Nova Law Review

Volume 30, *Issue* 2 2006 *Article* 4

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Richard H. Pildes*

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THE CONSTITUTION AND POLITICAL COMPETITION

RICHARD H. PILDES*+

I. INTRODUCTION

Something has gone awry with American democracy. Since at least the start of this decade, the country has been closely and sharply divided when it comes to national elections and national policy. Yet at the very same time, more and more elections in the United States are becoming little more than formal rituals; they are affairs of acclimation rather than intensely competi-

* Sudler Family Professor of Constitutional Law, New York University School of Law. Carnegie Scholar 2004-05. I would like to thank former Congressman and independent candidate for the Presidency in 1980, John Anderson, now a professor at Nova Law School, whose commitment to competitive democracy has been an inspiration to many.

+ This article is based on an amici curiae brief I co-authored with my colleagues, Professors Samuel Issacharoff and Burt Neuborne, and filed in the currently pending "Texas redistricting case," *League of United Latin American Citizens v. Perry.* Brief of Samuel Issacharoff, Burt Neuborne, & Richard H. Pildes as Amici Curiae in Support of Appellants at 1, League of United Latin Am. Citizens v. Perry, Nos. 05-204, 05-254, 05-276, 05-439 (U.S. Aug. 11, 2005). I would like to personally thank Sam and Burt, best of colleagues, for their indulgence in permitting me to reproduce portions of that brief here. I also thank David Litterine-Kaufman for research assistance.

tive contests that force conflicts over policies and ideologies to the surface and give voters meaningful choice. This is true for certain national elections, such as for Congress, and for many elections to state institutions, such as state legislatures.

Consider the following striking fact: the post-redistricting elections in 2002 were the least competitive in American history.[1] Challengers managed to defeat only four congressional incumbents.[2] More than one-third of state congressional delegations did not change at all.[3] There were 338 incumbents who won by more than a twenty-point margin, the generally accepted definition of a "landslide."[4] There were only thirty-eight minimally competitive districts nationwide, using the generally accepted definition of less than a ten-point margin of victory (and even many of those districts were designed by commissions, not partisan legislatures).[5] These figures reflect a dramatic decline from previous decades in competitiveness.[6]

The purpose of this essay is to offer a constitutional framework for identifying and rectifying the constitutional threat posed by the most pernicious cause that now contributes to the near elimination of competitive congressional elections: the design of election districts.[7] In particular, the aim of this essay is to offer an alternative framework to the way litigants and the Court have previously thought about the constitutional issues concerning election-district design. In the past, litigants and the Court have relied primarily on the Equal Protection Clause to challenge and judge the structure of election districts, whether in the original malapportionment cases, the vote

1. *See* Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10–11 (2003).

2. *Id.*

3. These numbers were compiled from the following sources: CONG. QUARTERLY'S STAFF, CQ'S POLITICS IN AMERICA 2004: THE 108TH CONGRESS (David Hawkings & Brian Nutting eds., 2003); MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2004 (2003); and STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 5, 2002 (Jeff Trandahl ed., 2003), *available at* http://clerk.house.gov/members/electionInfo/2002election.pdf [hereinafter 2002 ELECTION STATISTICS].

4. *See* tbl.1 *infra* p. 273.

5. *See* CONG. QUARTERLY'S STAFF, *supra* note 3. On the effects of commission rather than legislative redistricting, see *infra* pp. 275-76.

6. *See* tbl.1 *infra* p. 273.

7. The doctrinal arguments in this essay build on the conceptual work in: Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) [hereinafter Pildes I]; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999) [hereinafter Pildes II]; and Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

dilution cases, or the racial-redistricting cases.[8] This has led to continuing judicial struggle to define partisan "excessiveness" in districting, whether through the "consistent degradation" test of *Davis v. Bandemer*,[9] or through the three different proposals of the dissenters in the recent *Vieth v. Jubelirer*[10] decision.[11]

When it comes to the threat that non-competitive elections pose to legitimate representative self-government, then, the instinct of lawyers and judges will similarly be to turn to the Equal Protection Clause. This impulse is understandable. For over forty years, the Equal Protection Clause has served as the principal constitutional vehicle for intensive judicial involvement in protecting the right to vote and to run for office.[12] The Supreme Court's insistence on rigorous compliance with principles of formal electoral equality has provided—and continues to provide—an essential foundation for American democracy.

In the last decade, however, it has become clear that formal political equality can co-exist with suppression of an essential element of democratic self-governance—competitive elections in which voters can hold their representatives electorally accountable. When a state legislature designs a congressional apportionment that satisfies the formal mathematical norms of "one-person one-vote," but intentionally dispenses with competitive elections in virtually every congressional district, the lens of formal equality no longer reveals the nature of the constitutional injury. Nor is that injury fully addressed in a search for a "fair" allocation of the political spoils between the political parties. Rather, the constitutional violation lies in the structural harm to representative self-government that results when state legislatures abuse their powers under the Elections Clause, Article I, Section 4, and deliberately suppress competitive elections in systematic fashion.

Such a structural harm to the fundamental mechanisms of representative self-government is a kind of harm that the Equal Protection Clause is not well designed to recognize, let alone remedy. My aim here is to provide an alternative, one tied more directly to the constitutional underpinnings for

8. Pildes II, *supra* note 7; Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997).

9. 478 U.S. 109, 132 (1986) (plurality opinion).

10. 541 U.S. 267 (2004).

11. *Id.* at 339 (Stevens, J., dissenting); *Id.* at 346–53 (Souter, J., dissenting); *Id.* at 362–67 (Breyer, J., dissenting).

12. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

state regulation of national elections. As the Supreme Court increasingly confronts these and related issues, as in the Texas mid-decade redistricting case before the Court this Term,[13] the need for an appropriate framework for constitutional protection of the basic mechanism of representative self-government—the electoral accountability of officeholders to voters—is all the more urgent.

II. THE ASSAULT ON COMPETITIVE ELECTIONS

As noted above, congressional elections in the wake of the post-2000 redistricting were the least competitive in American history. No matter which way the question is framed—incumbents defeated, incumbents retired, incumbents victorious in a landslide—the 2002 elections were less competitive than after any redistricting in any decade since *Baker v. Carr*.[14] Turnover, the percentage of new representatives, is at an all-time low.[15] The following published Table provides the summary statistics:[16]

13. League of United Latin Am. Citizens v. Perry, Nos. 05-204, 05-254, 05-276, 05-439 (argued Mar. 1, 2006).

14. 369 U.S. 186 (1962).

15. Gary C. Jacobson, Competition in U.S. Congressional Elections (draft paper presented at conference, "The Marketplace of Democracy" (March 6, 2006).

16. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 183 (2003).

Table 1. Comparison of the 2002 Election with Elections from 1972 to 2000[17]

Category	Average "normal election" (1974–1980, 1984–1990, 1994–2000)	Average post-reapportionment election (1972, 1982, 1992)	2002 Election
Incumbents reelected	375	348	381
By > 20 points	297	261	338
By < 20 points	78	87	43
Incumbents defeated	21	35	16
In the primary	3	13	8
In the general	18	22	8[18]
Incumbent retirements	37	48	35
New members	60	87	54

This lack of competitive elections for Congress contrasts notably with the greater competitiveness seen in Senatorial and Gubernatorial elections. While only one of eleven House elections was decided by less than ten percentage points, fully half of state governorships and Senate seats contested on the same day—in elections impervious to political gerrymandering—were instead competitive enough to be decided by less than this ten-point margin. As one of the leading political science analysts of congressional elections has

17. *Id.* at 183 tbl.1.

18. Challengers defeated only four incumbents in the 2002 election. Jacobson, *supra* note 1, at 10–11. An additional four incumbents lost seats due to diminution in the size of their States' congressional delegations. Hirsch, *supra* note 16, at 183. They challenged other incumbents and lost. *Id.*

put it: "Redistricting was clearly one source of the loss of potentially competitive districts, especially after 2000."[19]

The virtual elimination of competitive congressional elections has come about as a result of multiple causes.[20] But of these causes, only one is subject to easy change, has little justification, and is capable of being reached through constitutional law: political gerrymandering of election districts. Over the last twenty years or so, state legislatures have learned to "perfect" two forms of gerrymandering. The first is the partisan gerrymander, such as the Texas plan before the Court this Term, in which a faction with transitory dominance draws district lines to maximize its party's political advantage at the expense of the minority party. The second kind is the "sweetheart," bipartisan gerrymander, in which the two major parties work as a cartel and risk-aversely agree to allocate political representation to protect as many

19. *See* Jacobson, Congressional Elections, *supra* note 15, at 8. In earlier work shortly after the 2002 elections, Jacobson attributed a strongly causal role to redistricting: "Redistricting patterns are a major reason for the dearth of competitive races in 2002 and help to explain why 2002 produced the smallest number of successful House challenges (four) of any general election in U.S. history." Jacobson, *supra* note 1, at 10–11.

20. The other potential contributing causes appear to be the greater consistency with which voters vote along party lines; the greater geographical concentration of voters by party affiliation independent of the way election districts are designed; and the increasing cost of elections, which disadvantages challengers. Of course these factors likely interact, also, in complex ways. Some have argued, for example, that the apparent greater polarization in voting patterns is an effect of safe districting, rather than a cause; faced with only the extreme partisan choices generated by non-competitive safe districts, voters, on this view, will appear to be more partisan in their voting behavior. *See* MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2005). In recently published work, some authors have suggested that redistricting practices have not played a significant role in the decline of competitive elections. Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 86 (2006). But other experts have convincingly pointed out serious methodological flaws that undermine this recent work; in particular, this study uses the three-way 1992 Presidential election, in which Ross Perot received 18.9% of the vote, as a baseline for assessing the 1992 congressional elections, while using the conventional two-party Presidential race in 1988 as a baseline for the 1990 elections. This greatly distorts the results; when the data are reanalyzed with less distorted baselines, they continue to show that redistricting has contributed to the decline of competitive congressional elections. *See* Michael McDonald, *Re-Drawing the Line on District Competition*, 39 PS: Pol. Sci. & Pol. 99 (2006); *see also* Michael McDonald, *Drawing the Line on District Competition*, 39 PS: Pol. Sci. & Pol. 91 (2006). Although Gary Jacobson, a leading analyst of congressional elections, earlier concluded that redistricting practices were "a major reason" for the decline in competitive elections, more recent, unpublished work by Jacobson concludes that increasing partisan consistency and polarization in voters' voting patterns in all elections, districted or not, contributes more than redistricting to the decline in competitive congressional elections. See *supra* note 19.

incumbents as possible.[21] Common to each form is intentional state legislative action to minimize the risk of competitive elections or eliminate that risk altogether. These tactics have contributed to the decline in competitive congressional races.[22] Even during the decades of gross malapportionment, disfranchisement, and a virtual Democratic Party monopoly on political power in the South, incumbents still lost 10-11% of the time on average during, for example, the 1930s and 1940s—as compared to 1.8% in the 2000s so far.[23]

These results are even more troubling because the first election after the decennial census, reapportionment, and redistricting is historically the time when congressional elections are *most* competitive. When not intentionally manipulated to eliminate competitive elections, redistricting is historically the moment at which incumbents and prior political coalitions are most destabilized and elections therefore most open to new blood. As the data presented above show, with new incumbents settling into their seats in new districts, congressional elections typically become less and less competitive over the ensuing decade.

The impact of self-interested, anti-competitive gerrymandering on electoral accountability is also suggested by differences between the competitiveness of congressional districts that are drawn by courts or commissions and those that partisan state legislatures design.[24] In 2002, the seventeen states using commissions or courts to draw congressional lines, 31% of the commission-drawn districts were competitive enough to preclude a landslide, 23.3% of the court-drawn districts were similarly competitive, but only 16.3% of the legislatively-drawn districts were competitive enough to be won by less than a landslide.[25] A decade earlier, the 1992 redistricting produced the same general pattern: Commission-drawn districts were the most competitive, court-drawn districts were less so, and legislatively drawn districts were the least competitive. The major difference between 1992 and

21. Experts characterize California, New York, Illinois, and Ohio (with a combined total of 119 seats) as having adopted bipartisan gerrymanders in which nearly all seats were protected, though both California (Democratic) and Ohio (Republican) were nominally under unified party control. BARONE & COHEN, *supra* note 3, at 44.

22. See *supra*, note 20.

23. HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2005-2006, at 47 tbl.1-14 (2006).

24. Data and analysis in this paragraph are from Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 ST. POL. & POL'Y Q. 455 (2004).

25. *Id.* at 456, 460 tbl.1. "A race is [defined here as] competitive if the winning candidate received less than 60 percent of the two-party vote in the general election." *Id.* at 460 tbl.1.

2002 was a decline of almost 50% by 2002 in the number of congressional districts not won by a landslide when legislatures controlled districting. Thus, these data further confirm the perverse "perfection" in recent years of the political insider's "art" of undermining competitive congressional elections.

The cost of these "designer districts," artificially manipulated to ensure non-competitive elections, is not just the loss of electoral accountability that is the defining element of representative self-government. Competitive elections also are essential to other tangible democratic and constitutional values. Thus, it is well documented that competitive elections encourage the appearance of strong challengers to incumbents and increase voter turnout and party mobilization.[26] The two-party system itself is enhanced over the long run by competitive elections, for political parties that are overwhelmingly dominant in particular localities have no greater incentives than do lazy monopolists in economic markets.[27]

Finally, the structural role of the House is to be the institution most immediately and directly responsive to shifts in popular political preferences. Elections every two years and minimal qualifications for office were designed for exactly this reason. That is why mid-term congressional elections have historically served, as designed, as a partial referendum on national policy in the long interval between Senatorial and Presidential terms. State legislative abuse of the Elections Clause power interferes with this intended structural role of the House. As a result of anti-competitive districting, the House is now perhaps the *least* responsive institution in the national government:

> A national swing of five percent in voter opinion—a sea change in most elections—will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia that arrests the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion, and

26. *See* STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 177–88 (2003); L. Sandy Maisel & Walter J. Stone, *Determinants of Candidate Emergence in U.S. House Elections: An Exploratory Study*, 22 LEGIS. STUD. Q. 79 (1997); Gary W. Cox & Michael C. Munger, *Closeness, Expenditures, and Turnout in the 1982 U.S. House Elections*, 83 AM. POL. SCI. REV. 217 (1989); *see also* EVERETT CARLL LADD, WHERE HAVE ALL THE VOTERS GONE?, at xxii (2d ed. 1982) (identifying greater sense of efficacy among voters able to hold incumbents accountable).

27. *See* ALAN ROSENTHAL, THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS, PARTICIPATION, AND POWER IN STATE LEGISLATURES 194–95 (1998).

> thus frustrates change and creates undemocratic slippage between the people and their government.[28]

To ensure that all elections are competitive is, of course, impossible. A natural political advantage enjoyed by one or another political faction in a geographical area may render election outcomes a foregone conclusion. Nothing in the Constitution or in democratic political theory guarantees a perennial political minority anything other than a fair chance to persuade the political majority and continued enjoyment of equal treatment under law. But as evident from the design of 90% of congressional districts nationwide, a lethal combination of modern technology, partisanship, and incumbent self-dealing renders it possible for state legislatures to assure that nearly all congressional elections are non-competitive.

Challenges by the political parties to partisan gerrymandering have always been framed in terms of whether one party or the other has been so "discriminated" against in districting as to violate the Equal Protection Clause.[29] The political parties dispute the distributional equity of one or another districting plan. But even as they do so, the undeniable fact of modern political life is the virtual disappearance of competitive congressional elections. None of the equal-protection arguments about the partisan implications of one or another districting plan captures the full insult to the constitutional commitment of electoral accountability that state legislative creation of overwhelmingly "safe" congressional districts entails. In California, for example, not a single challenger in the 2002 congressional general election received even 40% of the vote.[30] Political actors facing such an absence of electoral competition well understand that the power to "choose" representatives in "elections" resides, not in "the People," but in what the Court has elsewhere termed a "self-perpetuating body" of self-dealing insiders.[31] One need look no further for proof than this unabashed admission regarding California redistricting by Representative Loretta Sanchez, in which she describes the role of redistricting czar Michael Berman, the leading consultant to the controlling Democratic Party in drawing the new district lines:

> So Rep. Loretta Sanchez of Santa Ana said she and the rest of the Democratic congressional delegation went to Berman and made their own deal. Thirty of the 32 Democratic incumbents have paid Berman $20,000 each, she said, for an "incumbent-protection

28. Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 487 (2004).
29. U.S. CONST. amend. XIV, § 2.
30. Hirsch, *supra* note 16, at 182.
31. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793 n.10 (1995).

> plan." "Twenty thousand is nothing to keep your seat," Sanchez said. "I spend $2 million (campaigning) every election. If my colleagues are smart, they'll pay their $20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them."[32]

No political actor seeking such a path to electoral sinecure has an incentive to bring before the courts the full constitutional harm that political gerrymandering of this sort imposes. Nor is the Equal Protection Clause, focused on alleged discrimination between the political parties, well designed to address the full constitutional harms at stake in the systematic, intentional elimination of electoral competition and accountability. The Elections Clause[33] grants the States enumerated powers to regulate national elections only for legitimate purposes. As Part III now seeks to show, judicial enforcement of the limits contained in the Elections Clause, particularly when read in conjunction with other constitutional provisions, best protects the structural constitutional values under assault by the systematic, intentional, and self-interested design of overwhelmingly "safe" election districts that make officeholders less accountable to voters.

III. CONSTITUTIONAL LIMITATIONS ON STATE MANIPULATION OF NATIONAL ELECTIONS

The Constitution contains at least three textual provisions that, properly understood, prohibit state legislative efforts to systematically design non-competitive congressional election districts and frustrate the Constitution's essential requirement that members of Congress be electorally accountable to the voters.

First, the Elections Clause delegates power to state legislatures to establish only the "[t]imes, [p]laces and [m]anner" of congressional elections.[34] Just as Article I's grant of enumerated powers to Congress necessarily limit the exercise of those powers to the reasons for which granted, the specific and limited delegation of power in the Elections Clause does not license state legislatures to eviscerate competitive congressional elections and undermine electoral accountability. Yet the systematic creation of overwhelmingly "safe" election districts on behalf of partisan allies does precisely that. In

32. 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, *available at* http://fairvote.org/redistricting/reports/remanual/usnews6.htm#arch.

33. U.S. CONST. art. I, § 4, cl. 1.

34. *Id.*

terms of constitutional law, the question should not be simply whether, under the Equal Protection Clause, one of the major political parties has been unconstitutionally discriminated against in districting. The question should also be—indeed, perhaps the central question ought to be—whether state legislatures have the constitutional power intentionally and systematically to insulate congressional candidates and incumbents from contested elections. In my view, the Elections Clause should be understood to grant no such power.

This inherent limitation on state legislative authority over congressional elections is confirmed by two other constitutional provisions: Article I, Section 2, which requires that the People (not the state legislatures) choose the members of Congress, and the First Amendment, which guarantees freedom of speech, assembly, association, and petition.[35] Together with the Elections Clause, these provisions combine to prevent state legislatures from manipulating congressional elections through the creation of overwhelmingly "safe" election districts. Under Article I, Sections 2 and 4, and the principle of representative self-government that motivates the First Amendment, the abuse of redistricting authority to turn congressional elections into empty rituals should be found unconstitutional.[36]

I will develop each of these points in turn. But before doing so, it is helpful to keep a more general perspective in mind. The Supreme Court has long protected two of the three great structural pillars of the American political and constitutional system: federalism and separation of powers. In just the same way, the Court should protect the Constitution's third great structural imperative—representative self-government through contested elections—from destruction at the hands of self-dealing political incumbents and their allies of both major parties. Moreover, as the last part of this essay will suggest, manageable judicial standards to do so exist.

A. *The Elections Clause*

The states' power to design congressional districts derives exclusively from the specifically enumerated grant of power in the Elections Clause.[37]

35. U.S. CONST. art. I, § 2; U.S. CONST. amend. I.
36. *Id.*
37. *See* U.S. CONST. art. I, § 4, cl. 1.

The states have no reserved or inherent powers over the regulation and design of congressional districts and elections.[38]

Just as the grant of enumerated powers in Article I to Congress limits the exercise of those powers to the scope and objectives for which granted,[39] the constitutional grant of specifically enumerated power to the states over congressional districting limits the scope and aims for which those powers can be exercised.[40] The Supreme Court has indicated many times the importance of ensuring that Congress' powers are limited to the scope and aims for which the Constitution specifically enumerates the grant of particular powers.[41] In exactly the same way, the Court should continue to recognize that, when state legislatures exercise power pursuant to a specifically enumerated grant in Article I, this power is limited to the scope and aims for which the Constitution grants it.

In particular, state legislatures have no delegated power under Article I to design congressional districts for the purpose and effect of destroying the electoral accountability between representatives and citizens that is essential to representative democracy. The Elections Clause does not grant states the power to regulate congressional elections with the aim and effect of artificially insulating members of Congress from electoral competition through state creation of overwhelmingly "safe," non-competitive congressional election districts. As the Court noted in *United States Term Limits, Inc. v. Thornton*, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[42]

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38. Cook v. Gralike, 531 U.S. 510, 522–23 (2001) (recognizing that "[n]o other constitutional provision [other than the Elections Clause] gives the States authority over congressional elections"); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 834–35 (1995) (stating that state authority over national elections exists only insofar as specifically delegated in the Elections Clause).

39. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 553 (1995).

40. *See Cook*, 531 U.S. at 523. "[T]he States may regulate the incidents of [congressional] elections, including balloting, only within the exclusive delegation of power under the Elections Clause." *Id.*

41. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 365 (2001); United States v. Morrison, 529 U.S. 598, 607, 620–21 (2000); City of Boerne v. Flores, 521 U.S. 507, 516 (1997); *Lopez*, 514 U.S. at 553.

42. United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995). *See also* Smiley v. Holm, 285 U.S. 355, 366 (1932) (noting that the Elections Clause grants states the power to regulate national elections "as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right [to vote] involved").

The Elections Clause, like the Qualifications Clauses at issue in *Term Limits*, does not empower the states (or Congress) to design congressional districts in a way that "would lead to a self-perpetuating body to the detriment of the new Republic."[43] At the Constitutional Convention, James Madison noted the risk of leaving unfettered power in the hands of potentially self-interested political actors to regulate elections: "A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect."[44] The Court has constrained the ability of political bodies to manipulate electoral outcomes through gerrymandering voting ("the number authorised to elect")[45] and vote-counting rules.[46] But artificially non-competitive election districts are now the most direct and devastatingly effective means of creating a "self-perpetuating body" in the House, in light of modern election-behavior data bases and sophisticated computer technology. The manipulation of district design to ensure artificially that one party or the other's congressional candidates face no meaningful competition on general election day is neither a necessary nor a proper exercise of the specific power delegated to the state legislatures in the Elections Clause.[47]

The Court and individual members of the Court have recognized that numerous provisions of the Constitution were specifically designed to protect against even the *risk* of self-interested manipulation of the election process by those in power. That those temporarily in office will seek to leverage their power over election-rule design into more enduring power for themselves and their allies is eminently predictable. As Justice Scalia has noted, "[t]he first instinct of power is the retention of power."[48] Similarly, Justice Thomas has observed that the structure of the Census and Apportionment Clauses reflected the Framers' realization that the danger of self-interested

43. *Term Limits*, 514 U.S. at 793 n.10.

44. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 250 (Max Farrand ed., 1911).

45. *Id.*

46. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985); Bush v. Gore, 531 U.S. 98 (2000).

47. For recent scholarship also addressed to the limitations the Elections Clause imposes on state legislative regulation of national elections, see Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021 (2005), and Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196 (2004) [hereinafter *A New Map*].

48. McConnell v. FEC, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part).

political manipulation of the census and apportionment required that the Constitution create "a standard that would limit political chicanery."[49]

If numerous provisions of the Constitution are understood to guard against the *risk* of self-interested manipulation of the election process, surely the Elections Clause prohibits the *actual, transparent, and even brazen* self-interested manipulation involved in the willful creation of overwhelmingly "safe," non-competitive election districts that destroy electoral accountability. It is also odd that some of the Justices most attentive to the risk that "[t]he first instinct of power is the retention of power," such as Justices Scalia and Thomas, are among those Justices least inclined to find political gerrymandering claims justiciable.[50] And unlike campaign finance regulation or statistical sampling under the Census Clause, there can be no dispute about the purpose and effects of the current redistricting—and now, mid-decade redistricting—processes I challenge here: Political insiders candidly admit that they intentionally design congressional districts to be overwhelmingly safe for partisan allies and incumbents. As the post-2002 redistricting elections demonstrate, these plans have contributed to achieving precisely that aim.

The Elections Clause does not empower state legislatures to artificially create overwhelmingly non-competitive congressional districting plans whose purpose and effect is overwhelmingly to insulate preferred candidates from electoral accountability.[51] As noted above, not all districted elections can be made competitive. But just as there is a difference between natural and illegal economic monopolies, there is a difference between safe districts that arise naturally from following traditional districting principles in particular geographic areas and safe districts that arise because political insiders have grossly manipulated district designs for the purpose and effect of insulating preferred candidates from meaningful competition.[52] The latter should not be understood to be a permissible justification for exercise of the limited,

49. Utah v. Evans, 536 U.S. 452, 500 (2002) (Thomas, J., concurring in part and dissenting in part).

50. *McConnell*, 540 U.S. at 263 (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part).

51. For recent scholarship also addressing the limitations the Elections Clause imposes on state legislative regulation of national elections, see Greene, *supra* note 47, and *A New Map*, *supra* note 47.

52. For fuller analytical development of the risk of self-interested capture of political and economic markets, see Issacharoff, *supra* note 7. *See also* David Schleicher, *"Politics as Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, SUP. CT. ECON. REV. (forthcoming 2007), *available at* http://ssrn.com/abstract=740304.

enumerated power delegated to state legislatures on behalf of the people of the United States under the Elections Clause. Judicial enforcement of the Elections Clause is necessary to enforce the structural commitment to representative self-government through competitive elections that enable voters to hold elected officials accountable.

B. *Article I, Section 2 and the Fundamental Voting Right for the United States House*

Article I, Section 2, of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States."[53] The Constitution thereby expressly recognizes an affirmative right of the People to choose their representatives through properly structured congressional elections. This is the only textual reference to "the People" in the body of the original Constitution and the only express, original textual right of the People to direct, unmediated political participation in choosing officials of the national government.

Whatever issues may still cloud the justiciability of partisan vote dilution claims under the Equal Protection Clause, the Court has recognized for many decades its power to enforce strictly the guarantees to the People under Article 1, Section 2. In *Wesberry v. Sanders*,[54] the Court rejected any justiciability claim that:

> would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction . . . . The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I.[55]

The protections of Article I, Section 2, specifically designed to guarantee the integrity of national elections, are greater than those under the general provisions of the Equal Protection Clause. The Supreme Court reached this conclusion with specific reference to the redistricting process itself already.[56]

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53. U.S. CONST. art. I, § 2.

54. 376 U.S. 1 (1964).

55. *Id.* at 6–7 (citations omitted).

56. *Compare* Kirkpatrick v. Preisler, 394 U.S. 526, 528–29, 536 (1969) (striking down under Article I, Section 2, congressional districts with population deviations of as little as 6%), *with* Mahan v. Howell, 410 U.S. 315, 319, 333 (1973) (upholding under Equal Protection Clause challenge state legislative districts with population deviations up to 16.4%).

As the Court has recognized many times, Article I, Section 2, makes unconstitutional state electoral practices that obstruct the right of the People to "fair and *effective* representation" and "an equally *effective* voice" in the selection of representatives, as identified by *Reynolds v. Sims*.[57] The importance of the voting rights of the People in congressional elections is highlighted by three cases whose significance for the Article I, Section 2 implications of non-competitive congressional districts has been underappreciated: *Powell v. McCormack*,[58] *U.S. Term Limits, Inc. v. Thornton*, and *Cook v. Gralike*.[59] Each overturned an effort to deny or improperly condition the ability of the People of a State to choose freely a congressional representative of their choice, either by congressional refusal to seat a disfavored representative,[60] by state constitutional restriction on the ability to return a preferred candidate to office,[61] or by imposition of conditions that compelled the attention of voters to predetermined issues.[62] In each case, as expressed in *Term Limits*, the Court sought to "vindicate[] the same 'fundamental principle of our representative democracy' that we recognized in *Powell*, namely, that 'the people should choose whom they please to govern them.'"[63]

These cases recognize two principles with direct bearing on the unconstitutionality of grossly manipulated "safe" elections. First, the Court reiterated the importance of the sovereignty of the people in selecting freely their own representatives; as expressed by Justice Kennedy, "[n]othing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives."[64] Recalling the infamous Wilkes incident from Britain, in which Parliament attempted to usurp the power to decree proper representation, *Powell* turned to the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'"[65]

Second, the Court identified a concern at the Founding that reposing the power to set the terms of congressional qualifications in the hands of incum-

57. 377 U.S. 533, 565–66 (1964) (emphasis added).
58. 395 U.S. 486 (1969).
59. 531 U.S. 510 (2001).
60. *Powell*, 395 U.S. at 489.
61. U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 783.
62. *Cook*, 531 U.S. at 514–15, 525–26.
63. *Term Limits*, 514 U.S. at 819 (quoting *Powell*, 395 U.S. at 547).
64. *Id.* at 842 (Kennedy, J., concurring).
65. *Powell*, 395 U.S. at 547 (quoting Alexander Hamilton, Debates, *in* DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 251, 257 (Jonathan Elliot, ed., Burt Franklin Reprints 2d ed. 1974) (1968)).

bent officeholders would be a direct threat to the constitutional guarantee of voter sovereignty:

> [In *Powell*,] we recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government. For example, we noted that "Robert Livingston . . . endorsed this same fundamental principle: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.'"[66]

Whatever the right of the political parties not to be discriminated against in districting, a critical question of constitutional law ought to be whether the carving up of essentially uncontestable and uncompetitive spheres of influence is an impermissible effort, in purpose and effect, that threatens to "lead to a self-perpetuating body" as identified in *Term Limits*.[67] The constitutional principle that meaningful electoral accountability depends on the competitive integrity of congressional elections is not captured through the narrow framework of impermissible partisan advantage previously presented to the Supreme Court in cases like *Vieth*[68] and *Bandemer*.[69] Article I, Section 2's specific grant of an affirmative right of the People to demand the accountability of their Representatives itself requires protection against artificially manipulated, non-competitive elections. As expressed by Justice Kennedy, "freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office."[70]

The Constitution prohibits state legislatures from undermining the House's essential structural role.[71] Article I, Section 2 works hand-in-hand with the Elections Clause.[72] The Elections Clause does not grant state legis-

66. *Term Limits*, 514 U.S. at 794–95 (omission in original) (quoting *Powell*, 395 U.S. at 541 n.76).

67. *Id.* at 793 n.10.

68. Vieth v. Jubelirer, 541 U.S. 267 (2004).

69. Davis v. Bandemer, 478 U.S. 109 (1986). Nor is *Gaffney v. Cummings*, 412 U.S. 735 (1973), to the contrary. *Gaffney*, like *Bandemer*, addressed equal protection limitations on state legislative redistricting for state legislatures. *See id.* at 735–36; *Bandemer*, 478 U.S. at 114–15. Neither case addressed the Article I limitations on state legislative power over congressional elections. *See generally Vieth*, 541 U.S. 267; *Bandemer*, 478 U.S. 109.

70. Cook v. Gralike, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring).

71. *See* Pildes I, *supra* note 7, at 55, 61.

72. *See* U.S. CONST. art. I, § 2.

latures the power to manipulate congressional elections for impermissible reasons.[73] This limitation on the grant of power is necessary to protect the affirmative right "of the People" in Article I, Section 2, to choose their Representatives.[74]

C. *The First Amendment*

In addition to the Article I concerns already addressed, the intentional evisceration of competitive congressional elections can also be understood to threaten or violate core principles of the First Amendment.[75] Widespread anticompetitive gerrymanders do disrupt and damage the profound relationship—both substantive and textual—that the Supreme Court has recognized between self-government and the First Amendment.[76] Although the Elections Clause and Art. I, Section 2 most directly address limits on manipulation of congressional districts, the best understanding of these provisions is buttressed by the First Amendment's grounding in principles of democratic competition.

The Framers organized the six textual clauses of the First Amendment in an order that reflects the nature of democracy itself.[77] These clauses move in disciplined order from a citizen's conscience, to individual expression (speech), to mass expression (press), to political organization (assembly and association) and, finally, to interaction with elected officials (petition). Indeed, it is common ground that the First Amendment's core purpose is the protection of the free flow of information needed to permit genuine electoral choice.[78] When genuine electoral competition is systematically and intentionally subordinated to partisan and incumbent advantage, the damage to the First Amendment is serious.

Moreover, the clauses themselves describe the essence of self-government.[79] The quintessential act of political expression is the casting of a ballot. The quintessential act of political association occurs in the relation-

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73. *See id.*

74. *See id.*

75. *See* Pildes I, *supra* note 7, at 31–32.

76. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77, 101–03 (1980).

77. This insight is attributable to my colleague, Burt Neuborne, who originally authored, for the brief noted above, these paragraphs on the First Amendment.

78. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Republican Party of Minn. v. White, 536 U.S. 765 (2002).

79. *See* U.S. CONST. amend. I.

ship between a voter and a favored candidate. The quintessential act of assembly is the rallying to the polls on Election Day. The election itself is the modern analogue of the petition for redress of grievances. When statewide political gerrymanders—either partisan or bipartisan—intentionally and systematically turn congressional elections into a mere formality, the acts of voting, assembling, associating, and petitioning are reduced to hollow rituals. Under such circumstances, voters ratify political choices made for them by someone else, but do not exercise the generative political power that is the essence of representative self-government.

An obvious political gerrymander that systematically constructs islands of voters throughout a state in such a manner that competitive elections are virtually eliminated in every congressional district artificially destroys the core element of self-governance—competitive elections— and for no legitimate public purpose. It matters not that the apportionment respects formal equality. It matters not that the resulting political division of congressional representation is said, in some contexts, to be roughly equitable. What matters is that the state has treated voters, not as individuals, but as fungible political units whose democratic role is not self-governance, but the allocation of political spoils.[80]

IV. JUDICIAL REMEDIES FOR STATE LEGISLATIVE ABUSE OF THE POWER TO REGULATE NATIONAL ELECTIONS

A. *The Courts Should Recognize A Per Se Prohibition Against Mid-Decade Redistricting, Absent Judicial Order or Extraordinary Circumstance*

Amidst all the pre-existing problems with politically self-interested manipulation of the design of election districts, this decade has added a new, "sudden shock to the ritual of redistricting politics."[81] For the first time in what appears to be at least the 20th century, state legislatures have begun to take multiple bites at the redistricting apple.[82] At least two states, as of the time of this article, have engaged in mid-decade "re-redistricting" of their congressional districts;[83] after the census and apportionment, these state leg-

80. *See* Elrod v. Burns, 427 U.S. 347, 372–73 (1976) (finding government employees may not be viewed as political units designed to allocate the spoils of victory); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 726 (1996) (applying *Elrod* to independent contractors); *cf.* Miller v. Johnson, 515 U.S. 900, 927–28 (1995).

81. Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 751 (2004).

82. *See id.* at 751–52.

83. *Id.*

islatures were gridlocked by partisan divisions, courts were forced to draw new districting plans for the decade, and then later in the decade, when the legislature had a new partisan configuration, the legislature created a new districting plan for what remained of the decade.[84] State legislatures have also commenced mid-decade re-redistrictings for state legislative seats as well. With respect to Congress, the purpose of these "re-redistrictings" was, quite obviously, to bolster the partisan prospects of the state legislatures' partisan allies in the congressional battle for control of the United States House.[85] In the most egregious case, a court drawn plan for Colorado's congressional districts, which reflected the state's entitlement to one new district after the Census, created one of the most competitive districts in the nation, which a Republican then won by 121 votes in the 2002 elections. When Republicans gained control of the state legislature, they then drastically re-drew the congressional districts, shifting large populations around in advance of the next election, in an effort to turn this competitive district into an overwhelmingly safe one for the Republican incumbent.[86]

Whatever the United States Supreme Court's response to the inevitable abuses at the decennial reapportionment stage, the Court should recognize that the Elections Clause does not grant state legislatures the power to engage in mid-decade re-redistricting, absent judicial decision requiring it or extraordinary circumstances (such as Hurricane Katrina and the accompanying massive population shifts).[87] I have no belief the Court will actually do so in the Texas case currently pending, however; the political-party challengers in the case have not pressed the issue of competitive elections, nor sought such a per se bar on mid-decade redistricting. But such a bright-line rule would enforce the limitations of the Elections Clause's grant of enumerated power and would reinforce the constitutional protection of electoral accountability and competitive elections. The risks that mid-decade districting will be used for purposes not within the scope of the Elections Clause, and the costs of mid-decade redistricting, are simply too substantial to tolerate.

The constitutional requirements of the decennial census and congressional reapportionment, combined with the constitutional requirement of one person, one vote, require the states once a decade to exercise their Article I

84. *See* Pildes I, *supra* note 7, at 62.

85. *See id.* at 61.

86. The Colorado Supreme Court held this re-redistricting to violate the state constitution. People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (2003) (en banc), *cert. denied*, Colorado General Assembly v. Salazar, 124 S. Ct. 2228 (2004).

87. *See* U.S. CONST. art. I, § 4, cl. 1.

powers.[88] When this power lies in the hands of partisan, self-interested incumbents (as in most states), it is predictable and inevitable that those insiders will seek to insulate their allies from electoral accountability, to pursue partisan advantage, or both.

The misuse of these Article I powers artificially to eliminate electoral accountability and create non-competitive districts, as noted above, should be unconstitutional, in principle, in any context. But whatever the Court's response to abuses during the decennial redistricting process, the risk that mid-decade redistricting will be used to abuse the Elections Clause power mandates a discrete rule dealing with mid-decade redistricting. A bright-line, per se prohibition would forestall the risk of a spiral of retaliatory mid-decade re-redistrictings, as the political fortunes of the two parties ebb and flow throughout the decade across different states or as incumbents find themselves at electoral risk.

No constitutional compulsion—indeed, no legal compulsion of any sort—exists for state legislatures to engage in redistricting during the decade as partisan political prospects wax and wane in particular states. Indeed, nothing in our historical experience compels this extraordinary assumption of power by the state legislatures. In the Twentieth century, there had been no practice of mid-decade congressional redistricting before mid-decade redistricting efforts suddenly erupted this decade. Indeed, as one historical study of redistricting in the United States concluded, politicians have long understood that districting takes place once a decade, in response to a new census and reapportionment.[89] As that study put it:

> [T]here is no denying that when a new party gains a legislative majority in mid-decade it does not redistrict the state's congressional delegation right away but waits until the next Census. This is another of the "rules of the game" in legislative life, for everyone wants to avoid violent seesaws in policy.[90]

But the rules of the game have changed in recent years. Mid-decade redistricting has suddenly emerged as a new strategy in the partisan wars.[91] The recent emergence of this practice results from a combination of: 1) closely balanced partisan control of the House; and 2) technological break-

88. U.S. CONST. art. I, § 2, cl. 3.

89. ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 74 (rev. ed. 1964).

90. *Id.*

91. Pildes I, *supra* note 7, at 62.

throughs in election databases and computer technology that enable "perfecting" the self-interested creation of overwhelmingly safe districts. The partisan margin of power in the House has hung in the balance for a more sustained period than at any time over the past 100 years;[92] when partisan control was last divided as closely, numerous state legislative schemes sprung up to manipulate congressional elections.[93] National legislation and constitutional law now prohibit most of the offending historical practices, such as legislative manipulations of suffrage rules and vote fraud. But given the allure of political power, efforts to invent new practices not yet prohibited—such as mid-decade redistricting—will inevitably arise again when partisan control of the House is at stake.

In criticizing mid-decade redistricting, I do not mean to defend the constitutionality, the fairness, or the appropriateness of the prior legislative plans that preceded the recent mid-decade redistrictings in those states that have engaged in the practice thus far. However, as a matter of constitutional doctrine, a per se rule against mid-decade congressional redistricting, when not required by judicial decision or extraordinary circumstance, is the most appropriate judicial means to implement the guarantees and limitations of Article I and the First Amendment. The risk that such a power will be used for constitutionally impermissible purposes is obvious; the benefits of such power for legitimate purposes are undemonstrated, given the absence of a historical state practice of mid-decade redistricting; and, even assuming mid-decade redistricting might conceivably be used in some context for permissible purposes, the courts will find it difficult on a case-by-case basis to distinguish mid-decade redistricting that reflects constitutionally permissible versus impermissible purposes. To judge whether a prior plan was "fair," or whether the new, mid-decade plan uses the purported unfairness of the prior plan to justify a new plan that is also "unfair," would require the Supreme Court to re-visit the inquiries that divided it in *Vieth*. To judge the sole, dominant, or partial purpose of a particular mid-decade redistricting similarly requires difficult judicial determinations—and only invites political actors to disguise their purposes better the next time around.

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92. *See* 2002 ELECTION STATISTICS, *supra* note 3, at 54.

93. Thus, in the late 19th century, when partisan control of the House similarly hung in the balance over many years, practices of vote fraud, intimidation, manipulation of suffrage rules, and extraordinarily gerrymandered election districts proliferated. *See* J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 135, 141–52 (Bernard Grofman & Chandler Davidson eds., 1992).

These inquiries are difficult, to say the least, for courts. They are also politically charged in the context of redistricting, since the allocation of political power is at stake. For these reasons, courts would do better not to get mired in these kind of inquiries when an appropriate bright-line doctrinal rule is available. Instead, a per-se rule that the Elections Clause does not permit mid-decade redistricting is the most appropriate means to enforce the Elections Clause's enumerated grant of limited power to state legislatures.[94]

A per se prohibition also reinforces the right incentives for political actors who control districting. Those actors likely to lose at the start of a new districting cycle have an incentive to paralyze the process, to game the outcome that might be reached, perhaps through a court-drawn plan, and then to revisit the plan if they dislike it and gain more legislative power over the decade. A per se rule makes clear that political actors must negotiate and compromise at the start of the decade, at the risk of otherwise losing control of the outcome. A per se rule also indirectly constrains partisan gerrymandering. Justice O'Connor suggested in *Bandemer* that "political gerrymandering is a self-limiting enterprise."[95] To an extent that remains so in the age of computer technology, it is because political actors must bind themselves to a redistricting plan at the start of the decade and live with the consequences until the next census. Mid-decade redistricting destroys that inherent, structural check.[96]

Moreover, were mid-decade redistricting to be permitted, the political parties would inevitably engage in retaliatory re-redistricting—particularly when partisan control of the House is closely divided. In the Dormant Commerce Clause context, the United States Supreme Court recognized long ago that the appropriate means to address discriminatory state commercial laws was not for states to enact retaliatory discriminatory laws of their own; instead, the Court declares such laws unconstitutional, lest a downward spiral of retaliation, in which national prosperity is drained, ensue.[97] The Court

94. *See* Crawford v. Washington, 541 U.S. 36, 67–68 (2004) (holding that constitutional guarantees of proper legal process must be protected through bright-line, categorical rules to withstand inevitable pressures to distort in controversial cases).

95. Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring).

96. *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1243 (Colo. 2003) (holding mid-decade congressional redistricting designed to protect vulnerable incumbents unconstitutional under state constitution), *cert. denied*, 541 U.S. 1093 (2004).

97. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (condemning "local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.") (citing THE FEDERALIST NO. 22 (Alexander Hamilton); James Madison, Vices of the Political System of the United States, *in* 2 WRITINGS OF JAMES MADISON 361, 362–63 (Gaillard Hunt ed. 1901)).

should instead stop this cycle in its inception by recognizing that the Constitution does not authorize states to engage in mid-decade redistricting, at least absent judicial compulsion or extraordinary circumstance.

B. *Judicial Standards Are Available for Future Decennial Redistricting*

For contexts outside that of mid-decade redistricting, including more routine, decennial redistricting, the specific standards courts can employ to respond to the attempts of state legislatures to eliminate or diminish electoral accountability and competition cannot adequately be addressed here. Suffice it to say, a principal tool for legislative self-dealing in this context is running roughshod over traditional districting principles: the freewheeling parceling out of pieces of towns, cities, and counties into a number of different districts; the cavalier disregard of any obligation to keep districts reasonably compact; the use of wholly artificial means to purportedly keep districts "contiguous" in only the most nominal sense; and the use of increasingly refined partisan electoral data in the districting process.[98] In earlier decades, respect for these principles imposed tacit constraints on the extent to which self-interested redistricters could manipulate district design to insulate preferred incumbents and candidates from political competition and electoral accountability. As with other tacit constraints, once these informal, generally accepted limitations on unmediated pursuit of political self-interest begin to break down, a race to the bottom quickly ensures the virtual elimination of these traditional constraints altogether. Mid-decade redistricting is but one example of the recent erosion of such long-understood constraints.

Most importantly, it is essential to recognize that judicial standards in this area need not take the form of bright-line rules, with necessary and sufficient doctrinal criteria of application fully specified in algorithmic-like form.[99] Just as in other areas involving the Constitution's central structural commitments, certain aspects of gerrymandering's constitutional threat might lend themselves to bright-line judicial doctrine; others will not. In enforcing federalism and limits on enumerated national powers, for example, the Court has been able to craft bright-line rules in certain contexts.[100] But for other contexts, the Court has candidly acknowledged that even the best formulated doctrine will inevitably leave "legal uncertainty" concerning the

98. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 744 (1983) (Stevens, J., concurring); Shaw v. Reno, 509 U.S. 630, 635 (1993).

99. *See* Pildes I, *supra* note 7, at 69–70.

100. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (anti-commandeering rule).

doctrine's boundaries.[101] Nonetheless, as the Court concluded in *United States v. Lopez*, "[a]ny possible benefit from eliminating this 'legal uncertainty'"—either through abandoning judicial enforcement or overly rigid judicial doctrine—"would be at the expense of the Constitution's system of enumerated powers."[102]

Similarly, in enforcing the separation of powers, the Court has sometimes recognized violations that lend themselves to bright-line boundaries.[103] But for some of the most momentous issues, the Court has acknowledged that maintaining the proper constitutional balance between diffusing and integrating governmental power cannot be judicially enforced through highly determinate legal doctrine.[104] The structural foundations of the constitutional order, including the commitment to self-government through the electoral accountability of representatives, are too essential to be judicially unenforceable, but too complex always to yield to bright-line judicial doctrine. "The great ordinances of the Constitution do not establish and divide fields of black and white."[105]

Judicial standards for enforcing the limits on the power delegated to state legislatures in the Elections Clause, and for enforcing the right of "the People" under Article I, Section 2, and the First Amendment to hold their representatives electorally accountable,[106] should be evaluated in this context, not against abstract ideals of doctrinal perfection neither available nor applied in enforcing the Constitution's other fundamental structural commitments.

V. CONCLUSION

Three structural ideas permeate the Constitution: separation of powers, federalism, and representative self-government. One of the institutional roles of the United States Supreme Court has been the forging of constitutional

101. United States v. Lopez, 514 U.S. 549, 566 (1995). "[A]s the branch whose distinctive duty it is to declare 'what the law is,' we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines." *Id.* at 579 (Kennedy, J., concurring) (citation omitted).

102. *Id.* at 566 (majority opinion); *see also* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (employing "congruence" and "proportionality" standard).

103. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 722 (1986) (invalidating an "active role for Congress in the supervision of officers charged with the execution of the laws it enacts").

104. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.").

105. Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

106. *See* U.S. CONST. art. 1, § 2; U.S. CONST. amend. I.

doctrine preserving separation of powers[107] and federalism[108] in settings where leaving these commitments to the political branches cannot protect the relevant structural values. While the contested nature of separation of powers and federalism occasionally involve the Court in controversy, the Court has recognized that judicially-enforced constitutional law must provide a keystone for two of the Constitution's three great structural arches.

The third structural arch and arguably the most important—representative self-government through periodic competitive elections, in which voters are able to hold their representatives accountable—similarly cannot be left to the political process itself. Mid-decade redistricting, absent judicial order or extraordinary circumstance, should be unconstitutional. Judicial standards should also be developed to limit state legislative abuse of the Elections Clause power in the more regular decennial redistricting context.

107. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Clinton v. City of New York, 524 U.S. 417 (1998); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); *Youngstown*, 343 U.S. 579; United States v. Nixon, 418 U.S. 683 (1974).

108. For "vertical federalism," see, e.g., United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). For "horizontal federalism," see, e.g., C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).