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 2 Election L J 643 (2004).

<sup>118</sup> This point also suggests that there could be some unanticipated costs to another popular idea for reform—the proposal that voters use states' initiative processes to transfer authority to draw congressional district lines from legislatures to nonpartisan or bipartisan commissions. If such efforts were successful in only a few states (or if there were a consistent partisan alignment among the states most likely to enact such reforms by initiative), the use of commissions might exacerbate certain harms. In this vein, it is interesting to note that Arnold Schwarzenegger is reportedly eyeing the possibility of backing an initiative in California to give redistricting authority to a group of retired judges. See Peter Nicholas, *Governor Considers a Special Election*, LA Times A1 (Dec 2, 2004).

## CONCLUSION

Congressional political gerrymanders pose different analytic, normative, and constitutional questions than do state legislative gerrymanders. The latter implicate the composition of the whole legislative body, while the former affect only a part. This difference, generally overlooked by courts and commentators, reveals that the Supreme Court's general approach in *Vieth v. Jubelirer*—of treating the case as a referendum on *Davis v. Bandemer*—is incomplete and misguided.

In contrast to state legislative partisan gerrymanders, congressional partisan gerrymanders produce harms that are most plausibly located at the *national*, not the state or individual district level. This aspect of the harm complicates the judicial review of congressional partisan gerrymanders, introducing a different set of empirical questions that bear on whether intervention is worthwhile, and highlighting the importance of judicial coordination for any successful intervention. While these new complications are significant, my aim is not to suggest that they are intractable and counsel swift judicial retreat. Rather, my goal is to refocus the discussion about congressional partisan gerrymanders on those issues that are central to evaluating the appropriateness of judicial intervention.

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