

POLITICAL GERRYMANDERING  
AND  
ELECTORAL ACCOUNTABILITY

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**Abstract.** *Standard theories borrowed from political science and economics shed new light on the perceived harms of political gerrymandering and cast doubt on whether self-interested district line-drawing can systematically distort the will of the voters. A detailed theory of voting and representation indicates that elections provide a robust system of accountability. Moreover, the internal logic of this system appears to be immune to political gerrymandering. A brief, initial foray into data on elections and representation from the 91st to the 109th Congresses provides tentative support for this hypothesis, although the analysis is admittedly inconclusive. The results are tantalizing enough, however, to motivate further and more sophisticated efforts to test the theory.*

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## POLITICAL GERRYMANDERING AND ELECTORAL ACCOUNTABILITY

(May 22, 2007)

*Michael W. Khoo*

### I. INTRODUCTION

In May 2003 more than fifty Texas Democrats decamped from the state capitol in Austin and boarded several chartered buses bound for a Holiday Inn in Ardmore, Okla. Their purpose was to deny Republicans in the state House of Representatives a quorum and, consequently, an opportunity to redraw district boundaries for the state's thirty-two congressional seats. The hiatus lasted only four days, but it was merely the opening act in a five-month battle that would ultimately include a state and federal manhunt for the missing legislators,<sup>1</sup> a six-week flight by eleven Democratic state senators to Albuquerque, N.M., hundreds of thousands of dollars in fines levied against the missing

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1. The search included Texas state troopers combing a Galveston hospital's neonatal unit, where a Democratic representative's newborn twins were receiving care. *See Texas Search for Democrats Is Ruled Illegal*, N.Y. TIMES, July 12, 2003, at A7. Texas officials requested and received assistance from the federal Department of Homeland Security and the Federal Aviation Administration in tracing the plane of one of the missing Democrats, a tactic that in turn spurred investigations into the potential misuse of federal resources. *See Karen Masterson, FAA Workers Knew Laney's Plane Would Point to Dems*, HOUSTON CHRON., July 12, 2003, at A3. Then-U.S. House Majority Leader Tom DeLay played a conspicuously brazen role in the episode, quipping at one point, "I'm the majority leader, and we want more seats [in the U.S. House of Representatives]." David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1.

lawmakers,<sup>2</sup> three special legislative sessions in as many months, a web of litigation, a Supreme Court decision,<sup>3</sup> and a new map that reversed the state's partisan polarity from a 17-to-15 Democratic edge to a 21-to-11 Republican advantage.<sup>4</sup>

Texas has not been the only state recently gripped by redistricting fever. In Colorado, Republicans attempted to boost their electoral fortunes by replacing a court-drawn map with one meant to favor GOP candidates. The state supreme court, however, tossed out the new plan for violating a state constitutional prohibition on mid-decade redistricting.<sup>5</sup> And Democrats in Pennsylvania challenged a post-2000 redistricting effort which they claimed was intended “to maximize the number of Republicans elected to Congress throughout the decade, while eliminating as many Democrats as possible” and which they argued “sacrificed every redistricting principle traditionally applied . . . , slicing through municipalities, counties, and communities and creating bizarrely shaped districts that are commonly referred to by their resemblance to animals (the ‘supine seahorse,’ the ‘upside-down Chinese dragon,’ etc.).”<sup>6</sup>

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2. The absent senators faced fines of \$57,000 apiece as a result of their flight to New Mexico. The fines were ultimately suspended after the lawmakers were placed on “probation” by Texas Lt. Gov. David Dewhurst. See R.A. Dyer, *Senate Passes Remap, Ends Legislative Battle*, FORT WORTH STAR-TELEGRAM, Oct. 13, 2003, at 1A.
  3. *League of United Latin Am. Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006). In *LULAC*, the Court struck down one of the new congressional districts for violating section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000). The Court, however, rejected a broader argument that the entire redistricting was an unconstitutional partisan gerrymander. *LULAC*, 126 S. Ct. at 2612 (plurality opinion).
  4. In the 2006 mid-term elections, Republicans lost two Texas congressional seats, cutting their margin down to 19-to-13.
  5. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), *cert. denied*, 541 U.S. 1093 (2004). A mid-decade redistricting is an attempt to draw new district boundaries without there having been an intervening national census. In *LULAC*, a plurality of the Court held that there is no federal constitutional bar to mid-decade redistricting. 126 S. Ct. at 2612.
  6. Brief for Appellants at 2, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580). The *Vieth* Court produced a badly fractured set of opinions which ultimately upheld the challenged map. Justice

Such *partisan* squabbles are only the tip of the proverbial iceberg when it comes to the time-honored art of the gerrymander. There is, in addition, the *bipartisan* or “sweetheart” gerrymander, intended to divide a state’s electorate into safe seats according to each major party’s proportional strength. Thus, Californians, long-time practitioners of sharp partisan politics, called a truce in 2000 and produced what may be “the most perfect bipartisan gerrymander in the nation.”<sup>7</sup> The state’s fifty-three congressional seats represent twelve percent of the country’s total. In 2002 only one of them—the seat previously held by scandal-tainted Rep. Gary Condit—was arguably competitive.<sup>8</sup> In 2004, the only seat to offer even a hint of drama was an open one in the Central Valley.<sup>9</sup> And in 2006, “not one of [the state’s] 53 congressional contests [was] competitive enough to make the target lists of nonpartisan handicappers or either political party.”<sup>10</sup> The California gerrymander was, perhaps, particularly unseemly for its flagrancy in constructing safe seats. In an oft-quoted remark, Democratic Rep. Loretta Sanchez noted that thirty of her thirty-two fellow Democratic Representatives had each paid \$20,000 to redistricting guru Michael Berman for his help in crafting an “incumbent protection plan”: “‘Twenty thousand is nothing to keep your seat,’ Sanchez said. ‘I spend \$2

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Scalia, writing for a four-member plurality, would have held claims of partisan gerrymandering to be nonjusticiable, thereby overturning *Davis v. Bandemer*, 478 U.S. 109 (1986) (holding that partisan gerrymandering claims *were* justiciable as violations of the Equal Protection Clause). A string of dissents in *Vieth* revealed that five Justices were at least willing to entertain claims of partisan gerrymandering but were evidently unable to agree on a standard against which to weigh such claims.

7. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 60 n.141 (2004).
8. MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 2006, at 156.
9. *Id.*
10. Jackie Calmes, *Politics & Economics: California’s Slim Congressional Pickings; Redistricting Narrows Opportunities for Both Parties To Pick Up Seats on Election Day*, WALL ST. J., Sept. 20, 2006, at A6.

million . . . every election. If my colleagues are smart, they'll pay \$20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them.”<sup>11</sup> The whole of it is enough to induce a fair amount of hand-wringing, and it has.<sup>12</sup>

But for all the theatrics, high drama, and furrowed brows, I want to suggest that there may be more heat than light in this debate. Self-serving politicians never cut sympathetic figures. Yet, it is another thing altogether to suppose that their machinations have fatally undermined the foundations of democratic representation. Most commentators have remarked on the unsavory nature of political redistricting and, from that starting point, have deduced a long list of potential ills. I take a different point of departure: the internal logic of elections as a system of accountability. In the end—no matter how voters are sliced, diced, cracked, packed, shuffled, and reshuffled—successful candidates must still attract the votes of a majority of their constituents.<sup>13</sup> That, I argue, is a powerful and, ultimately, infeasible check on wayward lawmakers. Political gerrymandering, far from ignoring the will of the voter, can work only if it explicitly identifies, registers, and builds upon that will.

Working from that premise, I define the will of the voter in *ideological* rather than *partisan* terms. While party outcomes are culturally salient, easily observed, and conveniently tallied, they are at best a proxy for the real accountability measure: political

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11. Hanh Kim Quach & Dena Bunis, *All Bow to Redistrict Architect: Politics' Secretive, Single-Minded Michael Berman Holds All the Crucial Cards*, ORANGE COUNTY REG., Aug. 26, 2001, at A1.

12. See, e.g., Earl Blumenauer & Jim Leach, Op-Ed., *Redistricting, a Bipartisan Sport*, N.Y. TIMES, July 8, 2003, at A23 (recounting political manipulations of the redistricting process from across the nation and calling for independent redistricting commissions to relieve self-dealing legislators of the duty to redraw legislative boundaries).

13. Assuming, that is, a two-party contest. For reasons discussed below, however, American elections are almost always—as a practical matter—two-party affairs. See *infra* pp. 27-30.



preferences as defined over a policy space of possible legislative outcomes. Taking the long view, successful American political parties are essentially channels through which ideological preferences are sorted, collated, summed, and expressed. They are temporary homes for this coalition of interests or that alliance of strange bedfellows. Empirically, the Democratic and Republican parties have been quite heterogeneous. What is important for accountability purposes is not the D or the R following a legislator's name, but whether the legislator's policy preferences reflect his or her district's.

Thus, intuitively, we can imagine that an attempt by, say, Massachusetts Republicans to enhance their numbers through artificial boundary drawing may succeed, but only by electing relatively moderate-to-liberal Republicans. Conversely, a Georgia gerrymander meant to benefit Democrats is likely to produce rightward-leaning Democrats. In the case of bipartisan gerrymanders, we might expect a similar result: representatives may sit in safe districts, but only insofar as their representation continues to track the political preferences of their constituents. That is, as soon as Rep. Dennis Kucinich molts his liberal shell to reveal his inner conservative, his seat is no longer safe. A state's overall congressional delegation, whether it is Republican or Democratic, will reflect the underlying political preferences of its constituents.

This Paper is an attempt to develop the theoretical foundations for the preceding thumbnail argument and to test its empirical implications. Part II explores the standard arguments for electoral accountability and the arguments against partisan (and bipartisan) gerrymandering. Part III presents my alternative understanding of the electoral system, an understanding that imports common analyses of voter behavior and representation from political science and economics. This alternative theory yields a number of testable

hypotheses, and Part IV is an initial attempt to test my thesis with empirical data. Part V concludes the discussion and proposes potential avenues for further inquiry.

## II. PARTISAN SELF-SERVING AND SWEETHEART DEALS: THE CASE AGAINST GERRYMANDERING

In Part I above, I distinguished between *partisan* and *bipartisan* gerrymanders. Although both tactics draw on overtly political considerations, they differ somewhat in their motives, consequences, and alleged harms. I therefore examine them separately in this Part.<sup>14</sup>

### A. *Partisan Gerrymandering*

#### 1. Defining the Problem

The partisan gerrymander is the classic form of the practice and has pride of place in *Black's Law Dictionary's* definition of "gerrymandering": "The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."<sup>15</sup> The logic behind a partisan gerrymander is devilishly simple.

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14. Gerrymandering, of course, need not be predicated on strictly political grounds. In fact, the Supreme Court's first invalidation of jurisdictional line-drawing struck down Alabama's attempt to excise virtually all of the black inhabitants of Tuskegee from the city's limits. The new map had converted the city's boundary line "from a square to an uncouth twenty-eight-sided figure." *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960). There are obvious parallels between racial and political gerrymanders. Indeed, sometimes they are difficult to distinguish. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (noting that race and voting behavior are often correlated). But there are enough significant differences—the immutability of race compared to the fluidity of political identity; the long, difficult history of U.S. race relations; constitutional amendments and statutory protections specifically directed at race and voting; etc.—to preclude treating them together in my analysis. And so a caveat: the arguments presented in this Paper should not be taken as arguments for or against racial considerations in legislative districting.

15. BLACK'S LAW DICTIONARY 708 (8th ed. 2004).

Imagine, first, a world with only two parties, *A* and *B*, and in which there is perfect party loyalty and no cross-over voting (such that Party *A*'s voters always vote for Party *A*'s candidates and similarly for Party *B*). If we take the perspective of a hypothetical party boss concerned only about electing candidates from Party *A*,<sup>16</sup> then it is a pure waste to situate any of Party *A*'s voters in a district in which they would form a minority. Since Party *B* will inevitably win these districts, Party *A*'s voters are essentially casting ballots in vain. Moreover, it is also wasteful for Party *A* to assemble in a given district any more of its voters than are necessary to reach a bare majority. Once Party *A* has tipped the district to its candidate, adding additional Party *A* voters to that district will accomplish nothing. Note that the logic of this argument requires a focus on a binary variable: whether Party *A* or Party *B* will win a given district.

A shrewd and politically cunning mapmaker will therefore attempt to distribute his or her partisans as efficiently as possible, drawing boundary lines so that Party *A*'s voters constitute a bare majority in as many districts as possible. Conversely, he or she will want to distribute Party *B*'s voters as inefficiently as possible. To do so, the mapmaker will “crack” Party *B*'s strongholds and submerge the resulting fragments in districts in which they will fall just short of constituting a majority. If Party *B* has too many voters to completely dissipate through cracking, the mapmaker will be forced to concede a handful of districts to the opposition, but in doing so will “pack” as many of them as possible with inefficient supermajorities supporting Party *B*.

A simple numerical example makes the intuition clear. Imagine a hypothetical jurisdiction of 1000 voters who are divided among ten equipopulous districts of 100

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16. A perspective which, I will argue below, is not only possible but probable. See *infra* note 50 and accompanying text.

voters each. Suppose further that 400 voters invariably support Party *A* and the remaining 600 likewise support Party *B*. As a mathematical matter (and assuming the appropriate geographical dispersion of partisan identity), it is no problem to create seven districts in each of which 51 voters support Party *A*. As a consequence of our assuming pure partisan loyalty (and assuming one hundred percent turnout), we can confidently predict that Party *A* will win seven seats by one vote each. Thus, Party *A* will have seventy percent of the legislative seats despite having only forty percent of the aggregate popular vote.

The prospect of an electoral minority exercising a legislative majority reflects the extreme form of the partisan gerrymander. Lesser chicanery might include a majority merely enhancing its already dominant position or a minority padding its number of seats yet remaining on the outs. The story, particularly the extreme version, has a clear anti-majoritarian flavor that seems to offend some basic sense of fairness.

## 2. Supreme Court Treatment

The Court's jurisprudence in this area is, at the moment, almost hopelessly fractured. Twenty years ago, in *Davis v. Bandemer*,<sup>17</sup> the Court entered the particular "political thicket"<sup>18</sup> of partisan gerrymandering when it held for the first time that such claims are justiciable. The Court further elaborated a notoriously difficult standard to apply in assessing such claims.

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17. 478 U.S. 109 (1986).

18. The phrase—Justice Frankfurter's—is from *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (holding that apportionment controversies were nonjusticiable), *abrogated by* *Baker v. Carr*, 369 U.S. 186 (1962).

[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole. . . .

. . . [S]uch a finding of unconstitutionality must be supported by 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.<sup>19</sup>

The reasoning of *Bandemer*, bottomed on the Equal Protection Clause,<sup>20</sup> is unmistakably rights-oriented. Yet gerrymanders do not interfere with the formal right to register to vote, to appear at the polls, or to have one's vote counted. Rather, they interfere with the structure of the electoral machinery writ large, thereby constraining (so it is alleged) the outcome. But it is difficult to articulate exactly what right an individual (or even a group, such as a political party) has to a particular *outcome*.<sup>21</sup> Indeed, once individuals and groups assert constitutionally-protected rights to realize their preferred electoral outcomes, the debate will have shifted to true terra incognita. These difficulties may help explain why, in the intervening decades, only one case has conclusively found an unconstitutional partisan gerrymander.<sup>22</sup>

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19. *Bandemer*, 478 U.S. at 132-33. Having found the plaintiffs' claims justiciable, the Court nevertheless decided that the challenged redistricting plan did not violate the announced standard. *Id.* at 134-37.

20. U.S. CONST. amend. XIV, § 1, cl. 4.

21. The Court often speaks in the language of "vote dilution," suggesting an individual right to an "undiluted" vote. This, of course, only raises the difficult, perhaps insoluble, problem of what an undiluted vote is. See Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563 (1989); cf. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) (concluding that vote dilution can be understood as a species of individual harm, but recognizing the difficulty of reconciling her argument with conventional individual rights doctrines).

22. *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992). In *Republican Party*, the Fourth Circuit determined that the statewide election of local judges systematically denied Republicans a fair shot at winning judicial elections in a state dominated by Democrats. Somewhat embarrassingly, while the case was pending on remand, "the Republicans not only overcame their . . . degraded state, but also swept state elections in 1994, including the judicial elections." Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 604 (2002).

In any event, the Court's more recent jurisprudence casts the vitality of *Bandemer* in doubt. In 2004, a plurality of Justices voted to overrule *Bandemer* in *Vieth v. Jubelirer*<sup>23</sup> and to hold partisan gerrymandering claims nonjusticiable for lack of a manageable standard with which to police them. While a majority of Justices wanted to preserve such cases for adjudication, they could not agree on what standard ought to control them. Justice Kennedy, in a concurring opinion, agreed with the plurality that, as yet, no one had advanced a workable standard. Still, he refused to shut the door that *Bandemer* had opened, lest a standard might one day appear on the horizon.<sup>24</sup>

The dissents are notable, however, for appearing to recognize that insofar as gerrymandering causes damage, it is damage to the democratic *structure* more so than to a particular individual's right to participate at the polls or to influence political outcomes. Thus, Justice Stevens argued that it is a basic democratic norm that elected officials should be responsive to their constituents. "Gerrymanders subvert that representative norm because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles."<sup>25</sup> Similarly, Justice Breyer worried that unrestrained partisan gerrymanders could indefinitely entrench a minority in power:

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23. 541 U.S. 267 (2004) (plurality opinion). This is the decision that ultimately upheld the previously discussed Pennsylvania redistricting. *See supra* p. 2 and note 6.

24. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."). Justice Kennedy, in particular, hypothesized that partisan gerrymandering claims might be litigated as First Amendment cases: "[T]hat means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Id.* at 314. While the argument is intriguing, it still suffers from the same problems discussed in the text—defining "representational rights" in a way that does not vest each voter with a right to his or her preferred outcome. *See also* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626 (2004) (critiquing Justice Kennedy's First Amendment analysis).

25. *Vieth*, 541 U.S. at 330 (Stevens, J., dissenting).

“Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and these democratic values are dishonored.”<sup>26</sup>

Last summer, the Court handed down its most recent pronouncements on partisan gerrymandering in *League of United Latin American Citizens (LULAC) v. Perry*.<sup>27</sup> Justice Kennedy, writing for a shifting majority, declined to revisit *Bandemer*’s central holding that partisan gerrymanders are justiciable<sup>28</sup> but proceeded nonetheless to reject the petitioners’ proposed standard for evaluating such claims.<sup>29</sup> *LULAC* essentially leaves the Court and the law stuck where they have both been since *Bandemer*: without an accepted standard to govern gerrymandering claims, which nevertheless hover on the margins of justiciability.

### 3. Partisan Gerrymandering and Accountability

The Court’s struggle for coherence almost certainly reflects a certain tension between its reliance on a rights-based treatment of gerrymandering and the intuition that the actual harm—such as it might be—is an *institutional* or *structural* one that corrodes the electoral *raison d’être*: the accountability of elected officials to the electorate. Professor Issacharoff identifies this dissonance when he writes “[t]he gerrymandering cases have little to say about the positive role that elections and the electoral process play

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26. *Id.* at 361 (Breyer, J., dissenting).

27. 126 S. Ct. 2594 (2006). *LULAC* was the Court’s response to the Texas redistricting circus that introduced this Paper. *See supra* pp. 1-2 and note 3.

28. *LULAC*, 126 S. Ct. at 2607. Justice Kennedy was joined in this particular paragraph by Justices Stevens, Souter, Ginsburg, and Breyer.

29. *Id.* at 2607-12 (opinion of Kennedy, J.).

in a *system of democratic governance*. These cases are instead limited to identifying circumstances in which individuals or, on occasion, groups can raise rather confined rights-based claims.”<sup>30</sup>

The previous hypothetical contest between Party A and Party B has already identified the (perceived) institutional threat posed by partisan gerrymandering: its ability to inflate a party’s representation in the legislature and, in the extreme, award a majority of seats to an electoral minority. As noted above, the dissenters in *Vieth* appeared also to be groping towards this conclusion. Among legal academics, it is a well-rehearsed complaint that partisan gerrymandering “is indefensibly antimajoritarian.”<sup>31</sup> “A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government.”<sup>32</sup> Even commentators who argue against judicial superintendence of partisan gerrymandering nonetheless pinch their noses as they make their cases.<sup>33</sup>

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30. Issacharoff, *supra* note 22, at 613 (emphasis added).

31. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 516 (1997).

32. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 106 (2000). Professor McConnell identifies a variant of the tension discussed above, namely that a rights-based approach to redistricting cases seems somehow inadequate. He argues that the Court took a wrong turn in focusing on the Equal Protection Clause as the constitutional touchstone for these cases. McConnell would focus explicitly on the structural harms by invoking the Republican Form of Government Clause, U.S. CONST. art. IV, § 4. “The gravamen of a Republican Form of Government challenge is not that individual voters are treated unequally, but that the districting scheme *systematically* prevents effective majority rule.” McConnell, *supra*, at 114 (emphasis added). For additional charges of anti-majoritarianism and non-responsiveness, see Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 112 (1985); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1646-47 (1993).

33. See, e.g., Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1330 (1987) (“I do not wish to defend partisan



In sum, the principle indictments of partisan gerrymandering are its anti-majoritarianism; the apparent danger that it will decouple government policy from the preferences of the electorate; and the threat it therefore poses to the accountability of elected officials. These are serious concerns, and I hope not to minimize them. However, I will argue below that the risks are overstated and potentially non-existent. But before presenting my alternative understanding, it is worth pausing to consider the partisan gerrymander's "sweetheart" cousin.

### *B. Bipartisan Gerrymandering*

The bipartisan gerrymander is a straightforward affair in which the dominant parties call a political cease-fire long enough to shore up their current allotment of seats and to ensure a distribution that roughly mirrors their proportional strengths in the electorate as a whole. Thus, the bipartisan gerrymander is sometimes referred to as a "sweetheart" or "incumbent-protecting" gerrymander. It operates by packing districts insofar as possible with like-minded partisans, thereby ensuring comfortable majorities for Parties *A* and *B* in their respective bailiwicks.

In contrast to the partisan gerrymander, the jurisprudence regarding the bipartisan variety is relatively uncomplicated. The Supreme Court, in *Gaffney v. Cummings*,<sup>34</sup> addressed head-on the proportional division of Connecticut's General Assembly between Republicans and Democrats and, in the end, gave its blessing. "[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties

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gerrymandering. That practice, motivated as it is by narrow, self-interested ends, offends the ideal of a public-regarding politics toward which our polity should strive.").

34. 412 U.S. 735 (1973).

in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.”<sup>35</sup> More than thirty years later, *Gaffney* remains good law.<sup>36</sup>

While the Court has had no opportunity to reconsider its *Gaffney* holding, the same has not been true for legal scholars. Because bipartisan gerrymanders are, by definition, roughly proportional, it is difficult to attack them with the same anti-majoritarian ammunition directed at partisan line-drawing. Nevertheless, critics fault such backroom deal-making for, in the end, producing a similar accountability deficit. Professor Issacharoff has offered one of the more detailed critiques:

[T]he richer concept of republicanism must turn not simply on majoritarian triumph, but on the idea of selecting elected representatives through robust competition before the electorate. The essence of republicanism then becomes not the lack of direct participation in government by the *demos* but, critically, the fact that the elected representatives were forced to compete in the arena of public accountability. The fact that the public has selected its representatives in turn allows us to impute some legitimacy to the representation . . . .<sup>37</sup>

According to this argument, safe seats leech from elections the rigors of competition. Consequently, lawmakers take their constituents’ support for granted and become correspondingly less attuned and less responsive. In this model, political competition between well-matched candidates is not simply a byproduct of elections, but a critical element in the calculus of legitimacy. Bipartisan gerrymanders, by shielding certain candidates from the electoral crucible, undermine “the accountability of the elected to the

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35. *Id.* at 754.

36. If anything, the Court may have strengthened the legitimacy of bipartisan gerrymanders when it recognized as a legitimate state interest the desire to shield incumbents from running against each other. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). In fact, the Court in *Karcher* opines that protecting incumbents is sufficiently important to justify deviations from the otherwise iron-clad “one-person, one-vote” rule laid down with respect to congressional districting in *Wesberry v. Sanders*, 376 U.S. 1 (1964).

37. Issacharoff, *supra* note 22, at 614.

electors, an accountability that is in turn shaped through competitive elections. Allowing partisan actors to control redistricting so as to *diminish* competition runs solidly counter to the core concern of democratic accountability.”<sup>38</sup>

Moreover, the argument continues, dividing a jurisdiction into safe seats necessarily requires grouping together like-minded voters. The result is a polarized electorate, polarized parties, and a polarized legislature. “Left behind in the ‘sweetheart gerrymander’ are the droves of median voters increasingly estranged from the polarized parties. Left behind as well are the incentives to provide representation to the community as a whole.”<sup>39</sup> This is, of course, another critique based on electoral accountability: if Republicans are corralled into Republican districts and Democrats into Democratic ones, then the two camps will face each other across an expanding divide, into which moderates will tumble and from which they will never return. As with partisan gerrymandering, if these arguments are correct, they present potentially serious problems for basic notions of fairness, transparency, and, most of all, *accountability*.

### III. IDEOLOGY AND THE MEDIAN VOTER: AN ALTERNATIVE TALE OF ACCOUNTABILITY

All parties to the debate, myself included, regardless of whether they find harm in political gerrymandering, tend to agree on one key point: elections are a principle mechanism for ensuring accountability. Often, this is immediately followed by the rather conclusory assertion—as if, without more, it should be obvious—that politically-inspired districting disrupts the normal channels of accountability. There is a certain intuitive

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38. *Id.* at 623.

39. *Id.* at 628.

appeal to this. The gerrymandering process is admittedly self-serving, and it is therefore easy to infer that its practitioners must be up to no good. But I argue that the truth of the matter is a good deal more complicated. To begin, self-interest is not irreconcilable with increased social welfare. This has been a bedrock supposition of economics at least since Adam Smith:

[M]an has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and show them that it is for their own advantage to do for him what he requires of them. . . . It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.<sup>40</sup>

If we accept this proposition in the market for goods and services, it at least bears asking whether a similar self-interest is *necessarily* corrosive in the political sphere. To answer this question, however, requires a better understanding of what we mean by *accountability* and, more to the point, *who* is accountable to *whom*, *how*, and for *what*?<sup>41</sup>

#### A. Electoral Accountability

For our purposes, the *who* and the *whom* are relatively straightforward—elected representatives should be accountable to their constituencies.<sup>42</sup> This is a common theme in the political science literature: “The citizens’ ability to throw the rascals out seems fundamental to modern representative democracy because it is the ultimate guarantee of a connection between citizens and policymakers. . . . Such accountability is a keystone of

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40. 1 ADAM SMITH, *THE WEALTH OF NATIONS* 18 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1776).

41. For more on the meaning of “accountability,” its different components, and its various manifestations, see Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 115 (Michael W. Dowdle ed., 2006).

majoritarian democratic theory.”<sup>43</sup> Elections provide to voters an opportunity to sanction governments—or even individual legislators or executives—when they shirk their duties to the voters.

Of course, in some cases (such as that of a second-term President or a state legislator facing a term limit), the threat of sanction is unavailable. In these instances, political scientists may invoke the “mandate” function of elections, according to which voters signal to candidates their collective policy preferences and thereby instruct the subsequently elected officials on how to conduct the affairs of government.<sup>44</sup> Clearly, accountability and mandate can play off of each other, and the two are not always

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42. Actually, the question of *whom*—i.e., defining an official’s constituency—can be frightfully complicated. Should a representative be accountable only to the residents of his or her district? Only to those who are citizens? Those who can vote? Those who *do* vote? In fact, the intricacies of this question are likely to intersect with the decision to choose representatives by district in the first place. However, in the context of *redistricting*, we may take it for granted that elections are district-based. The question for us is, given a district-based constituency, will drawing boundary lines in pursuit of political advantage implicate accountability? For the purpose of this latter question, I take the naïve view that “constituency” itself is unproblematic and means roughly the same thing as “the voters.”

43. G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 47 (2000).

44. The distinction between “mandate” and “accountability” is discussed in Bernard Manin, Adam Przeworski & Susan C. Stokes, *Elections and Representation*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 1, 16 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999). There is a third understanding—representation as “authorization”—whereby representatives, once authorized as such, are free to exercise that authority as they see fit. This is the theoretical underpinning for Thomas Hobbes’s defense of absolute sovereignty. See HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 53 (1967). In fact, the American Framers’ understanding of representation contains shades of this last conception. James Madison expected quasi-aristocratic elected officials to consciously deviate from the express wishes of their constituents when the public good required it. Thus, representation should “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary and partial considerations.” THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961). For an extended discussion of the Framers’ understanding of the connections between representation, democracy, and aristocracy, see BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT (1997). I will not dwell on representation as authorization since it essentially inverts the contemporary model of accountability by licensing representatives and binding constituents. See PITKIN, *supra*, at 55.

distinct. Indeed, a given election may both sanction an incumbent government while bestowing a mandate on its successor.<sup>45</sup>

What is important for present purposes, however, is that both mandate and accountability require some correspondence between the preferences of voters and the actions of their representatives. The distinction is temporal, with mandate imposing an *ex ante* constraint on lawmakers and accountability providing an *ex post* check. Because the remainder of my discussion will not depend on this distinction *per se*, but on the noted correspondence, both mandate and accountability are subsumed under the analysis. Thus, although I will frequently speak of “accountability,” my arguments apply with equal force to both theories of representation.

There is, however, one other formidable challenge lurking. That, of course, is Professor Arrow’s famous Impossibility Theorem, by which it is demonstrated that given our inability to judge one person’s welfare as against another’s (i.e., given that there is no common scale according to which my preference for *X* can be intelligibly compared or balanced against your preference for not-*X*), any expression of *collective* preferences is inevitably dependent on the particular mechanism used to aggregate *individual* preferences.<sup>46</sup> To put the matter more plainly, different procedures for summing individual preferences are likely to yield different, perhaps incompatible, expressions of

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45. In a representative democracy, the core accountability mechanism is the general election, at which an incumbent government presents itself to the citizens and seeks a renewal of its *mandate* to govern. Elections compel governments to explain and justify their actions and give citizens the opportunity to listen and *impose a verdict*.

RICHARD MULLIGAN, *HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES* 41 (2003) (emphases added). For more on the interplay between mandate and accountability (and on possible hybrids) see James D. Fearon, *Electoral Accountability and the Control of Politicians*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, *supra* note 44, at 55.

46. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

the collective will, with no procedure or outcome obviously better, more authoritative, more rational, or more genuine than another. There is no guarantee of a dominant, stable equilibrium unless one part of society simply dictates to another.

There is, however, a dodge around Arrow's challenge: dispense entirely with any notion of a general welfare function and re-imagine politics as a contest among individual self-interested candidates appealing to individual self-interested voters for their support. In other words, follow the logic of Adam Smith. In doing so, we confront the next question in our accountability framework: *how?*

### *B. Elections and the Median Voter*

In 1929, Harold Hotelling noted that an economic competitor will attempt to locate itself as nearly as possible to its rival in order to insert itself between that rival and the bulk of consumers.<sup>47</sup> By coming between the rival and its former market, the savvy firm isolates the competition and thereby captures a greater share of the demand. While most of Hotelling's analysis involved the physical location of competing merchants, he realized that the same dynamic could apply along any dimension of competition, including a product's quality and its available features (thus, manufacturers tend to standardize their products). Moreover, he realized that these forces might apply beyond the purely mercantile world:

In politics it is strikingly exemplified. The competition for votes between the Republican and Democratic parties does not lead to a clear drawing of issues, an adoption of two strongly contrasted positions between which the voter may choose. Instead, each party strives to make its platform as much like the other's as possible. Any radical departure would lose many votes, even though it might lead to stronger commendation of the party by some who would vote for it anyhow. . . . Real differences, if they ever

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47. Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929).

exist, fade gradually with time though the issues may be as important as ever. The Democratic party, once opposed to protective tariffs, moves gradually to a position almost, but not quite, identical to that of the Republicans. It need have no fear of fanatical free-traders, since they will still prefer it to the Republican party, and its advocacy of a continued high tariff will bring it the money and votes of some intermediate groups.<sup>48</sup>

As Professor Hotelling's anachronistic discussion of tariffs demonstrates, the two major American parties have continued to evolve ideologically and, for the most part, in tandem. While there is room for disagreement around the margins of U.S. trade policy, is there any doubt that Presidents Bill Clinton and George W. Bush are, fundamentally, free-traders?

Hotelling's insights were noted and greatly expanded upon by Anthony Downs.<sup>49</sup> In Downs's analysis, voters and candidates are rational actors pursuing their own self-interests. Politicians, in particular, "act solely in order to attain the income, prestige, and power which come from being in office. . . . They treat policies purely as means to the attainment of their private ends, which they can reach only upon being elected."<sup>50</sup> Thus, the self-interested candidate is first (if not foremost) a *vote-maximizer*. Because voters are also rational, "each citizen casts his vote for the party he believes will provide him with more benefits than any other."<sup>51</sup> The result is a dynamic of self-interested politicians competing for votes and self-interested voters awarding their support to the candidates offering the most enticing package of taxes and services. From this emerges a

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48. *Id.* at 54-55.

49. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

50. *Id.* at 28. For those put off by the more or less mercenary flavor of this assumption, it is worth noting that for my analysis the motivations of politicians need not be entirely pecuniary or self-aggrandizing. The important point is that politicians are motivated by a desire to *win office*, whether we treat that as an end in itself or simply a means along the way to higher purposes.

51. *Id.* at 36.



political market in which vote-maximizing politicians behave much like Hotelling's profit-maximizing firms: competitors converge.

As the two parties move closer together, they become more moderate and less extreme in policy in an effort to win the crucial middle-of-the-road voters, i.e., those whose views place them between the two parties. This center area becomes smaller and smaller as both parties strive to capture moderate voters; finally the two parties become nearly identical in platforms and actions.<sup>52</sup>

This is the Median Voter Theorem. The “median voter” is the voter whose position along some political dimension—say, the familiar left-to-right spectrum—lies exactly in the middle, with one half of the voters falling to his or her left and the other half falling to his or her right. In its most robust form,<sup>53</sup> the theorem predicts that a party whose position is closest to that of the median voter will win a majority of the votes cast. From here it is a simple step to predict that savvy politicians will direct their appeals to this electoral bellwether.<sup>54</sup>

Downs's analysis focuses primarily on the behavior and motivation of political parties, but it offers an important insight for my story of electoral accountability. Namely, it identifies the nature of the correspondence between constituent preferences

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52. *Id.* at 116-17.

53. Notably, Downs himself did not believe that parties and candidates will always converge on the median. In particular, he hypothesized that when the electorate is itself badly polarized such that the ideological distribution is split between two opposing extremes, parties will gravitate to those extremes. The result, predicted Downs, will be instability, oppression, perhaps revolution, and, occasionally, even a reign of terror. *Id.* at 120. By contrast, convergence on the median occurs when voter preferences are roughly normally distributed with a peak somewhere in the middle. *Id.* at 118. Luckily, despite pronouncements of a hopelessly polarized American electorate, *see, e.g.*, THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA (2004), those removed from the chattering classes (which is to say, most Americans) display remarkably few divisions. For a sobering view of the overstated ideological divide, see MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2005).

54. For those who would prefer a more rigorous statement of the theorem, complete with mathematical proofs, see JAMES E. ENELow & MELVIN J. HINICH, THE SPATIAL THEORY OF VOTING: AN INTRODUCTION §§ 2.2-2.3 at 12-13 (1984).

and political outcome. While candidates converge on the median position and may therefore seem to ignore voters in the left and right wings, the location of the median is in the first instance a function of the positions of *all* the voters in the district and is therefore dependent on those wings. While I may not be the median—while I may, in fact, vehemently disagree with the median—my presence in the district nonetheless helps determine the location of the median. If I am to the left, my mere presence pulls the median (and the candidates) that much further to the left. If I am to the right, my presence swings the needle in the other direction. We can think of the median voter, then, as the fulcrum through which every voter may exercise electoral leverage.<sup>55</sup>

To change metaphors, the median voter is the channel through which accountability flows. A critical feature of this theory is that even voters who do not entirely agree with the candidates for whom they vote—even voters who cast ballots for *losing* candidates—are nevertheless included in the accountability calculus simply because their presence affects the location of the median and, therefore, the political hue of the successful candidate. Additionally, this argument addresses the previously discussed tension between an individual, rights-based conception of voting and a structural one.<sup>56</sup> The franchise gives all voters an individual right to hold officials accountable—but that does not require a right to *dictate* the outcome. Rather, it requires

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55. Admittedly, given a district of more than a few dozen, the effective leverage of any single voter is negligible. But this is the inevitable result of each voter being only one of approximately 646,952 residents in a given congressional district. See U.S. Census Bureau, Congressional Apportionment, <http://www.census.gov/population/www/censusdata/apportionment.html> (last visited Mar. 21, 2007) (indicating the average population of U.S. congressional districts following the 2000 Census). An individual voter's vanishing influence on the median is no more a cause for complaint than is his or her practical inability to decide an election single-handedly by casting the decisive vote.

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

an equal chance to *influence* the outcome. This right is lodged within and protected by the inherent structure of voting and the Median Voter Theorem.

This argument is certainly not original to me. In fact, the majority in *Bandemer* recognized something very similar:

[T]he power to influence the political process is not limited to winning elections. An individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.<sup>57</sup>

A related but distinct argument is also made in the context of racial gerrymandering. Thus, in *Georgia v. Ashcroft*, the Court noted that “spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase ‘substantive representation’ in more districts.”<sup>58</sup> According to the Court’s analysis, black voters, while a minority in a given district, may exercise sufficient influence within that district—or may gain such influence by forming coalitions with like-minded white voters—that they ultimately wield effective political power. In the Court’s reckoning, such considerations saved a Georgia redistricting plan from retrogression claims under section 5 of the Voting Rights Act of 1965.<sup>59</sup>

The *Georgia* argument is slightly different from mine; in the former, the Court claims minority voters are able, through indirect means, to select representatives of their liking; my argument is that voters, through indirect means, are able to influence and moderate even those representatives whom they dislike and oppose. In both instances,

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57. Davis v. Bandemer, 478 U.S. 109, 132 (1986).

58. 539 U.S. 461, 481 (2003).

59. 42 U.S.C. § 1973c (West, Westlaw through July 2006 amendments).

however, influence and accountability are understood to be subtle forces that do not depend on having voted for the victor or on being in the majority.<sup>60</sup>

So far, then, I have argued that elected *officials* are accountable to *voters*. Moreover, I can now expand that statement to say that accountability runs to “*all voters*.” This theory abandons any conception of sequestered government officials reading election returns like so many tea leaves in an attempt to divine the contours of a general welfare function. Instead, it relies on a dynamic in which individual, self-interested candidates are tethered to the positions of the median voters within their constituencies. The remaining voters, no matter where they find themselves in the political continuum, each exert some pull on the location of the median. Their political preferences are thereby transmitted to the center and upwards to the elected official. This is our *how*. The final question is accountable *for what*?

### C. Ideology and Party

There is, no doubt, some voter somewhere who chooses candidates based solely on ballot order, the position of heavenly bodies, or perhaps a coin-flip. None of us, however, aspires to be that one. In fact, I have already hypothesized, in keeping with Downs’s analysis, that voters are rational and that they select candidates based on the expected benefits each promises to deliver. Thus, in identifying the relevant median voter, we measure not according to favorite color, musical tastes, or astrological sign.

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60. In fact, to argue otherwise is in effect to deny that voters who support losing candidates even have a place within the accountability apparatus. This would come as a shock, I suspect, not only to unlucky Democrats and Republicans, but also to partisans of the Green, Libertarian, Socialist-Worker, and Reform parties who may justly ask why they have been wasting their time supporting out-of-favor candidates. My theory of accountability, however, is able to accommodate these various currents of political thought and to give them roughly proportional influence within the electoral system even if they never slate a single successful candidate.

We are interested in the median as it is defined along a spectrum of political preference or governing *ideology*.

This point may seem too obvious to bear much analysis. Yet even if it might otherwise go without saying that ideology is the natural candidate for our accountability metric, it is worth dwelling briefly on its role. This is, in part, because the case law and the academic literature frequently overlook ideology as an important element of accountability and, instead, treat partisan considerations as the sole relevant guide to electoral fairness.<sup>61</sup> In fact, one might be forgiven for concluding—based on a canvass of existing analyses—that the victims of gerrymandering are not the voters whose views may be stifled, but rather the political parties which may not win their expected share of seats.<sup>62</sup> Thus come the complaints that conniving Democrats have short-changed Republicans or that vote-grubbing Republicans have returned the favor. Really, though, it must be asked: if voters' preferences are ignored in the legislature, does it matter what

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61. See, e.g., *League of United Latin Am. Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006) (considering—and rejecting—a gerrymandering claim based on the partisan intentions of the mapmakers); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (considering—and rejecting—a gerrymandering claim based on an alleged attempt to maximize Republican seats at Democrats' expense); *Davis v. Bandemer*, 478 U.S. 109 (1986) (considering—and rejecting—a gerrymandering challenge based on a map's alleged underrepresentation of statewide Democratic voting strength); *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988) (judging an alleged gerrymander according to whether California Republicans had been “shut out” of the political process); Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004) (identifying “partisan fairness” as a potential casualty in redistricting); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179 (2003) (critiquing a national Republican “distributional bias” in purely partisan terms).

62. One pair of commentators has picked up on this point. See Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 570 (2004) (“[W]hat exactly is the claimed harm in [recent gerrymandering cases]? Note that it is not that the electoral system was manipulated, or that elected representatives have been essentially immunized from accountability to the electorate. . . . Rather, the claim is that the particular manipulation of the redistricting process that produced the challenged plan did not provide an aliquot number of safe seats for members of the out-party’s delegation.”). Among other things, these claims actually *strengthen* the case for bipartisan gerrymanders by seeking a rough proportionality between the parties.

the partisan breakdown is? And the converse: if representatives remain accountable to their constituents, who cares what partisan labels they adopt?

It is perhaps no mystery why the debate focuses so intently on partisan identity. Tallying the votes for a certain party and comparing the results to the number of seats won is a simple and straightforward task. While a congressional delegation's partisan composition is visible and well marked, its ideological composition is not necessarily so. Moreover, party affiliation may be considered a proxy for ideology.

In fact, Downs argues that parties adopt ideologies almost in the same sense that firms adopt brand identities: as a way to market themselves to voters in a world of uncertainty and high information costs.<sup>63</sup> Once a party constructs an ideology, it has certain reputational interests to consider before it deviates from its public position. After all, no one wants to appear wishy-washy or incompetent by wandering haphazardly across the political landscape. But it is important to remember that these ideological mantles are essentially instrumental. A party will eventually distance itself from its previous ideological positions if they become more hindrance than help in wooing the electorate. Thus, in Hotelling's example, Democrats abandoned their free-trade allies to join Republicans in supporting high tariffs. If, from a 21st Century perspective, it seems odd to associate "fanatical free-traders" with the Democrats or to associate either party with protectionist tariffs, it is only for failure to take the long view. Over the last 150 years or so, the two major American parties have changed their stripes more often than can be documented in this Paper. For Downs, this is a natural result of self-interested politicians tracking the ever-changing mood of the median voter.

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63. DOWNS, *supra* note 49, at 100-02.

But setting Downs aside, there are other reasons to treat the Democrats and Republicans as empty corporate shells, devoid of any inherent political substance and inhabited instead by temporary, successive waves of shifting alliances. As one scholar remarks:

When viewed across space, any single party label encompasses a wide range of character traits and associated party practices. When viewed over time, the unchanged identity of party labels masks significant longitudinal transformations in party characters and social conditions.

The dominant American political parties have never been internally homogenous—socially, ideologically, or in any other important way. They have instead been constituent, or coalitional, parties, entities that have united a wide variety of disparate groups into single, but limited, systems of action.<sup>64</sup>

Were we to insist on a contrary interpretation—that is, were we to claim that voters are drawn to the Democratic and Republican parties for their distinct, principled, and timeless ideologies—we should have a difficult time explaining the durability of the American two-party system.<sup>65</sup> Can it really be argued that, in contrast to multi-party Europe, American political culture exhausted its intellectual capital 150 years ago when it produced the current Democratic and Republican line-up? In the intervening years, have there been no new ideologies worthy of partisan recognition and support, none capable of motivating and sustaining political action? This is a dubious proposition, as even passing acknowledgement of Nineteenth Century Progressivism, the New Deal, the Civil Rights struggle, and modern neo-conservatism must indicate. But rather than form new parties,

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64. Paul Kleppner, *Critical Realignments and Electoral Systems*, in *THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* 3, 3 (Paul Kleppner ed., 1981).

65. “The most momentous fact about the pattern of American politics is that we live under a persistent, obdurate, one might almost say *tyrannical*, two-party system. We have the Republicans and we have the Democrats, and we have almost no one else, no other strictly political aggregate that amounts to a corporal’s guard in the struggle for power.” CLINTON ROSSITER, *PARTIES AND POLITICS IN AMERICA* 3 (1960).

each of these movements captured—or was captured by—one or the other of the existing parties.<sup>66</sup>

The reason, perhaps, is not difficult to fathom. The overwhelming dominance in the United States of single-member, first-past-the-post voting systems produces powerful incentives for the various strands of American political life to pull together into one of two opposing parties. This is Duverger's Law: "*the simple-majority single-ballot system favours the two-party system*. Of all the hypotheses [considered], this approaches the most nearly perhaps to a true sociological law."<sup>67</sup> In other words, the American two-party system does not spring from a neat, bipolar ideological divide within the electorate; rather, it is *imposed* upon the electorate by the internal logic of the nation's dominant election practices. Second place is no consolation in a winner-take-all system. Consequently, parties and voters have incentives to bulk up by combining as many viewpoints as possible into a broad coalition.<sup>68</sup> The power of these incentives was on

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66. For a partial history of this ebb and flow, viewed through the lens of realignment theory, see JEROME M. CLUBB, WILLIAM H. FLANIGAN & NANCY H. ZINGALE, *PARTISAN REALIGNMENT: VOTERS, PARTIES, AND GOVERNMENT IN AMERICAN HISTORY* (1980); JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* (1973). For a treatment of realignment theory itself, see Walter Dean Burnham, *Party Systems and the Political Process*, in *THE AMERICAN PARTY SYSTEMS* 277 (William Nisbet Chambers & Walter Dean Burnham eds., 1967).

67. MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217 (Barbara North & Robert North trans., John Wiley & Sons 2d English Ed. 1959) (1951).

68. See GARY W. COX, *MAKING VOTES COUNT* § 2.3 at 29-30 (1997) (arguing that both voters and elites will be reluctant to "waste" their votes and resources on "hopeless" candidates). This point is, to some extent, in tension with an argument made earlier, *supra* note 60, that American minor parties play a useful role in the electoral system. The apparent contradiction is explained, however, if we consider that voters may be future-oriented. Voters at the tails of the ideological spectrum may therefore throw their support to a minor party in the hopes of encouraging one of the major parties to reverse its march to the median. "They are willing to let the worse party win today in order to keep the better party from moving towards the center, so that in future elections it will be closer to them. Then when it does win, its victory is more valuable in their eyes." DOWNS, *supra* note 49, at 119. This is precisely the rationale often attributed to Ralph Nader's ill-fated candidacies. See, e.g., Anthony Lewis, Op-Ed., *Abroad at Home: Philosophy of the Worst*, N.Y. TIMES, Feb. 24, 2001, at A13.



open display during the 2000 and 2004 presidential elections when anxious Democrats and their supporters excoriated Green Party candidate Ralph Nader for splitting the progressive vote.<sup>69</sup>

The two parties are thus not outgrowths of voter sentiment or vessels for particular ideologies. They are extensions of the institutional architecture. They are *constituent* parts of that architecture and, thus, are pre-ideological. “Parties in the European democracies tend to be bi-functional [i.e., constituent *and* policy-oriented] . . . ; parties in the United States tend to be unifunctional, or ‘constituent.’”<sup>70</sup> Thus, even when a third party successfully breaks into the political arena—say, on a regional stage—it tends not to join the two established parties in a three-way competition but instead to displace one of them, thereby maintaining a two-party balance. So, for example, in the 1920s, the populist Farmer-Labor party of Minnesota “came into being as a loose-knit but full-fledged party, and at once became the chief competition for the majority Republicans as the Democratic party went into limbo.”<sup>71</sup> By 1926, Democrats in Minnesota captured only 3.2 percent of the vote for U.S. Senate and only 5.4 percent of the vote for governor.<sup>72</sup> But even regional third-party ascendance was not sustainable. By 1944, the political system’s natural intolerance for third parties reasserted itself, pressuring the

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69. See, e.g., Lewis, *supra* note 68; Jon Sawyer, *Nader Shrugs Off Idea that Election Mess Is His Fault*, ST. LOUIS POST-DISPATCH, Nov. 19, 2000, at A10.

70. Theodore J. Lowi, *Party, Policy, and Constitution in America*, in THE AMERICAN PARTY SYSTEMS, *supra* note 66, at 238, 239-40.

71. SUNDQUIST, *supra* note 66, at 169. Robert “Fighting Bob” La Follette’s Wisconsin Progressives achieved something comparable during the same period. *Id.* at 171.

72. *Id.* at 170.

Farmer-Laborites to merge with the Democrats, forming in the process the Democratic-Farmer-Labor (DFL) party.<sup>73</sup>

Whether our starting point is Downs's hypothesis that political parties are inherently interested only in winning elections or whether it is Duverger's Law, the conclusion is the same: while the two major U.S. parties may exhibit enough short-term coherence to serve as tolerable proxies for policy preferences, it is important not to let the tail wag the dog. American parties are notable for their

lack of ideological or programmatic commitment . . . . They are creatures of compromise, coalitions of interest in which principle is muted and often even silenced. They are vast, gaudy, friendly umbrellas under which all Americans, whoever and wherever and however-minded they may be, are invited to stand for the sake of being counted in the next election.<sup>74</sup>

Partisan identity is a measure of convenience, but ultimately it can only be a stand-in for the bedrock accountability measure of ideology.<sup>75</sup>

Having now canvassed various theories of voting and representation drawn from the law, from political science, and from economics, we can now restate and summarize our understanding of electoral accountability. In representative democracies, an elected *official* (who?) is accountable to *all voters* (whom?) via *the self-interested correspondence of his or her policy platform with the median voter's* (how?) preferred *ideology* (what?).

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73. See LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 125 (1986). To this day, Minnesotans refer to their Democrats as "DFLers." See Minn. DFL Party Website, <http://www.dfl.org> (last visited Mar. 23, 2007).

74. ROSSITER, *supra* note 65, at 11.

75. Admittedly, it is an oversimplification to hang everything on ideology. Representation requires considerably more than voting on hot-button issues. Constituents may expect a full range of services, including assistance navigating the bureaucracy, lobbying for district projects, and bringing home the district's share (at least) of government largesse. See *infra* p. 40. But if parties are, in the long run, indistinguishable ideologically, they are even more so when it comes to pork barrel politics.

#### *D. Political Gerrymandering and Ideological Accountability*

For the final step, it remains to link the preceding discussion to political gerrymandering. To do so, I again discuss partisan and bipartisan gerrymanders separately.

##### 1. Partisan Gerrymandering

Recall that the alleged harm of partisan gerrymandering is its purported anti-majoritarianism. In Part II.A we saw how a minority party could manipulate district lines so as to engineer an artificial majority in the legislature (or, somewhat less drastically, to enhance its legislative influence without altering the majority-minority balance). But we also noted that the argument depended on the bimodality of the variable of interest: partisan outcome. That is, Party *A*'s mapmaker was able to "waste" a vote for Party *B* by submerging that vote in a majority-*A* district. Again, assuming we care only about the partisan identity of the subsequently elected representative, the *B* voter's ballot may as well not have been cast.

But what if the variable of interest is not partisan affiliation, but ideology? In this case, it remains true that submerging the *B* voter in a majority-*A* district will not necessarily change the partisan identity of the victorious candidate. However, applying our median voter analysis, we see that the *B* voter's presence *does* exert some amount of political pull on the median. True, a single *B* voter will likely go unnoticed. But as Party *A*'s mapmaker cracks more and more *B*-districts and channels those voters into *A*'s strongholds, we can anticipate that the effect on the median will grow. Notably, the median position on the ideological scale *is not binary*. Even without tipping the district

to Party *B*'s candidate, the influx of *B* voters will gradually draw the district's ideological needle *B*-ward. If Party *A*'s candidate does not respond by following the drifting median, he or she will open a window of opportunity for Party *B*'s candidate to capture the middle ground and, potentially, flip the district.

Moreover, to the extent that Party *A*'s mapmaker attempts to waste Party *B*'s votes by packing its supporters into inefficient supermajorities, the result will be a handful of districts whose median points are skewed heavily *B*-ward. This will give Party *B* a reservoir of "super-ideologues" who, while true to their districts' medians, will deviate markedly from the balance of districts and who will tend to offset the artificial loss of majority-*B* districts elsewhere in the jurisdiction.

Thus, under the accountability scheme advanced in this Paper, partisan gerrymandering quickly runs up against natural limits and safeguards. While some fear that self-interested districting will sap electoral accountability, it turns out that electoral accountability is more robust than may have been originally thought—and, in fact, *it is electoral accountability that imposes curbs on partisan gamesmanship*. It does this in the two ways that we have seen. First, if Party *A* attempts to boost the number of majority-*A* districts, it will need to trim its margins of victory in each one, which in turn will make those districts correspondingly more competitive. Referring to the Median Voter Theorem, Party *A*'s candidates will therefore feel increasing pressure to moderate their positions. Second, if Party *A* attempts to limit the number of majority-*B* districts to a handful of seats packed with *B* voters, the resulting representatives will become even more extreme in their *B*-ness. Putting this together, we see that such gerrymandering succeeds only at the cost of moderating the dominant party's candidates and polarizing

the opposition's. Thus, attempts to manipulate the *partisan* composition of a legislative delegation have precisely the opposite effect on the delegation's *ideological* composition. Once the pieces are thus laid out for inspection, it appears the partisan gerrymander may very well be toothless.

Moreover, set aside for the moment any predicted effects—or lack thereof—on ideology. Partisan gerrymandering proceeds by attempting to spread the dominant party's votes thinly and to win a large number of seats by small margins each. Thus, it is inherently unstable. Even a small shift in the electoral winds can completely undo the gerrymander. Justice O'Connor acknowledged this in her *Bandemer* concurrence.<sup>76</sup> There is perhaps no better illustration of this risk than Pennsylvania. Following the GOP's post-2000 gerrymandering—ultimately upheld by the Supreme Court's favorable ruling in *Vieth*—Pennsylvania Republicans took a 12-to-7 lead in the state's congressional delegation. But shifting fortunes in the 2006 mid-term elections almost completely reversed that result.<sup>77</sup> Democrats now outnumber Republicans 11-to-8 in the delegation. The precariousness of partisan gerrymanders is perhaps underestimated by legal commentators, leading to the occasional embarrassing call.<sup>78</sup>

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76. *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring) ("An overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious.").

77. Jeanne Cummings, *Politics & Economics: Redistricting: Home To Roost; How Republicans' Gerrymandering Efforts May Have Backfired*, WALL ST. J., Nov. 10, 2006, at A6 ("Republican leaders may have overreached and created so many Republican-leaning districts that they spread their core supporters too thinly.").

78. See Hirsch, *supra* note 61, at 202-04 (suggesting in 2003 that Republican gerrymandering might have created a decade-long, unassailable House GOP majority). Hirsch was certainly not alone in this analysis. More generally, political analysts seem to find risky predictions irresistible. Thus, only months before the 1994 Gingrich Revolution, did a pair of observers wonder if House Republicans were doomed to permanent minority status. WILLIAM F. CONNELLY, JR., & JOHN J. PITNEY, JR., CONGRESS' PERMANENT MINORITY? REPUBLICANS IN THE U.S. HOUSE (1994). To their

## 2. Bipartisan Gerrymandering

The preceding discussion notwithstanding, let us assume, *arguendo*, that partisan gerrymandering does undermine electoral accountability by granting disproportionate power to a particular political party. The apparent solution, then, is to recalibrate district lines to more closely reflect actual electoral strength: the antidote to partisan gerrymandering appears to be a healthy dose of bipartisan gerrymandering. In fact, the Supreme Court gave its blessing to such political backscratching in its *Gaffney* decision. Nevertheless we are told that the cure may be as bad as or worse than the disease. Critics claim that bipartisan gerrymandering undermines electoral accountability in two related ways: by draining elections of their competitive rigor and by encouraging political polarization.<sup>79</sup>

The pro-competition argument against bipartisan gerrymandering essentially relies on an atheoretical play on quasi-synonyms: a “safe seat” is a “non-competitive” seat. Since competition is good, bipartisan gerrymandering must be bad. But the analysis never digs deeper to ask the critical accountability question: *why* are safe seats non-competitive? Is it because political opponents are jailed and beaten?<sup>80</sup> Is it because of massive, government sponsored fraud at the polls?<sup>81</sup> Is it because rival political parties

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credit, however, Connelly and Pitney were skeptical of Republican claims that their forty-years (at the time) in the minority desert were a function of Democratic gerrymandering. *Id.* at 129-33.

79. See discussion *supra* Part II.B.

80. See, e.g., Peta Thornycroft, *Mugabe Thugs on Rampage To Cripple All Opposition*, DAILY TELEGRAPH (London), Mar. 24, 2007, at 16 (detailing an “orgy of violence” against Zimbabwean opposition activists).

81. See, e.g., Alex Rodriguez, *U.S. Denounces Belarus Vote Results: Lukashenko Rejoices in Landslide Victory, Scoffs at World Critics*, CHI. TRIB., Mar. 21, 2006, at 7 (describing fraud and intimidation in the 2006 Belarusian presidential election).

are outlawed?<sup>82</sup> Any and all of these practices are grievous insults to the will of the electorate. But, of course, none is used in bipartisan gerrymandering.

Safe seats, American-style, are non-competitive for exactly the opposite reason. Rather than crushing the will of the voters, bipartisan gerrymandering works by identifying and measuring that will with exacting precision and by scrupulously pairing candidates with voters *whose beliefs they share*. Candidates in safe seats are considered safe, after all, not because they are excused from standing for election, but because in election after election voters return them to office by large margins. To take this as evidence that such representatives unaccountably diverge from their constituents' interests requires a mind-bending inversion of what elections, representation, and accountability mean.<sup>83</sup>

Simply stated, nothing about bipartisan gerrymandering interferes with the electoral machinery outlined in this Part. A safe incumbent remains safe only so long as he or she continues to track the preferences of his or her constituency. A non-competitive seat is thus not a reflection of the incumbent's disregard for voters' preferences, but the precise opposite: a consistent and reliable solicitude for those preferences. It is not the case that the voters' power to sanction errant lawmakers has been revoked; it is rather that the voters have not seen fit to invoke it. The gateway to office is, even in this instance, controlled by the electorate, and even the safest of incumbents needs a majority of the votes on election day.

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82. See, e.g., Timothy Garton Ash, Comment, *Meet the New Pharaoh, Same as the Old Pharaoh*, GLOBE & MAIL (Toronto), Mar. 10, 2007, at A23 (describing Egyptian restrictions on presidential ballot access that essentially preclude any effective opposition candidates).

83. Professor Issacharoff anticipates this argument, but rather than confront its persuasive force, he inexplicably dismisses it out of hand! "So framed, engaging this argument seems as productive as debating whether Elvis is really alive and will shortly return to Graceland." Issacharoff, *supra* note 22, at 627.

Let us now consider the polarization argument. This, too, is slightly curious since it attacks, at some level, the very rationale for districts in the first place.<sup>84</sup> At-large, multi-member elections give an at-large majority the power to completely dominate legislative elections by choosing all of a jurisdiction's members. In such a system, disfavored or otherwise minority viewpoints may largely go unaddressed and unconsidered. In fact, in the racial context such at-large systems have been successfully challenged as violations of the Equal Protection Clause<sup>85</sup> or of the Voting Rights Act.<sup>86</sup> Single-member districts, by contrast, allow the electorate's heterogeneity to emerge. In fact, allowing diverse sub-electorates to deviate from the jurisdiction's overall median is one of the principle rationales for creating single-member legislative districts.<sup>87</sup> It is therefore at least somewhat problematic to criticize such districts for working as designed, that is, for allowing discrete subgroups—racial or ideological—a chance to elect representatives of their own choosing.

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84. Moreover, it may simply be empirically false. See David C. King, Congress, Polarization, and Fidelity to the Median Voter (undated) (unpublished manuscript, on file with author) (presenting data that *competitive* elections, by raising the costs of sitting on the sidelines, energize partisan extremists and produce correspondingly more polarizing candidates), available at [http://ksghome.harvard.edu/~dking/Extreme\\_Politics.pdf](http://ksghome.harvard.edu/~dking/Extreme_Politics.pdf). For my own empirical analysis of this question, see *infra* pp. 61-64.

85. *White v. Regester*, 412 U.S. 755 (1973) (invalidating two at-large districts in Texas as unconstitutional attempts to exclude black and Mexican-American voters from the political process).

86. *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (upholding, for the most part, the district court's invalidation of several at-large districts in North Carolina that "impair[ed] the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process" as was their right under the Voting Rights Act).

87. States that are apportioned more than one member in the U.S. House of Representatives are currently required by statute to hold districted elections. 2 U.S.C. § 2c (2000). In supporting this requirement, Sen. Howard Baker of Tennessee noted that states were often home to "widely divergent interests such as different ethnic groups, different heritage, different religious groups, and the like" and that single-member districts were the "only way effectively . . . that the majority can provide for the protection of the minority voice in the councils of government." 113 CONG. REC. 34,365 (1967).



More importantly, however, the argument suffers from its focus on individual districts. It is true that a bipartisan gerrymander may, in the course of creating a safe seat for Party *A*, draw a district brimming with *A* voters. The resulting lawmaker from that district may, therefore, be “extreme” in his or her *A*-ness. But keep in mind that across the run of districts, gerrymandering is a fixed-sum game. That is, if *B* voters are displaced from one district so as to make it safe for Party *A*’s candidate, those *B* voters do not simply disappear. They show up in a different district, where they continue to cast ballots and hold lawmakers accountable. The same is true of political moderates and unaligned voters. As their moderating influence is displaced from one district, it inevitably alights in a neighboring district.

Thus, to the extent that voters are excluded from one district or another, they are never entirely evicted from the jurisdiction as a whole. A political shift in one district simply creates an equal and opposite shift elsewhere in the system. According to the Median Voter Theorem, no amount of bipartisan gerrymandering will dislodge the expected result: representatives will reflect the median voters of their districts and—concentrating not on this isolated district or that one, but on the entire run of districts—the aggregate legislative delegation will reflect the jurisdiction as a whole.

In short, neither the competition nor the polarization arguments present compelling reasons to believe that accountability is short-circuited by bipartisan gerrymandering. Like its partisan relative, the bipartisan gerrymander’s bark may be worse than its bite.

*E. A Pre-emptive Response to Potential Objections*

Before proceeding to the empirical evidence in support of my theory, I want to pause briefly and respond to what I anticipate will be a number of counter-arguments to this Paper's analysis. The machinery of modern electoral systems is exceedingly complex, with many more moving parts that the preceding discussion seems to acknowledge. There are—in addition to the per se districting concern of legislative boundaries—any number of variables that may enter into and affect the accountability equation as well as the resulting policy outputs. These include non-district-based incumbency effects, campaign finance rules, primary campaigns, media exposure, candidate charisma, candidate name recognition, and the parliamentary rules that guide and to some extent constrain lawmakers in their ultimate task of passing legislation.

One response might be to say that, yes, all of these factors matter, but that they may be neutralized by going back through the above discussion and inserting “*ceteris paribus*” in every alternate sentence. In other words, these factors would matter even in the absence of gerrymandering and are usually not exacerbated by adding the latter to the mix. It is nonetheless worth the effort to address what I perceive are the thornier objections, most of which essentially question or seek to undermine the force of the Median Voter Theorem.

The first concerns primary elections. The familiar argument is that partisan extremists play a gate-keeping role at the primary stage, a role that enforces a sort of ideological loyalty on the part of candidates who survive to the general election.<sup>88</sup> As a result, the ultimate contest will not be between two candidates staking out the median

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**88.** This is a very common argument. For one version, see ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY 71-73 (1970). See also King, *supra* note 84, at 2 (“The more extreme the primary voters are in a district, the more extreme (or off-median) the candidates in the general election will be.”).

voter, but between two ideologues pre-screened by the most dogmatic elements of their respective parties. This, however, is not really an argument against the Median Voter Theorem. In fact, in a critical respect, it actually *relies* on that theorem. Primary candidates court party activists because those activists disproportionately vote in the primary. In other words, successful primary candidates reflect the *median primary voter*. This, of course, can throw a monkey wrench in the overall accountability regime, but the wrench neither originates with nor can it be blocked by district line-drawing.

Recall, for example, that partisan gerrymandering actually tends to have pro-competitive effects insofar as one party must draw down its margins of victory so that it can expend its electoral strength across a greater number of districts.<sup>89</sup> The enhanced level of general election competition thus tends to discourage extremist hijackings of the endorsement and nomination process. The more party activists ignore this reality, the more likely they are to suffer ultimate defeat at the hands of an opposing candidate who *does* reflect the median general election voter.<sup>90</sup>

On the other hand, in the context of a bipartisan gerrymander, the argument is that a preponderance of like-minded partisans in a safe district will blur the distinction between the primary electorate and the general electorate. Thus, the primary election becomes the decisive contest. This may be; but it does nothing to undermine the accountability mechanism I outlined above, either for a given district or for a jurisdiction as a whole. If in a bipartisan gerrymander the median primary voter and the median

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89. See *supra* notes 76-78 and accompanying text.

90. Recognizing this, the Connecticut Republican Party in the mid-1980s sought to open its primaries to independent voters as well as to registered Republicans with the intention of producing more moderate nominees for the general election. The ensuing showdown with the state ultimately resulted in a Supreme Court decision upholding the party's right to expand its pool of primary election voters. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

general election voter are the same, then the primary mechanism has only accelerated the inevitable: the successful candidate, by tracking the primary median, will reflect the district median.

In sum, the effects of primary elections and other candidate nominating processes may pose challenges for electoral accountability. But they are not challenges that implicate gerrymandering. If one is concerned about distortions introduced by primaries, one should direct one's efforts to reforming the problem at the root by, for example, expanding eligibility for voting in primaries.<sup>91</sup>

The next objection I address concerns a catch-all category I will call "political capital." The essential intuition is that for a variety of reasons, representatives may have some freedom to deviate from the median ideologies of their constituents without fear of repercussion. For example, an incumbent with seniority may be able to provide a host of services that a freshman replacement could not. This might include interceding on behalf of constituents who have disputes with the government. It might include bringing resources and government projects—pork—back to the district. In recognition of these services, voters may be willing to let the leash out, so to speak, for performing representatives.<sup>92</sup> These incumbent advantages are available and valuable with or

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91. Somewhat surprisingly, there may be a constitutional limit on how wide a jurisdiction may open the primary doors. *See* *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down California's "blanket primary" because it interfered with the First Amendment associational rights of party activists whose votes were arguably diluted when more moderate outsiders participated in primary elections).

92. An argument to this effect is advanced by Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 670-71 (2002). Professor Persily is one of the few academic commentators to defend bipartisan gerrymandering.

without the added complication of bipartisan gerrymandering.<sup>93</sup> Partisan gerrymandering, on the other hand, may actually weaken incumbents by increasing competition.

Political capital may accumulate in forms other than incumbency. Significant campaign war chests, for example, allow the well-financed to drown out their opponents or to redefine them as extremists even when those opponents may, in fact, be better representatives of the median. The mere threat of such tactics may discourage candidates from running. Again, however, the problem is not gerrymandering, it is campaign finance rules.

The list goes on. Media exposure can shape public attitudes and either enhance a candidate's image or, in some cases, irremediably tarnish it. A candidate's prior celebrity status, personal wealth, and natural charisma are increasingly important factors for determining election results. There is no denying the potential for these forces and many others to distort outcomes and allow representatives some breathing room to deviate from the median voter. But once again, none of these problems is a result of gerrymandering and none can be cured by prohibiting gerrymandering. They are simply irrelevant to the discussion at hand.

A third objection is that less than honest politicians may present a moderate image to voters and then, once in office, shirk their responsibilities in ways that are difficult for the public or the media to monitor. This objection is not peculiar to gerrymandered districts. In fact, it is not peculiar to elections at all. It is a difficulty encountered in any

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93. Recent empirical works suggests that incumbency advantages are similar across both legislative and executive offices—"from utility commissioner to Governor, from state legislator to Senator"—and thus are not likely to be a function of gerrymandering. Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L.J. 315, 316 (2002).

principal-agent relationship and one that is adequately covered by an expansive literature all of its own. I do not treat it here.

The next objection carries the greatest force and deserves some reckoning. Legislative and parliamentary rules in, say, the U.S. Congress may give disproportionate power to whichever party controls a bare majority. That is, key leadership roles including Speaker of the House, Senate Majority Leader, and committee chairmanships are doled out according to which party runs which chamber. In this sense, partisan identity *does* matter—first, because it may determine whether a given candidate will sit with the majority or the minority and, second, because it may determine which party sits in the majority and is able to appoint legislative leaders. Strictly speaking, this is not a criticism of gerrymandering per se. It is a larger problem through which legislative leaders exert undue influence. Even if each legislator truly represents his or her median constituent, parliamentary rules may produce results that do not correspond to the median legislator—that is, policy outcomes depend on more than simple majority support on the chamber floor.

Although this problem would persist even in the absence of gerrymandering, it might be exacerbated by the partisan version. If, because of parliamentary rules, legislative outcomes reflect not the median of the legislature as a whole but the median of the majority party, then the identity of the majority takes on additional significance. In this sense, a partisan gerrymander that creates an artificial legislative majority out of an actual electoral minority would produce outcomes centered on the “wrong” party’s median. Although we might prefer outcomes centered on the median of the legislature in

toto, in the alternative we surely would prefer outcomes centered on the “true” majority party rather than those centered on a gerrymandered majority party.

As an initial response, it seems that since the problem of parliamentary rules and excessive leadership powers rears its head in both the gerrymandered and the non-gerrymandered contexts, it would make sense to attack the problem at its source: the parliamentary rules themselves. Having done so, there would be no problem to which gerrymandering might contribute. One despairs, however, that the parliamentary rules will be amended any time soon. This raises the question as to whether gerrymandering—the partisan kind at any rate—should be policed in order to make sure that at least the “right” leaders are exerting disproportionate influence.

It is doubtful that this sort of policing could be done effectively. The difficulty of developing a workable standard is at the heart of the Supreme Court’s current inability to manage gerrymandering claims.<sup>94</sup> But on more optimistic note, it appears that voters, in certain instances *are* able to perform this sort of policing. They are able to do so since, despite the emphasis on party, we are really dealing with a sort of ideological transference.

The voters of a given district may be perfectly happy with the representation offered by their legislator from Party A. However, by enabling his or her Party A seatmates to maintain a majority, that legislator is forced to bear some of the burden for the seatmates’ actions. The ideological position of one—especially a leadership heavyweight—is transmitted to all through the medium of their common partisan identity. In the ordinary course of things, this may make no difference. But when control of a chamber is at issue (at it was in both the House and the Senate in the 2006 mid-term

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94. See discussion *supra* Part II.A.2.

elections) and when one or two highly salient issues dominate much of the campaign discourse (as the Iraq War did in those same elections), voters understand that a candidate's *partisan* loyalty carries *ideological* freight. In these circumstances, ideologically-motivated voters are more than capable of acting to defeat the offending combination of party loyalty and parliamentary rules. If some may doubt this proposition, it is likely that Lincoln Chafee does not.<sup>95</sup>

Finally, one may justifiably ask why, if I am correct, politicians and their aides spend so much time, energy, and resources on redistricting battles, both in the legislature and in the courts. Surely all the fuss indicates gerrymandering has consequences? Yes, gerrymandering has consequences. In fact, we have already seen that these consequences are worth at least \$20,000 to Rep. Sanchez.<sup>96</sup> Clearly, particular lawmakers, candidates, and professional party activists have *individual* stakes in the gerrymandering game. Their careers ultimately depend on which particular candidate or party prevails in a given election. So when former Rep. Martin Frost saw his old Texas seat cracked by GOP gerrymandering, he certainly suffered an individual harm.<sup>97</sup>

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95. Former Sen. Lincoln Chafee was widely regarded as the most liberal Republican in the U.S. Senate. Despite a healthy approval rating of more than 60 percent, he was defeated last November by Democratic challenger Sheldon Whitehouse in large part because of his affiliation with national Republicans. See, e.g., Pam Belluck, *A G.O.P. Breed Loses Its Place in New England*, N.Y. TIMES, Nov. 27, 2006, at A1. Chafee himself conceded that his defeat may have benefited the country by placing Democrats in control of the Senate. Michelle R. Smith, *Chafee Unsure of Staying with GOP After Losing Election*, BOSTON.COM, Nov. 9, 2006, [http://www.boston.com/news/local/rhode\\_island/articles/2006/11/09/chafee\\_unsure\\_of\\_staying\\_with\\_GOP\\_after\\_losing\\_election/](http://www.boston.com/news/local/rhode_island/articles/2006/11/09/chafee_unsure_of_staying_with_GOP_after_losing_election/). Among other things, Sen. Chafee's career affirms several of the arguments made in this Paper: legislators reflect their constituents' underlying ideological preferences despite their partisan affiliations; voters value ideology over party designations; but—the current point—voters will penalize a candidate's choice of party when it has ideological repercussions.

96. See *supra* note 11 and accompanying text.

97. Frost, a thirteen-term incumbent, was defeated by Republican Pete Sessions in the 2004 elections, the first to use the controversial Texas map.



This is not evidence, however, that such particularized grievances matter to the larger system of democratic representation or to the ability of voters to exert ideological pull.<sup>98</sup> The structures that maintain and protect democratic accountability remain intact. The typical voter should care not whether Martin Frost or Loretta Sanchez is sent to Washington so long as his or her replacement is at least as responsive to the median voter.<sup>99</sup>

It may, of course, be jarring for a loyal liberal to find himself or herself, *grâce à* gerrymandering, in a new district stocked with staunch conservatives and represented by the same. But it is inconceivable that any election system would satisfy all voters by allowing each to be represented by his or her personal candidate of choice. In this sense, even critics of gerrymandering argue that the proposed harms are more correctly understood as structural ones and not as violations of individual rights.<sup>100</sup>

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98. These grievances may, however, give parties (and presumably candidates) legal standing in other contexts! Last year, the Texas Republican Party attempted to replace retiring, indicted Republican incumbent Tom DeLay with the fresh face of Shelley Sekula-Gibbs on the general election ballot. Democrats sued to prevent the name swap, asserting injury-in-fact based on their reduced chances of winning if the GOP were allowed to make the substitution. The Fifth Circuit agreed. “Political victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party’s interests. While power may be less tangible than money, threatened loss of that power is still a concrete and particularized injury sufficient for standing purposes.” *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (citation omitted).

99. This ignores, of course, nostalgic or emotional or expressive bonds that constituents may develop for a given legislator. I do not deny that such relationships exist, but I consider them incidental to a model of electoral accountability.

[T]he function of the election process is to ‘winnow out and finally reject all but the chosen candidates,’ not to provide a means of giving vent to ‘short-range political goals, pique, or personal quarrel[s].’ Attributing to elections a more generalized expressive function would undermine the ability of the States to operate elections fairly and efficiently.

*Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (citations omitted).

100. See discussion *supra* Part II.A.3.

In sum, the various objections are for the most part beside the point in the context of political gerrymandering. It is true that complicated elections present multiple opportunities for the accountability process to derail. These dangers, however, exist independently of political gerrymandering and, for the most part, are not enhanced by the practice. The single exception involves parliamentary rules which favor the legislative majority. However, this concern applies only to the partisan form of gerrymandering and, at bottom, presents a threat because of its ability to advance the median ideology of the “wrong” party. Savvy voters may, when the stakes are appropriate, respond by punishing partisan loyalties where such loyalties threaten ideological accountability.

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I have argued in this Part that a detailed, theoretical discussion of elections yields a more complex and nuanced understanding of accountability when we break open the black box of voting and representation in order to examine its mechanics. This analysis indicates that the internal logic of voting induces candidates and political parties to court the median voter in a given district. The location of the median voter, however, is a function of the locations of all other voters—thus, each individual’s presence and vote has a ripple effect through which he or she influences the election. This will be true even if the voter supports a losing candidate. Moreover, voters treat partisan identity as a proxy for ideology, but it is the latter that will ultimately trump and which is the foundational measure of accountability.

Lastly, shuffling district boundaries and blocks of voters may have profound effects on individual districts, but because the dislocated voters eventually come to rest somewhere in the jurisdiction, their influence is never extinguished. At worst, it is

transformed. Previously they may have felt a close fit between themselves and an ideologically similar representative. After gerrymandering they may instead—in their new districts—compose the opposition. This shift may be personally unpleasant. It may destroy the careers of certain vested political actors. *But it does not defeat the machinery of accountability. Those mechanisms depend on the internal logic of voting, and no amount of political redistricting by itself can disrupt that logic.*

Importantly, this theory produces, in addition to rhetoric, several testable hypotheses. I expect to find that, all else equal, (1) within a group of legislators, the median legislator will represent the median voter of their combined constituencies and (2) to the extent that (1) is frustrated, it will be because of other defects in the accountability process and *not* because of political gerrymandering. The remainder of this paper examines the empirical support for these propositions.

#### IV. ESTIMATING ELECTORAL ACCOUNTABILITY: 1968-2004

As untidy as reality can be, it is nice to know that the preceding discussion's theoretical abstractions do actually correspond to real phenomena. On the campaign trail, hopeful candidates portray their opponents as “extremists,” disconnected from the sensible middle ground. Talk-show pundits fetishize the near-mythic “swing voter,” who might be, by turns, a suburban soccer mom, an undecided independent, or a Reagan Democrat. What do these ideal types represent but the median incarnate? The draw of the center and other themes quickly emerge during even a casual survey of the 2006 mid-term elections.

In North Carolina, for example, Democrats picked up the relatively conservative 11th District, but did so by backing a candidate who tracked the district's voters—former football star Heath Shuler. Shuler, who departs from most of his partisan colleagues by generally opposing gun control and abortion rights, defeated incumbent Republican Charles Taylor last November. “Bill Sabo, a political scientist at UNC Asheville, says some Democrats are trying to persuade more liberal friends ‘that winning is more important than ideological purity.’ He says Shuler’s conservatism may be an advantage in a district where more liberal Democrats have failed—particularly on social issues.”<sup>101</sup>

Shuler, of course, is not the only moderate-to-conservative in the new Democratic majority. The incoming freshmen, as might be expected during a period of party turnover, include substantial numbers of centrist candidates who evidently ran to their districts’ medians.<sup>102</sup> Furthermore, the new ideological mix is expected to alter the congressional output—not just by putting Democrats in charge of the agenda, but by realigning and moderating the Democratic delegation itself.<sup>103</sup> Nor is it only Democrats playing the game.

[With their recent] losses still fresh in their minds, Republican moderates remaining in the House are vowing to pursue their centrist positions more assertively, even if it means endorsing Democratic initiatives. And the new Republican leadership, concerned about losing even more seats in

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101. Jim Morrill, *Hero of Bryson City Studies New Playbook: Shuler Considered Best Hope for Dems in N.C.*, CHARLOTTE OBSERVER, Apr. 26, 2006, at 1A.

102. See, e.g., Carl Hulse, *New Mosaic of Democrats Is Challenge for Leaders*, N.Y. TIMES, Nov. 9, 2006, at A1. “About half the incoming Democratic freshmen are already planning on joining the New Democratic Coalition—a generally centrist group . . .” *Id.* Moreover, “[o]ther Democrats in the group intend to enlist with the Blue Dog Coalition, a more conservative group viewed as having a more rural outlook and a focus on balancing the budget.” *Id.*

103. See, e.g., David D. Kirkpatrick, *Black Lawmakers Set To Take Crucial Posts Face Pressure*, N.Y. TIMES, Dec. 5, 2006, at A25 (“[B]lack lawmakers are being cautioned to be mindful of a broader audience that includes voters in Republican-leaning swing districts where [traditional minority] initiatives can be politically perilous.”).

2008, appears to be showing a more pragmatic streak by allowing moderates to stray more freely from the party fold.<sup>104</sup>

At the risk of belaboring the point, we can also examine results in state legislatures, where similar Democratic waves swept many Republicans out of power last fall. In Minnesota, freshman state representatives Julie Bunn, a Democrat, explained the success of her and her seatmates: “Many people, in my view, voted for us not because we are Democrats but because we were moderate voices.”<sup>105</sup> A defeated Minnesota Republican complained that her challenger had co-opted her platform: “My opponent ran on a Republican agenda . . .” said Karen Klinzing . . . . “If you look at her literature versus mine, there wasn’t much differentiation.”<sup>106</sup> It would have made Hotelling proud.

The anecdotal evidence, from my perspective, is reassuring. But I understand that, by itself, it is unlikely to persuade anyone who is not already persuaded. The remainder of this Part, therefore, presents a more rigorous examination of election data and representatives’ ideologies for the 91st through the 109th congresses.<sup>107</sup> I begin with a brief description of my data and my methodology. Afterwards, I attempt to measure the divergence between a state’s congressional delegation and its constituents. These divergences are then analyzed in the separate contexts of partisan and bipartisan gerrymandering.

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104. Raymond Hernandez, *Democrats’ Rise Has Pluses, Say G.O.P. Centrists*, N.Y. TIMES, Apr. 7, 2007, at A1.

105. Kirk Johnson, *In State Legislatures, Democrats Are Pushing Toward Parity Between the Sexes*, N.Y. TIMES, Feb. 15, 2007, at A26.

106. *Id.*

107. I have chosen to focus on elections to the U.S. House of Representative mainly because there are richer data for this universe. The underlying theory, however, should hold for any districted elections, including state legislatures, city councils, etc.

## A. Data and Methodology

### 1. Definitions

Throughout this Part, I make repeated reference to several key variables, and it is worth taking a moment at the outset to define them explicitly as follows:

- (D1)  $\Theta_{i,t} \equiv$  the ideology of the *median voter* in state  $i$  in the elections to congress  $t$ ;
- (D2)  $\theta_{i,t} \equiv$  the ideology of the *median U.S. representative* from state  $i$  elected to congress  $t$ ;
- (D3)  $\sigma_{i,t}^2 \equiv$  the *variance* in the ideologies of state  $i$ 's U.S. representatives elected to congress  $t$ ;
- (D4)  $\delta_{i,t} \equiv \theta_{i,t} - \Theta_{i,t}$ , i.e., the *ideological divergence* between state  $i$ 's median voter in the elections to congress  $t$  and that state's median representative in the same congress;
- (D5)  $\gamma_{i,t} \equiv$  the extent of *partisan gerrymandering* affecting state  $i$ 's districts during the elections to congress  $t$ ; and
- (D6)  $\lambda_{i,t} \equiv$  the extent of *bipartisan gerrymandering* affecting state  $i$ 's districts during the elections to congress  $t$ .

With these definitions in hand, I can state more rigorously the propositions which concluded the preceding Part:

- (P1)  $\delta_{i,t} \equiv \theta_{i,t} - \Theta_{i,t} = 0$ ;
- (P2a) if  $\delta_{i,t} \neq 0$ , then  $\delta_{i,t} \perp \gamma_{i,t}$ ; and
- (P2b) if  $\delta_{i,t} \neq 0$ , then  $\delta_{i,t} \perp \lambda_{i,t}$ .

I will also examine a related proposition which does not directly flow from my theory of electoral accountability, but which is easily tested with the same data used to examine the preceding propositions:

- (P3)  $\sigma_{i,t}^2 \perp \lambda_{i,t}$ .

In heuristic terms, P1 merely states that the *median U.S. representative* from state  $i$  elected to congress  $t$  will share the same ideology as the *median voter* from state  $i$  participating in the elections to congress  $t$ . But if P1 fails to hold for any state  $i$  and congress  $t$ , P2a and P2b merely hypothesize that such deviations will be uncorrelated with either *partisan* or *bipartisan* gerrymandering. Finally, P3 states that the ideological variance of a state's congressional delegation—that is, the amount by which individual representatives within the delegation diverge from each other—is uncorrelated with bipartisan gerrymandering.

## 2. Data and Methodology

In 1964, the Supreme Court decided *Wesberry v. Sanders*,<sup>108</sup> holding that states were required to draw equipopulous congressional districts. Although population disparities do not directly interfere with the Median Voter Theorem, they do allow voters in relatively sparse districts to exercise inordinate influence on setting the median. Thus, my analysis begins post-*Wesberry*, in a world of equipopulation. Allowing a few years for the Court's decision to filter through the states, I have chosen to begin the analysis with the 1968 elections to the 91st Congress. The data continue up through the 2004 elections and the 109th Congress. Data on the currently sitting 110th Congress are obviously unavailable.

For my measure of  $\theta_{i,t}$ , I rely on the “Common Space” version of the NOMINATE data calculated by Professors Keith Poole and Howard Rosenthal.<sup>109</sup> These

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**108.** 376 U.S. 1 (1964).

**109.** The Common Space Scores are so-called because ideological scores are directly comparable between the House and the Senate. For reasons that will soon become obvious, this feature is critical

data provide ideological scores for each U.S. representative and senator from the 75th through the 109th Congresses based on their lifetime records of roll call votes. The scores range from -1.0 to 1.0, with -1.0 being most liberal and 1.0 being most conservative. For each state  $i$  and congress  $t$ ,  $\theta_{i,t}$  is simply the median ideological score observed within that state's U.S. House delegation for that congress.<sup>110</sup>

Measuring  $\Theta_{i,t}$  is somewhat trickier. Self-reported voter ideologies are likely to be unreliable and variable across states, i.e., what passes for moderation in Mississippi might appear quite conservative in Wisconsin. Moreover, I am not aware of any suitable data with enough depth and detail to estimate statewide voter ideologies for each state for each of the nineteen congresses in my sample.<sup>111</sup> Luckily, there is a nice proxy measure available for  $\Theta_{i,t}$ : the ideologies of state  $i$ 's U.S. senators in congress  $t$ . Because senators are elected at-large, political gerrymandering cannot reach them or influence their selection. Thus, U.S. senators, all else equal, should provide a reasonably accurate approximation of their states' median ideologies. I acknowledge, of course, that any given senator is likely to deviate somewhat from his or her constituency's median. But I do not expect these deviations to be systematically biased in one direction or another, and

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to the analysis. Unfortunately, an individual's score does not vary over time, precluding any attempt to capture a candidate's ideological evolution in response to changing constituencies. For a technical description of the data, see Keith T. Poole, *Recovering a Basic Space From a Set of Issue Scales*, 42 AM. J. POL. SCI. 954 (1998). The data are available online at <http://voteview.com>. I use the data set's "First Dimension Coordinate" to measure ideology over the familiar liberal-to-conservative scale.

110. If more than one person represented a district within a given congress (because of, say, the death, incapacitation, or resignation of the incumbent), I take an average of the various seatholders' ideologies to represent the ideology of that district's congressperson.
111. One valiant effort to estimate state voters ideologies across time is William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. POL. SCI. 327 (1998). Unfortunately, the methodology estimates voters' preferences based on whom they vote for. In other words, it assumes what I am attempting to demonstrate, namely that representatives' ideologies will track voters' ideologies.



over the run of senators, I expect such divergence to wash out. I therefore return to the same Poole and Rosenthal data to identify  $\Theta_{i,t}$ , selecting this time the average ideological score for state  $i$ 's senators elected to congress  $t$ .<sup>112</sup>

An extensive literature has developed around the question of measuring partisan gerrymandering,  $\gamma_{i,t}$ . The most favored approach attempts to estimate the “partisan symmetry” of a districting plan. The basic intuition is that a given percentage of votes won ought to translate into a given percentage of seats won no matter which party earned those votes.<sup>113</sup> Consequently, partisan symmetry is violated if, for example, a districting plan would give the Democrats 65 percent of the seats if they won 55 percent of the vote but, were the tables turned and were the Republicans to win an equivalent 55 percent of the vote, the same districting plan would reward the GOP with fewer than 65 percent of the seats.<sup>114</sup>

An important consequence of partisan symmetry is that when both parties receive the same percentage of the vote (i.e., 50 percent), they should both win the same percentage of seats (i.e., 50 percent). One simple measure of  $\gamma_{i,t}$ , then, is to examine the

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112. As was the case with  $\theta_{i,t}$ , if more than two individuals served a state as senators in a given congress, the average of all such senators is taken.

113. But note that the percentage of votes won and the percentage of seats won need *not* be equal. Divergence between these two numbers is not a sign of partisan bias and, actually, is a completely normal and well-studied feature of winner-take-all districted elections. For an early statement of this phenomenon, see Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540, 540 (1973) (“A party that wins a majority of votes generally wins an even larger majority of seats.”).

114. See, e.g., Gary King & Robert X Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1250, 1251-52 (1987) (presenting one of the first attempts to treat partisan bias as a distinct feature of elections). Partisan symmetry has become something of a gold standard for evaluating bias. See, e.g., 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) (“We are aware of no published disagreements or even clear misunderstanding in the scholarly community about partisan symmetry as a standard for partisan fairness in plurality-based American elections . . .”). Moreover, several Justices have recently indicated their willingness to use partisan symmetry as an important indicator of partisan gerrymandering. See *id.* at 4.

number of seats won by Democrats when they win exactly half of the statewide vote. Of course, this is only *conceptually* simple since it is never the case that we will observe one party winning exactly half of the vote. However, a simplifying assumption known as “uniform partisan swing” allows estimation of the seats-votes relationship at the 50 percent mark. Uniform partisan swing presumes that as partisan allegiances shift within a state, they shift by the same amount in each individual district.<sup>115</sup> So, for a given congress  $t$  and state  $i$ , I simply shift votes in each district by a uniform percentage (and in a uniform direction) until they produce a statewide 50-50 split. I then calculate the percentage of seats the Democrats would have won under the hypothesized scenario. Partisan gerrymandering, as measured by  $\gamma_{i,t}$ , is simply the difference between this percentage and the expected “fair” allotment of 50 percent of the seats. Thus,  $\gamma_{i,t}$  will be positive when a redistricting plan favors Democrats, negative when it favors Republicans, and zero when the plan is exactly balanced.

The actual data used to perform these calculations are taken from two sources. For the years 1992 through 2004, congressional election data are from POLIDATA.<sup>116</sup> For the years 1968 through 1990, the data come from observations prepared by Professor

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115. For an early application of the “uniform partisan swing” assumption, see D.E. Butler, *Appendix to H.G. NICHOLAS, THE BRITISH GENERAL ELECTION OF 1950*, at 306, 329 n.1 (1951). “Uniform partisan swing” has fairly good empirical support. “[I]t is remarkable that the . . . assumption does hold approximately in a vast array of democratic elections in the U.S., worldwide, and throughout history.” Grofman & King, *supra* note 114, at 11 (noting, however, that the assumption has weaknesses and drawbacks). In the intervening years, researchers have developed more sophisticated measures of partisan symmetry which do not require partisan swings to be exactly uniform across districts. See Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. POL. SCI. 514 (1994). Estimating Gelman and King’s model, however, requires considerably more extensive data and is beyond the scope of this initial foray into the empirical issues.

116. *Presidential Results by Congressional District*, POLIDATA, available for purchase at <http://www.polidata.org/data/default.htm> (last visited Apr. 15, 2007).

King and available through the Inter-University Consortium for Political and Social Research.<sup>117</sup>

These same data are used to estimate my final parameter,  $\lambda_{i,t}$ , which is a very simply affair. I define a “safe seat” as one in which the successful candidate won more than 60 percent of the vote. For state  $i$  and congress  $t$ ,  $\lambda_{i,t}$  is simply the percentage of that state’s U.S. House delegation elected to congress  $t$  from safe seats.

### *B. Estimating Ideological Divergence (P1)*

Returning to the propositions defined in Part IV.A.1, recall that P1 predicts  $\delta_{i,t} = 0$ . As it is defined, a positive number for  $\delta_{i,t}$  indicates that state  $i$ ’s House delegation to congress  $t$  is more conservative than the state’s median voter. Negative numbers indicate a liberal skew.

As the first line of Table 1 indicates, the mean of  $\delta_{i,t}$ —calculated over all of the nineteen congresses in the sample—is 0.020. This is a remarkably small deviation. To put it in perspective, the ideological gap between Rep. Dennis Kucinich (D, Ohio-10) and Speaker of the House Nancy Pelosi (D, Cal.-8) is 0.049. So the gap between Kucinich and Pelosi—not exactly a yawning divide<sup>118</sup>—is more than twice as big as any systematic divergence between a state’s congressional delegation and its median voter. On the other

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117. Gary King, *Elections to the United States House of Representatives, 1898-1992*, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, available at <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/06311.xml> (last visited Apr. 15, 2007).

118. Kucinich was ranked the thirteenth most liberal member of the 109th Congress; Pelosi was the thirty-third.

TABLE 1

Mean of $\delta_{i,t}$		
Congress (n=) <sup>*</sup>	Mean <sup>†</sup>	Prob >  t
91st-109th (830)	<b>0.020</b>	0.023
91st (44)	0.059	0.152
92d (45)	0.002	0.947
93d (44)	0.041	0.281
94th (44)	-0.004	0.911
95th (44)	0.030	0.464
96th (44)	0.017	0.625
97th (44)	-0.033	0.360
98th (44)	-0.055	0.125
99th (44)	-0.026	0.447
100th (44)	-0.008	0.812
101st (44)	0.009	0.795
102d (44)	-0.016	0.674
103d (43)	-0.007	0.871
104th (43)	0.079	0.084
105th (43)	0.050	0.233
106th (43)	0.020	0.579
107th (43)	0.063	0.068
108th (43)	<b>0.091</b>	0.017
109th (43)	<b>0.069</b>	0.044
Pre-Redist. <sup>‡</sup> (348)	0.015	0.246
Post-Redist. <sup>‡</sup> (351)	0.023	0.096

<sup>\*</sup> States with at-large elections were excluded from the sample, resulting in fewer than fifty states per congress.

<sup>†</sup> Means shown in **bold** are statistically significant at a 95 percent confidence level.

<sup>‡</sup> “Pre-redistricting” includes the pairs of elections that preceded each of the decennial redistrictings (i.e., elections in years ending in an “8” or a “0”). “Post-redistricting” include the pairs of elections that immediately followed the decennial redistrictings (i.e., elections in years ending in a “2” or a “4”).

side of the scale, the gap between former Rep. Tom DeLay (R, Tex.-22) and Rep. James Sensenbrenner (R, Wis.-5) is 0.022—again, larger than the mean of  $\delta_{i,t}$ .<sup>119</sup>

**119.** DeLay was ranked the 410th most liberal representative in the 109th Congress. Sensenbrenner was ranked 417th.

The skew, while tiny, is nevertheless statistically significant.<sup>120</sup> Thus, we are unable to reject the hypothesis that districted House members deviate from non-districted senators of the same state in some small but systematic way.<sup>121</sup> The implication for accountability is that despite fluctuations from congress to congress, a state's delegation is expected to be ever so slightly more conservative than the state's median constituent. It is difficult to attribute this to gerrymandering, however, unless we further assume that over the period in question Republicans were the shrewder cartographers.

I have also grouped elections according to where they fall in the redistricting cycle.<sup>122</sup> If an election is one of the two that precede any given redistricting, it is included in the “pre-redistricting” sample. Likewise, an election that is one of the two immediately following a redistricting is part of the “post-redistricting” sample. If gerrymandering has a significant effect on the mean of  $\delta_{i,t}$ , then we would expect a stronger result in elections immediately following a redistricting. After all, as years pass, the mapmaker's efforts are undone by normal demographic shifts. The final two lines of Table 1 report the results. The result is indeed stronger for the post-redistricting group, but only marginally so. Statistical tests indicate that the difference is insignificant.<sup>123</sup>

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**120.** By contrast, the means calculated for the individual congresses are generally *not* significantly different from zero, but this is due in part to the relatively small sample sizes at that level of disaggregation.

**121.** The inability to *reject* this hypothesis—or any other considered in this Paper—should not be mistaken for *confirmation* of the hypothesis.

**122.** The decennial census occurs in years ending in “0.” New maps are generally drawn for use in the elections that occur in years ending in “2.” So, for example, 1988 and 1990 were pre-redistricting years, whereas 1992 and 1994 were post-redistricting. I considered years ending in “6” to be mid-cycle years and did not include them in either of the other groups.

**123.** The *t*-statistic on the null hypothesis that the distributions of  $\delta_{i,pre}$  and  $\delta_{i,post}$  are identical is 0.43, with Prob. > |*t*| = 0.669.

In the end, however, Table 1 is not likely to resolve much. The hypothesis  $\delta_{i,t} = 0$  is only a first step and, in fact, may be consistent with either widespread distortions in voter sentiment or no distortions whatsoever. If it is the case that a Democratic gerrymander in one state cancels out a Republican gerrymander in another, then the mean of  $\delta_{i,t}$  might still be zero despite electoral shortcomings in the individuals states. In fact, a similar point has been made by at least one commentator who notes that the combined effect of many state-level gerrymanders presents a problem distinct from individual gerrymanders considered in isolation.<sup>124</sup>

On the other hand, even if it is true that  $\delta_{i,t} \neq 0$ , we need not conclude that political gerrymandering is the culprit. As noted in Part III.E, any number of complications may introduce white noise into the accountability system. The next question, therefore, is whether  $\delta_{i,t} \perp \gamma_{i,t}$ , i.e., are divergences independent of partisan gerrymanders?

### C. *Estimating the Effect of Partisan Gerrymanders (P2a)*

Table 2 summarizes the correlation between  $\delta_{i,t}$  and  $\gamma_{i,t}$  as computed over various individual and aggregated congresses. Recall that positive values of  $\delta_{i,t}$  indicate a conservative skew and that positive values of  $\gamma_{i,t}$  indicate a Democratic gerrymander. A negative correlation would therefore constitute evidence that Democrats were introducing a liberal distortion into the electoral system through rigged redistricting.

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124. Adam Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 411 (“[T]he way in which federal courts review congressional partisan gerrymandering claims today—examining individual states’ redistricting plans in isolation—makes it impossible for courts to identify the presence or absence of the harms commonly thought to flow from partisan gerrymanders.”).

TABLE 2

Correlation of $\delta_{i,t}$ and $\gamma_{i,t}$		
Congress (n=) <sup>*</sup>	$r^{\dagger}$	Prob > $ r $
91st-109th (781)	<b>-0.153</b>	< 0.001
91st (43)	-0.232	0.134
92d (43)	-0.197	0.206
93d (42)	-0.045	0.777
94th (41)	0.050	0.758
95th (42)	0.012	0.942
96th (40)	0.038	0.815
97th (39)	<b>-0.357</b>	0.023
98th (42)	0.004	0.981
99th (41)	-0.118	0.463
100th (41)	0.019	0.906
101st (40)	-0.199	0.218
102d (42)	-0.105	0.508
103d (41)	-0.300	0.057
104th (41)	-0.284	0.072
105th (41)	-0.198	0.215
106th (40)	-0.018	0.912
107th (41)	<b>-0.378</b>	0.015
108th (41)	<b>-0.280</b>	0.076
109th (40)	-0.207	0.201
Pre-Redist. <sup>‡</sup> (329)	<b>-0.185</b>	0.001
Post-Redist. <sup>‡</sup> (328)	<b>-0.148</b>	0.007

\* States with at-large elections were excluded from the sample as were states that did not report election returns for certain districts (generally because a candidate was running unopposed). Louisiana adopted a non-partisan election system beginning with the 96th Congress and has therefore been removed from the later years of the sample.

<sup>†</sup> Correlation coefficients shown in **bold** are statistically significant at a 95 percent confidence level.

<sup>‡</sup> “Pre-redistricting” includes the pairs of elections that preceded each of the decennial redistrictings (i.e., elections in years ending in an “8” or a “0”). “Post-redistricting” include the pairs of elections that immediately followed the decennial redistrictings (i.e., elections in years ending in a “2” or a “4”).

In fact, as the results indicate, there is a very slight negative correlation of -0.153 calculated for the pool of nineteen congresses in the sample.<sup>125</sup> The correlation is,

125. A correlation coefficient can take values ranging from -1.0 to 1.0, with zero indicating no correlation

moreover, statistically significant.<sup>126</sup> Consequently, I am unable to reject out of hand the argument that partisan gerrymandering produces electoral distortions. Yet the magnitude of the correlation is so slim that, I argue, any such distortions must be regarded as *practically* insignificant.

Following the same breakdown of pre- and post-redistricting used above,<sup>127</sup> we see another pair of slight, negative correlations. Interestingly, the pre-redistricting correlation (-0.185) is a tad stronger than the post-redistricting correlation (-0.148). If anything, this would indicate that redistricting ameliorates distortions rather than exacerbates them. Nonetheless, the correlations are so small and so alike that there can be no practical significance attributed to the slight variation between them.

Taken together, the data suggest that, on average, state  $i$ 's congressional delegation will deviate only slightly from the state's median voter (as measured by the state's senators). This deviation is approximately of the same magnitude as the difference between Reps. DeLay and Sensenbrenner or about twice the gap between Reps. Pelosi and Kucinich. Moreover, to the extent this deviation is real and persistent (a possibility that I am currently unable to reject), its relationship to partisan gerrymandering is vanishingly small. The bulk of the variation in this deviation remains unexplained, and although I cannot reject the suggestion that partisan gerrymandering plays some role, it certainly appears that far more important determinants remain to be discovered.

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whatsoever, -1.0 indicating a perfect negative correlation, and 1.0 indicating a perfect positive one.

**126.** The correlations for any given congress are generally not significant (nor are they always negative). But, as was the case with the estimates for the mean of  $\delta_{i,t}$ , their statistical insignificance is due in part to the small sample sizes in each election.

**127.** See *supra* note 122 and accompanying discussion.



In addition, the correlation coefficients say nothing about *causality*. In fact, it might be the case that the faint correlation detected by the data reflect the effect of a third variable—political capital—on both  $\delta_{i,t}$  and  $\gamma_{i,t}$ . That is, a party with some weight to throw around—as indicated by powerful incumbents, generous donors, influential leadership positions, etc.—is able to expend some of that capital so as to (1) deviate somewhat from the median voter and (2) to protect its individual members' privileged positions through gerrymandering. As noted in the theoretical section of the Paper, this sort of self-serving may play into the interests of individual politicians and their party functionaries without necessarily derailing the electoral accountability mechanism.<sup>128</sup> A more sophisticated regression model that specifically accounted for the multitude of these and other inputs might help tease out how the various parts interact and, very possibly, could explain away entirely the trace of correlation reported in Table 2.

#### *D. Estimating the Effects of Bipartisan Gerrymanders (P2b and P3)*

While the results in Tables 1 and 2 might appear inconclusive, the results in Table 3 could not be more clear. The correlation between  $\delta_{i,t}$  and  $\lambda_{i,t}$  is a virtually non-existent -0.009. Moreover, the result is statistically indistinguishable from zero, providing strong support for P2b. This finding accords with the theory previously laid out: while bipartisan gerrymandering might create safe havens for certain ideologues, it does so by creating a spread of ideologues roughly proportional to the state's underlying preferences. There should be no surprise, then, if bipartisan gerrymandering appears to produce no discrepancy between the ideological balance of a state's congressional delegation as a whole and the ideological balance of the state as a whole.

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<sup>128</sup>. See *supra* pp. 44-45.

TABLE 3

Correlation of $\delta_{i,t}$ and $\lambda_{i,t}$		
Congress (n=) <sup>*</sup>	$r^{\dagger}$	Prob > $ r $
91st-109th (815)	-0.009	0.799
91st (44)	-0.215	0.162
92d (45)	-0.215	0.156
93d (44)	-0.267	0.080
94th (44)	-0.130	0.399
95th (44)	0.094	0.544
96th (43)	-0.192	0.218
97th (42)	0.303	0.051
98th (43)	0.185	0.236
99th (43)	<b>0.462</b>	0.002
100th (43)	0.190	0.223
101st (43)	0.020	0.897
102d (43)	0.255	0.100
103d (42)	-0.088	0.579
104th (42)	0.087	0.582
105th (42)	-0.115	0.469
106th (42)	-0.140	0.375
107th (42)	-0.147	0.352
108th (42)	-0.049	0.759
109th (42)	-0.028	0.860
Pre-Redist. <sup>‡</sup> (329)	-0.057	0.291
Post-Redist. <sup>‡</sup> (342)	0.030	0.579

<sup>\*</sup> States with at-large elections were excluded from the sample. Louisiana adopted a non-partisan election system beginning with the 96th Congress and has therefore been removed from the later years of the sample.

<sup>†</sup> Correlation coefficients shown in **bold** are statistically significant at a 95 percent confidence level.

<sup>‡</sup> “Pre-redistricting” includes the pairs of elections that preceded each of the decennial redistrictings (i.e., elections in years ending in an “8” or a “0”). “Post-redistricting” include the pairs of elections that immediately followed the decennial redistrictings (i.e., elections in years ending in a “2” or a “4”).

Critics of bipartisan gerrymandering may argue that even if non-competitive seats do not change the overall delegation’s median point, they do exacerbate differences within the delegation. Thus, the middle ground between two extremists may be

TABLE 4

<b>Correlation of <math>\sigma^2_{i,t}</math> and <math>\lambda_{i,t}</math></b>		
<b>Congress (n= )<sup>*</sup></b>	<b><math>r^{\dagger}</math></b>	<b>Prob &gt;  r </b>
91st-109th (815)	-0.016	0.656
91st (44)	0.099	0.524
92d (45)	-0.036	0.816
93d (44)	-0.176	0.255
94th (44)	0.012	0.938
95th (44)	-0.158	0.307
96th (43)	-0.167	0.283
97th (42)	-0.009	0.957
98th (43)	-0.126	0.422
99th (43)	-0.127	0.417
100th (43)	-0.161	0.303
101st (43)	-0.093	0.554
102d (43)	-0.034	0.828
103d (42)	-0.110	0.489
104th (42)	-0.021	0.893
105th (42)	0.184	0.245
106th (42)	-0.253	0.106
107th (42)	-0.199	0.208
108th (42)	0.091	0.567
109th (42)	0.017	0.916
Pre-Redist. <sup>‡</sup> (329)	-0.039	0.473
Post-Redist. <sup>‡</sup> (342)	0.006	0.910

\* States with at-large elections were excluded from the sample. Louisiana adopted a non-partisan election system beginning with the 96th Congress and has therefore been removed from the later years of the sample.

<sup>†</sup> Correlation coefficients shown in **bold** are statistically significant at a 95 percent confidence level.

<sup>‡</sup> “Pre-redistricting” includes the pairs of elections that preceded each of the decennial redistrictings (i.e., elections in years ending in an “8” or a “0”). “Post-redistricting” include the pairs of elections that immediately followed the decennial redistrictings (i.e., elections in years ending in a “2” or a “4”).

identical to the middle ground between two moderates, but the former will have a considerably harder time reaching consensus. I have addressed this argument above and

noted that it sets itself against the very reason for districted elections to begin with<sup>129</sup> and that, as P3 proposes, it may also simply be empirically false.<sup>130</sup>

The figures in Table 4 measure the relationship between ideological extremism and bipartisan gerrymandering. The former is captured by  $\sigma_{i,t}^2$ , i.e., the variation in the individual ideologies represented in state  $i$ 's delegation to congress  $t$ . The latter is the previously defined variable  $\lambda_{i,t}$ . The results strongly support P3, thereby contradicting the argument that bipartisan gerrymandering leads to more extreme views within a state's congressional delegation. The correlation coefficient is statistically indistinguishable from zero (i.e., no correlation) for each individual congress and for the various aggregations across congresses. These data simply provide no evidence that bipartisan gerrymanders create schisms within congressional delegations or lead to the election of polarized extremists.

## V. CONCLUSION

Let me conclude by cheerfully admitting that this Paper has proven nothing. But in saying so, I merely acknowledge that the empirical work of Part IV is only a first step towards fully exploring the consequences and implications of the theory presented in Part III. That modest acknowledgement notwithstanding, I believe I have accomplished quite a good deal.

In the first place, I hope I have at least indicated the value of reframing the debate on political gerrymandering. Rather than simply observing the practice's concededly

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129. *See supra* p. 36.

130. *See supra* note 84 and accompanying text.

distasteful, self-serving nature and thereby concluding that it must be antagonistic to the public good, I have commenced my inquiry from the other side of the question. Returning to first principles, I inquire into the purpose of elections. Then, I attempt to disassemble the electoral black box to understand its internal mechanics and to explain how it serves the previously articulated purpose. As part of this effort, I incorporate a number of standard theories from political science and economics. Only after developing a consistent and plausible theory of electoral accountability do I reach the question that others have been so quick to answer: how might political gerrymandering interfere with the logic of elections? The conclusion, perhaps surprisingly, is that political gerrymandering should have little if any effect on the ability of voters to influence the ideological tenor of their representatives.

Among other things, the theory outlined in the Paper yields several testable hypotheses. I present a few relatively simple statistics to help support my predictions. In one respect, the data analysis is admittedly inconclusive. I am unable to reject the argument that partisan gerrymandering causes systematic distortions in the electoral system. However, the trace evidence that prevents such a rejection is hardly compelling proof that the feared harms have been realized. In fact, the divergence between median representatives and their median constituents is quite tiny—less than the gap between co-partisan lawmakers who, for all practical purposes, we might have thought indistinguishable. Moreover, the correlation between this divergence and partisan gerrymandering is quite tenuous. It certainly leaves open the possibility that the correlation would simply evaporate in the face of a more sophisticated analysis than I have mounted.

With respect to bipartisan gerrymandering, however, I believe the data show quite persuasively that it has no effect on the ability of constituents to influence their elected officials. This, really, should come as no surprise. After all, bipartisan gerrymandering only works if its practitioners pay close attention to the preferences of voters and match those voters with candidates of their liking. The bipartisan mapmaker ignores the electoral will at his or her peril. The alternative argument against sweetheart deals is that they encourage extremism. This argument, however, is in a funny tension with the very rationale for districts in the first place. It also appears to countenance partisan gerrymandering as a cure of sorts: sweeping out the bipartisan cobwebs means cracking safe seats and dispersing the fragments in “competitive” districts. But more importantly, the evidence I have collected lends no support whatsoever to this concern.

All the same, I am open to correction or rebuttal and am willing to entertain additions to or subtractions from the theory and the empirical analysis. Along these lines, allow me to end by sowing a few ideas for future research. I believe there are three significant ways in which my analysis could be improved. First, using senators’ ideologies as a proxy for the preferences of their constituents—while defensible—is perhaps unsatisfactory. There are a number of reasons having nothing to do with gerrymandering that might cause a senator to diverge from the median voter. There are potential reasons why senators might, in fact, diverge from their House colleagues. Think, for example, of their staggered terms, their six-year terms of office, the slightly patrician ethos of the body. A better measure of citizen ideology—constructed, perhaps, from a mix of demographic and survey response data—would facilitate the analysis.

Second, estimating partisan gerrymandering is a tricky affair. My measure of  $\gamma_{i,t}$ , while plausible, is well short of state of the art. The partisan symmetry approach suggested by Gelman and King<sup>131</sup> is certainly superior. Their methodology would require fairly rich data for each state for each election in the sample. But the reward would likely be worth the effort.

Third and finally, the simple statistics I have relied on—means and correlation coefficients—are capable of producing powerful insights. But in the current case, more sophisticated methods are certainly warranted. Correlations, after all, capture only linear relationships; they do not indicate causality; and they may mask the effects of unexamined variables. Where elections are concerned, it seems there are *always* unexamined variables. Once again, the data are the limitation. At the least, however, we might expect more compelling results from a regression analysis that includes, in addition to a more discerning measure of  $\gamma_{i,t}$ , measures of incumbency, campaign expenditures, voter turnout, voter demographics, years elapsed since the last redistricting, the presence of other high profile races (governor, president, etc.), and the like.

It is a significant agenda, but one that I find inherently interesting. I believe the theory is sufficiently plausible and the data sufficiently tantalizing to make such efforts worth the while. In addition, I anticipate that such efforts would further vindicate the underlying arguments of this Paper. Of course, it may be that more powerful analyses would have the opposite effect. Even this result would be welcome if it leads to refinements of the theory or produces altogether new ones yet unimagined. In any event, we cannot know the answer until we accept the challenge. But that is for another day.

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131. See *supra* note 115.