INCUMBENT PROTECTION IN LEGISLATIVE REDISTRICTING: FIRST PRINCIPLES AND THE CONSTITUTION

David N. Wecht* and Brett Graham**

I. INTRODUCTION

In American politics, few things are more predictable than the reelection of a member of the U.S. House of Representatives. Congress' perennial unpopularity notwithstanding, the House reelection rate has been as high as 98 percent in recent cycles, and very rarely dips below 90 percent.[1] Incumbent advantage extends to the states as well: in 2020, 95 percent of state legislators nationwide won reelection.[2] Political scientists often attribute this phenomenon to name recognition, consolidation of party support, fundraising superiority, or some combination thereof.[3] Legal observers, though, might search elsewhere for an additional factor.

For decades, incumbent protection (which, with apologies to the intellectual property bar, we will call "IP") has played a substantial role in the legislative redistricting process. IP is the practice of redrawing district boundaries with the intent to maximize

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* Justice, Supreme Court of Pennsylvania. Any views expressed in this Article are not offered on behalf of the Court.

** Law Clerk to Justice Wecht.

[1] *See* Tom Murse, *Do Members of Congress Ever Lose Re-election?*, THOUGHTCO (Dec. 10, 2020), https://www.thoughtco.com/do-congressmen-ever-lose-re-election-3367511; Harry Enten, *Congress' Approval Rating Hasn't Hit 30% in 10 Years. That's a Record.*, CNN (Jun. 1, 2019), https://www.cnn.com/2019/06/01/politics/poll-of-the-week-congress-approval-rating/index.html.

[2] *Election Results, 2020: Incumbent Win Rates by State*, BALLOTPEDIA (Feb. 11, 2021), https://ballotpedia.org/Election_results,_2020:_Incumbent_win_rates_by_state.

[3] *See, e.g.*, Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L. J. 315 (2004); David L. Eckles et. al, *Risk Attitudes and the Incumbency Advantage*, 36 POL. BEHAVIOR 731 (2013); Markus Prior, *The Incumbent in the Living Room: The Rise of Television and the Incumbency Advantage in U.S. House Elections*, 68 J. POL. 657 (2006).

an elected official's opportunity to win reelection.[4] Examples include using incumbents' home addresses as starting points in formulating new maps,[5] drawing potential challengers out of districts,[6] and alternatively concentrating or diluting political constituencies in attempts to create "safe" seats.[7] Experts often testify to state legislatures that IP is a traditional, valid interest in such projects, one that the judiciary has recognized and blessed.[8] Indeed, both state courts and lower federal courts have understood United States Supreme Court precedent to support the same conclusion.[9]

We begin by taking an analytical step backward. Here, we examine the judicial assumption that fashioning electoral maps to protect incumbent legislators and their individual career interests

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[4] *Id.*

[5] *See, e.g.*, Andre M. Larkins, *Community. Rights: Fighting the Walmart Invasion of Small Town America with Legal Intelligence*, 17 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 407, 430-32 (2015) (recounting how the city council of Cibolo, Texas redrew districts around council members' home addresses).

[6] *See, e.g.*, Jill Nolin, *PSC Challenger Fights to Stay on the Ballot After Being Drawn Out of the Race*, GA. RECORDER (Jun. 14, 2022), https://georgiarecorder.com/2022/06/14/psc-challenger-fights-to-stay-on-the-ballot-after-being-drawn-out-of-the-race/ (recounting how the chairwoman of a Georgia state commission told a fellow Republican to "get [his prospective challenger's] home address and sent [it] to [her]," shortly before the challenger was drawn out of the relevant district).

[7] *See, e.g.*, Sam Gringlas, *How 2 Competitive Districts in Georgia Became a Very Red One and a Very Blue One*, NPR (May 23, 2022), https://www.npr.org/2022/05/23/1100446446/redisticting-georgia-swing-districts-midterm-elections (discussing the "decimation of competitive districts in this round of redistricting").

[8] *See* Yunsieg P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 WIS. L. REV. 101, 113-14 (2021) (compiling references to subject matter experts who have testified before state legislatures that the Supreme Court recognizes incumbent protection as a valid criterion in redistricting).

[9] *See*, *e.g.*, Dickson v. Rucho, 766 S.E.2d 238, 257 (N.C. 2014) ("The Supreme Court . . . has recognized that . . . incumbency protection . . . [is a] legitimate governmental interest."); Ga. State Conf. of NAACP v. Fayette Cty. Bd. of Comm'rs, 996 F. Supp. 2d 1353, 1362 (N.D. Ga. 2014) ("Protecting incumbents has been recognized as a legitimate state interest[.]").

comports with the Constitution. A review of the string of cases cited to establish IP's validity reveals a legal question more complicated and less settled than most commentary suggests. The Supreme Court has determined that IP does not violate particular clauses of the Constitution in certain discrete circumstances and has accompanied those determinations with sparse analyses.[10] State courts and lower federal courts have proceeded to invoke those passages for much broader justifications of IP's constitutionality.[11] A discerning reader will find that the Supreme Court has neither wholly endorsed nor wholly rejected IP. The practice operates in a gray area in which its validity is regularly assumed, but in which neither its compatibility with foundational democratic principles nor its potential for injuring voters has ever been closely scrutinized.

In Part II, we examine the Supreme Court's cursory treatment of IP to date, paying particular attention to the handful of cases that courts have cited in support of IP's validity, and we note passing expressions of skepticism regarding that validity. In Part III, we consider potential representational injuries that may arise from IP's continued prevalence in our legislative redistricting process, and we survey the arguments for and against its constitutionality. In Part IV, we touch upon the current state of Pennsylvania jurisprudence on this question. Part V offers a brief conclusion.

II. AN OPEN QUESTION

In the 1996 case of *Bush v. Vera*, a plurality of Justices remarked that the Supreme Court had long "recognized incumbency protection, at least in the limited form of avoiding contests between

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[10] Throughout this Article, we refer continuously to the Supreme Court of the United States as "the Supreme Court" (or simply "the Court") and the Constitution of the United States as "the Constitution." We employ this convention for ease of reference and because we deem "SCOTUS" to be unduly journalistic for an academic publication. We are fully mindful that the United States includes not one, but rather fifty-one, Supreme Courts and constitutions. *See generally*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW. (2018); JEFFREY S. SUTTON, WHO DECIDES: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021). And, in Part IV below, we indeed address the law of our own State, Pennsylvania.

[11] *See* cases cited *supra* note 9.

incumbents, as a legitimate state goal" in the redistricting process.[12] A 2004 plurality in *Vieth v. Jubelirer* cited *Vera* for this proposition, and other courts have followed suit.[13] Justice Sandra Day O'Connor, a former state legislator, wrote for a three-Justice plurality in *Vera* and buttressed her assertion with a lengthy string-cite that included election law precedents such as *Karcher v. Daggett* and *Gaffney v. Cummings*.[14] One might assume from this train of authority that the Court had, at some point or another, squarely considered IP's relationship to the Constitution, reviewed briefs, discerned no friction, and then confirmed that holding head-on in subsequent cases. One would be mistaken.

Close scrutiny of the *Vera* plurality and review of other decisional treatment of IP reveals a house of cards that continues to be regarded as a brick-and-mortar dwelling. The Supreme Court has never engaged in careful and contemplative assessment of IP or even explicitly endorsed its constitutionality. As a matter of constitutional principle, IP remains an open question. After (i) examining the cases that have been offered as conclusive on the subject and demonstrating that their treatment was cursory, this Part then (ii) catalogues instances in which jurists have expressed skepticism that IP might pass constitutional muster and (iii) recounts how some courts appear to treat IP as a second-order consideration.

A. An Incomplete Answer

There can be no question that the Supreme Court is aware of IP. The Justices have long recognized that legislatures prioritize the

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[12] Bush v. Vera, 517 U.S. 952, 964 (1996) (plurality) (cleaned up).

[13] *See* Vieth v. Jubelirer, 541 U.S. 267, 298 (2004) (plurality) (citing *Vera*, 517 U.S. 952); Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elec., 827 F.3d 333, 352 (4th Cir. 2016) (citing *Vera*, 517 U.S. 952); *Ga. State Conf. of NAACP*, 996 F. Supp. 2d at 1362 (citing *Vera*, 517 U.S. 952); City of Greensboro v. Guilford Cty. Bd. of Elec., 251 F. Supp. 3d 935, 947 n. 109 (M.D.N.C. 2017) (citing *Vera*, 517 U.S. 952); Rodriguez v. Pataki, 308 F. Supp. 2d 346, 458 (S.D.N.Y. 2004) (citing *Vera*, 517 U.S. 952); *In re* Legis. Districting of State, 805 A.2d 292, 330 n.3 (Md. 2002) (Raker, J., dissenting) (citing *Vera*, 517 U.S. 952).

[14] *Vera*, 517 U.S. at 964 (plurality) (citing Karcher v. Daggett, 462 U.S. 725 (1983); Gaffney v. Cummings, 412 U.S. 735 (1973)).

interests of sitting office-holders and have reported lower courts' approval of that practice.[15] In the same term that it decided *Vera*, the Court observed in *Shaw v. Hunt* that "protecting Democratic incumbents came into play" when North Carolina's legislature adopted maps in response to the 1990 census.[16] In *Easley v. Cromartie*, it recognized that "[the legislature] drew its plan to protect incumbents—a legitimate political goal recognized by the District Court."[17] There, an expert had testified that, "whatever districts [incumbents] end up with, they tend to . . . like and wish to preserve as long as they can."[18]

None of these cases carries jurisprudential heft. The Court's bare-bones acknowledgments of IP, without comment or analysis, offer little meaningful authority. We must, therefore, search further and elsewhere; we must seek out those recognitions of IP that are accompanied by some actual argument, something upon which constitutional scholars could hang their proverbial hats. All roads lead back to four cases, each of which offers some reasoning, and each of which we now address in turn.[19] But don't get your hopes up; none of these cases provides a straightforward or developed analysis that might settle the constitutional question. Indeed, to read any one of these cases as standing for the proposition that IP is *per se* legitimate would be to overstate its status. Rather, as we shall see, the Supreme Court has ruled in particular scenarios that consideration of IP does not violate specific clauses of the Constitution.[20]

i. Burns v. Richardson

When voters challenged S.B. 1, the bill that enacted U.S. House maps for Texas in 1971, on the ground that it failed to achieve equal populations between districts, the State replied by invoking its

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[15] *See* Shaw v. Hunt, 517 U.S. 899, 901-02 (1996).

[16] *Id.* at 907.

[17] Easley v. Cromartie, 532 U.S. 234, 248 (2001); *see also* Cromartie v. Hunt, 133 F. Supp. 2d 407, 412-13 (E.D.N.C. 2000).

[18] Cromartie v. Hunt, 133 F. Supp. 2d 407, 427 n.14 (2000) (Thornburg, J., concurring in part and dissenting in part) (quoting Trial Transcript at 279-80).

[19] Burns v. Richardson, 384 U.S. 73 (1966); *Karcher*, 462 U.S. 725; *Gaffney*, 412 U.S. 735; Larios v. Cox, 314 F. Supp. 2d 1357, 1362 (2004).

[20] *See infra* Section III.B.

policy of promoting "constituency-representative relations."[21] In *White v. Weiser*, the Supreme Court characterized this goal as "a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority [that] the members of the State's delegation have achieved in the United States House of Representatives."[22] Writing for the majority, Justice Byron White explained that the Court would not "disparage this interest"— in fact, it "[had] said that [drawing maps to minimize] the number of contests between present incumbents does not in and of itself establish invidiousness."[23] As support for this proposition, the majority invoked a footnote in *Burns v. Richardson*, a then-seven-year-old decision which offered the Court's first real comment on IP.[24]

In *Burns*, the Court rejected a challenge to Hawaii's use of, *inter alia*, multi-member districts to elect the state senate.[25] Writing for a unanimous Court, Justice William Brennan reasoned from *Fortson v. Dorsey*, in which the Court had held that the Equal Protection Clause does not necessarily require states to form all single-member districts in a state's legislative reapportionment scheme.[26] Assuming that *Reynolds v. Sims*[27] had been satisfied, Justice Brennan explained, *Fortson* meant that the use of multi-member districts would "constitute an invidious discrimination *only if* it can be shown that 'designedly or otherwise, [such a scheme], under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' "[28] In a footnote, the Court rejected "the suggestion that the districts [had been] arbitrarily or invidiously

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[21] White v. Weiser, 412 U.S. 783, 791, n.10 (1973) (quoting Brief for Appellant 72).

[22] *Id.* at 791.

[23] *Id.*

[24] *Id.*; *Burns*, 384 U.S. at 89 n.16.

[25] *See Burns*, 384 U.S. 73.

[26] Fortson v. Dorsey, 379 U.S. 433, 436-37 (1965).

[27] Reynolds v. Sims, 377 U.S. 533, 585 (1964) (holding that state senate districts must have roughly equal populations).

[28] *Burns*, 384 U.S. at 88 (quoting *Fortson*, 379 U.S. at 439) (emphasis added).

defined."[29] That the "boundaries may have been drawn in a way that minimizes the number of contests between present incumbents [did] not in and of itself establish invidiousness."[30]

Justice Brennan's footnote does not signal any wholesale validation of IP. Rather, his use of the word "invidiousness" invokes the touchstone for violations of the Equal Protection Clause.[31] And the *Burns* footnote is carefully qualified. While evidence of IP cannot "*in and of itself* establish invidiousness," the Court left open the possibility that such evidence could establish a violation if other factors were to come into play.[32] Justice White's blanket refusal to "disparage [the] interest" identified in *Weiser* in light of *Burns* was, therefore, overly broad.[33] That protecting incumbents in one circumstance could not alone establish a specific Equal Protection violation is neither here nor there when it comes to the broader question of compatibility between redistricting schemes and the Constitution as a whole.

ii. Karcher v. Daggett

In another Texas case, *LULAC v. Perry*, the Court waded into questions concerning section 2 of the Voting Rights Act and partisan gerrymandering, as understood through the lens of "partisan symmetry."[34] There, the District Court concluded that "the reason for taking Latinos out of District 23 . . . was to protect Congressman [Henry] Bonilla from a constituency that was increasingly voting against him."[35] Here, though, for the proposition that "incumbency

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[29] *Burns*, 384 U.S. at 89 n.16.

[30] *Id.*

[31] *See* Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886) (distinguishing two cases in an Equal Protection context by stating that they involved "no invidious discrimination against any one . . . ."); *see also* Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976).

[32] *Burns*, 384 U.S. at 89 n.16 (emphasis added).

[33] White v. Weiser, 412 U.S. 783, 791 (1973) (citing *Burns*, 384 U.S. at 89 n.16).

[34] LULAC v. Perry, 548 U.S. 399, 419-20 (2006) (opinion of Kennedy, J.) (examining the notion that a particular share of the total votes received in a given election should translate to a particular number of legislative seats).

[35] *Id.* at 440.

protection can be a legitimate factor in districting," the *LULAC* Court cited not *Burns*, but *Karcher v. Daggett*.[36] Like *Burns*, *Karcher* touched upon IP only narrowly and briefly.

At issue in *Karcher* was the equal representation standard enshrined in Article I, Section 2 of the Constitution.[37] In reviewing legislative policies that "on a proper showing could justify minor . . . deviations" from the one person, one vote standard, Justice Brennan listed "avoiding contests between incumbent Representatives."[38] He also added the caveat that none of the policies would be upheld if they were used for a discriminatory purpose.[39] Again, the Court offered no analysis in support of its assertions, and qualifiers abound.

More pertinent, though, is the fact that *Karcher* is as narrow in its holding as *Burns*. The conclusion that IP *could* justify minor differences in population between legislative districts *on a proper showing* and *assuming no discriminatory purpose* is not at odds with the idea that more robust forms of IP would violate some other constitutional value or command. Hence, *Karcher* similarly fails to prove conclusive on the question of IP's constitutional validity writ large.

iii. Gaffney v. Cummings

Others might discern the High Court's acquiescence to IP in *Gaffney v. Cummings*,[40] an Equal Protection case dealing with population deviations and partisan interests.[41] There, Connecticut had engaged in a "sweetheart" or "bipartisan" gerrymander, which involved "the two major political parties agree[ing] to a reapportionment scheme that w[ould] protect each party's incumbents."[42] The Court declared that it was:

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[36] *Id.* at 441 (citing Karcher v. Daggett, 462 U.S. 725, 740 (1983)).

[37] *Karcher*, 462 U.S. at 727.

[38] *Id.* at 740.

[39] *Id.*

[40] Gaffney v. Cummings, 412 U.S. 735 (1973).

[41] *See, e.g.*, White v. Weiser, 412 U.S. 783, 792 (1973); Harper v. Hall, 868 S.E.2d 499, 534 (N.C. 2022).

[42] Stephanie Cirkovich, Note, *Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote*, 31 CARDOZO L. REV. 1823, 1849 n.214

> quite unconvinced that the reapportionment plan offered by the three-member Board violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.[43]

Setting aside the fact that this quote appears once again in the Equal Protection context, and further setting aside the absence of the word "incumbent" or any variation thereof, the *Gaffney* Court's distillation of the argument against IP presents a bit of a strawman. Those who question the constitutional validity of IP do not necessarily make the case that political considerations should disappear from the redistricting process altogether, or that evidence that party strength was considered must invalidate a map. Rather, such observers might simply suggest that the Constitution requires that those considerations be minimized wherever possible, or else take a back seat to other, more defensible interests (*e.g.*, access, competition).

iv. Larios v. Cox

Finally, we might look to *Larios v. Cox*, in which a three-judge district court panel found that Georgia's 2001 reapportionment plan did not violate Article I, Section 2, because the very small population deviations therein were supported by legitimate state interests.[44] Over a singular dissent, the Supreme Court summarily affirmed that holding.[45] According to expert testimony, "[w]hile Democratic incumbents . . . were generally protected, Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as

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(2010); *see also* Samuel Issacharoff & Pamela Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 545-46 (2004).

[43] *Gaffney*, 412 U.S. at 752.

[44] *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1338 (N.D. Ga. 2004), *aff'd* 542 U.S. 947 (2004) ("protection of incumbents is . . . permissible . . . *only* when it is . . . applied in a consistent and nondiscriminatory manner").

[45] *Id.*

possible."[46] Furthermore, the plan "systematically underpopulat[ed] the districts held by incumbent Democrats . . . [and] overpopulat[ed] those of Republicans."[47]

Citing *Karcher*, the district court discussed IP as a permissible state policy that could justify minor deviations from population equality.[48] It noted that "forty years of Supreme Court jurisprudence ha[d] established that the creation of [these] deviations for the purpose of allowing the people of certain geographic regions of a state to hold legislative power to a degree disproportionate to their population is plainly unconstitutional."[49] However, the court added, using IP to justify minor population deviations is permissible only "when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner."[50] Because this assertion flows from *Karcher*, its applicability is similarly limited to the context of equipopulation and Article I, Section 2. And because *Larios* was a summary affirmance, its precedential value is both difficult to discern and inherently limited.[51] Nonetheless, insubstantial as *Larios* might be, it constitutes another piece of the puzzle in the Court's IP jurisprudence.

B. Expressions of Skepticism

The Supreme Court's treatment of IP has been neither uniform nor thoroughly reasoned. On several occasions, secondary opinions—both before and after some of the above-discussed

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[46] *Id*. at 1329.

[47] *Id.*

[48] *Larios*, 300 F. Supp. 2d at 1330.

[49] *Id.* at 1338.

[50] *Id.*

[51] *Compare* Picou v. Gillum, 813 F.2d 1121, 1122 (11th Cir. 1987) ("A summary affirmance by the Supreme Court has binding precedential effect."); *and* Robert Stern et al., SUP. CT. PRAC. 287 (6th ed. 1986) (explaining that summary affirmances still have precedential value); *with* Anderson v. Celebrezze, 460 U.S. 780, 784-85 n.5 (1983) ("We have often recognized that the precedential effect of a summary affirmance extends no further than the precise issues presented and necessarily decided by those actions.") (internal quotation marks omitted); *and* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (holding that summary affirmances ". . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved").

decisions—have expressed wariness concerning IP's status as settled law, as well as IP's ultimate constitutionality. These concurrences and dissents further undercut assumptions that IP's legitimacy is a foregone conclusion.

In *Cromartie*, for instance, Justice Clarence Thomas' dissent referred to the district court's assumption that IP is legitimate as "[n]o doubt . . . a questionable proposition."[52] He further stated that, because the issue of IP's validity was not raised by the parties, he "d[id] not read the Court's opinion as addressing it."[53] Notably, though, Justice Thomas and two of his colleagues who joined that dissent would soon make up part of the *Vieth* plurality, which appeared to treat IP as traditional and legitimate.[54]

In *Weiser*, Justice Thurgood Marshall took exception to the Court's reliance upon Justice Brennan's IP footnote in *Burns.*[55] He argued that "whatever the merits" of that proposition, "it is entirely another matter to suggest that a federal district court which has determined that a particular reapportionment plan fails to comport with the constitutional requirement of 'one man, one vote' must . . . give consideration to the apparent desires of the controlling state political powers."[56] Rather,

> the judicial remedial process in the reapportionment area—as in any area—should be a *fastidiously neutral and objective one, free of all political considerations* and guided only by the controlling constitutional principle of strict accuracy in representative apportionment.[57]

On Justice Marshall's view, it seems, IP would have no place at all, and legislatures would be limited to the consideration of only nonpartisan factors in redrawing district boundaries.

Dissenting in *Vieth*, Justice David Souter, joined by Justice Ruth Bader Ginsburg "[took] as given" that *Gaffney* was "settled

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[52] Easley v. Cromartie, 532 U.S. 234, 262 n.3 (2001) (Thomas, J., dissenting).

[53] *Id.*

[54] *See* Vieth v. Jubelirer, 541 U.S. 267, 298 (2004) (plurality).

[55] White v. Weiser, 412 U.S. 783, 799 (1973) (Marshall, J., concurring).

[56] *Id.*

[57] *Id.* (emphasis added).

law," with its implied "approval of bipartisan gerrymanders [and] their associated goal of incumbent protection."[58] The dissent expressed unease, however, at "lumping all measures aimed at incumbent protection together."[59] Instead of adopting the plurality's blanket acceptance, the dissenters would have waited for district courts to develop records in relation to particular IP efforts and would then have reviewed those records on a case-by-case basis.[60] For Justice Souter, "the issue [was] one of how much is too much."[61] So, while *stare decisis* may have mandated his acknowledgment of IP in the particular context of *Vieth*, he refused to foreclose the possibility that it might offend the Constitution in others.

C. A Second-Tier Consideration

Even assuming that IP is a jurisprudential reality, some experts, legislatures, and courts have explicitly treated it as secondary to other districting criteria. In *Larios*, for instance, the district court-appointed special master was "permitted to review the issue of incumbency protection only as a *distinctly subordinate* consideration," which would yield to "the Constitution and the mandate of one person, one vote, the Voting Rights Act, and the traditional state interests of compactness, contiguity, minimizing the splits of counties [and municipalities], recognizing communities of interest, and avoiding multi-member districts."[62] Similarly, the Supreme Court once affirmed a district court opinion that had described IP as "inherently more political than factors such as

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[58] *Vieth,* 541 U.S. at 351 n.6 (Souter, J., dissenting).

[59] *Id.*

[60] *Id.* at 352 n.6.

[61] *Id.* at 344. He would have adopted a test analogous to the summary judgment standard in Title VII cases. *Id.* at 346 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Plaintiffs would attempt to satisfy certain *prima facie* elements to show impermissible partisan bias, at which point the state would have the opportunity to rebut those arguments and offer its own affirmative justifications.

[62] Larios v. Cox, 314 F. Supp. 2d 1357, 1362 (2004) (emphasis in original).

communities of interest and compactness," such that it should be "subordinated . . . to . . . other considerations."[63]

As recently as 2018, a district court held that the legislative desire to protect incumbents must "give way" to the court's obligation to "remedy . . . constitutional violation[s]."[64] This is especially pertinent in light of the judiciary's obligation to remedy race-based redistricting.[65] Efforts at IP, one court explained, "cannot prevail if the result is to perpetuate violations of the equal-opportunity principle contained in the Voting Rights Act."[66] In the words of the Seventh Circuit:

> Since it is frequently impossible to preserve white incumbencies amid a high black-percentage population without gerrymandering to limit black representation, it seems to follow that many devices employed to preserve incumbencies are necessarily racially discriminatory. We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus.[67]

To put it lightly, "the issue [of IP] becomes more complex . . . when race is used as a tool to achieve [it]."[68]

While it certainly is true that all districting goals must yield to constitutional requirements, it appears that courts have recognized IP as presenting unique challenges because of its interaction with those standards. Unlike the minimization of municipal splits, for instance, there are no objective and established touchstones from which courts could launch an IP inquiry. IP inherently calls for subjective assessments of political strength, which may skew or

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[63] *See* Johnson v. Miller, 922 F. Supp. 1556, 1565 (S.D. Ga. 1995) *aff'd* 521 U.S. 74 (1997).

[64] Covington v. North Carolina, 283 F. Supp. 3d 410, 433 (M.D.N.C. 2018).

[65] *Id.* at 420.

[66] Jeffers v. Clinton, 756 F. Supp. 1195, 1199-1200 (E.D. Ark. 1990).

[67] Ketchum v. Byrne, 740 F.2d 1398, 1408 (7th Cir. 1984).

[68] Black Pol. Task Force v. Galvin, 300 F. Supp. 2d 291, 313 (D. Mass. 2004); *see also* Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131 (1996).

otherwise complicate review. Furthermore, IP may provide an attractive pretext for redistricting mischief. On this basis, some observers might conclude that justifications based upon the political self-interests of incumbent legislators should be subject to more exacting scrutiny in order to ensure that they do not control or foreclose a reviewing court's analysis of other claims.

III. FIRST PRINCIPLES

As the foregoing discussion demonstrates, it is not entirely accurate to say that the Supreme Court has deemed IP to be a *per se* legitimate interest in redistricting. Per *Burns*, IP's consideration does not *alone* establish a violation of the Equal Protection Clause.[69] Per *Karcher*, IP can be used, on a proper showing, to justify minor population deviations between districts.[70] Per *Gaffney*, considering political party strength does not necessarily indicate unconstitutionality, though such assessments might need to be wielded in a non-discriminatory manner, per *Larios*.[71] The amalgamation of these takeaways falls well short of the cut-and-dried approval of IP that subsequent opinions have synthesized or discerned.[72] Such blanket validation of an unexamined practice represents precedent-creep that has periodically slouched forward without any deliberative pause for careful and meaningful analysis.

And so, let us now enter that liminal space. This is the space that the Court's IP jurisprudence has left behind, a space in which we undertake a free-standing assessment of IP's constitutional validity.[73] Without particular facts or a record, we look instead to founding principles to guide our inquiry. First, we explore the case that organizing election districts around incumbent legislators and their political self-interests conflicts with prevailing understandings of the freedom of association and representational harm. On this view, IP might conflict with early American principles of pure

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[69] Burns v. Richardson, 384 U.S. 73, 96-97 (1966).

[70] Karcher v. Daggett, 462 U.S. 725, 740 (1983).

[71] Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

[72] *See supra* note 9.

[73] Again, as noted at the outset, the following endeavors to be an evenhanded academic exercise, and should not be construed to represent Justice Wecht's position in any current or future cases.

electoral competition and decentralized political control. Next, we respond to those arguments and consider the contrary position, which asserts that, even though the Court has never ruled as such, IP is a legitimate tool for the organization of democracy and offends no constitutional command.

A. The Case Against Incumbent Protection

In his seminal work, *Democracy and Distrust: A Theory of Judicial Review*, constitutional scholar John Hart Ely argued that courts should intervene in election disputes only when the political market "is systematically malfunctioning."[74] Such malfunction could be identified, Ely wrote,

> when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in . . . and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[75]

Opponents of IP might classify its prevalence in redistricting as one such systemic malfunction. At bottom, to weigh the interests of individual politicians, or to think of certain seats as "belonging" to one of the two major political parties or to any incumbent legislator, appears tantamount to anti-competitive behavior. In Ely's parlance, it keeps the "ins" in and the "outs" out. At least in the abstract, the disinterested observer might hypothesize that a redistricting regime which focuses upon IP inevitably will skew the mapmaking, in derogation of generally accepted neutral factors such as compactness and contiguity of districts.

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[74] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (Harvard U. Press, 4th ed. 1982).

[75] *Id.*

If one takes the Supreme Court at its word—that the goal of legislative apportionment is to achieve "[the] effective representation of all citizens,"[76] and produce "politically fair"[77] results—then it would seem that IP constitutes the sort of monopolistic scheme that would frustrate those ends. For one thing, not all voters belong to the Democratic and Republican parties. In fact, the share of Americans who identify as Independents has seen a marked rise in the past decade, such that four in ten now express a wish to identify with neither party.[78] That figure is higher now than it has been at any time throughout the 1980s, 1990s, and 2000s.[79] Meanwhile, third-party candidates played an outsized, pivotal role in the 2016 presidential election,[80] and nearly two in three voters say that the "parties do such a poor job representing the American people that a third party is needed."[81] The question of whether these trends might translate into electoral results lies well beyond the scope of this Article. But the fact that some non-negligible quantum of voters exists outside of the two-party binary must remind us that *bipartisan* results are not the same as *nonpartisan* results.

The Supreme Court has been loath to recognize that important distinction. Decades before the Court deemed partisan gerrymandering claims to present a political question outside the jurisdiction of Article III courts,[82] for instance, it decided *Davis v. Bandemer*.[83] There, four Justices explained that deliberately

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[76] Reynolds v. Sims, 377 U.S. 533, 565-66 (1964).

[77] Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

[78] Jeffrey M. Jones, *Americans Continue to Embrace Political Independence*, GALLUP (Jan. 7, 2019), https://news.gallup.com/poll/245801/americans-continue-embrace-political-independence.aspx.

[79] *Id.*

[80] Alexandra Jaffe, *By the Numbers: Third-Party Candidates Had an Outsize Impact on the Election*, NBC NEWS (Nov. 8, 2016), https://www.nbcnews.com/storyline/2016-election-day/third-party-candidates-having-outsize-impact-election-n680921.

[81] Jeffrey M. Jones, *Support for Third U.S. Political Party at High Point*, GALLUP (Feb. 15, 2021), https://news.gallup.com/poll/329639/support-third-political-party-high-point.aspx.

[82] Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019). State courts and state constitutions may still afford some remedy. *See id.*

[83] Davis v. Bandemer, 478 U.S. 109 (1986).

drawing district lines to benefit some discrete class does not usually constitute the sort of consistent degradation of a population's influence upon the political process that would violate the Equal Protection Clause.[84] The *Bandemer* plurality set forth two reasons for this hesitation.[85] First, it credited the "adequate representation" theory, that "an individual or a group of individuals [that] votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district."[86] On this view, once a candidate takes office, both Democrats and Republicans become that successful candidate's constituents and will have equal access to him or her. Second, the "virtual representation" theory proceeds from the notion that fairness should be measured by statewide political influence, rather than influence in a single district.[87] On this view, Democratic voters in a Republican-leaning district with a Republican representative will have their preferred positions represented by Democratic representatives elected from other districts elsewhere in the state, and vice versa.

Although the scholarly literature probing these points is surprisingly sparse, at least one author has observed that neither of the *Bandemer* theories offers much comfort when applied to independents and third-party voters.[88] While it might not be "fanciful in the extreme" to expect that constituents who do not belong to either major party "will still have as meaningful an opportunity to influence the winning candidate's views as other voters,"[89] it would be naïve to assume that sitting legislators will respond the same way to politically isolated individual constituents

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[84] *Id.* at 132 (plurality).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *See* Walter M. Frank, *Help Wanted: The Constitutional Case Against Gerrymandering to Protect Congressional. Incumbents*, 32 OHIO N. U. L. REV. 227, 245 (2006).

[89] *Id.*

as they will to familiar, coordinated interest groups.[90] Accordingly, the adequate representation theory provides little recourse to voters who exist outside the Democratic and Republican parties. Meanwhile, the virtual representation theory rings hollow because it essentially ignores the existence of those voters altogether. The last non-incumbent independent to be elected to the U.S. House was Bernie Sanders of Vermont in 1991;[91] the last third-party candidate to win that office was Franklin D. Roosevelt, Jr. of New York in 1949.[92] Even if those individual legislators could have served as conduits for all political sentiments that fell outside the two major parties—which is unlikely, considering that independents and third-party voters by definition hold disparate views that fall outside of the mainstream—they were and continue to be the exception, as opposed to the rule, by quite a large margin.

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[90] *See* Dylan Matthews, *Studies: Democratic Politicians Represent Middle-Class Voters. GOP Politicians Don't.*, VOX (Apr. 2, 2018), https://www.vox.com/policy-and-politics/2018/4/2/16226202/oligarchy-political-science-politician-congress-respond-citizens-public-opinion ("We have a government by interest groups in which voters-qua-voters aren't really listened to at all.") (citing Matt Grossman et al., *Political Parties, Interest Groups, and Unequal Class Influence in American Policy*, 83 J. POL. 1706-20 (2021) ("Longstanding political science suggests that the path of information from governing elites to the public is stronger than the reverse.")).

[91] *See generally Senator Bernard Sanders*, LIBR. OF CONG., https://www.congress.gov/member/bernard-sanders/S000033 (last visited Sept. 26, 2022); *Representative Paul Mitchell*, LIBR. OF CONG., https://www.congress.gov/member/paul-mitchell/M001201 (last visited Sept. 26, 2022); *Representative Justin Amash*, LIBR. OF CONG., https://www.congress.gov/member/justin-amash/A000367 (last visited Sept. 26, 2022); *Rep. Virgil Goode*, GOVTRACK, https://www.govtrack.us/congress/members/virgil_goode/400153 (last visited Sept. 26, 2022) (Two politicians—Paul Mitchell and Justin Amash, both of Michigan—became independents during their tenure, but then never faced re-election. Virgil Goode was an incumbent Democrat who ran for re-election once as an independent in 2000, before joining the GOP in 2002).

[92] Warren Moscow, *Tammany Still Seeking Jobs for the Faithful; In Fight Against FDR Jr., the Hall Hopes to Prove All is Not Lost*, N.Y. Times (Apr. 17, 1949), https://www.nytimes.com/1949/04/17/archives/tammany-still-seeking-jobs-for-the-faithful-in-fight-against-fdr-jr.html. Roosevelt ran in a special election to replace Sol Bloom, who had represented New York's 20th congressional district. Rejected by the Tammany Hall Democrats, Roosevelt ran as a member of the Liberal Party. He was subsequently re-elected as a Democrat.

It seems obvious that, when the Democratic Party protects its incumbents and the Republican Party protects its incumbents, both groups entrench themselves in power. On this view, the anticompetitive installation of binary political choice runs counter to what motivated the Framers in creating the U.S. House of Representatives in the first place. In Federalist 52, Publius[93] forecasted that Congress' lower chamber would "have an immediate dependence on, and an intimate sympathy with, the people."[94] In Federalist 39, Madison defined a republic as:

> a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. *It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it*; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.[95]

One North Carolina delegate to the Constitutional Convention feared that "if a majority of the legislature should happen to be 'composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own

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[93] Scholars debate whether James Madison or Alexander Hamilton authored Federalist 52. *See* Paul L. Ford & Edward G. Bourne, *The Authorship of the Federalist*, 2 AM. HIST. REV. 675 (1897).

[94] THE FEDERALIST NO. 52, at 360 (Alexander Hamilton or James Madison).

[95] THE FEDERALIST NO. 39, at 257 (James Madison) (emphasis added).

body.' "[96] What functional difference could proponents of IP's constitutionality draw between Congress limiting House membership to those who have legal training and state legislatures using redistricting to ensure that only Democrats and Republicans win elections? In both cases, discrete classes construct or artificially alter the composition of that body in a way that impairs its ability to reflect the popular will. In both cases, certain classes are deprived of their opportunity to contribute to national discourse.

To be sure, the consideration of IP must offend something more than the general spirit of competitive democracy or vague articulations of the House of Representatives' function. Some particular provision of the Constitution must be in play. Plaintiffs in gerrymandering cases have almost uniformly invoked the Equal Protection Clause of the Fourteenth Amendment. There can be no doubt that this provision has some relevance here. But a claim challenging IP might resonate in a different constitutional arena, as well[97]—the First Amendment's Freedom of Association Clause.

In *Gill v. Whitford*, twelve voters challenged Wisconsin's 2011 legislative maps.[98] A Republican majority had drawn district lines such that it gained 60 percent of the seats in the 2012 election, notwithstanding the fact that GOP candidates had received less than 50 percent of the statewide vote.[99] The Supreme Court unanimously held that the plaintiffs lacked standing based upon the particular claims they advanced, and the Court remanded the case for consideration of evidence that might establish that standing.[100]

Chief Justice John Roberts' majority opinion and Justice Elena Kagan's concurrence articulated two distinct approaches for

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[96] Powell v. McCormack, 395 U.S. 486, 535 (1969) (quoting 2 Records of the Federal Convention of 1787, at 250 (M. Farrand rev. ed. 1911)).

[97] *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644-45 (1998) (arguing that "courts avoid confronting fundamental questions about the essential political structures of governance and instead apply sterile balancing tests weighing individual rights of political participation against countervailing state interests in orderly and stable processes."); *id.* ("the focus on rights poorly explains the nature of vote dilution claims, in which individuals can only show harm as part of an aggregate entity").

[98] Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018).

[99] *Id*

[100] *Id.* at 1933-34.

analyzing partisan gerrymandering claims.[101] These approaches are of particular relevance in a post-*Rucho* world.[102] In the only section of the Court's opinion which did not garner all nine votes, Chief Justice Roberts described the right to vote as "individual and personal in nature,"[103] and concluded that remedies must be "tailored to redress [a] plaintiff's particular injury."[104] In other words, claims would proceed on a district-by-district basis and focus upon voters who suffer particularized harms, at the expense of those who would bring an overall challenge or advance a claim of group injury. Meanwhile, Justice Kagan furthered a line of thinking first advanced by Justice Anthony Kennedy's concurrence in *Vieth*.[105] She credited the *Whitford* plaintiffs' theory that partisan gerrymanders may "inflict . . . constitutional harm" beyond mere vote dilution claims.[106] In some circumstances, biased redistricting could represent "an infringement of [plaintiffs'] First Amendment right of association."[107] As Justice Kennedy explained, when state actors purposely "[subject] a group of voters or their party to disfavored treatment by reason of their views," they burden its members' representational rights because of their "participation in the electoral process, their voting history, their association with a political party or their expression of political views."[108] Justice Kagan's concurrence in *Whitford* held the door open for such claims to be heard in future cases, opining that, "when legislatures can entrench themselves in office despite the people's will[,] the foundation of effective democratic governance dissolves."[109]

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[101] *Id.*

[102] *See* Samuel S.-H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 210 (2019).

[103] *Whitford*, 138 S. Ct. at 1930.

[104] *Id.* at 1934.

[105] Vieth v. Jubelirer, 541 U.S. 267, 314-15 (Kennedy, J., concurring).

[106] *Whitford*, 138 S. Ct. at 1934 (Kagan, J., concurring).

[107] *Id.*

[108] *Id.* (quoting *Vieth*, 514 U.S. at 314 (Kennedy, J., concurring)).

[109] *Id.* at 1940-41; *see also* Williams v. Rhodes, 393 U.S. 23, 32 (1968) ("The fact is . . . that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two

Because the Supreme Court has been "singularly unreceptive to adopting a pro-competition theory of the First Amendment that would ensure the requisite conditions for competitive elections,"[110] opponents of IP perhaps might celebrate the fact that, after *Rucho*, the views and predilections of Article III courts have no bearing upon whether these challenges will succeed. More importantly, though, they might find that the associational injury theory, advanced by Justices Kennedy and Kagan, dovetails well with their arguments. Unlike any of the other interests at play in redistricting—*e.g.*, compactness, contiguity, maintaining communities of interest, avoiding splits—IP explicitly binds the voter not only to an individual legislator, but also to that individual legislator's baldly partisan and political self-interests. The state forfeits its purported goal of accurate representation[111] and instead creates fiefdoms, endorsing manufactured coalitions that support the parties' ends. It sorts citizens based upon their ability to contribute to or hinder those ends, preserving and perpetuating a bipartisan monopoly. Voters, then, no longer exist under the banner of a particular region or community, but under the banner of the individual who currently represents that particular region or community. They do not belong to "District 1," but to "Congressman Jones' district."

Independents and third-party voters bear the brunt of this injury. When Democrats protect their incumbents and Republicans protect theirs, they essentially monopolize political markets so that anyone who exists outside of those two major parties is compelled to funnel

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parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.").

[110] Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1230 (2018).

[111] *Cf.* White v. Weiser, 412 U.S. 783, 799 (1973) (Marshall, J., concurring) ("the judicial remedial process . . . should be a fastidiously neutral and objective one, free of all political considerations and guided only by the controlling constitutional principle of strict accuracy in representative apportionment").

their discourse and dissent into that binary system.[112] Anti-partisans and would-be partisan competitors are drafted against their will into a tug-of-war that they would prefer not to join in the first place. Supreme Court precedent leaves open the possibility that IP measures abrogate constitutional guarantees against such compulsion. As one state court opined in the 1960s, prior to *Burns* and *Gaffney* and other such cases, "the Constitution does not protect incumbents, leaving the review of such action to the electorate alone."[113] Perhaps it really is that simple.

B. In Defense of Incumbent Protection

But perhaps it isn't. Indeed, before embarking upon a survey of the substantive, constitutional defenses of IP, we also must recognize scholarship which undermines the notion that there is much of a causal relationship between redistricting and incumbent retention at all. In a thorough, empirical examination of the topic, one author observed that statewide elections for governor, attorney general, and U.S. Senator—all of which are unaffected by map drawing—have seen incumbency advantages on par or in excess of those enjoyed by legislators in the U.S. House and statehouses.[114] Social scientists likely would identify the various other advantages that incumbent politicians enjoy, including name recognition and donor networks, as major confounding variables. Artful drawing of district lines can only go so far.

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[112] *Cf.* Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957) ("All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply provided the virtue of political activity by minority, dissident groups who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.").

[113] Jones v. Falcey, 222 A.2d 101, 108 (N.J. 1966); *see also* Kirby v. Illinois State Elec. Bd., 251 F. Supp. 908, 909 (N.D. Ill. 1965) ("Protection of incumbents cannot constitutionally extend further than adhering to the nucleus of existing districts, increasing or diminishing that basic area as necessary to arrive at a constitutional population figure.").

[114] Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 665 (2002).

This Section's focus, though, is the *legal* case for IP's legitimacy. Because no provision of the Constitution affirmatively blesses consideration of IP, we concern ourselves with the various ways in which recognizing an injury in this context would confuse or undermine existing, workable principles in the law.

Suppose that courts accept the theory that considering the interests of incumbents is somehow improper or offends some constitutional command. The next question becomes: What standard might judges employ in differentiating frivolous claims from meritorious ones? Perhaps even more so than in the vote dilution context, IP cases would call for jurists to make *ad hoc* assessments about whether statewide contests are sufficiently competitive. Their focus would not be upon individual deviations from recognized standards, but upon holistic claims about overall fairness or competition. In other words, IP claims (as described in the previous Section) would compel courts to leap into the "political thicket" with both feet,[115] and would force them to consider questions that traditionally are beyond judicial competence.

Moreover, there is good reason that the "politics as markets" approach has never taken root in our election jurisprudence: American courts concern themselves with equality of access, not outcome.[116] In *Burdick v. Takushi*, a disgruntled voter sued Hawaii because its laws prevented him from casting a write-in vote in both the Democratic primary and the general election.[117] The state asserted that, among other things, the policy prevented "divisive sore-loser candidacies" which failed to find sufficient support in the primary stage but which might attempt to participate in and disrupt the general election by launching write-in campaigns.[118] Writing for the Court, Justice White explained that:

> [Hawaii's] system . . . provides for easy access to the ballot until the cutoff date for the filing of nominating petitions,

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[115] *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality) ("Courts ought not to enter this political thicket."), *overruled in part by* Baker v. Carr, 369 U.S. 186, 209 (1962) ("We hold that this challenge to an apportionment presents no nonjusticiable political question.") (quotations omitted).

[116] Issacharoff, *supra* note 97.

[117] Burdick v. Takushi, 504 U.S. 428, 430 (1992).

[118] *Id.* at 439.

> two months before the primary. Consequently, any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary."[119]

Burdick had not been deprived of his opportunity to participate in an election.[120] He had participated, and his preferred candidate did not prevail; accordingly, the only interest he maintained was the expressive interest in casting a protest vote, which could not surmount Hawaii's interest in orderly elections.[121]

Similarly, hypothetical plaintiffs who bring IP actions will not have been denied the opportunity to vote out incumbents or to influence redistricting. If voters who are neither Democrats nor Republicans disagree with IP on policy grounds, they can use the normal avenues of political discourse to influence members of the two major parties and make progress towards legislative outcomes. They could lambaste sitting officials for tamping down competition or advocate for statutory prohibitions against the use of IP in redistricting. Independents and third-party voters could gain political power by organizing and electing candidates of their own—who could then, in turn, benefit from IP—rather than by pursuing victories in court.

In addition, even assuming that politics should be treated as a marketplace, IP might just be one advantage that the market tolerates. Congress and the courts have recognized the need for limitations upon the ways in which incumbents can wield their power for electoral advantage. In *Buckley v. Valeo*, the Court drew a distinction—albeit in *dicta*—between "the legitimate and necessary efforts of legislators to communicate with their constituents" and "activities designed to win elections . . . in their other role as politicians."[122] Members of Congress and their staffs are subject to the criminal provisions of the Hatch Act, which prohibit the use of "official authority for the purpose of interfering

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[119] *Id.* at 436-37.

[120] *Id.* at 437-38.

[121] *Id.* at 439.

[122] Buckley v. Valeo, 424 U.S. 1, 84 n.112 (1976); *see also* Patrick T. Roath, *The Abuse of Incumbency on Trial: Limits on Legalizing Politics*, 47 COLUM. J. L. & SOC. PROBS. 285 (2014).

with, or affecting, the nomination or the election of any candidate" for political office.[123] Federal law also prohibits the use of congressional resources for campaign purposes and forbids the solicitation or receipt of campaign funds in any federal building.[124] One might therefore argue that the law is not silent or blind when it comes to the advantages of holding political office, but is rather selective in addressing them.

As well, some degree of legislative entrenchment would cohere with Madisonian conceptions of our supermajoritarian system.[125] The canonical Father of the Constitution hailed the Senate as a necessary "check" on simple majorities, which might otherwise enact "improper acts of legislation" based upon the whims of fleeting political coalitions.[126] Perhaps IP is not much different. If the "Constitution's core objective was not to employ democracy but to promote republicanism—a system of government that channels popular consent in a manner conducive to the public good,"[127] then state legislatures' decisions to promote stability by advantaging existing, duly elected officers and political coalitions aligns with that objective. Although George Washington would no doubt shudder,[128] Justice O'Connor once opined that:

> [t]here can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued

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[123] 18 U.S.C. § 595. The civil provisions of the Hatch Act apply only to the executive branch.

[124] 31 U.S.C. § 1301(a); 18 U.S.C. § 607.

[125] *See generally* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).

[126] *Id.* at 721 (quoting THE FEDERALIST No. 62, at 379 (James Madison) (Clinton Rossiter ed., 1961)).

[127] *Id.* at 725.

[128] *See* George Washington, Farewell Address (Sept. 17, 1796), *reprinted in* SPEECHES OF THE AMERICAN PRESIDENTS 17, 21 (Janet Podell & Steven Anzovin eds., 2d ed. 2001) (discussing the "baneful effects of the spirit of party," as the "worst enemy" of democracy).

> vitality of our two-party system, which permits both stability and measured change.[129]

IP does not emerge from some edict handed down from on high. Time and again, state legislatures *choose* to countenance this objective of steady government that protects against sudden change, and those that disagree can and have acted to abrogate (or attempt to abrogate) its consideration.[130] Voters' tolerance of IP in line drawing may not arise from ignorance, but from acquiescence and agreement.

It might also be observed that too much emphasis on IP might obscure the presence of another redistricting factor. At a different level of abstraction, the so-called entrenchment of sitting politicians might be termed an organic construction of communities of interest around a leader or public servant. The now-defunct 16th congressional district in southeastern Michigan, for instance, has boasted one of the largest working-class, Polish-American populations in the country for nearly a century.[131] In 1932, a prominent member of that community—John D. Dingell, Sr.—won that seat in Congress.[132] He held it for twenty-two years until his son, John D. Dingell, Jr. succeeded him.[133] The younger Dingell continued to represent the area just south of Detroit over the next sixty years and was succeeded by his wife after his 2014 retirement,

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[129] Davis v. Bandemer, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring).

[130] *See* Voters FIRST Act for Congress, Cal. Prop. 20 (2010) ("Allowing politicians to draw these districts, to make them safe for incumbents, or to tailor the districts for the election of themselves or their friends, or to bar the districts to the election of their adversaries, is a serious abuse that harms voters."); CAL. CONST. art. XXI § 2(e) ("The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.").

[131] Keith Schneider & Katharine Seelye, *John Dingell Jr., a Power in Congress With the Longest Tenure, Dies at 92*, N.Y. TIMES (Feb. 9, 2019), link.gale.com/apps/doc/A573203973/BIC?u=wideneru_main&sid=ebsco&xid=88fd47ea.

[132] *Id.*

[133] *Id.*

four years before his death.[134] All in all, a Dingell has continuously represented the interests of southeastern Michigan for nearly a century.[135] How could a court dissect political history and say with any degree of certainty or objectivity that what motivated map drawers was improper or overly partisan, as opposed to natural and ordinary? This dynastic example may represent an outlier, but it bears mentioning that to weigh IP is to engage thorny questions about the role representatives play in their districts and to navigate the complex development of political communities.

Finally, if IP opponents' best case runs through the First Amendment, as the prior Section suggests, those cases would push the limits of our understanding of associational freedom. Since its recognition in *NAACP v. Alabama ex rel. Patterson*,[136] the Court has identified two distinct subparts of the right: expressive association, or the right to join a group for purposes of engaging in protected communicative activities, and intimate association, or the right to pursue private relationships.[137] Theoretical IP claimants, whose legal argument would depend upon conceptualizing congressional districts as a sort of pseudo-association, fit neither description. The discrete right to join a group and operate within that group is overextended when it is applied to an entire political subdivision, the members of which ostensibly have nothing in common besides their shared affiliation with an elected government official. A congressional district is not an "association" in this context any more than a state or a country is. It is not a private subgroup within society that can exercise control over its membership, but a governmental, organizational unit of our republic to which every citizen belongs.

And so, even supposing that precedent leaves IP in jurisprudential limbo, and even supposing that a colorable theory of constitutional injury exists, such a theory may be rendered non-viable by virtue of the conflict or tension it presents with other

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[134] *Id.*

[135] *See id.*

[136] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[137] Roberts v. United States Jaycees, 468 U.S. 609 (1984); *see generally* John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010).

established rules and principles. A Supreme Court that squarely confronts IP might find these considerations too formidable to allow for change in the jurisprudential status quo.

IV. INCUMBENT PROTECTION IN PENNSYLVANIA

Having shown that the validity of IP represents an unanswered or lightly considered constitutional question at the Supreme Court, and having sketched out preliminary arguments for and against that validity, we turn to our own Commonwealth. While Pennsylvania state courts' treatment of IP has followed that of their federal counterparts to no small degree, several cases merit attention for their framing of the issues.

In 2018, when the Supreme Court of Pennsylvania struck down a 2011 congressional redistricting plan as an unconstitutional partisan gerrymander under the Pennsylvania Constitution's free and equal elections clause, it noted a non-exhaustive list of "factors [that] have historically played a role" in drawing legislative maps.[138] Writing for the majority, Justice Debra Todd acknowledged "the preservation of prior district lines, *protection of incumbents*, [and] the maintenance of the political balance which existed after the prior reapportionment."[139] These factors were to be viewed as "wholly subordinate," though, "to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts."[140] For this idea, the 2018 court cited its decision *Holt v. 2011 Reapportionment Comm'n* ("*Holt II*"),[141] in which it had approved a redistricting plan for the statehouse.

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[138] League of Women Voters v. Commonwealth, 178 A.3d 737, 817 (Pa. 2018); PA. CONST. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

[139] *League of Women Voters*, 178 A.3d at 817 (emphasis added). *See also* Mellow v. Mitchell, 607 A.2d 204, 210 (Pa. 1992) (holding that protecting incumbents "is not in and of itself an inappropriate consideration").

[140] *League of Women Voters*, 178 A.3d at 817; *see supra* Section II.C.

[141] Holt v. 2011 Legis. Reapportionment Comm'n, 67 A.3d 1211 (Pa. 2013) ("*Holt II*").

The *Holt II* court expounded upon the interplay between first-order redistricting considerations and "political factors."[142] Political parties "[n]aturally . . . seek to protect their own incumbent seats," and redistricting has always had an inevitably political dimension.[143] Nevertheless, the court was "unpersuaded" that such considerations had been "constitutionalized, that they *must* be accommodated, or . . . that their consideration can justify what would otherwise be a demonstrated violation of . . . specific constitutional constraints."[144] Political factors could "operate at will," Chief Justice Ronald Castille explained, so long as they did not "do violence" to requirements concerning "population equality, contiguity, compactness, and respect for the integrity of political subdivisions."[145] He wrote that, while the court was "not so naïve as not to recognize that the redistricting process may also entail an attempt to arrange districts in such a way that some election outcomes are essentially predetermined for voters . . . nothing in the Constitution prohibits their consideration."[146] The 2011 plan did not "impose a requirement of balancing the representation of the political parties," nor did it "protect the 'integrity' of any party's political expectations"—its focus was "history and geography, not party affiliation or expectations."[147]

The political winds, and voter preferences, may shift over time. Citizens within a political subdivision may want a realistic chance to elect someone other than their incumbent. Assume that a redistricting map is in place that one party views as unfairly balanced (politically) or as crafted to solidify or ensure the power of another party. In the next redistricting process,

> the party that considers itself aggrieved by the old map can seek to rework the map to accomplish what it views as a restoration of political balance—or even to tilt the balance

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[142] *Id.* at 1235.

[143] *Id.* at 1234 (quoting Holt v. 2011 Legis. Reapportionment Comm'n, 38 A.3d 711, 745 (Pa. 2012) ("*Holt I*")).

[144] *Id.* at 1235 (emphasis added).

[145] *Id.*

[146] *Id.*

[147] Holt v. 2011 Legis. Reapportionment Comm'n, 67 A.3d 1211, 1235-36 (Pa. 2013).

> more heavily in its favor. There is nothing in the Constitution to prevent such a politically-motivated effort[.] . . . In short, there is no "preference for incumbency" or preservation of party representation restraint in our Constitution prohibiting future reapportionment commissioners from seeking to achieve this end; and if that view secures a majority vote of that year's LRC, and it does not do violence to the Section 16 restrictions, presumably, it can become law.[148]

According to *Holt II*, it would appear, IP is a matter of public policy, and one that voters can dislodge on Election Day without resorting to the judiciary.

Years before, in *In re Nader*, the Commonwealth Court of Pennsylvania "wholeheartedly agree[d] with the principle that states may not enact laws to totally insulate the Democratic and Republican two-party system from minor party or independent candidate 'competition and influence.' "[149] Perhaps this position tracks with *Holt II*; while IP represents *some* measure of insulation for the two major parties, it cannot be deemed *total* insulation. But perhaps drawing that negative inference defeats the point.

If *Holt II* and *Nader* leave IP opponents uneasy about their prospects in Pennsylvania, though, they need look no further than *In re Olshefski* for some degree of comfort.[150] There, six candidates for municipal office in Lackawanna County delivered their statutorily-required financial disclosure statements to an incumbent city council member, who then delivered them to the appropriate office.[151] On appeal, the Commonwealth Court of Pennsylvania considered whether the statements had been timely filed with "the local governing authority," as required by the Ethics Act.[152] In finding that the statements had not been timely filed, and that the six

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[148] *Id.* at 1236.

[149] *In re* Nomination Paper of Nader, 856 A.2d 908, 912 (Pa. Commw. Ct. 2004) (citing Anderson v. Celebrezze, 460 U.S. 780 (1983)).

[150] *In re* Nominating Petition of Olshefski, 692 A.2d 1168 (Pa. Commw. Ct. 1997).

[151] *Id.* at 1170.

[152] *Id.*; 65 P.S. § 404(b)(2) (repealed 1998).

candidates could not appear on the ballot, the court reasoned as follows:

> [I]f we allowed filing of ethics statements by incumbents running for office to be with themselves, the incumbent office holders immediately are given a substantial advantage over non-incumbent office holders because, while the opponent attempting to unseat an incumbent would for all practical purposes only have an option of filing in the public office of a local political subdivision, the incumbent would have the option of filing with themselves and/or with the local office of the political subdivision. This distinction and this advantage given to an incumbent vis-a-vis a non-incumbent challenger would, this Court believes, be constitutionally suspect since it does not afford the non-incumbent challenger the same protections that an incumbent would be afforded.[153]

Though *Olshefski* does not concern a task as complex as redrawing legislative districts, and though it deals with a statute rather than a constitution, it is worth noting for an incongruity. If simple matters of convenience—like bringing a financial statement to an acquaintance who will submit it on a candidate's behalf as opposed to manually delivering it to a government office—register as "constitutionally suspect" advantages, how is it that drawing districts in light of blatantly political interests does not? To recognize one and not the other appears incongruous.

This Article takes no position as to the status or viability of IP in Pennsylvania. Rather, it endeavors simply to survey some of the precedential ground upon which both sides of the debate might tread, in the event that litigants seek to develop and present relevant theories in some hypothetical future.

V. CONCLUSION

Serious constitutional questions rarely are met with simple answers. IP presents a particularly thorny constitutional question.

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[153] *Olshefski*, 692 A.2d at 1174.

It implicates equal protection and associational rights, concerns about justiciability, political questions, and valid state interests. It raises fundamental structural questions about how easy it is—or how easy it should be—to bring about change through elections. By failing to wrestle with IP in any meaningful sense on the numerous occasions in which it had the chance to do so, the United States Supreme Court has left this analysis woefully incomplete. In overreading the Court's sparse comments on the subject to deem the practice legitimate *per se*, state courts and lower federal courts have furthered the illusion that this is settled law.

Scholars, attorneys, judges, and politicians will no doubt debate which of the foregoing arguments carries the most heft. All should agree, though, that republican democracy and the rule of law are best served when courts meet difficult constitutional questions with sober scrutiny and careful, clear, comprehensive analysis, as opposed to unwary assumption or incomplete review.