

Title of Article: **Help Wanted: The Constitutional Case against Gerrymandering to Protect Congressional Incumbents**

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Abstract

Only 17 out of 435 congressional races in 2004 were decided by 9 points or less. Observers and scholars with perspectives as disparate as Thomas Friedman, Michael McConnell, Samuel Issacharoff, and Lexington in the Economist have connected the practice of incumbent protecting gerrymanders with these one-sided outcomes and a resulting shrillness and ideological rigidity in our contemporary politics. Nevertheless, the Supreme Court continues to treat incumbency protection as a traditional and acceptable redistricting principle. This article argues that the Court's position is wrong and that the Court should undertake to limit these kinds of gerrymanders. Part I of the Article sets out three lines of attack on these gerrymanders as they apply to congressional redistricting, arguing that they are inconsistent with the framers' understanding of the purpose of elections, that they have locked in an undemocratic practice in a manner which makes them virtually immune to challenge, and that they deny non-aligned voters fair and effective representation in violation of the equal protection clause. Part II then seeks to make the case for judicial regulation of excessive incumbent protection gerrymanders by showing, among other matters, that there is a manageable standard for identifying such gerrymanders and a reasonable way to remedy them. In the course of the article, I try to show how such regulation is consistent with our constitutional framework and is necessitated by the Court's own approach to the political process. I also address possible objections to a suit challenging such gerrymanders on grounds of lack of standing, the political question doctrine, and concerns for federalism.

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Help Wanted: The Constitutional Case against Gerrymandering To Protect Congressional Incumbents

Walter M. Frank

Walt Whitman loved elections with their torchlight parades, unending campaign oratory and passionate divisions. For him, « the most powerful scene in the western world » was « the still small vibrating voice – America’s choosing day. »¹

Had he been told that America’s real choosing days now occur long before the voters go to the polls, he would undoubtedly have disapproved. But, at least with respect to the House of Representatives, that is precisely the case. Today, most elections for Congress have all the suspense of driver’s license renewal and all the excitement of a trip to the mall.

In the 2004 congressional election only 17 out of 435 races (a ratio of approximately one in twenty-five) were decided by nine points or less.² In Ohio and Florida, certainly two of the most contested states in the presidential election, only two out of forty-three congressional races were decided by less than *twenty* points.³ Outside of Texas where a special and virtually unprecedented interim redistricting occurred aimed at eliminating Democratic incumbents, only 3 incumbents were defeated in the general election.

The 2002 congressional election, the first election following the latest round of redistricting, had similar results:

« Only four challengers knocked off incumbents in the November 2002 general election – a modern record low not only for a redistricting year, but for any election year. In California, none of the 50 general-election challengers garnered even 40% of the total vote.....On average, the 435 victorious candidates won a higher percentage of the

¹ Walt Whitman, « *Election Day, 1884* », In Walt Whitman, Complete Poems, Penguin Classics, 586 (2004 edition).

² Compiled from information available in Wikipedia
http://wikipedia.org/wiki/U.S._House_election%2C_2004.

³ Id.

popular vote than in any House election in more than half a century. »⁴

While incumbency brings with it many competitive advantages (including name recognition, enhanced fundraising ability, and the opportunity to perform services for grateful constituents), there is no question but that redistricting affords the parties a major opportunity to protect incumbents, especially otherwise vulnerable incumbents. The 2000 redistricting in particular was marked by a largely successful effort by both parties to protect their most vulnerable members.⁵

Many thoughtful commentators have lamented these developments. One leading scholar generally viewed as a conservative has written:

« The problem has become particularly acute with modern computer districting software which allows map-makers to create imaginative districts with the precision of a surgeon. The results? Protection for incumbents, a tendency toward homogeneous-and hence more partisan districts, racial and partisan gerrymandering, and, ultimately, a widespread sense that elections do not matter. »⁶

Single member House districts are not constitutionally mandated. The requirement has been imposed on the state legislatures by federal statute since 1842⁷ pursuant to Congress's authority under Article I, Section 4, clause 1 of the Constitution.

In *Gaffney v. Cummings*⁸, decided in 1973, the Supreme Court upheld a districting plan for the Connecticut state legislature, citing its political fairness to the two parties. The plan, relying on an analysis of past election results, created safe seats for both parties roughly in proportion to their voting strength in the State. « The reality is, » wrote Justice White, « that districting inevitably has and is intended to have substantial political consequences. »⁹In so holding, the Court implicitly accepted the principle of incumbent protection.

And while *Gaffney* involved a plan for redistricting a state legislature, in *White v. Weiser*,¹⁰ decided on the same day as *Gaffney*, the Court indicated that avoiding contests

⁴ 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).

⁵ Id. at 186: « Redistricting significantly strengthened 'at risk' incumbents. »

⁶ Michael W. McConnell, *The Redistricting Cases : Original Mistakes and Current Consequences*, 24 Harv. J. Of L. And Pol. 103 at 103-104. See also Sally Dworak-Fisher, *Drawing the Line on Incumbency Protection*, 2 Mich. J. Race and L. 131 at 135 (1996) : « Incumbents' political ability to more accurately manipulate the outcome of elections through database information, computer information, and computer programs has exacerbated traditional unease with self-dealing and increased scrutiny of the redistricting process. »

⁷ Act of June 25, 1842, s 2, 5 Stat. 491

⁸ 412 U.S. 735 (1973).

⁹ Id. At 753.

¹⁰ 412 U.S. 783 (1973)

between congressional incumbents might be a legitimate state interest sufficient to justify deviations in the rigid standard of population equality for congressional districts.¹¹

As for the current Court, in *Vieth v. Jubelirer*¹², Justice Scalia, writing for himself, Chief Justice Rehnquist, Justice O'Connor and Justice Thomas, called incumbent protection « a traditional and constitutionally acceptable districting principle »¹³ and Justice Souter, in a dissent joined by Justice Ginsburg, wrote, « Gaffney is settled law, and for today's purposes, I would take as given its approval of bipartisan gerrymanders, with their associated goal of incumbent protection. »¹⁴

The attitude of the Court toward incumbent gerrymandering is in direct contrast toward its view respecting excessive partisan gerrymanders. Though the Court has found it virtually impossible to agree on a manageable standard for regulating such gerrymanders, it appears almost unanimous in regarding them as a constitutional violation.¹⁵

In a recent article, two noted scholars wrote, « The Justices, recent opinions almost entirely ignore the question whether judicial intervention should be directed at entrenchment itself, rather than the secondary question of who gets to be entrenched. »¹⁶ Such omission is unfortunate since excessive incumbent gerrymandering is both more dangerous if uncorrected and more amenable to judicial regulation than partisan gerrymandering.

The goal of this article is to advance these propositions specifically with respect to redistricting for the House of Representatives.

I make two central arguments : (1) a state redistricting plan which results in an overwhelming number of non-competitive districts should be held presumptively unconstitutional as an excessive incumbent protection gerrymander and (2) the Court can establish a manageable standard for identifying, and a workable remedy for correcting, such gerrymandering.

In Part I of this article I argue that pervasive incumbent protection plans are unconstitutional, in the context of Congressional redistricting, because (a) they destroy the accountability that frequent elections were intended to achieve; (b) they are inconsistent with fundamental democratic principles which the Supreme Court has held to be of constitutional dimension; and (c) they constitute a denial of equal protection to independent voters. While each claim stands separately, together they may be viewed as

¹¹ Id. at 791-792.

¹² 541 U.S. 267 (2004).

¹³ Id. at 298.

¹⁴ Id. at 352.

¹⁵ In *Vieth v. Jubelirer*, even the four justices who would have ended the project of fashioning a standard for excessive partisan gerrymandering did not deny that it constituted a constitutional violation. (See quotation from Justice Scalia's plurality opinion cited at Note 57.)

¹⁶ Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541 at 543 (2004-2005).

different perspectives on the same problem since each line of attack ultimately points to the same remedy.

I argue in Part II that the Supreme Court should address the issue of pervasive incumbent gerrymandering because (a) a principled and manageable standard for handling such cases can be formulated; (b) potential objections to the judiciary's entering into this arena, primarily objections based on lack of standing, the political question doctrine, and concerns for federalism, are answerable; (c) a workable remedy can be fashioned that will not involve the judiciary in micro-managing politics around the country; and (d) our constitutional structure and the logic of the Supreme Court's own decisions make it both necessary and appropriate for the Supreme Court to deal with this question.

In Part II I propose as a manageable standard the concept of a mathematical formula for non-competitiveness state-wide based on the number of districts which result in victory margins in excess of a certain percentage. I argue that the creation of such a formula is completely in line with current Supreme Court precedents. I look at the potential objections to such a formula and also consider the wisdom of initially leaving to the lower courts the creation of state specific standards of non-competitiveness. I also propose that the remedy for a violation should be process driven, taking away from the legislature any authority to redraw lines once a violation has been established. In effect, I am suggesting as a remedy what Professor Issacharoff has proposed as a guiding constitutional principle in the first instance, namely that self-interested actors should not be drawing district lines.¹⁷ I would be willing to give the legislature one bite of the apple but not two. I conclude Part II by pointing to a number of factors which I believe make the Court's regulation of the incumbent gerrymander both necessary and appropriate, including that such regulation furthers a variety of interpretive approaches to constitutional decision-making.

* * *

Incumbent protection gerrymandering is an important topic not only because it involves the degrading of a fundamental right but also because it goes to the heart of what kind of democracy we will enjoy. The result of so many « safe » districts, as one well known observer has recently pointed out, is that « few candidates have to build cross-party coalitions around the middle ».¹⁸ Consequently, the system produces candidates « who appeal only to their party's base – so we end up with a Congress paralyzed between the far left and the far right. »¹⁹ As noted, the Supreme Court in *Gaffney* recognized that districting has substantial political consequences. As I hope to show in this article, when one of those consequences is the virtual elimination of competitive elections, we have an issue of constitutional dimension.

¹⁷ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harvard L. Rev. 593 (2002)

¹⁸ Thomas L. Friedman, *Thou Shall Not Destroy the Center*, N.Y. Times, November 11, 2005, at A23.

¹⁹ *Id.*

Part I

A. A redistricting plan marked by a pervasive concern for incumbent protection is a constitutional violation because it directly undermines the original constitutional intent respecting the nature and purpose of House elections.

1. Elections and Accountability. Prior to the adoption of the Constitution, most legislative representatives were elected for a one year term. In fact, the conventional wisdom was « Where annual elections end, tyranny begins. »²⁰ Madison believed that frequent elections would inevitably assure a continual turnover of all but the ablest representatives.²¹

In No. 57 of the Federalist Papers, Madison argued that elections would assure congressional accountability. There Madison addresses the charge that the House of Representatives will inevitably « be taken from that class of representatives which will have least sympathy with the mass of the people. »²² Answering this objection, he first points to a number of factors making it unlikely that a representative would ignore the mass of his constituents. But then Madison adds:

« All these securities would be found insufficient without the restraint of frequent elections. Hence, in the fourth place, the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend from the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it. »²³

(Emphasis added.)

When representatives choose their voters to perpetuate themselves in power, Madison's vision is compromised beyond recognition.

²⁰ See The Federalist No. 53 (James Madison) (Benjamin F. Wright, ed., 1961, Harvard University Press, 1961) reprinted as Barnes and Noble Books edition p. 364 (2004).

²¹ Id. at 368.

²² The Federalist No. 57 (James Madison) (Benjamin F. Wright, ed., 1961, Harvard University Press, 1961) reprinted as Barnes and Noble Books edition p. 383 (2004).

²³ Id. at 385

2. Framers' fear of manipulative power of legislators. The framers of the Constitution genuinely feared that representatives could perpetuate themselves in office by changing the rules of the game. Indeed, the Supreme Court cited that fear in *U.S. Term Limits v. Thornton*²⁴, to be discussed later, to show that individual states could not add to the qualifications fixed in the Constitution for holding congressional office.²⁵

Two statements made during the framers' debate over the qualifications clause (both were quoted by the Court in *Thornton*) illustrate this viewpoint. Hugh Williamson, a delegate from North Carolina, expressed the fear that if Congress was composed of « any particular description of men, of lawyers for example....future elections might be secured to their own body. »²⁶ In the same debate, Madison noted, « a Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect. »²⁷.

3. Elections and Legitimacy. Madison's views expressed in the *Federalist* and the debates at the Constitutional convention are not our only sources for the historical understanding of elections. Professor Rebecca Brown, citing the work of Edmund Morgan, has shown that colonial elections were viewed not as mechanisms for translating the will of the majority into public policy but were really about accountability in the sense of serving as the check, the primary and perhaps only check, on entrenched power.²⁸ « A virulent and prolonged debate, » she writes, « about the nature of accountability in the government went on for years, before, during, and after the drafting and ratification of the Constitution. »²⁹ She continues:

« The view of those who ultimately prevailed in the debate over accountability was expressed in 1787 by Benjamin Rush : 'It is often said that « the sovereign and all other power is seated *in* the people.' This idea is unhappily expressed. It should be – 'all power is derived *from* the people.' They possess it only on the days of their elections. After this, it is the property of their rulers, nor can they exercise it or resume it, unless it is abused. »³⁰ (emphasis added)

The highlighted language from Benjamin Rush's statement is particularly telling because it underscores the prevailing view at the time of the writing of the Constitution

²⁴ 514 U.S. 779 (1995)

²⁵ *Id.* at 790-791.2

²⁶ Records of the Federal Convention of 1787, p.250 (M. Farrand ed. 1911) quoted in *U.S. Term Limits v. Thornton*, *Supra*, Note 19 at 791.

²⁷ 2 Records of the Federal Convention of 1787, p.249-250 (M. Farrand ed. 1911) quoted in *U.S. Term Limits v. Thornton*, *Supra*, Note 19 at 790-791.

²⁸ Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 *Colum. L. Rev.* 531 (1998). See discussion at 558 to 571.

²⁹ *Id.* at 568.

³⁰ *Id.* at 568.

that the « people » govern themselves only in the sense that they choose those who are to govern them. The vehicle for that choosing is of course our electoral system.³¹

Thus, when incumbents are allowed to manipulate district lines to help assure their own re-election, they are not just playing politics, they are sabotaging the sole source of their authority to govern. It is certainly true that political parties were not within the contemplation of the framers who indeed feared the factions which have in fact become, through the two party system, the organizing principle of modern politics. But the fact is that pervasive incumbent gerrymandering is not in furtherance of a two party system but of a one-party, the Democratic-Republican, system. In any event, regardless of the vehicle, fixing election outcomes in advance is hardly consistent with the notion of elections as the legitimating source of legislative governance.

* * *

The power of incumbency in a society immeasurably more complex than Madison could have ever imagined is a given. As previously noted, much of that power is inevitable given the advantages of incumbency. But when the judiciary adds to these advantages by giving a free pass to a redistricting motive so at odds with the intent of the framers, it places politics on much too high a pedestal.

B. Gerrymandering for incumbent protection when carried to extremes is also a constitutional violation because it offends basic democratic principles in a way that is not amenable to change through the normal political processes. Elections are the normal political process for effectuating changes in membership in the House of Representatives but excessive incumbent gerrymanders are intended to damage the efficacy of that process.

1. A dead-end street. Baker v. Carr³² established that legislative practices which seek to freeze the status quo in ways which are beyond the ordinary power of the electorate to reverse can be unconstitutional and are the judiciary's business.

In his monumental work on the reapportionment revolution, Robert Dixon endorsed Baker v. Carr and its progeny because « when political avenues for redressing political problems become dead-end streets some judicial intervention in the politics of the people may be essential in order to *have* any effective politics. »³³

The growing effectiveness of incumbent friendly redistrictings over the past few decades has come close to creating the same dead end street for competitive elections to

³¹ For an additional perspective which also emphasizes the key role of elections in the constitutional structure, See Daniel R. Ortiz, *Got Theory*, 153 U. Rev. 459 at 476-477. Professor Ortiz concludes, “Nearly every special feature of the House’s design was meant to ensure that it, unlike other primary structures of the federal government, was highly responsive to public sentiment.” (at 477.)

³² 369 U.S. 186 (1962).

³³ Robert G. Dixon Jr., *Democratic Representation – Reapportionment in Law and Politics*, 8 (1968).

the House. Theoretically, state legislatures (or redistricting commissions in the few states which utilize them for congressional redistricting)³⁴ can enact legislation making competitiveness a redistricting value. Only Iowa, however, has gone so far as to require that the legislatively created commission charged with the initial responsibility for drawing a plan must ignore political data. Not coincidentally, « Iowa is the only state to attempt to conduct redistricting via a politically neutral body. »³⁵ In some states, appointed commissions believe that a key part of their role is to protect incumbents in order to protect the state's influence in Congress.³⁶

The defeat of the redistricting initiatives in Ohio and California in 2005 also underscores how the political parties can mobilize to defeat redistricting efforts not perceived to be in their best interest. As one article noted, « The problem with both the California and Ohio Initiatives was not that voters don't want reform, it's that they perceived these two initiatives as partisan power grabs. And the voters were largely right. »³⁷

Incumbent protection works with ever increasing effectiveness due to a combination of factors: (1) the identification of many voters with one or the other of the two major parties (2) the resulting predictability of voting patterns;³⁸ and (3) the enormous power that today's computer technology affords legislators to harness that predictability to create gerrymandered districts.

Districts packed with enough solid Democratic or Republican votes make it virtually impossible for any challenger from the other party or an independent to succeed. When the two parties come together for the purpose of manipulating election results in advance, there is no real political check on that behavior.

Pervasive incumbent gerrymandering is actually more of a 'dead-end street' than partisan gerrymandering because at least in partisan gerrymandering, the party

³⁴ The States that use a commission for congressional redistricting are Arizona, Hawaii, Idaho, Montana, New Jersey and Washington with Indiana using one if the legislature cannot pass a plan. Arizona's commission was created through passage of a voter initiative. See Justice Breyer's dissent in *Vieth* at 541 U.S. 267 at 363 (2004).

³⁵ Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 *Tex. L. Rev.* 837 at 848 (1997).

³⁶ New Jersey provides one example. See Donald Scarini and Nomi Lowy, *Congressional Redistricting in New Jersey*, 32 *Seton Hall L. Rev.* 821 at 832-835 (2003). For a broader treatment of the subject of redistricting commissions, see Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 *Tex. L. Rev.* 837 (1997). For an article giving a good ground level view of redistricting in one state, see Timothy P. Brennan, Note, *Cleaning out the Augean Stables : Pennsylvania Most Recent Redistricting and a Call to Clean Up this Messy Process*, 13 *Widener L.J.* 235 (2003).

³⁷ Sam Hirsch and Thomas E. Mann, *For Election Reform, a Heartening Defeat*, the *New York Times*, November 11, 2005, p. A23.

³⁸ « In the November 2002 elections 86% of all successful House candidates belonged to the same party as the presidential candidate who carried the District in November 2000 – a level of consistency unmatched since the 1940's. » Hirsch, *supra* Note 2 at p. 185. In the 2004 elections, the percentage was almost exactly the same. See http://en.wikipedia.org/wiki/U.S._presidential_election_2004. The information is contained in Section 3.5.

controlling the redistricting process faces risks when it engages in extreme gerrymandering. If it tries to spread its vote over too many districts, it decreases its margin of error and creates less safe seats, something abhorrent to all incumbents regardless of party. This is what Justice O'Connor meant when she argued that partisan gerrymandering is essentially a « self-limiting enterprise. »³⁹ No such check exists with respect to incumbent gerrymandering. When there is a shared goal of maximizing incumbent protection, the more lopsided the margins the more the gerrymandering goal has been accomplished. To use the current terminology, partisan gerrymandering depends upon a combination of « packing » and « cracking ». Incumbent protection is only about packing.

The political impact of the Supreme Court's willingness to tolerate pervasive incumbent gerrymandering is heightened by the Court's decision in *U.S. Term Limits v. Thornton*.⁴⁰ In this case, the Supreme Court held unconstitutional a state constitutional amendment enacted by the voters of Arkansas with the admitted goal of eliminating career legislators in the Congress (as well as the State legislature). The Arkansas amendment, among other things, denied ballot access to congressional candidates who had been elected to two terms to the United States Senate or three terms to the House. The Supreme Court, in a 5-4 decision, held that the amendment constituted an additional qualification for office and that the Constitution did not allow states to impose additional qualifications.

The effect of this decision was to invalidate the one direct avenue voters had to overcome the long term effects of the incumbent protection gerrymander. As a measure of the depth of feeling on this issue, it should be noted that following *U.S. Term Limits v. Thornton*, the voters of Nebraska, South Dakota, Maine, California, Colorado, Idaho, Arkansas and Oklahoma each passed initiatives (ultimately found unconstitutional in each case by Circuit Courts of Appeal) intended to encourage the passage of a federal constitutional amendment allowing for the establishment of congressional term limits.⁴¹

2. Inconsistency with Democratic values. Professor Sunstein has suggested that deliberative democracy, that is democracy that sees real value in the meaningful participation of the broad electorate, has two goals: « political accountability and reason-giving. »⁴² I would argue that incumbent protection gerrymanders deeply offend both goals : certainly political accountability is diminished when political parties through redistricting reconfigure constituencies for the purpose of assuring the re-election of their own incumbents and reason-giving is also undermined since incumbents having no fear of defeat have no real reason to explain themselves or their actions.

While perhaps not of direct constitutional relevance, I would also submit that it violates democratic principles to treat individuals as nothing more than statistical aggregates.

³⁹ *Davis v. Bandemer* 478 U.S. 109, 152 (1986).

⁴⁰ *Supra*, Note 24.

⁴¹ See *Cook v. Gralike* 531 U.S. 510, 518 note 10 (2001).

⁴² Cass R. Sunstein, *One Case at a Time – Judicial Minimalism on the Supreme Court*, 31 (1999).

In his dissent in *Lucas v. Colorado General Assembly*,⁴³ Justice Stewart wrote:

« Legislators do not represent faceless numbers. They represent people, or more accurately a majority of the voters in their districts – people with identifiable needs and interests which require legislative representation and which can often be related to the geographic areas in which these people live. »⁴⁴

Voters are not faceless numbers and a districting plan that counts their votes before they are cast renders their vote as meaningless as a process which fails to count them afterwards.

3. A distortion of the purpose of geographic based districting. Pervasive incumbent gerrymandering plans also diminish the constitutional validity underlying the whole process of drawing geographic lines. When Congress first enacted the requirement of single member districts, it did so because it recognized that in an at large election, many interests in the State might not be represented.⁴⁵ Districting was created not to minimize competition but to assure that there were many competitions so that in effect one competitive result would not prevail throughout the State. Balkanizing a State in such a way as to eliminate competition was the farthest thing from Congress's mind in 1842 when it introduced the requirement of single member districts.

The drawing of geographic lines should relate in significant part to geographic factors that enhance the effectiveness of representation. So-called neutral factors which focus on compactness, recognizing communities of interest, and keeping the entirety of a municipality or county within the same congressional district, all arguably enhance the goal of effective representation and thus are rationally related to the process of drawing geographic lines. Incumbency gerrymanders (and partisan gerrymanders) on the other hand merely seek to use geographic boundaries to accomplish a political purpose.

Commentators have made the point, correctly I believe, that no basis for drawing geographic lines is completely neutral since even the choice of neutral criteria will almost

⁴³ 377 U.S. 713 (1964).

⁴⁴ *Id.* At 750. Stewart argued unsuccessfully in *Lucas* that because geographic districting “carries with it an acceptance of the idea of legislative representation of regional needs and interest” (at 750), Colorado should be allowed to redistrict at least one of its legislative bodies on something other than the one man one vote principle. The majority, in *Lucas* did not dispute that geographic districting to advance representation based on regional needs was appropriate but made that goal of districting subject to the one man one vote principle.

⁴⁵ « The 1842 law was inspired in large part by complaints that statewide elections of congressional candidates had resulted in a state's single dominant political party winning all of that state's congressional seats, thereby impairing the ability of political parties in Congress to fulfill their role of representing a large coalition of diverse interests. » Howard A. Scarrow, *Vote Dilution, Party Dilution, and the Voting Rights Act: The Search for Fair and Effective Representation*, in *Political Gerrymandering and the Courts*, Bernard Grofman, ed., p.45 (1990).

inevitably assist one party more than the other.⁴⁶ Moreover, it is naive to believe that politics will not play some role in the districting process. It does not follow, however, from either of these concessions that redistricting meets constitutional standards when it degenerates into a wholesale effort to deny voters a meaningful choice in the general election and to perpetuate those in power.

4. Practical effects as inconsistent with the healthy democracy and stable two party systems which the Court ostensibly seeks to promote in its decisions governing the political process.

The Supreme Court has endorsed a stable two party system as a good thing⁴⁷ and a legitimate objective of state legislation.⁴⁸

A stable two party system has been deemed worthy of constitutional protection by the Court and commentators in part because the parties have been viewed as non-ideological in nature.

In a dissent in a 1973 case joined by Justices Douglas, Brennan and Marshall, Justice Powell wrote:

« Political parties in this country traditionally have been categorized by a fluidity and overlap of philosophy and membership... »⁴⁹

In 1981, in a dissent joined in by Justice Blackmun and Chief Justice Rehnquist, Justice Powell wrote:

⁴⁶ See Daniel H. Lowenstein and Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest : Elusive or Illusory*, 33 U.C.L.A. L. Rev. 1, 35 (1985) where the authors after examining a number of formal criteria, such as compactness, municipal boundaries and communities of interest conclude, « From a practical standpoint, the most serious defect of the formal criteria is that, without justification, they tend systematically to favor one of the two major parties.»

⁴⁷ Justice O'Connor, for example, has written, « There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two party system, which permits both stability and measured change. » *Davis v. Bandemer*, Supra Note39 at p. 144-145.

⁴⁸ Recent cases upholding such objective against claimed burdens on rights of independent voters and independent and third party candidacies include : *Burdick v. Takushi* 504 U.S. 428 (1992) holding that prohibition of write-in voting was not unconstitutional; *Timmons v. Twin Cities Area New Party* 520 U.S. 351 (1997) upholding anti-fusion legislation; *California Democratic Party v. Jones* 530 U.S. 567 (2000) invalidating the blanket primary; and *Arkansas Educational Television Commission v. Forbes* 523 U.S. 666 (1998) upholding right of state-owned public television to exclude an independent candidate from a televised debate. Earlier cases upholding state ballot access and registration requirements include *Jenness v. Fortson* 403 U.S. 431 (1971); *Rosario v. Rockefeller* 410 U.S. 752 (1973); *American Party of Texas v. White* 415 U.S. 767 (1974); *Storer v. Brown* 415 U.S. 724 (1974); and *Munro v. Socialist Workers Party* 479 U.S. 189 (1986).

⁴⁹ *Rosario v. Rockefeller* 410 U.S. 752, 769 (1973).

« The Democratic Party is not organized around the achievement of defined ideological goals. »⁵⁰

In 1996, in a dissent joined in by Chief Justice Rehnquist and Justice Scalia as to Parts I and III of the dissent, Justice Thomas wrote:

« American political parties, generally speaking, have numerous members with a wide variety of interests, [citations omitted] features necessary for success in majoritarian elections. »⁵¹

There is, I believe, a direct linkage between the Court's belief in the essentially non-ideological nature of American political parties and its promotion of a stable two party system.

More and more, however, commentators have noticed the increasingly ideological nature of our political parties and lay the blame in substantial part on the doorstep of incumbency protection. I previously quoted a recent column by Thomas Friedman to this effect.⁵² In a similar vein, Lexington in the Economist has written:

«The most striking thing about American politics is the disjunction between the opinions of ordinary Americans and the behavior of the political elites.....A growing proportion of Democrats come from deep-blue congressional districts where it is more important to pander to the liberal base than to reach across the aisles. And the Republicans are doing everything they can to make the middle ground uninhabitable.....Revolt is growing, particularly in the west against the institutionalized gerrymandering that hands power to the political extremes. »⁵³ (emphasis added).

Scholars have come to the same conclusion. Thus Professors Karlan and Issacharoff write, « The pervasive consequence of the incumbent gerrymander is that it skews the distribution politically by driving the center out of elective office at the legislative level. »⁵⁴

Our two party system has produced effective governance because it has produced a system in which people can broadly identify with the discernibly different principles and

⁵⁰ Democratic Party of U.S. v. Wisconsin 450 U.S. 107, 131 (1981).

⁵¹ Colorado Republican Campaign Committee v. Federal Election Commission 518 U.S. 604, 647 (1996).

⁵² Supra, Note 18.

⁵³ Lexington, « Slumbering On, » the Economist, April 9, 2005, p. 28.

⁵⁴ Supra, Note 16, at 574.

interests represented by the two parties but still be reasonably comfortable in turning to either party when the party in power is no longer regarded as doing an effective job.

To the extent that the two party system no longer plays that role, the Court, given its own underlying premise regarding the non-ideological nature of our political parties, needs to be concerned.

One political scientist has noted, « When they [the major parties] are functioning well, » they submerge racial, ethnic and religious differences « in a joint search for communal victory. »⁵⁵ Incumbent friendly gerrymanders negate this important role of political parties because there is no need for ‘a joint search for communal victory’ in an electoral landscape devoid of real competition.

Vigorous campaigns require that the parties engage each other and the voters. When they don’t, a critical element in developing democratic consensus is lost and a political atmosphere develops in which constructive debate and coalition building does not count for much. Their absence in the electoral process inevitably carries over into the governing process and may help explain the decline of both civility and consensus building in our governing culture, particularly in the House of Representatives.

By making a stable two party system the basis of so many of its decisions⁵⁶, the Court has implicitly assumed responsibility for assuring that the system is working in a way that promotes effective governance. That does not mean that the Court is somehow responsible for controlling or even influencing political outcomes. Nor is it responsible for how nicely people play in the sand box. But it does mean that, by entering the political thicket, it bears some responsibility for assuring that the stable two party system it promotes is not itself undermining our system of governance. When persons on all points along the political spectrum see a direct connection between the absence of real competition in our congressional elections and a growing disfunction in our governing process, that is a matter which should concern the Court in the limited sphere in which it does operate. And since incumbent protection is itself a result of a statutory scheme mandated by Congress, regulation of such protection is well within that limited sphere.

5. A violation of democratic principles in and of itself can be unconstitutional without reference to any particular provision of the document.

Even as conservative a justice as Justice Scalia has implicitly recognized that a violation of democratic principles raises issues of constitutional import. Thus, in his plurality opinion in *Vieth v. Jubelirer*, he wrote:

⁵⁵ Gerald Pomper 1980. *The Contribution of Political Parties to American Democracy*, In *Party Renewal in America*, edited by Gerald Pomper, p. 6, quoted in Howard A. Scarrow, *Vote Dilution, Party Dilution, and the Voting Rights Act: The Search for Fair and Effective Representation* in *Political Gerrymandering and the Courts*, Bernard Grofman, ed., p.46 (1990).

⁵⁶ See cases cited at Note 48.

« Much of his [Justice Stevens'] dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment.....The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy. » (emphasis added).⁵⁷

Clearly Justice Scalia in this passage equates a violation of democratic principles with a violation of the Constitution.

The one man one vote principle for congressional elections has been located by the Court in Article I Section 2 of the Constitution,⁵⁸ which provides for election to the House of Representatives « by the people of the several States. ». A textual argument can be made that incumbent gerrymandering violates this provision since incumbent gerrymanders result in representatives who have effectively elected themselves. Even if one views this as a strained interpretation, the absence of a particular textual reference should not be decisive, for as Professor Issacharoff has noted, « There is no narrow textual justification for almost any body of law governing the political process. »⁵⁹

Moreover, since the single member district system for election to the House of Representatives is imposed on the States by Congressional legislation, the absence of any textual reference in the Constitution to how districting should be implemented should carry little weight.

C. A state plan marked by pervasive incumbent redistricting is also unconstitutional because it violates the right of the voter not affiliated with either major party to fair and effective representation.

The constitutional violations described in A and B above harms all voters by undermining the very purpose and democratic value of elections. (The possible standing issue raised by this level of inclusiveness is discussed further in Part II below.)

In this Section C, I urge that independent voters are denied fair and effective representation by pervasive incumbent protection gerrymandering. For purposes of this argument, I define independents as those registered voters who do not affiliate with either the Democratic or Republican parties since these voters are often accorded no role in the nominating process for congressional candidates and are clearly identifiable.

The phrase, « fair and effective representation » comes, of course, from the Supreme Court's opinion in Reynolds v. Sims:

⁵⁷ Supra, Note 12 at 292.

⁵⁸ See Wesberry v. Sanders 376 U.S. 1, 8 (1964).

⁵⁹ Samuel Issacharoff, *Why elections*, 116 Harv. L. Rev. 684, 687 (2002).

« Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. »⁶⁰

As used in *Reynolds v. Sims*, fair and effective representation is supposed to be the end product of the reapportionment process and, by extension, redistricting as well.

The question then becomes whether pervasive incumbent gerrymanders cause independents to suffer an invidious discrimination which results in a denial of their right to fair and effective representation.

Special status of independents as a political element.

Independent voters form a substantial portion of the electorate. Over the last 30 years, approximately one-quarter to one-third of the population at any one time has characterized itself as independent with one-third of this group indicating no preference for either party and the remaining two-thirds indicating that they consider themselves closer to one of the two major parties than the other.⁶¹

Independents by definition are uncomfortable with affiliating too closely with either major party. Their reasons may be many ranging across a broad spectrum of attitudes including fundamental disagreement with the principles of both parties, a belief that each party embodies some good and some not so good principles, or a belief that neither party has any principles at all. And, of course, the desire not to affiliate may have nothing to do with principle. In fact, it may simply be a matter of personal temperament or a product of family history or a dislike of the whole idea of political parties.

Whatever the reasons, independents in competitive contests are coveted by both parties because, if they move clearly in one direction or another, they can determine the outcome of an election.

Admittedly, suburban soccer moms or Roman Catholic blue collar workers are also often targeted as a group by one party or the other and can swing election outcomes.

From a constitutional standpoint, however, independents (who certainly can include soccer moms and blue collar Roman Catholics in their number), should be deemed to enjoy a political status no different than Democrats or Republicans since such status is as much a function of the registration process as the status of Democrats and Republicans and a refusal to affiliate with either major party is as much a political statement as a decision to affiliate. Thus, if Democrats and Republicans are entitled to be protected from

⁶⁰ 377 U.S. 533, 565-566 (1964).

⁶¹ See the NES Guide to Public Opinion and Electoral behavior, Party Identification 7-Point Scale 1952-2002.

extreme partisan gerrymanders, there is certainly no reason why independents should not be protected from a gerrymander that works to eliminate their political influence.

Indeed, the consistent degradation of a « voter or a group of voters' influence on the political process as a whole »⁶² is precisely the injury independents suffer in the face of excessive incumbent gerrymandering.

More than 30 years ago, the Supreme Court declared that apportionment schemes deny equal protection when they « would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. » (Emphasis added)⁶³ More recently, the Supreme Court held that the major political parties are not required to allow voters to vote in blanket primaries even when the voters of the State have, by initiative, provided for that inclusion.⁶⁴ When (a) independents are excluded by state law or internal party policy from participating in the nominating process of the major parties and (b) the major parties are constitutionally permitted to create a state delegation composed almost exclusively of safe seats, it seems clear that the voting strength of a major political element has been minimized if not cancelled out.

2. Hybrid nature of the Violation.

The equal protection claim I am advancing sounds in both individual and group rights. Since the essential harm involves a denial of fair and effective representation based on the deprivation of the right to cast a meaningful vote and the elimination of any practical incentive to participate in the political process, the claim sounds strongly in individual rights, just as *Baker v. Carr* sounded in individual rights even though, as a practical matter, the case was ultimately about how rural interests had locked in their political power at the expense of urban interests. Since independents, for the reasons discussed above, are an important and clearly identifiable political element whose influence is all but eliminated in non-competitive elections, it may be equally appropriate to view the claim as resting in group harm as well. The hybrid nature of the claim is not a reflection of weakness but rather the result of the fundamentally incoherent theoretical framework laid down in the gerrymander cases which require that a group harm be examined through the prism of individual rights.

3. Real injury.

Professors Pamela Karlan and Daryl Levinson have noted that the Supreme Court, in gerrymandering cases, « has identified two reasons for finding no injury »⁶⁵ :

« First, the 'adequate representation' theory holds that «
[a]n individual or group of individuals who votes for a

⁶² Bandemer, *Supra*, Note 39 at 132.

⁶³ *Fortson v. Dorsey* 379 U.S. 433, 439 (1965).

⁶⁴ *California Democratic Party v. Jones* 530 U.S. 567 (2000).

⁶⁵ Pamela S. Karlan and Daryl J. Levinson, *Why Voting is Different*, 84 Cal. L. Rev. 1201, 1209 (1996).

losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. » Second, the ‘virtual representation’ theory takes as a premise that the relevant political unit for determining the fairness of political influence is an entire jurisdiction, rather than a single district. Thus, Democratic voters in majority-Republican districts with Republican representatives will have their distinctively Democratic interests represented by Democratic representatives elected from other districts. » [citations omitted]⁶⁶

Neither the adequate representation theory nor the virtual representation theory provides a basis for denying a claim based on pervasive incumbent gerrymandering. In fact, the theory of virtual representation legitimizes looking at a pervasive incumbent gerrymander from the perspective of the entire state. The concept also underscores the way in which the independent voter is harmed by the pervasive incumbent gerrymander because the independent has no virtual representation in the same way that Democrats or Republicans do. With respect to « adequate representation’, it seems fanciful in the extreme to believe that a group that is given no opportunity to influence the electoral process in a meaningful way will still have as meaningful an opportunity to influence the winning candidate’s views as other voters.

Let me briefly address three additional arguments against treating the incumbent gerrymander as posing a serious constitutional harm to independents.

First, one might argue that independents can always register with a major party if they wish to influence a nominating process. I would respond that to require a voter to register as a Democrat or a Republican when, in fact, that voter does not actually view himself or herself as a Democrat or Republican just so that they might have some influence on the political process, would amount to a coercion of belief in violation of the First Amendment and in any event does not answer the real difficulty of minimizing or canceling out the voting strength of independents in the general election.

Second, To those who might argue that independents can form their own parties and nominate their own candidates, I would point out that the two party system is so deeply entrenched in our political system, in no small way the result of a myriad of Supreme Court decisions, that such a right is simply not a realistic consolation for essentially being frozen out of the current political process.

Finally, to those who might argue that even in highly one-sided districts, independent voters are not prevented from exercising their political rights and their vote will still be counted even though the result is a foregone conclusion, I would respond that the individual worker in *Lochner*⁶⁷ could theoretically negotiate his own terms and

⁶⁶ Id. at 1209-1210.

⁶⁷ *Lochner v. New York* 198 U.S. 45 (1905).

conditions of employment. Today, we recognize that the worker's right was in fact illusory and so too, I would argue, is the right of the independent, often undecided voter to participate in an election whose outcome has already been decided.

Part II

In 1986, in *Davis v. Bandemer*⁶⁸ the Supreme Court ruled that claims of extreme partisan gerrymandering presented a justiciable issue. In 2003, in *Vieth v. Jubelirer*⁶⁹, Justice Scalia's plurality opinion stated that it was time to reverse that decision since the seventeen years after *Bandemer*, to paraphrase a lengthy argument, had produced only a lot of dead trees and billable hours, no manageable standard for discovering excessive partisan gerrymandering having been found.⁷⁰

I mention this at the outset of this Section because there may be a presumption that if the Court can't develop a manageable standard for partisan gerrymandering, it won't be able to develop one for incumbent gerrymandering either. There is, however, a crucial distinction between the two claims. In partisan gerrymandering the concept of vote dilution is critical since the claim is based upon unfairly dashed expectations of electoral success and to prove that case one must show the results that the party was entitled to expect but for the gerrymandered dilution of its vote. Vote dilution, however, is simply not relevant to an incumbent gerrymandering claim. The basis of an independent's equal protection claim is being frozen out of meaningful participation in the political process not the dashing of legitimate expectations of electoral success. Similarly, the violations posited in Sections A and B of Part I are based on the fundamental incompatibility of excessive incumbent gerrymanders with the role that elections play in our constitutional and democratic processes.

1. A Manageable Standard

Not long after *Bandier* was decided, Professor Bernard Grofman, a political scientist, suggested that the decision had created a clear and manageable standard for excessive partisan gerrymandering, namely that it must be « (1) intentional, (2) severe, and (3) predictably nontransient in its effects. »⁷¹ History has shown that Professor Grofman's

⁶⁸ 478 U.S. 109 (1986).

⁶⁹ 541 U.S. 267 (2004).

⁷⁰ Justice Scalia wrote: « Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. » 541 U.S. 267, 281 (2004).

⁷¹ Bernard Grofman, *Toward a Coherent Theory of Gerrymandering : Bandemer and Thornburg*, in *Political Gerrymandering and the Courts*, Bernard Grofman, ed., p. 30 (1990).

interpretation of Bandemer discounted language in the opinion that made it virtually impossible for either major party to sustain an excessive partisan gerrymander claim.

I would suggest, however, that Professor Grofman's reading of the Bandemer standard is actually a manageable standard for an excessive incumbent protection gerrymandering claim.

a. Intentionality.

Intentionality should not be a difficult element of the standard to meet.

In Bandemer, Justice White, in his plurality decision, wrote, « As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended. »⁷²

Moreover, intentionality can, consistent with the Supreme Court's approach in other cases,⁷³ be inferred if the severity standard discussed below is met. As one scholar has noted:

« Because public bodies do not confess invalid motives, courts must often use inferential methods of proof; that is, they must look at the effects. In many areas of the law, there is a strong inference that the natural and probable consequences of an action are intended. »⁷⁴

Intentionality should also not be a problem since legislators have very rarely made a secret of their desire to protect themselves and their friends and, certainly in the circumstance of shared power, incumbent protection is the one motive that unites all legislators.

b. Severity.

A standard for severity can be quantified based on a definition of competitiveness. A non-competitive district would be one in which the margin of victory was at least a certain number of percentage points (we'll call it the Victory Spread). One possible standard would be that any plan in which at least x percentage (we'll call it the Gerrymandered District Percentage) of the total of the districts in the state were won by the Victory Spread in the first election following redistricting would be presumptively unconstitutional.

⁷² Bandemer, Supra, Note 39 at 129.

⁷³ See Rogers v. Lodge 458 U.S. 613, 623-627 (1982) where Court held that racially discriminatory intent could be inferred from a number of factors, including of particular relevance to our issue, failure of black candidates to be elected.

⁷⁴ Stephen E. Gottlieb, *Districting and the Meanings of Pluralism : The Court's futile search for standards in Jiryas Joel*, in *The U.S. Supreme Court and the Electoral Process*, David K. Ryden, ed., p. 68 (2002).

Establishing a statistical standard for non-competitiveness is well within the competence of the judiciary since it involves an objective inquiry into establishing that margin of victory which creates a strong presumption of continued success for an incumbent in the future.

Determining the Gerrymandered District Percentage is admittedly more of a subjective, value-laden exercise. It is not, however, one the Court needs to shy away from. Courts strike balances all the time. In this case, the balance is between competitiveness as a value and incumbent protection. Establishing a minimum standard of competitiveness is no more subjective an exercise than the Court's development of permitted deviations from the one man one vote principle for state legislative redistricting.⁷⁵

I accept as a given that it is very difficult, in analyzing the result of any one election district, to show that redistricting, as opposed to other factors favoring a particular incumbent, accounted for that incumbent's success. But the basis of an incumbent gerrymander claim must necessarily involve evaluating a state districting plan as a whole. Incumbent gerrymandering becomes a particular constitutional problem not when one or two favored leaders or rising politicians are afforded extra comfort in a particular district but when the parties, taking advantage of their dominance of the political system, attempt to protect all or virtually all their own with safe seats.

In short, while the motive of gerrymandering to protect incumbents, in the abstract, violates the Constitution whenever it occurs, it becomes an affront to the constitution requiring judicial intervention only when it is done wholesale, not retail, because it ultimately was wholesale entrenchment which worried the framers and it is only now when the practice has become so pervasive and so powerful that it presents a basic affront to democratic principles and a denial, particularly with respect to independent voters, of the right to fair and effective representation.

The development of a severity standard will not be without difficulties. Whether one quantitative standard should govern the entire country or whether it should be individual to a jurisdiction is, of course, something with which the courts will need to wrestle. It may be appropriate also, as a standard develops, to exclude individual districts from being counted toward the gerrymander under certain circumstances, for example, where the number of registered Democrats and Republicans in a district are shown to be registered in roughly equal numbers. Also, the total number of Democrats and Republicans in the State may need to be taken into account in establishing the Gerrymandered District Percentage.

There would also need to be a careful evaluation of the impact of a finding of unconstitutionality on majority minority districts since they represent a normative value

⁷⁵ See *Mahon v. Howell* 410 U.S. 315 upholding a 16.4% deviation from ideal population equality for a redistricting plan for the Virginia state legislature. Obviously, there is nothing constitutionally magical about 16.4% but the Court did note that this percentage « may well approach tolerable limits. » (410 U.S. 315, 329).

which should not be ignored in remedying an unconstitutional plan. In *Mahan v. Howell*, the Court declared:

« ...it is open to the State, in the event it should fail to achieve the goal of population equality to attempt to justify its failure by demonstrating that precise equality could not be achieved without jeopardizing some critical governmental interest. »⁷⁶

The presence of majority minority districts could similarly excuse, in proper circumstances, what would otherwise be an unconstitutional plan under the severity standard. Or, recalling the Court's suggestion in *White v. Weiser* that congressional equal population requirements might be relaxed to avoid clashes between incumbents, perhaps some minor relaxation of strict population equality for congressional districts could be allowed in the interests of a more competitive districting plan that would not significantly affect majority minority districts.

From the standpoint of manageability, however, the key point is that defining the parameters of a non-competitive district is a much less speculative and subjective inquiry than the « what is fair » and « what might have been » benchmarks that have proved so elusive for identifying excessive partisan gerrymandering.

The standard I have proposed is also inherently conservative. If the first election year following a redistricting is one in which one party does exceedingly well, it is unlikely that the incumbents of the disfavored party will consistently prevail to a degree meeting the severity standard except in a highly gerrymandered plan. On the other hand, if such election year results reflect normal election patterns, then a plan in which incumbents of both parties consistently win by the Victory Spread *presumably* will reflect a gerrymandered plan.

I say « presumably » because a *prima facie* case could perhaps be rebutted by clear and convincing evidence that the districting plan was drawn by a truly independent commission or group which did not consider incumbent protection in developing its plan.

The proposed approach is, of course, not the only possible one. Its focus, for example, on the election results immediately following the enactment of the plan might be seen as too limited a time period for either finding or not finding a violation although I would argue that the non-transience element of the proposed standard described below would provide some comfort for the finding of a violation based on one election.

An alternative approach open to the Court would be simply to declare severe incumbent gerrymanders unconstitutional without locking itself in too early to a particular standard for non-competitiveness. We are in an area, after all, where the political science community and even the legislature (once resigned to a new era in

⁷⁶ 410 U.S. 315, 340 (1973).

redistricting) can be very helpful in developing appropriate standards and in suggesting ways to integrate competitiveness as a value in the redistricting process.

Just as *Baker v. Carr* established the justiciability of a claim rooted in malapportionment without simultaneously establishing a standard, so might the Court make clear that excessive incumbent gerrymanders are unconstitutional while leaving it to the lower courts initially to develop the criteria for identifying such violations. In terms of the framework proposed by Professor Sunstein for categorizing Supreme Court opinions, it may be best to initially render an opinion which would be wide in the sense of articulating a comprehensive constitutional norm but narrow in the sense that it would initially be left to the lower courts to determine the breadth of situations to which the rule would be applied.⁷⁷

c. Non-transience.

Finally, as to non-transience, the third element of Professor Groffman's standard, this is a criteria in which the use of historical data would be appropriate. If prior election data shows a history of one-sided election results on a level that would have raised a presumption of pervasive incumbent gerrymandering had such gerrymandering been previously a subject of judicial scrutiny, certainly such results would raise an inference that the current gerrymander would be equally effective.⁷⁸

2. Obstacles to Suit

a. Standing to Sue

Under Article III, Section 2, federal courts only have jurisdiction over a case or controversy. One element of that requirement is that plaintiffs must establish that they have standing to sue. In *United States v. Hays*⁷⁹, the Supreme Court held that the irreducible minimum for standing contains three elements: (1) injury in fact – defined as an invasion of a legally protected interest which is concrete and particularized, not conjectural or hypothetical; (2) a causal connection between the injury and conduct

⁷⁷ *Supra* Note 42. See particularly discussion at pages 16 to 19 with reference to Professor Sunstein's nomenclature.

⁷⁸ While not completely analogous, it should be noted that it is not unusual for the Supreme Court, in seeking to evaluate whether a constitutional violation has occurred, to examine past history and behavior patterns. For example, in *Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1 (1971), the Court found that although the existence of single race schools did not establish a constitutional violation, there was a presumption, where the school had engaged in past de jure segregation, against schools substantially disproportionate in their racial composition. See also *Hutts v. Finney* 437 U.S. 678 (1978) where the Court recognized that punitive isolation in a prison for more than 30 days, while not prohibited per se, was constitutionally forbidden in the context of an Arkansas prison system so deficient that its entire operation raised 8th Amendment issues.

⁷⁹ 515 U.S. 737 (1995).

complained of; and (3) likelihood that the injury can be redressed by a favorable decision.⁸⁰

An independent voter claiming a denial of equal protection based on exclusion from the political process should have no problem meeting the standing requirement since (a) the right to fair and effective representation is a legally protected interest, (b) the inability to cast an effective vote represents a real injury to that interest; (c) there is certainly a causal connection between the gerrymander and the degradation of that voting right; and (d) regulating incumbent gerrymandering to provide more competitiveness will afford a fair if not complete remedy for the injury. (While the relevant jurisdiction for the evaluation of the equal protection claim that I have proposed is the entire state, it is possible that the Supreme Court might require the independent voter to reside in one of the safe districts created by the Plan).⁸¹

The standing problem is more complex when we consider the violations posited in Sections A and B of Part I. Concepts like concreteness and particularity obviously can mean many different things depending upon the context. In the context of standing, some guidance is afforded by Chief Justice Rehnquist's reiteration in *Raines v. Byrd* that « standing is built on a single basic idea – the idea of separation of powers. »⁸²

With that basic understanding of the standing requirement in mind, it seems clear that a voter's claim that his vote has been degraded by a legislature's attempt to pervasively fix election outcomes is sufficiently concrete to meet a standing challenge. Indeed, the claim itself shows why the concept of separation of powers should be given little weight, for the very claim revolves around the allegation of an unconstitutional practice benefiting members of the very branch of the government to whom separation of powers would ordinarily require deference.

Moreover, the injury to the voter posed by incumbent gerrymandering is as great and in fact more intimately connected to his or her status as a voter than the supposed injury to the white voters allowed to pursue their claims of racial gerrymandering in the *Shaw* line of cases.⁸³ In these cases white voters in North Carolina were allowed to sue to overturn majority minority districts. The claim that plaintiffs brought, as one scholar has put it, was more about « feeling disenfranchised » than « being disenfranchised »⁸⁴ and in the final analysis was « not a claim about voting rights at all. »⁸⁵ What was a stake was the abstract proposition that gerrymanders should not be motivated primarily by racial considerations. Whether one agrees with the *Shaw* line of cases or not, a claim that all citizens are deprived of the right to participate meaningfully in the political process when

⁸⁰ *Id.* at 742-743.

⁸¹ In *United States v. Hays*, the Court held that a plaintiff complaining of an alleged racial gerrymander had to reside in the District about which the claim was being made.

⁸² *Raines v. Byrd* 521 U.S. 811, 820 (1997).

⁸³ *Shaw v. Reno* 509 U.S. 630 (1993); *Shaw v. Hunt* 517 U.S. 899 (1996); and *Easley v. Cromartie* 532 U.S. 234 (2001).

⁸⁴ Pamela S. Karlen, *Nothing Personal : The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N. Car. L. Rev. 1345, 1350 (2001).

⁸⁵ *Id.*

incumbents seek to put themselves beyond the reach of the voters' judgment is certainly as real an injury as the claim of the white voters in *Shaw v. Reno* that they felt disenfranchised. The fact is that *Shaw* imposed on the political process a requirement of color blindness based on no showing of real injury to the plaintiffs. In contrast, voters suffer a real injury when all the significant choices have been made before they enter the polling booth.

b. The Political Question Doctrine

In *Baker v. Carr*, the Court identified six concerns which could each justify invocation of the political question doctrine.⁸⁶ Among them, in addition to lack of manageable standards discussed above, was «the impossibility of deciding [the question] without an initial policy determination of a kind clearly for nonjudicial discretion. »⁸⁷

Does a claim of excessive incumbent protection gerrymandering raise such a question? Given the variety and importance of cases in which the Court has effectively made policy determinations governing the political process, this concern, whatever applicability it might have had half a century ago, should certainly not now bar consideration of an incumbent gerrymandering claim.

As one scholar recently wrote:

« In the past decade alone, the Supreme Court repeatedly has found itself in the center of major electoral questions. It found the imposition of term limits on U.S. Senators and House members unconstitutional, effectively nullifying the most popular and widespread grassroots political reform in decades. The Court has essentially outlawed political patronage – the effect of which, many observers would argue, has irreparably damaged partisan organizations' governing and campaign capabilities. At the same time, the Court has upheld state laws that make it virtually impossible for minor or new parties effectively to challenge the two party status quo. It has considered the constitutionality of racial, partisan and religious redistricting and has barred ballot initiatives limiting civil liberties. »⁸⁸

It is difficult to see how the incumbent protection gerrymander raises any more of a political question than any of the other redistricting cases cited in the above passage

⁸⁶ 369 U.S. 186, 217 (1962)

⁸⁷ *Id.*

⁸⁸ David K. Ryden, *The U.S. Supreme Court, the Electoral Process, and the Quest for Representation : An Overview*, in *The Supreme Court and the Electoral Process*, David K. Ryden, ed., p. 4 (2002).

not to mention the cited cases dealing with the constitutionality of term limits and political patronage.⁸⁹

Moreover, the political question formulation, like the standing requirement, is rooted in a respect for the separation of powers.⁹⁰ Separation of powers, however, should not bar entertaining an incumbent gerrymandering claim because (a) the Congress can hardly be expected to regulate a practice which so clearly benefits its membership; (b) in any event we are dealing with the actions of state legislatures or other state created bodies, not Congress; and (c) separation of powers is not a particularly compelling concept when the legislature is in effect acting as a committee of the whole for the two party system rather than in its traditional legislative capacity.

c. Federalism

Regulation of incumbent gerrymandering should not be avoided by the federal judiciary out of concerns for federalism, at least in the case of districting for the House of Representatives. The reasons are partly historic, partly structural, and partly peculiar to the nature of the incumbency gerrymander claim itself.

The historic part deals with the framer's intention respecting the House of Representatives. The Senate was supposed to address the interests of the States, the House the interests of the people. Madison makes this very clear in No. 39 of the Federalist papers.⁹¹ Thus, the States, as political units, have no constitutionally based interest in redistricting. This is important because one of the key defenses for incumbent gerrymandering is that it increases the influence of the State in a body where power and influence are based in substantial part on seniority. It should also be noted that (a) the Senate, not the House, is the legislative body which the Supreme Court has held to be the primary protector of state sovereignty⁹² and (b) any constitutional rule respecting incumbent gerrymandering will be applicable to all the States and will not therefore put any one of them at a disadvantage.

From a structural standpoint, deference out of a respect for state or local autonomy is neither necessary nor appropriate when the issue is one of establishing appropriate constitutional norms for election to a national office.

⁸⁹ See Note 87 for a brief enumeration of cases in which the Court has addressed aspects of the political process.

⁹⁰ Baker v. Carr 369 U.S. 186, 210 (1962).

⁹¹ In Federalist No. 39 Madison wrote : « 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.. » (my emphasis). The Federalist No. 39 (James Madison) (Benjamin F. Wright, ed., 1961, Harvard University Press) reprinted in Barnes and Noble Books p. 283 (2004).

⁹² See Garcia v. San Antonio Metropolitan Transportation Authority 469 U.S. 528, 550 (1985).

Finally, deference is not appropriate in the circumstances of an incumbent gerrymander for the same reason it was not appropriate in *Kramer v. Union School District*.⁹³ That case involved a challenge to a state law that provided that only certain school district residents, those owning or renting property or with children enrolled in local public schools, could vote in school district elections. In evaluating the equal protection claim raised by an excluded person living in the District, the Court declared that in reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes was not applicable. The Court reasoned:

« The presumption of constitutionality and the approval given ‘rational’ classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge to this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. »⁹⁴

I would submit that the Court’s reasoning in *Kramer* is equally germane to an attack on the constitutionality of a pervasive incumbent gerrymander since such an attack also challenges the basic assumption of fairness which would otherwise entitle a state statute to some deference.

3. The Remedy

Professor Daryl Levinson has argued that the distinction between rights and remedies in constitutional law is a false dichotomy and that constitutional rights and remedies are « inextricably intertwined». ⁹⁵ In the constitutional model he presents, constitutional rights are « dependent on remedies not just for their application to the real world, but for their scope, shape and very existence. »⁹⁶

Professor Levinson’s insights strike a responsive chord in analyzing the issue of the incumbent protection gerrymander. Does every attempt at protecting an incumbent constitute a constitutional violation? That would arguably mean that every district in which incumbent protection was the primary motive for drawing the district line would need to be redrawn. If the constitutional violation only occurs when incumbent protection becomes too pervasive a redistricting theme, then the remedy can be limited to discouraging that practice.

⁹³ 395 U.S. 621 (1969)

⁹⁴ *Id.* at 628.

⁹⁵ *Id.* at 858.

⁹⁶ *Id.*

But there is a problem: How is a court to fashion a remedy that will make some incumbents vulnerable but not others? Courts would seem to face the almost impossible task of choosing which districts must be redrawn. As one article has noted, « The major stumbling block for the weak anti-incumbent criterion, » which the authors define as a criterion which would allow for some but not too much incumbent protection, « is how to determine which incumbents should be sacrificed. »⁹⁷

I would submit, however, that the judiciary need not make that determination in fashioning its remedy.

Rather, since the violation is an abuse of a delegated power, then the remedy is to deprive that body of the right to exercise that power for that particular redistricting cycle by substituting a different process. As long as the plan is drawn by someone other than the self-interested legislators themselves under standards that include competitiveness as a constitutional value, then by definition the constitutional violation has to a considerable extent already been remedied.⁹⁸

The process for districting in Iowa provides for a non-partisan commission to draft the initial redistricting plan and specifically forbids the commission from considering political data in formulating that plan.⁹⁹ Adopting the Iowa process or some variant thereof as a remedial tool for a districting plan that has gone too far in protecting incumbents would not require any specific electoral outcome. It would redress the unconstitutional balance created by that plan and would impose a penalty on the legislature by effectively prohibiting any incumbent protection under the new plan to be adopted.

A legislature operating in a constitutional environment in which incumbency protection if carried to an extreme will result in the redistricting process being taken out of its hands for that census cycle is likely to take steps to assure that such an outcome does not occur.¹⁰⁰ Once, therefore, legislatures get the message that competitiveness is a constitutional value which must be recognized, our congressional elections are likely in fact to meet their original goal of providing a measure of accountability and responsiveness to public opinion. That would be the beneficial result of the proposed remedy but the remedy itself would come simply from the substitution of a process in accord with constitutional standards for a process which failed to meet those standards.

⁹⁷ Supra, Note 46 at p. 46 .

⁹⁸ Current constitutional practice is to allow the legislature to redraw district lines found to be unconstitutional. *Upham v. Seamon* 456 U.S. 37, 41 (1982). I would question whether such a practice should be required for a violation based on pervasive incumbent gerrymandering since the incentive for the legislature to continue to protect its own will be as powerful the second time around as the first. Also, certainty that redistricting authority will be taken from it will be the strongest and perhaps the only real incentive the legislature will have for getting things right the first time.

⁹⁹ Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 Tex. L. Rev. 837 at 848 (1997).

¹⁰⁰ For a more extended discussion of this point, see Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency :Leading the Legislature to Police Itself*, 4 Journal of Law and Politics 653, 687 to 689, (1987-1988).

Whatever remedial process is ultimately devised by the judiciary, and there doesn't necessarily need to be one size fits all, the process should be an open one with hearings and input from the public and from legislative representatives. That the legislature might have lost its chance to be the ultimate decision-making authority in the redistricting process by reason of its gerrymander does not mean that it should not have the opportunity to make its views known to the new decision-maker, whether it be an independent commission, a special master appointed by the Court, or some form of arbitration panel.

Whether or not the revised plan will actually result in more competitive elections is not a judgment that the judiciary needs to make. Rather, judicial oversight of the remedial process can and should be confined to the question whether in creating the revised plan, the decision-maker did not consider incumbent protection as a primary factor in drawing district lines and did make some effort to include competitiveness as a value in the process.

One scholar opposed to an active judicial role in the regulation of gerrymandering has written: « When the Court considers whether and how to regulate politics, it should resist reforms requiring blunt remedial tools that threaten to transform, rather than refine, the American political system. »¹⁰¹

While the caution is a good one, the fact is that incumbent gerrymandering and the growing sophistication and power with which it has been applied, has itself worked a transformation in our political system. Not only has it completely warped the reality of electoral politics but, as previously discussed, it has arguably contributed in a significant way to the polarization of our two major political parties into warring ideological camps.

The proposed corrective remedy is, in any event, not blunt but it is meant to restore some sense of balance to the process by which redistricting lines are drawn. It does not require a particular result and it can only be imposed when a plan falls short of meeting a clearly discernable measure of competitiveness and there is no reasonable explanation offered to explain the failure to meet that standard. Moreover, the local federal district court judges, much more knowledgeable about the political culture of their State than the Supreme Court, should have wide latitude to fashion a process that fits within that culture and to judge whether the basic requirement that some effort have been made to consider competitiveness as a value has been met. Whether or not increased competitiveness results from such a plan will ultimately be up to the voters but at least they will know that their vote did not occur in a Potemkin Village created by their government to foster the illusion but deny the reality of a meaningful election.

¹⁰¹ Peter H. Schuck, "The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics," 87 Col. L. Rev. 1325, 1330 (1987).

4. A Few Other Considerations

There are three other considerations deserving brief mention which support judicial regulation of pervasive incumbent gerrymanders.: First, regulation is consistent with the reasoning of most of the major approaches to constitutional adjudication; Second, judicial involvement would not jeopardize the standing of the Court given the widespread public concern over the entrenched power of incumbency; Third, incumbent protection is inconsistent with the Court's view respecting incumbency set forth in its major decision dealing with political patronage.

a. Consistency with prevailing approaches to constitutional interpretation.

Pervasive incumbent gerrymanders should distress those embracing a variety of interpretive theories and approaches to constitutional adjudication.

For the originalist, a practice which so clearly sabotages the framers' intent respecting responsiveness and accountability of elections should be of great concern. And there is nothing in originalism that requires the Court from forbearing to address this problem. Professor Whittington has written:

« . The judiciary is not a problem to be worked into American constitutionalism but an integral component of that enterprise, and it is positively authorized to take action under it. In that context, judicial passivism is appropriate at the limits of interpretive knowledge but is distinctly inappropriate when the constitutional law is available to be interpreted and applied. »¹⁰²

For those particularly mindful of constitutional law as a form of common law, the incredible growth in the computing power of today's technology and the amount of information to which that technology can be applied means that incumbent protection gerrymanders today are much more effective in fixing election outcomes than they were even 30 or 40 years ago. Thus, a practice which might not have seemed as threatening in the past can legitimately be seen as a much different, more potent problem today.

Regulation of pervasive incumbent gerrymandering also furthers the goal of representation reinforcement and participation set out in famous Footnote 4 of the *Carolene Products* case¹⁰³ and in Professor Ely's work¹⁰⁴ because, as previously discussed, pervasive incumbent gerrymanders essentially lock into our governance an anti-democratic practice not easily remedied by normal political processes.

¹⁰² Keith E. Whittington, *Constitutional Interpretation : Textual Meaning, Original Intent and Judicial Review*, 168 (1999).

¹⁰³ *United States v. Carolene Products Co.* 304 U.S. 144 at 152-153 (1938).

¹⁰⁴ See particularly John Hart Ely, *Democracy and Distrust, A Theory of Judicial Review*, (1980).

Finally, those who regard themselves as majoritarians should be particularly distrustful of a redistricting motive which allows legislators to handpick their own majorities and entrench themselves in power. Majoritarians should also be especially concerned about incumbent gerrymandering in light of *U.S. Term Limits v. Thornton* which, as previously discussed, prohibits majorities from imposing term limits on their congressional representatives.

I would submit that the appeal for regulating incumbent gerrymandering is heightened by the fact that it can be seen as furthering a variety of interpretive approaches.

b. Acceptance.

Clearly, the judiciary should be wary of undertaking a role which risks its institutional legitimacy. Obviously, this is a risk that the Court has been willing to undertake from time to time.¹⁰⁵ More to the point, however, judicial concern regarding incumbent protection would only mirror widespread public concern over the same subject and thus, if done appropriately, would likely enhance, not diminish the stature of the Court.

c. Elrod v. Burns.

Pervasive incumbent protection gerrymanders are also inconsistent with part of the Court's rationale in *Elrod v. Burns*.¹⁰⁶ In that case, the Court prohibited political patronage for employees other than policymakers in part on the ground that « Patronage tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant. »¹⁰⁷ Certainly, if political patronage raises constitutional concerns because it tips the electoral process in favor of incumbency, so should incumbent gerrymandering, a much more direct means to the same end.

Conclusion

In Part I of this article, I proposed three separate foundations upon which a constitutional claim against pervasive incumbent gerrymandering might be laid consistent with current Supreme Court precedents. I then attempted to show why the Supreme Court can and should declare such gerrymanders unconstitutional and, in the process, have

¹⁰⁵ I would cite *Bush v. Gore* 531 U.S. 98 (2000) as Exhibit A. The fact that the Supreme Court's decision, essentially determining the outcome of a closely contested presidential election, did not lead to a major questioning by the public of the Court's role in the political process should certainly fortify the Court's courage in taking on the issue of incumbent protection if such fortification is necessary.

¹⁰⁶ 427 U.S. 347 (1976).

¹⁰⁷ *Id.* at 356.

offered some tentative suggestions respecting the specifics of a possible standard and remedy.

The claim that I have described recognizes that some degree of incumbent gerrymandering is inevitable and locates the constitutional violation in a scheme in which incumbent protection is so extreme, on a statewide basis, that competitiveness, accountability and the robust interaction our democracy contemplates have been effectively eliminated. The actual harms created by these results include denying independent voters the opportunity to participate meaningfully in the political system, undermining the very reason we have elections, and the disintegration of a stable and effective two party system into a jigsaw puzzle of one-party systems in which nominations in effect substitute for elections.

Someone once drew the distinction between a genuine conversation and an apparent conversation which is really nothing more than a series of intersecting monologues. Our politics today have become a series of intersecting monologues. We need to restore the conversation. Recognizing competitiveness as a constitutional value that needs to be balanced against incumbent protection would be a step in that direction.