Success Changes Nothing: The 2006 Election Results and the Undiminished Need for a Progressive Response to Political Gerrymandering

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In the spring of 2006, with the midterm elections just a few months away, the conventional wisdom was that extensive partisan gerrymandering made a change in control in the U.S. House of Representatives unlikely, if not impossible.[1] In June, when the Supreme Court refused to strike down one of the nation's most notorious gerrymanders—the Texas map masterminded by House Majority Whip Rep. Tom Delay—any remaining hope that enough congressional races would be competitive in 2006 to change the balance of power in the House seemed all but extinguished.[2] A growing frustration with this legal and political reality led many progressive political figures and academics to take up the cause of redistricting reform as the best course to create competitive elections and preserve electoral accountability.[3]

Election Day 2006, however, brought a very different result than the one predicted a few months earlier. Notwithstanding the map-makers' handiwork, roughly thirty seats changed hands, shifting control of Congress from Republicans to Democrats. A similar phenomenon took place in state legislatures across the country.[4] How was the conventional wisdom

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[1] *See, e.g.*, Jeffrey Toobin, *Drawing the Line*, NEW YORKER, Mar. 6, 2006, at 32. ("[T]he extreme gerrymandering in most states makes the Democrats' challenge nearly impossible, even in a year when national political trends may favor them."); Bruce Cain, Redistricting and Voting Rights, American Political Science Association, 2006, http://www.apsanet.org/content_5243.cfm (concluding that districting "in Texas and Colorado, and the Supreme Court's unwillingness to reverse the reputed bias of the Pennsylvania districts have added to the long odds against Democrats recapturing the house").

[2] *See, e.g.*, John Fortier, *Delay's Two Step*, HILL, July 5, 2006, at 13.

[3] *See, e.g.*, Dean Murphy, *Who Should Redistrict?*, N.Y. TIMES MAG., Oct. 23, 2005, at 24.

[4] Democrats significantly increased their control of state legislatures in the 2006 election. Before the election, they controlled 21 of the 49 State Houses of Representatives; after the election, that number was 28. Likewise, before the election, Democrats controlled 26 State Senates; after the election, that number climbed to 28. In five states, Democrats took

proven wrong? Had a widely touted "self-corrective" mechanism, in which the gerrymandering party is vulnerable to electoral defeat when it spreads its core supporters too thin, worked to resolve the districting dilemma? [5] And most importantly, now that progressives control Congress, a majority of state governorships, and a majority of state legislative chambers, how should they approach redistricting reform? Should they continue to push for redistricting reform, or should they simply continue to wage partisan battle under the current regime?

This Essay argues that, notwithstanding the change the voters achieved at the polls in November 2006, excessive partisan gerrymandering has diminished voter choice and weakened participatory democracy. Moreover, this Essay contends that progressives should have a particularly strong interest in redistricting reform, because, over time, political gerrymandering tends to erode support for progressive government and progressive causes. Voters highly atomized into districts that are far-flung, frequently changing, and composed of disparate interests fail to develop the cohesion with one another, with their representatives, or with the political process that is conducive to progressive organizing. As a result, progressive-minded activists and lawyers have a special reason for advocating redistricting reform and judicial oversight of redistricting.

The Essay then turns to two ideas—one doctrinal, one legislative—for reversing the unchecked tide of partisan district drawing. While the odds of success of either approach are modest, the need to take some action to provoke change seems clear: as fresh as our memories are of the disgraceful post-2000 round of districting, we are more than half way through the decade, and the upcoming post-2010 redistricting cycle looms dauntingly on the horizon.

I.

That the post-2000 redistricting cycle saw an unprecedented level of technologically sophisticated, highly partisan districting is so well known and so extensively documented that there is little point in further developing the observation here.[6] While the phrase "gerrymander" itself establishes the long lineage of the practice—Elbridge Gerry, after all, was a

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control of both chambers where they previously controlled only one (or neither). *See* Democratic Legislative Campaign Committee, Election Analysis, http://www.dlcc.org (last visited Nov. 15, 2006).

[5] *Cf.* Jeanne Cummings, *Redistricting: Home to Roost*, WALL ST. J., Nov. 10, 2006, at A6 ("[The GOP's] strategy of recrafting district boundaries may have backfired, contributing to the defeats of several lawmakers and the party's fall from power . . . . Republican leaders may have overreached and created so many Republican-leaning districts that they spread their core supporters too thinly.").

[6] *See, e.g.*, Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 184 (2003); Jeffery Toobin, *The Great Election Grab*, NEW YORKER, Dec. 8, 2003, at 63.

signer of the Declaration of Independence—a combination of new, highly effective technological tools[7] and an era of bitterly divisive politics made the post-2000 redistricting cycle one of the most effective, most ruthless, and most partisan in our history.[8]

How politicians and strategists were going to behave in the post-2000 districting cycle was widely foreseen before the districting cycle began. Less clear, however, was how the courts would respond to these new legislative tactics and technologies. Would the courts, which had become increasingly lax in policing districting issues unrelated to race, increase their scrutiny in the face of new and more aggressive legislative actions? Commentators waited, watched, and speculated.[9] Yet as the judicial decisions emerged, the trend became clear: the lower courts were not going to play any significant role in reining in legislative excess.[10]

Ultimately, the abstentionist approach was ratified by the Supreme Court in a triad of decisions: *Vieth v. Jubelirer*,[11] *Cox v. Larios*,[12] and *League of United Latin American Citizens v. Perry* .[13] Taken together, the cases sent a clear message to those who favored judicial policing of partisan districting: despite the Court's avowed preservation of an equal protection prohibition on excessively partisan districting, in practice, judicial limits on political gerrymandering had become a dead letter.

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[7] The 2000 redistricting cycle was the first, for example, where local political parties, individual legislators, and even mere interested citizens could engage in sophisticated mapmaking with fairly inexpensive software running on a personal computer. In addition, precinct-specific data was more available, more manipulable, and more sophisticated than ever. *See* Kimball W. Brace, Technology and Redistricting: A Personal Perspective on the Use of Districting Technology Over the Past Thirty Years 18 (Brookings Inst. Conference on Congressional Redistricting 2004), *available at* http://www.brookings.edu/gs/crc_Brace.pdf. *See also* Samuel Issacharoff, Remarks at the American University Forum: Has the Supreme Court Destabilized Single-Member Districts? (1995), http://www.fairvote.org/reports/1995/chp5/issacharoff.html ("with the computer … the lines are more extreme than they used to be"); Sasha Abramsky, *The Redistricting Wars*, NATION, Dec. 29, 2003, at 15 (quoting redistricting software manufacturer as saying "It's become a lot easier to build districts that are lopsided districts, because people can understand the data so much better. You're able to really manipulate the data quickly, to try different scenarios, to move the boundaries around and see what that means.").

[8] While this Essay is largely about partisan gerrymandering, the analysis does not differ significantly in the case of a bipartisan gerrymander, also known as an "incumbent protection plan." *See generally* Walter M. Frank, *Help Wanted: The Constitutional Case Against Gerrymandering To Protect Congressional Incumbents*, 32 OHIO N.U. L. REV. 227 (2006); Lisa Plendl, *Are Voters Dissed by Redistricting?*, CAL. J., Jan. 2002, at 12. Such plans can best be thought of as two partisan gerrymanders combined into a single plan (i.e., a partisan gerrymander in some districts on behalf of one party and in others on behalf of the other party). It is worth noting that such plans are increasingly rare in politics, as parties press harder for any advantage in states where such advantage can be had, and as intra-decennial districting allows any advantage, even temporary, to be exacerbated by the imposition of a new map. *See infra* text accompanying notes 27– 32.

[9] *See e.g.*, Alan Greenblatt, *The Mapmaking Mess*, GOVERNING MAG., Jan. 2001, at 20.

[10] *See infra* notes 17–24 and accompanying text.

[11] 541 U.S. 267 (2004).

[12] 542 U.S. 947 (2004).

[13] 126 S. Ct. 2594 (2006).

Indeed, the Court's most recent ruling on this issue—last Term's decision in *Perry*—demonstrated that even a plan with no rationale other than naked partisan political advantage would not be subjected to serious judicial review (other than as it relates to race).[14] It seems that equal protection scrutiny of partisan gerrymandering—always a "we will know it when we see it" doctrine—is now in the hands of a Court that either will never "know it" or never "see it."[15] In truth, the Court's post-2000 decisions should have come as no surprise: in the twenty years since the Supreme Court first opened the door to such claims in *Davis v. Bandemer*,[16] no final court decision *anywhere in the country* has invalidated a single districting plan under that doctrine, despite literally hundreds of such challenges.[17]

The de facto death of the federal constitutional prohibition on political gerrymandering has been both unsurprising and well-publicized.[18] Somewhat more surprising and less noticed has been the slow and quiet death of state constitutional and statutory limits on partisan legislative districting.

There was a time when state law doctrines such as "compactness," "contiguity," and "communities of interest" placed meaningful constraints on how far state legislatures could go in drawing state legislative district lines.[19] But in the 2000 cycle, of the fifty state districting plans, only

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[14] *Perry*, 126 S. Ct. at 2631 (Stevens, J., concurring).

[15] It is hard to imagine a more compelling case for judicial intervention than *Perry* posed, on its facts. First, the plan was not the original plan adopted after the Census was complete; instead, the legislature moved on it only after the 2002 elections increased the Republican majority in the Texas legislature. *Id.* at 2628–29. Second, as noted above, the District Court found that the "single-minded" purpose of the districting plan was partisan advantage—there was no other rationale for this legislative enactment. Session v. Perry, 298 F. Supp. 2d, 451, 470 (E.D. Tex. 2004). Indeed, reflecting an excess of mathematics that was emblematic of the plan, one legislative leader suggested that partisan advantage was "110% of the motivation for the plan." *Id.* at 473 (quoting State Senator Bill Ratliff). Third, the plan was passed only after a series of extraordinary and unseemly legislative tactics, including an ad hoc change in a long-standing State Senate rule that would have required a two-thirds majority to pass the plan, *see Perry*, 126 S. Ct. at 2630, and the use of resources of the Department of Homeland Security in an attempt to find Democratic legislators who had absented themselves from the state in an ultimately unsuccessful attempt to obstruct passage of the plan due to the absence of a legislative quorum. *See* Philip Shenon, *Investigator Steps Aside from Tempest Roiling Texas*, N.Y. TIMES, May 20, 2003, at A18. And fourth, the result—increasing the GOP majority in the delegation from 17 of 32 (53%) to 21 of 32 seats (66%) in the first election under the plan—was obviously disproportionate to the overall level of support Democratic and Republican candidates received in the congressional elections.

[16] 478 U.S. 109 (1986).

[17] Bernard Grofman and Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, ELECTION L.J. (forthcoming July 2007) ("[I]n the . . . two decades [since *Bandemer*], no redistricting plan has been struck down as an unconstitutional partisan gerrymander.").

[18] *See, e.g.*, Michael A. Carvin & Louis K. Fisher, *A Legislative Task: Why Four Types of Redistricting Challenges Are Not and Should Not Be Recognized by Courts*, 4 ELECTION L.J. 2 (2005).

[19] *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33

three—the plans in Alaska,[20] North Carolina,[21] and Maryland[22]—were invalidated on these (or similar, state-specific) grounds.

This is not because state legislatures acted with more restraint in drawing state legislative districts than they did in drawing congressional districts. Rather, it is a product of the fact that state courts, taking abstentionist cues from the Supreme Court, and fearful of running afoul of a morass of federal race-related redistricting doctrines,[23] have found increasingly tortured ways to eviscerate state constitutional and statutory limitations on districting.[24] Courts charged with reviewing districts to ensure their "contiguity" have employed the odd concept of "contiguity by bridge" to hold that a district separated by water was "contiguous" so long as one could traverse it by bridge.[25] When even that proved too constraining, courts went further to allow the oxymoronic idea of "contiguity by water," where two disconnected land masses, linked only by an imaginary corridor through a large body of water, would be deemed to be a "contiguous" territory.[26] Districts with extremely irregular boundaries have been deemed "compact," even when such shapes were not compelled by racial considerations.[27] Challenges based on a lack of "community interests" in districts that combine suburban office workers and rural farmers are often rejected in fa-

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UCLA L. REV. 77, 84-88 (1985).

[20] *In re* 2001 Redistricting Cases, 44 P.3d 141 (Alaska 2002) (overturning a legislative redistricting plan on the grounds that it violated a provision of the Alaska Constitution requiring that the legislature draw districts to be, inter alia, composed of integrated and contiguous socio-economic areas).

[21] Stephenson v. Bartlett, 582 S.E.2d 247, 254 (N.C. 2003) (striking down a legislative redistricting plan on the grounds that it improperly divided counties and that it failed to comply with the communities of interest and compactness requirements of the North Carolina Constitution).

[22] *In re* Legislative Districting of the State, 805 A.2d 292 (Md. 2002) (invalidating the Maryland redistricting plan as not compliant with the provisions of the state constitution requiring that the legislature give due regard to the compactness of districts and to existing political divisions).

[23] *See* Shaw v. Reno, 509 U.S. 630 (1993). *Shaw*'s formulation has become a green light for partisan gerrymanders. Melissa L. Saunders, *A Cautionary Tale:* Hunt v. Cromartie *and the Next Generation of* Shaw *Litigation*, 1 ELECTION L.J. 173, 191 (2002). In fact, asserting a partisan motivation is an affirmative defense in a *Shaw* case alleging racial gerrymandering. *Id.*; *see also* Easley v. Cromartie, 532 U.S. 234 (2001); Bush v. Vera, 517 U.S. 952, 959 (1996).

[24] Needless to say, courts still are very vigilant on racial gerrymanders. Indeed, one prominent scholar in this field has posited that the lack of judicial supervision of political gerrymandering has led to an "overracialization" of doctrine in this area. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 645–46 (2002). Because the focus of this Essay is the absence of judicial supervision of political gerrymandering, the vigilance of the judiciary in policing racial districting issues is not addressed here.

[25] Wilkins v. West, 571 S.E.2d 100, 108–09 (Va. 2002).

[26] *In re* Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 824 (Fla. 2002).

[27] *See, e.g.*, Parella v. Montalbano, 899 A.2d 1226, 1252 (R.I. 2006) (reiterating that the state constitution's "compactness requirement" is "most essential to the concept of effective representation and does not refer to general spatial relationships."); Beaubien v. Ryan, 198 762 N.E.2d 501, 506 (Ill. 2001) ("the ability to devise more compact formulations is not a sufficient basis for invalidating a map duly approved and filed according to law.").

vor of other constitutional requirements that enable courts to affirm the gerrymander.[28] Given how far courts have gone to stretch these once-vital doctrines to make them meaningless—virtually admitting as much in their decisions—the surprising thing is not that forty-seven of fifty state legislative district-drawing bodies avoided these limitations, it is that three of fifty plans did not pass muster.[29]

Hence, as we approach the post-2010 redistricting round, it is not unfair to say that the only two remaining legal doctrines that restrain legislative prerogative in districting are the doctrines concerning race and those concerning equality of population. Even that overstates the constraints placed on legislatures because, given modern districting technology, the requirement of population equality is scarcely a speed bump to map makers.[30] As long as a legislature ensures that all districts are "equal" in population—a mechanical task easily achieved by sophisticated districting software—and complies with *Shaw*, its progeny, and the Voting Rights Act, the legislature may develop tortured, distended, and disconnected districts to its heart's content. And legislatures may do so not just once a decade, but every time the legislature changes hands, changes its mind, or simply changes its mood. Tom DeLay may be gone from our political system, but DeLayism is firmly enshrined in our legal firmament.

II.

Many of the harms of the contemporary districting regime are well-documented by academics and well-known to virtually every observant voter. The most popular redistricting aphorism—that instead of voters picking representatives, representatives now pick the voters—has gone from being a joke to an accurate description of our representative democracy. The most prominent example from the post-2000 districting cycle is the 2004 election in California, where not one of the fifty-three congressional districts, not one of forty State Senate districts, and not one of the eighty State Assembly districts changed party hands.[31] And California, though extreme, was far from unique: as a result of technologically enabled redistricting, the number of competitive congressional districts na-

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[28] *See, e.g.*, *Wilkins*, 571 S.E.2d at 116. *Cf.* Cole-Randazzo v. Ryan, 762 N.E.2d 485 (Ill. 2001) (approving a district containing rural and urban voters without addressing plaintiff's community of interest arguments).

[29] *See supra* notes 19–21 and accompanying text.

[30] *See generally* Vieth v. Jubelirer, 541 U.S. 267, 343 (2004) (Souter, J., dissenting) (arguing that the requirement of equality of population does little to prevent other forms of unfair redistricting discrimination). *See also* Abramsky, *supra* note 7, at 15 (noting that the spread of technology has made it possible for any organization to design their own complete redistricting plans).

[31] David S. Broder, *Crossing Lines in California*, WASH. POST, Mar. 31, 2005, at A19. *See also* Walter Shapiro, *Incumbent Protection Racket Worked Well Tuesday*, USA TODAY, Nov. 8, 2002, at 5A (noting that only three seats changed hands in 2002).

tionwide dropped dramatically; in 2004, only 7% of congressional races saw the winner held to under 55% of the vote. Perhaps most ominously, the correlation between partisan voter preference at the polls and seats held by that party in Congress dropped to one of its lowest levels in decades.[32]

Do the 2006 election results—which seemingly yielded so much change in both the national and state legislatures—disprove these conclusions, or diffuse this concern? For several reasons, the answer to this question is, most emphatically, no.

Given the exceptionally strong national trend in favor of the Democratic Party, the surprising thing about 2006 is not that Democrats took control of Congress or a number of state legislatures, but rather, it is how *few* seats actually changed hands. [33] Indeed, even in an election dominated by serious questions of war and peace, and variously described as a "tsunami" or "tidal wave," only about fifty-five of the 435 congressional districts (or under 13%) saw an election that could be described as competitive.[34] This is far below historic norms. Indeed, only one redistricting cycle earlier, in the election most similar to 2006—the GOP "tidal wave" election of 1994—there were 138 competitive races, or more than twice as many as in 2006.[35] The fact that the voters still have some power to change control of Congress shows only that America remains a representative democracy in the end—not that the democracy functions properly to reflect popular will.

Many have also suggested that 2006 demonstrates that partisan redistricting is self-correcting. In this view, though a party may temporarily improve its electoral chances via partisan gerrymandering, such districting risks spreading party loyalists too thinly across districts; when a party's fortunes turn sour, that party loses big. And there is no doubt that some of that took place in the 2006 elections. Consider the heavily partisan districting in Florida, a state well-known (especially after the 2000 presidential election) for being comprised, in aggregate, of roughly even numbers of Democrats and Republicans. It is true that Democrats picked up two seats in Florida in the 2006 election, one almost certainly because of an overreach by the Republicans in their 2001 districting plan (which left one incumbent Republican with too few GOP voters to sustain him in a

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[32] Andrew Kohut, *Can Safe Seats Save the Republicans?*, N.Y. TIMES MIDTERM MADNESS BLOG, October 24, 2006, http://midtermmadness.blogs.nytimes.com/?p=24.

[33] *Cf.* Thomas E. Mann, *How to Think About the November 2006 Congressional Elections*, ISSUES IN GOVERNANCE STUD., July 2006, at 2, *available at* http://www.brookings.edu/views/papers/mann/20060716.pdf ("The decline of competition in congressional elections has weakened but by no means eliminated the capacity of voters to change majority control of the House and Senate.").

[34] The Cook Political Report, 2006 Competitive House Race Chart (Nov. 6, 2006), http://www.cookpolitical.com/races/report_pdfs/2006_house_comp_nov6.pdf.

[35] *See* Kohut, *supra* note 32. Under this analysis, if the current districts had been drawn in a way more akin to historical districting patterns, the Democratic pick-up in the 2006 election might have been closer to 70 seats, not the approximately 30 that were actually gained in the election. *Id.*

lean year). But even with that two seat pick-up, evenly divided Florida has a congressional delegation that is comprised of sixteen Republicans and nine Democrats. Or, put another way, a 50/50 state has a congressional delegation that is still 64% Republican, even after an election in which Republicans' suffered resounding defeats at the polls. Moreover, in the 2006 election, only four of Florida's twenty-five districts saw an even modestly competitive election (where the two candidates were separated by 10% or less). In contrast, fifteen of the twenty-five districts saw the winner triumph by a margin greater than 20%. The analysis is the same in many other states; consequently, the results of the 2006 election do not undermine the conclusion that contemporary districting practices have squelched competitive legislative elections.

A loss of electoral competition is the principle harm discussed in most commentary on the subject of partisan districting. As such, it would seem that partisan gerrymandering would have no *systematic* ideological impact; In most debates over redistricting reform, the positions of the various parties and ideologies tend to reflect the very case-specific question of "whose ox is being gored" in any particular jurisdiction. [36] Is there a systematic ideological consequence, beyond the case specific, to partisan gerrymandering?

While the evidence and analysis are not as well-developed as they are for the competition issue, there is reason to believe excessively political districting particularly and peculiarly erodes support for progressive government and progressive causes. This tendency is subtle and needs to be separated from a specific electoral context. There is no doubt that in an immediate sense, political gerrymandering that favors Democrats tends to advance progressive objectives (and vice versa), especially in the short run.

But this Essay's contention is this: even if partisan gerrymandering worked out to be a "wash" for the two parties nationwide—i.e., even if Democrats gained as many seats from pro-Democratic plans as Republicans gained from pro-Republican plans—the long-run effect of such districting practices would be to lessen public support for progressive government and to tilt the political landscape in favor of conservatism. This view rests on four theses set forth below.

Admittedly, these theses are more the product of a career of observation, rather than the result of social science research. They undoubtedly reflect certain biases, and they flow from the perspective—again, admittedly, a personal and ideological one—that progressivism thrives when citizens can unite to combat the influence of powerful forces in the political arena, and that by coming together this way, progressives can build support for activist government action to promote social and economic equality.

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[36] *See infra* text accompanying notes 77–78 (discussing partisan positioning on state redistricting reform efforts).

While the same could be argued, in some cases, for populist conservatism—which also employs popular organizing as a key tool, and also seeks activist governmental action (albeit of a different sort)—progressivism is generally more dependent than conservatism on grassroots support, collective action, citizen engagement with elected officials, and a connectedness to (and confidence in) the institutions of government.

With this as a backdrop, the ways in which gerrymandering is particularly corrosive of progressivism include the following:

(1) *There are fewer shared objectives and needs among voters in gerrymandered districts.* Non-contiguous, non-compact districts that do not respect the lines of traditional political subdivisions, and do not represent a true community of interest, are more likely to be filled with voters who do not share common needs or objectives. Voters in a compact area are more likely to come together to petition their representative for some activist governmental measure that would benefit that area—new schools, new roads, new social services—thereby creating a cohesive public pressure for progressive governmental action.[37] By contrast, voters in a non-compact district are less likely to see action on behalf of any one part of that district as benefiting them.[38]

For example, voters in a district composed solely of citizens from County *A* will, unsurprisingly, urge their representative to support governmental action that advances social progress in County *A*. But voters in a district composed of citizens from Counties *A*, *B*, and *C*, especially if those voters are spread out in a long, non-compact district, are less likely to build support for governmental action to benefit one particular county. Indeed, these voters are more likely to believe that such projects are a waste of their tax money and are likely to prefer candidates who support lower taxes over those who support progressive community action.[39] As a result,

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[37] *See* MICAH ALTMAN, DISTRICTING PRINCIPLES AND DEMOCRATIC REPRESENTATION 312 (1998), *available at* http://etd.caltech.edu/etd/available/etd-05192004-142452/ nrestricted/6chapter_6.pdf (reviewing research indicating that a lack of district compactness tends to "weaken voters' attachments to districts and legislators").

[38] *Cf.* PIPPA NORRIS, DEMOCRATIC PHOENIX: REINVENTING POLITICAL ACTIVISM 66–68 (2002).

[39] Of course, this analysis is contingent on assumptions about absolute and relative number of *A* voters in the combined district and the "choice" mechanisms employed to determine voter preferences. Depending on those factors, "public choice" analysis suggests that fragmenting a bloc of voters across several districts may not necessarily decrease their influence. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1973); DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). While this more sophisticated analysis may be correct, it does not fundamentally blunt the observation made in the text. First, while in some instances fragmented voters may continue to have sufficient influence to remain potent in disparate districts, this will almost certainly be the exception and not the rule. *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997, 1027–28 (1994) (discussing the assumption that "the fragmentation of a minority group among various districts is an acknowledged dilutive device" (internal quotation marks omitted)). Second, this tendency will be exacerbated in the case of partisan districting where the objec-

support for governmental action erodes, undermining a key component of a progressive movement: popular support for an activist government.

(2) *Gerrymandering creates obstacles to progressive organizing.* As a movement, progressivism depends upon organized and concerted public action as a counterweight to powerful private forces, such as corporate or elite interests, that are inherently well-organized. But popular organization rests, at least in part, on geographic compactness and public cohesion—a shared sense of place and interests—that is undermined when geographically compact or cohesive voters are split among multiple political jurisdictions due to gerrymandering. While atomizing otherwise contiguous voters into multiple voting districts is a less dramatic form of crowd dispersion than using a fire hose, it may, in the long run, be even more effective.[40]

Consider a group of voters who want governmental action to halt the polluting activities of a powerful business in their area. As a result of gerrymandering, these voters (who would otherwise live in the same district) are divided among multiple districts and will therefore find it difficult to organize and gain political influence. In contrast, the company may find it less challenging to deal with the phenomenon of being "represented" by multiple representatives. Unlike the citizens, who are disseminated over a wide area, the company is a concentrated and well-organized entity. Moreover, its impact on the political process is likely to depend less on organized grassroots efforts and more on influence through lobbying and campaign contributions. Hence, the dispersion of a single matter of concern into multiple districts can create a non-reciprocal impact on the prospects for political action in response to that concern. This imbalance between organized interests (both economic and otherwise) and dispersed citizen groups tends, in general, to tilt toward the conservative side.

(3) *Voters perceive less connection with their elected officials due to gerrymanders.* Progressive governmental action requires voter confidence in government. A lack of confidence breeds cynicism, which, over time, undermines support for progressive governmental action.[41] Unlike the old saying, when it comes to popular representation, familiarity does not breed contempt, just the opposite: even voters who are cynical about the system

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tive of the fragmentation of a disfavored group is precisely to lessen its influence.

[40] It is true that various forms of "virtual organizing"—online communities, message boards, and the like—tend to mitigate the impact that geographic dispersion has on depressing organizing activities. But even the most famous recent effort to use the Internet as a tool for political organizing—the Howard Dean campaign's use of web-organized "meet ups" in 2004—still required interested persons to come together at a single (web-selected) place in the "real world" to translate online organization into political action. *See* Gary Wolf, *How the Internet Invented Howard Dean*, WIRED, Jan. 2004 at 138, 141. The Internet may make geography less important, but not unimportant altogether.

[41] *See, e.g.*, Thomas Frank, *G.O.P. Corruption, Bring in the Conservatives*, N.Y. TIMES, Aug. 19, 2006, at A19 ("Conservatives are infinitely better poised to capitalize on public disillusionment with the political system, regardless of who does the disillusioning.").

generally tend to view their own representative more favorably and with more confidence if they are familiar with him or her.[42]

Repeatedly moving voters between districts—a phenomenon that is likely to become more common as intra-decennial redistricting increases—tends to further weaken the connection between voters and their elected officials.[43] Indeed, while it is impossible to know for sure, it seems conceivable that the 2002 election—the first held after the most recent redistricting cycle—was the first election in modern times where more Americans found themselves with a new congressional representative because they had been moved into a new district than because they had elected a new representative. The same may be true for many state legislatures as well.

For the same geographic and shared-interest reasons discussed above, voters subject to gerrymandering are not only less likely to know their incumbent representatives, they are also less likely to know challengers to those representatives and are less likely to share common geography or interests with either candidate. Hence, partisan gerrymandering maximizes disconnectedness between elected representatives and their constituents and thereby weakens a valuable link for galvanizing support for progressive governmental action.

(4) *Gerrymandering leads to lower participation and a dampened sense of "ownership" in government.* Public support for progressive governmental actions may require a greater sense of public "ownership" of the political system. For example, public support for raising taxes to fund governmental action almost certainly requires a greater sense of investment in the political system than does support for lowering taxes. Support for other progressive programs—greater social spending or initiatives to advance economic equality—likewise requires a greater sense of public confidence and legitimization of political decisions than their ideological opposites.

Yet countless studies have shown that as elections become less competitive, voters are less likely to participate.[44] Even voters whose preferred candidate is likely to win are less likely to vote because they believe the election outcome is preordained. Hence, because political gerrymandering lessens electoral competitiveness, it also has the effect of dampening political participation. Likewise, the sense (that gerrymandering creates) that government is structured for the benefit of the governing class, rather than the governed—with districts created to advance the cause of political parties and their leaders, rather than the voters of the

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[42] A. R. Dick & J. R. Lott, *Reconciling Voters' Behavior with Legislative Term Limits*, 50 J. PUB. ECON. 1, 1 (1993).

[43] For example, in the 2003 Texas districting plan, eight million Texans were moved into new Congressional districts. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2630 (2006).

[44] *See, e.g.*, ANGUS CAMPBELL ET AL., THE AMERICAN VOTER 54 (1964); GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 116 (6th ed. 2004).

district—further exacerbates this problem. Over time, disenfranchised voters, seeing a "corrupt" electoral system with little chance to truly choose their elected officials, provide a very weak base for innovative, progressive governmental action.

Again, each of these four theses are general tendencies: for each, there are exceptions and counter-examples. Yet taken as a whole, they suggest that, over time, partisan gerrymandering will prove more corrosive of progressivism than conservatism.

Progressive lawyers and activists therefore must take the lead in combating this practice.

III.

The unmitigated increase in partisan gerrymandering (and accompanying decline in judicial intervention) has raised the stakes in the districting debate for progressives. But what are they to do? This section argues that a greater focus on First Amendment challenges, as opposed to Equal Protection Clause challenges, might, over the very long run, prove to be a more successful legal strategy for constraining partisan gerrymanders. Failing success in the courts, this section argues that progressives should advocate for the adoption of non-partisan commissions to conduct future districting.

A.

First Amendment challenges to partisan districting plans are not new. Such claims have often been part of multi-faceted challenges to districting plans, although they have usually been assigned a secondary or tertiary role in both plaintiffs' cases and judicial opinions.[45] Given the failure of equal protection doctrine to provide any meaningful constraint on partisan gerrymandering, perhaps it is time to reconsider First Amendment law in this area.

The theory behind a First Amendment challenge to a partisan districting plan is straightforward: the government cannot discriminate against persons based on their political views because the desire to disadvantage a group for political reasons is not a legitimate governmental objective.[46] The idea that government may not "penaliz[e] citizens because of . . . their association with a political party," is so elemental as to be acknowledged even in judicial opinions *rejecting* First Amendment challenges to districting schemes.[47] Since the First Amendment includes an implicit "fun-

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[45] *See, e.g.*, *Perry*, 126 S. Ct. at 2609 (dismissing the First Amendment claim in a single clause); Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689 (N.D. Ga. May 16, 2006) (dismissing this claim with more analysis).

[46] *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 447 (1985).

[47] *See* Vieth v. Jubelirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) ("The

damental duty of the sovereign to govern impartially,"[48] governance that discriminates based on one's First Amendment-protected political views would seem to be unconstitutional.

Given this, it is somewhat difficult to understand why First Amendment law has failed to act as a meaningful constraint on partisan gerrymandering. Notwithstanding whatever subterfuges or intrigues might be involved in the often-murky world of redistricting, legislative leaders have been unabashedly blunt in stating their objective in partisan gerrymanders: promoting the partisan advantage of one party over another and the advantage of the voters of one party over the voters of another.[49] As one of the leaders of the Colorado legislature explained in setting forth the "public interest" behind that body's enactment of a congressional districting plan:

> I decided, as a Republican leader in Colorado that if the voters put us back in the legislative majority for 2003, one of our goals should be to blunt the Democratic drive for recapturing Congress . . . . There are only two kinds of Congress to choose from . . . one where . . . Republicans hold the majority . . . or one where . . . Democrats do . . . . And that's why SB 352 is the right map for Colorado . . . .[50]

In case after case, legislators have made it clear that they consider little beyond the unvarnished pursuit of partisan objectives in drawing districts.

It is almost impossible to imagine that any other governmental discrimination would be tolerated on such an avowedly partisan basis. Imagine if a legislature openly acknowledged that better schools were being built in one district as opposed to another because that district predominantly consisted of members of a certain political party. Or if, in drawing lines for which neighborhoods would be served by a fire station with newer, better equipment, a legislative leader said: "We have drawn the line this way because the area getting better fire trucks consists mostly of Republicans and we want them to have better fire protection." Indeed, with the exception of allowing political considerations in the hiring and firing

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First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. . . . [T]hose burdens in other contexts are unconstitutional . . . .").

[48] *Perry*, 126 S. Ct. at 2635 (Stevens J., dissenting). *See, e.g.*, Session v. Perry, 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004) (noting that Texas State Senator Bill Ratliff stated that "[p]olitical gain for the Republicans was 110% motivation for the plan."). *See generally* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003).

[49] *See, e.g.*, *Session*, 298 F. Supp. 2d at 473; *Davidson*, 79 P.3d at 1221.

[50] Sen. John Andrews, Op-ed, *Districts Remapped in Public Interest,* DENV. ROCKY MTN. NEWS, June 9, 2003, at 30A.

of policymaking officials,[51] it is almost impossible to identify another circumstance in which a governmental actor is allowed to discriminate on the basis of political affiliation.

Assigning voters to a district based on their partisan views is obviously not as directly harmful as a denial of education or fire protection. But if the harm of assigning voters to districts based on their partisan affiliation is less direct, it is only a difference of degree, not type. The entire premise of the Court's one-person one-vote doctrine, and the limitations on race-based districting, is that districting allocates political power, and hence the ability to determine who gets benefits, such as fire protection and education.[52] In the end, there is little difference between according fewer governmental benefits to a district because its residents are Democrats and using redistricting to give Democrats in a particular area less political power: the latter will almost inevitably lead to the former.

The irony of the lack of First Amendment limits on discrimination in districting is that it is now unconstitutional to choose a city garbage contractor based on the political views of its owner,[53] but it is perfectly lawful to diminish a citizen's prospect of prevailing in legislative efforts to obtain better garbage collection by assigning him or her to a district dominated by members of one political party. Or more broadly, why is it unlawful for a state to discriminate in the provision of benefits, large and small, according to political affiliation,[54] but lawful for it to discriminate in the assignment of voters to districts by virtue of their political views?[55] This discriminatory assignment results in important differences in the influence granted to citizens, and hence the ability of those citizens to lobby for, and get, services and benefits.

The logic of a First Amendment limit on political gerrymandering is compelling. The weakness of this strategy may be that it "proves too much": a First Amendment prohibition on political gerrymandering probably would result in an absolute prohibition on the consideration of political affiliation in redistricting.[56] And, some will surely suggest, if the U.S. Con-

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[51] *See generally* Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion).

[52] *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."); Baker v. Carr, 369 U.S. 186, 207–08 (1962) ("The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties.").

[53] *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996).

[54] *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (concerning participation in a public TV station program); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (concerning funding for university student newspapers).

[55] *See* Bush v. Vera, 517 U.S. 952, 964 (1996) (plurality opinion) (declining to apply strict scrutiny to a political gerrymandering claim).

[56] Vieth v. Jubelirer, 541 U.S. 267, 294 ("[A] First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting.").

stitution does contain an absolute ban on political gerrymandering, why have courts not previously recognized it?[57] Courts are certain to be reluctant to change directions so dramatically, and do so in a way that interferes so powerfully in a politically charged area.[58] And yet, there are momentous times when the Court explicitly reverses itself, even when dealing with contentious and visible areas.[59] Indeed, the cases that launched the modern era of one-person, one-vote districting, *Baker v. Carr*[60] and *Reynolds v. Sims*,[61] represented just such a reversal. These cases constituted a complete 180-degree turnaround from earlier decisions that refused to adjudicate such claims, finding them non-justiciable.[62] There is no reason why a similar reversal could not be undertaken by the Court now with regard to partisan gerrymandering.

Another objection to permitting First Amendment claims against districting plans is that the proof of such claims would rest on an assessment of the legislative motivation behind such plans, and courts tend to disfavor inquiries into legislative motivations. Yet, this objection is unavailing for two reasons. First, when reviewing districting plans adopted during the current cycle, courts will face no shortage of open expressions of partisan discriminatory intent.[63] Courts will not have to look hard to find such confessions; the record is replete with not just admissions, but downright boasts about such motivations. Second, even after legislatures become more discrete and circumspect, there is ample precedent for adducing legislative motivation from the lines themselves. Since the Court ruled in *Shaw v. Reno*,[64] courts have routinely policed racially discriminatory districting, despite the inherent difficulty of determining legislative motive. In early *Shaw* cases, courts could rely on explicit legislative admissions of discriminatory intent, but in later cases—brought after legislators became more guarded in their statements—courts inferred intent from the lines themselves.[65] If the federal courts can "look into a legislature's mind" to determine if a line was drawn for the purpose of discriminating based on

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[57] *Cf.* Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) ("[W]hen a practice not expressly prohibited [in the Constitution] bears the endorsement of a long tradition of open . . . use . . . we have no proper basis for striking it down.").

[58] *See e.g.*, Vieth, 541 U.S. at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."); Cox v. Larios, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (The problem with this analysis is that it assumes "politics as usual" is not *itself* a "traditional" redistricting criterion.").

[59] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Lawrence v. Texas, 539 U.S. 558 (2003).

[60] 369 U.S. 186 (1962).

[61] 377 U.S. 533 (1964).

[62] *See Baker*, 369 U.S. at 208–09 (limiting Colegrove v. Green, 328 U.S. 549 (1946)).

[63] *See, e.g.*, *supra* text accompanying notes 41–42 (discussing open expressions of partisan discrimination in Colorado and Texas as illustrative).

[64] 509 U.S. 630 (1993).

[65] Hunt v. Cromartie, 526 U.S. 541 (1999); Miller v. Johnson, 515 U.S. 900 (1995).

race, than surely it can perform the same exercise to see if partisan-affiliation or viewpoint discrimination is at work.

Today, two decades after *Davis v. Bandemer*, it is time for the Court to do what it did in *Baker* and *Reynolds*: reverse directions, recognize the profound threat to representative government posed by partisan gerrymandering, and put an end to such redistricting abuse. While this outcome seems unlikely so long as the Court has its current membership, pressing this effort is no less likely to produce meaningful change than continuing on the current course.

Hence, as progressive and reform-minded groups prepare their litigation strategies for the next redistricting cycle, special consideration should be given to mounting new First Amendment-based attacks on political gerrymandering. As a starting point, state constitutional free expression provisions could be invoked as a basis for challenging state districting schemes. Success at the state level could provide precedents that gradually encourage federal courts to reconsider their interpretation of the First Amendment in gerrymandering cases. Further studies on the consequences of partisan redistricting—including how it impacts participation and dictates substantive outcomes that effectively amount to viewpoint discrimination—could also add support to the argument that political gerrymandering effectively silences some viewpoints.

Legislative minorities also should be counseled to develop legislative records in the districting process that would provide additional evidence for use in such cases. Records could help illustrate how the partisan districting lines negatively impact many constituents and could help preserve evidence of discriminatory intent and effects. Academics should reinvigorate their research and writing into the deleterious effects of gerrymandering on political participation. None of these measures are likely to bear fruit over a short period, but then again, neither *Baker* nor *Reynolds* were overnight sensations. In time, one can hope that just as deviations from one-person, one-vote have been understood to violate the Equal Protection Clause, so too will deviations from viewpoint neutrality in the districting process be seen to violate the First Amendment.

B.

Recognizing that judicial constraints on political gerrymandering are virtually nonexistent, and that creating a vibrant First Amendment doctrine in this area will take time, those who are concerned with the practice of partisan gerrymandering must look to other approaches for more immediate results. One approach gaining increasing interest is the use of nonlegislative districting commissions to draw district lines.

While we take districting by legislatures for granted, the American practice is actually the exception, not the rule, among democratic countries using single-member-district electoral schemes.[66] Most democratic nations, recognizing the inherent dangers of allowing representatives to draw their own districts, leave such tasks to extra-legislative commissions.[67] While not all progressives agree that non-partisan districting commissions are a desirable approach,[68] the failure of the courts to exercise any meaningful control over the current system (combined with the current system's detrimental effects on progressive goals) has encouraged a progressive reassessment of non-partisan districting commissions.

In fact, twenty states already use such commissions as part of the redistricting process. However, in the vast majority of the states, the commissions are advisory-only and are often ignored. In only six states do these bodies have the power to draft redistricting plans that are not subject to legislative review.[69] While the various reform plans all differ, the critical elements of such commissions are bipartisan or non-partisan membership, some "tie-breaking" process if the bipartisan members disagree, and a set of criteria or principles that guide the drafting of districting plans.

A recent study by political scientists Jamie Carson and Michael H. Crespin found that non-partisan redistricting commissions create more competitive electoral districts.[70] Because the commissions focus on criteria like compactness concern for traditional boundaries, and the preservation of communities of interest—along with strong provisions to protect the ability of racial minorities to have influence in the political process—they are credited with the creation of districts that are less atomized and less polarized. Having such explicit criteria for commissions is a significant aspect of the needed solution. By contrast, merely moving the current districting mess from legislative bodies to extra-legislative ones is no solution if those extra-legislative bodies merely replicate the partisan dynamic of a legislature or employ a partisan tie-breaker.[71] The key is creat-

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[66] Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1386 (2005).

[67] *Id.*

[68] Richard L. Hasen, *Hold the Line*, SLATE, Dec.12, 2005, http://www.slate.com/id/2132703/.

[69] More states, approximately a dozen, use such commissions as the primary mechanism for state legislative districting. Still, these commissions remain the very distinct minority at all levels. *See, e.g.*, Ryan P. Bates, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 347 n.84 (2005); National Conference of State Legislatures, Redistricting Commissions, http://www.ncsl.org/programs/legman/redistrict/com&alter.htm (last visited Oct. 14, 2006).

[70] Jamie Carson and Michael H. Crespin, Comparing the Effects of Legislative, Commission, and Judicial Redistricting Plans on U.S. House Elections, 1972-2002 (2004), *available at* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/PaperRedistrictingPoliticalCompetition.pdf.

[71] *See* Ian Brett Yohai, *Changing the Lines: Race and Redistricting In New Jersey*, 14 J. POL. & SOC. 51, 57–58 (2003) (noting that the New Jersey bipartisan redistricting com-

ing commissions that genuinely implement and adhere to specific criteria when drawing districts.[72]

Iowa presents a unique example, assigning a state agency the task of drawing district maps. The Iowa Legislative Services Agency (LSA) is a permanent, independent agency that presents redistricting plans for legislative approval. The agency is intended to be nonpartisan, and many credit the LSA with keeping congressional races in Iowa competitive.[73] The rationale behind the agency recalls Bruce Ackerman's argument in favor of a "democracy branch," a fourth branch of government that would assist in maintaining a true separation of powers by resisting the "predictable efforts by reigning politicians to entrench themselves against popular reversals at the polls."[74] While the LSA aims to insulate map-drawers from political pressure, concerns remain that the agency will be too responsive or deferential to incumbent office-holders and, therefore, less than maximally effective in promoting electoral competition.[75]

Ultimately, the question of whether the Iowa LSA is a good model for nonpartisan districting is a second-order question: the overarching issue presented here is whether the results of the 2006 elections should lead progressives to reconsider their support for redistricting reform. The need for reform—which was obvious when progressives were in the minority in Congress and most state capitols—may seem less compelling now that Democrats hold a majority of congressional districts, a majority of state legislative chambers, and a majority of the governorships. In addition, many prominent Democratic leaders have previously opposed redistricting reform for reasons related to local politics or incumbency-protection.[76] In general, history shows that the party in power rarely is interested in reforming underlying electoral mechanisms under which they have achieved success.

Despite these clear obstacles to a progressive embrace of reform, there are ample reasons for the new Democratic leadership in Congress and the

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mission was dominated by partisan bickering and that the tie-breaking vote resulted in a Democratic-dominated map).

[72] Of course, districts created by nonpartisan commissions will not be exempt from court challenge or dispute. *See, e.g.*, Old Person v. Cooney, 230 F.3d 1113 (9th Cir. 2000); Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 366 F. Supp. 2d 887 (D. Ariz. 2005); Rybicki v. State Bd. of Elections, 574 F. Supp. 1147 (N.D. Ill. 1983). But the number of court challenges to redistricting maps is not the best metric for measuring whether a reform regime is working; rather, it is the competitiveness of commission-generated legislative districts that shows them to be a better alternative. *See* Issacharoff, *supra* note 24, at 612.

[73] *See* Bates, *supra* note 69, at 351.

[74] Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 718 (2000).

[75] *See* Note, *Trends in State Self-Regulation of the Redistricting Process*, 119 HARV. L. REV. 1165, 1170 (2006) (noting that Iowa reelection rates remain extremely high notwithstanding the success of the LSA).

[76] Posting of Paul Feist to SFGate: Politics Blog, http://www.sfgate.com/cgi-bin/blogs/sfgate/indexn?blogid=14 (Oct. 6, 2005, 15:23 PST); Posting of Kos to Daily Kos, http://www.dailykos.com (Oct. 15, 2005, 20:55 PST).

state houses to embrace redistricting reform as a long-run strategy. First, congressional Democrats have made "reform" a major element of their political platform and have pledged quick and bold action on matters of political reform.[77] While this agenda has been largely focused on ethical and lobbying reform, redistricting reform could be easily included in this approach. Second, incoming Democratic leaders (on both the national and the state level) have repeatedly promised a less-partisan and less-political approach to governing.[78] Nothing would signal this change more decisively than embracing reform of one of the most heated and crassly political aspects of our current system: partisan gerrymandering. Third, from a purely practical perspective, the evidence continues to suggest that Republicans retain a partisan advantage under the current districting regime. There is ample reason to believe that a more neutral set of district lines would have yielded more victories for the Democrats in the 2006 elections, not fewer. Finally, as argued here, there are reasons why progressives benefit in the long run from districting plans based on more traditional districting concepts.

All of these points suggest that the new Democratic leadership in Congress and the state houses would be wise to embrace redistricting reform. One approach would be to adopt a "fix it and forget it"[79] mantra: propose a comprehensive nationwide fix of districts to right the current wrongs, with all future districting to be done by independent commissions governed by traditional districting principles, with rigorous protections for representation of racial and ethnic minorities.[80] A starting point for a "fix it and forget it" effort could be legislation proposed by Representative John Tanner (D-Tenn.), entitled the "Fairness and Independence in Redistricting Act," that would create a national process for redistricting.[81] Representative Tanner's bill calls for decennial redistricting maps to be drawn by independent commissions after the release of federal census data. The commissions would feature tie-breaker membership and appointments by state legislators of both parties with the swing vote selected by the commission members. Prospective commission members would swear not to run for office during the lifetime of the reapportioned map, and individu-

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[77] Jeffrey Birnbaum, *Lobbyists Won't Like What Pelosi Has in Mind*, WASH. POST, Oct. 30, 2006, at D1.

[78] *See, e.g.*, Silla Brush, *We Won! Now What the Heck Do We Do?*, U.S. NEWS, Nov. 12, 2006, at 50.

[79] Credit—or blame—for this phrase goes to the "slow cooking" approach to meal preparation. *See, e.g.*, PHYLLIS GOOD, FIX IT AND FORGET IT (1984).

[80] Obviously, it would be a tragic miscarriage of reform if it was used—intentionally or inadvertently—to reverse the historic gains in minority representation in Congress that have been achieved since the early 1990s. There is no reason why this should be the case and any reform efforts should be extremely mindful of the need to preserve majority-minority districts and other districting devices to insure minority representation.

[81] Fairness and Independence in Redistricting Act, H.R. 2462, 109th Cong. (2005).

als having sought public office within four years of the establishment of the commission would also be barred from service.

To date, reform efforts at the federal level have been unavailing, and any progress thus far has come at the state level. That said, prospects for further reform efforts in the states are mixed, and the alignments are complex—as illustrated by the defeat of redistricting reform proposals in California and Ohio within the past two years. [82] The problem with state-by-state reform is that, in any one state, the partisan consequences of a shift in districting power are immediate and not directly offset by gains by that party elsewhere. And while reform would be, on the whole, beneficial to progressives, at the same time, they cannot—and should not—adopt a posture of "unilateral districting disarmament" in the face of fiercely partisan districting by conservatives and Republicans. Progressives should have a special dedication to redistricting reform, but not a self-sacrificing one. Comprehensive national reform would significantly mitigate this concern.

In addition to state- and situation-specific objections, progressive doubts about districting commissions also stem from longstanding anxiety over the transfer of authority from a popularly elected body to an expert one.[83] There are also fears that minority voters will not fare as well in such bodies as they have in the legislative process since the 1990s.[84] While these concerns are important, well-designed commissions with appropriate criteria can go a long way towards meeting them.

From a progressive perspective, arguments could be made—and rebuffed—for any particular formulation of non-legislative redistricting authority. Whether bipartisan or expert, standing body or ad-hoc, drawn from political ranks or drawn from judicial backgrounds, there will always be elements to object to and "worst-case scenarios" to be painted. Regardless, true reform is more likely to come from bodies that consist of neutral experts, guided by neutral districting principles, and governed by consensus or super-majority rules. As noted above, commissions that allow rabid partisans to prevail by a one-vote margin simply move the desire

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[82] In 2005, a redistricting reform proposal in California—Proposition 77—was defeated largely because of strong opposition from Democrats in the California Congressional delegation (and general statewide antagonism toward its patron, Republican Governor Arnold Schwarzenegger). *See* John Wildermuth, *Voters Reject Attempt to Take Boundary-Drawing from the Hands of State Legislators*, S.F. CHRON., Nov. 9, 2005, at A14. A similar proposal in Ohio was defeated; while this proposal (unlike the one in California) had the support of local progressives, the position and involvement of national Democratic leaders was less clear. *See* Chris Cillizza, *Ohio: Ballot Measures a Test of Voter Anger*, http://www.washingtonpost.com, Nov. 7, 2005 ("National Democrats have not been financially active in support of the Ohio redistricting measure . . . .").

[83] Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 678 (2002).

[84] Rhonda Barnes, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret,* 35 ARIZ. ST. L.J. 575, 579 (2003).

for partisan gerrymandering from the legislature to a non-legislative body.[85] Concepts such as compactness, contiguity, and commonality of interests—so long as they can be applied consistently with the protection of minority voting power and rights—should be given force by a neutral district-drawer. As an added check, the process should include some sort of judicial review to ensure the commission's compliance with its own criteria, as well as other state and federal laws, particularly the Voting Rights Act.

V.

In sum, the current system for legislative line-drawing has failed those who should be the ultimate beneficiaries of any mechanism related to elections: the voters. From a progressive perspective, extremely partisan gerrymandering has served to create districts that hinder the citizen cohesion, connectedness, and organizing that advance progressive causes. The current system of highly atomized districts, reflecting random boundaries, which frequently change in composition and delineation, creates voter cynicism and disenchantment that erodes support for an activist government.

The 2006 election results do not change this analysis. Progressive candidates triumphed, but those victories almost certainly would have been greater had districting been more equitable. And in the long run, it is redistricting reform, not maximizing gains on current maps, that holds the greatest promise for the progressive cause. This can be achieved either by reinvigorating judicial oversight through newly invigorated doctrines such as a First Amendment prohibition on political gerrymandering, or by supporting non-partisan districting commissions as an alternative to contemporary legislative gamesmanship.

The decade is more than half over; reform is far less than half-achieved. With the clock ticking away toward the next redistricting cycle, progressives need to think creatively and begin to find effective means to draw districts that protect voters and advance democratic goals. Progressives should use the new power they have attained in the 2006 elections to seek comprehensive and permanent reform of the current failed system.

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[85] *See supra* note 63 and accompanying text.