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Drawing the Line on Incumbency Protection

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DRAWING THE LINE ON INCUMBENCY PROTECTION

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In the wake of each census, reapportionment emerges as a subject for debate. How district lines are drawn has a major impact on electoral outcomes. A dubious aspect of this line drawing is that it remains under the control of incumbents. It is in the interest of these incumbents, who are disproportionately White, to draw district lines to promote their chances for re-election and to promote fellow party members' chances for re-election. Protection of incumbents is often seen as a desirable goal for reasons such as a stable legislature, quality candidates, and seniority advantages. However, protection of incumbents is unnecessary to accomplish the bulk of these objectives. The costs of protection far outweigh the benefits. Still, the Supreme Court refused to address the problem of incumbency and redistricting because it considered the issue to be a political contest. At the same time, the Court took an active role in racial gerrymandering claims to ensure that race was not a predominant influence. Consequently, White incumbents are protected at the expense of efforts to enhance minority voting power; the result is a strikingly homogeneous legislature. If the integrity of the democratic system is to be maintained, the Court must eliminate its double standard when reviewing gerrymandering cases.

The health of democracies, of whatever type and range, depends on one wretched technical detail—electoral procedure. All the rest is secondary.[1]

INTRODUCTION

In the wake of each decennial census, reapportionment and redistricting[2] become the focus of academic debate and costly litigation. In recent years, much of the debate has revolved around

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1. JOSE ORTEGA Y GASSET, THE REVOLT OF THE MASSES 158 (1932), *reprinted in* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).

2. *Reapportionment* refers to the redistribution of seats in the House of Representatives among the states due to fluctuations in population; *redistricting* refers to the redrawing of Congressional district boundaries within the states. CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 925 (Congressional Quarterly Inc. ed., 1994). This Note uses the terms interchangeably.

the limits of the Voting Rights Act[3] and the use of race as a factor in redistricting.[4] While courts and academics alike have struggled to delineate the constitutional parameters of the use of race, an arguably more problematic aspect of the process—the influence of incumbents—remains conspicuously unexamined. To the limited extent that incumbents' influence in the redistricting process has been acknowledged by courts, it has been accepted and even endorsed without analysis.[5] Moreover, this unquestioned acceptance by the judiciary mirrors the surprising dearth of analysis and debate about the issue among academics.[6]

The ability of incumbents to influence district boundaries in an effort to enhance the likelihood of their re-election raises a number of complex issues. First, the question arises as to whether the protection of incumbents through redistricting makes sense from a policy perspective. Answering that question involves consideration of the potential benefits of protecting incumbents and of the arguments that doing so undermines the legitimacy of the electoral process. Second, the issue of incumbency protection must be analyzed in the context of contemporary American society. It may be that protecting incumbents makes sense on an abstract level, but in the context of competing objectives—the creation of majority-minority districts to alleviate effects of past discrimination, for example—it conflicts with those efforts and should be reconsidered. Finally, the issue is deeply embedded in even larger questions of who should be responsible for redistricting plans and how they should be evaluated.

In an effort to fill the void in scholarly debate and legal analysis, this Note evaluates incumbency protection as a redistricting principle and analyzes its treatment in various court opinions. After arguing that protecting incumbents is not a legitimate redistricting objective, this Note illustrates how the Supreme Court and lower federal courts have been reluctant to pass judgment on incumbency protection. This Note contrasts this "hands-off" approach to the strict scrutiny afforded claims of racial gerrymandering and argues that

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3. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

4. *See, e.g.*, Miller v. Johnson, 115 S. Ct. 2475 (1995); Shaw v. Reno, 509 U.S. 630 (1993); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588 (1993); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993).

5. *See, e.g.*, White v. Weiser, 412 U.S. 783 (1973); Prosser v. Elections Bd., 793 F. Supp. 859 (W.D. Wis. 1992).

6. *But see* Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 4 TEX. L. REV. 913 (1996).

such an approach enables incumbents to manipulate the Voting Rights Act for their self-interest. Additionally, this Note argues that incumbents, a disproportionate majority of whom are White,[7] are effectively protected at the expense of efforts to enhance minority voting power and that the Court's double standard offends notions of equal protection. This Note concludes that the current approach to redistricting undermines the legitimacy of the electoral process and briefly considers alternatives.

I. INCUMBENTS AND REDISTRICTING: WHAT ARE THE STAKES?

According to social choice theory, those who control the process by which choices are offered also have the potential to manipulate the outcome.[8] In terms of redistricting, this means that those who have power over the redistricting process also have power to draw the lines to their own advantage. The relationship between redistricting and democracy cannot be overstated: in a society that governs by majority-rule legislatures comprised of representatives of single-member, winner-take-all districts, the contours of the district lines affect who wins the election and whose public policy agenda is enacted. More concretely, the redistricting plan enacted will "help to determine whether the House will be dominated by Democrats or Republicans, liberals or conservatives, and whether racial or ethnic minorities receive fair representation."[9]

Perhaps because of the importance of redistricting, few people agree on how it should be conducted. Currently, the process varies from state to state, but it is most often completed by the representatives of the states where redistricting takes place.[10] Thus, often the very politicians who are running for election are in control of the redistricting plan. The districts created by the incumbents are then passed into law and used in elections until another plan is needed;

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7. African Americans compose 12.6% of the resident population in the United States while they make up only 7% of Congress; Latinos compose 10.2% of the population and hold only 3% of the seats in Congress. *See* STATISTICAL ABSTRACT OF THE UNITED STATES, THE NATIONAL DATA BOOK (1995); *see also* Jamin B. Raskin, *Supreme Court's Double Standard: Gerrymander Hypocrisy*, THE NATION, February 26, 1995, at 167.

8. Social choice theory refers generally to the idea that the will of a majority is determined by the process used to derive it. For an explanation of social choice theory and how it applies in the context of redistricting, see Silverberg, *supra* note 6.

9. CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS, *supra* note 2, at 925.

10. *See id.* There are notable exceptions to this rule, however. Several states, among them Colorado, Connecticut, Michigan, Montana, New Jersey and Pennsylvania, have created electoral commissions to draw district lines without reference to political considerations.

most often this occurs after the decennial census when population shifts are documented.[11]

Not surprisingly, the battles over what redistricting plan will be enacted are among the fiercest in American politics. In the usual scenario, members of the majority party in the state attempt to create as many election districts favorable to their party as possible.[12] The stakes are incredibly high:

> [L]egislators are fighting for . . . their party, just as surely as in an election campaign, but with more durable results. Depending on how district lines are drawn, a party with only a minority of the popular vote can assert control over a majority of seats in the state assembly and over its state's delegation to the national House of Representatives. More typically, a party that enjoys only a small majority in popular support over its principal competitor will, through its control of the districting process, translate this popular edge into preemptive institutional dominance.[13]

The success of the majority party is not, however, the only consideration that influences the proposed district boundaries. Legislators involved in the redistricting process are also heavily influenced by their personal stake in the outcome:

> The district lines drawn . . . can determine the strength of an incumbent's position and the chances of his or her political survival. They can also influence who runs against an incumbent and how much money will have to be spent on both sides. Given these stakes, legislators cannot help analyzing plans from the perspective of how they are personally affected.[14]

The fact that political self-interest is foremost in the minds of most legislators is hardly a secret.[15] In the words of Phil Burton, architect of the infamous California congressional districts in 1981 and 1982, "The most important thing you do, before anything else, is you get yourself in a position to draw lines for [your own] district. Then,

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11. This is due to the constitutional requirement of equally populated districts. *See* Baker v. Carr, 369 U.S. 186 (1962).

12. *See* CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS, *supra* note 2, at 926.

13. Polsby & Popper, *supra* note 1, at 302.

14. BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 1 (1984).

15. For example, Representative George E. Brown, Jr.(D. Cal.) admitted to the *Wall Street Journal* that he believed good gerrymandering "was essential" to making his district safe for another two terms. Paul Gigot, *Incumbent for Life: I Came, I Saw, I Gerrymandered*, WALL ST. J., Nov. 4, 1988, at A14.

you draw them for all your friends . . . ."[16] Referring candidly to his attempt to protect the Democratic Party and his brother John, Burton reportedly remarked that the zig-zagging district lines were his "contribution to modern art."[17]

As a result of the high stakes and obvious temptation for self-dealing, redistricting raises concerns about gerrymandering. Gerrymandering, "the intentional manipulation of territory toward some desired electoral outcome . . . [that] affect[s] the societal distribution of power,"[18] is widely perceived as a threat to democracy.[19] Gerrymandering is considered "opposite in spirit and in practice to the 'rational persuasion' paradigm of getting votes" because its purpose is to eliminate the need for appeal.[20] Thus, gerrymandering is viewed as an unjustified advantage for the party of the incumbent who can alter the distribution of votes, and thereby increase the likelihood of victory.[21] While some, including many social choice theorists, would argue that the potential for gerrymandering is inherent in the system, others counter that the potential has been greatly abused.[22]

Due to advances in technology, the problem of gerrymandering is now considered significantly more acute today than previously. In earlier times, manipulation of district boundaries was arguably more likely to backfire because accurate data on voters were difficult

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16. Gordon E. Baker, *The Totality of the Circumstances Approach, in* POLITICAL GERRYMANDERING AND THE COURTS 203, 207-08 (Bernard Grofman, ed., 1990) [hereinafter POLITICAL GERRYMANDERING].

17. Frederick K. Lowell & Teresa A. Craigie, *California's Reapportionment Struggle: A Classic Clash Between Law and Politics*, 2 J.L. & POL. 245, 246 (1985) (citation omitted).

18. Richard Morrill, *A Geographer's Perspective, in* POLITICAL GERRYMANDERING, *supra* note 16, at 212.

19. *See, e.g.*, BRUCE ADAMS, TOWARD A SYSTEM OF "FAIR AND EFFECTIVE REPRESENTATION": A COMMON CAUSE REPORT ON STATE AND CONGRESSIONAL REAPPORTIONMENT 24 (1977); James A. Gardner, *The Uses and Abuses of Incumbency:* People v. Ohrenstein *and the Limits of Inherent Legislative Power*, 60 FORDHAM L. REV. 217 (1991); Polsby & Popper, *supra* note 1.

20. Polsby & Popper, *supra* note 1, at 314.

21. *See* Charles Backstrom et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1129 (1978).

The type of advantage referred to is well illustrated in the case of Massachusetts Governor Eldridge Gerry, after whom the term "gerrymandering" was coined. In that case, the redistricting plan passed by the majority party packed the opposing Federalist party's supporters into a few districts and divided the remaining supporters into other districts. The convoluted districts were effective in insuring the majority party's control. Despite having lost the popular vote, the party won twenty-nine of the forty state senate seats. *See* Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 406 (1993).

22. *See generally* Polsby & Popper, *supra* note 1.

to collect.[23] Within the last decade or so, new computers, better market research, and advanced data bases have enabled legislators to gerrymander with more precision.[24] In fact, "a computer can churn out not one but hundreds of . . . districting plans which affect outcomes, power relationships in the legislature, and representation."[25] Not surprisingly, politicians now frequently hire consultants and use computer programs to generate potential districts from which they can choose.[26] Incumbents' potential 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.

II. THE ILLEGITIMACY OF PROTECTING INCUMBENTS

Proponents of incumbency protection in redistricting offer various arguments to support their position. Rationales for that policy include an ability to attract quality candidates, the promotion of a stable legislature, the desire to capitalize on seniority, and a lack of neutral alternatives. While these justifications may appear legitimate at first blush, reasoned analysis reveals that they are not as strong as they initially appear. Moreover, competing considerations weigh strongly against the justifications regardless of their strength. Concern about the effect of incumbency protection on the legitimacy of the electoral process, for example, strikes at the heart of democratic ideals and suggests that the policy is illegitimate regardless of the justifications. Examination of the competing rationales leads to the

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23. *See* Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering*, 92 MICH. L. REV. 652, 664 (1993).

24. *See id.*

25. Robert G. Dixon Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, *in* REPRESENTATION AND REDISTRICTING ISSUES 7, 8 (Bernard Grofman et al., eds., 1982)

26. *See* Polsby & Popper, *supra* note 1, at 303. In Indiana for example:

> [In 1981 the] Republican State Committee enlisted Market Opinion Research, Inc., a Michigan market research firm, to assist in the creation of the Republican gerrymander. The Committee housed the computer equipment in its headquarters and paid $250,000 to Market Opinion Research for their services. . . . Computer systems to assist in redistricting first appeared in the mid-1960s. By 1971 . . . state party organizations used computers extensively. These systems were archaic by today's standards.

David L. Anderson, Note, *When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante*, 42 STAN. L. REV. 1549, 1557 (1990) (citations omitted).

conclusion that incumbency protection is an illegitimate redistricting objective.[27]

A. *Quality Candidates and a Stable Legislature*

A common justification for allowing incumbents to influence redistricting is the argument that such protection is necessary to attract quality candidates to the political arena.[28] According to this rationale, qualified men and women will not seek election unless it affords the opportunity of a career. Affording incumbents or their political party this power is a means of increasing the security of the office and convincing high-quality individuals to become candidates. Without the power to influence district boundaries, a position in public office would be so insecure that a substantial number of otherwise qualified and interested individuals would be deterred from seeking election.[29] Because society values attracting talented candidates, incumbents are afforded job security by allowing them some control over redistricting.

Advocates argue that promoting the security of the incumbent's position also serves another objective, enhancing the stability and effectiveness of the legislature. Because the creation of less competitive seats ensures that small swings in the votes will not have large effects on the composition of the legislature, the legislature remains stable. The participation of the incumbents in the process also acts as a check on any potentially radical changes, and promotes meaningful participation by the electorate:

> [A]llowing legislators to participate in reapportionment puts the brake on major departures from the status quo and hands over the ultimate decision on district lines to individuals with [a] vested interest[s] in district continuity. That interest in continuity is not necessarily deleterious to the democratic process. Name recognition and familiarity make it easier for voters to know what the incumbent stands for and what [s]he has done: from a policy perspective, the voters are more informed and their votes are more meaningful.[30]

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27. For an analysis of the legitimacy of allowing incumbent legislators to control the redistricting process using social choice theory, see Silverberg, *supra* note 6.

28. *See, e.g.*, Peter H. Schuck, *The Thickest Thicket*, 87 COLUM. L. REV. 1325, 1350 (1987).

29. *See* CAIN, *supra* note 14, at 12 (discussing the threat of arbitrary removal as a deterrence to attracting quality people); *id.* at 186 (discussing using safe seats as a means of promoting legislative professionalism).

30. *Id.* at 185.

Moreover, the protection of incumbents promotes better government because "a legislature based upon the ideal of stability might produce more consistent policy over time . . . ."[31] Finally, protecting incumbents promotes careerism, which is desirable because "[i]t engenders loyalty, helps define an institution's place in its social and political environment, and lends stability by ensuring the presence of experienced members."[32]

B. *Stability and Quality Rebuttals*

While the argument that protecting incumbents promotes stability and is necessary to attract quality candidates has an intuitive appeal, such protection is unnecessary for a number of reasons. First, the Framers designed the national legislature in such a way as to ensure stability even in the event that every member of the House of Representatives lost in a re-election battle:

> Technically, the entire membership of the House could be overturned every two years. This was part of the Framers' "dangerous" experiment with popular rule. The danger, as it was perceived at the time (and it was part of the argument for a Senate), was that the House would be too swayed by the changeable winds of public passion to permit sober perspective to develop with time.[33]

In part to respond to the fear of instability, the Senate was added, creating a separate house of the legislature with members whose qualifications were different and whose terms of office were longer. One of the objectives of the Senate was to temper "the propensity of all single and numerous assemblies to yield to . . . sudden and violent passions" and provide stability in the face of "rapid succession of new members, however qualified they may be."[34] Thus, the arguments about stability and continuity were already considered in the design of the political institution, leaving little, if any justification for additional provisions for stability.

Second, even if one doubted the Framers' ability to ensure the stability of Congress through the bi-cameral legislature, there is little to suggest that incumbency protection through redistricting is

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31. Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & Pol. 653, 683 (1988).

32. ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 34 (1985).

33. BARBARA HINCKLEY, STABILITY AND CHANGE 9 (1978).

34. THE FEDERALIST NO. 62, at 184-85 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

necessary for the task. As an initial matter, re-election rates are so high that concerns about entrenchment are more common than concerns about stability.[35] A house-cleaning year such as 1992, when more than three-quarters of the members of Congress were returned to office,[36] suggests that one would have to do more than just remove protection through redistricting before instability would be a concern; it also suggests that potential candidates are unlikely to be discouraged by the limited potential for a career. Indeed, history shows that the system is capable of handling significantly greater turnover without complaints of unqualified candidates: "Throughout most of the 19th century, service in the House was likely to be a matter of one, or, at most, a few terms."[37] Accordingly, turnover during that period ranged from 30 to over 60% at every election,[38] and qualified candidates continued to pursue political careers.

1. Built-In Incumbency Advantages

The fact that incumbents also enjoy significant advantages over challengers undermines both the notion that incumbency protection is needed for stability and that it is crucial to attracting quality candidates. For example, regardless of their influence over redistricting, incumbents receive a number of benefits by virtue of their visibility as public officials: "Being an incumbent means, in addition to other things, receiving more news coverage, more endorsements, and having more money to spend on television advertising."[39] Such visibility is an added advantage in the context of extremely low public interest, where name recognition alone may be the basis on which voters cast their ballots.[40] Indeed, studies have shown that most voters recognize the incumbent's name in all districts and that voters who were unable to recognize the challenger's name were much more likely to vote for the incumbent.[41]

Incumbents also benefit from a number of official privileges which enhance their chances for re-election and make a political career a realistic possibility. Perhaps the most well known of the

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35. *See generally* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1131 (1994).

36. *See* CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS, *supra* note 2.

37. H. Douglas Price, *Congress and the Evolution of Legislative Professionalism*, *in* 2 THE CONGRESS OF THE UNITED STATES 89 (Joel H. Silbey ed., 1991).

38. *See id.*

39. MALCOLM E. JEWELL & SAMUEL C. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 44 (4th ed. 1986).

40. *See* HINCKLEY, *supra* note 33, at 23-24.

41. *See* DANIEL HAYS LOWENSTEIN, ELECTION LAW CASES AND MATERIALS 663 (1995).

incumbents' privileges is the franking privilege, which allows an officeholder to mail letters by writing a signature where a stamp belongs. This privilege has become a tool which incumbents use to target voters with carefully targeted messages through computerized mass-mailing systems. At times some incumbents have even sent their literature to voters who are not present constituents, but who may later become district residents as a result of redistricting.[42] The magnitude of this advantage is illustrated by the fact that the average incumbent spends more of the taxpayers' money on franked mailings than the average challenger spends on his/her entire campaign.[43]

In addition to using the franking privilege, members of both Houses have complete access to two congressional recording studios to tape their own cable network interview shows and radio broadcasts funded with tax dollars.[44] Not surprisingly, incumbents now often rely heavily on prepackaged videotapes which they send home to local television stations and have aired as straight news reports without any indication that they were prepared by the incumbent and financed by the taxpayers.[45] This increased media attention is an additional bonus above the media that an incumbent gains naturally through his/her status as a representative.

Perhaps the most obvious—and the most controversial—of the benefits that advantage incumbents in re-election are the campaign finance rules. As a result of a 1976 Supreme Court decision,[46] there are now limits on the amounts that individuals may contribute to congressional campaigns, but there are no limits on the amounts candidates may spend to run for office.[47] At the same time, Political Action Committees (PACs), which give more than ninety percent of their funding to incumbents, are permitted to donate five times as much money to a campaign as an individual.[48] Meanwhile, since the Court's decision, spending on congressional campaigns has skyrocketed.[49] This situation seriously disadvantages challengers who generally need to outspend incumbents to make up for the other benefits incumbents enjoy.[50] In sum,

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42. *See* Paul Jacob, *From the Voters with Care*, *reprinted in* LOWENSTEIN, *supra* note 41, at 700-01.

43. *See id.*

44. *See* LOWENSTEIN, *supra* note 41.

45. *See id.*

46. *See* Buckley v. Valeo, 424 U.S. 1, 29 (1976).

47. *See* Wertheimer & Manes, *supra* note 35, at 1131 (1994).

48. *See id.*

49. *See id.*; House winners in the 1976 election averaged $87,280 on their campaigns while in the 1992 campaign the average winning candidate spent $549,571, more than a six-fold increase from 1976. *See id.* at 1132.

50. *See* Jacob, *supra* note 42, at 702-03.

> [t]he built-in resources of congressional office are so great that they not only give incumbents a nearly unbeatable advantage, but they scare off potential challengers. The costs of campaigning have become so great that there is a declining number of serious challengers who can mount the necessary effort . . . .[51]

Given the already overwhelming obstacles to mounting an effective campaign against an incumbent, the argument that incumbency protection through redistricting is necessary for stability and to attract quality candidates appears, at best, disingenuous.

C. *Capitalizing on Seniority*

The objectives of attracting quality candidates and promoting the stability and effectiveness of the legislature are said to have special force in the context of the rules that operate within Congress. The seniority rules in particular are cited as another justification for protecting experienced legislators.[52] In the most basic sense, Congress' seniority system is "a device for selecting the leaders of the standing committees."[53] Leadership of a committee is a coveted position because it enables a legislator to have considerable influence over legislation. Committee chairs have substantial procedural powers; they decide the time and frequency of meetings, determine the agenda, and schedule hearings on proposed legislation.[54] Thus, if a committee chair is opposed to a piece of legislation, s/he can delay the scheduling hearings or refuse to schedule regular meetings.[55] According to one source, "Chairmen [also] determine the time allocated for hearings; they preside over meetings and control its agenda. A determined chairman . . . can delay hearings indefinitely, and can also prevent a member from gaining a vote on a bill for a long time . . . ."[56]

However, the seniority system does not only affect the assignment of leadership positions in committees, however. Rather, "it pervades the whole life of the Congress. . . . Seniority confers status upon members which affects much of their legislative life and

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51. LOWENSTEIN, *supra* note 41, at 647.

52. *See, e.g.*, DAVIDSON & OLESZEK, *supra* note 32, at 34; BARBARA HINCKLEY, THE SENIORITY SYSTEM IN CONGRESS 4 (1971).

53. HINCKLEY, *supra* note 52.

54. *See id.* at 89.

55. For example, Graham Barden, former Chairman of the House Education and Labor Committee, refused to schedule regular meetings. *See id.* at 90. Likewise, Chairman Howard Smith delayed scheduling hearings on civil rights legislation. *See id.* at 90.

56. JEWELL & PATTERSON, *supra* note 39, at 152.

especially the perquisites available to them."[57] For example, seniority also affects who will be rewarded their choice of committee assignments, who will be assigned to what office space, and who will receive recognition both on the floor and in committee hearings.[58] Thus, more than just a rule for deciding committee leadership, "[s]eniority is a norm of central importance to a legislature."[59]

Because the seniority system benefits those legislators who have served the longest, it creates an incentive for their protection. In the eyes of both constituents and party members, protection of incumbents increases the likelihood of a leadership position and thereby also increases the likelihood of favorable legislation.[60] Thus, states that regularly do not return incumbents to office will not have legislators in chairmanship positions and will be less likely to be rewarded with favorable legislation. This in effect decreases the desire to create truly competitive seats in the redistricting process because unsafe seats decrease the probability of re-election. To the extent that voters want their legislators to be influential in Congress, protecting incumbents through redistricting clearly makes sense.

D. *Reconsidering Seniority*

Despite the attraction of protecting incumbents to reap the benefits of the seniority rules, close examination of the seniority system reveals that the perceived benefits may be greatly exaggerated. Often overlooked is the fact that seniority rules for choosing committee chairs refer to the length of service on a given committee, rather than in Congress; an incumbent who changes committees therefore loses standing regardless of his or her length of time in the legislature.[61] In addition, the seniority rules, while still important, are not nearly as strong as they once were. Selection of committee chairs, for example, is no longer solely an issue of seniority. Instead, "the criterion of seniority is generally intermingled in House decision-making with a great many other criteria of choice, and the business of choosing [a chairperson] is not automatic, but remains in

57. *Id.* at 106.

58. *See* HINCKLEY, *supra* note 52, at 6.

59. JEWELL & PATTERSON, *supra* note 39, at 106.

60. Evidence of this perception can be seen from the reaction of Kansans to the retirement of Senate Majority Leader Robert Dole after 28 years in the Senate, and Senate Labor and Human Resources Committee chair Nancy Kassenbaum in 1996. *See* John Hanchette, *Kansas Lieutenant Governor Tapped to Succeed Dole in Senate*, GANNETT NEWS SERVICE, May 24, 1996 ("There is no question we'll have less clout, but we've had a long run with a couple of superb senators." (quoting Kansas University political scientist Burdett Loomis)).

61. *See* HINCKLEY, *supra* note 52, at 4.

the hands of persons having some considerable discretion." [62] According to one commentator:

> It may be that the seniority requirement exerts only a marginal impact on the choice of Congressional leaders . . . . Therefore, the kind of chairmen selected may be the result of many causes, with the seniority rule only one of a number of influences, and . . . its impact may have been considerably overstated.[63]

Moreover, the tenure of committee chairs is relatively short, with upwards of forty percent of committee leaders changing within a decade.[64] The high turnover, combined with emphasis on other criteria, suggests that the position of committee chair is no longer a position strictly dependent on length of service with the committee.

In addition to the relaxation of the criteria for appointing committee chairs, the growing use of subcommittees has weakened the authority of the committee chairs.[65] It is now the norm to hold most House committee hearings and working sessions at the subcommittee level, and the full democratic membership determines the jurisdiction and membership of the subcommittees.[66] At the same time, the ability of the committee chair to block or delay action on bills has been weakened by the passage of the Subcommittee Bill of Rights and the growing independence of individual members.[67] In sum,

> [c]hanges in congressional committees have produced less rigid adherence to seniority, more open decision-making, and greater decentralization of power through the subcommittees. One result has been to give the rank-and-file member a greater share of power in committee decisions.[68]

Thus, the seniority rules in Congress no longer confer an automatic grant of influence to members who have been in office the longest. Rather, younger members are given more power through reliance on the use of subcommittees.

While the relaxation of seniority rules in itself suggests that such rules may not be a valid justification for protecting incumbents

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62. Nelson W. Polsby et al., *The Growth of the Seniority System in the U.S. House of Representatives, reprinted in* 1 THE CONGRESS OF THE UNITED STATES: PATTERNS OF RECRUITMENT, LEADERSHIP, AND INTERNAL STRUCTURE 305 (Joel H. Silbey ed., 1991).

63. HINCKLEY, *supra* note 52, at 12.

64. *See id.* at 23.

65. *See* JEWELL & PATTERSON, *supra* note 39, at 154.

66. *See id.* at 155.

67. *See id.* at 271.

68. *Id.* at 170.

in redistricting, other considerations further undermine that rationale. Given that power is a zero-sum game, the objective of gaining power by protecting incumbents through redistricting is realized most fully when very few states pursue this objective. For example, if only one state redistricts to protect incumbents, that state will be represented by politicians with seniority and will enjoy a power advantage relative to the rest of the states. However, whenever any new state begins to redistrict in order to protect its incumbents the power returned to individual states already involved is diluted. At the point where every state is redistricting to protect its incumbents, the return to any given state will be zero.

With respect to redistricting to protect incumbents for seniority purposes, realizing the zero-sum nature of the game reveals two problems. First, in a scenario where not all states seek to protect incumbents and the returns to other states are significant, the fact that some states lose by not competing is cause for concern. While it makes sense for any individual state to compete for its own gain, the outcome is not necessarily better for the polity as a whole. Because some states gain an advantage at the expense of other states, the resulting power imbalance among states reflects a problematic lack of influence among voters in those states not competing to protect their incumbents. Second, in the scenario where all states are competing to protect their incumbents, the equilibrium is one in which the returns to any state are zero. If this is the case, the equilibrium is no different from a situation in which no state redistricts to protect its incumbents, and the rationale for the policy is undermined. Under either scenario, the objective of protecting incumbents through redistricting for the sake of seniority is hardly compelling.

Additionally, assuming experience is rewarded in Congress, and that senior legislators are able to exert influence in a way that benefits their districts, voters will recognize that they are the beneficiaries of their legislator's seniority. In other words, if experienced legislators are indeed better legislators because of their increased influence, voters will be more likely to support them and they will be re-elected on the strength of their record. The reward is one that will be, and should be, given by the voters without manipulating the boundaries of the districts for the protection of those legislators. Thus, even if the seniority system in Congress was still strongly followed, the justification for protecting incumbents through redistricting would be weak.

E. *Acquiescence and Lack of Neutral Alternatives*

While security, stability, and seniority are most often offered as justifications for protecting incumbents, they are not the only rationales that apply. To the extent that partisan gerrymanders also

attempt to protect the incumbents of the majority party, it is also useful to consider the rationales offered to justify partisan gerrymanders.

One rationale put forth to justify partisan gerrymandering is based on the notion of acquiescence. According to proponents of this position,

> [t]he rule permitting partisan gerrymandering has been tolerated for two centuries by both parties, who as erstwhile majorities and minorities have experienced the benefits and the burdens of that rule . . . and by the general public in those jurisdictions [where plans] . . . have been adopted by popular referenda.[69]

Proponents argue that because the two parties are equally able to benefit from their control of the redistricting process, it is legitimate to allow the winning party to reap what benefits it may.[70] Put another way, gerrymandering is merely a "victory bonus" that accrues to the party with majority support at the polls.[71] Applying this rationale to the question of incumbency protection, it is legitimate to allow incumbents to draw districts favorable to them, or to allow other members of their party to protect them, because such power is recognized and accepted as the political reward of a winning campaign.

Yet another rationale often advanced to justify the current redistricting processes is that preferable alternatives do not exist. This argument relies on the inherently political nature of redistricting and, like the acquiescence rationale, prefers the status quo to the unknown. According to this theory of redistricting,

> The key concept to grasp is that there are no neutral lines for legislative districts . . . . [E]very line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place. And . . . the electoral result will be different in each case.[72]

In other words, "[s]ince all reapportionments will necessarily affect the partisan balance of a state, district lines cannot be neutral even if the line-drawers are impartial themselves."[73] Because every "neutral" criterion overtly or covertly imports a view about who

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69. Schuck, *supra* note 28, at 1356.
70. *See id.* at 1358.
71. *See id.*
72. Dixon, *supra* note 25, at 7.
73. CAIN, *supra* note 14, at 135.

ought to exercise power, there is nothing inherently troublesome about the current process.[74] Accordingly, allowing politicians to draw the districts lines is no worse than allowing anyone else to draw the lines.

The notion that there are no neutral lines applies with special force in conjunction with the argument that partisan gerrymanders are rarely effective. If a majority party is weak, for example, it will not have the votes it needs to pass a gerrymandered plan or it will not be able to risk creating more competitive seats.[75] Even if the party is powerful, however, an attempt to gerrymander is likely to be of limited value. The party leaders will want to create seats that incumbents are likely to win with the fewest possible number of extra supporters in order to maximize the number of favorable districts.[76] This process of increasing the competitiveness of the district often backfires: "When gerrymanderers try to spread their party's voting strength thinly, in order to capture as many seats as possible, they leave themselves vulnerable to electoral tides that may sweep their party out of office."[77] Thus, since districts remain competitive even in an attempt to gerrymander, there is no reason to adopt alternative redistricting mechanisms.

F. *Alternatives and Neutrality Rebuttals*

The rationale that influence over redistricting is merely a victory bonus equally available to all winners is spurious. The fact that both sides historically have tolerated the practice does not address the issue of whether the practice should be tolerated. As Daniel Polsby and Robert Popper point out, "Democratic ballot box stuffing in Chicago is not meaningfully cured by Republican ballot box stuffing downstate."[78] Moreover, the fact that it has been tolerated by the politicians, who sometimes gain from the policy, ignores the voters' powerlessness. Because it is the incumbents who vote for the

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74. For the proposition that there are no coherent public interest criteria for legislative districting independent of substantive conceptions of the public interest, see Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest, Elusive or Illusory?* 33 UCLA L. REV. 1, 66-68 (1985).

75. *See id.*; CAIN, *supra* note 14, at 151.

76. *See* CAIN, *supra* note 14, at 148-49. Proponents of this rationale point out that the interests of the majority party leaders in a partisan gerrymander may conflict with those of their incumbents such that districts remain competitive. In this scenario, an incumbent is likely to be risk averse and want to create the least competitive district s/he can draw. *See* Lowenstein and Steinberg, *supra* note 74, at 67-68.

77. Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 156 (1985) (citation omitted).

78. Polsby & Popper, *supra* note 1, at 308.

rules, their failure to object to the rules should not be considered a valid indication of voter support. Likewise, whether or not district lines produce the intended outcome does not address the validity of the procedure. Again, ballot box stuffing and hiring goon squads may also backfire, but that fact does not enhance their legitimacy.[79]

Finally, the argument that all districting is inherently political and that therefore allowing self-interested legislators to influence the process is not problematic seems to prove too much. The fact that the process cannot be completely "neutral" does not mean that all processes are equally valid. Moreover, the assumption that a rule is not "neutral" because it is used to determine an outcome is mistaken: "Rules are neutral, as most people understand that term, even though their application determines a winner."[80] Neutrality in the context of redistricting rules means "according to generally accepted ideas of procedural fairness—in other words, that the person who did win, should have won, with 'should' drawing its meaning from precisely the democratic ideas that are instantiated by holding elections in the first place."[81] Put another way, in the redistricting context, a neutral rule would be one that treated all the actors involved the same.[82] Thus, the fact that redistricting is never a purely neutral process does not obviate the need to ensure that the process treats all interested parties equally.

G. *Additional Concerns*

1. Electoral Process Integrity & Democratic Legitimacy

While the infirmities of the rationales for incumbency protection in themselves suggest that the policy is illegitimate, consideration of additional concerns solidifies that conclusion. For example, critics emphasizing the centrality of voting argue that protecting incumbents by manipulating boundary lines to favor their re-election threatens democracy.[83] They note that since the time of the Declaration of Independence, the United States has acknowledged that the government derives its just powers from the consent of the governed.[84] A central feature of our democracy is that the people give their consent to be governed through their appointment of representatives. The representatives are accountable to the people,

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79. *See id.* at 307-08.

80. *Id.* at 310.

81. *Id.* at 311.

82. *See* Dixon, *supra* note 25, at 11.

83. *See* Erwin Chemerinsky, *Protecting Democratic Process*, 49 OHIO ST. L.J. 771, 773 (1988); Gardner, *supra* note 19.

84. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

without whose support they have no claim to govern. Thus, our democratic system depends on the ability of the electorate to vote officials in and out of office.[85]

Because voters' preferences are expressed through the procedures and mechanisms of voting, the mechanisms used are extremely important. The ability to control the process of redistricting largely determines the choice voters are offered and can virtually ensure the electoral advantage of one party or candidate.[86] The contours of the district lines affect the outcome of the election by altering the numbers of supporters in a given geographic area. For a voter, boundary lines can mean the difference between electing the candidate s/he prefers or being in the minority; for a candidate, it can mean the difference between winning and losing; and for society, it can mean the difference between the Great Society and rugged individualism. Thus, while it may be true that any line-drawing will have political consequences, the intentional manipulation of district boundaries for a desired outcome is qualitatively different because it undermines the goal of attempting to objectively divine the "collective will."

2. Undermining Accountability and Political Self-Determination

When legislatures enact a plan designed to protect incumbents, they also limit the power of the electorate *vis-à-vis* the incumbent: "When the government uses its power to . . . influence decisions about who gets to hold office, this basic right of political self-determination is undermined."[87] Protection of incumbents makes it more difficult for challengers to wage an effective campaign and allows incumbents to rely on their legislative power over redistricting rather than their appeal as candidates.[88] Granting legislators this power of self-selection in effect insulates them from the popular will and is contrary to the notion of democracy embedded in the Consti-tution.[89] In sum, the manipulation of boundaries to favor an incum-bent undermines "the meaningful and effective participation of voters in electing individuals who meet [their views] of representation . . . ."[90]

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85. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-18, at 1097 (2d ed. 1988).

86. For an explanation of social choice theory and its application to the redistricting process, see Silverberg, *supra* note 6.

87. Gardner, *supra* note 19, at 221.

88. *See id.* at 223.

89. *See* Polsby & Popper, *supra* note 1, at 304.

90. *See* Morrill, *supra* note 18, at 213.

One concomitant of the ability to manipulate the political will is the incumbents' increased freedom from accountability. In the eyes of critics, this freedom also threatens the democratic system.[91] Line drawing that favors the re-election of an incumbent insulates the representative from the reproach of her/his constituency: "By redrawing district lines in such a way as to favor their own reelection, incumbents can partially protect themselves from challenge. They can pursue their self-interests at the expense of their constituents' interests with less fear of being unseated."[92] Moreover, creating less competitive districts also results in less effective representation in single member districts because "[s]afe districts remove the incentive to grant political concessions to constituent interests or create electoral coalitions [that] ensure representation of diverse points of view."[93] Because incumbents protected by gerrymanders have less need to make compromises to assure their success, critics also claim that they are more likely to be ideologues.[94] In sum, incumbents who can rely on re-election can also be less sensitive to the interests of the voters in their district, and that diminished accountability is antithetical to the ideal of representative democracy.

3. Ripple Effects and Voter Disillusionment

Manipulation of district boundaries also has second-order effects beyond the immediate contest between two politicians. In addition to frustrating the ability to elect a challenger, control of redistricting also enables a party with only a minority of the popular vote to gain control of a majority of seats in the state assembly and in its delegation to the House of Representatives.[95] Having secured the majority of the districts, the legislators are then also in a position to transform their edge into "preemptive institutional dominance."[96] In addition to partisan effects, incumbents who win one election because of gerrymandering thereafter enjoy other benefits of incumbency, such as enhanced name recognition, that make their

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91. *See, e.g.*, ADAMS, *supra* note 19, at 24.

92. Ortiz, *supra* note 31, at 675; *see also* Gerhard Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 12 ("[F]avoring incumbents often is no more than a euphemism employed by those incumbents for perpetuating themselves as a power elite unaccountable to the voters because of skewed districting.")

93. *See* ADAMS, *supra* note 19, at 24 (1977).

94. *See, e.g.*, Polsby & Popper, *supra* note 1, at 306 (arguing that the Madisonian version of constitutional democracy is undermined because the strategy of acquiring support of the majority of voters who cluster toward the "middle" of the political spectrum is not necessary, absent competitive districts).

95. *See* Lewyn, *supra* note 21, at 406.

96. *Id.*

re-election more likely regardless of whether future districting is favorable to them.[97] Thus, an effective gerrymander not only impacts the will of the voters in the election immediately following redistricting, but it arguably gives the majority party and its incumbents power to benefit from that distortion thereafter.

Finally, redistricting with the goal of protecting incumbents is troublesome because of its effect on the perceived legitimacy of the system. By reducing the competitiveness of elections, the incumbent gerrymander causes voters to question the integrity of the system. In the words of one analyst: "If done poorly, districting can create a sense of disenfranchisement and futility . . . ."[98] This is likely to occur when the same group of voters consistently feels powerless: "If a particular rule works to the systematic disadvantage of one group over another, members of that group are less likely to think the rules, and any policies produced by them, are legitimate."[99] Disenfranchisement triggers a cycle of diminishing faith in the process leading to "reduced voter participation, reduced willingness to support the government, and, [ultimately,] reduced quality of government."[100] One critic alleges that incumbents' influence has already created the "public perception that legislators are single-minded seekers of re-election whose desire for job security far exceeds their desire or ability to fulfill the public duties with which they are entrusted."[101] Thus, because voters feel that the results are predetermined, many are apathetic to voting and considerable doubt is cast on the legitimacy of the election process.

III. INCUMBENCY PROTECTION AND THE COURTS

Despite its deficiencies, incumbency protection remains one of the most powerful influences in redistricting plans. In part, incumbents' ability to manipulate districts to their own advantage stems from the reluctance of the judiciary to analyze the redistricting process. The Supreme Court, viewing redistricting as a largely political contest posing non-justiciable issues, has developed an extremely high standard for proving partisan gerrymandering claims.

While the Court's unwillingness to address incumbents' influence makes sense in terms of Article III justiciability requirements, it stands in stark contrast to the approach to claims of

97. Polsby & Popper, *supra* note 1, at 308.

98. Morrill, *supra* note 18, at 213.

99. Cain, *Perspectives on* Davis, *in* POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 16, at 132.

100. Morrill, *supra* note 18, at 213.

101. Gardner, *supra* note 19, at 217.

racial gerrymandering, where the Court has become deeply involved in reviewing state plans to ensure that race was not a "predominant" influence in the process.[102] The effect of the Court's double standard has been to protect primarily White incumbents at the expense of efforts to enhance minority voting power. Essentially, the Court is engaged in a process of denying equal protection that undermines its legitimacy as an institution and the electoral processes upon which our democracy depends. Analysis of the case law illustrates this development.

A. *The Early Cases*

While the reapportionment revolution of the 1960s brought with it attention to qualitative aspects of voting and the search for "fair and effective representation for all citizens,"[103] the Supreme Court was reluctant to become involved in the more political aspects of reapportionment, including partisan gerrymandering.[104] Instead, the Court focused most of its attention on the application of the one-person, one-vote standard (the equipopulation principle)[105] as the means of achieving political fairness.[106] Along with the reluctance to consider partisan gerrymandering claims was a failure to scrutinize the legitimacy of incumbency protection as a districting principle. The Court referred to the issue in a footnote in *Burns v. Richardson*, a case dealing with the application of the equipopulation standard.[107] In *Burns*, the Court rejected the contention that districts in Hawaii were discriminatory, stating, "The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."[108] Without further discussion of whether and when protecting incumbents would ever be considered problematic, the Court upheld the apportionment plans.

In a later reapportionment case, *Gaffney v. Cummings*,[109] the Court elaborated on its reluctance to scrutinize the details of the redistricting process and intimated that incumbency protection in redistricting was a legitimate part of the political process. The Court

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102. *See* Miller v. Johnson, 115 S. Ct. 2475 (1995).

103. Reynolds v. Sims, 377 U.S. 533, 544 (1964).

104. *See* Grofman, *supra* note 77, at 100.

105. *See Reynolds*, 377 U.S. at 562 (requiring State to construct districts "as nearly of equal population as is practicable").

106. *See* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1648-49 (1993).

107. Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966).

108. *Id.*

109. 412 U.S. 735 (1973).

ruled that a state legislative plan that seeks to provide proportional representation to political parties may deviate from strict equality. The Court was unequivocal in its insistence on limited judicial involvement: "From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' is primarily a political and legislative process."[110] The Court rejected the claim that the plan represented a political gerrymander evidenced by "indecent" district shapes, stating, "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement . . . ."[111] Validating the political jockeying in the redistricting process, the Court went on to say,

> Politics and political considerations are inseparable from districting and apportionment. . . . District lines are rarely a neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.[112]

In addition, the Court rejected the "politically mindless approach" of ignoring political data in redistricting,[113] preferring instead to allow those who redistrict to seek "to achieve the political or other ends of the State, its constituents, *and its officeholders.*"[114]

In *White v. Weiser*, a case dealing with congressional redistricting, decided the same day as *Gaffney*, the Court took the position that federal courts should honor state policy and defer from intruding on legislative plans to the extent possible.[115] The Court held that in choosing among possible plans, the district court erred in choosing the plan that was more compact over the plan that most clearly approximated the state policies and preferences.[116] The Court declared that the reviewing court is obliged to "follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature."[117]

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110. *Id.* at 749 (citations omitted).
111. *Id.* at 752 n.18.
112. *Id.* at 753.
113. *Id.*
114. *Id.* at 754 (emphasis added).
115. 412 U.S. 783 (1973).
116. *See id.* at 796.
117. *Id.* at 795.

Significantly, the state policy in *Weiser* was "aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives."[118] The Court specifically stated: "[w]e do not disparage this interest."[119] The Court criticized the district court for not following state preferences in a case where it did not also "hold that the legislative policy of districting so as to preserve the constituencies of congressional incumbents was unconstitutional or even undesirable."[120] While the Court left open the question of the legitimacy of protecting incumbents through redistricting, its admonishment of the district court evinces a reluctance to address the question and an implicit acceptance of state freedom to determine redistricting criteria.

B. Karcher v. Daggett

The Court's "hands-off" attitude toward the political jockeying in the redistricting process began to change gradually in the 1980s after the development of racial gerrymandering claims. In *Karcher v. Daggett*,[121] a majority of the Court declared its willingness to deviate from the one-person, one-vote standard and to affirm the legitimacy of other districting goals without scrutiny: "Any number of consistently applied legislative policies might justify some variance [from strict population equality], including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and *avoiding contests between incumbent Representatives*."[122] Because the Court found the violation of equipopulation principle conclusive,[123] it left unaddressed the fact that "in a flight of cartographic fancy, the Legislature packed North Jersey Republicans into a new district many call 'the Swan.' "[124]

Karcher v. Daggett, while illustrating the Court's traditional stance, also marked a turning point for the Court. In addressing the shortcomings of the Court's blind adherence to the equipopulation

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118. *Id.* at 791.

119. *Id.*

120. *Id.* at 797.

121. 462 U.S. 725 (1983).

122. *Id.* at 740 (emphasis added).

123. The deviation in New Jersey's districts was less than the margin of error resulting from undercounts in the census, meaning that "there was no assurance that the apparently underpopulated districts were less populous than the seemingly overpopulated ones, or that the situation could have been remedied by the Court's zero tolerance standard for deviations from the equipopulation rule." Issacharoff, *supra* note 106, at 1656.

124. 462 U.S. at 762 (Stevens, J., concurring).

principle, Justice Stevens' concurring opinion advocated recognizing a claim of political gerrymandering.[125] Stevens declared, "political gerrymandering is one species of 'vote dilution' proscribed by the Equal Protection Clause."[126] Arguing that the Constitution provides broader protection than the one-person, one-vote standard, Stevens wrote,

> The Equal Protection Clause requires every State to govern impartially. When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. . . . If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time . . . they violate the constitutional guarantee of equal protection.[127]

Stevens argued that the logic of racial gerrymandering claims could not be limited because "[a]s long as [the Equal Protection Clause] proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well."[128] Thus, departing from their positions in previous cases, at least some members of the Court in *Karcher* recognized a cognizable harm caused by the unrestrained power to develop reapportionment plans and called for further scrutiny of the legitimacy of the redistricting process.

C. Davis v. Bandemer

The next time the Supreme Court addressed the issue of partisan gerrymandering was in *Davis v. Bandemer* when a six-three majority ruled that such claims were justiciable under the Fourteenth Amendment.[129] In *Bandemer v. Davis*, the district court addressed the issue after the Indiana legislature passed plans created by the Indiana Republican Party[130] with the purpose of protecting "[Republican] incumbents and creat[ing] every possible

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125. One of the circuit court judges noted that "partisanship produced artificial bulges or appendages of two districts so as to place the residences of [certain congressmen] in districts where they would be running against incumbents." *Id.* at 764 n.33 (Stevens, J., concurring).

126. *Id.* at 744 (Stevens, J., concurring).

127. *Id.* at 748 (citation omitted) (Stevens, J., concurring).

128. *Id.* at 749 (Stevens, J., concurring).

129. 478 U.S. 109 (1986).

130. 603 F. Supp. 1479, 1483 (S.D. Ind. 1984).

'safe' Republican district possible . . . ."[131] Indiana Democrats brought suit alleging an unconstitutional gerrymander after having received 51.9% of the popular vote, but only forty-three of one hundred seats in the state house under the new plan.[132]

While a majority of the Court recognized that extreme partisan gerrymandering can offend the Constitution, its reluctance to immerse itself in the politics of redistricting and constant judging of reapportionment plans was again evident:

> Inviting attack on [reapportionment schemes] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step toward that end, which would be so much at odds with our history and experience.[133]

Perhaps due to that reluctance, or due to a lack of consensus on legitimate criteria for districting, the Court limited the cause of action to the narrow issue of election outcomes.[134]

The application of the standard announced in *Davis* supports the view that the Court sought to narrow the potential class of partisan gerrymandering claims. The Court found inconclusive the fact that Democrats did not receive seats in proportion to their voting share, stating, "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render the scheme constitutionally infirm."[135] In addition, it found that the lower court's focus on the outcome of a single election was similarly unsatisfactory because "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence [on] the political process as a whole."[136] Because the district court found neither that the Democrats would be unable to secure control of the Assembly in one of the following elections, nor that they had no hope of doing better after the 1990 census, the Supreme Court overruled the finding of unconstitutionality.[137]

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131. *Id.* at 1488.
132. *See id.* at 1485.
133. *Davis*, 478 U.S. at 133.
134. *See id.*
135. *Id.* at 131.
136. *Id.* at 132.
137. *See id.* at 135.

Not surprisingly, *Davis v. Bandemer* has been criticized for establishing a standard which makes a constitutional violation practically impossible to prove.[138] Because the nature of gerrymandering typically results either in some competitive districts or in some districts so packed with the minority party that it is sure to win, plaintiffs will almost never be able to claim they have been consistently frustrated in expressing their will. In addition, it is unlikely that either political party in a partisan gerrymandering claim ever will be able to maintain that it has been excluded continuously from the political processes. Moreover, with respect to the issue of incumbency protection, the case virtually ensures that the policy will never be scrutinized. Only if and when plaintiffs can meet the stringent "effects" standard of the partisan gerrymandering claim will the Court consider the legitimacy of the districting process and potentially consider the legitimacy of protecting incumbents. In the more likely scenario where the Court finds no discriminatory effects, however, it will not have to reach the question of whether the criteria used in creating the districts serve a legitimate state interest.[139]

D. *The Effects of* Bandemer

Cases since *Davis v. Bandemer* support the theory that the standard virtually ensures that courts will almost never have to evaluate the legitimacy of states' districting policies in general, and the policy of incumbency protection in particular. *Badham v. Eu* [140] is perhaps the clearest example of the effect of the partisan gerrymandering standard. *Badham* addressed United States Representative Phil Burton's infamous "Burtonmander,"[141] a plan pairing three sets of Republican incumbents and splitting one Republican incumbent's district into six pieces.[142] Under this plan, the Democrats' lead in the California congressional delegation increased from a slim twenty-two to twenty-one lead in 1980 to a sizable twenty-eight to seventeen majority in 1982.[143] In 1984, Republicans won slightly more than half the vote, but Democrats took 60% of the seats; in 1986 and 1988, the trend continued, as the Democrats maintained their 60% share of the

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138. *See* Polsby & Popper, *supra* note 1, at 318.

139. *See id.* at 319-20.

140. Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988).

141. *See supra* text accompanying notes 16-17.

142. *See* Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783, 811 (1992).

143. Issacharoff, *supra* note 106, at 1671 n.142.

seats despite the fact that Republicans garnered 47% of the votes.[144] In addition, the circumstances surrounding the enactment of the plan suggested foul play; after being defeated by a ballot initiative sponsored by the Republican Party, the lame-duck Democratic governor and legislature then passed an alternative plan which was barely distinguishable from the original just as the Governor was about to leave office.[145]

Despite what many would consider evidence of gerrymandering violative of the Constitution, the lower court denied the partisan gerrymandering claim.[146] Focusing on the "effects" test articulated in *Bandemer*, the court found that the complaint failed to make any allegation regarding the California Republicans' role in "the political process as a whole," nor did it allege that they were "shut out" of the process or "entirely ignored" by their congressional representatives.[147] In addition, the court found that the "bizarre and irregular" shapes of the districts were not alleged to have affected Republican voters any differently than other voters.[148] Because plaintiffs failed to show "strong indicia of lack of political power and the denial of fair representation,"[149] the complaint was dismissed without leave to amend.[150] When the case was appealed, the Supreme Court issued a memorandum affirmance.[151]

Potentially more problematic than the fact that *Davis v. Bandemer* provides little hope for scrutiny of partisan gerrymanders is the fact that some courts have interpreted it to actually ensure the policy of incumbency protection. For example, in *Prosser v. Elections Board*,[152] Republican legislators filed suit after the 1990 census challenging the apportionment of the Wisconsin legislature as unconstitutional and violative of the Voting Rights Act.[153] In the course of its opinion, the court incorrectly assumed that one of the essential problems of partisan gerrymandering was that it forced contests between incumbents:

> The broader problem is that if as a result of redistricting two incumbents find themselves residents of the same district, and neither decides to retire or to move to another district, they must run for "re-election" without any of the

144. *Id.*
145. *Id.* at 1671-72 n.142.
146. *Badham*, 694 F. Supp. at 666.
147. *Id.* at 670.
148. *Id.* at 671.
149. *Id.*
150. *Id.*
151. *See* Badham v. Eu, 488 U.S. 1024 (1989).
152. 793 F. Supp. 859 (W.D. Wis. 1992); *see also* Issacharoff, *supra* note 106, at 1671.
153. 793 F. Supp. at 862.

> usual advantages of incumbency, because their opponent is also an incumbent. In recent years . . . incumbents have had a marked advantage in electoral contests with newcomers, so a partisan redistricting plan will seek to "pair" . . . as many legislators of the opposite party, and as few of their own party, as possible; more precisely, pair as many opposing (and as few of one's own) legislators who plan not to retire . . . as possible.[154]

Depriving incumbents of their usual advantages—including the advantage gained by the ability to manipulate the district boundaries—was, in the eyes of the court, a harm to be avoided. Without further explanation of whether and why this advantage was legitimate, the court adopted its own plan in part because it paired the fewest incumbents.[155] The Court recognized the possible objection that "in protecting incumbents, our plan perpetuates and entrenches political imbalances created by the existing, and unconstitutional, apportionment," but it found this objection unjustified.[156]

Prosser v. Elections Board is not the only case to misinterpret the problem of partisan gerrymandering recognized by the Court in *Davis v. Bandemer*. Courts seem similarly misguided in their conception of the role of judicial oversight as a check on the self-interested manipulation of district boundaries.[157] The focus on minimizing contests between incumbents completely misses the mark:

> At best, the coupling of incumbents in newly created districts may provide evidence that partisan power in the redistricting process is more concentrated than in years past. On the other hand . . . [it] could indicate that there are changing demographics that compel a partial realignment of power blocs. Conversely, the absence of incumbent coupling does nothing to ensure the sanctity of the process from . . . redistricting plans drawn to protect a sufficient number of incumbents so as to secure legislative approval.[158]

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154. *Id.* at 864.

155. *Id.* at 871.

156. *Id.*

157. *See* Wesch v. Hunt, 785 F. Supp. 1491, 1499 (S.D. Ala.) ("[W]e have discovered no justifiable basis for the fact that the Pierce Plan places [two incumbents] in the same district. The Supreme Court has recognized the policy of 'avoiding contests between incumbent representatives' as a legitimate objective. Accordingly, we have modified the Pierce Plan so that the two congressmen will not be in the same district." (citations omitted)), *aff'd sub nom.* Camp v. Wesch, 504 U.S. 902 (1992); *see also* Issacharoff, *supra* note 106, at 1673.

158. Issacharoff, *supra* note 106, at 1673-74 (footnotes omitted).

The critical lesson, which courts seem to have misunderstood, is not that incumbents must be protected from having to compete with one another, but that their influence on redistricting can be problematic if left unchecked. *Bandemer* therefore not only deters critical examination of the redistricting process through its demanding standard of proof, but it also guarantees that special treatment of incumbents will be protected without question. In effect, confronting the problem of excessive political manipulation of the districting process has secured the very forces of self-interest it was intended to limit.

E. *Incumbency Protection and the Voting Rights Act*

The Supreme Court's reluctance to become involved in reapportionment and its failure to evaluate incumbents' influence over the process is particularly problematic when analyzed in the context of cases interpreting the Voting Rights Act.[159] The Voting Rights Act is a congressional response to the problem of the disenfranchisement of racial minorities; its purpose is to restore fairness in the political process and to ensure effective representation for minority interests in government.[160] Recently, the Supreme Court has scrutinized closely redistricting plans under the Act in an attempt to delineate the extent to which the influence of race is permissible.[161] Thus, the policy of protecting incumbents remains unfettered while the use of information on race may be subject to strict scrutiny. This double standard at best limits the effectiveness of the Voting Rights Act. At worst, it raises doubts about the legitimacy of the entire electoral process.

One example of the dangerous interplay between the standards for partisan gerrymandering claims and Voting Rights Act compliance is the *Pope v. Blue*[162]*-Shaw v. Reno*[163] sequence. As a result of the 1990 Census, North Carolina was entitled to one additional U.S. congressional seat, increasing its delegation from eleven to twelve. Because a number of counties in North Carolina had a history of voting discrimination, the Voting Rights Act required that changes in voting practices in those jurisdictions be precleared by

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159. Voting Rights Act of 1965, Pub. L. No. 89-110 § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. 1973c (1988)).

160. *See* David O. Barrett, Note, *The Remedial Use of Race-Based Redistricting After* Shaw v. Reno, 70 IND. L.J. 255 (1994).

161. *See, e.g.*, Miller v. Johnson, 115 S. Ct. 2475 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

162. 809 F. Supp. 392 (W.D.N.C.) (three-judge panel), *aff'd*, 506 U.S. 801 (1992).

163. 509 U.S. 630 (1993).

the Attorney General.[164] The General Assembly, which created the redistricting plans and submitted them for preclearance, was controlled by Democrats.[165] After its original plan, which included only one majority-minority district, was refused preclearance, the General Assembly then passed another plan creating two majority-minority districts, both of which were contorted to protect White Democratic incumbents. That plan was pre-cleared, and it immediately became the subject of intense controversy.

Upon passage of the second reapportionment plan, the Republican Party of North Carolina and a group of registered voters brought suit. In the case brought by the Republican Party, *Pope v. Blue*,[166] plaintiffs alleged that they were prevented from influencing the redistricting process[167] and that their constitutional rights were denied because the plan was designed "primarily to further the interests of White incumbent Democratic Congressmen in avoiding competitive elections."[168]

Using the standards elaborated in *Bandemer* and *Badham*, the Court found that the reapportionment plan was indeed designed in part to disadvantage a political group, but it stressed that plaintiffs failed to allege that they were entirely "shut out of the political process."[169] In order to meet the "effects" standard of *Bandemer*, plaintiffs would have to show that "they have been or will be consistently degraded in their participation in the entire political process, not just in the process of redistricting."[170] The plaintiffs were unable to make such a showing, and thus failed to state an equal protection claim. In addition, although plaintiffs alleged that the General Assembly could have created more compact, contiguous districts which also complied with the Voting Rights Act, the district court denied such a plan was constitutionally required because "[t]he Supreme Court has often recognized that redistricting is an inherently political process."[171] Like *Badham v. Eu*, the court's decision was summarily affirmed by the Supreme Court.[172]

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164. Section 5 preclearance is intended to ensure that a change in voting procedures in a covered jurisdiction does not have the purpose or effect of "denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c) (1982).

165. Although the Governor of North Carolina at that time was Republican, North Carolina does not give the governor veto power. *See* Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992).

166. 809 F. Supp. at 392.

167. *See id.* at 395.

168. *Id.* at 396 (quoting Plaintiff's Complaint, para. 91).

169. *Id.* at 397.

170. *Id.*

171. *Id.* at 398.

172. *See* Pope v. Blue, 506 U.S. 801 (1992).

Shortly after the complaint in *Pope v. Blue* was filed, five White registered voters also challenged the reapportionment plan on grounds that it was an unconstitutional racial gerrymander in *Shaw v. Reno*.[173] Their claim alleged that:

> [T]he plan deliberately 'creates two Congressional Districts in which a majority of African-American voters was concentrated arbitrarily—without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions with the purpose of 'creat[ing] Congressional Districts along racial lines' and assuring the election of two African-American representatives.[174]

Justice O'Connor, writing for the majority of the Supreme Court in *Shaw*, characterized the claim as one that objects to "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification."[175] Concluding that the plan was indeed unexplainable on grounds other than race—despite the fact that the bizarre shape of the districts could be explained by the efforts of Democrats to protect primarily White incumbents—the Court found that such a plan required strict scrutiny.[176] Dismissing the argument that racial gerrymandering claims are functionally equivalent to partisan gerrymandering claims, the Court stated, "nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny."[177] According to the Court, classifying citizens on the basis of race threatens special harms: "It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[178] Thus, the Court held that a reapportionment statute that, "though race-neutral on its face, cannot be understood as anything other than an effort to separate voters on the basis of race . . ."[179] must pass strict scrutiny to be considered within the acceptable limits of the Constitution.[180]

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173. Shaw v. Reno, 509 U.S. 630, 633-4 (1993).

174. Shaw v. Hunt, 861 F. Supp. 408, 418 (E.D.N.C. 1994) (alteration in original) (quoting Plaintiffs' Amended Complaint para. 36(A)).

175. Shaw v. Reno, 509 U.S. at 642.

176. *Id.* at 657.

177. *Id.* at 631.

178. *Id.*

179. Shaw v. Reno, 509 U.S. at 649.

180. *Id.* at 657.

When the case was remanded to the district court, a majority of the three judge panel found the plan constitutional on grounds that it was narrowly tailored to further the State's compelling interests in complying with the Voting Rights Act.[181] On appeal in *Shaw v. Hunt*, the Supreme Court reversed.[182] The Court rejected the argument that the creation of a majority-minority district was required by the Voting Rights Act based on earlier findings that Congress did not intend for states to maximize majority-minority districts under the Act.[183] It also rejected the argument that the bizarrely drawn District 12 was narrowly tailored to avoid a vote dilution claim because such a claim requires that a minority group be "geographically compact." District 12 failed to meet this requirement.[184]

Examination of the *Shaw* case reveals that the Court's failure to scrutinize the policy of incumbency protection undermines the effectiveness of the Voting Rights Act. In *Pope*, the Court was willing to accept bizarrely shaped districts in a plan designed primarily to protect White incumbent Democratic politicians.[185] Although the plaintiffs asserted that more compact plans with majority-minority districts could be created, the Court rejected the notion that such plans were constitutionally required.[186] When the same set of facts was litigated as a racial gerrymander, however, the Court found that the district shapes could not be explained on grounds other than race, despite its awareness of the influence of incumbency protection on the shape of the districts.[187] In finding the plan unconstitutional, the Court in effect told legislators that bizarrely-shaped districts drawn solely to protect incumbents will be protected, but those drawn with the object of creating majority-minority districts will not. Legislators may learn one of two lessons from the Court's opinion (1) attempts by the majority party to create majority-minority districts will potentially limit its right to electoral

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181. Shaw v. Hunt, 861 F. Supp. at 474.
182. *See* Shaw v. Hunt, 116 S. Ct. 1894 (1996).
183. *Id.* at 1903-04.
184. *See id.* at 1906.
185. *See* Pope v. Blue, 506 U.S. 801 (1992).
186. *See id.*; *Pope*, 809 F. Supp. at 397.
187. Justice Stevens' dissent forcefully refuted the majority's position:

> If race rather than incumbency protection had been the dominant consideration, it seems highly unlikely that the Democrats would have drawn this bizarre district rather than accepting more compact options that were clearly available. If race, rather than politics, had been the "predominant" consideration for the Democrats, they could have accepted the Republican Plan . . . [i]nstead . . . the legislature deliberately crafted a districting plan that would accommodate the needs of Democratic incumbents.

Shaw v. Hunt, 116 S. Ct. 1894, 1916 (Stevens, J., dissenting).

advantage by inviting strict scrutiny,[188] and (2) as a minority they can use the Voting Rights Act to invoke strict scrutiny of a redistricting plan that would be found constitutional under a partisan gerrymandering analysis.[189] Under either scenario, the objectives of the Voting Rights Act are sacrificed to the interests of primarily White incumbents.

The troubling irony of the Court's dual standard for partisan gerrymandering and racial gerrymandering is also illustrated by the *Terrazas v. Slagle*[190]-*Vera v. Richards*[191] sequence of cases. After the 1990 Census, Texas gained three congressional seats and sought to enact a reapportionment plan pursuant to the Texas Constitution and subject to the Voting Rights Act. Republican plaintiffs brought suit under the Fourteenth and Fifteenth Amendments and the Voting Rights Act alleging that the plan sacrificed the rights of racial and political minorities to enhance re-election chances of Anglo-Democratic incumbents.[192] Interpreting *Bandemer* to require evidence of a group perpetuating its power through gerrymandering in a political structure where the minority group lacked power to counteract the tactic, the court dismissed the partisan gerrymandering claim because plaintiffs failed to show that Republicans had no influence in the state political process as a whole.[193] The court also found that the plan did not dilute the voting rights of racial or ethnic minorities in violation of either the Constitution or the Voting Rights Act.[194]

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188. Of course, legislators in areas subject to § 5 of the Voting Rights Act will still have to seek preclearance, and will not be able to create districts which dilute minority voting strength. However, to the extent that the Court's rulings also potentially reflect a higher threshold for proof of vote dilution, *see* Johnson v. DeGrandy, 114 S. Ct. 2647 (1994), or even doubt about the legitimacy of the Voting Rights Act itself, legislators may view their obligations under the Act differently. Thus, they may be less likely to attempt to create minority-majority districts on average, and particularly reluctant to do so in situations where it does not appear absolutely required.

189. Justice Stevens also noted the potential manipulation of the Voting Rights Act in his discussion of standing in his dissent:

> It is plain that these intervenors are using their allegations of impermissibly race-based districting to achieve the same substantive result that their previous, less emotionally charged partisan gerrymandering challenge failed to secure. . . . [I]t is inevitable that allegations of racial gerrymandering will become a standard means by which unsuccessful majority-race candidates, and their parties, will seek to obtain judicially what they could not obtain electorally.

Shaw v. Hunt, 116 S. Ct. 1894, 1908 (1996) (Stevens, J., dissenting).

190. 821 F. Supp. 1162 (W.D. Tex. 1993).

191. 861 F. Supp. 1304 (S.D. Tex. 1994).

192. This is how plaintiffs' original cause of action was described in *Vera*, 861 F. Supp. at 1314.

193. 821 F. Supp. at 1174.

194. *See id.* at 1171-72.

After the enactment of the challenged plan and the 1992 elections, registered voters also brought suit alleging that twenty-four of the State's thirty Congressional Districts were unconstitutional in *Vera v. Richards*.[195] This time, however, the suit alleged that the plan was an unacceptable racial gerrymander under *Shaw v. Reno*.[196] In evaluating a claim using district appearance as evidence, the extensive history of incumbency protection and bizarrely shaped districts in Texas was particularly relevant.[197] As a former member of the Texas House and Senate involved in the 1980 and 1990 redistricting battles explained: "[C]ompactness is not a 'traditional districting principle' in Texas. For the most part, the only traditional districting principles that have ever operated here are that incumbents are protected and each party grabs as much as it can."[198]

Not surprisingly, Congressional incumbents had been actively involved in the redistricting process, with the Texas Democratic Congressional Delegation forming a redistricting committee to develop plans according to incumbents' needs and preferences.[199] The court found that the plan reflected incumbents' interests and successfully avoided pairing them to favor their chances of reelection.[200] In focusing on District 30 in particular, the *Vera* court found that a more compact African American majority district could have been drawn if it were not for the concerns of incumbents.[201] The need to mediate competing objectives and adhere to the equipopulation requirement had resulted in irregularities in the shape of the district: "[A]fter [the incumbents] won back territory on the east and west of District [thirty], the District was forced further north, because of the traditional one-person, one-vote requirement of population equality among districts."[202]

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195. 861 F. Supp. at 1309.

196. *See id.*

197. In the 1960s Texas was home to the infamous District 6, a contorted district drawn to support incumbent "Tiger" Teague. *See id.* at 1312; *see also* Brief of Appellants at 8, Lawson v. Vera, 116 S. Ct. 1941 (1996) (No. 94-806) (citing examples of protecting incumbents at the expense of compactness).

198. *Vera*, 861 F. Supp. at 1313 n.9.

199. *Id.* at 1317.

200. *Vera*, 861 F. Supp. at 1317-18.

201. *See id.* at 1321; *see also* Reply Brief of Appellants at 4, Lawson v. Vera, 116 S. Ct. 1941 (1996) (No. 94-806) ("The reason the State chose irregular over regularly shaped versions of Districts 18, 29, and 30 was to protect White incumbents and to aid White Senator Gene Green.").

202. Brief of Appellants at 12, Lawson v. Vera, 116 S. Ct. 1941 (1996) (No. 94-806). Expanding the district to the North increased the racial diversity of the district because the area to the North contained lower percentages of minority residents. State Appellants' Brief on the Merits at 13, Bush v. Vera, 116 S. Ct. 1941 (1996) (No. 94-805).

Similar influences and tensions had affected Districts twenty-nine and eighteen, where the court noted: "[T]he only way to protect all incumbents . . . draw two majority-minority districts, and get [sufficient] votes in the House . . . and in the Senate, was for one district to go through Downtown and the other to go around it."[203] Once again, because of the competing demands of incumbents, the requirements of the Voting Rights Act, and the one-person one-vote principle, bizarrely-shaped districts were drawn despite the fact that more compact versions were possible.[204] As a result of the plan, the composition of the Texas legislature grew from one African American, four Latinos, and twenty-two Anglos, to two African Americans, five Latinos and twenty-three Anglos.[205]

Upon review of the evidence, the district court rejected both the argument that Texas did not adhere to a policy of compactness and the argument that the irregular shapes were caused by Texas' policy of protecting incumbents. With respect to incumbency protection, the court noted that no more than three incumbents were jeopardized by the creation of minority districts. [206] It found, without explaining why, that the block-by-block computer-generated exclusion of voters was "much different in degree from the generalized and legitimate goal of incumbent and seniority protection previously recognized by the Supreme Court."[207] Instead, the court found that the boundaries sabotaged traditional principles of compactness and stated, "[i]ncumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering."[208]

The court rejected the incumbency protection rationale because it found that incumbents' attempts to design their districts were largely dictated by concerns about the racial composition of the voters.[209] Accordingly, "racial gerrymandering was an essential part of incumbency protection, as African-American voters were deliberately segregated on account of their race among several

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203. *Vera*, 861 F. Supp. at 1325 n.30.

204. Brief of Appellants at 11, Lawson v. Vera, 116 S. Ct. 1941 (1996) (No. 94-806).

205. *See Vera*, 861 F. Supp. at 1314.

206. *Vera*, 861 F. Supp. at 1334.

207. *Vera*, 861 F. Supp. at 1334. Nowhere did the court explain why the use of computer technology makes a legally significant difference in the State's effort to protect incumbents. State Appellants' Brief on the Merits at 11 n.7, Bush v. Vera, 116 S. Ct. 1941 (1996) (Nos. 94-805, 94-806, 94-988). Moreover, while the Court suggested that the State inappropriately used race to identify likely Democratic voters at the census block level because partisan voting patterns were not on the computer system, it ignored the fact that such data was available to incumbents from the national party. *See* Reply Brief of Appellants at 10 n.16, Lawson v. Vera, 116 S. Ct. 1941 (1996) (No. 94-806).

208. *Vera*, 861 F. Supp. at 1336.

209. *Vera*, 861 F. Supp. at 1338.

Congressional districts."[210] With respect to one district, the court found, "[it] was carefully gerrymandered on a racial basis to achieve a certain number of African-American voters; in order to protect incumbents, other African-American voters were deliberately fenced out . . . and placed in other districts that are equally 'untraditional.' "[211] Likewise, in two other challenged districts, the court stated, "the goal of incumbent protection was itself realized by the deliberate segregation of voters on the basis of race. . . . Incumbent Democrats were fencing minorities into their districts or into the new majority-minority districts while those same minorities were effectively being removed from Republican incumbents' districts."[212] Thus, because those districts were "formed in utter disregard for traditional redistricting criteria and because their shapes are ultimately unexplainable on grounds other than the racial quotas," they were subject to strict scrutiny.[213]

Applying strict scrutiny, the court found that the districts neither were narrowly tailored nor served a compelling state interest.[214] For perhaps the first time, a court was forced to address the issue of incumbency protection, and it found that such a policy was not a compelling state interest strong enough to overcome adherence to an objective districting principle such as compactness.[215] Despite the fact that the Supreme Court had earlier held that compactness was not constitutionally required and could be subordinated to other state objectives,[216] the court imposed a standard that Texas had never before adhered to in its history. Noting that a *Shaw* claim focuses on the appearance of the districts, the court held that "to be narrowly tailored, a district must have the *least* possible amount of irregularity in shape, . . . [and w]here obvious alternatives to a racially offensive districting scheme exit, the bizarre districts are not narrowly tailored."[217]

Significantly, the *Vera* court also upheld other challenged districts that were also designed to protect incumbents, in part because they were less bizarrely-shaped.[218] Although plaintiffs alleged that other districts also produced racial segregation, the court concluded that both race and politics influenced the divisions of the districts because the incumbent Congressmen were seeking to include

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210. *Id.* at 1339.
211. *Id.*
212. *Id.* at 1341.
213. *Id.*
214. *Vera*, 861 F. Supp. at 1345.
215. *Id.* at 1343-44.
216. *See* discussion Part III.A, *supra*.
217. Vera v. Richards, 861 F. Supp. 1304, 1343-44 (S.D. Tex. 1994).
218. *Id.* at 1344.

Democrats in their districts. Moreover, because they were not highly irregular in shape and "the addition or subtraction of these minority populations was not proportionately significant," they did not require strict scrutiny.[219] In other words, where the twin goals of incumbency protection and Voting Rights Act compliance did not result in irregularly shaped districts, no constitutional violation was found. On appeal in *Bush v. Vera*, the Supreme Court agreed that the "bizarre" districts required strict scrutiny and affirmed the judgment.[220]

The courts' decisions are problematic for a number of reasons. Most important, they overlook the fact that irregularity of boundaries may be powerful evidence that racial considerations did not in fact predominate but instead were subordinated to other state objectives. In ignoring the complex interaction of influences, the *Bush v. Vera* decision imposes an additional hurdle in the way of attempts to create majority-minority districts. As Texas noted in its brief, the "failure to consider the highly irregular shapes of Texas' majority-White districts, as evidence of a general, non-racial abandonment of compactness, resulted in a double standard, treating minority voters, minority candidates, and minority incumbents worse than White voters, candidates and incumbents."[221] The result of such a double standard is that recognition of minority interests will be significantly more difficult:

> Under the rule established by the court . . . a State may construct irregular districts to recognize the voting strength of any group that is not a historically disadvantaged racial minority . . . . Yet, to obtain a district that recognizes their interests, racial minorities must convince Texas to forsake all of its other districting goals and, even more to maximize the regular shape of opportunity districts. This heaps an additional disadvantage on minority groups which already suffer barriers to participation in the political process.[222]

Equally troubling is that the decision implicitly says that "Anglo officeholders may not fight to keep minority voters . . . .

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219. *Id.* at 1345.

220. 116 S. Ct. 1941 (1996).

221. Reply Brief for Appellants at 7.

222. Brief for Appellees at 57; *see also* United States Supreme Court Official Transcript at 35, Bush v. Vera, No. 94-988, 94-806, 94-805, WL 729899 (Dec. 5, 1995) (Penda Hair of the NAACP stating that "to single out minority opportunity districts and say that they have to have a special Federal rule of compactness that does not apply to majority White districts or any other districts in Texas we believe disadvantages them in the process").

[and] minority voters may not attempt to retain officeholders who have been favorable to them" when such attempts result in irregularly shaped districts.[223] In effect, the decision institutionalizes the very disparate racial treatment it purportedly sought to overcome. Rather than strengthening the command of equal protection under the Fourteenth Amendment, the court is actually undermining it.

The analysis of the *Pope-Shaw* and *Terrazas-Vera* lines of cases thus crystallize the troubling consequences of the courts' reluctance to scrutinize incumbency protection, particularly when they have chosen to scrutinize strictly plans under the Voting Rights Act. Districts created solely to increase the likelihood of an incumbent's reelection are virtually beyond reproach because of the extremely difficult burden of proof required by partisan gerrymandering claims.[224] On the other hand, districts designed to increase minority voting power are vulnerable because they are easily subject to strict scrutiny.[225] The double standard results in disparate treatment for minority voters and enables manipulation of the Voting Rights Act by individuals or parties who are dissatisfied with a redistricting plan but cannot prove partisan gerrymandering.[226] In addition, legislators acting in self-interest will be more cautious in their use of racial data and less likely to create majority-minority districts, particularly if such districts would be irregular. The dual standards for partisan and racial gerrymandering claims therefore perpetuate the relative powerlessness of minority voters by protecting entrenched interests at the expense of the Voting Rights Act.

Even if the double standard applied to racial and partisan gerrymandering claims does not result in a cognizable reduction in attempts to increase minority voting power, the approach is disturbing for other reasons. Ultimately, the Court's standards send the message to both voters and politicians that protecting incumbents takes preference over attempts to rectify discrimination

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223. State Appellants' Brief on the Merits at 45.

224. As Appellees pointed out, "[t]he Court has consistently emphasized that protection of incumbents is a legitimate State districting principle which, in the exercise of State discretion, may be given a higher priority than compactness." Brief for Appellees at 33, Bush v. Vera, 116 S. Ct. 1941 (1996) (citations omitted).

225. This proposition however, depends on the court's willingness to accept incumbency protection as a legitimate policy as well as the court's willingness to overlook the shape of the district. For example, on remand, the district court in North Carolina upheld the districts under strict scrutiny. Thus, notwithstanding the irregular shape of the districts, the plan was deemed valid. *See* Shaw v. Hunt, 861 F. Supp. 408 (1994). However, to the extent that the plans are subject to more scrutiny, the probability that more of them will be declared unconstitutional increases.

226. The possibility that the Voting Rights Act is being used by the Republican Party for their benefit is discussed in Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said, "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1248 (1993).

by increasing minority voting power. This message can be understood as an "expressive harm" whereby governmental action—in this case the jurisprudence of the Supreme Court—undermines political integrity and threatens the legitimacy of the electoral process.[227] The harm is exacerbated by the fact that the Court was concerned with social perceptions of redistricting only where bizarrely-shaped districts serve to enhance minority voting power. Thus, as the Court in *Shaw v. Reno* was compelled to recognize an "expressive harm" based on its belief that the bizarrely drawn districts might undermine voters' faith in the integrity of the electoral process,[228] its decision itself was an expressive harm of potentially greater magnitude. Rather than promoting the integrity of the process, the Court has perpetuated its most objectionable aspects at the expense of those who have traditionally suffered most and has further eroded the legitimacy of the electoral system.

IV. WHAT ARE THE ALTERNATIVES?

While the Supreme Court has been reluctant to involve itself in what is considered a task appropriately left to the state, having stepped into the redistricting thicket in the quest for "fair and effective representation," it cannot legitimately scrutinize only some aspects while leaving others unquestioned. The above analysis of incumbency protection clearly reveals the danger of the Court's piecemeal approach to examining redistricting plans. In failing to scrutinize the legitimacy of incumbency protection in general, the Court has granted legislators the power to pursue their self-interest and to potentially threaten the democratic process. Moreover, that failure is particularly harmful where other factors, such as the use of race, are subject to strict scrutiny, thereby allowing incumbents to protect themselves at the expense of historically disenfranchised groups. Finally, even if a court does examine incumbency protection in the context of a racial gerrymandering claim, limiting consideration of that practice only to those districts designed to comply with the Voting Rights Act suggests the very disparate treatment the Act was intended to remedy.

To say that the current approach of the Supreme Court is incorrect or even illegitimate does not, however, answer the question of what a proper approach would be. While any in-depth analysis of different suggestions is beyond the scope of this Note, a number of observations and suggestions can be made.

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227. For a discussion of the meaning of "expressive harms" in the context of *Shaw v. Reno*, see Pildes & Niemi, *supra* note 4.

228. *Id.*

First, while concerns about the institutional capacity of the Court and about the appropriate distribution of power between the states and the federal government are indeed legitimate, they may be inappropriate in this context. In the past, the Court has recognized the need to become involved where the problem is one that cannot be rectified through the political process. Just as the Court recognized that voters were unable to correct the problem of malapportionment in *Baker v. Carr*,[229] the Court should likewise recognize that voters are hostage to self-interested legislators who have no incentive to modify redistricting criteria from which they benefit. Deference to legislators' attempts to protect themselves through redistricting is unwarranted in a situation such as this where the Court may be the only means of correction.

One possible approach would be to alter the standards for judging partisan gerrymandering claims and reduce partisan manipulation of the Voting Rights Act. Toward that end, the Court could focus on the redistricting *process* and judge redistricting plans according to formal criteria, rather than the electoral *outcome*. For example, the Court could capitalize on what it has done in the context of the Voting Rights Act, and require that all districts meet a certain standard of compactness. Daniel Polsby and Robert Popper argue that a compactness standard, combined with the "one-person one-vote" requirement, and a requirement of contiguity would considerably limit the ability to gerrymander.[230] They argue that the equipopulation requirement of *Baker v. Carr*, standing alone, is a weak tool for ensuring fair elections because gerrymanderers remain free to draw districts in any shape in hopes of manipulating outcome to their advantage.[231] A compactness requirement, however, would make gerrymandering significantly more difficult because it would constrain strategic line drawing; the less discretion the line drawers have, the less able they are to influence election outcomes. Moreover, Polsby and Popper argue that a compactness standard is as judicially manageable as the "one-person, one-vote" standard. The authors offer a variety of means by which compactness may be judged[232] and posit that any voter placed in a minority district would have standing and could assert a prima facie case where they could proffer a more compact plan.[233]

Alternatively, when faced with a partisan gerrymandering claim, the Court could employ a multi-factor approach which takes into consideration both formal criteria and outcomes. Bernard

229. 369 U.S. 186 (1962).
230. Polsby & Popper, *supra* note 1, at 333.
231. *See id.* at 329.
232. *Id.* at 329-40.
233. *Id.* at 333.

Grofman, for example, has developed an approach that would consider factors such as (1) differential treatment of incumbents of the major parties, (2) whether voters had been concentrated or dispersed, (3) whether deviation from compactness and failure to follow political boundaries systematically favored one party, and (4) whether the plan limits the number of competitive seats in such a way that one party is likely to be disadvantaged for the foreseeable future.[234] He argues that consideration of statistical complexities is not beyond the institutional competence of the court. Indeed, he counters that the complexities involved in gerrymandering claims are less than those considered by the Court in Title VII cases.[235] Again, establishing a list of criteria informs actors and encourages compliance, and provides a judicially administrable test for evaluating partisan gerrymandering claims.

Another approach that has not received much attention is encouraging states to explore technology aimed at computer-automated redistricting. Professor Issacharoff argues that automated redistricting would require states to articulate their redistricting criteria in advance and thereby encourage public scrutiny.[236] He suggests that courts could require states to submit their objectives to a computer program prior to the release of formal census data. The plans would be easy to judge because "the controlling computer algorithm would make explicit and obvious the policy choices of the states in ways that would allow courts to review reasonably and intelligently the relevant choices for unconstitutional attributes."[237]

Yet another alternative would be to encourage the use of independent electoral commissions to design redistricting plans without any reference to political considerations or partisan voting breakdowns. Such commissions would have the obvious advantage of limiting incumbents' ability to act in self-interest and, depending on their composition and powers, could reduce the need for prolonged litigation and judicial interference.[238] Although such commissions are obviously not immune to political pressures, it is beyond doubt that removing the process of redistricting from the

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234. *See generally* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 155 (1985).

235. *Id.*

236. Issacharoff, *supra* note 106 at 1697 (citations omitted).

237. *Id.* at 1699.

238. The organization Common Cause advocates adoption of its Model Act that calls for a five member commission, four of whom are selected by the leaders of the majority and minority parties, and the fifth member elected by the other four. The commission would be given guidelines for drafting district boundaries with opportunities for public participation. The guidelines would then serve as standards by which courts could judge the plan in the event of litigation. *See* Adams, *supra* note 19, at 60.

legislature would decrease incumbent influence. Moreover, the establishment of such commissions would free the legislature from prolonged battles over redistricting and enable them to devote more time to other matters of importance to voters. A number of states have already established such commissions and they readily serve as models.[239]

Finally, the Court might also choose to address the issue of incumbency protection only in certain situations, such as those dealing with the Voting Rights Act. Since a long history of incumbency protection suggests that the Court would not be willing to declare that incumbency protection in redistricting per se violates the Constitution, a less drastic alternative would be for the Court either to rule that incumbency protection must yield to the objectives of the Voting Rights Act whenever the dual objectives conflict, or that incumbency protection is a sufficiently strong state objective that it can be used to rebut a claim of racial gerrymandering. In this way, the Court might begin to establish a hierarchy of districting principles that is consistent with the goal of fair and effective representation. Such an approach leaves the states free to redistrict according to their redistricting principles and would also recognize the complexity of influences that shape a redistricting plan. The obvious limitation to this approach is that incumbency protection would still remain largely unquestioned and would only become an issue in cases dealing with the Voting Rights Act.

While these suggestions are not meant to be comprehensive, they further illustrate the inadequacy of the Court's current approach to the problem of incumbents' influence in redistricting. Indeed, without necessarily endorsing any one of the alternatives as superior, it appears that any of the options would represent an improvement over the current approach. Progress toward a coherent approach to redistricting will necessarily require more analysis of these alternatives, but to the extent that a variety of alternatives exist, progress does not appear to be difficult.

CONCLUSION

The analysis of incumbency protection, the history of its treatment by the Court, and in particular, its effect on the Voting Rights Act suggest that "fair and effective representation" may be more illusion than reality. More analysis of redistricting criteria is needed to develop a coherent theory of redistricting, and indeed, to determine what should be considered "fairly" drawn districts. The

239. Among the states that have established such commissions are Colorado, Montana, Pennsylvania, and New Jersey. *See id.* at 80.

above suggestions indicate some of the research that is necessary to develop such a theory. In the meantime, the conclusions of this Note suggest that the Supreme Court should at least begin to question the role of incumbency protection in redistricting and whether or under what circumstances such a practice offends the Constitution. Further consideration of second-order issues about who should be developing redistricting plans and what role the Court should play is also necessary, as is the potential future role of independent electoral commissions. Such inquiry, while difficult, is essential not only for historically disenfranchised voters who currently bear the burden of the Court's reluctance to intervene, but to all voters who rely on the legitimacy of the electoral process to express their consent to be governed.