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TEMPEST IN AN EMPTY TEAPOT: WHY THE CONSTITUTION DOES NOT REGULATE GERRYMANDERING

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Judges and scholars are convinced that the Constitution forbids gerrymandering that goes “too far”—legislative redistrictings that are too partisan, too focused on race, etc. Gerrymanders are said to be unconstitutional for many reasons—they dilute votes, they are anti-democratic, and they generate uncompetitive elections won by extremist candidates. Judges and scholars cite numerous clauses that gerrymanders supposedly violate—the Equal Protection Clause, the Guarantee Clause, and even the First Amendment. We dissent from this orthodoxy. Most of these claims rest on the notion that the Constitution establishes certain ideals about representation in legislatures and about the outcome and conduct of elections. Yet the

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Constitution nowhere provides that a party's strength in the legislature should roughly mirror its strength in the populace, as the partisan gerrymandering cases suppose. Nor does the Constitution favor competition in legislative races, thereby forcing legislators to draw districting lines that maximize the number of competitive elections. In maintaining that the Constitution establishes districting and election ideals, the critics of gerrymandering have supposed that the Constitution incorporates their preferences about what is fair and just with respect to electoral contests and outcomes. But as we show, there are innumerable reasonable preferences about the composition of districts and legislatures, not all of which can be satisfied simultaneously. More importantly, there is no reason to think that the Constitution enshrines any of these preferences about districting and election outcomes, let alone the critics' particular preferences. We believe that the critics of gerrymandering have made the mistake of imagining that the Constitution incorporates their particular preferences. That is to say, they have sought a constitutional resolution to a matter of ordinary politics. Unfortunately, the search is futile, for the Constitution does not address the ills, real or imagined, associated with drawing district lines. The Constitution no more regulates gerrymandering than it regulates pork-barrel spending or the many advantages of incumbency.

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INTRODUCTION

Gerrymandering is older than the republic, the first American gerrymander occurring in early eighteenth-century Pennsylvania.¹ The portmanteau “gerrymander” was coined in 1812 to describe a particularly contorted Massachusetts district, one created as part of a larger redistricting plan that Governor Elbridge Gerry had signed into law.² Apparently, guests at a dinner party were lamenting the contours of that particular district, noting that it looked like a lizard or salamander, when one guest exclaimed that the district looked more like a “gerrymander.”³ Ever since, “gerrymander” has been used as an epithet to describe districts that are thought to have been drawn with an eye toward furthering various agendas.

The legislators who drafted the 1812 Massachusetts redistricting plan were rank amateurs compared to the sophisticates who craft districting plans today. For some time now, legislators have used demographic data to identify, among other things, the racial background, party affiliations, and voting proclivities of residents.⁴ Using these data, legislators have utilized computers to draw precise district lines in order to include certain voters in particular districts and exclude others.⁵ The aim is to draw district boundaries that increase the likelihood of some electoral outcome,⁶ such as more Republican (or Democrat) legislators, or more (or fewer) minority legislators.

As lawmakers have become more skilled at shaping district lines, a scholarly consensus has emerged that excessive gerrymandering is unconstitutional.⁷ Racial gerrymanders might be used to divide

1. See GEORGE L. CLARK, *STEALING OUR VOTES: HOW POLITICIANS CONSPIRE TO CONTROL OUR ELECTIONS AND HOW TO STOP THEM* 21 (2004).

2. *Id.* at 19.

3. *Id.*

4. *Id.* at 51.

5. *Id.*

6. *Id.* at 13.

7. See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 783 (2005); Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397 (2005); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 506-07, 509-

the votes of racial minorities and thereby deprive them of a “fair share” of legislative representation. Partisan gerrymanders⁸ might minimize the electoral representation of members of the opposing party.⁹

This is one area where the courts largely agree with the scholars. Indeed, the Supreme Court has long regarded certain racial gerrymanders to be unconstitutional.¹⁰ Moreover, all current Justices seem to agree that certain partisan gerrymanders may be unconstitutional, even as a slim majority continues to believe that no judicially administrable standards exist by which to determine precisely when partisan gerrymanders are unconstitutional.¹¹

10 (2004) [hereinafter Gerken, *Lost in the Political Thicket*]; Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667-68 (2001) [hereinafter Gerken, *Understanding the Right to an Undiluted Vote*]; Jamal Greene, *Judging Partisan Gerrymanders under the Elections Clause*, 114 YALE L.J. 1021, 1026 (2005); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 614 (2002) [hereinafter Issacharoff, *Gerrymandering and Political Cartels*]; Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymandering*, 153 U. PA. L. REV. 541, 543 (2004); Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 373-80 (2004).

8. By “partisan gerrymander,” we mean nothing more than the drawing of districts with an eye towards maximizing a political party’s representation in the legislature. Typically this means concentrating supporters of opposing political parties in as few districts as possible while creating a majority of so-called “safe” districts for the party that enacts the partisan gerrymander.

We use “partisan gerrymanders” rather than “political gerrymanders” because of our conviction that district lines drawn by legislatures will inevitably be political in the sense that legislators will draw those lines with an eye towards their likely electoral and policy outcomes. In our view, every conceivable districting plan drafted by legislators generates a political gerrymander. Because we do not wish this point to be lost, we use the more precise and less confusing “partisan gerrymander” to cover those situations where lines are drawn to maximize the representation of a particular political party in the legislature.

9. See *supra* note 7.

10. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *Gomillion v. Lightfoot*, 364 U.S. 339, 341-42, 347-48 (1960).

11. In two recent cases, *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *LULAC v. Perry*, 126 S. Ct. 2594 (2006), the Supreme Court issued a fractured set of opinions that upheld state redistricting plans. In *Veith*, four Justices said that partisan gerrymandering claims were non-justiciable political questions, and four Justices wholly rejected that idea. *Veith*, 541 U.S. at 267, 317. Justice Kennedy voted to dismiss because he knew of no workable test for judging when a partisan gerrymander was unconstitutional. *Veith*, 541 U.S. at 306 (Kennedy, J., concurring). Yet he held out hope that such a test might yet be devised. *Vieth*, 541 U.S. at 311-12. In *LULAC*, Justice Kennedy declined to reconsider the justiciability question that was central to *Veith* because none of the *LULAC* parties had raised it in their briefs. *LULAC*, 126 S. Ct. at 2607. Accordingly, Kennedy considered and rejected the particular constitutional arguments of the *LULAC* appellants and left undisturbed his prior view that

Although there is a consensus that gerrymandering may violate the Constitution, there is a marked disagreement as to why. To begin with, there is disagreement about which provisions of the Constitution gerrymanders violate. Depending upon whom one reads, gerrymandering supposedly violates the First Amendment,¹² the Guarantee Clause,¹³ the Elections Clause,¹⁴ and the Equal Protection Clause.¹⁵ A few go further, claiming that although gerrymandering violates no specific clause, it violates the Constitution's overall structure.¹⁶ Perhaps just as important, there is disagreement about the constitutional evils caused by gerrymandering. Some claim that gerrymanders are unconstitutional because they dilute votes;¹⁷ others lament that they generate uncompetitive elections;¹⁸ and still others say that the evil is that gerrymanders produce extremist legislators, who are unwilling to compromise.¹⁹

Disagreement about why some statute or practice is unconstitutional is not uncommon. For instance, several scholars have written about what *Roe v. Wade*²⁰ ought to have said, with many different rationales (other than the Court's) offered to justify the claim that the Constitution safeguards an abortion right.²¹ Such disagreement, by itself, hardly means that each of the alternative rationales is wrong. Still, it does suggest that individuals approach the question of abortion regulation from different perspectives and that these perspectives, in turn, lead to distinctive diagnoses of the supposed constitutional problems associated with laws regulating abortion.

a viable test for gerrymandering might still be devised. *Id.*

12. U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press ...").

13. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government ...").

14. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...").

15. U.S. CONST. amend. XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

16. See *infra* Part II.C.

17. See Gerken, *Understanding the Right to an Undiluted Vote*, *supra* note 7.

18. See Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 7, at 614.

19. See Berman, *supra* note 7, at 846-49.

20. 410 U.S. 113 (1973).

21. See JACK M. BALKIN, *WHAT ROE V. WADE SHOULD HAVE SAID* ix-xiii (Jack M. Balkin ed., 2005).

We believe something similar has occurred with respect to gerrymanders. Diverse constitutional arguments have been invoked against gerrymandering because gerrymanders trouble individuals for many different reasons. Certain preferences resonate with some scholars and judges (for example, the desire for a legislature that reflects the demography of the electorate)²² at the same time that other preferences (such as the desire for competitive elections)²³ strike a chord with a different set of critics. In the case of gerrymandering, we believe that the dissensus about why and when gerrymanders are unconstitutional reflects rather serious shortcomings with the underlying assertion that the Constitution somehow regulates gerrymandering.

Legislators do nothing constitutionally suspect when they draw districts with the hope of securing a partisan advantage. Indeed, politicians pass many statutes with an eye toward securing their election and giving their party a leg up on the competition. Gerrymandered districting plans are no different in kind. Such schemes are just a matter of ordinary politics, no more unconstitutional than pork-barrel spending or legislation that confers a benefit upon a labor union or corporation.

Moreover, despite the even more robust consensus that the Constitution forbids racial gerrymanders that dilute the votes of racial minorities,²⁴ this orthodoxy likewise rests on a false foundation. The idea that so-called minority vote dilution violates the Constitution mistakenly assumes that the Constitution actually addresses this form of vote dilution.²⁵ But as we show, the Constitution simply does not speak to minority vote dilution.²⁶ The same point holds true for *any* gerrymander, using the term broadly to mean any outcome-driven drawing of electoral district lines. Neither “gender gerrymanders,” “ethnic gerrymanders,” nor “religious gerrymanders” are unconstitutional because they allegedly dilute the votes of males, Latin-Americans, or Catholics.²⁷

22. See *infra* Part II.A.1.

23. See Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 7, at 614.

24. See *infra* Part III.

25. See *infra* Part II.A.

26. *Id.*

27. Others have made similar claims. See Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L.

How can this be? Each of the very different objections voiced against gerrymandering—vote dilution, the non-competitiveness of elections, the polarization of legislatures—assumes that the Constitution establishes certain controversial districting and election ideals. The fatal flaw running through all such complaints is that the Constitution neither envisions nor mandates any such ideals. The Constitution never sets out criteria for the proper composition of the legislature, the suitable amount of electoral competitiveness, or the correct ideological balance of legislators within a legislature.

Consider vote dilution. The very concept of dilution necessitates some baseline against which to measure the supposed dilution. Yet the Constitution does not establish an ideal composition of either districts or legislatures. It never says that districts or state legislatures should reflect the partisan divide of a state's populace. Nor does the Constitution dictate that a state legislature be composed of representatives that roughly mirror the racial composition of a state. If there are no constitutional ideals by which to assess partisan or racial outcomes, there can be no such thing as unconstitutional vote dilution with respect to those categories. Vote dilution has no more constitutional foundation than the notion that per capita federal spending ought to be the same in all congressional districts.

Or consider the claim that gerrymandering violates the Constitution because it generates uncompetitive elections. This complaint assumes that that Constitution actually requires competitive elections for legislative office. It is hard to fathom why or how the Constitution could do any such thing. As we explain later, often the only way to make elections seemingly more competitive in some districts is to make them far less competitive in other

REV. 1, 4-5 (1985) (“[T]he courts ought not make the Constitution the arbiter of competing partisan redistricting claims.”); Daniel H. Lowenstein, *Vieth’s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL’Y 367, 378, 387 (2005) (arguing that gerrymandering is almost never unconstitutional). One of us has previously questioned whether gerrymanders can ever be unconstitutional. See Larry Alexander, *Lost in the Political Thicket*, 41 U. FLA. L. REV. 563, 574-79 (1990); Larry Alexander, *Still Lost in the Political Thicket (or Why I Don’t Understand the Concept of Vote Dilution)*, 50 VAND. L. REV. 327, 337 (1997).

districts.²⁸ There is no reason to think the Constitution mandates this controversial and contestable preference. Just as important, voters decide whether elections will be competitive. No manner of district line-drawing can change that. By one-sidedly favoring some candidates or parties, voters can always spoil the efforts of those who would engineer districts with an eye toward increasing competitive elections.

Our simple point is that the Constitution does not contain any districting ideals. Once one realizes that the Constitution never discusses districting, much less requires that districting satisfy some imaginary ideals, one must conclude that districting plans are never unconstitutional for generating uncompetitive elections or for producing too few legislators of a particular party or minority group. Because the Constitution does not enshrine some platonic form of districting plan, there is no constitutional standard against which districting plans can be measured and found lacking. When people censure some districting scheme as unconstitutional on the grounds that it will generate too many Democrats or too few Hispanics, they are merely making the common mistake of reading their preferences into the Constitution.

Lest we be misunderstood, we are not saying that it is impossible for a constitution to embody districting and electioneering preferences. A constitution could provide that the representation in the legislature must mirror a state's partisan, racial, or ethnic composition. Alternatively, it could require that districting lines be drawn with an eye toward *maximizing* the presence of racial minorities in the state and federal legislatures. Or it could require district line drawers to maximize, to the extent possible, the number of competitive elections. We just deny that the federal Constitution contains anything remotely resembling such mandates.²⁹

28. See *infra* notes 115-17 and accompanying text.

29. Because we make claims about the Constitution, we do not consider whether gerrymandering might violate federal statutes that regulate state elections. It may well be that even though the Constitution never forbids gerrymandering, current federal statutes actually bar certain forms of gerrymandering. In particular, we will not discuss whether the Voting Rights Act bars certain or all racial gerrymandering. See 42 U.S.C. § 1973 (2006); see also *Grove v. Emison*, 507 U.S. 25, 42 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 149, 158 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 34, 80 (1986); *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980).

We do note, however, that if the Voting Rights Act *does* bar racial and perhaps other forms

Nor should we be seen as apologists for partisan or racial gerrymanders. We do not much care for them ourselves. We wish that legislators would draw districts without regard to race. And we might support proposals that take redistricting away from legislatures and assign it to computers. Yet we do not harbor the commonplace illusion that the Constitution somehow incorporates our preferences at the expense of others who have different views about who ought to draw districts, about the ideal composition of legislatures and districts, and about the ideal conduct of elections.

Part I briefly lists complaints that critics have voiced against gerrymanders. Part II considers (and rejects) the assertion that partisan gerrymanders are unconstitutional. We address the claims that partisan gerrymanders unconstitutionally dilute votes, that they undermine democracy, that they violate structural constitutional principles, and that they contravene the First Amendment. Part III extends the argument to racial and other types of gerrymanders. Part IV addresses three objections to our assertion that the Constitution does not regulate gerrymanders.

I. WHY GERRYMANDERS ARE THOUGHT TO BE UNCONSTITUTIONAL

Before we explain why the Constitution does not regulate gerrymanders, we need to say a little about what gerrymanders are and why so many regard them as unconstitutional. Although people tend to use “gerrymander,” “gerrymandered,” and “gerrymandering” as terms of disapproval, we will use them as purely descriptive terms. Under our neutral definition of “gerrymander,” any attempt to draw district lines to effect the legislature’s composition or, more remotely, to influence legislative enactments constitutes a gerrymander. A districting scheme meant to ensure the election of legislators who are utterly devoted to child welfare or peace is a gerrymandered districting plan, notwithstanding the widespread support these objectives might enjoy. While the set of desired outcomes is as varied as the preferences of those who draw district

of gerrymandering, then our argument calls into question whether the Act can be justified as an exercise of Congress’s power to enforce the Fourteenth and Fifteenth Amendments. *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). We merely raise this possible implication of our argument but do not explore it further.

lines, the most typical goals are partisan control of the legislature, racial inclusion or balance in the legislature, and incumbent protection.³⁰

In partisan gerrymanders, the party controlling the legislature draws the district lines in an attempt to maximize the number of legislators from that party elected in the next rounds of elections.³¹ This will usually involve concentrating members of the opposition party in a few districts and creating many more districts dominated by the controlling party. In bipartisan gerrymanders, the dominant two parties collude in attempting to preserve each party's control of certain districts, typically to protect incumbents from both parties.

Racial and ethnic gerrymanders involve attempts to influence the number of legislators of particular races or ethnic groups who are elected.³² Typically, a districting scheme is said to be racially gerrymandered if it minimizes the number of elected members of a particular race.³³ So if African Americans constitute 20 percent of a state's population, and districts are drawn in such a way and with the intent that they generate something substantially less than 20 percent of the legislators (say 5 percent), the districting scheme will be seen by many as a racial gerrymander. We use the phrase "racial gerrymander" to cover any districting scheme that is drawn with an eye toward the ultimate racial composition of a legislature. Under our neutral definition, if a districting scheme is drawn with the hope of generating 20 percent African American legislators, that scheme is racially gerrymandered as well.

The drawing of district lines, even with the assistance of computers, demographers, and political scientists, is an imperfect and highly fallible way of accomplishing the aims of those who craft districting schemes. Voters will not always vote in predictable ways. Sometimes a district drawn to be a safe "Democrat" district will nonetheless elect a Republican.³⁴ Moreover, even should the district elect a Democrat, the elected official may not be a yellow-

30. CLARK, *supra* note 1, at 13.

31. *Id.* at xiii.

32. C.J.S. *Elections* § 13 (2008).

33. *Id.*

34. *See infra* notes 119-21 and accompanying text for examples from history of gerrymandered districts electing representatives different than those intended by the gerrymander.

dog Democrat. That is to say, the nominal Democrat may side with the Republicans some or much of the time. The same surprises will arise when districts are drawn with an eye toward the racial composition of a legislature. Occasionally a district expected to elect a white candidate will instead elect a Latino or African American. Despite the potential for such surprises, gerrymandering is one of the means that legislators have to accomplish their ends, and, not surprisingly, they use it.

To many, gerrymandering, aside from resulting in oddly shaped electoral districts and thus perhaps providing an aesthetic affront, also seems ethically unsavory, smacking vaguely of self-dealing. Why should legislators be able to make the rules and then have an advantage in the resulting game? In drawing district lines, legislators are stacking the deck in their favor.

For this reason, there seems to be a visceral reaction against gerrymandering, a response that we share to an extent. Members of the judiciary certainly seem offended by partisan gerrymanders. In *Davis v. Bandemer*,³⁵ a plurality of the Court claimed that when there is “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process,” there has been an unconstitutional gerrymander.³⁶ In the more recent *Veith v. Jubelirer*, Justice Souter described the standard as “an extremity of unfairness,”³⁷ and Justice Breyer said the evil was “*unjustified entrenchment*.”³⁸

Most judges have been content to rest the unconstitutionality of partisan gerrymanders on the Equal Protection Clause.³⁹ Perhaps sensing the weakness of that view, Justice Kennedy has suggested that the First Amendment might bar partisan gerrymanders.⁴⁰

Scholars have been more enterprising, scouring the Constitution in search of additional pigeonholes in which to fit these gerrymandering claims. Depending upon whose scholarship one reads,

35. 478 U.S. 109 (1986).

36. *Id.* at 133.

37. 541 U.S. 267, 344 (2004) (Souter, J., dissenting).

38. *Id.* at 360 (Breyer, J., dissenting).

39. *See, e.g.*, *Reynolds v. Simms*, 377 U.S. 533, 568 (1964); *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963); *Baker v. Carr*, 369 U.S. 186, 195 n.15 (1962).

40. *Veith*, 541 U.S. at 314 (Kennedy, J., concurring).

gerrymanders not only violate the Equal Protection Clause,⁴¹ but perhaps the Guarantee⁴² and the Elections Clauses⁴³ as well. Some scholars do not tether their constitutional claims to particular clauses. Instead, they make more abstract structural claims: Partisan gerrymanders dilute the right to vote.⁴⁴ They stifle “effective majority rule”⁴⁵ and entrench groups representing minority sentiments. They eliminate competitive elections.⁴⁶ They result in the election of extremist legislators, not centrists, which in turn produces polarized, factious (and fractious), inefficient legislatures.⁴⁷

The failure to agree on why partisan gerrymanders are unconstitutional and what constitutional harms partisan gerrymanders produce ordinarily might be dismissed as nothing more than minor differences in opinion. Yet we think something more fundamental is afoot. The dissensus among judges and scholars reflects the fact that the Constitution says nothing about gerrymanders at all. Because people have a tendency to imagine that the Constitution addresses all major ills, and because many are upset by legislators who stack the districting deck in favor of certain outcomes, they naturally conclude that the Constitution bars partisan gerrymanders. But a constitutional violation cannot arise from nothing more than a healthy sense of outrage. What we have here is a quixotic quest for a constitutional provision or principle that will somehow bar various gerrymanders.

We know our argument has a high degree of difficulty and that many will be skeptical. After all, gerrymanders routinely evoke

41. U.S. CONST. amend. XIV, § 1 (“No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

42. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government”).

43. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”).

44. See *infra* Part II.A.

45. See, e.g., Michael McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 114 (2000).

46. See Gerken, *Lost in the Political Thicket*, *supra* note 7, at 522; Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 7, at 622-27.

47. See Briffault, *supra* note 7, at 416; Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 7, at 629.

indignation and contempt, and the pages of United States Reports and the law reviews are filled with claims that gerrymanders are unconstitutional because they dilute votes, stifle democracy, and so on. Nonetheless, we hope to demonstrate that the loathing of gerrymanders has no constitutional basis. Gerrymanders are no more unconstitutional than other fonts of outrage, such as incompetent Federal Emergency Management Agency directors and bridges to nowhere.

II. THE CASE OF PARTISAN GERRYMANDERS

Partisan gerrymanders supposedly cause a number of constitutional harms and violate one or more constitutional provisions. This section addresses each of these claimed harms and finds them unpersuasive as a constitutional matter. We begin by considering the argument that partisan gerrymanders dilute votes in violation of the Equal Protection Clause. We then turn to the idea that partisan gerrymanders subvert democracy. We next consider the many new structural claims against partisan gerrymanders. Finally, we conclude by considering the more recent assertion that partisan gerrymanders violate the First Amendment.

A. Partisan Gerrymanders as Unconstitutional Vote Dilution

In the 1960s, legislative districting schemes were attacked for what we shall call first-generation vote dilution.⁴⁸ First-generation vote dilution occurred when legislative districts of quite unequal populations were drawn (or left unchanged) to keep intact traditional political boundaries and to assure some degree of representation for particular interests or demographic groups.⁴⁹ The first-generation vote dilution claims were directed at the inequality in population size of the legislative districts so drawn. This vote

48. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544, 571-72 (1969); *Burns v. Richardson*, 384 U.S. 73, 93 (1966); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 739 (1964); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Baker v. Carr*, 369 U.S. 186, 237 (1962).

49. See, e.g., *Burns*, 384 U.S. at 76; *Reynolds*, 377 U.S. at 537, 540; *Gray*, 372 U.S. at 370-71; *Baker*, 369 U.S. at 192-95.

dilution was said to violate both the Guarantee Clause and the Equal Protection Clause.⁵⁰

Although the Supreme Court was inhospitable to the Guarantee Clause attack,⁵¹ it saw merit in the Equal Protection challenge when it constitutionalized the principle of “one person, one vote.”⁵² The theory of first generation vote dilution, and its violation of constitutional equality, was simple: If one district had a greater number of voters than another, the voters in the former district would have less potential influence on electoral outcomes than the voters in the latter district.⁵³ Moreover, once the election was over, the voters in the former district would have less per capita access to, and influence on, their representative than voters in the latter district.⁵⁴ The Equal Protection Clause demanded that districts be drawn to eliminate this inequality among voters in the same state—the “dilution” of the electoral influence of some voters and the corresponding enhancement of the influence of other voters.⁵⁵

Even if the first-generation theory of vote dilution was simple and mathematical, the conclusion that such vote dilution violated the Equal Protection Clause was controversial.⁵⁶ Legislatures had violated equality of influence in order to make sure that some interests—primarily those of rural voters—were better represented. Ensuring inequality of electoral influence among voters thus arguably furthered other, more substantive notions of equality, in particular the goal of furthering equal influence in the legislature

50. See, e.g., *Reynolds*, 377 U.S. at 537; *Gray*, 372 U.S. at 370; *Baker*, 369 U.S. at 194-95 n.15.

51. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946). Guarantee Clause claims have consistently been treated as nonjusticiable political questions. See *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912).

52. See *Reynolds*, 377 U.S. at 565-66; *Gray*, 372 U.S. at 379-80.

53. *Reynolds*, 377 U.S. at 540-41; *Gray*, 372 U.S. at 371-73; *Baker*, 369 U.S. at 192-95, 207-08.

54. *Reynolds*, 377 U.S. at 540-41; *Baker*, 369 U.S. at 192-95.

55. The Court has never settled on whether the districts must have equal numbers of people, equal numbers of citizens, or equal number of voters. See Lowenstein & Steinberg, *supra* note 27, at 49-50.

56. See, e.g., *Baker*, 369 U.S. at 266-330 (Frankfurter, J., dissenting); MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* 250-52 (1964); Lawrence R. Caruso, *The Lucas Case and Apportionment of State Legislatures*, 37 U. COLO. L. REV. 433, 456 (1965); Robert G. McCloskey, *The Supreme Court 1961 Term - Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 54-55 (1962); Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 252-53.

for rural and urban voters. Which of these competing conceptions of equality was superior was hardly obvious. As Peter Westen pointed out some time ago, equality is an empty vessel into which varying content can be poured.⁵⁷

Nonetheless, the concept of equality that *Reynolds* and its progeny relied upon was defensible. First-generation vote dilution was similar to granting some voters two or three votes and others only one. If that would violate the Equal Protection Clause, then “one person, one vote”—the obligation to create equipopulous districts within a state—followed as a matter of course.

1. Partisan Gerrymanders as Second-Generation Vote Dilution

Though of more recent vintage, second-generation vote dilution claims likewise have been based on the Equal Protection Clause.⁵⁸ Such claims maintain that even if legislators respect the one-person, one-vote principle, their drawing of district lines nonetheless may still dilute the votes of some citizens and, as a corollary, enhance the votes of others. Such dilution and enhancement violates the electoral equality that the Equal Protection Clause supposedly mandates.⁵⁹

Dilution is necessarily a relative concept. In chemistry, dilution is the process of reducing the concentration of a solute in a solution. As solvent is added to the solution, the solution becomes progressively more diluted. For instance, as we add more pure water to a saline solution, the saline solution becomes less concentrated, or more diluted. Likewise, if solute is removed from a solution, we have dilution as well. Hence, if we remove some salt from a saline solution, the saline solution becomes more diluted.

In the partisan gerrymandering context, vote dilution is something of an elusive, if nonetheless ubiquitous, concept. For people to speak of such gerrymanders as vote diluting, they must have in mind some ideal demographic baseline. Although scholars and judges have repeatedly argued against partisan gerrymanders on

57. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982).

58. *Shaw v. Reno*, 509 U.S. 630, 657-58 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 157 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 34-35 (1986).

59. See *supra* notes 55-57 and accompanying text.

the grounds that those gerrymanders dilute votes, these critics have never identified the baseline against which vote dilution claims should be measured.⁶⁰

Presumably, critics of partisan gerrymandering regard a state's partisan divide⁶¹ as the proper baseline for dilution claims.⁶² If that is the case, districting plans might dilute votes on either a statewide or a district-wide basis. The former claim is far more common. Many scholars and judges seem to be of the view that should either a state's legislature or a state's congressional delegation fail to roughly mirror that state's partisan divide (however measured),

60. See Berman, *supra* note 7, at 782-85, 796, 807; Lowenstein & Steinberg, *supra* note 27, at 3-4, 10-11.

61. We do not know of any standard answer to the question of which measure of partisan divide matters. Should we look to voter self-identification, how voters are registered, or how they actually vote in elections? After all, sometimes registered Democrats—Blue Dog Democrats—may vote consistently Republican, and some registered Republicans may behave like RINOs—Republicans in Name Only.

62. Several political scientists studying districting urge, as a baseline standard for measuring unconstitutional vote dilution, statewide “partisan symmetry”—roughly, that party *A* receive the number of seats in the legislature as party *B* would have received had it gotten the same percentage of the statewide vote as party *A*. See Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 ELECTION L. J. 2, 6 (2007). This standard was cited approvingly in *LULAC v. Perry* by Justices Stevens, Breyer, Souter, and Ginsburg. See 126 S. Ct. 2594, 2638 n.9 (2006) (Stevens, J., concurring in part and dissenting in part); *id.* at 2647 (Souter, J., concurring in part and dissenting in part). For reasons that we adduce in the text below, we do not find mirroring the statewide partisan divide, in this manner or any other, to have self-evident normative appeal. More importantly, we do not find that it has any constitutional provenance. Equal treatment of persons, which *does* have constitutional credentials, does not translate into equal treatment of political parties in districting.

We add that the conception of partisan symmetry that political scientists have devised, and in particular, the conception endorsed by Grofman and King, is not obviously normatively compelling. Grofman and King offer the following example of their test: If the Democratic Party wins 55 percent of the statewide vote in legislative district elections and thereby wins 70 percent of the seats in the legislature, the districting satisfies partisan symmetry if, and only if, the Republican Party would have won 70 percent of the seats had it received 55 percent of the vote. Grofman & King, *supra*, at 8. Notice, however, that the counterfactual—the Republicans' receiving 55 percent of the vote—is silent regarding who the Republican candidates are, what particular issues they are identified with, from which districts the extra 10 percent of the Republican vote comes from, and so forth. How one constructs the counterfactual (i.e., how one answers these and other questions) will be outcome determinative of whether partisan symmetry has been violated. Any such construction will be arbitrary. In other words, whether Republican legislators would have captured 70 percent of the seats had Republican candidates received 55 percent of the vote is not answerable as an objective matter and any conclusion (either yes or no) will be based on wholly subjective assumptions.

there has been an unconstitutional partisan gerrymander. For instance, when Republicans control the legislature and draw new districts, they might seek to concentrate likely Democrat voters into a small number of districts and disperse Republican voters across many districts. This partisan gerrymander might result in a Republican-dominated legislature, even when a state's populace is evenly split between Democrat and Republican voters or has a slight Democratic majority. When this occurs, the common claim is that the districting plan has diluted the votes of Democrats and violated their constitutional rights.⁶³ We can call this type of vote dilution "statewide vote dilution" because it references the effect of a gerrymander on the state's legislature or on its congressional delegation.

Alternatively, one might argue that vote dilution occurs whenever the composition of individual districts departs from a state's partisan divide. So if Republicans constitute 47 percent of a state's population, Republicans who find themselves in a district with 40 percent Republicans have had their votes diluted. As compared to the ideal, the percentage of Republicans in the district is far less than it should be, and hence there is Republican vote dilution. From the perspective of Republicans in the district, their influence on the election of a representative is much diminished to the point that some might feel their votes do not really "count" or are "meaningless." We can call this version of vote dilution "district vote dilution" because it describes dilution in the context of individual districts.

In the abstract, there is perhaps something attractive about the notion that a state's partisan divide should be mirrored in the legislature and in its congressional delegation. One might conclude that representatives as a whole simply do not represent the state's populace when the composition of the state legislature or its congressional delegation varies greatly from the state's partisan divide. At the same time, there is also something appealing about the notion that citizens should not have their votes rendered pointless by being surrounded by a disproportionate number of voters from other political parties. This district vote dilution might

63. See *Davis v. Bandemer*, 478 U.S. 109, 115 (1986).

tend to make its victims feel dispirited and cynical. Voting in such circumstances might seem, to some at least, an empty gesture.⁶⁴

2. Why the Constitution Has Nothing To Say About Second-Generation Vote Dilution

Despite the appeal of each of these second-generation vote dilution complaints, the fundamental assumption underlying these claims has no proper foundation. Critics of partisan gerrymanders must assume that the Constitution enshrines some ideal baseline against which dilution can be measured.⁶⁵ Yet there is no such baseline. The judicial and scholarly opponents of partisan gerrymanders have merely assumed that some ideal is natural and then have bemoaned departures from it.

a. Difficulties with the Concept of Statewide Vote Dilution

Consider the far more common statewide vote dilution complaint. The Constitution never specifies that a legislature must be composed of legislators that mirror, roughly or otherwise, the partisan divisions within a state. To be sure, the Constitution

64. We recognize that there will be many who view voting as a largely ceremonial gesture because they recognize that their vote is unlikely to be the swing vote in an election, no matter how district lines are drawn. After all, few citizens have the privilege of casting the deciding vote. We are speaking of those citizens who normally vote (and thus achieve some satisfaction from the process) but who find some or all of the utility drained from the ritual by the knowledge that they are in a district where the number of their allies is diluted from some supposedly constitutionally required baseline.

65. Martin Shapiro has argued that those who believe that certain gerrymanders are unconstitutional *need not* identify ideal districting plans in order for the gerrymandering critique to hold water. Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 227-28 (1985). We believe this is a fundamental error. If the claim is that only certain districting outcomes dilute votes, corrupt democracy, etc., it necessarily follows that there are one or more other districting outcomes that do not violate the Constitution. In other words, there must be some constitutional baseline or baselines that critics of excessive gerrymandering find constitutionally permitted. Without such baselines, it becomes impossible to say *why* the particular districting scheme is unconstitutional. Put another way, without identifying some districting plans or electoral results that are constitutional, it is impossible to denounce others as unconstitutional. Those who speak of vote dilution, uncompetitive elections, etc., absolutely must describe the permissible set of districting plans and outcomes that they believe are constitutional if we are to make sense of their claims that only some districting plans and electoral outcomes are unconstitutional.

demands elections, per the guarantee of republican government.⁶⁶ And it implicitly demands that the candidate with the most votes wins. That is the point of elections, after all. But the Constitution surely does not dictate any sort of partisan divide in the state legislature—a partisan divide determined by reference to voter registration figures, public opinion polling, or statewide partisan vote totals.

But is there not something constitutionally suspect about a state where Republicans make up 55 percent of the state's population but only comprise 45 percent of the legislators in a state assembly? Does not this disparity, if traceable to a districting plan produced by a Democratically-controlled legislature, prove that the Democrats *wrongfully and unconstitutionally* have rigged the elections? Of course not. We must never forget that voters, and not district line-drawers, decide who will represent them in the legislature. In the minds of voters, partisan identity does not trump everything else.⁶⁷ Voters favor candidates for many different reasons. Besides deriving information from partisan affiliation, voters also consider name recognition, the candidates' stances on issues, their other affiliations, an evaluation of a candidate's honesty and credibility, and so on. Given the host of relevant factors, the mystery is why anyone would suppose that partisan affiliation would trump all else. The claim that the Constitution requires a partisan mix of legislators that mirrors the state's partisan mix says far more about the legal academy's preoccupation with political parties than it says about the Constitution.⁶⁸

A host of difficulties and embarrassments arises once we suppose that the Equal Protection Clause somehow requires a certain mix

66. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government”).

67. Exit polls following the 2004 presidential election show that more than 15 percent of voters who identify with a party did not vote for the party's candidate. CNN Election 2004, Exit Polls, available at <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html> (last visited Sept. 24, 2008). Furthermore, almost 30 percent of voters who identified themselves as “liberal” or “conservative” did not vote with the corresponding political party which most closely embodies that ideology. *Id.*

68. Although some have argued that the legal academy overlooks the importance of political parties, see, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2325 (2006), we find plenty of evidence to the contrary, particularly in the literature on partisan gerrymanders. See *supra* Part II.

of legislators. To begin with, if the Clause demands a mix of legislators, we fail to see why it demands only a partisan political mix. Why would the Equal Protection Clause's broad terms not equally require that a state legislature must be composed of legislators who reflect a state's mix of females, veterans, pacifists, gun owners, vegetarians, Hindus, and atheists? Indeed, why would a Constitution that never mentions political parties, much less Republicans, Democrats, and Libertarians, grant special status to partisan identity? It is not as if people have a unique attachment to their party affiliation.⁶⁹ Many people are not even members of a political party, despite the ease with which one can join them. Moreover, even the most steadfast partisans have deeper attachments to other issues, causes, and interests.⁷⁰ Many people are far more wedded to their political ideology, their religious identity, or their ethical concerns than to their political parties.⁷¹

Consider the union member more loyal to her union than any political party. This devoted unionist may note that although union members form 30 percent of a state's populace, only 3 percent of the legislators are union members. On the other hand, capitalists might form 10 percent of the state's population, but form 30 percent of the legislature.⁷² Do we have an unconstitutional capitalist gerrymander in this case? Is this a clear case of unconstitutional labor vote dilution? If not, why must the union member's complaint take a back seat to the Republican voter's complaint about a Democrat gerrymander? We see no constitutional warrant for being more solicitous of the Republican voter's complaint.

69. We do not deny the importance of political parties, either to the workings of the American political system or to the electoral decisions of American voters. But the fact that many voters rank political party above issues and personalities does not make political party representation the bellwether of electoral fairness, much less constitutionality.

70. See THE PEW RESEARCH CENTER, DEMOCRATS GAIN EDGE IN PARTY IDENTIFICATION 2 (2004), available at <http://people-press.org/commentary/pdf/95.pdf> (showing that over a 15-year period, almost 40 percent of people do not strongly affiliate with a party).

71. See Exit Polls, *supra* note 67 (showing that party identity does not trump all other considerations in voting).

72. We might expect that capitalists are overrepresented in an era where campaign contributions to candidates are regulated but self-financed campaign expenditures are not. See *Buckley v. Valeo*, 424 U.S. 1, 12-59 (1976) (striking down limits on self-financed political campaigns while upholding limits on contributions to political campaigns).

The upshot is that if the Constitution is best read as requiring an ideal mix of partisans in the legislature, it must likewise be read as requiring that legislators generally reflect all sorts of relevant and significant divisions in society. Needless to say, such a constitutional rule makes districting an impossible task, for the district line-drawers must somehow predict likely electoral outcomes across hundreds, if not thousands, of variables.

We believe the Equal Protection Clause enshrines no ideal mix of legislators. A carnivore gerrymander is wholly constitutional despite the resulting under-representation of vegetarians. And what is true for vegetarians and labor is true for Democrats and Republicans. The Constitution does not provide any special succor for the representational complaints of voters who strongly identify with a political party.

Perhaps the critics of partisan gerrymanders might respond that although legislators consciously try to generate a partisan mix of legislators that departs from a state's partisan ratios, legislators pay no attention to many of the other attributes of the electorate and populace. When drawing districts, at least legislators are not seeking to disfavor union members or gun owners. Partisan legislators clearly *are* trying to disadvantage the members of the opposition party, however.

We suppose this is true. We do not know of any evidence that gerrymandering legislators seek to disadvantage evangelicals, males, or pacifists. But we do not see why this matters. Once again, the dilution claim is an argument that must be made in reference to some ideal or ideal range. Our point is that when it comes to the composition of a legislature, no such constitutional ideal exists. And if there is no ideal baseline, there can be no unconstitutional dilution, even if all agree that some or all legislators are intent on "diluting" the votes of Republicans or Green Party members.⁷³

73. Even if we were willing to accept that there is such an ideal, there is no reason to think that legislative *intent* would matter. If a randomly generated districting plan resulted in a legislature composed of 60 percent Republicans and 40 percent Democrats in a state evenly divided between the two parties, the districting plan would have diluted the votes of Democrats precisely because it departs from the implicit ideal. More precisely, it has diluted Democratic votes no less than a scheme consciously drawn to achieve the same 60/40 split in seats. Legislative intent cannot matter where the claim is a departure from some ideal.

Another embarrassment arising from the idea that the Constitution envisions some ideal mix of legislators is that the same districting scheme can be unconstitutional in one year and constitutional the next. For instance, suppose in the first election after a redistricting, a state's legislature fails to reflect the proper mix of Democrats and Republicans, but in the second election, many voters are moved by some issues unforeseen in the previous year and overcome the gerrymander. As a result, the voters produce a mix of legislators that reflects the ideal mix that the Constitution supposedly mandates. The districting plan would now seem to be constitutional, whereas before it was unconstitutional. And if, while litigation challenging the districting plan is pending, the voters in the third round of elections depart from the ideal mix of legislators, the districting plan is once again unconstitutional.⁷⁴

This hypothetical underscores the oddity of the claim that although the Constitution requires an ideal mix of legislators, it never directly requires that mix but instead requires that voters in legislative districts indirectly generate the ideal composition through their votes. If the Constitution really sought to ensure that a state legislature roughly reflected a state's partisan divide, however measured, it would cede far less electoral flexibility to the states. It would instead directly require that state legislatures reflect a particular partisan composition. For instance, seats might be allocated by party. For a state with a 100 legislators and a partisan split of 60 percent Republicans and 40 percent Democrats, the Constitution itself could have mandated that about 60 seats be reserved for Republicans and about 40 seats for Democrats. This scheme of reserved seats would ensure that statewide vote dilution was impossible. Thus, if the Constitution really requires that each state's legislature roughly mirror that state's partisan divide, it

74. The problem with departures from an ideal baseline can be ameliorated by envisioning an ideal baseline and then allowing minor deviations from the baseline. For instance, although the ideal might require 45 Democrats in the legislature, maybe plans that generate 40 to 50 Democrats would be acceptable as well. Permitting some deviations is an attractive idea, but we question what in the Constitution would permit such deviations. If equal protection requires 45 Democrats, why should 40 Democrats be permissible? In any event, allowing deviations still leaves open the possibility that sometimes the answer to the question whether some districting plan violates the Equal Protection Clause will change from year to year.

does so by a most inefficient and indirect means—that is, through the drawing of district lines, leaving voters free to vote for candidates of the other party and defy the representational divide that the Equal Protection Clause supposedly mandates.

Relatedly, the complaints laid at the doorsteps of district line-drawers are better laid elsewhere. The legislators who draw districts can only influence electoral outcomes. They cannot actually choose who will serve in the legislature. Only the voters can do that. If the voters elect legislators who depart from the ideal mix, the voters are the ones to be blamed, notwithstanding the obvious collective action problem. Under the theory that reads the Constitution as requiring an ideal mix of legislators, these voters have violated the Constitution no less than state voters, voting in a state initiative, might violate the Constitution by enacting curbs on political speech. Although the voters might have thought (with much justification) that they had the freedom to vote for whomever they wished, they were mistaken—at least if we accept the premise that the Constitution requires an ideal mix of partisans in the state legislature. As strange as this may sound, the voters who march into court claiming that legislators have diluted their votes should be suing their fellow voters for failing to elect the particular mix of legislators that the plaintiff-voters believe they have a constitutional right to demand.

Finally, if the statewide dilution claim has merit in the context of partisan affiliation, we have to face up to the fact that every single current districting scheme amounts to an unconstitutional partisan gerrymander. Every state has citizens who are members of so-called “fringe parties,” such as the Reform Party, the Green Party, the Libertarian Party,⁷⁵ and so on. Moreover, every state has citizens who vote for candidates of these parties. Yet legislatures typically lack legislators from these parties.⁷⁶ Why is not every redistricting plan unconstitutional that results in the exclusion of fringe party legislators because of the obvious vote dilution of fringe

75. *See, e.g.*, Libertarian National Committee, Frequently asked questions about the Libertarian Party, *available at* <http://www.lp.org/faq> (last visited Sept. 24, 2008) (noting that although the Libertarian Party is active in all 50 states, it only has some 200,000 registered voters).

76. *Id.* (admitting that the Libertarian Party is more successful at the local level rather than the national level of politics).

party voters? Put another way, why is some form of proportional representation system, calibrated to reflect actual party support statewide (however measured), not constitutionally required by the dilution metaphor?

Moreover, some states have high numbers of independent voters, that is, registered voters who choose not to be affiliated with any party. For instance, a recent New Hampshire study found that almost 45 percent of its voters were independents.⁷⁷ Nationwide, some 30 percent of voters identify themselves as independents.⁷⁸ Yet independent legislators are a rarity. In New Hampshire's case, it has but one independent legislator in its House⁷⁹ despite having the third-largest legislative body in the world.⁸⁰ Nationwide, there are a total of 70 independents out of more 7,000 state legislators.⁸¹ Independent voters have perhaps the strongest dilution claim of all and should be able to overturn every single districting plan in America, at least if we take seriously the idea that the Constitution prohibits statewide dilution of votes as measured by the affiliations of voters.⁸²

77. Brian C. Mooney, *Big Growth in Independents Among New Hampshire Electorate*, BOSTON GLOBE, Dec. 25, 2007, at 26A, available at http://www.boston.com/news/nation/articles/2007/12/25/big_growth_in_independents_continues_among_new_hampshire_electorate/.

78. Dan Balz & Jon Cohen, *A Political Force with Many Philosophies: Survey of Independents, Who Could Be Key in 2008, Finds Attitudes from Partisan to Apathetic*, WASH. POST, July 1, 2007, at A1.

79. See New Hampshire House Roster, available at [http://www.gencourt.state.nh.us/downloads/Members\(Excel%202003\).xls](http://www.gencourt.state.nh.us/downloads/Members(Excel%202003).xls) (listing Brenda Ferland as the sole independent).

80. See Gregory Rodriguez, *New Hampshire's Missing Yankees*, L.A. TIMES, Dec. 17, 2007, at A19, available at <http://www.latimes.com/news/opinion/commentary/la-oe-rodriguez17dec17,0,1821391.column?coll=1a-opinion-righttrail>.

81. See 2008 PARTISAN COMPOSITION OF STATE LEGISLATURES (2008), <http://www.ncsl.org/statevote/partycomptable2008.htm>.

82. We admit that unaffiliated voters will not necessarily vote for unaffiliated, independent candidates. They may choose to vote for candidates affiliated with parties. Still, the system we have clearly has the effect of suppressing vote totals for third party and independent candidates. The prevailing "first past the post election rule," which provides that the candidate with the most votes wins, leads people to favor candidates from the two established parties at the expense of other candidates. See DONALD GREEN ET AL., *PARTISAN HEARTS AND MINDS* 224 (2002).

In any event, those who find gerrymanders constitutionally troublesome are precisely those who assume that party affiliation is the most important predictor of voting behavior, because such scholars and judges suppose that a district stacked with Democrats inevitably will produce a Democratic legislator. The very existence of unaffiliated voters who choose to

Our reading of the Constitution is not susceptible to these criticisms. We read the Constitution as neither directly nor indirectly mandating that state legislatures and congressional delegations reflect a state's partisan divide. When legislators try to stack the deck in favor of their party, they do not violate the Constitution. Likewise, voters have not violated the Constitution when, even in the face of a districting scheme consciously designed to preclude statewide dilution, they elect a "disproportionate" number of Republican or Democratic candidates. Because the Constitution contains no ideal outcome or range for the distribution of seats across parties,⁸³ voters may vote for whomever they want without fear of transgressing the Constitution.

b. Difficulties with the Concept of District Vote Dilution

District vote dilution—when votes are said to be diluted in one or more districts—may not seem at all like a sound basis for a valid complaint. Indeed, the complaint may seem downright obtuse. After all, why would a rational voter care if her vote is diluted within a district so long as such dilution enables or furthers the dominance of the voter's party in the rest of the state? Does not party control of the legislature (or the congressional delegation) matter above all else?

This point of view glosses over the tradeoffs inherent in districting and assumes preferences that are hardly obvious. In the racial gerrymandering cases, African Americans have brought suit, arguing that more African Americans ought to have been pooled together in particular districts to enable the election of more African American legislators.⁸⁴ These voters hold this preference even though the predictable consequence of the creation of such majority-minority districts is to make more districts lean Republi-

support candidates affiliated with parties supports our claim that voters within districts decide who will win. The party affiliation of voters does not necessarily determine whom voters will vote for and elect. *See supra* note 67.

83. With respect to composition of state legislatures, the Constitution only requires a "republican form of government." *See* U.S. CONST. art. IV, § 4. State governments may satisfy this requirement irrespective of whether their legislative districts are gerrymandered. *See infra* Part II.B.

84. *See, e.g.,* *Dunn v. Oklahoma*, 343 F. Supp. 320 (W.D. Okla. 1972) (per curiam).

can and thereby potentially weaken the power of the party with which most African Americans identify, the Democrats. Although this preference may strike some as odd, it is a real preference that many voters hold, and it is hardly irrational.

Similarly, we believe that some voters will prefer not to have their vote diluted within their district merely to secure the chance that their allies in other districts will be able to vote more like-minded partisans to the legislature. Voters who oppose district vote dilution within their district may wish to keep like-minded partisans energized within their district, something that may be difficult or impossible if district vote dilution makes it unlikely that their party will ever win elections within the district. Or voters opposed to district vote dilution may hope for the day when a small change in vote totals within districts across the state causes the legislative majority to flip from one party to another. Finally, there is something undoubtedly appealing about being represented by someone who shares your political preferences, even if it means that fewer like-minded individuals from other districts will be members of the legislature. Our simple point is that it is hardly obvious that voters, given the choice, would gladly suffer district vote dilution as a means of securing possible party advantage elsewhere. Voters aggrieved by district vote dilution are not dimwits unable to appreciate the “big picture.”

Although we defend the rationality of those who might complain about district vote dilution, their underlying constitutional claims, like the claims of statewide dilution, have no sound constitutional foundation. To begin with, the Constitution does not prescribe in detail the conduct of federal elections, much less require the use of districts. Although the Constitution requires that states hold elections to select their Representatives in the House,⁸⁵ it never specifies how voters are to elect their Representatives. States have traditionally divided up their populations into districts, and building upon this tradition, there is a federal statute requiring the use of single-member districts for the election of members of the

85. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...”).

House.⁸⁶ But so far as the Constitution is concerned, states might choose alternative election methods. A state legislature could decide that its people will elect its House delegation through a statewide at-large vote. For instance, Connecticut, which has five representatives in the House, might plausibly choose to elect its House members on a statewide vote rather than having five separate congressional districts. In particular, if Connecticut gives its voters five votes each and permits them to vote for each candidate only once, the resulting mix of legislators is unlikely to reflect that state's partisan divide. Indeed, if Connecticut elected all of its representatives on a statewide basis using the system described above, all five of its representatives might well be Democrats because Connecticut is a relatively strong "blue" state.⁸⁷

Likewise, the Constitution does not detail how state legislators must be chosen. The Guarantee Clause certainly requires that these legislators be elected—we doubt that any state could have a hereditary chamber that paralleled the House of Lords.⁸⁸ Notwithstanding the Guarantee Clause, a state could decide to have districts or not, no matter how many legislators might populate its legislature.⁸⁹ If a state decided not to have districts, its legislators would be elected on a statewide basis.⁹⁰

If the Constitution does not require legislative districts of any sort, we think it unlikely that it mandates rather specific and controversial rules about any districts that a state might choose to

86. 2 U.S.C. § 2c (Supp. III 1967).

87. Of registered voters in Connecticut in 2004, 33.7 percent were registered Democrats and 22.0 percent were registered Republicans. See *Party Enrollment in Connecticut*, <http://www.sots.ct.gov/sots/LIB/sots/ElectionServices/ElectionResults/statistics/enrollst.pdf>. In the 2004 presidential election, Kerry received 54.31 percent of the vote and Bush received 43.95 percent. FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 2004 at 28, <http://www.fec.gov/pubrec/fe2004/federaelections2004.pdf>.

88. The bar against granting titles of nobility might suggest the same conclusion. U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States.").

89. The only time the Constitution speaks of districts is in the Sixth Amendment, when it requires that individuals be tried for crimes in the district in which the crime occurred. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law"). This use of "district" refers to the expected division of the United States into numerous judicial districts and carries no implication that there must be "districts" for purposes of elections.

90. *Id.*

create. In particular, we doubt that every district must mirror a state's partisan divide, lest all districts dilute the vote of certain partisan voters.

If we are wrong and the Constitution somehow does prohibit district vote dilution, the prohibition has a few interesting implications. One oddity with the district dilution claim is that even those voters who dominate a district will have a vote dilution claim. If a state has a 65/35 partisan divide, but a certain district only has a 55/45 partisan divide, it seems quite clear that certain votes have been diluted under the district dilution conception. Why would voters within the district be concerned about this sort of district dilution? Because informed voters know that they have party comrades who may, on occasion, vote for candidates of the other party. A district divided 55/45 occasionally may elect a member of the minority party. If the district actually reflected the larger statewide partisan divide (65/35), this possibility becomes more remote.

We alluded to another interesting implication at the outset. Partisans who, on many accounts, might be thought to benefit in some way from a legislature dominated by legislators of their party may have a valid dilution claim.⁹¹ For instance, in a state that is divided evenly between Democrats and Republicans, the Democrats who happen to control the legislature might craft a districting plan designed to generate a 55/45 split in the legislature. For this to occur, however, some Democrats will be stranded in districts where the Republicans have an overwhelming majority. These Democrats, even though they perhaps benefit from a legislature dominated by Democrats, may utterly despise their isolation in a Republican-dominated district. They therefore have a valid district dilution claim, for within their district, their votes have been diluted, at least as compared to the statewide averages.

c. Voters Favoring Vote Dilution

If we step back from the minutiae of either dilution claim, there is another more devastating argument against the notion that

91. *Id.*

partisan gerrymanders unconstitutionally dilute votes. Like the critics of gerrymanders, we have assumed that the “victims” of vote dilution will uniformly oppose the gerrymander. But this is hardly obvious. Risk-averse Democrats may embrace a Republican gerrymander that all but guarantees that certain seats will have safe Democratic constituencies. They may be willing to trade off the greater possibility of securing a Democratic legislative majority in favor of the certainty of many completely safe Democratic seats. Why? Because a district plan that leaves open the possibility of a Democratic majority also makes possible a complete Republican rout.

Of course, there are real examples of this phenomenon. Some Democrats favor Republican gerrymanders that increase the likelihood that African American legislators will be elected, even at the cost of a legislature dominated by Republican legislators. Such a result would “dilute” the votes of Democrats (including African American Democrats) on a statewide basis. This raises the inevitable question: Is a districting plan designed to maximize the number of minority legislators simultaneously (and necessarily) a Republican partisan gerrymander because of its tendency to assist in the election of Republicans, notwithstanding the fact that a good number of Democrats, both in the legislature and outside, favor the gerrymander?

Moreover, other Democrats clearly will prefer to have their votes “diluted” on a district basis if they foresee that this will increase the chances of a legislature composed of party comrades. That is to say, they will prefer to find themselves overwhelmed by a disproportionate number of Republican voters in their districts if that means that there may be fewer Republican legislators overall.⁹² Indeed, those voters who allege statewide vote dilution necessarily are requiring some form of district vote dilution. Put differently, such voters are requesting the creation of more districts that their party has a better chance of capturing even though that will mean that they may find themselves in a district that is disproportionately populated by voters from the other party.

92. *Id.*

If some Democrats (and Republicans) will prefer to have their votes “diluted” as compared against some ideal (whether on a statewide or district basis), this casts doubt on the idea that vote dilution of any kind is unconstitutional. We have to suppose that the Constitution implicitly exalts and constitutionalizes certain preferences (the possibility of more Democrats at the risk of more Republicans) over other preferences (the comfort that comes with certain safe Democrat seats). The preferences of risk-averse Democrats or Republicans are hardly obtuse, making it hard to believe that the Constitution implicitly entrenches any set of controversial preferences related to the composition of districts and legislatures.

3. Which Form of Vote Dilution Does the Constitution Prohibit?

We have attempted to flesh out what critics mean by vote dilution in the partisan gerrymandering context. To that end, we have discussed two possible forms of vote dilution, statewide vote dilution and district vote dilution. The careful reader has perhaps discerned that these two conceptions will almost always be in tension with each other.

If we try to avoid district vote dilution, we may be stuck with statewide vote dilution. In a state divided 58/42, Democrat to Republican, drawing districts that reflect this state pattern may lead to a legislature almost wholly dominated by Democrats. Likewise, if we try to ensure that the legislature reflects a state’s partisan divide, we will have to construct individual districts that depart from the statewide average, thus ensuring some district vote dilution. The only time the conceptions of vote dilution will not be in tension is if the state is evenly split between the two parties. Then we might say that every district should be evenly populated by Democrats and Republicans and that the legislature will likely—though not certainly—be evenly split as well.

Those who wish to retain the idea of unconstitutional vote dilution must choose between these two incompatible conceptions. Each conception of vote dilution is equally plausible in the sense that one can imagine voters who object to (or favor) one or the other conception. Furthermore, each conception is equally plausible in the

constitutional sense, for the Constitution apparently shows no preference for one or the other. Neither seems more malignant, more violative of “equal protection,” such that it renders the other type of vote dilution constitutionally irrelevant.

Luckily, we do not have to make any such choice. As noted earlier, the Constitution has nothing to say about the ideal composition of legislatures or districts. And if it has nothing to say about either of these two important subjects, it makes the whole idea of vote dilution a constitutional non-starter.

Once again, we are not denying that particular constitutions might define and bar vote dilution. Constitution-makers might agree that a legislature should mirror, to a certain extent and in certain ways, a state’s populace. If that were the goal, however, a constitution would just establish reserved seats that would ensure that the legislature would be composed of legislators who had whichever traits the constitution-makers deemed important. A constitution that envisions an ideal mix of legislators but does not reserve seats that match that ideal always runs the risk that the voters will not generate the requisite mix, no matter how highly engineered the districts are. Alternatively, a constitution might prohibit district vote dilution and require that each district be, along some dimensions, a microcosm of the state. Again, we think that constitution-makers who sought this goal would be quite explicit about imposing this specific and cumbersome requirement, lest future interpreters fail to discern this required feature of districting plans.

The idea that certain equipopulous districting schemes dilute votes is seductive. It seems obvious that when a districting plan departs from a seemingly natural ideal, that plan necessarily violates the Constitution. Saying that a districting plan “dilutes” votes gives it the veneer of a scientific fact. But the Constitution nowhere mandates either that legislators draw district lines to ensure some ideal composition of the legislature or that they ensure that each district mirrors the demography of the state. Although the metaphor of vote dilution conjures an arresting image of some natural concentration of legislators or voters that is then adulterated by conniving and crafty politicians, the Constitution

has nothing to say about departures from non-constitutionally grounded ideals.

B. Partisan Gerrymanders as Anti-Democratic Measures

Although vote dilution has been the principal complaint against partisan gerrymanders, perhaps the dilution metaphor is not what the courts and the critics of gerrymandering really find troublesome. Indeed, sometimes judges and scholars write as if gerrymandering systematically thwarts the will of democratic majorities. For instance, Judge Michael McConnell argues that the vote dilution/equal protection rationale against gerrymandering should be abandoned.⁹³ McConnell locates the harm of gerrymandering in the Guarantee Clause, which he interprets as a “structural or institutional guarantee, emphasizing the right of ‘the People’—the majority—to ultimate political authority.”⁹⁴ He advocates repudiating the nonjusticiability of Guarantee Clause challenges, but only when a districting scheme prevents “effective majority rule.”⁹⁵

McConnell does not give content to this constraint on districting, so we have to speculate how and when gerrymandering might thwart “effective majority rule.”⁹⁶ We suppose that gerrymanders might prevent majority rule because they permit a minority to control a legislature and thereby thwart what the majority wishes to accomplish. In other words, a state does not have a republican government if the will of the state majority is frustrated at the polls and in the legislature. If a majority of the state electorate favors universal health care, the state legislature must enact legislation that bestows such care. If an electoral majority disfavors welfare payments, the legislature must repeal any and all welfare statutes. Similarly, when the majority opposes farm subsidies, the legislature should not enact them; and when the majority favors more education spending, the state legislature should not cut such spending.

Once again, this complaint rests on an ideal: the will of a state’s majority should prevail, and minority viewpoints should never find

93. McConnell, *supra* note 45, at 106-07.

94. *Id.* at 107.

95. *Id.* at 114.

96. *Id.*

their way into law. When the majority does not prevail, or more charitably, does not prevail often enough, the legislature has been gerrymandered. Here, the partisan makeup of the legislature does not matter. So long as the majority sentiment triumphs all or most of the time, that is all that matters. Moreover, although we might imagine that most gerrymanders are intended, it is possible—indeed, as we shall argue, inevitable—for someone to devise a districting plan that unintentionally thwarts majorities. If this happens, the districting plan is unconstitutional regardless of the legislative intent.

Although “majority rule” with respect to each possible item on the legislative agenda is perhaps a normatively attractive principle, it is hopelessly utopian. In the real world, where people are diverse and preferences are quite complex, there is no districting scheme that will ensure that majorities always triumph and that minority viewpoints always lose. And if there is no districting scheme that will always ensure the triumph of majority preferences, then we ought to conclude that the Constitution does not require that which is impossible.

Start with an assumption that a majority of voters within a jurisdiction agree on all aspects of a legislative program and on all other relevant qualities of their representatives. Under such circumstances, it might make a good deal of sense to demand that any districting plan result in the election of legislators who will enact the majority agenda and possess the other characteristics deemed relevant by the majority. If it is possible for the majority always to prevail, maybe we should have a constitutional rule that requires that the majority always triumph.

Now let us move from this unreal world, in which an unchanging majority of voters agree on everything relevant, to the real world in which majorities shift depending upon the issue or personality under consideration and almost no issue is two-dimensional. In this real world, the concept of anti-democratic districting becomes rather indeterminate. Given only two constraints—that all votes should be given the same weight and that the majority should win—we no longer can determine what legislative program should be enacted and what representatives should be elected. If we cannot determine which personalities and programs “the majority” would

choose, we cannot determine which districting schemes are more undemocratic than others.

Arrow's theorem reveals why it is impossible to find a cohesive majority on all issues.⁹⁷ Professor Kenneth Arrow proved that democratic procedures for determining policy cannot avoid the possibility of intransitive ordinal rankings of voters' preferences. For example, when the policy choices are A, B, and C, and the voters are V_1 , V_2 , and V_3 , it is possible for V_1 and V_2 to favor A over B; it is possible for V_2 and V_3 to favor B over C; and it is possible for V_1 and V_3 to favor C over A.⁹⁸ In such a situation, majority rule produces indeterminate results.⁹⁹ Every policy a majority favors can be trumped by another policy favored by a different majority in an endless cycle. Unless restrictions are placed on voting agendas, some votes are given extra weight, or some other controversial constraints are placed on the voters, this possibility of endless cycling is unavoidable.¹⁰⁰

Given reasonable assumptions about preferences, Arrow's problem is inevitable in a plebiscitary democracy. Consider just one aspect of defense policy, which is just one aspect of the entire legislative agenda: the war in Iraq. Don favors immediate withdrawal; Dana favors withdrawal according to a timetable; Dean favors the same, unless the situation worsens, in which case he

97. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2-8 (2d ed. 1963); see also Thomas Schwartz, *Votes, Strategies, and Institutions: An Introduction to the Theory of Collective Choice*, in CONGRESS: STRUCTURE AND POLICY 318-45 (Matthew D. McCubbins & Terry Sullivan eds., 1987).

98. ARROW, *supra* note 97, at 2-3. The possibility of such cycling of majority preferences, resulting in their intransitivity, was first noted by Condorcet. *Id.* at 93.

99. *Id.* at 3, 51-59. In a direct democracy, Arrow's problem may or may not arise, depending upon whether the preferences of these different majorities are themselves intransitive. If, for example, a majority favoring a certain defense policy remains cohesive and favors that policy above all alternative defense policies, Arrow's problem will not arise in a direct democracy. On the other hand, if the majority that favors defense policy D_1 over D_2 is noncohesive, and the presence of option D_3 produces intransitivity, even direct democracy will be plagued by Arrow's problem.

100. The conditions Arrow identifies as necessary to ensure the problem are: nondictatorship (no single voter's preferences dictate the outcome); Pareto efficiency (if all voters prefer X to Y, Y should not win); universal admissibility (no voters' preferences are kept off the voters' agenda); independence from irrelevant alternatives (the presence or absence of an alternative that is itself not preferred should not affect the choice among remaining alternatives); and transitivity (if voters prefer X to Y and Y to Z, X should be preferred to Z). See *id.* at 22-31.

favors immediate withdrawal; Devi is with Dean, except that if the situation worsens, she favors calling off the withdrawal; Daoud thinks the war was a mistake but is against any withdrawal timetable; Dawn is for the war and wants a surge of troops; Del favors sticking to the present policy; and so on. Every policy put before the voters might fail to muster a majority unless the agenda is restricted. Indeed, even people's second, third, or fourth choices might fail to muster majorities. Moreover, when one considers the other policies implicated by just this one aspect of defense policy, such as whether the war should be financed by debt, by increased taxes, or by cuts in other programs, determining which policies are favored by the majority is hopeless. Or, more precisely, the proper conclusion is that few policies can be said to be favored by the majority, and surely no set of policies or ranking of such sets can be said to be favored by the majority. *Hence, a majority-favored legislative agenda does not exist.* If there is no majority-favored legislative agenda, no districting scheme can be accused of thwarting this non-existent agenda.

Now consider the situation in a representative democracy. Representative democracy is one step removed in terms of majority-favored policies from a direct democracy. Not only do you have Arrow's problem within the legislature itself, but representative democracy also introduces new considerations for the voters that do not exist in plebiscites: the personal characteristics of candidates (Is the candidate trustworthy? Is she a vigorous advocate for the district? Does she appeal to whatever personal traits voters wish to see in their elected officials?). No matter how the district lines are drawn, the representatives elected will not enact all the policies the different majorities favor, nor will they possess all the other relevant characteristics the different majorities favor. Some policies and personal qualities will inevitably lose out in any representative democracy. The question now becomes, which ones should lose?

This is where Arrow's theorem surfaces with a vengeance. If the different majorities with respect to trade policy, taxation, health care, and legislator character traits are asked which of these policies and personalities they would most and least regret to see defeated in the legislature, Arrow's problem certainly will arise. The very differences that block the formation of a single majority

that agrees on everything undoubtedly will block formation of a stable set of meta-preferences about which majority-favored items should win and which should lose. Yet if we cannot discover a cohesive majority regarding how policies and personalities rank in importance—for example, that the majority-favored foreign policy is more important than the majority-favored welfare program or the majority-favored tax program—we will be unable to determine which districting scheme a majority would favor. Once again, every districting arrangement will inevitably thwart some majority-favored policies.¹⁰¹

Basing districting on the policies a direct democracy would produce presents a further problem. Many voter preferences, especially those relating to characteristics of representative and not to general policies, themselves depend upon how voting districts are drawn.¹⁰² Thus, if Samantha votes in an ethnically homogenous district, she might prefer a representative with qualities A, B, and C, whereas if she is in an ethnically heterogeneous district, she might prefer a representative with qualities X, Y, and Z—the qualities most conducive to effectiveness might vary with the nature of the constituents. Moreover, even if Samantha is in the majority on the issue of which qualities are preferable in which districts, she may be in the minority when it comes to choosing whether her district should in fact be ethnically homogeneous or heterogeneous. Arrow's problem demonstrates that it is impossible to have a stable, transitive set of majority preferences.¹⁰³ And because Arrow's problem denies us an ideal baseline of stable

101. Daniel Lowenstein asks us the following question: "Why should a proponent of majority rule have either to say (a) that the majority must prevail on each and every issue, or (b) shut up?" In a similar vein, he accuses us of holding the view that "if the majority preferences cannot always be satisfied, then there is no point in trying to satisfy them as much as possible" E-mail from Daniel Lowenstein to Larry Alexander (Jan. 29, 2007).

Lowenstein mischaracterizes our argument. We are not opposed to satisfying majority preferences as much as possible. Rather, we deny that there is any coherent notion of satisfying majority preferences "as much as possible." Put another way, all those who favor satisfying majority preferences as much as possible face the insuperable difficulty of identifying stable, transitive majority preferences that have yet to be satisfied.

102. See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 224 ("Individual legislative elections are often intensely personal matters, turning not in the slightest degree on which party the voter wants to control the legislature").

103. See *supra* notes 98-99 and accompanying text.

majority preferences, it makes it impossible for us to determine how to draw the districts consistent with the principle of majority rule.¹⁰⁴

We note two final difficulties with the idea that gerrymanders are somehow anti-democratic. First, even if one could say as a theoretical matter that a stable majority favored some policies and disfavored others, we think it is beyond reason to expect that legislators will be able to discern which of the potentially innumerable districting plans always ensures that majorities prevail. Moreover, judges, as wise as they no doubt are, seem no more capable of undertaking this task. Only a statist fully confident in the wisdom and knowledge of government officials would hold out the hope that legislators and judges could possibly discern the ideal districting scheme. Whatever else one might say about the Constitution, it hardly overflows with confidence when it comes to the knowledge and proclivities of officials, elected or otherwise.

Second, the remedy for an anti-democratic legislative majority is remarkably indirect. Rather than merely instantiating the preferences of a majority of a statewide electorate, legislators are to draw districts that will, in turn, generate legislators who will, in turn, enact the policies that would have triumphed in a plebiscite. If the goal is to incorporate the results generated by a plebiscite, however, we should instead conduct a poll with a small margin of error and treat the policies favored by the majority of those polled as the laws.¹⁰⁵ That is to say, if the Constitution demands that the views of the majority of the voting public always (or usually) prevail, why bother with a republican government at all? Why not instead just hire a pollster and be done with it? As we said earlier, we do not think a stable majority exists as to all possible policies. But even assuming such a majority exists and that the Constitution demands that this majority always triumphs, we have a Constitution that is

104. *Id.*

105. Of course, as we have pointed out in our discussion of Arrow, even such a poll is impossible without violating Arrow's conditions, as it will perforce neglect the non-binary nature of most policy preferences and their interrelatedness, as well as the non-legislative qualities of legislators such as constituent services. As importantly, it cannot anticipate issues that arise after, but were unanticipated before, the legislature is selected, or the qualities of legislators most apt for resolution of those unanticipated issues. *See supra* notes 97-104 and accompanying text.

needlessly complex if it demands that the majority triumph through the indirect and highly fallible means of district line-drawing, voting for representatives, and then subsequent voting by legislators.

The upshot of all this is that in the real world, no districting plan can ensure that majority preferences will always triumph because this is utterly impossible.¹⁰⁶ Although many of the founders may not have been aware of Condorcet's paradox and certainly were not aware of Arrow's theorem, we doubt that any of them would have thought that the Constitution did, or should, contain a principle that majorities should always prevail. To the contrary, the obvious republican nature of the federal Constitution coupled with the Republican Guarantee Clause¹⁰⁷ suggests a desire for representatives who will occasionally thwart majority desires. When one adds to the equation the Constitution's many provisions that clearly constrain majorities, one cannot escape the conclusion that the Constitution was not built on the seductive yet futile notion that the majority always must prevail. Nothing in the Constitution's text betrays any hint of the ideal that majorities should always win—an ideal that Arrow showed to be a theoretical as well as a practical impossibility.

C. Partisan Gerrymanders as Structural Constitutional Violations

Perhaps sensing that the vote dilution and democracy arguments against gerrymanders are ultimately without merit, some scholars have recently suggested that partisan gerrymandering amounts to a structural constitutional violation. Relying upon the Republican Guarantee Clause, Samuel Issacharoff has argued that the Constitution is offended whenever people are denied competitive elections, not just when a minority can effectively embed itself in power.¹⁰⁸ Bipartisan gerrymandering is, for Issacharoff, analogous to a cartel arrangement among business competitors.¹⁰⁹ The

106. *See supra* notes 97-104 and accompanying text.

107. U.S. CONST. art. IV, § 4.

108. Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 7, at 614.

109. *Id.* at 618-20.

creation of safe districts for Republicans and Democrats is akin to business competitors dividing up sales territories and agreeing not to compete in each other's territory. As the latter denies consumers the benefits of market competition, the former denies voters the benefit of competitive elections. Without competitive districts, politicians are not accountable to the public. Voter preferences are ignored. Centrists are no longer coveted swing votes, and, as a consequence, their voice is lost. Gerrymandering also creates inefficient, fractious legislatures and a polarized House of Representatives.¹¹⁰

Richard Briffault and Heather Gerken have made similar arguments. Briffault claims that gerrymandering yields an excessive partisanship that "subverts popular sovereignty."¹¹¹ For in gerrymandering, the legislature, not the people, chooses the representatives, thereby subverting popular sovereignty.¹¹² Gerken sees a "diffuse structural harm" in partisan gerrymanders.¹¹³ Partisan gerrymanders, particularly of the bipartisan variety, injure the entire polity, not particular groups or individuals, by depriving the entire polity of the right to vote in competitive districts.¹¹⁴

We think these more recent claims are yet another attempt to discover a constitutional violation where none exists. Once again, scholars have imagined that there is something natural or inevitable about their preferences and then have purported to find these

110. *Id.* at 613-14. Issacharoff, writing with Pamela Karlan, has more recently repeated the argument that gerrymandering, including bipartisan gerrymandering, produces a structural constitutional harm by denying the polity competitive elections and producing non-centrist legislators and fractious legislatures. See Issacharoff & Karlan, *supra* note 7, at 14.

111. Briffault, *supra* note 7, at 416.

112. *Id.*

113. Gerken, *Lost in the Political Thicket*, *supra* note 7, at 522. Gerken actually sees another harm from gerrymandering. Gerken believes that partisan gerrymandering harms the political group not in power, much as other forms of gerrymandering harm other groups. As a result, too few of the "right" representatives with the "right" policy views will be selected. *Id.* at 527. We discussed this conception of harm earlier and have nothing more to say here.

114. *Id.* at 522, 538. Mitchell Berman also believes political gerrymandering constitutes a structural violation of the Constitution, its constitutionally significant harm being that of "excessive partisanship." Berman, *supra* note 7, at 783. Berman's principal focus, however, is not on defending that proposition but rather is on addressing how courts might translate that constitutional meaning into constitutional doctrine.

preferences enshrined in the Constitution's more open textured phrases.

The claim about competitive elections may seem appealing—after all, everybody loves a tight horse race. But how could a constitution that assumes voter autonomy ever guarantee competitive elections? Imagine a state where one party wholly dominates the electorate. It has just captured the hearts and minds of the citizens of that state. The predictable consequence of almost any districting plan is that a member of the dominant party will win any election. Have the district makers violated a constitution that implicitly requires competitive elections by failing to provide the impossible?

More realistically, consider a state that is split 60 percent Democrat and 40 percent Republican. Must legislators who draw district lines maximize the number of competitive seats even if that means some districts will be wholly Democratic as a result? Around the world, America rails against one-party states. It would be odd to read the Constitution as somehow mandating one-party districts in order to ensure competitive elections elsewhere in the state. We fail to see the wisdom of trying to make sure that some districts are competitive when many more will likely be wholly uncompetitive.¹¹⁵

What about the most compelling situation for competitive districts, when a state's population is evenly split between two parties? Should we not regard the Constitution as mandating competitive districts at least in this narrow circumstance? Just because something becomes possible in a narrow circumstance does not mean that the Constitution requires it. There are many preferences about how district lines ought to be drawn. Some voters may prefer districts that reflect geographical boundaries. Others may prefer

115. A potential unintended consequence of the desire for competitive elections is that a "minority" party might gain a majority. Suppose that districts are created in a 60/40 Democrat-Republican state so as to maximize competitive seats. And suppose that Republican support surges to 45 percent in a particular election. In that case, because Democrats are concentrated in particular districts (so as to ensure that the other districts are "competitive"), Republicans might well win more than 45 percent of the seats and capture control of the legislature.

Another possible unintended consequence is that the Democrats might capture all the seats in the legislature should a Democratic wave surge up. If Democrats get 65 percent of the votes statewide, they will likely take a supermajority of seats in the legislature. These examples suggest that maximizing the number of competitive seats maximizes the chances of wide swings in party representation in the legislature.

lines to keep self-identified neighborhoods intact. And still other voters may have aesthetic preference for compact districts. Feminist voters may wish to see more females in the legislature, regardless of their party affiliation. Some voters may prefer to see specific candidates elected and thus will want district lines drawn to favor that result. The most sophisticated voters might prefer to have districts drawn to maximize the chances that their preferred legislative agenda gets enacted. Each of these preferences has as good a claim on the Constitution as the desire for competitive elections, which is to say, none at all. We see no reason to suppose that the Constitution singles out the desire for competitive elections and privileges it above all these other preferences and thereby forces legislatures to construct competitive districts.

Of course, there is an insuperable problem with the idea that elections within districts must be competitive: there is no way for legislatures to guarantee that future elections will be competitive. Short of dictating how people vote, legislatures cannot guarantee competitive elections.¹¹⁶ Once again, an election may be competitive the first year after redistricting and become uncompetitive after that. We doubt that the district was constitutional the first year but subsequently became unconstitutional after that because the district's voters were independent minded enough to buck the best-laid plans of those who engineered districts to ensure competitive elections.¹¹⁷

116. See *supra* Part II.A.2.

117. Nathaniel Persily argues against Issacharoff's view that political gerrymandering undermines political competitiveness by pointing to facts that tend to rebut that view. Nathaniel Persily, *In Defense of Foxes Guarding the Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 649-50, 660 (2002). Persily argues that incumbents are accountable. They behave as if they were "unsafe at any margin," taking great pains to secure more resources for their district and to work their constituents. They face increased electoral uncertainty, as voters are still capable of casting votes based on their "retrospective judgments of incumbent performance," and this threat "remains to keep incumbents honest." *Id.* at 660 (citing Stephen Ansolabehere, David Brady & Morris Fiorina, *The Vanishing Marginals and Electoral Responsiveness*, 22 BRIT. J. POL. SCI. 21, 21 (1992)). "Indeed, one might ask why incumbents spend so much time raising money for their campaigns if they are in a position truly comparable to representatives installed by an enlightened despot who has properly assessed the preferences of the citizenry." *Id.*

Persily also takes issue with Issacharoff's antitrust analogy. He argues that Issacharoff does not take competitive primaries into account. These competitive primaries should produce the same "responsiveness, accountability, and 'ritual cleansing'" that Issacharoff

Similar arguments rebut the other alleged structural harms. The idea that partisan gerrymandering undermines popular sovereignty because the legislature rather than the people selects the representatives¹¹⁸ is rhetorical hyperbole masked as constitutional argument. When legislatures draw districts, they in no way select who will occupy the resulting seats. Although the legislature's design of the districts surely affects who may get elected, the legislature does not, and cannot, control what the voters do within those districts. As candidates know all too well, the voters decide their fate, not the mapmakers.

A number of historical incidents illustrate this point. The very first gerrymander after the Constitution's ratification, an attempt to keep James Madison out of Congress, failed.¹¹⁹ Moreover, the district that triggered the epithet "gerrymander" similarly failed to elect a Republican, as it was designed to do.¹²⁰ Finally, in more

desires in the general election. *Id.* at 661-62.

Persily also argues that gerrymandering might not be to blame for the lack of competition and growth of incumbent safety, citing various statistics that point to other causes. For example, U.S. Senators are unaffected by redistricting, yet 90 percent of Senators who sought re-election won—almost as high a percentage as the 95 percent figure for winning incumbent House members (who *are* affected). Several other factors could affect incumbent rates (i.e., "candidate-centered politics," "rising campaign costs that inhibit effective challengers," etc.). *Id.* at 665-67.

Persily points to certain advantages of gerrymandering. Bipartisan gerrymandering, for example, produces proportional representation. Proportional representation might more effectively contribute to effective government than competitive districts. Competitive districts draw the parties to the median voter, and as a result of this convergence, the parties become more alike, leaving the voter with an illusory "choice." *Id.* at 668-69.

Popular incumbents also might merely be a sign of market efficiency. Citizens' long-term relationships with their representatives might allow for more effective governance. "Entrenched" representatives know the most about their constituents and can do the most for them. *Id.* at 670-71.

118. See Briffault, *supra* note 7, at 416. Briffault's excessive partisanship theory of constitutional violation is premised on the legislature's violation of its constitutional obligation to act only in the public interest rather than act solely out of personal or group interest, an obligation Briffault would locate in the Due Process Clause. *Id.* at 413-14. Even assuming that there is such a constitutional obligation, we doubt that most legislators distinguish between the public interest and their interest in getting themselves and members of their party elected. After all, they no doubt believe their own vision of the public interest is superior to that of others; and that vision cannot be implemented if they and like-minded representatives are not re-elected. And surely no court is in a position to gainsay these beliefs.

119. See RALPH KETCHUM, *JAMES MADISON: A BIOGRAPHY* 275-77 (1990).

120. See Eli Rosenbaum, *Redistricting Reform's Dead End*, WASH. POST, Oct. 29, 2005, at

recent times, gerrymanders in various states have often been thwarted by voters. In Indiana, the Republicans gerrymandered the congressional delegation in an attempt to secure a six-to-five-seat split. But voters ultimately elected eight Democrats to two Republicans—hardly the result sought by the Republican gerrymanders.¹²¹ We by no means believe that thwarted gerrymanders are routine, but our point that district makers cannot guarantee who gets elected seems indisputable.

Finally, the claim that partisan gerrymanders cause excessive partisanship in the legislature may be true but is wholly beside the point. Once again, the Constitution never says that there should be any political parties. It does not even recognize them. Not taking cognizance of them, it is hard to see how the Constitution has anything to say about partisanship. Even if the Constitution somehow recognized political parties, there can be no basis for supposing that it regulates a legislator's (un)willingness to work with members of other political parties. The Constitution does not require legislators, either state or federal, to be polite and work well with their colleagues any more than the Constitution requires legislators to exaggerate and emphasize their differences with members of other parties. Relatedly, we doubt that the Constitution implicitly favors "centrist" legislators and parties any more than it opposes parties that attempt to erect "big-tents" that welcome people of diverse viewpoints.

To drive home our point, imagine a group of well-meaning scholars who thought that the legislators were insufficiently partisan. To these scholars, the two principal parties seem no different than Tweedledee and Tweedledum. (Indeed, this was and is a commonly voiced complaint.) Scholars who held such views might then write articles demanding that legislators display more partisanship and ideological purity, and thereby sharpen the differences between parties. To give a special impetus to their argument, they might then add that failure to craft districts that lead to more partisan legislators somehow violates the Constitution. In our view, the claim that legislators are insufficiently partisan

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121. See David Lublin & Michael P. McDonald, *Is it Time to Draw the Line?: The Impact of Redistricting On Competition in State House Elections*, 5 ELECTION L.J. 144 (2006).

would be, as a constitutional matter, no more persuasive than the claim that the Constitution bars districting that supposedly fosters excessive partisanship.

As citizens, we have views on the desirability of competitive elections and partisanship, just as we have views on the substantive merits of the policies that our political institutions produce. But our particular views about elections and degrees of partisanship in legislatures are constitutionally immaterial. The Constitution says many different things, but it is not a catchall meant to bar whatever the professoriate or the judiciary happens to think ails our democratic process.

D. Partisan Gerrymanders as First Amendment Violations

In his separate *Vieth* opinion, Justice Kennedy suggested that partisan gerrymanders might violate the First Amendment injunction against burdening citizens because of their political views and affiliations.¹²² That argument, which has also found expression in the scholarly literature,¹²³ builds upon the Supreme Court's political patronage decisions denying government the power to condition non-policymaking jobs and contracts on political affiliation.¹²⁴

The problems with the First Amendment argument are fatal. First, as Briffault points out, the argument either requires complete inattention to the political impact of districting—something no legislator is capable of—or it does no work at all.¹²⁵ If it requires legislative obliviousness to the political impact of district lines, then it is really an argument for something like computer-generated districting, an argument that surely has no constitutional provenance.¹²⁶

122. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

123. See, e.g., Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1131-39 (2005). See generally Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 (2003).

124. See, e.g., *Bd. of Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

125. See Briffault, *supra* note 7, at 408-09.

126. See *infra* Part IV.C.

Second, in contrast to those who are denied government jobs or contracts because of their political views, those disadvantaged by districting schemes are not denied the right to vote, the right to an equally weighted vote, the right to advocate their views, the right to organize, or any other right associated with political activity.¹²⁷ They are merely denied their preferred—and others' *dispreferred*—demographic composition of their district and their legislature. Denial of policy and personnel preferences is a regular and inevitable feature of politics.

Third, the patronage cases are inapposite because they dealt with non-policymaking positions and did not forbid governments to discriminate on political grounds with respect to policymaking positions.¹²⁸ The position of legislative representative is, however, a quintessentially policymaking one.

The most recently voiced reason why partisan gerrymanders are unconstitutional—that they violate the First Amendment—is just as unpersuasive as its predecessors.¹²⁹ Once again, people have taken a political problem and searched in vain for a constitutional prohibition. Perhaps the fact that the First Amendment argument is such a stretch suggests that the futile search for reasons why partisan gerrymanders are unconstitutional is in its last throes.

E. Why Partisan Gerrymanders Are Matters of Ordinary Politics

Partisan gerrymanders generate a lot of frustration. For good reason, people do not see much that is redeeming in a process that allows legislators to stack the deck to affect their own reelection and affect those who might be elected elsewhere within the state. Having politicians determine the composition of districts, a process that enables them to tilt the election returns, seems the antithesis of democracy, where “We, the People” are supposed to rule. Surely this must be unconstitutional.

Yet we must resist the understandable impulse to transform a public policy problem into a constitutional one. There is no natural

127. See Briffault, *supra* note 7, at 409.

128. See, e.g., *Elrod*, 427 U.S. at 367 (plurality opinion); *id.* at 375 (Stewart, J., concurring).

129. See *Veith v. Jubelirer*, 541 U.S. 267, 314 (2004).

or obviously correct way of dividing voters into equipopulous districts. People have diverse preferences about how that ought to occur. Nor are there obviously wrong or improper ways of allocating voters across equipopulous districts. If we are to believe that the Constitution mandates certain districting and electioneering ideals, then we have to suppose that the Constitution implicitly imposes certain rather controversial and complex preferences on the conduct of districting and elections. Necessarily, we have to imagine that the Constitution also implicitly rejects all other plausible preferences about districting and elections. We think that such claims have no merit.

This conclusion may seem terribly unsatisfying to some, but it should cause no more disquiet than the other types of legislative self-dealing that constitutions often do not regulate. Legislators typically decide their own salaries, which laws they will be subject to, and the extent of their constitutional powers vis-à-vis their institutional rivals in other branches. Legislators also pass all manner of laws that regulate the conduct of elections, laws that often grant incumbents an advantage. For good reason, no one supposes that all such laws are unconstitutional. The simple fact is that, all too often, constitutions permit politicians to establish rules that tilt the electoral process in their favor.

We take solace from the fact that no matter what legislators do to stack the electoral deck, their various ploys and strategies can be thwarted by the voters. If sufficiently moved by personality, policy, or anger, voters can elect an African American candidate in a white district, or a Democratic candidate in a Republican district. Although not a perfect solution to legislative self-dealing, “throwing out the rascals” is an American tradition.¹³⁰

III. WHY RACIAL AND OTHER GERRYMANDERS ARE NO DIFFERENT

One rather controversial implication of our analysis is that racial gerrymanders—the drawing of electoral districts with an eye to affecting the number of representatives of particular races or ethnicities—might be of no constitutional significance. To see why

130. See James A. Stimson, Michael B. MacKuen & Robert S. Erikson, *Opinion and Policy: A Global View*, 27 PS: POL. SCI. & POLS. 29, 30 (1994).

this is so, we need to focus on the constitutional violations supposedly associated with racial gerrymanders.

A. The Seemingly Hard Case of Racial Gerrymanders

The first potential violation associated with racial gerrymanders might arise from an alleged “under-representation” of African Americans in the state legislature or in the state’s congressional House delegation. This type of supposed equal protection violation would occur whenever African Americans were denied their “rightful” share of the legislators, whether or not race was used as a factor in districting decisions. In other words, the constitutional harm in such a case would not turn on whether redistricting was done with race in mind. All that would matter would be African American under-representation. If there were under-representation, there would be a constitutional violation. Theoretically, a computer-generated redistricting plan would be unconstitutional if it were to result in the election of an insufficient number of African American legislators.

The difficulty with the racial under-representation claim is the same difficulty identified in the cases of supposed partisan under-representation. In all gerrymandering cases, where dilution is the gravamen of the complaint, no one can demonstrate harm except relative to some baseline. Yet, as we have argued, the Constitution establishes neither a statewide nor a district baseline.¹³¹ In the absence of such a baseline, the district line drawers and the voters merely will have thwarted the preferences of perhaps some African Americans while at the same time likely satisfying preferences of other African Americans.

What of extreme situations that seem to cry out for some relief? For instance, suppose we determine that all African Americans in a particular state favor districting schemes that increase the likelihood that African Americans will be elected to the legislature. Should not districting satisfy that preference, particularly if it is universal among African Americans and it trumps all other preferences?¹³²

131. See discussion *supra* Part II.A.

132. Just stating it this way shows how implausible these conditions are. For example,

Not as a matter of the Constitution itself. Whether all African Americans prefer a particular mix of legislators does not matter if the Constitution ordains no such mix. Although the Fourteenth Amendment requires that states accord African Americans the equal protection of the laws, neither it nor the rest of the Constitution enshrines all preferences favored by African Americans. The representational and policy preferences of African Americans are no more entitled to special constitutional solicitude than are the preferences of pacifists, veterans, or employers. In short, when the gravamen of the complaint is under-representation in the legislature, neither majority nor minority racial groups can suffer any violation of their constitutional rights because there is no constitutional right to have one's racial group "properly" represented in the legislature.

The second type of violation might arise from the failure to satisfy the districting preferences of some African Americans coupled with an additional crucial element, namely, the baleful consideration of race in districting. Consider what will seem to many the worst-case scenario: an all-white legislature draws districts with an eye towards ensuring, as far as possible, that no African Americans are elected. Does not such racism just have to be unconstitutional?

We have some sympathy for this claim. If one believes that it is unconstitutional to use race in governmental decision-making,¹³³ then of course it will be unconstitutional to try to draw districts with an eye towards screening out potential African American legislators. But such a conclusion flies in the face of a myriad of Supreme Court precedents. In none of its racial gerrymander cases has the Court ever said that race-conscious electoral districting

suppose this preference could be maximally satisfied by a districting scheme that would likely result in a legislature whose majority was hostile to the entire legislative agenda of the African American legislators. Would African Americans really favor that scheme over one that produced fewer African American legislators but more legislators sympathetic to their legislative agenda?

133. *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 127 S. Ct. 2738 (2007) (stating that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

itself was *per se* unconstitutional.¹³⁴ To the contrary, the Court has upheld and required race-conscious districting.¹³⁵

Of more importance, even if legislators intend to harm African Americans through their districting plans and even if all African Americans object to the resulting districts and favor another districting plan,¹³⁶ none of this matters if there is no constitutionally established representational baseline against which the districting plan can be judged and found constitutionally lacking. Because there is no such baseline, the use of race in redistricting simply cannot matter. In other words, because racial gerrymanders cannot cause a constitutionally recognized harm to individual African Americans, much less inflict harm on African Americans *qua* African Americans, a legislative desire to do so is inert. No constitutional harm, no constitutional foul. Put another way, in the absence of any constitutionally-recognized harm, the mere legislative intent to harm racial minorities coupled with the failure to satisfy the preferences of some African Americans does not violate the Constitution.

The controversial nature of our claim perhaps requires a further bit of explication. Consider the following hypothetical. Suppose Congress decides to distribute chocolate candy bars to the American public. Each candy bar is numbered consecutively. They are otherwise identical. Assume that African Americans, for whatever reason, favor even-numbered candy bars. Knowing this, racist members of Congress, wishing to harm African Americans, enact

134. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (striking down a racial gerrymander resulting in a bizarrely shaped district); see also *Easley v. Cromartie*, 532 U.S. 234 (2001); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

135. See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Connor v. Finch*, 431 U.S. 407 (1977); *United States v. Dallas County Comm'n*, 850 F.2d 1433 (11th Cir. 1988); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002). For an argument supporting race-conscious districting, even in a constitutional regime that is otherwise hostile to race-conscious decision making, see Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

More recently, the Supreme Court has upheld the use of race in university admissions, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (approving a race-conscious law school admissions process), while striking down the use of race in allocating students to public schools. *PICS*, 127 S. Ct. at 2768.

136. We cannot emphasize enough how implausible this hypothetical unanimity is. See *supra* note 132.

legislation providing that African Americans only receive odd-numbered bars. Our claim is that from a constitutional perspective, equipopulous districts are like the candy bars—they are equal in all constitutionally relevant aspects, even if they are preferred or dispreferred for various reasons.¹³⁷

Our claim that the Constitution does not constitutionalize particular preferences, such as the preference of some African Americans to maximize the number of African Americans in the legislature, becomes clearer once one considers the multiplicity of plausible preferences. As we explained earlier, some African Americans might favor districting plans that result in the utter exclusion of African Americans from the legislature if the resulting districts lead to the election of legislators who enact policies that those African Americans favor.¹³⁸ More realistically, individual African-Americans likely favor different points on a spectrum. Some will favor fewer or even no African American legislators in exchange for better policy results, perhaps produced by more Democratic representatives. Others will favor some African American legislators at the cost of somewhat less favorable policy results. And others will want to maximize the number of African American legislators at the expense of everything else. If that is true, it is impossible to say whether the exclusion of African American legislators actually harms African American voters. What is more relevant, it becomes impossible to insist that the

137. Preferences for certain of otherwise identical candy bars and for particular districting schemes differ from the matters typically at stake in racial discrimination cases. In ordinary cases of unconstitutional race-conscious discrimination against African Americans, African Americans are denied some benefit that is extended to others, for example the opportunity to compete for some job, equal education opportunities, etc. They are clearly harmed, at least in a comparative sense. The upshot of our analysis, however, is that there is no baseline available from which to determine harms and benefits in districting. No matter how the districts are drawn, some people will have their electoral preferences furthered and others will have theirs thwarted, and there are no meta-preferences available for favoring one set of preferences over the other. Thus, even if a legislature draws districts for the purpose of minimizing the number of African American representatives, they will probably succeed in thwarting the electoral preferences of only some African Americans while at the same time furthering the electoral preferences of other African Americans. Moreover, as we said in the text, even in the extremely unlikely event that *all* African Americans voters favored (or disfavored) one particular districting scheme, the Constitution has nothing to say about whether such a scheme is mandated (or forbidden), even if the legislature is consciously attempting to avoid (or bring about) that scheme.

138. See *supra* Part II.B.

Constitution requires that districting plans maximize African American representation in legislatures.

Once again, as a theoretical matter, a constitution could provide that failure to meet some representational ideal was unconstitutional. For instance, some foreign constitutions provide certain religious¹³⁹ or caste-based reservations¹⁴⁰ of legislative seats to ensure some minimal level of representation of certain groups. Alternatively, a constitution might establish an ideal racial composition of the legislature or require the satisfaction of certain policy preferences held by particular individuals part of some racial group.¹⁴¹ Our point is that we see no evidence that the United States Constitution establishes any of these ideals. This is in keeping with the Constitution's general silence about districting, parties, and policy preferences.

B. Other Gerrymanders

The arguments made above apply to *any* possible gerrymander—gender, religious, and so on. If the Constitution does not mandate some particular ideal mix of legislators, it does not matter whether mapmakers draw districts that exclude or include Christian, Muslim, pro-union, or free-trade legislators. The Constitution takes no notice of how districts are drawn because it establishes no constitutional ideals for districting. Certain voters may not like particular gerrymanders, and they might fervently wish that legislators had drawn radically different districts; but there is no reason to suppose that the Constitution incorporates their particular preferences for district lines and the voter composition of districts any more than it incorporates their preferences for pork-barrel spending, a flat tax, and government regulation of the economy. Moreover, we can be sure that if a districting plan were altered to satisfy the grievances of those upset by a particular gerrymander, there would be new groups of individuals who would

139. *Cf.* Lebanon Const. art. 24, *available at* http://www.servat.unibe.ch/icl/le00000_.html (requiring equal legislative representation among Christians and Muslims).

140. *See, e.g.,* Indian Const., Part XVI, arts. 330-33, *available at* <http://indiacode.nic.in/coiweb/coifiles/p16.htm> (establishing various caste based “reservations” in the lower national chamber and the state legislatures).

141. *Id.*

be upset by the alteration. There is simply no way to satisfy everyone's preferences about district lines and the composition of the legislature; hence, it seems quite unlikely that a Constitution would try to satisfy a few controversial preferences at the cost of upsetting so many others.

We pause for a moment to discuss the failure of American legislatures to reflect the gender composition of America. No one seems to regard the relative dearth of female legislators as a violation of the Constitution, even if many regret it. Why is the gender gap in legislative bodies regarded so differently from the results that flow from racial and partisan gerrymanders?

We suspect that no one regards the gender gap as evidence of unconstitutional districting schemes because people perceive that women have a fair chance of forming a working gender majority within districts across America and have chosen, for whatever reason, not to elect more women to legislative office. Although some racial groups exhibit racial solidarity in voting, females do not heavily favor female candidates when given the chance to do so. Moreover, unlike racial minorities, which are often concentrated in particular geographic areas, women are, for obvious reasons, relatively evenly distributed across districts and states. If women do not live in gender ghettos, it becomes impossible to create contiguous districts that are overwhelmingly female. Moreover, if women do not exhibit tremendous gender solidarity in voting, the number of women elected might not change much even if women did reside in gender ghettos.

If we have described accurately why litigants and scholars have not taken up and run with the idea of gender gerrymanders, reflection on the idea helps us better understand partisan and racial gerrymandering. First, if partisan voters were evenly distributed across a state, it would be impossible to create contiguous districts dominated by the minority party and thus be impossible to create a safe and contiguous Republican district in a generally Democratic state. In this context, we are left to wonder, whether allegedly unconstitutional partisan gerrymandering is simply impossible in a state without pockets of partisan concentrations. In other words, does a legislature have to reflect the partisan division of the state only when there are partisan ghettos? Put another

way, why does the partisan composition of a legislature have to mirror the electorate only in states where partisans of minority parties are geographically isolated in particular locales?

Alternatively, if one can have an unconstitutional partisan gerrymander in a state with no pockets of particular partisans, we wonder if the state must abjure contiguous districting and use non-contiguous districting, where voters are placed in districts not by virtue of geography but by virtue of their party affiliation. It seems to us that if it is unconstitutional to have Republicans “under-represented” in the state legislature in a state where partisan voters are evenly distributed throughout the state, then the state simply *must* have districts dominated by Republican voters. Indeed, the desire for contiguous districts, however strongly felt, does not seem like a sufficient justification for denying Republican voters their proper representation in the legislature.

Similar questions arise in the context of racial gerrymanders. Are racial gerrymanders only possible because racial minorities are typically geographically concentrated? Imagine a state where there is no voluntary residential segregation of African Americans and where African Americans form 40 percent of the state’s population. Are African Americans left without constitutional recourse because districts that are both geographically contiguous and majority African American are impossible? Or, does the Constitution instead require the creation of non-contiguous “racial” districts that are stacked with predominantly African American voters in any state in which African American voters are evenly dispersed? If the Constitution requires that legislatures be composed of legislators who “look like” their constituents, as many opponents of gerrymandering seem to believe, the answer would seem to be yes.

Relatedly, if African American voters fail to vote as a racial bloc in favor of African American candidates, is it impossible for the district line drawers to gerrymander districts racially? It may well be that racial gerrymanders can only exist in a world where the relevant racial group has a strong desire to elect its own members to office. Once again, this conclusion would suggest that it is constitutional to have legislatures that do not look anything like the constituents who are being represented. It also suggests that

whether some districting plan is unconstitutional could vary from election to election, as racial bloc voting waxed and waned.

We raise these questions not to suggest that non-contiguous racial districting might be required or to suggest that women who favor female representatives should, under the banner of the Fourteenth Amendment, demand the creation of female-dominated, non-contiguous districts. After all, we do not believe that the Constitution regulates districting in the first place. We merely raise these questions hoping that those who claim that the Constitution regulates gerrymandering will provide a clearer account of why they (apparently) believe some representational gaps (gender) are clearly constitutional but others (racial and partisan) are not.

IV. OBJECTIONS

Our thesis, that partisan and other gerrymanders are not harmful departures from some constitutional ideal about how districts should be drawn—because such an ideal is illusory—swims against the current both on and off the courts. We suspect that there will be many objections raised against our thesis. Below we address some objections that we have encountered, recognizing that there may be others that have escaped our attention.

A. Not All Majority Preferences Are Intransitive

Some have noted that although many majority-favored policy and personality preferences will produce Arrowian intransitivities, some will not.¹⁴² For example, there will be virtual unanimity regarding whether the laws against murder should be kept, whether Baluchi should be the official language of Arizona, and so on.

We agree, and nothing we have said depends on our denying this obvious truth. *No matter how district lines are drawn, these majority preferences are unlikely to be thwarted.* No representative will vote to repeal the law criminalizing murder or support making Baluchi Arizona's official language, much less a majority of representatives in the legislature. Our argument holds true if there is

142. Richard Arneson, Professor of Philosophy, University of California, San Diego, raised this point with us.

intransitivity among policies that might be thwarted. Our argument does not rest on the claim that there is intransitivity among all policies or among policies that no districting plan will thwart.

In any event, we doubt that the Constitution enshrines the principle that majority-disfavored legislation should never be enacted. Such enactments are rare enough and are likely to be reversed over time so that no such rule seems necessary. Moreover, we doubt that the Constitution authorizes judges to discern when majority preferences have been thwarted and the even more bizarre idea that courts are to remedy this supposed constitutional violation by requiring a new districting scheme. No one has ever thought that judges were especially good at discerning public opinion, and, as noted earlier, requiring districting plans to fix the problem of thwarted majority preferences seems obtuse. It would make far more sense for the judge who determines majority preferences are thwarted just to go ahead and impose those policies directly.¹⁴³

B. Our Argument Implicitly Repudiates Reynolds v. Sims

We have not attacked the one-person, one-vote cases—*Reynolds v. Sims*¹⁴⁴ and its progeny—mandating equipopulous districting. However, do our arguments about gerrymandering, if cogent, repudiate the rationale of those cases?

Here is one reason to think that they might. One might suppose that the malapportionment that *Reynolds* barred was somewhat similar to the entrenchment of a particular policy agenda. If farmers had more per capita representatives than city dwellers, the result might be as if pro-agriculture legislation had been entrenched against repeal. Suppose a legislature passed a farm subsidy that also provided that a two-thirds majority would be necessary for any repeal. If valid, that legislation would be similar to stacking the legislature with pro-subsidy legislators. Of course,

143. Once again, even if we could conceive of a districting plan that would thwart no majority preferences, the difficulties judges would face in discerning those preferences and then in drawing district lines to realize them constitutes an additional reason to doubt that the Constitution mandates that district lines be drawn to ensure no thwarting of majority preferences.

144. 377 U.S. 533 (1964).

such stacking also results from districting schemes that violate the one-person, one-vote principle such as those that gave rural voters more representatives per capita than urban voters.

If we concede that gerrymanders will tend to entrench certain policy outcomes, are gerrymanders functionally indistinguishable from pre-*Reynolds* malapportionment schemes? Yes and no. Yes, in the sense that both malapportionment and gerrymandering tend to entrench policy outcomes. No, in the sense that they do so differently, and that difference may make a difference constitutionally. Malapportionment treats individual voters unequally in a mathematical sense. Voter A has one vote out of 400,000, whereas voter B has one vote out of 10,000. With gerrymandering across equipopulous districts, however, that inequality does not exist. The quasi-entrenchment that does exist is that voter A may get fewer of his preferred policy outcomes enacted than voter B. *But that inequality is inevitable and ineradicable whether or not gerrymandering occurs.* Indeed, one of our principal points is that any districting plan will favor some set of policy outcomes over others. That is to say, any district map, however drawn, will favor some voters and disfavor others.

We think the rule announced in *Reynolds* seems to cohere better with the ideal of equality and is judicially administrable. Nonetheless, if our arguments weaken the underpinnings of *Reynolds*, so be it. What we are sure of is that nothing in *Reynolds* leads to the conclusion that equipopulous districts might be unconstitutional.¹⁴⁵ The idea that the Constitution bars forms of this type of gerrymandering draws no support from *Reynolds*.¹⁴⁶

C. Legislative Self-Dealing Simply Must Be Unconstitutional

The self-dealing objection to gerrymandering has the most appeal. This objection concedes that although each districting scheme will favor some policy preferences and disfavor others, there is no meta-principle by which to criticize any scheme or rank it

145. *Id.*

146. For another comparison of the vote dilution cases with *Reynolds*, see Daniel Lowenstein, *Bandemer's Gap*, in *POLITICAL GERRYMANDERING AND THE COURTS* 64, 69-80 (Bernard Grofman ed., 1990).

relative to others. Nonetheless, those who press the self-dealing objection insist that it is unfair to let legislators draw district lines when they are likely to draw lines that further their personal or ideological interests. Is that not analogous to allowing one litigant to pick the judge or panel of judges to hear his case?¹⁴⁷ Just as we require blind or randomized selection of judges and panels of judges—even though no particular judge or panel is unacceptable under any principle endogenous to the legal system—perhaps the Constitution likewise demands randomized districting, even if all districting schemes are, from a constitutional standpoint, equally acceptable.¹⁴⁸

This objection perhaps has some validity as a matter of fair play. But does it state a constitutional complaint? If so, its implications go far beyond political and racial gerrymanders. The practical upshot of this objection, if it is well-founded and constitutionally based, is to deem unconstitutional any districting scheme that is legislatively constructed with some of its electoral and policy outcomes relatively transparent. This objection would thus appear to mandate computer-generated districting schemes or their functional equivalents, using parameters that are totally or relatively opaque with respect to electoral and policy outcomes.

As noted earlier, the self-dealing complaint also casts doubt on all manner of statutes. Legislation granting franking privileges, excluding legislators from the ambit of statutes, and increasing spending and cutting taxes in election years—all of these measures arguably stack the deck in favor of incumbents. Of course, one might respond that voters can take such self-dealing into account and vote against self-dealing legislators, yet the same can be said about legislators who draw districts to ensure their own reelection. Legislators cannot ensure their own reelection because voters always may throw out the self-dealing, gerrymandering legislators.¹⁴⁹

147. Our colleague, Michael Rappaport, Class of 1975 Professor of Law, University of San Diego, pressed this analogy.

148. Put differently, even if we cannot deem any districting scheme to be constitutionally superior to any other, if some voters will inevitably have their preferences favored relative to other voters no matter how district lines are drawn, then should not those district lines be drawn “fairly”?

149. See *supra* notes 119-21 and accompanying text.

Another counter to the self-dealing objection rests on the obvious point that many people see something desirable about leaving political judgments to politicians answerable to the people. The districting scheme that legislators craft, warts and all, certainly has greater democratic warrant than would a districting scheme spat out of a computer.

Ultimately, we take no stand on this objection or the various replies to it insofar as fairness and sound policy are concerned. Our focus has been on whether partisan and other gerrymanders are constitutional wrongs in a world in which other, non-blind, non-randomized districting schemes are not. Because from before the constitutional founding down to the present, district lines have been drawn by legislators conscious of demography, we seriously doubt the contention that anything in the Constitution mandates computerized or randomized districting. Perhaps, however, the Supreme Court will instruct us otherwise. Stay tuned.

CONCLUSION

Many find gerrymanders obnoxious and dispiriting, on par with political corruption and vote suppression. Gerrymanders supposedly rob elections of their vitality and purpose because they lead voters to conclude that outcomes are foreordained by gerrymandering politicians. The Constitution has quite a few general terms, and so it is natural to suppose that the Constitution must somehow bar egregious gerrymanders. The notion that “there oughta be a law against gerrymanders” becomes there *is* a law—the Supreme Law of the Land.

This is nothing but wishful thinking. Although the dilution literature grows almost daily,¹⁵⁰ the dilution metaphor founders on the Constitution’s evident failure to establish an ideal districting baseline or ideal range against which dilution may be measured. Dilution is necessarily a relative concept, and if there is no ideal districting scheme—no “natural” districting baseline or range—one cannot sensibly talk about vote dilution. The infinite number of

150. See, e.g., Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008); J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667 (2008).

possible ideal districting baselines makes it all but impossible to suppose that the Constitution implicitly singles out one such baseline and mandates it.

Perhaps sensing that the traditional vote dilution critique of gerrymandering is an analytical dead end, more recent scholarship has argued that gerrymanders unconstitutionally deny the electorate competitive elections.¹⁵¹ This exalts a preference for competitive elections that is constitutionally immaterial. Although the Constitution promises elections in various ways,¹⁵² it never promises a competitive political horse race that will capture the imagination of voters and political junkies. Moreover, it is odd to suppose that the Constitution requires competitive elections and enforces that requirement by regulating how district lines are drawn. Given that voters have complete control over whether an election is competitive, it would make far more sense to regulate the votes that voters actually cast. Only such regulation can guarantee competitive elections, albeit at the terrible cost of barring voters from expressing their true preferences.

The majoritarian claim against gerrymanders fares no better. Commentators and judges who urge constitutional invalidation of gerrymanders on majoritarian grounds assume a number of improbable and fantastic things: that there are stable majority preferences or, at least, stable majority metapreferences; that there is a constitutional right to have those majority preferences enacted into law; that judges are competent to discern when a legislature has thwarted such preferences; and that judges must impose those preferences indirectly through the redrawing of electoral district lines rather than directly decreeing that those thwarted preferences be the law. These assumptions not only imply skills that judges evidently lack, they also attribute to the Constitution a strange preference for implementing rights circuitously rather than directly. In all other instances when the Constitution favors rights, it directly imposes them on the states and the federal government. The circuitous method of implementing a robust right to majority

151. See, e.g., Richard A. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 254 (2006) (attempting to “[rectify] the constitutional threat posed by ... the design of election districts”) (citations omitted).

152. U.S. CONST. art. I, amends. XIV, XVII, XXIII, XXVI.

rule through the drawing of district lines is a surpassingly strange way to run a constitutional railroad.

We believe that judges and legal scholars jumped the track long ago. The Constitution does not mandate a robust majoritarianism that is to be safeguarded by judicial review of the drawing of district lines. Rather, the Constitution's real concern with majority preferences is quite limited. It is reflected in the principle of majoritarianism that is the default rule in the electoral and legislative processes. It is also reflected in the principle of "one-person, one-vote" that the Supreme Court has found inherent in the Constitution's Equal Protection Clause and is likewise discernable in the Court's close scrutiny of all restrictions on the franchise, and in its deference to congressional extensions of the franchise.¹⁵³

When courts move beyond the actual denial of the franchise or the denial of voting equality in a *quantitative* sense and focus on *qualitative* equality, they encounter an electorate that divides along a multitude of different lines. Because of these divisions, there is no standard available in theory, much less in practice, for declaring partisan gerrymandering, or any form of gerrymandering, to be unconstitutional.

Although our principal focus here has been on partisan gerrymanders, our analysis applies to all gerrymanders and indeed to all methods of drawing equipopulous districts. Racial and ethnic gerrymanders, however unwholesome, are not unconstitutional on the grounds that they dilute votes or on the grounds that they fail to generate enough representation of some racial or ethnic group in the legislature, notwithstanding the Supreme Court's arguments to the contrary.¹⁵⁴ The Supreme Court went as far as was plausible into the political thicket when it discovered the "one-person, one-vote" requirement.¹⁵⁵ Any further, and the Court indulges the view

153. See *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (approving that part of the Voting Rights Act of 1965 that banned English literacy requirements for voting for those educated through the sixth grade in American schools); *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966) (approving various remedial provisions of the Voting Rights Act of 1965). *But see Oregon v. Mitchell*, 400 U.S. 112, 129-30 (1970) (disapproving of an amendment to the Voting Rights Act of 1964 which mandated an eighteen-year-old voting eligibility requirement for state and local elections).

154. *Shaw v. Reno*, 509 U.S. 630 (1993).

155. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1961).

that the Constitution prohibits whatever outrages judicial and scholarly sensibilities.

We have no doubt that our claims will be met with a good deal of skepticism. After all, Justices of the Supreme Court, along with a goodly number of intelligent and well-regarded scholars, have argued repeatedly that various gerrymanders are unconstitutional on grounds of vote dilution, anti-majoritarianism, and so forth.¹⁵⁶ How can all these smart people be wrong?

We think the gerrymandering jurisprudence and literature has created something of an echo chamber. Almost everyone who writes about gerrymanders assumes that there is something constitutionally amiss with them. The only significant debate concerns precisely which features of gerrymanders make them unconstitutional. Hence, we get the proliferation of theories that reflect the different sensibilities of their able scholarly and judicial advocates.

We think it is time to step back and ask rather basic questions. Once those questions are asked, we think it will become clear that the Constitution does not regulate the way equipopulous districts are drawn. Gerrymandering is just one of the many troubling legislative practices about which the Constitution says absolutely nothing.

156. See discussion *supra* Part II.