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MAKING OUR CONGRESSIONAL ELECTIONS MORE COMPETITIVE; A PROPOSAL FOR A LIMITED NUMBER OF STATEWIDE AT-LARGE ELECTIONS IN OUR MORE POPULOUS STATES

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INTRODUCTION

Seriously contested election campaigns "educate voters"[1] and provide "evaluative accountability that legitimates the chosen representatives."[2] Unfortunately, competitive elections for the House of Representatives reached an all time low in 2002 and 2004.[3] While the statistical support for both the need and appropriateness of the proposal advanced in this article for a limited number of statewide at large elections in our more populous states was based primarily on the elections of 2002 and 2004, a preliminary analysis of the 2006 election returns shows how markedly uncompetitive most House elections remain even in a year marked by extreme voter discontent. Eighty-six percent of the House races, for example, were still decided by more than ten percentage points. The problem remains particularly acute in our more populous states to which the proposal is addressed. In Missouri, Tennessee, Virginia and New Jersey, all with highly contested Senate races decided (except for New Jersey) by extremely narrow margins, only two of the combined forty-two House races were decided by a margin of ten points or less. In

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1. Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 685 (2002).

2. *Id.*

3. *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 182 (2003) (discussing the lack of competitiveness in House of Representative elections throughout the country). Speaking of the 2002 Congressional elections, Hirsch writes: "On average, the 435 victorious candidates won a higher percentage of the popular vote than in any House election in more than half a century." *Id.*

Missouri and Tennessee no race was actually decided by less than twenty points notwithstanding that the Senate races were decided by 2 and 2.7 points respectively. Moreover, the vast majority of the House races in our eight most populous states (the primary focus of the proposal) continued to be non-competitive. In California, for example, with fifty-three electoral districts, only five races were decided by twenty points or less. It is interesting also that Pennsylvania, which accounted for five of the fourteen changeover seats coming from the eight largest states, had a highly partisan gerrymander in 2001 in which incumbent protection was sacrificed to produce more Republican seats. Ironically, in sea change years, highly partisan gerrymanders might be one of our few routes to greater competitiveness.

Liberals and conservatives alike have decried the effect that the limited number of competitive districts has had on our politics. Thomas Mann, a noted scholar at the Brookings Institution, and Michael McConnell, a Professor of Law at Harvard frequently mentioned as a possible Bush nominee for the Supreme Court, both assess the current situation in strikingly similar terms.

Professor McConnell has written that currently:

> [I]ncumbents are rendered effectively secure, which enables them to legislate without real political accountability — and especially without fear that members of the other party will be able to unseat them. Indeed, with politically homogeneous districts, incumbents are more likely to face challenges from within their party, which tend to be from the ideological extremes. This creates an incentive against moderation in politics and is one reason why the House of Representatives, which is heavily gerrymandered, is more politically polarized than the Senate.[4]

Dr. Mann recently wrote:

> The legitimacy of the American electoral system requires some level of adherence to the principles of fairness, responsiveness and accountability. Recent elections to the U.S. House of Representatives threaten those principles. Congressional contests suffer from an unusually high degree of incumbent safety, a precipitous decline in competitiveness, growing ideological polarization, and a fierce struggle between the major parties to manipulate the rules of the game to achieve, maintain, or enlarge majority control of the chamber.[5]

Studies seem to confirm a connection between competitive elections and greater moderation: "there is evidence at the

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4. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. L. & PUB. POL'Y 103, 113 (2000).

5. Thomas E. Mann, *Redistricting Reform: What is Desirable? Possible?*, *in* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 92 (Thomas E. Mann and Bruce E. Cain eds., 2005) [hereinafter PARTY LINES].

individual district level that more competitive seats lead to more moderate members and that 'cross-pressured' members are more likely to have more centrist voting scores."[6]

To encourage more competitive House elections, this article proposes that Congress utilize its Article I, Section 4 power[7] to require that states with eight to fourteen representatives elect one representative at-large through a statewide vote, those with fifteen to twenty-one representatives elect two statewide, and States having twenty-two or more representatives elect three statewide. I also propose that states having less than eight representatives be given the option, but not required, to have one statewide elected representative. If these requirements had been in effect for the post 2000 census redistricting, then thirty-three at-large races would have occurred in a total of twenty-one states and an equal number of congressional districts in those states would have been eliminated.[8]

The Supreme Court does not view lack of competition as a constitutional problem, and in fact has looked favorably on redistricting for the purpose of protecting Congressional incumbents.[9] While the Court has recognized that excessive partisan gerrymandering can theoretically be a constitutional violation,[10] no standard has been agreed upon by the Court, and in a recent case four of the Justices declared that, after almost two decades of trying, it was time to give up the effort and treat partisan gerrymandering as non-justiciable.[11]

It seems clear at this point that constitutional challenges to either partisan gerrymanders or incumbent protection gerrymanders will not serve to expand competitiveness for Congressional elections. For reasons discussed in more detail

6. Bruce E. Cain, Karin McDonald, & Michael McDonald, *From Equality to Fairness: The Path of Political Reform since* Baker v. Carr, *in* PARTY LINES, *supra* note 5, at 21.

7. Paragraph one reads as follows: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators." U.S. CONST. art I, §4.

8. One at-large election would have occurred in Arizona, Georgia, Indiana, Maryland, Massachusetts, Missouri, Minnesota, New Jersey, North Carolina, Tennessee, Virginia, Washington, and Wisconsin; two at-large elections in Illinois, Michigan, Ohio, and Pennsylvania; and three at-large elections in Florida, California, New York and Texas.

9. *See* Gaffney v. Cummings 412 U.S. 735, 753 (1973) (noting that political districts are unavoidably drawn to benefit one political party or another); White v. Weiser 412 U.S. 783, 791-792 (1973) (decided on the same day as Gaffney stating that the court does not disparage the interest in drawing district lines to protect incumbent).

10. Davis v. Bandemer 478 U.S. 109 (1986).

11. Vieth v. Jubelirer 541 U.S. 267 (2004).

below, neither bi-partisan nor non-partisan independent commissions, nor the adoption of so called neutral criteria are likely to result in a major shift to more competitive House elections. The solution, if there is to be one, needs to be national in scope, fair, and direct.

The proposal for statewide at-large elections is premised on the belief that statewide races have the potential to be much more competitive than district races since: (a) many states are fairly evenly divided along partisan lines; (b) ticket splitting and the greater media attention on statewide races create more fluid dynamics that can result in more competitive elections even when one party enjoys a substantial edge in registered voters; (c) certain advantages of incumbency are less significant in a statewide race; and (d) the moderate and independent voter is likely to have a greater impact in such races. As this article will show, this premise is supported by a variety of historical data.

Enhancing competitiveness through the introduction of a limited number of statewide races has a number of advantages. First, it will increase the number of competitive contests without radically altering the basic winner take all single district system. While this might seem a weakness to advocates of more far reaching change, such as the introduction of proportional voting,[12] it does not require a wholesale shift in our political thinking. Indeed, as discussed below, the United States had statewide at-large elections for the House of Representatives as late as the 1960's.

Second, the proposal is simple and straightforward, raising no difficult questions of legal interpretation and imposing no significant new administrative burdens on the States. Third, its limited scope preserves the federal system of regulation set out in Article I, Section 4, and would not prevent other reform proposals for the essentially intact district system from going forward at either the state or federal level. Fourth, the creation of statewide contested elections means that the voice of the independent voter, whose influence is almost completely negated under the current districting system, will be heard. Fifth, the proposal will provide a mechanism for party accountability in House elections that the current system does not provide. Finally, the creation of a limited number of at-large representatives may well have important incidental benefits. For example, the creation of a limited number of statewide elected representatives could result in a larger pool for the emergence of national leadership.

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12. For an interesting discussion of alternatives to the current single district winner take all system, see Richard L. Engstrom, *Missing the Target: The Supreme Court, "One Person, One Vote," and Partisan Gerrymandering, in* REDISTRICTING IN THE NEW MILLENNIUM 313-340 (Peter F. Galderisi ed., 2005).

While bills have been introduced in Congress in the last twenty years aimed at reforming the redistricting process,[13] and while a number of model initiatives have been proposed to address, in part, the issue at a state level,[14] no serious effort has been made by the congressional leadership of either party to pass these bills. In 2005, however, Representative John Tanner, Democrat from Tennessee, introduced a comprehensive reform proposal that has attracted two Republican co-sponsors, Phil Gingrey of Georgia and Zach Wamp of Tennessee.[15] On March 1, 2006 Senator Tim Johnson, Democrat from South Dakota, introduced an identical bill in the Senate.[16] The bills are currently in the House and Senate Judiciary Committees respectively. Whether these bills will result in a serious consideration of this issue remains to be seen, but given the growing public interest in this subject, some form of federal legislation seems a reasonable possibility.

In Part I, this article briefly explains how we arrived at our current situation and why it is unlikely to change without congressional intervention. Part II presents historical evidence to support the premise that statewide races will increase the number of competitive elections. Part III proposes a numerical goal for competitive elections, then suggests a way of establishing a "competitiveness" rating for evaluating state election results and applies that measurement to the 2002 congressional election results for the states covered by the proposal. By assuming that the statewide results in 2002 would have mirrored those of statewide at-large races had the proposal been in effect in 2002, the increase in the number of competitive districts in 2002 that would have occurred under the proposal is measured. Part IV discusses in more detail the advantages of the proposal. Part V discusses potential drawbacks to the proposal and also discusses possible alternatives to and variations on the proposal.

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13. *See* H.R. 1711, 101st Cong. (1st Sess. 1989) (introduced in April 1989 by Mr. Sensenbrenner "to provide for an equitable procedure for establishing congressional districts"); *see also* S. 2595, 101st Cong. (2d Sess. 1990) (introduced in May 1990 by Mr. McConnell and including a proposed Section 205 to limit gerrymandering); H.R. 1173, 106th Cong. (1st Sess. 1999) (seeking "to provide that States may use redistricting systems for Congressional districts other than single member districts").

14. *See, e.g.,* THE REFORM INSTITUTE, BEYOND PARTY LINES: PRINCIPLES FOR REDISTRICTING REFORM (2005), *available at* www.reforminstitute. org/resources/Report7.pdf; Fairvote.org, Model State Redistricting Reform Criteria, http://www.fairvote.org/?page=1429.

15. H.R. 2642, 109th Cong. (1st Sess. 2005).

16. S. 2350, 109th Cong. (2d Sess. 2006).

I. HOW WE GOT HERE, AND WHY IT WON'T CHANGE ABSENT FEDERAL LEGISLATION

That we have arrived at a landscape almost totally devoid of competitive elections is primarily attributable to two factors. First, incumbent congressmen possess tremendous advantages over would-be challengers that only grow over time. These include the opportunity to perform constituent service, name recognition, greater ability to raise money, ability to craft an image with voters through communications paid for by the government through the franking privilege, easier access to media exposure, and the opportunity to bring home the bacon for the district in an institution where power and influence grow with seniority. While political scientists debate how many actual votes these advantages translate into,[17] there is no doubt that the amount is significant.

The second factor is the greatly enhanced ability of legislatures, and other interested observers and participants, through the use of powerful new computers and detailed databases, to manipulate district lines to assure desired election results. The current situation has been colorfully (and accurately) described this way:

> The professionalization of American politics generally is mirrored by the professionalization of redistricting. Gone are the political hacks who have worked the neighborhoods for years, replaced by massive computerized data sets containing ten years of precinct returns merged to census tracts and blocks. Now there are multitudes of redistricting consultants who work the computers, high-priced lawyers who advise on the myriad constitutional and legal constraints, moonlighting social scientists who run racial polarization tests and provide expert testimony should the plan end up in court, and in some places, community consultants who set up redistricting hearings and make sure that the right groups are invited to testify. Redistricting has opened up a multi-Million-dollar industry for all of these folks in a way that could not possibly have been anticipated by Chief Justice Warren and his colleagues on the Court in the mid-1960's.[18]

Even when competitive districts somehow bloom, their time in the sun can be a brief one. An example from the 2000 round of redistricting will suffice to illustrate how the current situation has evolved.

In 1998, Rush Holt, a Democrat, was initially elected in New Jersey's historically Republican 12th District with 50.1% of the

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17. For an interesting analysis of this subject, see Scott W. Desposato & John R. Petrocik, *Redistricting and Incumbency: The New Voter Effect, in* REDISTRICTING IN THE NEW MILLENNIUM, *supra* note 12, at 35-65.

18. Peter F. Galderisi & Bruce Cain, *Introduction: Redistricting Past, Present, and Future, in* REDISTRICTING IN THE NEW MILLENNIUM, *supra* note 12, at 5.

vote against 47.3%[19] for his Republican opponent, a one-term incumbent who had replaced long-time Republican Dick Zimmer.[20] In 2000, Zimmer tried to regain his seat but lost to Holt by 700 votes, one of the closest races in the country.[21]   For the redistricting following the 2000 census, the permanent bipartisan commission responsible for redistricting in New Jersey made clear that any bipartisan agreement among New Jersey's Congressional delegation would be presumed politically fair and given great weight.[22] A bipartisan agreement was reached; understandably, one of the key Democratic goals was to make Rush Holt's seat safer. As a result, some solidly Democratic areas (although not quite as many as requested) were added to Holt's district. In 2002, he was elected by a margin of more than 41,000 votes.[23]

While New Jersey's Commission system is not the norm, the fact is that whenever parties share power, incumbent protection becomes the common value that unites both sides. What is less expected is how partisan gerrymanders (resulting when one party has complete control of the redistricting process) also eliminate competitive districts. Theoretically, a maximally effective partisan gerrymander could require numerous competitive races. For example, in a state with fifty-one percent Democrats and forty-nine percent Republicans, the perfect gerrymander would produce an entire delegation of Democrats winning by two percent of the vote. In reality, most partisan gerrymanders work by providing overwhelming safety for the minority party in as few districts as

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19. All election results in this paragraph are calculated using the Statistics of the Congressional Election that have been compiled for the given year by the Clerk of the House of Representatives. *See, e.g.*, CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 5 (2002), http://clerk.house.gov/members/electionInfo/2002election. pdf.

20. Zimmer had given up his seat during an unsuccessful run for the United States Senate.

21. The closest race in the country in 2002, Colorado's Seventh District, also provides an example of how competitive districts disappear.   The Republican, Bob Beauprez, won that year by less than 150 votes. This highly competitive district was the creation of a court ordered plan promulgated in January 2002 after the legislature was unable to agree on a plan. In 2003, the newly elected Republican dominated legislature added heavily Republican areas of Arapahoe County to the 7th District and removed certain Democratic areas. In 2004, Representative Beauprez won by 29,000 votes. THE ALMANAC OF AMERICAN POLITICS, 2004 326-28 (Michael Barone et. al. eds., 2004).

22. Donald Scarinci & Nomi Lowy, *Congressional Redistricting in New Jersey,* 32 SETON HALL L. REV. 821, 829 (2003).

23. The New Jersey Commission's invitation to Congressional incumbents in effect to write their own redistricting plan also shows how, in a State where the difference in the total number of votes cast statewide for Democratic and Republican candidates for the House was less than 5 points, the closest actual race was won by a margin of 17 points and the average margin of victory, *excluding* the 3 most lopsided Democratic districts, was more than 31 points.

possible coupled with a smaller but still assured margin of safety for the in control party in all other districts.

The Texas mid-cycle redistricting of 2003, recently approved as a constitutional matter in *League of United Latin American Citizens v. Perry*[24] provides a good example of how partisan gerrymanders affect competitiveness. In 2002, a court approved redistricting plan in Texas resulted in eight races (out of thirty-two) being decided by a victory margin of less than twenty points with three being decided by ten points or less. As a result of the 2002 state legislative elections, the Republicans gained complete control of the state government and revised the redistricting plan with the sole view of increasing the number of Republican representatives. These limited revisions to the existing plan for partisan purposes had a marked impact on the competitiveness level, reducing the number of races decided by less than twenty points from eight to five and the number decided by less than ten points from three to one.

This situation is unlikely to change in the near future without federal legislation since the forces that produce it — the inherent advantages of incumbency and the incentive for gerrymandering (job security and a smooth career path) — will not disappear on their own. Moreover, the major efforts at reform at the state level — independent commissions, the adoption of neutral redistricting criteria, and the adoption of competitiveness as an explicit redistricting standard — will not necessarily lead to more competitive elections. Dr. Mann has written that "[d]esigning a commission that is neutral toward or that dampens the influence of both incumbents and parties is a challenge with which few states have successfully grappled."[25] He goes on to argue that "[p]arty control of a state delegation to the U.S. House carries few benefits, and minor shifts in the partisan composition of the New Jersey House delegation are unlikely to affect which party is in the majority in Washington. That encourages bipartisan collaboration in maintaining the status quo."[26] With mid-cycle gerrymandering now enjoying Supreme Court approval, there may be further erosion, if that's possible, in the number of competitive elections as gerrymandering becomes an even more effective and flexible tool for manipulating election results.

II. STATEWIDE AT-LARGE ELECTIONS INCREASE COMPETITIVENESS

Several strands of historical evidence strongly suggest that statewide at-large elections for Congress in the states covered by the proposal will be much more competitive than district elections.

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24. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006).
25. Mann, *supra* note 5, at 101.
26. *Id.* at 105.

The first strand involves a comparison of the margins of victory in statewide contests for governor and senator in 2002 (and 2004 where necessary to establish a statewide margin) with average victory margins in the district races for Congress in 2002. The second strand compares this same average margin of victory in District races for 2002 with the total vote each party received in the aggregate in that state in House elections that year. A third strand discusses the last statewide at-large congressional elections that occurred in 1962 and 1964. Finally, I point out certain data to show how much more mixed in general statewide election results are than the results of the heavily gerrymandered, incumbent protected districts that currently exist.

A. *District Races versus Statewide Races*

Table A of the Appendix compares the average margin of victory in 2002 Congressional races in each of the twenty-one states that would have had at-large elections in 2002 under the proposal with the margin of victory in statewide contests for Governor and Senator in 2002 (2004 if there were no state races in 2002).[27] It should be noted that districts in which the margin of victory was sixty points or better, including races in which there was no opposition from the other major party, were excluded from computing the average margin of victory for district races to avoid overstating those margins. The results are striking but not unexpected. In thirteen of the twenty-one states the average margin in district race(s) exceeded by at least twenty points the margin in the state race(s)and in another five states there was a difference of between ten and twenty points.

The results are even more revealing when states are analyzed individually. In Tennessee, only one district race out of nine was decided by less than thirty points; yet, the gubernatorial race was decided by three points and the senatorial race less than ten points. In Missouri, no congressional race was decided by less than twenty points and the average margin of victory was 36.32 points; meanwhile, the governor's race in 2002 was decided by three points. In Minnesota, the average margin of victory in the district races was 30.58 points while 7.91 points decided the gubernatorial race. Similar dramatic differences can be seen in the results of Georgia, Illinois, Maryland, New Jersey, North Carolina, Wisconsin, Michigan, Ohio, and California. Less dramatic but still significant differences were recorded in Florida, New York, Pennsylvania, and Texas.

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27. 2002 was used because it was the first election following the most recent round of redistricting and also because it was not a presidential election year; therefore, the closeness the presidential elections in 2000 and 2004 would not have influenced the results.

Even in highly one-sided states, statewide races hold out the prospect of greater competition. In Massachusetts, for example, no Republican was elected to Congress from the entire state in 2002, and the average margin of victory in the five of ten races in which there was any Republican opposition at all was twenty-four points. Yet, in 2002 the voters also elected a Republican governor by a margin of 4.3 percentage points.

We know how close the presidential election results were in both Florida and Ohio in 2000.[28] Yet, in 2002 no congressional race in Ohio was decided by less than seventeen points and the average margin of victory was 37.4 points. While Florida had three out of twenty-five races in 2002 decided by ten points or less, the average margin of victory was still 28.78 points and nineteen out of twenty-five races were decided by a margin of twenty points or greater. If Congress were to adopt the proposal discussed herein, there is no reason to believe that the dynamics of statewide races for the House would differ radically from those at work in gubernatorial and U.S. Senate races.

B. District Races versus Aggregate Partisan Vote.

Included as Table B of the Appendix is a chart comparing the average margin of victory in district races in each state shown in Table A with the aggregate vote received by each party's candidates for Congress statewide. Again, the results strikingly show how many states, which are closely divided in the aggregate, have resolved themselves into a series of partisan fiefdoms. The results are particularly notable for some of the larger states. In Michigan, for example, the average margin of victory in the Congressional races was 33.8 points while the difference in the aggregate vote statewide was 1.1 points. Similar differences occurred in Illinois, Ohio, California, New York, and Texas. Smaller states showing very significant differences included Maryland, New Jersey, Minnesota, Missouri, and Tennessee.

C. Results from the 1960's At-large Elections

Prior to the adoption of the one man, one vote rule, statewide at-large elections for the House of Representatives would occur, as a matter of course, when states gained House seats following a census and the Legislature was unable to agree on a redistricting plan.[29] Therefore, we have a body of evidence that allows us to

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28. President Bush won in Florida by 537 votes out of 5,825,043 votes cast; he won Ohio with 50.0% of the votes to 46.4 for Al Gore and 2.5% for the Green Party. Alice V. McGillivray, Richard M. Scammon & Rhodes Cook, AMERICA AT THE POLLS, 1960-2000, JOHN F. KENNEDY TO GEORGE W. BUSH, A HANDBOOK OF AMERICAN PRESIDENTIAL ELECTION STATISTICS (2001).

29. Gary Cox, *On the Systemic Consequences of Redistricting in the 1960's, in* REDISTRICTING IN THE NEW MILLENNIUM, *supra* note 12, at 17-19.

directly compare at-large results with District results in the same election year.

Five at-large congressional elections were held in 1962.[30] Four resulted from a gain, following the 1960 census, of one House seat each in Ohio, Michigan, Maryland, and Texas. The fifth at-large election was in Connecticut, which had been holding one at-large election since 1932 when Connecticut gained a sixth seat. The Connecticut experience is discussed below, but the experiences of Ohio and Michigan are particularly instructive as well.[31]

In Michigan, the 1962 at-large election was decided by a margin of 4.1 percentage points. That was the closest congressional race in Michigan that year and the average margin of victory in district races (again excluding races decided by more than sixty percentage points) was 22.58 points. There was no at-large election in Michigan in 1964, since a redistricting plan creating the additional district was effectuated prior to that date.

In Ohio, Republican Robert Taft Jr., a hallowed name in Ohio politics, won the at-large election in 1962 by a margin of twenty-one points. However, in 1964, a big year for the Democratic Party, a Democrat, Robert Sweeney, defeated the Republican Oliver Bolton by 4.4 points, a swing in one election from the Democrats to the Republicans of approximately twenty-five points.

This fluidity of statewide results from one election cycle to the next is one of the two keys to the likely increase in competitiveness that would result from statewide at-large elections. The other key is the absence in the first place of district lines drawn to benefit a particular party or incumbent.

The history of Connecticut's at-large election is also instructive. A total of twenty-one at-large elections were held in Connecticut between 1932 and 1962. During the eight elections occurring between 1932 and 1946, the at-large seat changed hands from one party to the other seven times. In only one election (1936) did the party holding the seat manage to keep it. After Antoni Sadlak gained the seat for the Republicans in 1946, he managed to hold on to the seat until he was beaten in the Democratic tide of 1958. But what is interesting is the relatively little advantage he gained from incumbency, as evidenced by the fact that though he won in 1946 by almost fifteen points, he won in

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30. All calculations in this Section are based on election results from 2 CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS (Jon L. Moore et. al. eds., 4th ed. 2001).

31. Texas was a one party, Democratic state in 1962. Nevertheless, even its results are illustrative: in 1962 the at-large Democrat won by 12.2 percentage points; that year only three of the District races out of twenty-two were as close. In Maryland, the at-large race was decided by 11.4 points in 2002 which was closer than all but two of the seven Maryland District races that year.

1948 by less than half a point, in 1950 by four-fifths of a point, and in 1954 by two points.[32]

D. Lack of Partisan Uniformity in Statewide Results.

District elections are predictable for a number of reasons and skillful gerrymandering to achieve a desired result is an important but not the only reason. Districts that are homogeneous, either because their voters share common economic or other interests or because they are majority-minority districts, will often be predictable in their voting patterns as well.

State results are much less predictable, certainly along party lines, because while districts are often characterized by homogeneity, states, particularly the more populous states, are not. For example, as of October 2006, in only seventeen out of fifty states did one party hold both U.S. Senate seats and also the governorship.[33] In thirteen states, the Senate seats were divided between the parties.[34] In eleven states the party holding a two–to–one edge for the two Senate seats and the governorship lost the presidential vote in 2004.[35] In 2000, Al Gore carried Michigan, Illinois, New York, Pennsylvania, and New Jersey. That year, each of those states had a Republican governor.[36]

To summarize, the results strongly support the position that the introduction of a relatively limited number of statewide at-large elections for the House of Representatives could significantly increase the number of competitive elections for the House. Undoubtedly, anomalous results affect the individual tabulations in one year for any state. But viewed in the aggregate, these results confirm what is perhaps intuitively plain in any event — namely, that elections are bound to result in more fluid and competitive electoral contests when self-interested legislators cannot manipulate the voting profiles of their constituents.

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32. It should be noted that while these were remarkably close races for an incumbent, Connecticut congressional district races in general were very competitive during this period.

33. The seventeen states are: Alabama, Alaska, Delaware, Georgia, Idaho, Illinois, Kentucky, Michigan, Mississippi, Missouri, New Jersey, South Carolina, Texas, Utah, Washington, West Virginia and Wisconsin. *See generally*, THE ALMANAC OF AMERICAN POLITICS, 2006 (Michael Barone et. al. eds., 2006).

34. The thirteen states are: Colorado, Florida, Indiana, Iowa, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oregon, Rhode Island and South Dakota. *See generally id.*

35. The eleven states are: Arkansas, Iowa, Louisiana, Maine, Minnesota, Montana, New Hampshire, New Mexico, North Dakota, Pennsylvania and Rhode Island. *See generally id.*

36. The Governors were George Ryan (Ill.), Argeo Cellucci (Mass.), Christine Whitman (N.J.), George Pataki (N.Y.), and Tom Ridge (Pa.). 33 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 15 (2001).

III. THE PROPOSAL, AND HOW IT WOULD HAVE WORKED IN 2002

If statewide at-large elections will produce a more competitive landscape, the next question is how competitive a landscape do we want. I suggest, as a standard that either (i) one out of every five races should be very competitive, defining a *very* competitive race as one where the percentage point margin between the candidates of the two major parties is less than ten points, or (ii) two out of every five races should be competitive, defining a competitive race as one where the margin is less than twenty points. This level of competitiveness would do much to assure that each election cycle would constitute a referendum on the performance of the House of Representatives, particularly, but not exclusively, the performance of the majority party.

How do the states affected by the proposal stack up against this standard? To make this determination, I have developed a very simple method of rating and comparing state election results for competitiveness. For each Congressional race in 2002 decided by less than ten percentage points, states were awarded two points, for each race decided by more than ten but less than twenty percentage points, one point was awarded. The total number of points earned was divided by the maximum number of points a state could earn under the system (two times the number of districts in the state) to calculate the State's competitiveness rating. The results are set forth in Table C in the Appendix.

A state meeting the competitiveness standard would have a rating of 0.200, but, as can be seen from the table, sixteen of the twenty-one states failed to meet this very lenient standard. There are a total of 338 congressional districts in the twenty-one states covered by the Proposal. If each state just met the standard, then the states would have a combined score of 135.2 (calculated by multiplying 338 x 2 and multiplying the result, 676, by 0.200). In actuality, the states achieved a combined competitiveness score of seventy-seven for the 2002 elections.

The largest states generally had the worst competitiveness rating. California was almost in a class by itself having only one race out of fifty-three under ten points and only two additional races below twenty points. Or consider that four states (Missouri, Massachusetts, Virginia, and Wisconsin) had no races decided by less than twenty points, and two more (Michigan and Ohio) had no races decided by less than ten points.

To measure the impact of the proposal on the competitiveness rating of each state had it been in effect in 2002, I assumed that the congressional statewide races would have mirrored the statewide party vote in U.S. Senate and gubernatorial races for that year (or for 2004 if there were no statewide elections in 2002). If there were two statewide elections, the results were averaged. Also, it was assumed the state would have the same number of

elections decided by less than ten and twenty points as it had without the proposal being in effect, except that for each of the five states with a competitiveness rating of at least 0.200 for the actual 2002 results, one point was subtracted from its total to compute the revised competitiveness rating. This subtraction is necessary because states with an already high competitive rating are more likely to lose a competitive district than ones with a lower rating.

As Table C shows, the introduction of the thirty-three at-large elections would have resulted in an increase in very competitive elections from twenty-five to forty-two and competitive elections from twenty-seven, to thirty-five. To put the revised rating in raw score terms, the proposal would have increased the combined score of the twenty-one states from 77 to 119, still short of the goal but substantially better.

IV. ADVANTAGES OF THE PROPOSAL

The proposal should be adopted because it is the most direct, but least federally intrusive way of creating more competitive congressional elections. The key advantages of the proposal are discussed below.

A. *Accommodating Increased Competition with Incumbent Protection*

Many commentators argue that incumbent protection is positive because it advances the goal of a stable two party system, assures continuity in policy making, provides a cadre of experienced representatives, and encourages able individuals to continue in public office.[37] Others disagree.[38] A major virtue of the proposal is that it does not require the resolution of this long running debate since it will likely increase the number of competitive congressional elections without significantly altering the current district system. At the same time, as discussed below, it would not preclude other reform proposals from going forward to deal with the vast majority of elections that would still continue at the district level.

Given that the current congressional districting system is essentially preserved, all the positive aspects, which some commentators attribute to incumbent protection, would still be in place, subject, of course, to whatever additional refinements (independent commissions, neutral criteria) that individual states might apply to their system. But the price of incumbent protection

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37. *E.g.*, Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence of Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

38. *E.g.*, Issacharoff, *supra* note 1.

and partisan gerrymandering, in terms of non-competitive elections, would no longer be quite as high.

In one respect, the proposal may actually protect incumbents by enabling an out-of-power party to preserve key incumbents who are the intended victims of a partisan gerrymander by the party in control. One of the key strategies for effectuating severe partisan gerrymanders is to pit incumbents of the victim party against each other in the same district under the new redistricting plan. At-large elections would afford incumbents pitted against each other the opportunity for both to be returned to Congress since one could choose to run in an at-large election. In fact, the opportunity to run statewide might provide the more ambitious incumbent an opportunity to gain wider recognition, a helpful stepping-stone to higher office. Thus, at-large elections might mitigate one of the more perverse effects of severe partisan gerrymanders and actually protect worthy incumbents. "Worthy" is a fair choice of words here given that the intended incumbent victim would only be returned if he or she could win a statewide contest.

The proposal would even afford a final chance for incumbents gerrymandered out of existence by their own party. Consider for a moment the case of Ben Gilman, a moderate, well respected fifteen term Republican Congressman from New York. When New York lost two seats as a result of the reallocation of seats among the states following the 2000 census, Mr. Gilman was the victim of a gerrymander engineered in part by his own party whose leaders apparently were afraid his district would go Democratic once he retired.[39] "In effect, Gilman's district was carved up among his neighbors."[40] With a limited at-large system, Mr. Gilman at least might have had a shot at continuing his congressional service.

B. Legal and Straightforward

There is no question that statewide at-large elections pass constitutional muster. Congressional authority to enact electoral regulations is well established.[41] If Congress has the constitutional authority to require districts to adopt a winner-take-all, single district system, it certainly has the authority to modestly modify the system to address one of its most pernicious effects.[42] Moreover, the system will not add any additional

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39. *See* THE ALMANAC OF AMERICAN POLITICS, 2004, *supra* note 22, at 1155-56.

40. *Id.* at 1156.

41. *See Ex Parte* Siebold 100 U.S. 717 (1879) (confirming Congressional authority to enact criminal penalties for federal election violations).

42. Professor Paul McGreal argues that the constitutionality of the federal statute requiring single member districts has been called into question by recent Supreme Court precedents returning certain powers to state governments. *See generally* Paul E. McGreal, *Unconstitutional Politics*, 76

administrative burdens. The proposal simply requires the elimination of a specified number of districts from the redistricting plan. In any given state, the resulting redistricting plan may be made more or less complicated by the reduced number of districts but it certainly does not raise, with one possible exception, any issues that are qualitatively different than those that would occur with any redistricting. The one exception relates to the Voting Rights Act of 1965 as amended; specifically, the possible argument that at-large districts might constitute minority influence districts under certain circumstances. This argument is not persuasive but it does add a possible new dimension to Section 2 (vote dilution) and Section 5 (retrogression) cases under the Voting Rights Act.

C. A National Solution that Preserves the Federal System intended by the Framers

The creation of a limited number of at-large districts does not preclude, and may even encourage, reform of the congressional single district system. Since the districting system would still be in place, proposals at the state level aimed at decreasing partisan gerrymandering, increasing the transparency of the process, and continuing the reduction in excessive incumbent protection lose none of their credibility or importance.

The federal statute proposed in this article is an attempt to address a serious national problem — namely, the unacceptably low number of competitive congressional elections in the very body of our national government that was supposed to be, through frequent elections, most responsive to the changing views of the people.[43] This is a problem that transcends the capacity of individual states and their ability to deal effectively with it, and in some sense, it is not their problem.

In the Federalist Papers, Madison showed that the Framers viewed the House and the Senate in fundamentally different ways,

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NOTRE DAME L. REV. 519 (2001). While this is not the place to comment extensively on Professor McGreal's article, I will note that I do not share his view, given that the manner of electing the nation's representatives seems to be very much a matter of national import for which the Constitution clearly gives the Congress supervisory power. The fact that the basic statutory scheme has been in effect since 1842 argues strongly against the likelihood of its being overturned now on the grounds suggested. Hamilton's *Federalist No. 59*, also undercuts, in my view, Professor McGreal's position: "Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." THE FEDERALIST NO. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Jamal Greene, *Judging Partisan Gerrymanders under the Elections Clause*, 114 YALE L. J. 1021, 1030-34 (2005) (providing a valuable account of the adoption of the elections clause at the Constitutional Convention of 1787 and the subsequent debate over its merits at the state ratifying conventions).

43. *See* THE FEDERALIST NO. 57 (James Madison).

which has real implications for our subject. In Federalist No. 39, Madison writes:

> The House of Representatives will derive its powers from the people of America; and the People will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is *national*, not *federal*. The Senate, on the other hand will derive its powers from the States, as political and coequal Societies . . . .[44]

Congress was given broad residual power to regulate the time, place, and manner of holding elections for the House precisely because the Framers feared manipulative devices by the states that could undo the structural framework they were creating.[45] This is precisely what has happened over a period of decades. While it cries out for correction, it can be corrected in a way that does not do great violence to the other clear intent of the Framers; namely, that for the most part the time, place, and manner of holding elections be left to the states.

D. Fairness to the Independent Voter

All voters are victims when election outcomes are fixed in advance because elections are intended to provide the accountability that fixed outcomes are intended to avert. Independent voters arguably suffer a particular affront since they are more prone than other voters to look beyond party identification.[46] Committed Democratic and Republican voters, even when a minority in a lopsided district, achieve what is sometimes referred to as "virtual representation"[47] since even the most partisan gerrymanders will result in some safe seats for their party. Not so for the independent voter whose vote is simply not needed in the vast majority of congressional districts today, which have been drawn to be safe for one of the two major parties.

As described above, since the creation of at-large districts will almost assuredly result in more competitive elections, independent voters will be courted and may often provide the crucial margin of victory. In a 2004 National Election Studies survey of partisan identification, forty percent of those surveyed classified themselves

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44. THE FEDERALIST NO. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original).

45. *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 791-92 (1995) (discussing the founders' intent with regard to the federal system).

46. Elsewhere, I have argued, among other things, that a state-redistricting plan containing virtually no competitive contests violates the equal protection rights of independent voters. Walter Frank, *Help Wanted: the Constitutional Case Against Gerrymandering to Protect Congressional Incumbents*, 32 OHIO N.U. L. REV. 227, 241-46 (2006).

47. Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1209 (1996).

as independent.[48]   Of this group, when asked whether they
considered themselves closer to the Democratic or Republican
parties, approximately twenty-five percent did not think of
themselves as closer to either party, roughly thirty-two percent
thought themselves closer to the Republicans and forty-three
percent closer to the Democrats.[49]

It would seem a fair assumption that voters who initially
classified themselves as independent would be willing to vote for
candidates of either party even if they viewed themselves as closer
to one of the parties. Thus, statewide at-large elections will give a
meaningful voice to the roughly 40% of the voting population who
have been effectively exiled from the current system of electing
congressional representatives.

E. Strengthening the Two Party System

There are two strong reasons for believing that at-large state
congressional races could largely become referenda on the
performance of the party in power in Congress. First, non-
partisan factors such as a personal following based on constituent
service and the ability to bring home the bacon for the district
would be less important at the statewide level with its much
greater population, particularly given that all voters would still be
represented by a district congressman with district offices to whom
they could turn for assistance.

Second, at-large representatives would occupy an interesting
niche in the governmental structure. They would certainly not, as
already noted, be as service oriented as district elected
representatives but neither would they be expected to have the
institutional influence of United States Senators since they would
still be 1 of 435, not 1 of 100. Without the incumbent advantages
arising from constituent service and success in representing
district interests, at-large representatives would likely be defined
primarily by their positions on public issues. They would in turn
have a particularly strong interest in broadening their party's
appeal and assuring that the party took positions consistent with
the views of the state's voters. Thus, at-large elections would very
likely turn on which party best represented the thinking of a
majority of the state's voters.

At-large districts would contribute to a stable two party
system for an additional reason. Political commentators all along
the spectrum have commented on the tendency of the current,
highly-gerrymandered system to exaggerate the influence of the

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48. *See* HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON
AMERICAN POLITICS 2005-2006 116 (providing statistics calculated from
National Election Studies data collected by the Center for Political Studies at
the University of Michigan, Ann Arbor).
   49. *Id.*

more ideologically fervent members of the two parties.[50]   This influence is the direct result of the fact that when incumbents are virtually guaranteed re-election, their main vulnerability lies, as noted by Professor McConnell,[51] in the nominating process in which usually only the most fervent of partisans participate. Thus, the current system produces candidates with a built in bias, based on self-interest, to cater to their party's ideological partisans.   At-large districts would likely prove an effective counterweight to this phenomenon since statewide candidates, particularly in states fairly evenly divided along partisan lines, would want to appeal to as many moderate and independent voters as possible.

A number of Supreme Court Justices have referred to the broad, non-ideological nature of our major parties.[52]   That description seems to be less and less apt in today's politics. Whether that is good or bad, the fact remains that as parties become more ideological, they will inevitably leave gaps that can only be filled by the evolution of additional political parties.   In fact, Thomas Friedman is confident that if the Democratic and Republican parties cannot work together on the energy issue, "there is going to be a third party in the 2008 election. It's going to be called the Geo-Green Party and it's going to win a lot of centrist votes."[53] A limited, at-large system that restores some bias toward moderation and breadth by checking the bias favoring the ideological wings of the two parties, would, in the long run, help preserve a stable two party system.

F. More Effective National Leadership

Starting with Theodore Roosevelt, seventeen different individuals have been elected President.   Of these, all but four (Taft, Hoover, Eisenhower, and George H.W. Bush) were elected to statewide office as either a governor or U.S. Senator before assuming the presidency. At present, therefore, the most likely pool of presidential candidates for both parties will generally constitute a total of 150 persons (50 governors and 100 U.S. Senators) currently serving in those positions plus any former occupants of those positions being seriously mentioned.   By creating an additional pool of statewide elected national

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50. *E.g.*, Thomas L. Friedman, *Thou Shall Not Destroy the Center*, N.Y. TIMES, Nov. 11, 2005, at A 23; Lexington, *Slumbering On*, THE ECONOMIST, Apr. 9, 2005, at 28.

51. McConnell, *supra* note 4, at 113.

52. *E.g.*, Rosario v. Rockefeller, 410 U.S. 752, 769 (1973) (Powell, J., dissenting); Colorado Republican Campaign Committee v. Federal Election Commission, 518 U.S. 604, 647 (1996) (Thomas, J., dissenting).

53. Thomas L. Friedman, *Gas Pump Geopolitics*, N.Y. TIMES, Apr. 28, 2006, at A23.

officeholders, the proposal would at a minimum provide an additional avenue for wider recognition that could expand the list of serious presidential prospects.

V. POSSIBLE DRAWBACKS AND ALTERNATIVES

A. *Proposal Disadvantages*

Repairing a political problem is not like fixing a car. Changing the brake shoes does not mean that you suddenly have to start worrying about the engine. Not so with democratic institutions, which are so deeply interwoven that any institutional change is often accompanied by other unsought changes.

In the case of the proposal advanced in this article, three unsought but inevitable impacts come to mind. First, the creation of statewide at-large elections will reduce the number of congressional districts in the affected states and thus increase the number of each representative's constituents in the remaining districts. The very limited number of at-large elections (thirty-three, leaving 402 districts) created under the proposal, however, does largely mitigate this concern. In the states for which one at-large election is proposed, those with eight to fourteen representatives, the impact will obviously be greatest in the states with only eight representatives, since only seven districts would remain to absorb the lost district's population, whereas in a state with fourteen representatives thirteen districts would absorb the lost district's population. Under the Proposal, districts would be somewhere between 7.7% and 14.24% larger than they otherwise would be but for the introduction of the at-large district.[54] The same ratios would hold for the states required to have two or three at-large elections under the proposal, although for states with twenty-eight or more representatives the percentage increase in district size would be even less than 7.7%, owing to the greater number of districts absorbing the loss of the three districts. These levels of increase appear to be a price worth paying for a proposal that would help restore competitiveness, strengthen the two-party system, encourage the development of national leaders and give many more independents a meaningful vote in House elections.

The second likely negative is incidental and difficult to quantify, but deserves mention: the increase in cost of at-large statewide races in comparison to district races. One might argue

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54. Consider, for example, a state of eight districts with 100 people in total, or 12.5 people per district. Spreading those 100 people over seven districts would increase each district's size to 14.2 people, an increase of 14.24%. Assuming a fourteen district state with 12.5 persons per district reduced to thirteen districts would mean an increase in district size to 13.46 persons per district, an increase of 7.68%.

that the amount of money that can be raised in any congressional election cycle is finite and that the introduction of at-large elections will likely have a negligible effect on the total cost of an election. It might also be possible to develop special public funding provisions for at-large elections that could serve as a model for other offices. In any event, the financial impact is too conjectural and incidental to affect the merits of the proposal.

Finally, the proposal could be seen as unfair to the more populous states since it arguably weakens their opportunities for incumbent protection. In an institution where power and influence accompany seniority, this is potentially a serious consideration. Based on the proposal's modest numbers, however, I would submit that this difficulty is primarily theoretical, but it is a potential issue for anyone who might advocate the creation of significantly more at-large elections for the populous states.

B. Possible Variations

Another possible route to the goal of more competitive elections would be for Congress to mandate that competitiveness be included as a criteria in drawing district lines or, even more directly, to require that a certain proportion of districts be drawn with a roughly equal percentage of registered Democrats and Republicans, subject to the requirements of one person, one vote and the Voting Rights Act of 1965.

A general mandate to include competitiveness is superficially appealing. But it is not difficult to imagine legal and political controversies arising as to whether a given districting plan gave sufficient weight to this requirement. Moreover, a criterion of competitiveness could still be manipulated when one party controls the redistricting process party since nothing would prevent the competitive districts from coming at the expense of the minority party's incumbents. Indeed, the requirement of competitive districts could force a partisan gerrymander to be more aggressive than it might otherwise have been by limiting the possibility of creating overwhelmingly safe districts for the minority party. Also, when one party controls the process, it is likely that even competitive districts will be shaped in subtle ways to give an advantage to the party controlling the gerrymander. Requiring that a particular proportion of districts be drawn with roughly equal Democrats and Republicans is a more definite way of mandating competitiveness and has the virtue of clarity but would still be subject to manipulation in the case of partisan gerrymandering.

Simply mandating competitiveness could also produce very one-sided delegations, particularly in states where either party enjoys a substantial advantage. If the competitive districts go in favor of the majority party, most of the other districts in the state

would likely go for the majority party as well, given that many minority party votes would have been wasted in the lost competitive races.

One possible variation of the proposal would be to provide the states with an option to introduce a limited number of statewide at-large districts, but not to mandate them. However, the success of the proposal would then depend on the extent to which it is adopted by the states and, therefore, defeat its main purpose — to assure an increase in competitive elections. Moreover, piecemeal adoption by some states, but not others could produce overall unfairness to one of the two major parties depending on who controls what legislatures and governorships. Also, if mid-cycle redistricting becomes more prevalent, at-large districts could appear and disappear to satisfy the needs of the party in power.

C. The Tanner Bill

The Tanner Bill[55] would require each state to appoint an Independent Redistricting Commission responsible for developing a redistricting plan. The Commission would consist of an equal number of members appointed by the Democratic and Republican parties plus a chairperson to be agreed upon by the members appointed by the two parties. The chair would be the deciding vote if the commission members from the two parties could not agree on a redistricting plan. The plan developed by the Commission would be submitted to the legislature for approval or rejection but would not be subject to amendment.

In addition to adhering to the one person, one vote standard and the applicable requirements of the Voting Rights Act of 1965, the Bill designates continuity of political subdivisions, continuity of neighborhoods, compactness and contiguity as criteria for the plan. The Bill specifically forbids the Commission from taking into account the voting history or political party affiliation of the district or the residence of incumbents,[56] except that the Bill provides that voting history can be taken into account "to the extent necessary to comply with any State law which requires the establishment of competitive Congressional districts."[57] Provision is made for the adoption of a plan by the judiciary if the

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55. *See supra* notes 15-16 and accompanying text.

56. The clause in the bill prohibiting an independent commission from considering the residence of incumbent members in drawing a redistricting plan could, if taken seriously, inaugurate a minor electoral revolution. The intent of this provision is not entirely clear. It may have been intended simply to prohibit district plans aimed at pitting incumbents against each other; but such a provision would hardly be necessary given that the state legislature would no longer drawing district boundaries under the Tanner bill.

57. H.R. 2642, 109th Cong. (1st Sess. 2005).

Commission is never appointed or a plan is not timely adopted in accordance with the dates established by the Bill.

The Tanner Bill is a thoughtful attempt to limit partisan and incumbent gerrymandering. It is based on the premise that it is possible to create politically fair districts based upon purely neutral criteria. There are some who dispute this premise, arguing that it is impossible to produce truly neutral criteria.[58] But the Bill's exception for taking into account voting history for the purpose of creating competitive districts only comes into play if a state chooses to make competitiveness a criterion. Nothing in the Tanner Bill directly requires the states to make competitiveness a criterion. The Tanner Bill ultimately seeks to make districting a technical, non-partisan exercise. Whether, as a practical matter this is truly possible would, if the Bill were enacted, await the verdict of time.

One potential danger implicit in the Tanner Bill could actually be alleviated by the creation of a limited number of statewide at-large races. The Tanner Bill, for all its good intentions, has the potential of actually locking a state into a pattern in which the actual voting strength of the two parties in state is not fairly reflected by the redistricting plan. There is no reason why a facially neutral system based on geographical factors could not lock in a pattern in which one of the two parties consistently failed to achieve seats reflecting its voting strength statewide. A modest number of statewide at-large districts would act as a potential counterweight to this possibility, particularly in the case of a majority party which was not getting its fair share of seats, since presumably, as the majority party in the state, it would have the better chance of winning at-large seats.

In summary, the Tanner Bill is not a substitute for the proposal being advanced in this article since it does not directly attack the issue of competitiveness. Additionally, the at-large elections being proposed could actually mitigate one of the potential difficulties inherent in the reliance on neutral geographic criteria that is the foundation of the Tanner Bill.

CONCLUSION

The two houses of Congress are now elected in ways diametrically opposed to how they were chosen at the outset of the Republic. Then, the Senate was chosen by the state legislatures and the House of Representatives by the people. Today, the people

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58. Robert G. Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts, in* REPRESENTATION AND REDISTRICTING ISSUES 7-8 (Bernard Grofman et al. eds., 1982). *But see* Sally Dworak-Fisher, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & LAW 131, 144-147 (1996) (criticizing the view that it is impossible to produce truly neutral criteria).

elect the Senate and, for the most part, the state legislatures choose our representatives.

The noted philosopher, Isaiah Berlin, has written: "Where ends are agreed, the only questions left are those of means, and these are not political but technical."[59] The proposal contained in this article for a limited number of statewide at-large districts assumes agreement that competition is a good thing or at least that the level of non-competition that currently exists is a bad thing. I have proposed in this article a possible way to address this issue that is simple, direct, limited, and clearly authorized under the Constitution. Moreover, it is modest in the sense that it is consistent with our constitutional framework, presents no overarching federal mandate, and is unlikely to lead to legal questions that would bring the judiciary further into the redistricting process. It makes no pretense at being an intellectually satisfying solution, but it is fair, pragmatic, and, I believe, worthy of serious consideration.

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59. Isaiah Berlin, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND, AN ANTHOLOGY OF ESSAYS 191 (Henry Hardy & Roger Hausheer eds., 1998).

APPENDIX[60]

TABLE A

(Asterisks denote elections in 2004)

	STATE	AV. MARGIN IN CONG. RACES	MARGINS FOR GOV. AND SEN.
8 to 14 Representatives	Arizona	26.80	1.04 (Gov.)
	Georgia	38.90	5.13 (Gov.); 6.13 (Sen.)
	Indiana	23.30	*7.72 (Gov.); *24.42 (Sen.)
	Maryland	34.30	3.96 (Gov.)
	Massachusetts	32.00	4.30 (Gov.); Unopp. (Sen.)
	Minnesota	30.80	7.91 (Gov.)
	Missouri	36.32	*2.98 (Gov.)
	New Jersey	31.60	9.93 (Sen.)
	North Carolina	26.80	8.40 (Sen.)
	Tennessee	35.31	3.06 (Gov.); 9.30 (Sen.)
	Virginia	33.14	Unopp. (Sen.)
	Washington	25.97	*12.24 (Gov.)
	Wisconsin	35.04	*11.24 (Sen.)
15 to 21 Representatives	Illinois	33.04	7.10 (Gov.)
	Michigan	33.80	4.02 (Gov.)
	Ohio	37.14	19.5 (Sen.)
	Pennsylvania	21.20	9.03 (Gov.)
Over 21 Representatives	California	35.30	4.86 (Gov.)
	Florida	28.78	12.85 (Gov.)
	New York	37.80	15.90 (Gov.)
	Texas	31.04	17.85 (Gov.); 11.93 (Sen.)

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60. All election statistics for the House of Representatives are, unless otherwise noted, based on election results provided in CONGRESSIONAL DISTRICTS IN THE 2000S, A PORTRAIT OF AMERICA (CQ Press ed., 2005). This volume provided the percentage of each candidate's vote as a share of the total vote as well as the raw vote for the 2002 elections. Statewide results in Gubernatorial and Senatorial races for 2002 and 2004 were taken from THE ALMANAC OF AMERICAN POLITICS, 2006 (Michael Barone et. al. eds., 2006). While the Almanac of American Politics also contained the percentage of each candidate's vote for the 2002 House elections, they were not carried out to as many decimal places as Congressional Districts in the 2000s.

TABLE B

The Column "Av. Margin in Cong. Races" simply repeats the first column in Table A giving the average margin of victory in a state's congressional races. "% point diff. in aggregate vote" describes the percentage vote margin between the two parties when each party's total votes in all House races in the state are aggregated. In Georgia, for example, the Republicans received 57.46% of the aggregate vote of the two parties and the Democrats 42.64%, a difference of 14.92 points. The difference between the two percentages is shown in the column with the majority party being identified next to the percentage.

TABLE B

	STATE	AV. MARGIN IN CONG. RACES	% POINT DIFF. IN AGGREGATE VOTE
8 to 14 Representatives	Arizona	26.80	18.06 R
	Georgia	38.90	14.92 R
	Indiana	23.30	13.52 R
	Maryland	34.30	9.12 D
	Massachusetts	32.00	68.06 D
	Minnesota	30.80	3.20 D
	Missouri	36.32	8.62 R
	New Jersey	31.60	4.88 D
	North Carolina	26.80	10.92 R
	Tennessee	35.31	4.20 R
	Virginia	33.14	36.90 R
	Washington	25.97	7.62 D
	Wisconsin	35.04	13.54 R
15 to 21 Representatives	Illinois	33.04	2.44 D
	Michigan	33.80	1.10 D
	Ohio	37.14	14.28 R
	Pennsylvania	21.20	15.90 R
Over 21 Representatives	California	35.30	7.26 D
	Florida	28.78	16.86 R
	New York	37.80	7.62 D
	Texas	31.04	9.43 R

TABLE C

The first number in each parenthesis reflects the number of very competitive races (margin between the two major parties under ten points) in the 2002 election and the second number reflects the number of competitive races (margin over ten but under twenty points). The Competitiveness Rating is calculated by giving a state two points for each very competitive election and one point for each competitive election and then dividing the sum by a number equal to the number of districts in the state multiplied by two, the maximum number of points a district could earn.   The Revised Competitiveness Rating reflects the Competitiveness Rating the state would have earned had the Proposal been in effect for the 2002 elections. It is calculated by adding to the state's score the number of at-large elections which would have been competitive or very competitive assuming that the margins in the at-large elections would have mirrored results in the applicable statewide elections for governor and Senator noted in Table A.

Where there were two statewide elections, an . average statewide margin was calculated and applied. A state with an initial Competitiveness rating of 0.200 or better had one point automatically deducted from its score to reflect the higher probability that it might lose a competitive district under the proposal since each state under the proposal has fewer districts. The revised sum was then divided by the same divisor as used to determine the Competitiveness Rating since the number of total races had not changed.

TABLE C

	STATE	COMPETITIVENESS RATING	REVISED RATING
8 to 14 Representatives	Arizona	0.125 (1+0)	0.250 (2+0)
	Georgia	0.230 (2+2)	0.290 (3+(2-1))
	Indiana	0.440 (4+0)	0.440 (4+(1-1))
	Maryland	0.250 (2+0)	0.310 (3+(0-1))
	Massachusetts	0.000 (0+0)	0.050 (0+1)
	Minnesota	0.125 (1+0)	0.250 (2+0)
	Missouri	0.000 (0+0)	0.111 (1+0)
	New Jersey	0.038 (0+1)	0.115 (1+1)
	North Carolina	0.150 (1+2)	0.230 (2+2)
	Tennessee	0.111 (1+0)	0.222 (2+0)
	Virginia	0.000 (0+0)	0.000 (0+0)
	Washington	0.220 (1+2)	0.277 (2+(2-1))
	Wisconsin	0.000 (0+0)	0.125 (1+0)
15 to 21 Representatives	Illinois	0.780 (1+1)	0.078 (1+1)
	Michigan	0.066 (0+2)	0.200 (2+2)
	Ohio	0.083 (0+3)	0.138 (0+5)
	Pennsylvania	0.210 (3+2)	0.289 (5+(2-1))
Over 21 Representatives	California	0.037 (1+2)	0.094 (4+2)
	Florida	0.180 (3+3)	0.240 (3+6)
	New York	0.068 (1+2)	0.120 (1+5)
	Texas	0.177 (3+5)	0.225 (3+8)