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POLITICAL GERRYMANDERING: WAS ELBRIDGE GERRY RIGHT?

C. Daniel Chill*

I. INTRODUCTION

In a process known as redistricting, electoral districts are reconfigured following each decennial census to account for population shifts since the previous census.¹ While a variety of factors inform the placement of new district lines, partisan considerations, notably incumbency protection, loom large. That the contours of electoral units are politically motivated is a matter of controversy.

Partisan redistricting—and its concomitant objective of protecting incumbents—is assailed by good government groups as undemocratic and fundamentally unfair. Good government groups such as Common Cause,² The League of Women

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¹ Such redistricting is required by the constitutional principle of one person/one vote announced by the United States Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1 (1964) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

² New York Common Cause, *Comments by Common Cause/NY to the Senate Standing Committee On Election*, (Oct. 9, 2009), http://www.commoncause.org/policy-and-litigation/testimony/NY_101209_Comments_Election_Reform_Senate.pdf (“Common Cause/New York is a nonpartisan citizens’ lobby and a leading force in the battle for honest and accountable government. Common Cause fights to strengthen public participation and faith in our institutions of self-government and to ensure that government and political processes serve the general interest, and not simply the special interests.”). “*Can the Plan*”: *How the 2012 Redistricting Deal Denies New Yorkers Fair Representation and the Fundamentally Flawed Redistricting “Reform”*, NYPIRG (June 2014), <http://www.nypirg.org/pubs/goodgov/2014.06.23Redistricting-CanthePlan/cantheplan.pdf>. “Consonant with our overall mission we have consistently worked . . . to improve accessibility, accuracy, transparency, and verifiability in our democratic process at the city, state and national level.” *Testimony of Susan Lerner Executive Director, Common Cause/NY Before the New York City Council Committees on Civil Rights and on Immigration Regarding Joining Public Hearing on Census Issues*, N.Y. COMMON CAUSE (Nov. 20, 2009), http://www.commoncause.org/policyandlitigation/testimony/NY_112009_SusanLerner_Testimony.pdf.

Voters,³ New York PIRG,⁴ and The Brennan Center,⁵ as well as newspapers as diverse as *The New York Times*,⁶ and *Milwaukee Wisconsin Journal Sentinel*⁷ have engaged in a crusade against partisan redistricting. Joining these advocates of restraints on partisan political line drawing are a plethora of academicians both legal and non-legal. Critics maintain that the Holy Grail of effective government is legislative turnover, achieved either by eliminating lengthy terms for legislators (term limits)⁸ and/or through non-partisan drawing of legislative districts.

This author maintains that despite its derision by academicians and good government groups, partisan redistricting aimed at protecting incumbents not only is not pernicious, but in fact, results in a preferred legislative product. As will be shown, this counterintuitive conclusion is impelled by considered judicial authority as well as a measure of reasoned scholarly analysis.

Part II provides an overview of the debate over the role of political partisanship in the district drawing process. Part III discusses the jurisprudence of redistricting protective of incumbents. Part IV

³ At a public hearing before the New York State Legislative Task Force on Demographic Research and Reapportionment (“LATFOR”), representatives of The League of Women Voters testified as follows: “The League is a non-partisan organization which encourages informed and active involvement in government and influences public policy through education and advocacy The public wants an independent commission – not LATFOR – to draw state legislative and congressional district boundaries” *Testimony Before the Legislative Task Force on Demographic Research and Reapportionment*, LMV: THE LEAGUE OF WOMEN VOTERS OF N.Y. ST. (Aug. 4, 2011), <http://www.lwvny.org/advocacy/gov-reform/redistricting/2011/Testimony-LATFOR080411.pdf>.

⁴ The New York Public Interest Research Group (“NYPIRG”) is a New York State-wide student-directed, non-partisan, not-for-profit political organization and NYPIRG advocates the creation of an independent redistricting commission, ensuring that legislative districts are drawn to best represent New Yorkers, rather than improve a legislator’s chances at reelection. *About NYPIRG*, NYPIRG, <http://www.nypirg.org/about/> (last visited Apr. 26, 2017).

⁵ The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice and is a “leader in the fight for just and equitable redistricting procedures” Justin Levitt, *A Citizen’s Guide to Redistricting*, BRENNAN CTR. FOR JUST. (2010), <https://www.brennancenter.org/sites/default/files/legacy/CGR%20Reprint%20Single%20Page.pdf>.

⁶ See Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html>.

⁷ See *End Partisan Redistricting in Wisconsin*, MILWAUKEE WIS. J. SENTINEL (Feb. 6, 2014), <http://archive.jsonline.com/news/opinion/end-partisan-redistricting-in-wisconsin-b99199581z1-244106841.html>.

⁸ Robert Kurfirst, *Term-Limit Logic: Paradigms and Paradoxes*, 29 POLITY 119, 126 (1996).

explores the overlap between politically and racially based district drawing. Finally, Part V examines the various restraints on incumbency protection currently employed by the states.

II. PARTISAN POLITICAL REDISTRICTING: THE DEBATE

Most political scientists and many legal scholars decry partisan political gerrymandering as violative of democratic principles of fair political competition. Partisan political gerrymandering is claimed, *ipso facto*, to result in an uneven electoral playing field. It therefore is anathema to many in the political science community who view such partisan advantage as a dagger in the heart of the body politic. Daniel D. Polsby, Professor of Law at Northwestern University and Robert D. Popper, a practicing lawyer, attack partisan political gerrymandering as antithetical to core precepts of democracy.⁹ They contend that “gerrymandering inflicts harm on democratic institutions . . . [and] violates the American constitutional tradition by conceding to legislatures a power of self-selection.”¹⁰ Self-constitutive legislatures, or self-constitutive governing institutions of any kind, make no sense under a Constitution whose most arresting innovation was the dispersion of power:¹¹ “Gerrymandering introduces a chronic, self-perpetuating skew into the business of popular representation, no matter how the term is defined.”¹² Martin Shapiro, Professor of Law (Emeritus) at University of California Berkeley School of Law, denounces partisan gerrymandering as a “pathology of democracy” and further stated that “[g]errymandering is a bad, bad thing.”¹³

The late Yale University Professor Robert A. Dahl defined “a key characteristic of democracy [as] the continuing responsiveness of the government to the preferences of its citizens, considered as political equals” with unimpaired opportunities.¹⁴ Dahl further elucidates, “the rights of citizenship include the opportunity to oppose and vote out the highest officials in the government.”¹⁵

⁹ Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301, 302 (1991).

¹⁰ *Id.* at 304.

¹¹ *Id.* at 304.

¹² *Id.* at 305.

¹³ Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 239, 251 (1985).

¹⁴ ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971).

¹⁵ ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 220 (1989).

Drawing on this concept, Jennifer Clark, Assistant Professor of Political Science at The University of Houston, argues:

The redistricting process has important consequences for voters. In some states, incumbent legislators work together to protect their own seats, which produces less competition in the political system Voters may feel as though they do not have a meaningful alternative to the incumbent legislator. Legislators who lack competition in their districts have less incentive to adhere to their constituents' opinions.¹⁶

Andrew Gelman, Professor of Political Science at University of California, Berkeley, and Gary King, Professor of Political Science at Harvard University maintain that optimal partisan redistricting plans produce a less responsive electoral system.¹⁷

Notwithstanding the distaste of these scholars and their ilk for partisan political gerrymandering, a viable solution is elusive. Bruce E. Cain, Professor of Political Science, University of California, Berkeley, concedes that the problems caused by the unfairness of partisan gerrymandering remain unresolved and that solutions offered by legal scholars and political science professors are either unworkable or undoable.¹⁸

Others, however, do not think the problem insuperable. Led by Professor Richard Pildes of the University of Michigan Law School, Professor Samuel Issacharoff of New York University Law School and Professor Pamela Karlan of Stanford Law School, these academicians

¹⁶ Aaron Manuel, *Redistricting Will Affect November Election*, THE DAILY COUGAR, (Oct. 16, 2012), <http://thedailycougar.com/2012/10/16/redistricting-will-affect-november-election/> (quotations omitted).

¹⁷ Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 543 (1994); see also Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 POL. GEOGRAPHY Q. 5, 12, 19 (1988).

¹⁸ For a review of Professor Cain's criticisms of proposed solutions, see Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1589 (1999); Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1812-13 (2012) [hereinafter *Buffer*]; BRUCE E. CAIN, *DEMOCRACY MORE OR LESS, AMERICA'S POLITICAL REFORM QUANDARY* 120, 122 (2015). Countermeasures to the perceived evil of partisan redistricting have taken the form of non-partisan drawing of districts by independent commissions and/or term limits. Term limits, which were popular in the decade of the 1990s, attack incumbency by limiting the number of terms a legislator may legally serve. Non-partisan redistricting, which was the focus of the 2000's redistricting laws, addresses the form and process of constructing legislative districts, irrespective of the candidate. The latter measure places the emphasis on the districts, not on the candidate. These are discussed in detail, see *infra* Part IV.

advocate attacking partisan political gerrymandering by engaging the legal system to assure an appropriate and competitive political environment without artificial barriers to robust political competition such as gerrymandering.¹⁹ Professor Issacharoff argues that:

So long as the [redistricting] process is left in the hands of incumbent political officials whose self-interest runs strongly to what they can get away with, and so long as judicial oversight remains cumbersome and unpredictable, the private interest will likely continue to subsume the public interest. A strategy of reinforcing political competition by taking the process of redistricting out of the hands of partisan officials offers the prospect of realizing our constitutional values.²⁰

A powerful rebuttal was not long in coming. In replying to Issacharoff's proposal to delegitimize districts drawn by self-interested decision makers, Professor Nathaniel Persily, James B. McClatchy Professor of Law at Stanford Law School, "disagree[s] fundamentally . . . with almost every aspect of Issacharoff's argument."²¹ Persily articulates four principal points of disagreement. First, Professor Persily disagrees with Issacharoff's definition and assessment of the problem he wishes to solve: "By focusing on incumbent reelection rates and margins of victory, Issacharoff ignores evidence both of intense competition for control of legislatures and of remarkable levels of legislative turnover."²² Second, Persily maintains that "to the extent incumbents have unfair and growing advantages over challengers, redistricting is not to blame."²³ Third, he argues that "the creation of safe seats, the principal target of Issacharoff's ire, is neither inherently undesirable nor easily avoidable."²⁴ Fourth, "the alternative that

¹⁹ See generally Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); see also SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 822 (3d ed. 2007); see also Samuel Issacharoff, *Judging Politics: The Elusive Quest for Political Fairness*, 71 TEX. L. REV. 1643, 1650 (1993).

²⁰ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 647-48 (2002) (footnote omitted).

²¹ Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymandering*, 116 HARV. L. REV. 649, 650 (2002).

²² *Id.* at 650.

²³ *Id.* at 650.

²⁴ *Id.* at 650.

Issacharoff would have the courts force upon state governments,” namely, “redistricting by politically insulated commissions” is “both undesirable in theory and difficult to create in fact.”²⁵ Persily claims that “there is good reason to consider safe districts preferable from the standpoint of democratic theory.”²⁶

As a preliminary matter, Persily notes that notwithstanding and in spite of partisan gerrymandering, there constantly have been significant degrees of legislative turnover, as the 1992 Congressional elections illustrate.²⁷ The 1992 Congressional election occurred on the heels of the 1990’s incumbent protective redistricting.²⁸ Yet, more than one quarter of the U.S. House of Representatives were elected for the first time.²⁹ Persily recounts that from 1972 through 2002, 10% to 20% of the seat holders in the House of Representatives changed with each election and that turnover was even greater at the state legislative level.³⁰

Next, Persily disputes the cause and effect relationship between partisan redistricting and low legislative turnover. He posits that the argument that gerrymandering of individual legislative districts results in unacceptable incumbent reelection rates is belied by the fact that “statewide elections unaffected by redistricting, such as elections for governor and U.S. Senate, have shown parallel growth in rates of incumbent reelection.”³¹ Further, Persily does not agree that from the standpoint of the electorate, low turnover translates into poor representation. He observes that because Congress accords great influence to representatives based on seniority, it is governmentally beneficial to keep incumbents in office as long as possible to enhance the seniority, and thus the influence, of a stated congressional delegate.³² Similarly, he argues that states have a legitimate interest “in keeping experienced legislators in state government.”³³

Finally, Persily describes the practical difficulties of replacing the present system with one that is purely non-partisan.³⁴ Obviously,

²⁵ *Id.* at 650.

²⁶ Persily, *supra* note 21, at 650.

²⁷ Persily, *supra* note 21, at 654.

²⁸ Persily, *supra* note 21, at 657.

²⁹ Persily, *supra* note 21, at 654.

³⁰ Persily, *supra* note 21, at 654.

³¹ Persily, *supra* note 21, at 650.

³² Persily, *supra* note 21, at 650.

³³ Persily, *supra* note 21, at 650.

³⁴ Persily, *supra* note 21, at 674, 676-77.

even members of so-called non-partisan commissions have political biases.³⁵ Neither they, nor the people who choose them, are politically immaculately conceived. Unlike formless space aliens, appointees to so-called independent districting commissions do not spring forth without any intention or form. As human beings, these appointees bring to the table their own internal political predilections, experiences and prejudices. And, the institutions and government officials who appoint such commissioners similarly start with their own set of political prejudices (*i.e.*, Democrats, Republicans, Socialists, rich, poor, et al.).³⁶ Persily proved to be prescient.³⁷

Persily is not a lone scholarly voice positing the notion that partisan political redistricting is not necessarily a governmental evil as Issacharoff and his fellow scholars assert. Stephen Ansolabehere, Professor of Government at Harvard University, and James M. Snyder, Jr., Professor of History and Political Science at Harvard University, conclude in a recent article that, in fact, redistricting actually weakens the incumbent advantage and helps promote turnover.³⁸

Professors Ansolabehere and Snyder undertook an empirical study of five factors indicative of the impact of political control over the districting process.³⁹ Their analysis shows that political redistricting does not necessarily result in incumbent advantage.⁴⁰ First, they found that while the expectation for protection of incumbents would dictate that districts be either overwhelmingly Democratic or overwhelmingly Republican, statistical analysis reveals that most districts are moderate, with little heavy skewing in favor of one party or the other.⁴¹ Second, because redistricting inevitably

³⁵ Persily, *supra* note 21, at 659.

³⁶ A challenge to the creation of an Arizona State Redistricting Commission was decided by the U.S. Supreme Court. *Arizona State Legislative v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). Even Supreme Court Justice Ruth Bader Ginsburg, who authored the majority opinion upholding Arizona's delegation of redistricting responsibility to the Commission, recognized that non-partisan redistricting is not an electoral panacea because it hasn't eliminated the inevitable partisan suspicions associated with political line drawing. She invoked Berkeley's Professor Cain in support of this proposition. *Id.* at 2676.

³⁷ See *Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016) (exploring a fuller discussion on how political considerations infected the claimed non-partisan Arizona Redistricting Commission).

³⁸ See Stephen Ansolabehere & James M. Snyder, Jr., *The Effects of Redistricting on Incumbents*, 11 ELECTION L.J.: RULES, POL., & POL'Y 490 (2012), <https://dash.harvard.edu/bitstream/handle/1/11910880/19401494.pdf?sequence=1>.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 4, 8-9.

results in changes to district boundary lines, with an attendant replacement of constituents whom the representative has served with new, unfamiliar voters, it is unhelpful to incumbents.⁴² Third, with respect to districted offices, such as the state legislatures and the U.S. House of Representatives, the vote share when an incumbent is running versus the vote share when an incumbent is not running is “much smaller” than the vote share of incumbents running for non-districted offices, such as governor or U.S. Senate.⁴³ Fourth, statistics reveal only small changes in district partisanship. Lastly, turnover was found to be highest in redistricting years.⁴⁴ (If redistricting was in fact co-extensive with incumbency protection the opposite would occur.)

Partisan political gerrymandering has also had other, earlier scholarly defenders. Peter H. Schuck, Professor Emeritus of Law at Yale School, has suggested that partisan gerrymandering in some of its aspects could actually benefit democracy because it “reinforce[s] the majority party’s capacity to govern alone, making it easier to attribute responsibility for political acts,” and thus furthers the goal of party accountability.⁴⁵ Professors Andrew Gelman and Gary King observe that:

The political turmoil created by legislative redistricting creates political renewal. Many of the goals sought by proponents of term limitations are solved by legislative redistricting. Even the reputation of the “egregious” partisan gerrymander has been somewhat rehabilitated: not only does redistricting perform the simple task of getting the numbers right, but redistricting has tended to reduce partisan bias and increase electoral responsiveness.⁴⁶

In 2006, Emory University professors Alan Abramowitz, Brad Alexander and Matthew Gunning wrote, “some studies have concluded that redistricting has a neutral or positive effect on competition [I]t is often the case that partisan redistricting has the

⁴² *Id.* at 13-14.

⁴³ Ansolabehere & Snyder, Jr., *supra* note 38, at 4-5.

⁴⁴ Ansolabehere & Snyder, Jr., *supra* note 38, at 5.

⁴⁵ Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1361 (1987).

⁴⁶ Gelman & King, *supra* note 17, at 554.

effect of reducing the safety of incumbents, thereby making elections more competitive.”⁴⁷

Persily wrote his rebuttal to Issacharoff in 2002. A review of election results following the most recent spate of incumbency protection statutes, passed after the 2010 census, buttresses Persily’s argument that despite partisan gerrymandering both the House of Representatives and state legislatures continue to experience significant legislative turnover. In 2014, an average of 23% of legislative seats in state senates turned over. In 2014, an average of 21.1% of house seats turned over. Even in large states such as California, 25% of the senate seats turned over and 47.5% of the house seats turned over.⁴⁸ In 2012, 65 members of the U.S. House of Representatives did not return, a turnover rate of 15%.⁴⁹

The turnover rate would seem antithetical to the claim that partisan gerrymandering is a major political device for incumbency protection.

III. JUDICIAL RECOGNITION OF THE LEGITIMACY OF INCUMBENCY PROTECTION IN REDISTRICTING

Under the U.S. Constitution, legislative districts must be redrawn after every decennial census to ensure voting equality by complying with the Constitutional mandate of one person, one vote.⁵⁰ Any redistricting plan must also safeguard the voting rights of minority groups,⁵¹ pursuant to the requirements of the Fourteenth and Fifteenth Amendments to the United States Constitution and of Sections 2 and 5 of the Voting Rights Act of 1965.⁵² Case law at all levels validates incumbency protection as a legitimate state redistricting policy.

⁴⁷ Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in the U.S. House Elections*, 68 J. POL. 75, 76 (2006) (citation omitted).

⁴⁸ *2014 Post-Election State Legislative Seat Turnover*, NCSL: NAT’L CONF. OF STATE LEGISLATURES (Dec. 1, 2014), <http://www.ncsl.org/research/elections-and-campaigns/2014-post-election-turnover.aspx>.

⁴⁹ *House Incumbents Retired, Defeated, or Reelected, 1946-2014*, BROOKINGS 13 (2014), https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch2_full.pdf.

⁵⁰ *Reynolds*, 377 U.S. at 583-84; *Wesberry*, 376 U.S. at 8-9.

⁵¹ *White v. Regester*, 412 U.S. 755, 765-66 (1973).

⁵² Voting Rights Act of 1965, 52 U.S.C.A. § 10301 (2014).

A. U.S. Supreme Court Authority

In a long line of cases, the Supreme Court has recognized the legitimacy of incumbency protection as a factor in legislative redistricting. That incumbency protection is a valid state policy to be taken into account in crafting a redistricting plan that flows from the oft cited Supreme Court admonition that “[p]olitics and political considerations are inseparable from districting and apportionment.”⁵³ As the Supreme Court recognizes “redistricting in most cases will implicate a political calculus,” the courts must accordingly “be sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus.”⁵⁴

In *White v. Weiser*, the Supreme Court recognized as a legitimate redistricting goal a state policy aimed at maintaining existing relationships between incumbent representatives and their constituents, and preserving the seniority of the state’s congressional delegation.⁵⁵

In *Karcher v. Daggett*, the Supreme Court held that “*preserving the cores of prior districts, and avoiding contests between incumbent Representatives*” is a valid state redistricting policy.⁵⁶

In *Abrams v. Johnson*, the Supreme Court held that Georgia’s interest in “maintaining core districts and communities of interest” justified certain deviations in population in a plan drawn by the district court.⁵⁷

In *Bush v. Vera*, the Supreme Court flatly stated: “[W]e have recognized incumbency protection, at least in the limited form of ‘avoiding contests between incumbents,’ as a legitimate state goal [L]egitimate districting considerations, including incumbency, can be sustained.”⁵⁸

In *Reno v. Bossier Parish School Board*, the Supreme Court, in a plurality opinion, recognized “incumbency protection” as a “customary districting concern.”⁵⁹ See generally *Houston Lawyers Ass’n v. Attorney General of Texas*, recognizing legitimacy of state’s

⁵³ Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

⁵⁴ Miller v. Johnson, 515 U.S. 900, 914-16 (1995).

⁵⁵ 412 U.S. 783, 791 (1973).

⁵⁶ 462 U.S. 725, 740 (1983) (emphasis added).

⁵⁷ 521 U.S. 74, 76 (1997).

⁵⁸ 517 U.S. 952, 964-65 (1996) (emphasis added) (citing *Karcher*, 462 U.S. at 740; *White*, 412 U.S. at 797; *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)).

⁵⁹ 528 U.S. 320, 346 (2000).

interest in “maintaining” an existing electoral system to preserve the “link” between an elected official and the official’s base.⁶⁰

The Supreme Court has declined to strike down politically motivated redistricting plans, even in cases where the evidence of partisanship was overwhelming.⁶¹ As recently as 2015, in *Alabama Legislative Black Caucus v. Alabama*,⁶² the Supreme Court listed with approval incumbency protection as a valid race-neutral redistricting principle.⁶³

B. Lower Federal Court Authority: New York State

In *Puerto Rican Legal Defense and Educ. Fund, Inc. v. Gantt*, the court acknowledged that the redistricting criteria that properly may be considered include “*maintenance of the cores of existing districts, communities of interest, and political fairness.*”⁶⁴

In *Diaz v. Silver*, the court found that the “legislators['] . . . quite legitimate concerns about the ability of representatives to maintain relationships they had already developed with their constituents,” as well as “the powerful role that seniority plays in the

⁶⁰ *Houston Lawyers Ass’n v. Att’y General of Texas*, 501 U.S. 419, 426 (1991).

⁶¹ *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (citing *Bush*, 517 U.S. at 968); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996); *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. 630, 646 (1993); *see also Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (upholding a Pennsylvania congressional redistricting plan that was challenged as a pro-Republican gerrymander); *Davis v. Bandemer*, 478 U.S. 109 (1986) (upholding an Indiana legislature plan alleged to be a partisan gerrymander); *Gaffney*, 412 U.S. at 752 (upholding a Connecticut legislature plan alleged to be a bipartisan gerrymander).

⁶² 135 S. Ct. 1257, 1270 (2015).

⁶³ By contrast, often in dissent, Justice Stevens has consistently held that partisan gerrymandering is justiciable and unconstitutional. *See Vieth*, 541 U.S. 267 (2004) where Justice Stevens stated in dissent:

Today’s plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license, for the first time, to partisan gerrymanders that are devoid of any rational justification. In my view, when partisanship is the legislature’s sole motivation – when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage – the governing body cannot be said to have acted impartially.

Id. at 318 (Stevens, J., dissenting). Justice Stevens also argued that the Constitution should be amended to prohibit political gerrymandering. JOHN PAUL STEVENS, *Political Gerrymandering, in SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 33-55 (2014).

⁶⁴ 796 F. Supp. 681, 691 (E.D.N.Y. 1992) (emphasis added).

functioning of Congress make[] incumbency an important and legitimate factor for a legislature to consider.”⁶⁵

The two decisions in *Rodriguez v. Pataki*,⁶⁶ involving New York’s redistricting in the wake of the 2000 census, further illuminate the validity of incumbency protection.

C. The Rodriguez Court Drawn Congressional Plan

After the 2000 decennial census, the New York State Legislature initially failed to draw new congressional district lines for use in the 2002 election.⁶⁷ A three-judge court was empaneled for drawing a court ordered redistricting plan for New York’s congressional delegation. The court appointed former U.S. District Judge Frederick B. Lacey Special Master to prepare and recommend to the court a proposed congressional redistricting plan.⁶⁸ On May 13, 2002, the Special Master filed his report with the court.⁶⁹ In that May 13, 2002 report, the Special Master acknowledged incumbency as a factor when he specifically rejected proposed plans that paired incumbents.⁷⁰ The court, in adopting the Special Master’s plan “in its entirety,” *inter alia*, noted with approval, the plan’s respect for “‘the cores of current districts and the communities of interest that have formed around them,’ “⁷¹ which resulted in the separation of two incumbents in Manhattan (Congresspersons Nadler and Maloney) so they would not have to run against each other.⁷²

1. Challenge in the Rodriguez Case to Legislatively Enacted Congressional, State, Senate and Assembly Lines

⁶⁵ 978 F. Supp. 96, 123 (E.D.N.Y. 1997).

⁶⁶ *Rodriguez v. Pataki*, No. 02 Civ. 618 (RMB), 2002 U.S. Dist. LEXIS 9272, at *3 (S.D.N.Y. May 24, 2002) [hereinafter *Rodriguez I*]; *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) [hereinafter *Rodriguez II*].

⁶⁷ *Rodriguez II*, 308 F. Supp. 2d at 354-55.

⁶⁸ Order Appointing Special Master, *Rodriguez v. Pataki*, 207 F. Supp. 2d 123 (S.D.N.Y. 2002).

⁶⁹ *Rodriguez I*, 2002 U.S. Dist. LEXIS 9272, at *2-3.

⁷⁰ *Rodriguez v. Pataki*, No. 02 Civ. 0618, 2002 U.S. Dist. LEXIS 11782, at *63 (S.D.N.Y. May 13, 2002).

⁷¹ *Rodriguez I*, 2002 U.S. Dist. LEXIS 9272, at *2, *20.

⁷² *Id.* at *20-21.

The *Rodriguez* plaintiffs, who included African-American, Hispanic, and Caucasian New York voters, asserted a further claim against Governor Pataki and other state officials (before the same three-judge federal court) seeking to overturn the congressional and legislative lines adopted by the state legislature following *Rodriguez I*.⁷³ After a lengthy trial, the court, on March 15, 2004, handed down a 211 page decision (“*Rodriguez II*”) dismissing all claims against the legislatively enacted Congressional, Senate and Assembly district lines.⁷⁴

One of the grounds constituting the basis for the challenge in *Rodriguez II* was the claim of partisan gerrymandering, which the court rejected, noting that ““preserving the cores of prior districts,”” and ““avoiding contests between incumbent Representatives”” are ““important state policies”” in redistricting.⁷⁵

Another ground on which the *Rodriguez II* challenge rested was the population deviation among the legislative districts. As to that claim, the *Rodriguez* court:

[D]enied the defendants’ initial motion to dismiss . . . the Complaint, . . . to give the plaintiffs an opportunity to meet their burden to show that the minimal deviation results solely from an unconstitutional or irrational state purpose rather than from other state policies recognized by the Supreme Court to be appropriate reasons for deviations. Such policies, announced in *Karcher*, include “making districts compact, respecting municipal boundaries, *preserving the cores of prior districts, and avoiding contests between incumbent representatives*.”⁷⁶

In finding that the population deviation in the plan at issue was justified by, *inter alia*, the need to protect incumbents, the court held: “The plan promotes the traditional principles of maintaining the core of districts and limiting incumbent pairing.”⁷⁷

⁷³ *Rodriguez II*, 308 F. Supp. 2d at 351.

⁷⁴ *Id.* at 351-52.

⁷⁵ *Id.* at 363, 366 (quoting *Karcher*, 462 U.S. at 740)

⁷⁶ *Rodriguez II*, 308 F. Supp. 2d at 366 (quoting *Karcher*, 462 U.S. at 740) (emphasis added).

⁷⁷ *Rodriguez II*, 308 F. Supp. 2d at 370 (emphasis omitted).

Finally, the *Rodriguez II* court specifically endorsed that part of the state senate plan drawn to “avoid[] [a] partisan reconfiguration against [incumbent] Sen[ator] Velella”⁷⁸

D. Lower Federal Court Authority: States Other Than New York

In *South Carolina State Conference of Branches of NAACP v. Riley*, the court stated the following about incumbency protection embodied in the plan it drew:

Any new plan should alter the old only insofar as necessary to obtain an acceptable result. Incumbents know their constituents in the old districts, and many of those constituents will know their congressman as “my congressman.” Many of the constituents would have been served by the congressman in ways calculated to obtain and enhance loyal support. Such voters ought not to be deprived of the opportunity to vote for a candidate that has served them well in the past and to enjoy his continued representation of them. Supporters and opponents, alike, have a basis for judging him.⁷⁹

In *Arizonans for Fair Representation v. Symington*, the court found:

The court [plan] also should avoid unnecessary or invidious outdistricting of incumbents. Unless outdistricting is required by the Constitution or the Voting Rights Act, the maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering.⁸⁰

⁷⁸ *Id.* at 459.

⁷⁹ 533 F. Supp. 1178, 1180-81 (D.S.C.) (per curiam), *aff’d sub nom.* Stevenson v. South Carolina State Conference of Branches of NAACP, Inc., 459 U.S. 1025 (1982).

⁸⁰ 828 F. Supp. 684, 688 (D. Ariz. 1992), *aff’d sub nom.* Hispanic Chamber of Commerce v. Arizonans for Fair Representation, 507 U.S. 981 (1993) (citation omitted).

In *Prosser v. Elections Board*, the court drawn plan lacked incumbent pairings thereby creating the least “perturbation in the political balance of the state.”⁸¹

In *Colleton County Council v. McConnell*, the court, in articulating the traditional redistricting principles that guided the court-drawn plan, stated that “[m]aintaining the residences of the incumbents” to protect “the core constituency’s interest in reelecting, if they choose, an incumbent representative in whom they have placed their trust,” was a “worthy” redistricting consideration.⁸²

In *Smith v. Clark*, the court included “protection of incumbent residences” as a factor to be considered in drawing of court-ordered plan because “maintenance of incumbents provides the electorate with some continuity.”⁸³ In discussing its plan, the court acknowledged its design to protect incumbents.⁸⁴

In short, judicial approval for legislatively enacted districts designed to effect incumbency protection is overwhelming throughout the United States court system. In any event, although the Supreme Court in *Davis v. Bandemer*,⁸⁵ held claims of partisan gerrymandering to be technically justiciable,⁸⁶ in *Vieth v. Jubelirer*,⁸⁷ and *League of United Latin American Citizens v. Perry*,⁸⁸ the Supreme Court decided that because a manageable standard for determining excessive partisanship could not be found, court intervention in political gerrymandering cases would be improper.⁸⁹

⁸¹ 793 F. Supp. 859, 871 (W.D. Wis. 1992).

⁸² 201 F. Supp. 2d 618, 647 (D.S.C. 2002).

⁸³ 189 F. Supp. 2d 529, 541, 545 (S.D. Miss. 2002).

⁸⁴ *Id.* at 545.

⁸⁵ 478 U.S. 109 (1986).

⁸⁶ *Id.* at 143.

⁸⁷ *Vieth*, 541 U.S. at 281.

⁸⁸ 548 U.S. 399, 413-14, 423 (2006).

⁸⁹ For an excellent and comprehensive analysis of *Davis v. Bandemer* and *Vieth v. Jubelirer*, see Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving & Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1564-66 (2005); however, see *Whitford v. Gill*, No. 15-cv-421-bbc, 2016 U.S. Dist. LEXIS 160811, at *3 (D. Wis. Nov. 21, 2016) (holding that the Wisconsin Legislature’s 2011 redrawing of State Assembly districts to favor Republicans was an unconstitutional partisan gerrymander, the first such ruling in three decades of pitched legal battles over the issue). On June 19, 2017, the Supreme Court granted certiorari in *Gill v. Whitford*. The court set forth the following issues: (1) whether the district court violated *Vieth v. Jubelirer* when it held that it had the authority to entertain a statewide challenge to Wisconsin’s redistricting plan, instead of requiring a district-by-district analysis;

IV. PARTISANSHIP AND RACE BASED REDISTRICTING

In 1965, the United States Congress passed The Voting Rights Act of 1965, which was signed into law by President Lyndon B. Johnson.⁹⁰

The Act provides nationwide voting protections for minority voters. Section 2 of the Act is a provision that prohibits every state and local government from imposing any voting law that results in discrimination against racial or language minorities.⁹¹ Other general

(2) whether the district court violated *Vieth* when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles; (3) whether the district court violated *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*; (4) whether the defendants are entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed; and (5) whether partisan-gerrymandering claims are justiciable. On June 19, 2017, the court in a 5-4 decision granted a stay of the lower court decision pending disposition of the appeal in the Supreme Court. <http://www.scotusblog.com/2017/06/todays-orders-court-tackle-partisan-gerrymandering/>; *Gill v. Whitford*, No. 16-1161 (S. Ct. June 19, 2017).

⁹⁰ Voting Rights Act, *supra* note 52. The Act was later amended five times to expand its protections. *Voting Rights Act*, HISTORY, <http://www.history.com/topics/black-history/voting-rights-act> (last visited Apr. 28, 2017).

⁹¹ The Voting Rights Act provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, [t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Voting Rights Act, *supra* note 52.

provisions specifically outlaw literacy tests and similar devices that historically were used to disenfranchise racial minorities.

Another important provision of the Act is the Section 5 preclearance requirement, which prohibits certain jurisdictions from implementing any change affecting voting without receiving preapproval from either the U.S. Attorney General or the U.S. District Court for the District of Columbia that the voting change does not derogate protected minorities.⁹² Section 5 applies to jurisdictions encompassed by the “coverage formula” prescribed in Section 4(b).⁹³ The coverage formula was originally designed to embrace jurisdictions that engaged in egregious voting discrimination in 1965.⁹⁴ The constitutionality of the Act was upheld in *South Carolina v. Katzenbach*.⁹⁵ However, in *Shelby County v. Holder*, the U.S. Supreme Court struck down the coverage formula as unconstitutional, reasoning that it was no longer responsive to current conditions.⁹⁶ The Court did not strike down Section 5, but without a coverage formula, Section 5 is toothless.⁹⁷

The essence of Section 2 of the Act requires that districts be drawn in a manner that preserves the ability of minorities to elect preferred candidates of their choice.⁹⁸ The Act specifically addressed two separate methods of disenfranchising minorities, cracking and packing. Cracking was a method used to disenfranchise minorities by dividing minority population concentrations into two separate districts, which prevented minorities from constituting a majority in either district.⁹⁹ Packing involved cramming so many minority voters into one district so it reduces their voting strength in surrounding districts.¹⁰⁰ Since concentration and/or dispersal of protected minorities are impermissible, race conscious redistricting is required in order to avoid running afoul of the Act.

⁹² 52 U.S.C.A. § 10304(a) (2006).

⁹³ 52 U.S.C.A. § 10303(b) (2006).

⁹⁴ *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618 (2013).

⁹⁵ 383 U.S. 301, 326 (1966).

⁹⁶ *Holder*, 133 S. Ct. at 2629.

⁹⁷ *Id.* at 2622.

⁹⁸ *Id.* at 2621.

⁹⁹ See David Lublin, *Race & Redistricting in the United States: An Overview*, in REDISTRICTING IN COMPARATIVE PERSPECTIVE, 141, 144 (Lisa Handley & Bernard Grofman eds., 2008) [hereinafter COMPARATIVE PERSPECTIVE].

¹⁰⁰ *Id.*

In *Thornburg v. Gingles*, the Supreme Court held that a Section 2 violation may occur by reason of the failure to construct an appropriate district for a protected minority where plaintiffs can establish three preconditions: “the minority group must be” (a) “sufficiently large and geographically compact to constitute a majority in a single-member district;” (b) “politically cohesive;” and (c) usually unable to elect its preferred candidate due to white-bloc voting.¹⁰¹ Accordingly, the existence of those circumstances may require that a redistricting plan create corresponding majority minority districts.¹⁰²

Since minorities vote overwhelmingly for Democrats, districts in which they are placed will have a partisan slant as the extent to which a district comprises minority populations will have a substantial effect on whether the district elects a Democratic legislator or a Republican legislator. Accordingly, there is inevitably a political calculus in drawing Voting Rights districts for protected minorities, albeit under the rubric of racial redistricting considerations.¹⁰³

The Supreme Court in *Harris v. Arizona Independent Redistricting Commission* vividly illustrates this point.¹⁰⁴ In 2014, Arizona voters brought a lawsuit contending that the Arizona so-called non-partisan Independent Redistricting Commission violated the Equal Protection Clause of the U.S. Constitution in drawing Arizona legislative lines that favor Democrats.¹⁰⁵ The complaint, *inter alia*, claimed that gaining partisan advantage for one political party by systemically overpopulating sixteen Republican districts while under populating eleven Democratic districts so as to favor Democrats is not a legislative function sufficient to justify deviation from the constitutional one-person, one-vote prerogative.¹⁰⁶

¹⁰¹ 478 U.S. 30, 50-51 (1986).

¹⁰² See Lublin, *supra* note 99, at 144; Bartlett v. Strickland, 566 U.S. 1, 26-27 (2009) (Souter, J., dissenting) (confirming that only communities that can form over 50% of a district’s relevant population have viable Section 2 claims).

¹⁰³ See Thomas Brunell & Bernard Grofman, *The Partisan Consequences of Baker v. Carr and the One Person, One Vote Revolution*, in COMPARATIVE PERSPECTIVE, *supra* note 99, 225, 227-29, 232-33. On December 5, 2016, the Supreme Court heard Oral Arguments for *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017) and *McCrory v. Harris*, 137 S. Ct. 458 (2016).

¹⁰⁴ *Harris*, 136 S. Ct. 1301.

¹⁰⁵ *Id.* at 1307.

¹⁰⁶ *Harris v. Arizona Indep. Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1050 (D. Ariz. 2014).

The three-judge district court found the commission malapportioned Arizona's legislature for two reasons: (1) the desire to give the Democratic party a political advantage; and (2) because the commission's lawyer and consultant said that the Justice Department would not preclear the reapportionment scheme under Section 5 of the Voting Rights Act unless the commission underpopulated eleven districts to create (or to attempt to create) minority "ability-to-elect" districts.¹⁰⁷ Two of the three district judges upheld the commission's unequal reapportionment plan on the ground that the Justice Department required unequally populated districts to obtain preclearance under the Voting Rights Act, even though they recognized that there was some partisanship involved.¹⁰⁸ Relying on the district court's finding that the "population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act," the Supreme Court upheld the redistricting plan, notwithstanding that most Democratic districts were underpopulated and almost all Republican district were overpopulated.¹⁰⁹ In its decision the Supreme Court expressly recognized that "partisanship played some role" and that "the tendency of minority populations in Arizona . . . [was] to vote disproportionately for Democrats."¹¹⁰ It nevertheless unanimously affirmed the decision below.

The Supreme Court has observed: "Our . . . decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact."¹¹¹ And as *Harris* demonstrates, partisan line drawing of districts (political gerrymandering) is a *de facto* byproduct of carrying out the purposes of the Voting Rights Act, sanctioned by the Supreme Court.¹¹²

¹⁰⁷ *Id.* at 1047.

¹⁰⁸ *Id.* at 1077.

¹⁰⁹ *Id.* at 1046.

¹¹⁰ *Harris*, 136 S. Ct. at 1309.

¹¹¹ *Cromartie*, 526 U.S. at 551 (emphasis omitted).

¹¹² *Id.* at 551-52.

V. THE VARIOUS RESTRAINTS ON INCUMBENCY USED BY THE STATES¹¹³

State legislatures drew new congressional districts in forty-two states and legislative districts in thirty-seven states.¹¹⁴ Since the legislature will obviously protect the seats of its own existing members, the districts drawn in those states undoubtedly will be designed for maximum partisan incumbency protection.

A. Redistricting Commissions

Arizona and California are the only states that have independent bodies that take the redistricting process wholly out of the hands of the legislature.

The California Citizens Redistricting Commission¹¹⁵ is the redistricting organization for the state of California. It is responsible for determining the boundaries for the Senate, Assembly, and Board of Equalization districts in the state.¹¹⁶ The fourteen-member commission consists of five Democrats, five Republicans, and four commissioners from neither major party.¹¹⁷ The commission was authorized following the passage of California Proposition 11,¹¹⁸ the Voters First Act, by voters in November 2008. The commissioners were selected in November and December 2010 and were required to complete new maps by August 15, 2011.¹¹⁹

Following the 2010 passage of California Proposition 20,¹²⁰ the Voters First Act for Congress, the Commission was also assigned the responsibility of redrawing the state's U.S. congressional district

¹¹³ For a comprehensive overview of the many different governmental institutions that participate in effecting redistricting throughout the 50 states, see Brief for National Conference of State Legislatures as Amicus Curiae Supporting Appellant, *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 132 S. Ct. 2652 (2015) (No. 13-1314) [hereinafter Brief for National Conference of State Legislatures]. See also Cain, *Buffer*, *supra* note 18.

¹¹⁴ *Who Draws the Lines?*, LOY. L. SCH.: L.A., <http://redistricting.lls.edu/who.php> (last visited Apr. 28, 2017).

¹¹⁵ *What's New*, CAL. CITIZENS REDISTRICTING COMMISSION, <http://wedrawthelines.ca.gov/> (last visited Apr. 29, 2017).

¹¹⁶ *FAQ*, CAL. CITIZENS REDISTRICTING COMMISSION, <http://wedrawthelines.ca.gov/faq.html> (last visited Apr. 29, 2017).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ CAL. CONST. art. XXI, § 2 (amended 2010).

¹²⁰ *Id.*

boundaries necessitated by the 2010 United States Census. The Commission works as follows:

The commission on appellate court appointees creates a pool of 25 nominees, ten from each of the two largest parties and five not from either of the two largest parties. The highest ranking officer of the [H]ouse appoints one from the pool, then the minority leader of the [H]ouse appoints one, then the highest-ranking officer of the [S]enate appoints one, then the minority leader of the [S]enate appoints one. These four appoint a fifth from the pool, not a member of any party already represented on the commission, as chair. If the four deadlock, the commission on appellate court appointments appoints the chair.¹²¹

Arizona's Independent Redistricting Commission¹²² (AIRC) draws both congressional and legislative districts. An amicus brief by the National Conference of State Legislatures in *Arizona State Legislative v. Arizona Independent Redistricting Commission* provides a good description of the AIRC:

The AIRC originated in 2000, when Arizona's voters approved Proposition 106, which amended the state constitution by 'removing congressional redistricting authority from the Legislature and vesting that authority in the AIRC.' The AIRC has five independent members. The commissioners are selected from an original pool of twenty-five candidates. The twenty-five candidates must include ten from each of the two largest political parties in the state and five who are not registered with either party. The candidates are selected not by the state legislature or any of its members; instead, they are selected by the Arizona state commission on appellate court appointments, which does not include any legislators among its members. Each of the four legislative leaders then chooses one

¹²¹ *Appendix F: Redistricting Commissions: Congressional Plans*, SENATE MN, <https://www.senate.mn/departments/scr/REDIST/Red2000/apfcomco.htm> (last visited Apr. 30, 2017).

¹²² *Arizona Independent Redistricting Commission: Mission*, AZ.GOV, <http://www.azredistricting.org/> (last visited Apr. 30, 2017).

commissioner from the pre-selected list of 25 candidates. The four commissioners chosen by the legislative leaders then select the fifth commissioner, who may not be registered in the same party as any of the four commissioners.¹²³

In Arizona, the legislative leaders must pick from a pre-selected list of candidates, which effectively prevents the legislature from picking the commissioners of its choice.¹²⁴

The Republican-controlled Arizona Legislature brought a legal challenge against Arizona's commission in 2012, arguing it was unconstitutional to strip lawmakers of a voice in redistricting.¹²⁵ They relied on the Constitution's elections clause, which says that the time, place, and manner in holding congressional elections "shall be prescribed in each state by the legislature thereof."¹²⁶ The Supreme Court's four liberals, and Justice Anthony Kennedy, rejected that argument, saying the clause could not be read to preclude voter initiatives that seek an alternative way of redistricting.¹²⁷

In five other states (Hawaii, Idaho, Montana, New Jersey, and Washington) boards appointed by the legislatures (not from a predetermined list) draw the lines in place of the legislature.¹²⁸ Since the legislature picks the members effectuating the final maps, these politician-appointed boards, which are not non-partisan, inevitably

¹²³ Brief for National Conference of State Legislatures, *supra* note 113, at 15-17.

¹²⁴ Brief for National Conference of State Legislatures, *supra* note 113, at 15-17.

¹²⁵ See *Arizona*, 135 S. Ct. at 2658-59; Amber Phillips, *The Supreme Court's Ruling in Favor of Redistricting Commissions, Explained*, WASH. POST (June 29, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/06/29/the-supreme-courts-ruling-in-favor-of-redistricting-commissions-explained/?utm_term=.eec7d95e9362.

¹²⁶ *Arizona*, 135 S. Ct. at 2658-59.

¹²⁷ In a 5-4 opinion authored by Justice Ruth Bader Ginsburg, the Supreme Court ruled the Constitution allowed Arizona voters to take line-drawing authority away from state lawmakers and give that to an independent commission. *Id.* at 2657. In that 2000 ballot initiative, Arizonans "sought to restore 'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'" *Id.* at 2677. The four most conservative justices dissented, saying the Court ignored clear constitutional language that gives state legislatures power to draw district lines. *Id.* at 2678 (Roberts, CJ., dissenting). For example, Chief Justice John Roberts wrote in dissent, "[n]o matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution." *Id.* at 2678 (Roberts, CJ., dissenting).

¹²⁸ Brief for National Conference of State Legislatures, *supra* note 113, at 10.

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produce districts desired by the legislators and incorporate incumbency protection districts.¹²⁹

¹²⁹ See Brief for National Conference of State Legislatures, *supra* note 113, at 10; Cain, *Buffer*, *supra* note 18, at 1820.

Four states (Iowa,¹³⁰ New York,¹³¹ Ohio,¹³² and Maine¹³³) have advisory commissions that advise the legislature through the mechanism of advisory reports or suggestions, or even propose maps,

¹³⁰ Iowa has a five-member advisory commission; however, if the legislature rejects the commission's plan three times, the legislature is free to enact its own plan. *See* IOWA CODE ANN. §§ 42.3, 42.5 (West 2014).

¹³¹ In 2011, New York good-government groups engaged in a vigorous effort to achieve non-partisan redistricting. For example, NY Uprising was a nonpartisan coalition of good-government groups founded by former New York City Mayor Ed Koch for the purpose of promoting independent nonpartisan redistricting in New York State in connection with the 2011 redistricting cycle. *NY Uprising*, BALLOTPEdia, https://ballotpedia.org/NY_Uprising (last visited Apr. 30, 2017). Such article stated that "[d]uring the 2010 elections, NY Uprising sought pledges from candidates supporting independent redistricting Those who signed the pledge were referred to by NY Uprising as 'Heroes of Reform,' while those that did not were called 'Enemies of Reform.'" *Id.* Notwithstanding that 350 candidates, including those eventually elected to the legislature, signed the pledge, they did not succeed in effecting a totally nonpartisan redistricting commission. *Id.* Many of the same institutions and persons who were part of the NY Uprising movement were also part of a parallel movement called ReShape New York: "ReShape New York is a nonpartisan coalition of 30 good-government groups working for redistricting reform in New York. Their goal is a fair and independent process to draw state legislature and congressional district maps." *ReShapeNY*, BALLOTPEdia, <http://ballotpedia.org/ReShapeNY> (last visited April 30, 2017). Instead, New York, by means of a legislatively-referred constitutional amendment, adopted an advisory commission which functioned as follows: The commission includes ten members, eight of whom are "appointed by the four leaders of the state legislature." *See* Brief for National Conference of State Legislatures, *supra* note 113, at 7. Those eight "then appoint the final two members of the commission." *See* Brief for National Conference of State Legislatures, *supra* note 113, at 7. If the legislature rejects the commission's plan twice, the legislature is free to enact its own plan. *See* Brief for National Conference of State Legislatures, *supra* note 113, at 8; N.Y. CONST. art. III, §§ 4, 5-b.

¹³² Ohio has a six-member advisory commission, but the Ohio State Legislature draws congressional district boundaries. Legislative boundaries are also drawn by a politically dominated commission comprising the following seven members:

1. Governor
2. State auditor
3. Secretary of State
4. One commissioner chosen by the speaker of the House in concert with his or her party's leader in the Senate.
5. One commissioner chosen by the House minority leader along with his party's leader in the Senate.
6. "One person appointed by the president of the senate"; and
7. "One person appointed by the legislative leader of the largest political party in the senate of which the president of the senate is not a member."

See OHIO CONST. art. XI, § 1; OHIO REV. CODE ANN. tit. 1, § 103.51 (West 2014). Consequently, Ohio congressional lines and legislative lines are drawn by a partisan rather than by a non-partisan process.

¹³³ Maine has a commission comprising 15 members. The legislature can override the commission's plans and enact a plan, of its own, but only by a 2/3 vote. *See* ME. CONST. art. IV, pt. 3, § 1-A (West 2014); ME. REV. STAT. tit. 21-A, § 1206 (West 2014).

but the legislature retains ultimate power to set the contours of the new districts, enabling the legislature to protect incumbents.

Finally, two states (Connecticut and Indiana) have backup commissions that prepare the redistricting only after a state legislature has failed to complete congressional redistricting on its own. In Indiana, the backup commission prepares the congressional plan only;¹³⁴ in Connecticut, the backup commission draws both the congressional and legislative plans.¹³⁵

Although political science Professor Cain favors independent commissions generally, he nevertheless notes that independent commissions, even those such as in California or Arizona, are not entirely free from partisan incumbency influence.¹³⁶ He recommends incorporating the New Jersey bargaining system into the independent commission system because New Jersey has a tiebreaking member within its system.¹³⁷ In New Jersey, the members of the commission for drawing congressional lines are appointed by the two majority and minority party leaders plus the two chairs of the state Democratic and Republican parties, each of whom get two selections.¹³⁸ The thirteenth or tiebreaking member is chosen by the other twelve or by the state supreme court if the members cannot agree.¹³⁹

B. Term Limits

Term limits attack incumbents by limiting the number of terms a legislator can serve.¹⁴⁰ It was a popular anti-incumbency weapon in the 1990s, but had no effect on Congress and limited effect on state legislatures.¹⁴¹

1. Congress

In *U.S. Term Limits, Inc. v. Thornton*, the U.S. Supreme Court ruled that states cannot impose qualifications for prospective members

¹³⁴ IND. CODE ANN. § 3-3-2-2 (West 2014).

¹³⁵ CONN. CONST. art. III, § 6.

¹³⁶ Cain, *Buffer*, *supra* note 18, at 1832-33.

¹³⁷ Cain, *Buffer*, *supra* note 18, at 1808, 1838.

¹³⁸ Cain, *Buffer*, *supra* note 18, at 1838.

¹³⁹ Cain, *Buffer*, *supra* note 18, at 1838.

¹⁴⁰ See *The Term-Limited States*, NCSL: NAT'L CONF. OF STATE LEGISLATURES (Mar. 13, 2015), <http://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx> (last visited Apr. 30, 2017) [hereinafter *Term-Limited States*].

¹⁴¹ See Jim Argue, Jr., *Term Limits: Panacea or Snake Oil?*, 28 ARK. LAW. 47, 47-48. See also *Term-Limited States*, *supra* note 150; *Term Limits in the United States*, BALLOTEDIA, http://ballotpedia.org/Term_limits_in_the_United_States (last visited Apr. 30, 2017).

of the U.S. Congress stricter than those specified in the Constitution.¹⁴² The decision invalidated the Congressional term limit provisions of twenty-three states.¹⁴³

In *Thornton*, Amendment 73 to the Arkansas Constitution denied ballot access to any federal Congressional candidate having already served three terms in the U.S. House or two terms in the U.S. Senate.¹⁴⁴ A member of the League of Women Voters sued in state court to have it invalidated.¹⁴⁵ She alleged that the new restrictions amounted to an unwarranted expansion of the specific qualifications for membership in Congress enumerated in the U.S. Constitution.¹⁴⁶ Both the trial court and the Arkansas Supreme Court agreed, declaring Amendment 73 unconstitutional.¹⁴⁷

The U.S. Supreme Court affirmed by a 5-4 vote.¹⁴⁸ Writing for the majority, Justice John Paul Stevens held that:

Finally, state-imposed restrictions, unlike the congressionally imposed restrictions at issue in *Powell*, violate a third idea central to this basic principle: that the right to choose representatives belongs not to the States, but to the people Following the adoption of the Seventeenth Amendment in 1913, this ideal was extended to elections for the Senate. The Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people.¹⁴⁹

He further opined that sustaining Amendment 73 would result in “a patchwork of state qualifications” for U.S. Representatives, and described that consequence as inconsistent with “the uniformity and national character that the Framers . . . sought to ensure.”¹⁵⁰

¹⁴² 514 U.S. 779, 783 (1995).

¹⁴³ See Linda Greenhouse, *High Court Blocks Term Limits for Congress in a 5-4 Decision*, N.Y. TIMES (May 23, 1995), <http://www.nytimes.com/1995/05/23/us/high-court-blocks-term-limits-for-congress-in-a-5-4-decision.html?pagewanted=all>.

¹⁴⁴ *Thornton*, 514 U.S. at 784.

¹⁴⁵ *Id.* at 784-85.

¹⁴⁶ *Id.* at 786.

¹⁴⁷ *Id.* at 783.

¹⁴⁸ *Id.* at 838.

¹⁴⁹ *Thornton*, 514 U.S. at 820-21.

¹⁵⁰ *Id.* at 822.

Concurring, Justice Anthony Kennedy wrote that the amendment would interfere with the “relationship between the people of the Nation and their National Government.”¹⁵¹

2. State Legislatures

While *U.S. Term Limits, Inc. v. Thornton* blocked term limits for Congress, there is no similar legal bar precluding the imposition of term limits on state legislatures. The following fifteen state legislatures have term limits:¹⁵²

| State | Limited: Terms (total years allowed) |
|------------|---|
| Arizona | House: 4 terms (8 years) Senate: 4 terms (8 years) |
| Arkansas | House: 3 terms (6 years) Senate: 2 terms (8 years) |
| California | 12 year cumulative total for either or both houses. |
| Colorado | House: 4 terms (8 years) Senate: 2 terms (8 years) |
| Florida | House: 4 terms (8 years) Senate: 2 terms (8 years) |
| Louisiana | House: 3 terms (12 years) Senate: 3 terms (12 years) |
| Maine | House: 4 terms (8 years) Senate: 4 terms (8 years) |

¹⁵¹ *Id.* at 845 (Kennedy, J., concurring); *see id.* (Thomas, J., dissenting) (countering the majority opinion by stating: “[i]t is ironic that the Court bases today’s decision on the right of the people to ‘choose whom they please to govern them.’ Under our Constitution, there is only one State whose people have the right to ‘choose whom they please’ to represent Arkansas in Congress Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.”) (internal citations omitted).

¹⁵² *State Legislative Term Limits*, U.S. TERM LIMITS, <http://termlimits.org/term-limits/state-term-limits/state-legislative-term-limits/> (last visited Apr. 30, 2017).

| State | Limited: Terms (total years allowed) |
|--------------|--|
| Michigan | House: 3 terms (6 years) Senate: 2 terms (8 years) |
| Missouri | House: 4 terms (8 years) Senate: 2 terms (8 years) |
| Montana | House: 4 terms (8 years) Senate: 2 terms (8 years) |
| Nebraska | Unicameral: 2 terms (8 years) |
| Nevada | Assembly: 6 terms (12 years) Senate: 3 terms (12 years) |
| Ohio | House: 4 terms (8 years) Senate: 2 terms (8 years) |
| Oklahoma | 12 year combined total for both houses |
| South Dakota | House: 4 terms (8 years) Senate: 2 terms (8 years) |

Professor Robert Kurfirst explores the reasoning behind proposals for term limits and concludes that although “all supporters believe that high legislative incumbency rates are unacceptable,” they do not share similar motivations.¹⁵³ Kurfirst divides the prevailing theories into four groups: “Progressives,” “Populists,” “Republicans,” and “Libertarians.”¹⁵⁴

Progressives value professionalism in politics. By eliminating “seniority” and candidates’ reliance “upon securing the financial resources necessary for reelection,”¹⁵⁵ term limits act as an immunization from corruption.

Populists value “responsive and efficient legislatures” above all.¹⁵⁶ As such, populists encourage an “influx of ordinary citizens” in order to infuse legislatures with “fresh perspectives and uncalledous outlooks”¹⁵⁷

¹⁵³ Kurfirst, *supra* note 8, at 119.

¹⁵⁴ Kurfirst, *supra* note 8, at 119.

¹⁵⁵ Kurfirst, *supra* note 8, at 123.

¹⁵⁶ Kurfirst, *supra* note 8, at 123.

¹⁵⁷ Kurfirst, *supra* note 8, at 124.

Republicanism within term-limit logic views “political distance” as necessary to both allow for the functioning of the “deliberate process” and preserve the “government’s authority.”¹⁵⁸

Libertarians see two benefits of term-limits: “they would eliminate both the votes and the leadership influence of the most pro-spending members.”¹⁵⁹

Professor Edward J. Lopez, BB&T Distinguished Professor of Capitalism at Western Carolina University, articulates two reasons for term limits.¹⁶⁰ First, higher tenure buttresses a legislature’s inefficient big government (high spending).¹⁶¹ Second, higher tenure creates inefficient (anti-competitive) conditions in the legislative election market.¹⁶²

Associate Professor at University of California, San Francisco, D.E. Apollonio and Assistant Professor of Political Science University of Massachusetts, Amherst, Raymond J. La Raja opt for a more quantitative than theoretical analysis of the effects of term limits on legislatures.¹⁶³ Apollonio and La Raja use a cross-state comparison of the power of legislators before and after term limits were imposed.¹⁶⁴ Their analysis found that term limits were able to decrease power in state legislatures by both decreasing average financial contributions to legislators and reducing the power of caucus leaders relative to other party members.¹⁶⁵ However, these changes are more apparent in the lower chambers than in the upper chambers.¹⁶⁶

Professor H. Abbie Erler, Associate Professor of Political Science, Kenyon College, details some of the reasons favoring term limits advanced by various academicians.¹⁶⁷ Professor Erler states, for one thing:

¹⁵⁸ Kurfirst, *supra* note 8, at 125.

¹⁵⁹ Kurfirst, *supra* note 8, at 126.

¹⁶⁰ See Edward J. Lopez, *Term Limits: Causes and Consequences*, 114 PUB. CHOICE 1, 1 (2003).

¹⁶¹ *Id.* at 1.

¹⁶² *Id.* at 1, 47 (acknowledging the need for further research to determine the veracity of pro-term limits advocacy).

¹⁶³ See D. E. Appollonio & Raymond J. La Raja, *Term Limits, Campaign Contributions, and the Distribution of Power in State Legislatures*, 31 LEGIS. STUD. Q. 259 (2006).

¹⁶⁴ *Id.* at 259.

¹⁶⁵ *Id.* at 267.

¹⁶⁶ *Id.* at 274.

¹⁶⁷ See H. Abbie Erler, *Legislative Term Limits and State Spending*, 133 PUB. CHOICE 479 (2007).

[T]erm limits will remedy the problem of adverse selection by facilitating the election of citizen-legislators. Supporters of term limits see citizen-legislators as the antithesis of the professionalized politicians who have come to dominate state legislatures. Unlike their professionalized peers, citizen-legislators have no desire to make careers out of service in the government.¹⁶⁸

Further Professor Erler went on to state that “term limits will put an end to the ‘culture of spending’ that pervades state legislatures. According to this view, legislators do not necessarily enter office with pro-spending preferences but, over time, develop these preferences as they become immersed in the process of governing.”¹⁶⁹

Einer R. Elhauge, Professor of Law at Harvard Law School, similarly lauded the merits of term limits.¹⁷⁰ He disagreed with those who argued that term limits “seemed to have no redeeming prodemocratic virtue; if most voters wanted to replace experienced incumbents with newcomers, they could do so without term limits. Just vote the bums out.”¹⁷¹ Professor Elhauge concluded:

There are compelling reasons to believe term limits help the electorate register its political preferences *more* accurately. Term limits reduce collective action pressures to vote for a senior incumbent to gain a higher share of legislative clout. And term limits lower entry barriers that keep out challengers. Both effects would likely reduce the ideological divergence between electorates and their representatives.¹⁷²

VI. CONCLUSION

Notwithstanding that partisan gerrymandering is both politically unfair and governmentally distasteful to many, elimination of the partisan gerrymandering phenomenon seems improbable.

¹⁶⁸ *Id.* at 480.

¹⁶⁹ *Id.* at 480-81.

¹⁷⁰ See Einer Elhauge, *Are Term Limits Undemocratic?*, U. CHI. L. REV. 83,85 (1997).

¹⁷¹ *Id.* at 85.

¹⁷² Elhauge, *supra* note 180, at 193 (emphasis added).

Undoubtedly, the primary reason for the failure to reform the districting process can be understood as resulting from the fact that the real voters and not academicians, legal scholars, newspapers and good government groups, generally like their representatives and do not wish to dispense with them.

In 2011, LATFOR conducted more than a dozen public hearings in different geographic locations in the State of New York for the purpose of soliciting the public's view in respect of any proposed 2012 redistricting plans.¹⁷³ The author, who was redistricting counsel for the New York State Assembly at that time, attended those public hearings and spoke with witnesses who, even after publicly excoriating partisan gerrymandering, urged that their congressional districts be drawn in a manner that kept the same voters in the new districts.

With respect to restraints on incumbency there appears to be a clear disconnect between theoretical distaste for incumbency protection and the continued popularity of keeping incumbents in power when actual, real elections are impacted.¹⁷⁴ In such cases, there is a NIMBY (not in my backyard) phenomenon operating. Voters want term limits or non-partisan redistricting so long as it does not hurt the ability of their representative to be re-elected.¹⁷⁵ In other words, term limits and/or nonpartisan redistricting are good in theory, but not in practice.

¹⁷³ See *Transcripts*, N.Y. LEGIS. TASK FORCE ON DEMOGRAPHIC RESEARCH & REAPPORTIONMENT, <http://www.latfor.state.ny.us/transcripts/> (last visited Apr. 30, 2017).

¹⁷⁴ Persily, *supra* note 21, at 670 (arguing that voters' connections with their own representatives, not gerrymandering, are the principal reasons incumbents get re-elected).

¹⁷⁵ Kong-Pin Chen & Emerson M.S. Niou, *Term Limits as a Response to Incumbency Advantage*, 67 J. POL. 390 (2005) (noting the paradox that supports this dichotomy, namely voters choose to re-elect their incumbents while simultaneously supporting term limits).