

GERRYMANDERING AND POLITICAL CARTELS

Samuel Issacharoff

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Samuel Issacharoff*

As redistricting reaches its decennial peak, and as courts anticipate the next round of redistricting litigation, it is worthwhile to revisit some of the fundamental tenets of the law governing gerrymandering. This Article explores three interrelated issues. First, the Article inquires as to the different treatment given to two analogous scenarios: although there has been an apparent collapse of any effort to control geographic carve-ups of territory between competing political parties, condemnation would inevitably ensue if market rivals were to attempt analogously to divide their respective zones of influence so as to preserve market share. The second part of the Article shows that this differential treatment results from the Supreme Court's having fastened on limited doctrines of individual rights and nondiscrimination in the political arena, while allowing notions of consumer welfare and the preservation of competition to govern product markets. The Article then concludes with a proposal to remove the power to redistrict from insider political operatives to promote a more competitive political process. This approach would render suspect all purposeful districting, thereby taking the pressure off of the vulnerable category of race. The aim is both to restore competition to the political process and to show a possible way out of the post-Shaw v. Reno morass.

I. INTRODUCTION: THE SEARCH FOR A CONSTITUTIONAL THEORY OF THE POLITICAL PROCESS

Nearly forty years ago, the U.S. Supreme Court ushered in the rights era in the law governing the political process. Beginning with its intuition that redistricting may impermissibly alter the outcomes of elections, the Court created a regime of justiciable rights that redrew the contours of politics, from eligibility for the franchise, to the effect of electoral schemes on minority electoral prospects, to the funding of candidates and the political process. Although few countries are comfortable with an American level of judicial intervention in the political arena, there is little question that a rights regime is asserting itself across much of Europe, and that even countries resistant to judicial

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review, such as Britain,¹ are finding the traditional divide between law and politics considerably more porous than they once did.

The passage of time, and the extensive case law that has developed, permits a revisitation of the core principles animating American jurisprudence on the political process. This is a more difficult undertaking than may appear, for American courts are more secure in their oversight of the political arena than in identifying the underlying principles that govern their intervention. The lack of a secure footing can be traced back to the Court's initial concern, as set out in the reapportionment cases of the 1960s, that districting (or the refusal to redistrict) may be an invitation to mischief.² While the Court's willingness to enter the "political thicket"³ was of tremendous jurisprudential significance, the underlying insight was hardly a great conceptual breakthrough. There is a core understanding in American politics, going back to the evocative imagery of the gerrymander, that geographically districted elections are subject to ends-oriented manipulation. Even when the distribution of votes remains constant, the actual partitioning of voters along district lines can determine the outcomes of elections and thereby tempt those who control the redistricting process to manipulate the lines for their own ends. Indeed, the history of the practice of ends-oriented manipulation of district lines traces back to the founding strokes of the American republic and the attempt to rig electoral boundaries in Virginia so as to keep James Madison out of the state legislature.⁴

Further, the Court's intuition of the harm in the malapportionment cases also comports with a well-trodden insight in political theory. Such luminous figures as the Marquis de Condorcet and Kenneth Arrow have explained that all election mechanisms are vulnerable to manipulation by a variety of means, including what is termed "agenda setting" — the attempt by those who structure the rules concerning presentation of questions to voters to create pathways that favor one or another outcome.⁵ For political theorists, a focus on districting is only a subset of a concern over the ability of insiders to gain unfair advantage over the disorganized mass of the electorate who must, of

¹ See, e.g., *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175, 191 (1998) (striking down a £5 independent expenditure limitation in electoral campaigns as infringing rights of expression).

² See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

³ This is Justice Frankfurter's evocative caution against engaging in constitutional oversight of the political process. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.) ("Courts ought not to enter this political thicket.").

⁴ See Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *MINORITY VOTE DILUTION* 85, 85 (Chandler Davidson ed., 1984).

⁵ See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 159–80 (1963) (discussing Condorcet's theory of elections).

necessity, await the manner in which issues are presented to them on election day before trying to exercise their will.⁶

In the early cases of the reapportionment revolution, the Court turned its attention primarily to numerical disparities among the districts.⁷ Not only did such disparities violate rudimentary conceptions of equality, they also prevented the citizenry from enjoying a somewhat abstract right to "full and effective participation" in the electoral process.⁸ Lurking in these cases was a deeper concern that the manipulation of the districting agenda could cause systemic harms to the political process.⁹ The difficulty, as I show in this Article, is in the development of a benchmark against which to measure the distortive effects of improper manipulation of the political process. To the extent that the problem in the early malapportionment cases could be limited to numerical disparities among districts, the one-person, one-vote principle provided a preliminary fix. However, as a conceptual matter and as a solution to the problems that would later confront the Court, the simple rule of equipopulational apportionment was at best a stand-in for a difficult constitutional confrontation with the world of politics.

Over the past decade, the focus of constitutional attention in the redistricting arena has been on the imprecise boundaries the courts have drawn against the use of racial considerations in apportioning representation. Following the pathbreaking opinion in *Shaw v. Reno* (*Shaw I*),¹⁰ the battle lines in the courts and in the scholarship have been drawn over the application of familiar equal protection categories in the struggles over race and representation. Often overlooked in the

⁶ Hence Robert Dixon's well-known aphorism that "[a]ll [d]istricting [i]s '[g]errymandering.'" ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968); see also Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998) ("If '[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals,' then redistricting stabs at the heart of the Fourteenth Amendment every time." (footnote omitted)).

⁷ For a review of the case law developing the one-person, one-vote rule of apportionment, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 141-216 (2d ed. 2001).

⁸ *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

⁹ Justice Clark made this problem clear in his concurring opinion in *Baker v. Carr*, 369 U.S. 186, 258-59 (1962) (Clark, J., concurring), in which he noted that the Tennessee electorate had "no practical opportunities for exerting their political weight at the polls" (internal quotation marks omitted). In a somewhat similar vein, Justice Warren warned in *Reynolds* that "[i]ndiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering." 377 U.S. at 578-79. The need for judicial intervention to disrupt non-self-correcting distortions of the political process in turn derives from Justice Stone's observation in the famous *Carolene Products* footnote that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁰ 509 U.S. 630 (1993).

profusion of scholarship following *Shaw I*, however, has been whether the battles over racial representation reveal a more systemic institutional failure in the redistricting process. Indeed, as I develop in this Article, it is possible to see in the *Shaw* line of cases a manifestation of a more deeply rooted problem in the redistricting context, one stemming from the acceptance to date of insider manipulation of the process for partisan gain. To gain traction on institutional factors that may exacerbate the already explosive issues of race in the redistricting battles, this Article examines the *Shaw* issues as a subset of the failure of constitutional law to ensure the competitive vitality of the political process. This approach contrasts most directly with the customary examination of the *Shaw* issues as simply another manifestation of the question of the level of equal protection scrutiny that should be afforded to race-conscious redistricting — a question presumably no different in the political arena than in schools, the workplace, or any other setting where public services are provided.

Examined from this perspective, the *Shaw* line of cases reveals not only ongoing doctrinal battles over the application of the antidiscrimination norm to state action deemed beneficial to racial minorities, but also something deeper about the relation between constitutional law and politics. To date, the Court has not developed any theoretical foundation deeper than its early insight that redistricting may be subject to systematic manipulation. Instead, the Court has articulated only a rudimentary concern that the susceptibility of redistricting to ends-oriented manipulation might result in impermissible discrimination or some other form of unfair partisan advantage. This limitation emerges most clearly not in the area of racial representation, but in the less normatively explosive context of partisan gerrymandering. Just as one may best observe a solar eclipse by focusing away from its brightest point, so too it may be that insights into the failings of current jurisprudence may be gained by diverting attention from the searing question of race. Accordingly, the opening sections of this Article avoid the problem of racial motivations in districting and turn instead to the core difficulty in the lack of clear purpose behind the current approach to judicial oversight of politics.

The place to start, therefore, is the breakthrough case of *Davis v. Bandemer*,¹¹ in which the Court first recognized a claim of unconstitutional discrimination in the redistricting context based on partisanship rather than the familiar equal protection category of racial classifications. In *Davis*, the Court grounded its constitutional concerns in the ability of political insiders to manipulate electoral boundaries to magnify their political power and frustrate the legitimate aspirations of

¹¹ 478 U.S. 109 (1986).

their political rival, defined for all practical purposes as one or another of the two major parties. The conceptual underpinning of the Court's analysis in *Davis* is undeveloped but appears to rest on an unelaborated intuition of unfairness to the political party not enjoying the bounties of incumbent power. *Davis* introduces the actionable claim of political vote dilution, an uncomfortable analogue of the concept of minority vote dilution, which in turn is an extension of antidiscrimination law.¹² But the analogy breaks down across many dimensions, and the unfortunate result is a new equal protection doctrine with an impossibly high burden of proof for actually making out a claim.¹³ As described below, the end result is a legal standard of potentially sweeping breadth but of virtually no meaningful application.

The conceptual weakness in how the Court has treated the potential for mischievous manipulation of redistricting is evident in a less criticized earlier case, *Gaffney v. Cummings*.¹⁴ There, the Court found unobjectionable a political compromise between the Democrats and Republicans of Connecticut to partition the state so as to lock in the political status quo ante. The Court reasoned that there could be no partisan harm, regardless of the geographic contortions of the district lines, when the two parties had negotiated a redistricting plan without either of them seeking to exploit the other for legislative gain.¹⁵ The Connecticut experiment in a negotiated division of power, which political scientist Bruce Cain terms a "bipartisan gerrymander,"¹⁶ does not present the problem of discrimination against one of the parties and thereby avoids the equal protection framework the Court has employed thus far. Put another way, if a legislative plan were to provide the two major political parties with reasonable prospects of achieving what they believed to be their appropriate shares of representation, what could be objectionable in such a coalition effort? From the vantage point of equal protection law, neither party should be considered a victim of discrimination under such a sharing of electoral opportunity.

The label "bipartisan gerrymander" suggests that there may be grounds for concern but does not elucidate the exact source of that concern. The invocation of the gerrymandering label may express an aesthetic objection to the contours of the districting lines, or it may hint at the stench of backroom politics improperly shielded from pub-

¹² See *id.* at 125.

¹³ See *id.* at 126 (stating that a claim of partisan gerrymandering will require "a showing of discriminatory intent," but requiring proof of consistent degradation to demonstrate actual impact).

¹⁴ 412 U.S. 735 (1973).

¹⁵ *Id.* at 752 ("We are quite unconvinced that the reapportionment plan . . . violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts.").

¹⁶ BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 159-66 (1984).

lic scrutiny, but it does not capture any substantive conception of what is wrong with the outcome when the two incumbent parties carve up the state into mutually acceptable bailiwicks.

A simple analogy might cast the putative benefits of a partisan nonaggression pact in a different light. Imagine that instead of two political parties agreeing to territorially defined zones of influence, we found that two dominant rival firms producing interchangeable products — as with Coke and Pepsi, to take but the most obvious example — had made such an agreement. To pose the question is virtually to answer it since such a pact would be a first-order violation of the antitrust laws. Such a market division agreement with the understood result of no real competition would constitute a *per se* violation of the Sherman Act.¹⁷ Moreover, the well-developed antitrust case law and commentary would have no trouble identifying the nature of the harm that such an arrangement would cause. The standard legal and economic analysis posits that consumer welfare would be adversely affected by the absence of competition between the dominant market players. Cartelization would produce monopoly rents in the market, and consumers would end up with fewer choices at higher prices.¹⁸ A more complete story would add concerns about long-term stagnation, incentives for product development, and so forth. Nonetheless, the story would boil down to the harms caused by the loss of competitive product markets.

As redistricting returns to its decennial full bloom, it is worth pondering why the two stories elicit such different legal reactions. Why is it that geographical divisions into clearly identified zones of influence trigger condemnation under the antitrust laws but approval under constitutional scrutiny? Pushed further, is there anything specific in the political arena that insulates a standstill agreement between the two dominant parties from being defined as anything less than a serious threat to consumer (defined here as voter) welfare? If politics were just a matter of product markets, there would be little to commend a market division agreement between competitors. Quite simply, the idea that competitors may agree to carve up the world is as violative of the premises of free markets as is imaginable.

At some level, the comparison to product markets may remain rhetorical. It is difficult to conjure up a “natural duopoly” in the product sphere that approaches the well-established propensity of districted election systems to yield two stable and relatively centrist parties.¹⁹ Yet the interesting question remains why the basic move to protect

¹⁷ See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607–08 (1972).

¹⁸ See 12 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 2031 (1999).

¹⁹ See sources cited *infra* note 103.

avenues of competition does not appear at all in the political arena. The first part of this Article suggests that the reason is that the Court's conceptual framework to date remains limited to the doctrinal categories of individual rights protection and antidiscrimination. Since the bilateral cartelization of political markets neither tramples individual rights to participate in the political process nor disadvantages one political party relative to another, the practice stays safely off the constitutional radar screen.

Viewed differently, however, this form of political market manipulation threatens a core tenet of democratic legitimacy: accountability to shifting voter preferences. The basic move here is to argue that the risk in gerrymandering is not so much that of discrimination or lack of a formal ability to participate individually, but that of constriction of the competitive processes by which voters can express choice.²⁰ Here an analogy to the evidentiary factors used in antitrust law suggests that market division agreements should be inherently suspect, if not per se prohibited. This, however, is only the first step. I want to push the argument further by suggesting that *Davis* and *Gaffney* got it exactly backwards: there should be greater constitutional concern and, correspondingly, greater warrant for judicial intervention when political parties have joined together to squeeze the competitive juices out of the process. In the case of an inequitable gerrymander, dissatisfied voters are forced to seek recourse in a distorted political process. The expression of their political will may be hampered, but they will at least have an ally and a willing institutional voice through the minority political party. No such mechanism is easily available in the context of the bipartisan gerrymander. In such cases, the only relevant market actors are fully complicit in the cartelized political market.

This analysis suggests several additional moves. First, the harm in gerrymandering is not really the discrimination that the Court identifies in *Davis*, nor is it the lack of transparency that the term "bipartisan gerrymander" suggests. Rather, the harm is the insult to the competitiveness of the process resulting from the ability of insiders to lessen competitive pressures. This consideration then points to the second and more contentious claim: the harm to be avoided may not be limited to *wrongful districting* but rather must encompass *purposeful districting*, much as the antitrust laws reach not only the actual

²⁰ For earlier versions of the argument about the need to preserve the competitive vitality of the political process, see Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL'Y 91 (2000); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001) [hereinafter Issacharoff, *Private Parties*]; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 702 (1998); and Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999).

cartelization of markets but also conspiracies that set out to frustrate competition.²¹

The final piece of the argument rests on the observation that the gerrymandering case law has failed to police effectively the risk of gerrymandering. After several rounds of post-*Baker/Reynolds* redistricting, and despite sensitivity to the risk of insider self-dealing in the process, courts have been unable to apply a legal standard that turns on difficult assessments of "political fairness." From this come several conclusions. First, I argue that the Court's decade-long struggle with the *Shaw* line of cases ended up addressing the wrong problem. To the extent that political insiders should be given latitude to engage in any ends-oriented redistricting, it should be only to promote political access for those on the outs politically, not to reward incumbent powers. Thus, the holding in *Easley v. Cromartie*²² that the latest incarnation of Mel Watt's congressional district survives challenge as a system of partisan reward was ill-conceived. But the point here is not to substitute an alternative test for racial or partisan gerrymandering, but to suggest a way to jettison the elusive search for improper motives altogether.

After several decades of trying to police the redistricting process with a series of unpredictable and combustible doctrines, it may well be time to call a halt to this failed experiment. Instead of monitoring redistricting ex post to tease out the necessarily complex and conflicting motivations of sophisticated partisan actors, the Court has available to it an alternative path. This Article ends with a proposal to establish a prophylactic per se rule that redistricting conducted by incumbent powers is constitutionally intolerable.²³

II. GERRYMANDERING AS A HARM

A useful starting point in examining the relation between constitutional law and politics is the question of political gerrymandering as

²¹ See 6 PHILLIP E. AREEDA, ANTITRUST LAW § 1400a, at 3-4 (1986) (explaining the Sherman Act statutory requirements regarding conspiracy).

²² 121 S. Ct. 1452 (2001), decided sub nom. *Hunt v. Cromartie*.

²³ See Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1606 (2000) (suggesting that "the limitations on race-conscious districting set forth in *Shaw* and its progeny . . . are a 'prophylactic' measure that overprotects individual constitutional rights in some cases in order to ensure adequate protection of those rights across a range of cases"); cf. Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 73-75 (considering the "prophylactic approach" to interpreting the Supreme Court's holdings in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Dickerson v. United States*, 530 U.S. 428 (2000)); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 21 (1975) ("A prophylactic rule might be constitutionally compelled when it is necessary to overprotect a constitutional right because a narrow, theoretically more discriminating rule may not work in practice.").

defined through *Davis v. Bandemer*.²⁴ Of all the Supreme Court's forays into the political process after the reapportionment cases of the 1960s, the political gerrymandering cause of action enunciated in *Davis* leaves the smallest trail in the actual political life of the country. Certainly when compared to the compelled decennial redistricting occasioned by *Baker* and *Reynolds*, or the limitation on campaign finance reform after *Buckley v. Valeo*,²⁵ or the representation of minorities in the wake of the vote dilution cases and then the *Shaw* line of cases, the constitutional concern over partisan distortions enunciated in *Davis* fades into quick oblivion. Most evidently, unlike in any other area of legal oversight of the political process, the definition of the constitutional harm involved in partisan gerrymandering has remained frustratingly imprecise. While other areas of the law settled on judicially recognizable concepts, such as one person, one vote, the evidentiary standard for partisan gerrymandering never moved beyond a concern over an ill-defined "consistent degradation" of a partisan group's electoral influence.²⁶

A number of reasons have been offered for why partisan gerrymandering survived constitutional scrutiny unaffected. There are by now two fairly well-established lines of criticism of the Court's approach. The first actually predates the Supreme Court's entry into the field in *Davis*, and arises from the social science debates over how to determine whether a particular districting configuration is a gerrymander. The difficulty largely mirrored the Court's own core problem in the political arena: to measure the extent to which a claimed gerrymander distorted the will of the electorate, there had to be some baseline for calculating what would be the proper distribution of electoral outcomes in the absence of the gerrymander. Here, social scientists were replaying a variant of the social science debates over the measure of minority vote dilution, which in turn was deeply influential in the evolution of legal doctrine.²⁷ In examining the extent to which a particular voting system frustrated the ability of minorities to elect the candidates of their choice, the dominant approach compared the voting preferences of the minority community to that of the majority. Re-

²⁴ 478 U.S. 109 (1986).

²⁵ 424 U.S. 1, 143 (1976) (per curiam) (striking down limitations on candidate expenditures but affirming the constitutionality of statutory limitations on individual contributions to political candidates, as well as disclosure and reporting provisions).

²⁶ See *Davis*, 478 U.S. at 132 ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.").

²⁷ See MINORITY VOTE DILUTION (Chandler Davidson ed., paperback ed. 1989) (discussing various themes of this social science debate); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) (relying on Davidson and other social scientists for an operational definition of minority vote dilution).

lying on the tools of bivariate regression analysis, social scientists were then able to determine whether the candidates of choice of the minority were routinely defeated as a result of the bloc-voting practices of the majority.²⁸ The key to comparing the voting preferences of distinct racial groups was the use of relatively straightforward statistical tests based on regression models that allowed a comparison of the racial composition of all electoral precincts in a jurisdiction and of the extent to which they voted for a particular candidate. When there was a black-white contest, to take the clearest case, polarized voting could be demonstrated by showing that the number of votes the black candidate received could be accurately predicted by the black composition of the precinct. As regression techniques became more widespread in the social sciences and more accepted in law, social scientists turned to these same models in an attempt to operationalize the concept of partisan vote dilution. Indeed, in retrospect, it is possible to see in the social science efforts at fashioning a statistical test for partisan vote dilution an attempt to replicate some variant of the ecological regression techniques used for minority vote dilution. Unfortunately, this effort ran into significant methodological difficulties for a host of reasons, including the instability of the definition of "Democrat" and "Republican," the high level of split-ticket voting, and the inability to derive stable census-block-level data analogous to the racial composition of the voting age population.²⁹ Because American political parties have no meaningful membership criteria,³⁰ the parties' actual levels of support are best measured in an "as revealed" state in terms of electoral results. There is accordingly no independent variable, analogous to the racial composition data of a district used in the analysis of racially polarized voting practices, that would permit relatively straightforward comparisons of the political opportunities of rival parties. At best, it would be possible to measure the expected statewide distribution of support for each party by examining a non-candidate-focused statewide election, as with voting for Secretary of State. Unfortunately, such a broad-level measure of statewide support provides little

²⁸ See *Thornburg*, 478 U.S. at 48–49.

²⁹ For a review and critical discussion of the social science literature, see Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of the Political Process*, 71 TEX. L. REV. 1643 (1993).

³⁰ See Elizabeth Garrett, *Is the Party Over? The Court and the Political Process* 14 (Aug. 2, 2002) (unpublished manuscript, on file with the Harvard Law School Library) ("Political parties are unusual organizations because, although they are often referred to as membership groups, determining who their members actually are may not be possible." (citation omitted)); see also PAUL ALLEN BECK, *PARTY POLITICS IN AMERICA* 7–12 (8th ed. 1997); V.O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 163–65 (5th ed. 1964); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 778 (2000).

specific information about whether any particular district was gerrymandered.

The second criticism comes into existence with *Davis* itself. The difficulty in devising a direct empirical test for partisan vote dilution was reflected doctrinally in the requirement in *Davis* that a claim of partisan vote dilution be predicated on proof that the electoral system "will consistently degrade a voter's or a group of voters' influence on the political process as a whole."³¹ This highly peculiar burden of proof had no antecedents in the law, and the need to prove consistency of degradation seemed to require a period of observation that could consume the entirety of the decennial lifespan of any particular redistricting.³² The effect of an unclear social science metric for measuring diluted partisan voting strength and an impossibly high burden of proof was a potentially invasive body of doctrine of no particular utility.³³ This problem was compounded by the embarrassment of the judiciary's one venture into actually finding an election system unconstitutional for diluting partisan voting strength: the North Carolina judicial elections struck down in a post-1990 Republican challenge to the statewide election of local superior court judges.³⁴ In that case, the lack of a clear measure of dilution and the poorly defined basis for constitutional intervention left the courts looking as foolish amateurs in the complex game of politics. No sooner had the Fourth Circuit deemed the electoral prospects of North Carolina Republicans sufficiently degraded as to offend the Constitution than did the partisan edge in the state tilt slightly, but significantly. While the remand lay pending, the Republicans not only overcame their doctrinally required degraded state, but also swept state elections in 1994, including the judicial elections.³⁵

These two forms of criticism resonate loudly as we begin the process of judicial review of the second round of post-*Davis* redistricting. Clearly, the intervening case law has not provided any further clarifying signposts. The leading cases attempting to apply *Davis* have either proven embarrassing to the judiciary, as in North Carolina, or have

³¹ 478 U.S. at 132.

³² This point is also further developed in Issacharoff, *supra* note 29, at 1670-88.

³³ For a review of the case law under *Davis*, see ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 882-89.

³⁴ *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992).

³⁵ See Betty Mitchell, *Democrats Failed to Get Out the Vote, Blue Said; But Republicans Mobilized Their Supporters and Attracted New Voters, the Speaker Says*, VIRGINIAN-PILOT, Nov. 13, 1994, at B1 ("In Tuesday's election, the Republicans added 36 seats to their numbers in the North Carolina House, winning 57 of 120 seats and taking control of the chamber for the first time this century."); Edward Walsh, *North Carolina Reflects Voting Shift in South: GOP Takeover Nov. 8 Both Wide and Deep*, WASH. POST, Nov. 26, 1994, at A1 (reporting on the Republican sweep of the 1994 elections).

shown that even the most systematic of gerrymanders can evade the lofty evidentiary standards of *Davis*, as with the abortive challenge to the 1980s Democratic gerrymander of the California congressional delegation.³⁶ In this regard, as I have argued before,³⁷ *Davis* is striking for its failure to produce an operational standard, much as would have been the case had *Baker v. Carr*³⁸ not been followed immediately by *Reynolds v. Sims*.³⁹ Indeed, *Davis* might well be thought of as *Baker* without the one-person, one-vote rule.

The operational criticisms of *Davis* are nonetheless incomplete. Looking beyond the difficulties in applying the *Davis* test reveals great uncertainty about what the exact harm from a gerrymander is. If we look to the Court's understanding of the harm that an improper manipulation of the electoral system might occasion, we find that there are three alternative claims.

A. Democratic Accountability

In the first instance, there is the classic rendition of an improper electoral system as hampering the necessary accountability of representative government to the electorate.⁴⁰ Here the animating principle, per the Supreme Court, is the belief that elections in a democratic order should permit the selection of "the free and uncorrupted choice of those who have the right to take part in that choice."⁴¹ On this view, democratic accountability turns on a principle of "popular choice of representatives,"⁴² which the Court has subsequently termed "the foundation of our representative society."⁴³ Ultimately, the popular choice can be deemed to have not been realized when electoral outcomes represent, in the formulation of *Davis*, a "frustration of the will of a majority of the voters."⁴⁴

When we examine this unsteady line of cases retrospectively, the Court appears to be attempting to identify a core value that is at stake in proper electoral practices. These cases ground the legitimacy of the

³⁶ See *Badham v. Eu*, 694 F. Supp. 664, 665–66 (N.D. Cal. 1988) (three-judge court) (dismissing the plaintiffs' challenge to the redistricting on the grounds that the plaintiffs failed to state a claim), *aff'd*, 488 U.S. 1024 (1989).

³⁷ See Issacharoff, *supra* note 29, at 1670 (considering the "failure of [*Davis*] to provide . . . a standard for the effective control of partisan gerrymandering").

³⁸ 369 U.S. 186 (1962).

³⁹ 377 U.S. 533 (1964).

⁴⁰ See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998) (arguing for the centrality of accountability in theories of democratic legitimacy and attempting to ground the need for judicial review in guaranteeing the accountability of governing bodies).

⁴¹ *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884).

⁴² *United States v. Classic*, 313 U.S. 299, 319 (1941).

⁴³ *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969).

⁴⁴ *Davis v. Bandemer*, 478 U.S. 109, 133 (1986).

exercise of governmental power in the fairness and propriety of the electoral process itself. The key to this approach is to tie the proper operation of elections to the expression of majority will and the ensuing legitimacy of government. Unfortunately, each of these cases also rests on formulations that are conspicuously vague about both the nature of the harm from improper electoral practices and the actual transmission mechanism between the electoral process and the representative legitimacy of government. The cases that best develop this intuition involve electoral arrangements that manifestly allowed a minority of the electorate to control a majority of the legislature. The intuition, however, goes to something deeper about democratic politics, something that transcends the simple case of a numerical minority capturing a majority of legislative representation. The inability of a majority to prevail electorally does not simply compromise the integrity of any particular election result. It also skews the incentive structures operating to ensure the accountability of elected representatives to shifts in the preferences of the electorate. Although this intuition about the proper functioning of the political process is evident right from the earliest cases in this area,⁴⁵ it is an intuition that is more invoked in passing than grounded in actual doctrinal holdings. Nonetheless, it remains the core insight about the role of constitutional scrutiny of the political process. I return to this core concept in the next section to provide a firmer grounding for the idea of preserving the competitive vitality of the electoral process.

B. Individual Rights

A second approach is to root the harm from gerrymandering in a conception of the individual right to participate. The intellectual foundation of this approach harkens back to Justice Holmes's unfortunate, century-old opinion in *Giles v. Harris*.⁴⁶ In a case involving the categorical denial of registration to all black voters in Alabama, Justice Holmes limited the power of judicial intervention to a narrow conception of individual make-whole relief, writing that "[a]part from the damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."⁴⁷ For Justice Holmes, courts were necessarily limited to hearing claims that individual rights were being frustrated. Consequently, the claim in *Giles* that structural relief was

⁴⁵ See, e.g., *Yarborough*, 110 U.S. at 662.

⁴⁶ 189 U.S. 475 (1903). For the historical background of the first systematic attempt to challenge racial exclusion from the ballot, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000).

⁴⁷ *Giles*, 189 U.S. at 488.

needed to provide a disenfranchised minority access to the political process was beyond the competence of the judiciary.

Justice Holmes then filled in the capacity of courts to provide individual relief in the earliest of the *White Primary Cases*,⁴⁸ in which the Court struck down, under the guise of individual suits for damages, repeated attempts to disenfranchise blacks in Texas Democratic primaries.⁴⁹ So long as black plaintiffs presented narrowly drawn individual claims that required no injunctive relief, the exclusion of black voters lay within the realm of remediable harms. Justice Frankfurter carried the limitation on judicial intervention to secure only individual rights into the modern era in *Colegrove v. Green*,⁵⁰ with his famous caution against judicial entry into the "political thicket."⁵¹ For Justice Frankfurter, reapportionment was an area that the political question doctrine immunized from judicial review because the harm suffered through the failure of Illinois to reapportion itself on a population basis was "not a private wrong, but a wrong suffered by Illinois as a polity."⁵² Whereas claims of individual wrongs could be redressed through customary doctrines of legal remedies, the equitable powers of the courts could not reach claims of systemic distortions of the political process. Even Justice Frankfurter's most venturesome opinion in the political arena — the decision in *Gomillion v. Lightfoot*⁵³ to strike down the surgical reconfiguration of Tuskegee, Alabama that had removed virtually all black voters — was carefully constructed as a deprivation of individual voting rights in contravention of the Fifteenth Amendment. In distinguishing the claim of malapportionment that the Court rejected in *Colegrove*, Justice Frankfurter found recourse in a narrow and unpersuasive reliance on "the Fifteenth Amendment to the Constitution of the United States, which forbids a State from passing any law which deprives a citizen of his vote because of his race."⁵⁴

The approach inherited from Justices Holmes and Frankfurter became enshrined in the breakthrough cases of the reapportionment revolution, *Baker v. Carr*⁵⁵ and its direct progeny. Here the Warren Court, and Justice Brennan in particular, chose to elide the constricting form of the political question doctrine by framing federal constitutional oversight of the political process in the same language of indi-

⁴⁸ See *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁴⁹ *Condon*, 286 U.S. at 89; *Herndon*, 273 U.S. at 541.

⁵⁰ 328 U.S. 549 (1946).

⁵¹ *Id.* at 556 (opinion of Frankfurter, J.).

⁵² *Id.* at 552. Justice Frankfurter expressly relied on the distinction Justice Holmes had drawn in *Giles* and the *Nixon* cases to frame the political question doctrine. See *id.*

⁵³ 364 U.S. 339 (1960).

⁵⁴ *Id.* at 345 (emphasis added).

⁵⁵ 369 U.S. 186 (1962).

vidual rights that prior case law left open.⁵⁶ By framing the obligation to reapportion on an equipopulational basis as an individual right to an equally weighted franchise, the Court could claim that it was merely giving force to a longstanding commitment to equal protection, rather than propounding a more robust claim about the proper operation of the political process.⁵⁷ This was, of course, a sensible evasion of the deeper problem given that in the early one-person, one-vote cases, the claim of debasement of each individual voter's stake actually made some sense.⁵⁸ But that narrow approach could not explain the Court's elliptical promise in these early cases to guarantee a "full and effective" right of participation,⁵⁹ nor could it explain the use of one person, one vote to address the problem of gerrymanders that had mutated so as to survive in the new one-person, one-vote era.

*Karcher v. Daggett*⁶⁰ exposed the limitation of this approach. At issue was a Democratic party gerrymander of congressional districts aptly termed "a flight of cartographic fancy" by outsiders struck by the swooping contortions of district lines.⁶¹ Although Justices Powell and Stevens were prepared to take on the partisan gerrymandering claim directly, Justice Brennan held fast to the individual rights approach inherited from *Baker*. The difficulty was that the population disparities at issue were less than the margin of error of the underlying census data, and even if there were disparities present, the average deviation from perfect equipopulational apportionment was entirely trivial.⁶² The core failing in Justice Brennan's approach came from his inability to extricate himself from the trap that Justices Holmes and Frankfurter had laid. Except perhaps at the extreme levels of the early

⁵⁶ See, e.g., *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-37 (1964) (casting the one-person, one-vote rule of apportionment as an individual right akin to the right against compelled speech upheld in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)).

⁵⁷ The precise formulation was that "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226.

⁵⁸ In *Baker*, the divergences (the ratio of the number of citizens that yield one representative in the most populated district to the number of citizens that yield one representative in the least populated district) reached twenty-three to one, while in *Reynolds* they were as high as forty-one to one. See ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 175.

⁵⁹ *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

⁶⁰ 462 U.S. 725, 744 (1983) (striking down a New Jersey partisan gerrymander on one-person, one-vote grounds, even though the disparities in district population were so negligible that they were less than the margin of error of the underlying census enumeration).

⁶¹ *Id.* at 762 (Stevens, J., concurring) (quoting Larry Light, *New Jersey Map Imaginative Gerrymander*, 40 CONG. Q. 1190, 1193 (1982)).

⁶² The details of *Karcher* and the misapplication of the one-person, one-vote rule are discussed in Issacharoff, *supra* note 29, at 1655-58. For an argument that the approach of the one-person, one-vote cases had lasting deleterious effects, see Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411 (2002).

malapportionment cases, no credible individual rights claim could be made where districts numbering in the many thousands deviated from the ideal size by less than one percent. As a result, the individual-rights-based, equal protection approach could not capture the nature of the constitutional insult. Instead, the harm is suffered at the level of core democratic values, perhaps, as Professor McConnell argues, with their constitutional embodiment in the Republican Form of Government Clause: "a government is not 'republican' if a minority faction maintains control, and the majority has no means of overturning it."⁶³ If the gravamen of the harm of gerrymandering lies in the inability of a majority of the whole body to govern, the continued attempt to restrict the voting rights inquiry to simply an individual claim must be doomed.⁶⁴ Such a group-based claim cannot be reduced to a right of individual access.⁶⁵

C. Group-Based Discrimination

The doctrinal significance of *Davis* lies in its substitution of partisan discrimination for the approach based upon claimed violations of individual rights. The use of the discrimination model to reach such claims of group harm outside the category of race originated with Justice Stevens in *Karcher*, in which he argued for a holistic approach to equal protection challenges to districting plans similar to the approach used to evaluate "attacks on other forms of discriminatory action."⁶⁶ For Justice Stevens, lack of compliance with one person, one vote was

⁶³ Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106 (2000). As McConnell elaborates:

A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government.

.... Had the litigation [in *Baker*] proceeded under the Republican Form of Government Clause, it would have been quite different. The gravamen of a Republican Form of Government challenge is not that individual voters are treated unequally, but that the districting scheme systematically prevents effective majority rule. There are many systems of representation that would satisfy the Republicanism requirement. But at a minimum, the Clause must mean that a majority of the whole body of the people ultimately governs.

Id. at 105, 114 (footnote omitted).

⁶⁴ This basic insight prompted Justice Powell to promote a more expansive defense of recognizing group-based harms in the partisan gerrymandering context: "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not." *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., dissenting in part).

⁶⁵ This is by now a fairly widespread criticism of the individual rights approach to voting claims reaching beyond simple access to the franchise. For earlier renditions of this argument see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1675-76 (2001); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 882-84 (1995).

⁶⁶ *Karcher v. Daggett*, 462 U.S. 725, 751 (1983) (Stevens, J., concurring).

an evidentiary shortcut used to answer the ultimate question whether the districting plan harbored a discriminatory intent against an identifiable group, defined as a "politically salient class, one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries."⁶⁷ As adapted by Justice White in *Davis*, a claim of unconstitutional partisan gerrymandering must be predicated on proof that there was "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."⁶⁸ In effect, the Court applied minority voting rights theory to the claims of the major political parties.

Unfortunately, the intentional discrimination model is of little use in the context of partisan gerrymandering. To begin with, as the Court acknowledged in *Davis*,⁶⁹ all districting is purposeful, such that meeting the intentionality requirement is a given. Moreover, the evidentiary hurdles of *Davis* have thus far proved insurmountable, as previously discussed. But of far greater significance is the absence of a core conception of the harm at stake in gerrymandering. Consider the key passage from *Davis* identifying the harm against which the Constitution protects:

[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.

....

... In both contexts, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. In a challenge to an individual district, this inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate. Statewide, however, the inquiry centers on the voters' direct or indirect influence on the elections of the state legislature as a whole. ... In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.⁷⁰

Even leaving aside the curious evidentiary standard of consistent degradation, the opinion is remarkably evasive about its core concerns.

⁶⁷ *Id.* at 754 (citation omitted). For an overall assessment of Justice Stevens's methodology in this area, see Pamela S. Karlan, *Cousins' Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521 (1996).

⁶⁸ *Davis*, 478 U.S. at 127.

⁶⁹ *Id.* at 128-29.

⁷⁰ *Id.* at 132-33.

What is the meaning of a “chance to effectively influence the political process”? Or to “directly influence” election returns? Or of having “direct or indirect influence on” elections? The key problem is that there is ultimately no real conception of what a properly functioning electoral system looks like and, not surprisingly, no real conception of what is the precise harm to be remedied. The problem of the absence of a core definition of constitutional harm is then compounded by the Court’s definition in *Davis* of what is constitutionally tolerable — a definition that is so broad as to encompass virtually any system in which voters can cast ballots:

[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who 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. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters.⁷¹

Neither *Davis* nor any subsequent case has shown what such “actual proof to the contrary” might entail. Thus this constitutional doctrine that purports to oversee partisan distortions of the political process, but presumes overwhelmingly that all electors are fairly represented by whomever might emerge as the victorious candidate, is of little practical value.

In sum, as I develop below, the Court was closer to the mark in its initial intuition that the harm to be avoided in the political process cases was the loss of the democratic legitimacy that presumably follows from free and fair elections. Lacking a developed theory of how to operationalize that intuition, the Court turned to the accessible categories of individual rights and antidiscrimination commands. These categories may have sufficed to address either extreme malapportionment or the fencing out of a racial minority, but they provided little explanatory power in the more difficult cases that followed. Indeed, the recourse to the domain of rights and discrimination actually moved the Court away from its initial insights in this area of law.

III. THE MARKET FOR PARTISAN CONTROL

Let us now return to the original premise of the Court’s intervention into the political process as securing “the free and uncorrupted

⁷¹ *Id.* at 131–32.

choice of those who have the right to take part in that choice.”⁷² It should be possible to rescue the evident early systemic concern of the Court from its subsequent derailment into the constricting language of individual rights and discrimination. If the concept of the integrity of voter choice is to again become the primary constitutional objective, then the task must be to identify the circumstances that best ensure that integrity.

A. *Political Noncompetition Agreements*

Stepping back from the case law of the past forty years, there is no evident reason why the concern over the integrity of the political process should be limited to questions of individual rights and group discrimination. These may have been the terms most conducive to the Court’s overcoming the justiciability hurdles of the brooding political question doctrine, but the legitimizing function of the democratic accountability of elected officials depends on more than simply the ability of individuals and groups to participate in the electoral process. To introduce the idea of political competition as an independent value in the political process, it is worth returning to the scenario underlying *Gaffney v. Cummings*.⁷³ As Justice White set out:

The record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas. Appellant insists that the spirit of “political fairness” underlying this plan is not only permissible, but a desirable consideration in laying out districts that otherwise satisfy the population standard of the reapportionment cases.⁷⁴

The Court found this assurance of “political fairness” between the parties to be far superior to “a politically mindless approach” of ignoring the likely electoral consequences of redistricting, a practice that in turn could produce “the most grossly gerrymandered results.”⁷⁵

The Court’s invocation of an unintentional or “mindless” gerrymander is curious. The idea that the harm of gerrymandering may result without design runs against the conventional supposition that, at

⁷² *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884).

⁷³ 412 U.S. 735 (1973).

⁷⁴ *Id.* at 752. To achieve this proportionate result, the Connecticut redistricters created various odd configurations of districts. It is ironic in light of the later *Shaw* cases to note that the *Gaffney* Court found this of no moment: “compactness or attractiveness [of district shapes] has never been held to constitute an independent federal constitutional requirement for state legislative districts.” *Id.* at 752 n.18.

⁷⁵ *Id.* at 752, 753 (internal quotation marks omitted).

bottom, the gerrymander is a willful attempt to advance one's own interests and harm one's rivals. Instead, the idea of a gerrymander occasioned by something other than wrongful intent suggests that the Court's conception of the harm to the political process is limited to the claims of the major parties to a proportionate stake of representation. Indeed, the Court candidly held that judicial scrutiny should "be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."⁷⁶ In this sense, *Gaffney* is consistent with *Davis* in limiting the ultimate reach of the constitutional prohibition on partisan gerrymandering to some notion of unfair conduct directed at one or the other of the major parties. Put another way, *Gaffney* must rest on the lack of any alternative systemic harm that gerrymandered districts might cause to any other participants in the political process. Thus, *Gaffney* is a more extreme version of *Davis* in assuming that there is no other interest in the gerrymandering context than the risk of discrimination by one party against another. It is here that I want to part company from this approach.

A simple extreme hypothetical can frame my initial inquiry. What if the parties in Connecticut agreed upon a proper division of legislative representation that preserved their respective shares of the legislature, and decided to forego elections altogether? If we leave aside the obvious constitutional and statutory requirements of some periodicity to elections, the question becomes quite difficult to answer within the narrow discrimination model of *Davis* and *Gaffney*. The gerrymandering cases have little to say about the positive role that elections and the electoral process play in a system of democratic governance. These cases are instead limited to identifying circumstances in which individuals or, on occasion, groups can raise rather confined rights-based claims. *Gaffney* illustrates the problem of the use of a discrimination model unmoored to any positive account of the electoral process. The lack of a theory of the aims of judicial intervention in the political process manifests itself more seriously in the *Shaw* line of cases, to which I turn in the next section.

So what is the conceptual harm in jettisoning elections and substituting a "fair" distribution of political power? Professor McConnell attempts to address this question by reinvigorating the Republican Form of Government Clause of the Constitution, a move that has much to commend it doctrinally.⁷⁷ On this view, the Republican Form of Gov-

⁷⁶ *Id.* at 754.

⁷⁷ See McConnell, *supra* note 63, at 106 ("Constitutional standards under the Republican Form of Government Clause are ill-developed, but surely a government is not 'republican' if a minority faction maintains control, and the majority has no means of overturning it."). To a large extent, I focus on McConnell's observations because he comes to the need for the separate treat-

ernment Clause must, at the very least, preserve some assurance that political majorities can ultimately assert their electoral will. The problem is that this move is of necessity incomplete and focuses on conditions in which a minority is able to embed itself in power, immune to the will of the numerical majority. Shifting the doctrinal categories may better capture the constitutional interest in the context of the extreme malapportionment evident in *Baker* or *Reynolds*. In such cases, numerical majorities in urban and suburban areas were unable to dislodge the stranglehold on legislative representation enjoyed by over-represented rural areas. Thus, the remedy may be self-revealing in the context of the grotesque minority lockups of power seen in the massive malapportionments in Tennessee and Alabama, the settings for *Baker* and *Reynolds*. But the answer is more elusive in the context of the manipulation of district lines consistent with one person, one vote, as *Karcher* and the post-*Davis* partisan gerrymandering cases reflect. At some level, the same problems that challenge the Court's equal protection jurisprudence will reassert themselves in trying to give content to the equally open-textured Republican Form of Government Clause. Outside the context of actual malapportionment, the challenge remains how to establish that a "districting scheme systematically prevents effective majority rule," to use McConnell's formulation.⁷⁸

A more textured understanding of the preconditions necessary for legitimate electoral choice is needed to give meaning to the concept of effective majority rule. Constitutional concern cannot be limited to the issue whether the majority does or does not hold its appropriate share of power, lest the hypothetical distribution of legislative seats without elections fall below constitutional scrutiny. Rather, the very concept of proper political outcomes requires attention to the electoral preconditions through which the majority expresses its will. If the absence of elections would compromise democratic integrity, then there must be some positive account of the role played by elections. Accordingly, the richer concept of republicanism must turn not simply on majoritarian triumph, but on the idea of selecting elected representatives through robust competition before the electorate. The essence of republicanism then becomes not the lack of direct participation in government by the *demos* but, critically, the fact that the elected representatives were forced to compete in the arena of public accountability. The fact that the public has selected its representatives in turn allows us to impute some legitimacy to the representation, even though public

ment of constitutive questions of politics from the perspective of constitutional law proper. Most of the work in this area to date has come from a group of scholars who have revisited these questions from the vantage point of developing what some of us have termed "the law of democracy."

⁷⁸ *Id.* at 114.

choice and other modern theories of collective action tell us that such selection processes are necessarily imperfect.⁷⁹

The conceptual harm in simply jettisoning elections is that the concept of "fair" representation has no meaning outside an appropriately competitive electoral process. The electorate can only express a "free and uncorrupted choice" if it has the ability to select among competing political prospects. At the heart of what has been termed the "political markets" approach⁸⁰ is a commitment to the competitive integrity of the political process as an indispensable guarantor of democratic constitutionalism. This concept may be expressed as

a market [for political office] whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition. Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interest and views of citizens.⁸¹

The key to this approach is to view competition as critical to the ability of voters to ensure the responsiveness of elected officials to the voters' interests through the after-the-fact capacity to vote those officials out of office. In turn, the accountability to the electorate emerges as the prime guarantor of democratic legitimacy.⁸²

Representatives remain faithful to the preferences of the electorate and responsive to shifts in preferences so long as they remain account-

⁷⁹ Public choice theory posits that collective preferences are inevitably the product of the manner in which choice may be expressed. Because of the impact of voting procedures on how preferences emerge, this theory questions whether any electoral outcome may be accepted "as uniquely representing the popular will." JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 298 (1988) (emphasis omitted). As a result, public choice theorists would argue either "that the notion of a popular will is incoherent, or that the popular will is itself incoherent, whichever you prefer." JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 155 (1989). The canonical text of this approach is KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1973). The application of Arrow's insights to political behavior is represented by WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982). For leading critical works on the application of public choice theory in law, see DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991), and Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

⁸⁰ See Persily & Cain, *supra* note 30, at 788-91 (providing an overview and critique of this approach).

⁸¹ Issacharoff & Pildes, *supra* note 20, at 646.

⁸² Numerous political theorists discuss responsiveness and the electoral process. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 205-07 (1989) (identifying responsiveness "as the core of a theory of legitimacy"); HANNAH PITKIN, *THE CONCEPT OF REPRESENTATION* 232 (1972) (arguing that a "representative government must not merely be in control, not merely promote the public interest, but must also be responsive to the people"); Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1149 (2002) (arguing that responsiveness is the measure of "how well democratic institutions track the substantive preferences of the electorate"); Pildes, *supra* note 20, at 1611 (identifying responsiveness as a "central democratic value").

able electorally. Thus, while we do not enforce campaign promises within the normal bounds of contract law, the same function is performed — if imperfectly — by the accountability of individual representatives for their success or failure in accurately representing their constituents' preferences. To the extent that elections are structured to limit accountability, whether it be by inordinately high filing fees, by restrictive petitioning requirements to get on the ballot, or by gerrymandered districts, the key role of accountability is compromised. In other words, accountability is a central feature of democratic legitimacy, regardless who wins or loses a particular election.

The political markets analysis therefore tries to define a risk to the electoral process that is independent of an individual rights claim and of a claim of discrimination. The focus is instead on an alternative risk that emerges from the vulnerability that the political marketplace shares with all other markets: the possibility that anticompetitive behavior will compromise the ability of selection to reveal true consumer preferences. At some basic level, we have no confidence in our knowledge of the true will of the majority or of a fair distribution of political power except through the revealed preferences of voters who are given competitive alternatives. Stripped of the market gloss, this is simply a restatement of Madison's early insight in *The Federalist No. 51* expressing the importance of true electoral choice: "A dependence on the people is no doubt the primary controul on the government . . ."⁸³

To pursue the analogy to a competitive market, the problem in *Gaffney* is the Court's confidence that a proper electoral balance had been struck in Connecticut without any clear competitive demonstration of actual voter preferences. The contrast between a properly competitive market and a proper allocation of legislative seats is oddly analogous to the contrast between the concept of revealed market valuations of goods and the medieval idea of the intrinsic just price of goods and services.⁸⁴ Not only is the *Gaffney* conception of proper political outcomes unmoored from the checking function of electoral competition, but it also assumes a fixed quality to political preferences that is immune to change or refinement over the course of contested partisan debate. The Court's conception draws from a dated proposition that, as framed by Joseph Schumpeter in his classic work on democracy, there is some entity called "the people," and that they "hold a

⁸³ THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

⁸⁴ An unrelated but parallel debate is playing itself out in the courts over the assignment of attorneys' fees in noncontractual cases. The strongest advocates of trying to replicate the market in court-awarded attorneys' fees, led by Judge Richard Posner of the Seventh Circuit, derisively characterize non-market-based approaches as a modern attempt to recreate a "medieval just price." See *Steinlauf v. Cont'l Ill. Corp.* (*In re Cont'l Ill. Sec. Litig.*), 962 F.2d 566, 568 (7th Cir. 1992).

definite and rational opinion about every individual question and that they give effect to this opinion — in a democracy — by choosing ‘representatives’ who will see to it that that opinion is carried out.”⁸⁵ For Schumpeter, this proposition inverts the importance of the selection of representatives. Rather than the selection process being merely a transmission mechanism for expressing the existing preferences of the voters, the power to decide meaningfully among representatives becomes the core of the electorate’s democratic rights: “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”⁸⁶

Applying this concept, we can now answer the question of the harm that would follow if Connecticut were simply to abolish elections and allow for a “proper” allocation of political power. Under a static view of democracy that focuses exclusively on the satisfaction of the preexisting political preferences of the electorate, the question whether there is any intrinsic value to elections persists. A focus on the legitimizing role of competition before the electorate, by contrast, not only condemns the wholesale abolition of elections, but also lays the foundation for contesting any idea that there can be “just” political outcomes independent of the competitive integrity of the electoral process. It also provides theoretical ballast for what the Court itself has recognized about the vitality of the political process: “Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.”⁸⁷ Further, the focus on competitive processes ties back to the undeveloped original Madisonian understanding of republican government as one that “derives all its powers . . . 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.”⁸⁸

B. Restraints on Competition

According to the Supreme Court, the primary appeal of the redistricting plan in *Gaffney* lay in the fact that no party suffered discrimination in the redistricting process.⁸⁹ However, if one were to examine

⁸⁵ JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (6th ed. 1987). Pamela Karlan, Richard Pildes, and I begin our casebook on the law of democracy by describing the most conventional understanding of democracy as existing “prior to and independent of the specific institutional forms in which it happens to be embodied at any particular time and place.” ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 1. We then go on to criticize this view, on grounds similar to Schumpeter’s, as “misconceived and perhaps even unintelligible.” *Id.*

⁸⁶ SCHUMPETER, *supra* note 85, at 269.

⁸⁷ *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

⁸⁸ *THE FEDERALIST* NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961).

⁸⁹ See *supra* pp. 612–13.

Gaffney as part of a systematic assessment of the importance of competition, rather than simply from the vantage point of discrimination against the parties, the result would be quite disturbing. In any other market, courts would determine an arrangement like the one in *Gaffney* to be a horizontal noncompetition agreement. Whereas the Court in *Gaffney* upheld and even praised collusion between the only two market players, such horizontal agreements among competitors in a product market are "antitrust's most 'suspect' classification, and as a class provoke harder looks than any other arrangement."⁹⁰ In antitrust law, courts have found such horizontal restraints so completely lacking in redeeming virtue that they are presumed to be illegal.⁹¹ Horizontal restraints that apply to territory, in particular, are per se invalid. Speaking to a *Gaffney*-style horizontal market division in the commercial context, the Court in *United States v. Topco Associates, Inc.*⁹² clearly stated the antitrust rule:

One of the classic examples of a *per se* violation of § 1 [of the Sherman Act] is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition This Court has reiterated time and time again that "horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." Such limitations are *per se* violations of the Sherman Act.⁹³

This per se rule precludes the Court from having to make any individualized inquiry into the economic justifications for the market division in a particular case.⁹⁴ Thus, regardless of the beneficial qualities the *Gaffney* court found in redistricting to maintain the proportional representation of the major political parties, such a scheme would be illegal per se under the antitrust laws regulating consumer markets. Even if there were no per se rule against horizontal territorial limitations, an application of the more lenient "rule of reason" balancing test,

⁹⁰ 11 HOVENKAMP, *supra* note 18, ¶ 1902a, at 190.

⁹¹ *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), *aff'd* 85 F. 271 (6th Cir. 1898); *see also* *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

⁹² 405 U.S. 596 (1972) (Marshall, J.).

⁹³ *Id.* at 608 (citation omitted) (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)); *see also* *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (holding that agreements to split a market are illegal "regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other"); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951) (holding that agreements between corporations to allocate trade territories are illegal).

⁹⁴ *See Topco Assocs.*, 405 U.S. at 607-08; *see also* *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967) (holding that horizontal territorial market divisions are "unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness").

which courts apply to more ambiguous antitrust situations,⁹⁵ would easily invalidate the anticompetitive behavior the Court upheld in *Gaffney* as well. The Supreme Court has explained that under the rule of reason analysis "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."⁹⁶ Courts applying this analysis have been especially wary of agreements between competitors when the surrounding circumstances include certain market conditions that are favorable to the establishment of cartels and the suppression of competition. Such market conditions include concentrated market power, high barriers to entry, and the ability of parties to police an agreement once it has been made. The first factor, market power, is determined in part by the market shares of the parties involved in the agreement⁹⁷ and is an essential element in proving an antitrust violation,⁹⁸ except in the more unusual cases in which there is direct proof of the actual anticompetitive effects of an agreement.⁹⁹ Market power alone, however, may not be dispositive in establishing an antitrust violation; courts will often inquire into the barriers to entry as well.¹⁰⁰ Thus, courts are especially skeptical of agreements between organizations when the barriers to entry are high enough to effectively eliminate the chance for outside competition.¹⁰¹ Finally, courts will often look for policing procedures because, to support an anticompetitive cartel, the colluding parties must have a way

⁹⁵ See 7 AREEDA, *supra* note 21, § 1500, at 361-64 (describing general issues surrounding the "rule of reason" and "per se rule").

⁹⁶ Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

⁹⁷ See *Flegel v. Christian Hosp.*, 4 F.3d 682, 689 (8th Cir. 1993) ("To establish that the defendants have market power, [plaintiffs] must show that the defendants have 'a dominant market share in a well-defined relevant market.'" (quoting *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 (8th Cir. 1986))); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 969 (10th Cir. 1990) (holding that a market share between forty-five percent and sixty-two percent could permit a finding of market power); *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 360 (7th Cir. 1990) (holding that a market share of greater than fifty percent may contribute to a finding of market power).

⁹⁸ See *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) ("Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason.").

⁹⁹ See *K.M.B. Warehouse Distribs. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) (holding that plaintiffs must prove market power unless there is evidence of actual adverse effects).

¹⁰⁰ See *Reazin*, 899 F.2d at 971 (inquiring into barriers to entry after considering market share); cf. 12 HOVENKAMP, *supra* note 18, ¶ 2002f6, at 27-28 (noting that low barriers to entry will destroy cartelization); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 288 (4th ed. 1992) ("If entry can be effected rapidly and entrants have no higher long-run costs than the members of the cartel, the profits of cartelization will be small, and so also the incentive to cartelize.").

¹⁰¹ See *Wilk*, 895 F.2d at 360 (noting that market share is especially predictive of market power when there are substantial barriers to entry); *New York v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 873 (E.D.N.Y. 1993) (noting that "[h]igh barriers to entry can effect [sic] the ability of new participants to enter the market and result in giving the established participants more power in the market").

to prevent one another from cheating and thereby ruining the cartel arrangement.¹⁰²

Any application of antitrust law under either a per se or rule of reason approach would condemn the arrangement found constitutional in *Gaffney*. Whatever arguments might be made to justify a horizontal restraint like the one in *Gaffney*, such arguments could never survive a court's antitrust scrutiny of noncompetition between two dominant firms when substantial barriers to entry exist. It is well established that single-member territorial districting with first-past-the-post winners almost invariably leads to two and only two serious political parties.¹⁰³ In antitrust terms, this market-compelled pressure toward two and only two major firms is a duopoly.¹⁰⁴ Moreover, policing a redistricting agreement in the political market is easy because the market division is enforced through government legislation. Cheating among the cartel members is a non-factor. Therefore, under a simple antitrust analysis, whether using the per se or rule of reason approaches, courts would be particularly skeptical of agreements in the political market because it is in fact the ideal market for cartelization and suppression of competition.

C. *The Effects of Noncompetition*

Whatever the allure of the antitrust analogy, it would be folly to claim that politics and economic markets are identical. One clear difference between product markets and the political arena turns on the measure of the harm that anticompetitive behavior causes. In product markets, anticompetitive behavior results in higher prices and diminished consumer welfare as a result of the ability of monopolists and cartels to extract prices untempered by competition.¹⁰⁵ Since the bene-

¹⁰² See 12 HOVENKAMP, *supra* note 18, ¶ 2002d2, at 19–20 (noting that despite being hard to maintain, cartels are still a major antitrust concern because they often have numerous tools available to punish cheaters).

¹⁰³ See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 216–28 (Barbara & Robert North trans., Methuen 1964) (1951) (proposing that a simple majority electoral system strongly favors a two-party system); see also GARY W. COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS* 13–33 (1997) (further discussing Duverger's Law); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 116 (1957) (noting that “a two party system would cause each party to move toward its opponent ideologically”).

¹⁰⁴ See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States To Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 332 (employing the term “duopoly” to describe the hegemony of the Democratic and Republican parties).

¹⁰⁵ See ROBERT H. BORK, *THE ANTITRUST PARADOX* 17 (2d ed. 1993) (describing the consensus that “competition could be injured to the detriment of consumers by the agreed elimination of rivalry . . . or by a powerful firm's attack upon rivals with the purpose of driving them out of the market”).

fits of political competition cannot be measured by so simple a metric as price, finding the definition of the harm that anticompetitive behavior causes in the political arena requires further elaboration. Indeed, even for commentators not taken with the analogy to market models, defining the harm in the gerrymandering context has remained a bit of a puzzle.

To address this puzzle, the political science literature has tried to assess the impact of gerrymanders on the partisan composition of a state legislature or a state's congressional delegation. From this perspective, the critical question is whether the manipulation of district lines will result in a stable realignment of partisan control over the course of the decennial redistricting cycle.¹⁰⁶ The general conclusion is that evidence of a stable partisan effect over the entire ten-year period is inconclusive at best.¹⁰⁷

In arguing against the creation of a partisan gerrymandering cause of action in *Davis*, Justice O'Connor also took the approach of defining harm as realignment of partisan control. According to Justice O'Connor, one reason for courts not to engage claims of partisan misbehavior in redistricting is that, in effect, the parties will be naturally restrained from pushing the limits of gerrymandering by fear of placing some of their safe seats at risk.¹⁰⁸ As a result, this argument con-

¹⁰⁶ For an early version of this argument, see Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1345 (1987) ("[A] party's motive to gerrymander is considerably stronger than its ability to execute and sustain one."). Professor Schuck goes on to question the ability of courts to redress as elusive a concept as a successful partisan gerrymander. See *id.* at 1345-48. As an empirical matter, Schuck's prognostication is difficult to dispute.

¹⁰⁷ See, e.g., Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in POLITICAL GERRYMANDERING AND THE COURTS 64, 95 (Bernard Grofman ed., 1990) ("Gerrymandering is not a potent enough instrument to permit a minority to dominate state government and perpetuate itself from decade to decade — especially not in a state in which an extraordinary legislative majority is required to overcome a governor's veto."); Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s*, 54 J. POL. 565, 571 (1992) (summarizing studies from the 1970s and 1980s to show that, though control over redistricting had an immediate partisan impact, that impact dissipated over the ten-year cycle).

¹⁰⁸ Justice O'Connor adds:

Indeed, there is good reason to think that political gerrymandering is a self-limiting enterprise. In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat — risks they may refuse to accept past a certain point. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious. More generally, each major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one. There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves.

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

tinues, there is unlikely to be any systematic distortion of the relative partisan strength in legislative bodies. A political equilibrium serves as a more effective and less intrusive check on partisan overreaching than would an uncertain measure of constitutional oversight.

From both the political science perspective and the constitutional approach Justice O'Connor promoted, even blatant partisan gerrymanders result in little lasting harm to the political partisan balance. The political scientists and Justice O'Connor focus on potential harm to political rivals rather than on the meaningfulness of the choices presented to voters. Thus, each of these approaches mistakenly examines the gerrymander from the perspective of the motivation of the gerrymanderer. Each then asks what the relative effectiveness of the gerrymander is likely to be in terms of gaining an overall partisan advantage in the legislature for the party enjoying the fruits of political power. This approach, in effect, reproduces the doctrinal methodology of *Gaffney* by reducing the scope of potential harm to the ability to discriminate against one's rival or hamper that party's future electoral prospects. Strikingly, neither the political science approach nor Justice O'Connor's intuition about the self-policing quality of excessive gerrymandering contemplates the potential for harm in terms other than the impact on the partisan composition of the resulting legislative body.

What if, instead of measuring harm exclusively in terms of the effect upon the partisan composition of the legislature, one were to examine the impact on the political equivalent of consumer welfare? Such an examination would shift the focus from whether the legislature is in balance to whether the parties are forced to compete for the votes of the electorate, are forced to attempt to educate and influence the voting public, and are in a deep sense accountable to changes in the preferences of the electorate. In other words, what if the competitiveness of elections were considered an independent democratic good? Democratic legitimacy, on this account, turns on the ability of the citizenry to "participate primarily by choosing policymakers in competitive elections,"¹⁰⁹ a more recent formulation of Schumpeter's insistence that the hallmark of democracy is "individuals acquir[ing] the power to decide by means of a competitive struggle for the people's vote."¹¹⁰ On this view, the competitiveness of elections emerges as a central guarantee of the integrity of democratic governance. As political scientist G. Bingham Powell, Jr. elucidates in his empirical assessment of

¹⁰⁹ G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY* 3 (2000).

¹¹⁰ SCHUMPETER, *supra* note 85, at 269; *see also* PITKIN, *supra* note 82, at 234 ("Our concern with elections and electoral machinery, and particularly with whether elections are free and genuine, results from our conviction that such machinery is necessary to ensure systematic responsiveness.").

the comparative democratic accountability of governments around the world:

Few contrasts between dictatorship and democracy are sharper than this one: in a democracy the citizens can vote the leaders out of office. The citizens' ability to throw the rascals out seems fundamental to modern representative democracy because it is the ultimate guarantee of a connection between citizens and policymakers. It enables the citizens to hold the policymakers accountable for their performance. Such accountability is a keystone of majoritarian democratic theory.¹¹¹

From this perspective of democratic legitimacy, democracy is defined primarily by the accountability of the elected to the electors, an accountability that is in turn shaped through competitive elections. Allowing partisan actors to control redistricting so as to *diminish* competition runs solidly counter to the core concern of democratic accountability. Even a cursory examination of American elections shows how tenuous is the ability of even a sizeable number of aroused and dissatisfied electors to hold incumbents accountable.

One can start this examination with congressional elections, the most visible battleground over redistricting. For all the battles over incumbent protection that have dominated news accounts in states such as New York,¹¹² one might assume that incumbents actually lost elections in meaningful numbers. Far from it. In the 2000 congressional elections, incumbents won 98.5% of the challenges, with 82.6% of those elections won by a margin of greater than twenty percent.¹¹³ Examined more closely, the numbers are even more astonishing. For example, in Massachusetts in the 2000 congressional elections, the *average* margin of victory — that is, the spread between the percentage achieved by the victor and that of his or her nearest rival — was 72.9%.¹¹⁴ Given that the political science literature defines a landslide as an election in which the winner receives more than sixty percent of the vote,¹¹⁵ the likelihood of serious challenge to an incumbent member of Congress is fleeting at best. Indeed, there is more likelihood of

¹¹¹ POWELL, *supra* note 109, at 47. Powell's ultimate conclusion that proportional design systems carry out this mandate better than majoritarian systems, such as first-past-the-post electoral systems, is beyond the scope of this Article.

¹¹² See Richard Pérez-Peña, *Albany Draws New Lines To Keep the House Safe for (Most) Incumbents*, N.Y. TIMES, June 6, 2002, at B6 (chronicling the intervention of the national political parties to secure increased levels of incumbent protection through redistricting after the state lost two congressional seats).

¹¹³ Center for Voting and Democracy, *Dubious Democracy*, at http://www.fairvote.org/2001/us1954_1998.htm (last visited Nov. 6, 2002) (on file with the Harvard Law School Library).

¹¹⁴ Center for Voting and Democracy, *Margin of Victory, 2000*, at <http://www.fairvote.org/2001/margins.htm> (last visited Nov. 6, 2002) (on file with the Harvard Law School Library).

¹¹⁵ See Allan J. Lichtman & J. Gerald Herbert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 5 (1993) (describing the sixty-percent "landslide standard" for single-member office elections).

self-implosion of a congressional career, as with Gary Condit,¹¹⁶ than defeat of an incumbent through the normal workings of electoral politics.

If anything, this pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved and political parties have ever more brazenly pursued incumbent protection.¹¹⁷ For example, it was estimated that after the 2001–2002 redistricting there could be as few as thirty competitive House races in the entire United States,¹¹⁸ with competitive being defined as a district that is likely to be won by a margin of less than ten percent. Meanwhile, forty-five candidates for the House were expected to run unopposed. Following the eminently incumbent-satisfying redistricting of Massachusetts, to take a particularly extreme example, the first elections in the new districts were expected to feature six of ten congressional candidates running unopposed, including four who were unopposed in the primary as well.¹¹⁹

Massachusetts may be extreme, but it is not aberrant. In California, political insiders expected redistricting to produce *no* competitively contested elections¹²⁰ among the state's fifty-three-member congress-

¹¹⁶ See Evelyn Nieves, *Fall of Condit, Still Caught in the Shadow of Scandal, Comes as No Surprise*, N.Y. TIMES, Mar. 7, 2002, at A21.

¹¹⁷ See, Pérez-Peña, *supra* note 112 (describing the exclusive focus on incumbent protection in the high-profile New York State redistricting).

¹¹⁸ See Michael Barone, *Sizing Up the 2002 Races*, U.S. NEWS & WORLD REP., May 13, 2002, at 35; see also *Democracy Denied*, RICHMOND TIMES-DISPATCH, Mar. 17, 2002, at E2, available at 2002 WL 7194862 ("Precision redistricting — i.e., gerrymandering — has made 380 districts safe for one party or the other. Citizens will cast ballots in November, but their votes effectively were counted when the pols drew the lines."); Juliet Eilperin, *House Democrats' Climb Gets Steeper: Party Lacks Rallying Cry as Redistricting, Incumbency Cut Competitive Races*, WASH. POST, Apr. 2, 2002, at A1 ("A decade ago, there were roughly 100 competitive races following redistricting; this year there will be 30 to 40, perhaps even fewer."); Ryan Lizza, *White House Watch: Future Tense*, THE NEW REPUBLIC, Sept. 2, 2002, at 10, 11 (reporting the estimate of Charlie Cook, a leading analyst for the *National Journal*, that there will be thirty-nine competitive elections for the House of Representatives this year); Alison Mitchell, *Redistricting 2002 Produces No Great Shake-Ups*, N.Y. TIMES, Mar. 13, 2002, at A20 ("With Congressional redistricting almost complete, the once-a-decade redrawing of the nation's political map is turning out to favor incumbents to an unusual degree, making many of the House's swing seats into safer territory for one party or the other.")

The *Wall Street Journal* noted on election day that only fifteen of 435 House races were "toss-ups." *The Gerrymandered Democrats*, WALL ST. J., Nov. 5, 2002, at A22. The *Journal* lamented that the House, which was "designed to be the body of government most responsive to the public," is now "far more insulated from public opinion than is the Senate, because no one has yet found a way to gerrymander a state." *Id.*

¹¹⁹ David Espo, *Miss. Dem to Back Party Candidate*, ASSOCIATED PRESS ONLINE, June 7, 2002, available at 2002 WL 21844498.

¹²⁰ Political scientists refer to the competitiveness of elections by the "marginals" separating the two leading candidates. The conventional definitions generally focus on a ten-percent vote spread (55% to 45% in a two-candidate election) as a competitive election and a twenty-percent spread (60% to 40% in a two-candidate election) as a landslide. See David R. Mayhew, *Congressional*

sional delegation.¹²¹ Nor were competitive congressional elections expected in other large states, such as Ohio, Illinois, Michigan, Texas, New Jersey, and New York.¹²² Not even Florida, the ultimate battleground of the 2000 presidential election, expected a race in which Democrats and Republicans had equal chances of victory.¹²³ Aided by new technologies,¹²⁴ incumbent preservation has become, in the words of the chief redistricting official of the Republican National Committee, a "sweetheart gerrymander."¹²⁵

The same pattern appears at the state legislative level. In the 2000 state legislative elections, 40.6% of the legislative seats in the forty-three states that hold partisan elections found a Democratic or Republican candidate for office *uncontested* by the other major party — in other words, a seat so safe as not to generate any serious challenge.¹²⁶ Equally striking is the decrease in intradistrict competition in the years following the post-1990 redistricting: the 1992 state legislative elections saw 32.8% of the seats essentially uncontested in the same forty-three states.¹²⁷ Over the course of the ten-year cycle, as incumbents became entrenched in their districts, the figure rose to 41.1% uncontested elections in 1998.¹²⁸

There is little dispute in the political science literature that there is a powerful incumbency advantage at all levels of federal and state elections, and that the observed incumbency advantage has climbed steadily since the 1940s.¹²⁹ Although there are strong proponents of the view that the manipulation of district lines is a significant causal

Elections: The Case of the Vanishing Marginals, 6 POLITY 295, 304 (1974) (defining marginality "narrowly," as 45 to 54.9 percent of the vote, and "broadly," as 40 to 59.9 percent of the vote); see also GARY C. JACOBSON, *THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946-1988*, at 26 (1990) ("The two thresholds of marginality commonly found in the literature are 55% and 60% of the vote. Winning candidates who fall short of the threshold are considered to hold marginal seats; those who exceed it are considered safe from electoral threats.").

¹²¹ See John Harwood, *No Contests: House Incumbents Tap Census, Software to Get a Lock on Seats*, WALL ST. J., June 19, 2002, at A1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *The Gerrymandered Democrats*, *supra* note 118 (discussing "computer databases that can account for voter tendencies down to the city block").

¹²⁵ Harwood, *supra* note 121 (quoting Thomas Hofeller).

¹²⁶ These data are drawn from state legislative files and compiled by Richard Winger, the editor of Ballot Access News. See *Dems, Reps Failed To Nominate in 2000 (Table)*, BALLOT ACCESS NEWS, Dec. 5, 2000, available at <http://www.ballot-access.org/2000/1205.html> (on file with the Harvard Law School Library).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See 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, 328 (2002).

factor in explaining the incumbency advantage,¹³⁰ the picture cannot be quite that simple. For example, Professors Ansolabehere and Snyder find that the incumbency edge is present not only in legislative elections, where district lines are subject to manipulation, but also in races for executive offices, where there are no district lines to redraw every ten years.¹³¹ The large number of causal explanations offered for the rising premium of incumbency¹³² suggests that there may be a variety of factors contributing to this effect, and that different factors may be at issue for elections to legislative as opposed to executive offices.

The empirical evidence cannot support so strong a claim as assigning to the gerrymander exclusive or even primary responsibility for the electoral prowess of incumbents. No doubt other factors, such as campaign finance regulations, contribute as well. Ultimately, however, this Article does not rise or fall on the narrow empirical question whether gerrymandering is the predominant cause of the increase in uncontested or uncompetitive elections. There is no question that district lines are manipulated for the purpose of protecting incumbents from effective challenge, that incumbents assiduously police the redistricting process to protect themselves from challenge, and that a diminishing number of legislative seats are electorally competitive. Certainly correlation cannot prove causation, and it may be that all political insiders are operating under the mistaken belief that gerrymanders benefit incumbents. My suspicion, however, is that incumbents have a keen understanding of the system in which they operate. It is probably not a matter of coincidence that in Iowa, where congressional boundaries are drawn by nonpartisan officials who are instructed to disregard incumbent and other political preferences, four out of five House districts were considered highly competitive in 2002.¹³³ Even if the extent of the effect that redistricting has on incumbent advantage remains a matter of debate, the question is whether the deliberate use of powers over redistricting to attempt to insulate incumbent officeholders from meaningful challenge is normatively proper and constitutionally tolerable.

It is of course possible to argue that these lopsided majorities, or even the absence of challengers, is simply a reflection of the true and

¹³⁰ See GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 127–205 (2002).

¹³¹ Ansolabehere & Snyder, *supra* note 129, at 328–29.

¹³² See, e.g., Richard D. McKelvey & Raymond Riezman, *Seniority in Legislatures*, 86 AM. POL. SCI. REV. 951 (1992) (highlighting the connection between seniority systems and the incumbency advantage).

¹³³ See *Rigged Voting Districts Rob Public of Choice*, USA TODAY, Aug. 28, 2002, at 13A (reporting the competitiveness of Iowa congressional districts and the resulting intense campaigning by both national parties).

uncorrupted will of the voters. So framed, engaging this argument seems as productive as debating whether Elvis is really alive and will shortly return to Graceland. A more serious version of this challenge would rely on the inherent imprecision of the term "competitive." Thus, one might argue that structural barriers that substantially diminish the prospect of contested elections are easy targets, but that every rule governing the electoral process limits some forms of challenge — with the prime example being the pronounced tendency of first-past-the-post electoral districts to reward two and only two political parties.¹³⁴ This objection must also fail. Undoubtedly, all rules limit choices. Yet no competitive endeavor, from elections to baseball, would be possible without predefined rules of engagement. It is possible to distinguish between enabling rules that define the engagement and restraining rules that are designed to frustrate challenge.¹³⁵ To return to the analogy of markets, although the question of the optimal number of firms in a competitive market is one that is unlikely to yield any answer in the abstract, it is still possible to identify anticompetitive behavior that artificially restricts the ability of new entrants to emerge or improperly entrenches the privileged position of the dominant actors.

The complacent lack of concern about noncompetitive districts also involves overlooking the cost of noncompetitiveness to the political process and to the ability to realize actual voter preferences. While each of the major American political parties is a big tent, there are nonetheless key divisions in their constituencies — particularly in their activist cores.¹³⁶ As a general matter, internal party selection of candidates, either by primary or direct party nomination, rewards the more

¹³⁴ See *supra* note 103. For leading examples of this critique directed against earlier formulations of the competitive markets approach to the law of the political process, see Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589 (1999).

Every electoral system introduces arbitrary advantages and disadvantages. Given a particular configuration of preferences, different electoral rules can lead to different outcomes. Groups that would win under one set of rules might lose under another. It is quixotic to look for the absolutely fair system. The danger of the Issacharoff-Pildes structural approach is that it might send the judiciary on just such a fruitless quest.

Id. at 1603; see also Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719 (1998).

¹³⁵ This approach follows the work of Stephen Holmes, who describes the limitations on precommitment inherent in a constitutional order as enabling rather than restricting democratic politics. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 227 (Jon Elster & Rune Slagstad eds., 1988) ("In general, constitutional rules are enabling, not disabling; and it is therefore unsatisfactory to identify constitutionalism exclusively with limitations on power.").

¹³⁶ A more elaborate version of this argument may be found in Issacharoff, *Private Parties*, *supra* note 20.

polarized activist wing of the party.¹³⁷ The process of having to run in the general election tempers that polarization as the parties compete for the median voters who may tip the election. A bipartisan gerrymander may keep intact the overall Republican-Democratic balance in the legislature, but it offers no guarantee that the same Democrats or Republicans would emerge from competitive elections.¹³⁸ Left behind in the "sweetheart gerrymander" are the droves of median voters increasingly estranged from the polarized parties. Left behind as well are the incentives to provide representation to the community as a whole.¹³⁹ As California Democratic Congressman Adam Schiff remarked, "[t]he best representation . . . comes out of the most marginal districts."¹⁴⁰

No districting scheme could (or should) aspire to recreate the exact partisan balance of the state or jurisdiction as a whole. The resulting legislature would replicate the winner-take-all feature of at-large elections, a feature that has been at the heart of the concern over minority vote dilution.¹⁴¹ If district lines were to be purposefully manipulated to make every district represent the actual political configuration of

¹³⁷ See ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* 71-73 (1970) (identifying the tendency of party activists to push their parties toward polar positions); Issacharoff, *Private Parties*, *supra* note 20, at 302-04 (identifying the polarizing role of activists, which is offset by electoral accountability).

¹³⁸ Hence the repeated observation that the parties today are more polarized and less likely to engage in bipartisan efforts than they once were. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311 (2001); David C. King, *The Polarization of American Parties and Mistrust of Government*, in *WHY PEOPLE DON'T TRUST GOVERNMENT* 155, 156 (Joseph S. Nye et al. eds., 1997).

¹³⁹ In an early article, Professor Ortiz ties the redistricting process to an effort by incumbents to insulate themselves from electoral accountability for their policy decisions:

By redrawing district lines in such a way as to favor their own reelection, incumbents can partially protect themselves from challenge. They can then pursue their self-interests at the expense of their constituents' interests with less fear of being unseated.

The smaller their fear, moreover, the more room they have to indulge their own preferences and ignore the voters — even the majority who elected them.

Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature To Police Itself*, 4 J.L. & POL. 653, 675 (1988); see also CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 72 (1993) (arguing that representatives with "electoral security" tend to "become complacent, not consulting their constituents as frequently as representatives from other kinds of districts do"). Subsequently, Professor Ortiz and I placed the problem of incumbent self-interest within the broader framework of the agency costs associated with political intermediaries. See Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999) (exploring the agency costs imposed by superagents monitoring our directly elected agents to prevent them from disregarding voter interests).

¹⁴⁰ Harwood, *supra* note 121 (internal quotation marks omitted).

¹⁴¹ See LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994) (detailing the problem of majority overrepresentation); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838-45 (1992) (describing the development of the voting rights assault on minority vote dilution).

the general population, the result would be to skew representation toward the median voters — with the predictable effect that nonmajoritarian views would be shut out of the legislature. While this problem is well identified in the case law and literature addressing the problems with at-large or multimember election districts,¹⁴² there is insufficient attention to the fact that gerrymandered single-member districts have distributional consequences that push in the opposite direction. If each district can potentially be gerrymandered to render it uncompetitive, the result is to create strong incentives toward polarization as the parties become more susceptible to partisan homogeneity — as is common with the cumulative effect of the tyranny of small decisions.¹⁴³ Gerrymandering and the diminution of competition have a predictable effect that is completely independent of the overall partisan composition of a legislative body. As one member of Congress put it, “[b]ecause the districts in Congress are more and more one-party dominated, the American Congress is more extreme.”¹⁴⁴ The result is not only less electoral accountability but also more fractiousness in government and more difficulty in forming legislative coalitions across party lines.

Finally, a focus on the competitive implications of rules governing the political process allows for confined yet effective court oversight to guard against conduct that frustrates democratic accountability.¹⁴⁵

¹⁴² See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“This Court has long recognized that multimember districts and at-large voting schemes may ‘operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.’” (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))) (alteration in original) (internal quotation marks omitted)); see generally ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 746–866 (reviewing case law and scholarship on minority vote dilution).

¹⁴³ See Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 46 (1999).

¹⁴⁴ *Id.* (quoting Rep. John Tanner (D-Tenn.)) (internal quotation marks omitted).

¹⁴⁵ Although it is beyond the scope of this Article, it is worth noting that other constitutional courts have taken the idea of policing the political arena to protect competitiveness as the core function of constitutional oversight. For example, the German Constitutional Court has written: “In the field of elections and voting, formal equality includes the principle of formal equal opportunity, namely, the opportunity of political parties and voter organizations to compete for electoral support.” DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 188 (2d ed. 1997) (translated from the National Unity Election Case, 82 BVerfGE 322 (1990)). In similar fashion, the Constitutional Court of the Czech Republic recently upheld a statute requiring a political party to obtain at least five percent of the vote before it could be represented in Parliament, but noted that “it is always necessary to gauge whether such limitation of the equality of the voting right is the minimum measure necessary to ensure such a degree of integration of political representation as is necessary for the legislative body to form a majority (or majorities) required for the adoption of decisions and formation of a government which enjoys the confidence of parliament.” 5 EAST EUROPEAN CASE REPORTER OF CONSTITUTIONAL LAW 159, 170 (1998) (translated from PI ÚS 25/96-37). For further discussion of these courts’ use of a competition-enhancing principle of constitutional oversight, see

The concern over incumbent manipulation of redistricting to thwart electoral accountability becomes a subset of a broader strategy for ensuring the democratic accountability of elected representatives.¹⁴⁶ It is not surprising that redistricting authority is a prime target for reform in those states where voters are able to bypass legislative obstacles through the initiative process.¹⁴⁷ But where that is not possible, the focus must be on the constitutional guarantees of the preconditions for democratic elections. This approach necessarily moves away from the notion of individual rights as the prime protector of the integrity of the political process, and looks instead to the structural vitality of politics. My collaborator Professor Pildes has expressed this point:

[C]ourts should become more aware of the need for external oversight of potentially anticompetitive practices that masquerade under the hoary labels of good order, stability, and similar homilies. When claims of rights are asserted, courts should attempt to recognize the structural and organizational implications of the resulting decisions. The way to sustain the constitutional values of American democracy is often through the more indirect strategy of ensuring appropriately competitive interorganizational conditions. It is in this way that central democratic values, such as responsiveness of policy to citizen values and effective citizen voice and participation, are best realized in mass democracies.¹⁴⁸

IV. SHAW AND PROPHYLAXIS

If we turn to the major redistricting battlefield of the 1990s, the racial gerrymandering cases, a second and perhaps even more significant benefit of reassessing the law of gerrymandering under a competition-reinforcing approach will hopefully become apparent. One of the perverse consequences of the absence of any real constitutional vigilance over partisan gerrymandering is that litigants must squeeze all claims of improper manipulation of redistricting into the suffocating

Issacharoff & Pildes, *supra* note 20, at 690–99, discussing the German Constitutional Court, and Pildes, *supra* note 20, at 1613–15, discussing the Constitutional Court of the Czech Republic.

¹⁴⁶ Professor Ortiz pushes a variant of this argument further to claim that the degree of competition, even absent gerrymandering, is generally insufficient in political markets consisting of only two actors — the major political parties. See Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 765 (2000) (“Weak markets do discipline — just too weakly. . . . For this reason, the antitrust laws do not stop with ensuring just a single competitor.”).

¹⁴⁷ The creation in 2000 of the Arizona Independent Redistricting Commission is an example. Proposition 106, the voter-approved measure that enabled the Commission, directed it to work largely without regard to partisan information and incumbent political biases, and to include among its overall objectives the maximization of competitive elections. See ARIZ. CONST. art. 4, pt. 2, § 1 (codifying Proposition 106, available at <http://www.azredistricting.org/default.asp?page=prop106>).

¹⁴⁸ Pildes, *supra* note 20, at 1611.

category of race.¹⁴⁹ The reasons for this are somewhat convoluted, but nonetheless critical. Immediately after the Court announced the rule of equipopulational districting in *Reynolds* and its progeny, mathematical disparities in district size became a convenient target of parties seeking to challenge the partisan impact of a proposed redistricting plan. As Justice White observed in 1983 in *Karcher*, “[m]ore than a decade’s experience . . . demonstrates that insistence on precise numerical equality only invites those who lost in the political arena to re-fight their battles in federal court.”¹⁵⁰ As redistricters adapted to tight equipopulational constraints on district configurations, the numerical challenge to the first rounds of post-*Baker* redistricting diminished in value as a vehicle to “refight” political battles through the courts. What emerged in its place were claims over the racial implications of redistricting decisions. In hindsight, this path of development appears to have been almost inevitable. The concern over minority vote dilution had already paved the way for expanded federal oversight of local election practices¹⁵¹ — well before *Bush v. Gore*¹⁵² — and *Shaw v. Reno* (*Shaw I*)¹⁵³ began the process of constitutionalizing federal oversight along the dimensions of race.

A. Race and Politics

Beginning with *Shaw I* in 1993, the Supreme Court ushered in a new era of constitutional entanglement with the redistricting process, one whose intensity and intrusiveness into state political arrangements are unmatched since the early days of *Baker* and *Reynolds*. At one level, Justice O’Connor’s recognition of a new “analytically distinct”¹⁵⁴ cause of action in *Shaw I* is consistent with the broad themes of this Article. By recognizing a systemic harm from excessive reliance on racial considerations in redistricting, *Shaw I* in effect repudiated decades of case law that had found equal protection harm only in the denial of individual rights to vote or in group-based discrimination through dilution of voting strength.¹⁵⁵ But *Shaw I*’s new structural equal protec-

¹⁴⁹ This mismatch is analogous to the problem of protecting employees from discharge only through the antidiscrimination laws and not through any just-cause criterion. The predictable consequence is to reward claims of discharge that can be cast in terms of discrimination, even where other more palpable, but legally permissible, factors may have been at play. See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1679–82 (1996).

¹⁵⁰ *Karcher v. Daggett*, 462 U.S. 725, 778 (1983) (White, J., dissenting).

¹⁵¹ See Issacharoff, *supra* note 141, at 1836 (arguing that cases interpreting the Voting Rights Act “dramatically enhanced federal power to regulate electoral processes”).

¹⁵² 531 U.S. 98 (2000).

¹⁵³ 509 U.S. 630 (1993).

¹⁵⁴ *Id.* at 652.

¹⁵⁵ In this sense, *Shaw I* decisively rejected the Court’s earlier ruling in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), which found that a claim challenging redistricting was only

tion, to use Professor Karlan's terminology,¹⁵⁶ admitted of only one lens through which to focus this new constitutional scrutiny, and the predictable effect was to magnify the distinct role of race in the redistricting battles. As a result, the structural difficulties in policing the political process were reduced to the single issue of race, and the necessarily murky partisan battles involved in redistricting were presented for judicial review only along that dimension.

Many have observed the difficulty of disentangling questions of race and politics,¹⁵⁷ and some have noted a paradox in the differential constitutional scrutiny between claims of racial gerrymandering and partisan gerrymandering. In the Texas redistricting saga presented as *Bush v. Vera*,¹⁵⁸ for example, the Court scrutinized the overlap of the categories of race and party to warn that simply offering partisanship as a justification for aggressive districting practices would not distract the Court's watchful eye from the constitutional infirmities involved in an excessive reliance on race in redistricting.¹⁵⁹ But the Court's admonition stayed at just that level: a warning that racial considerations could not be obscured behind claims of partisanship. However, the Court and the surrounding commentary failed to explore the perverse set of incentives that the decision created. Following *Shaw I*, there was every reason for disappointed players in the cruel game of partisan redistricting to recast themselves as aggrieved parties in equal protection dramas defined by race. Indeed, this became the defining legal pattern in the 1990 round of redistricting: the courts provided a second forum for redistricting battles if, *and only if*, the redistricting losers could recast themselves as victims of excessive consideration of race.

Thus, the question concerns the incentives established by combining exacting scrutiny for racial claims with no meaningful scrutiny for claims of partisan manipulation. One need only turn to the current round of redistricting to see how savvy political actors are responding to the Court's invitation. Only recently, for example, Georgia Republi-

actionable if individuals had been denied the right to vote or if a racial group had had its voting strength unfairly minimized or canceled out. *Id.* at 165 (plurality opinion).

¹⁵⁶ See Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 672-73 (2002) (assessing the Court's intuitive but unsystematic use of equal protection doctrine to intervene in highly charged political cases, from *Shaw I* to *Bush v. Gore*).

¹⁵⁷ For an earlier account of the difficulty of disentangling racial and political motivations, see Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23. Professor Briffault argues, based on social science evidence, that "in rejecting the essentialist assumption that all people of the same race necessarily vote alike, the Court's color-blindness doctrine risks going too far in the other direction — of ignoring the proven evidence that in some jurisdictions and at some times, race is a crucial basis in interest-group formation, with racial differences forming significant lines of political division." *Id.* at 69.

¹⁵⁸ 517 U.S. 952 (1996).

¹⁵⁹ See *id.* at 959.

cans, frustrated by the state Democratic success in building a coalition to restore Democratic-controlled districts to the state, immediately invoked the concept of minority vote dilution and the authority of the Voting Rights Act to undo what they perceived of as a Democratic gerrymander.¹⁶⁰ In effect, these Republicans were attempting to recapture the successes of the 1990s round of redistricting in which the creation of heavily black districts in Georgia laid the foundation for Republican control of that state's congressional delegation.¹⁶¹

If we examine the totality of the law governing redistricting, it is possible to identify a rather perverse incentive structure that the Court has inadvertently created for partisan warriors. Through a combination of *Shaw I* and the most recent contribution to the racial redistricting cases, *Easley v. Cromartie*,¹⁶² the Supreme Court has exacerbated the incentive to racialize partisan disputes by creating a two-track approach to redistricting that can best be summarized as "politics, but not race." Under this approach, racial considerations are extraordinarily suspect, raising the evocative concerns of "balkaniz[ation]" and "political apartheid" that Justice O'Connor articulated in *Shaw I*.¹⁶³ But the Court has apparently opened up a safe harbor for bizarre redistricting lines whose inspiration is political as opposed to racial, even if in many states, "racial identification is highly correlated with political affiliation."¹⁶⁴

The litigation history, at first glance, would seem to defeat attempts to draw the battle lines over the race/partisanship divide. In *Vera*, the Court rejected the defendants' claim that the Texas congressional redistricting plan was constitutional because it was inspired by partisan rather than racial considerations. Although it did so largely on the basis of the evidentiary proof in the case,¹⁶⁵ the Court noted quite forcefully that the overlap of racial and partisan considerations would not

¹⁶⁰ See Michael Finn, *Barnes Signs Senate Remap*, CHATTANOOGA TIMES, Aug. 25, 2001, at B2, available at LEXIS, News Library, Allnws File (reporting Republican opposition to the redistricting plan); Michael Finn, *Georgia Remap in Legal Quagmire*, CHATTANOOGA TIMES, Oct. 22, 2001, at A1, available at LEXIS, News Library, Allnws File (noting the Republican Party Chairman's opinion that the new redistricting maps "violate the integrity of local communities, and they deny minorities their legal rights under the Voting Rights Act").

¹⁶¹ For an overview of the debates and social science evidence on the creation of heavily minority-dominated districts in the 1990s, see ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 907-24.

¹⁶² 121 S. Ct. 1452 (2001), *decided sub nom.* Hunt v. Cromartie.

¹⁶³ *Shaw v. Reno*, 509 U.S. 630, 647, 657 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.").

¹⁶⁴ *Cromartie*, 121 S. Ct. at 1459.

¹⁶⁵ *Bush v. Vera*, 517 U.S. 952, 970 (1996) (plurality opinion).

assuage the concern evinced in the *Shaw* line of cases for the excessive reliance on race.¹⁶⁶

But the very argument that failed for evidentiary reasons in *Vera* has now succeeded in *Cromartie*, the fourth and last of the tortuous North Carolina cases to come to the Supreme Court from the 1990 round of redistricting¹⁶⁷ — this one decided in 2001, no less. According to Justice Breyer's majority opinion, a claim under *Shaw* must fail unless there is dispositive evidence that race, and not politics, was the driving motivation for the challenged redistricting plan:

A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial.¹⁶⁸

The distinction between race and politics is made curious in North Carolina, where the incumbent protected by the partisan gerrymander upheld in *Cromartie* was the very same congressman, Mel Watt, whose initial election had been held to be an unconstitutional racial gerrymander in *Shaw v. Hunt* (*Shaw II*).¹⁶⁹ The Court seemed not at all concerned that well-trodden equal protection case law would condemn this apparently neutral preservation of an unconstitutional objective, for it is the equal protection equivalent of the fruit of the poisonous tree.¹⁷⁰

¹⁶⁶ See *id.* at 967–69.

¹⁶⁷ The previous three cases were *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996); and *Shaw I*.

¹⁶⁸ *Cromartie*, 121 S. Ct. at 1460.

¹⁶⁹ 517 U.S. 899, 918 (1996). In *Cromartie*, the Court found that North Carolina “drew its plan to protect incumbents — a legitimate political goal.” 121 S. Ct. at 1461. Among these incumbents was Rep. Watt, who was originally elected by the subsequently invalidated majority-black Twelfth Congressional District. Cf. *id.* at 1473 n.3 (Thomas, J., dissenting) (assuming, without deciding, “that the goal of protecting incumbents is legitimate, even where, as here, individuals are incumbents by virtue of their election in an unconstitutional racially gerrymandered district”).

¹⁷⁰ See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430, 441 (1968) (striking down a school district's “freedom of choice” plan because, even if not unconstitutional in itself, the plan failed to remedy the district's unconstitutional racial segregation). Throughout the late 1960s and early 1970s, federal courts routinely struck down “freedom of choice” and other similar race-neutral moves intended to perpetuate unconstitutional racial segregation, even when the schools crafted new attendance policies to avoid any overt reference to race, as was the case in *Green*.

This is part of what was termed the “*Keyes* presumption,” in which courts allowed the finding of unconstitutional conduct to create a presumption that related conduct, both contemporaneous and prospective, was infected by the same unconstitutionality, even if facially neutral. As set out in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the presumption states “that a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious.” *Id.* at 208. For applications, see, for example, *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), which held:

What most distinguishes *Cromartie* is its curious factual acceptance of the claim that the preservation of a district drawn to ensure black representation could exist independent of racial considerations. By contrast, at the doctrinal level, the test set out in *Cromartie* is nothing more than a recapitulation of the doctrinally puzzling standard of *Miller v. Johnson*,¹⁷¹ the Georgia case that was the most significant of the post-*Shaw I* cases. Under the standard formulated in *Miller*, racial considerations become constitutionally injurious when they are the "predominant" factor behind a redistricting plan.¹⁷² Since Justice Breyer could not conceivably have believed that the legislature was unaware of the racial composition of the North Carolina districts, particularly after the Supreme Court had considered the issue on three earlier occasions, his alternative standard in *Cromartie* must have turned on the notion that the amount of racial consideration in North Carolina was not dispositive: "The evidence taken together . . . does not show that racial considerations predominated in the drawing of District 12's boundaries."¹⁷³ Whatever the conceptual limitations of the predominance standard before *Cromartie*,¹⁷⁴ the result after this district's fourth review by the Court is aptly characterized as "indeterminate to the point of incoherence."¹⁷⁵

Even though a freedom-of-choice plan had been adopted, the school system remained essentially a segregated system, with many all-black and many all-white schools. The board's continuing obligation, which had not been satisfied, was "to come forward with a plan that promises realistically to work . . . now . . . until it is clear that state-imposed segregation has been completely removed."

Id. at 459 (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13 (1971) (alterations in original) (quoting *Green*, 391 U.S. at 439)); see also *Brown v. Bd. of Educ.*, 892 F.2d 851, 904 (10th Cir. 1989) (summarizing Supreme Court cases as using "the *Keyes* presumption . . . to decree a current system-wide remedy on the basis of recent and remote purposefully segregative action, including the failure to satisfy the affirmative duty to eliminate a dual system").

¹⁷¹ 515 U.S. 900 (1995).

¹⁷² *Id.* at 916. The tortuous line of these cases confirms the absence of any clear content to this standard. See, e.g., *id.* ("Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."); *Shaw II*, 517 U.S. at 905 ("The constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." (citing *Miller*, 515 U.S. at 911, 915-16)).

¹⁷³ *Cromartie*, 121 S. Ct. at 1466.

¹⁷⁴ The doctrinal limitations of the "predominant factor" test are set out in Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45.

¹⁷⁵ John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 496-98 (2002) (arguing that "even if Justice Breyer had a magic x-ray machine that could tell him that here the desire to create a substantially African-American district was almost entirely parasitic on a desire to create a safely Democratic district, it would still be hard to understand why that makes the latter purpose 'predominant' for constitutional purposes" (footnote omitted)); see

The paradoxical combined effect of *Miller* and *Cromartie* is to turn the process of judicial review of redistricting into a robust evidentiary hunt for any trace of controlling racial considerations in the drawing of legislative boundaries. Thus, the *Cromartie* Court split over the proper evidentiary treatment of an isolated statement in the legislative record acknowledging the need for "racial and partisan balance" as one factor among the many that should be considered in an equitable assignment of electoral opportunity,¹⁷⁶ and of a single incriminatory e-mail that dared to utter the forbidden term "Black community" in describing how the districts were redrawn.¹⁷⁷ In finding that, thankfully as it appears, these stray comments did not infect the redistricting process, the Court blessed what is the most normatively troubling aspect of *Shaw I*: the conception of electoral opportunity that would allow any constituency save racial minorities to demand electoral opportunity. The bizarre extremes of this approach had already surfaced in lower court opinions that sanctified the divergent legislative needs of rice farmers and soybean farmers — all the while condemning the racial considerations that unconstitutionally infected the process.¹⁷⁸

Under *Cromartie*, then, a legislature is now free to seek any objective in redistricting, so long as it eschews any express commitment to providing representation to racial minorities. The result is an equal protection variant of the "seven dirty words" approach to the First Amendment protection of speech:¹⁷⁹ so long as the drafters never mention race, a plan will likely survive equal protection scrutiny. One may titillate with veiled intimations of partisanship that are widely understood to correlate heavily with race. But the explicit recognition of race as a critical divide in our society becomes the new equal protection obscenity — something just too hard-core for the frail ears of the body politic. The *Shaw* line of cases may now be said to have come full circle.¹⁸⁰ In keeping with Justice O'Connor's admonition from *Shaw I* that this is an area in which "appearances do matter,"¹⁸¹ the

also Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 302–03 (1996) (noting that the *Miller* predominance test could not explain the interconnected redistricting objectives of equipopulation, partisan advantage, and incumbent protection that exist even in majority-minority districts).

¹⁷⁶ *Cromartie*, 122 S. Ct. at 1464 (quoting state Senator Cooper's prior statement to the legislature).

¹⁷⁷ *Id.* at 1474–75 (Thomas, J., dissenting).

¹⁷⁸ See *Hays v. Louisiana*, 862 F. Supp. 119, 127 (W.D. La. 1994) (finding, among the defects of a challenged district, that "[t]he agricultural regions of District 4 include cotton, soybean, rice, sugar cane, and timber. Such diverse agricultural constituency [sic] have few common interests. We continue to question how one Congressional representative could adequately represent the varying interests of residents in such far-flung areas of the State.").

¹⁷⁹ *FCC v. Pacifica Found.*, 438 U.S. 726, 777 (1978).

¹⁸⁰ See Karlan, *supra* note 156.

¹⁸¹ *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Court has now come to believe that the appearances that matter are no longer the district lines but the formalities of the legislative record.

The upshot of *Cromartie* is that so long as the white majority Democratic legislature was gerrymandering a congressional district to reward *its* own interests, the Constitution would remain silent. But should the same legislators consider the political aspirations of historical outsiders, the courts must intercede. John Hart Ely well captures this point:

A central theme of our Constitution is the preclusion of self-dealing maneuvers on the part of incumbents (other than by the pursuit of constituent preferences) to perpetuate their incumbency or otherwise promote the fortunes of their political party. . . . [P]artisan gerrymandering is more clearly unconstitutional than pro-minority racial gerrymandering: whether or not the former should form the basis of a cause of action, it certainly should not be invocable as a defense to, or "innocent" explanation of, what appears to be the latter.¹⁸²

The contrast between insider manipulation and the claims of those without incumbent power becomes critical. Indeed, the Court's constitutional priorities in the *Shaw* cases appear to be backwards. The *Shaw* cases placed the Court in the awkward position of putting the Constitution on the side of protecting vested incumbent power, while prohibiting the redistribution of electoral opportunity to those out of power.¹⁸³

B. Perverse Incentives

Much has already been written on the troubling legacy of the *Shaw* line of cases for subsequent rounds of redistricting,¹⁸⁴ including careful assessments of the facts and issues in the North Carolina redistricting

¹⁸² Ely, *supra* note 175, at 503 (footnotes omitted).

¹⁸³ Professor McConnell elaborates upon this point in an attempt to moor the redistricting concerns textually within the Constitution:

Partisan gerrymandering is designed to entrench a particular political faction against effective political challenge — sometimes even to give a political minority effective control. That is in obvious tension with the values of Republicanism. Racial gerrymanders of the sort we have seen in recent years, by contrast, do not threaten ultimate majority rule. To be sure, they have other consequences that may well be deemed undesirable — such as the exacerbation of racial polarization in elections — but they are not unrepresentative. As long as the majority retains effective control, it is consistent with Republicanism for the majority to give greater influence to minority voices that would otherwise be submerged.

Adopting the Republican Form of Government Clause and abandoning the Equal Protection Clause as the basis for evaluating electoral districting would thus be a practical and judicially manageable means of curbing gerrymandering abuses of all kinds, and it would put an end to the embarrassingly standardless line of cases that began with *Shaw v. Reno*.

McConnell, *supra* note 63, at 116 (footnotes omitted).

¹⁸⁴ For an overview of the scholarship, see ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 906–07.

fiasco.¹⁸⁵ My goal here is not so much to criticize this line of case law, although one might observe that the set of commands it issues is almost as contorted as the original North Carolina districting plan struck down in *Shaw I*. Rather, my aim is to use the doctrinal morass over race and redistricting to highlight the Court's inability to develop a workable approach to policing constitutionally improper behavior in the redistricting arena. In particular, I want to direct attention to the perverse incentives the Court has created — incentives that encourage the racialization of all claims of improper manipulation of the redistricting process.

First, now that the post-1990 round of redistricting litigation has concluded, there is every reason to suspect that future redistricting fights will be framed in the inflammatory language of race to increase the possibility of subsequent judicial revision. In retrospect, it is fairly clear that partisan battles for the spoils of redistricting were successfully recast as racial gerrymandering claims once *Shaw I* established this "analytically distinct"¹⁸⁶ cause of action. Whether in North Carolina, Georgia, or Alabama, the story of racially motivated redistricting could be told compellingly — perhaps more compellingly than a story of a battle for partisan control.¹⁸⁷ Evidence of political influence

¹⁸⁵ For work on this score, see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227 (2001).

¹⁸⁶ *Shaw I*, 509 U.S. at 652. Only recently has the strategic use of claims of racial rewards been recognized in the scholarship as one of the deleterious consequences of the *Shaw* line of cases. For recent contributions to this discussion, see Charles & Fuentes-Rohwer, *supra* note 185, at 309, noting that "courts should handle the 'racial' gerrymandering cases just like the political gerrymandering cases because the race cases are not really about race after all. They are about politics," and Megan Creek Frient, Note, *Similar Harm Means Similar Claims: Doing Away with Davis v. Bandemer's Discriminatory Effect Requirement in Political Gerrymandering Cases*, 48 CASE W. RES. L. REV. 617, 655 (1998), observing that "[b]ecause what is really a political gerrymander cannot be invalidated unless plaintiffs allege the scheme is a racial gerrymander, parties both bringing and defending these claims have incentives to attempt to emphasize or downplay the degree to which considerations of race and political affiliation played a role in [redistricting]."

¹⁸⁷ The partisan effects of the Republican-proposed 1990 Alabama redistricting scheme have been described as follows:

Now consider the partisan distribution of Alabama's congressional delegation before and after the post-1990 redistricting, and a comparison of the black percentage of each congressional district. . . . [T]he immediate result of the redistricting is the replacement of two white Democratic congressmen from Districts 6 and 7 with a black Democratic congressman from District 7 and a white Republican congressman from District 6. Notice as well, the near even distribution of black voters prior to 1990 and the concentration of black voters after 1990.

ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 923. As political scientist David Lublin notes, "[r]edistricting in Alabama worked exactly as the Republicans hoped. . . . Thanks virtually entirely to favorable redistricting, Republicans won one new seat in 1992 and held on to one seat that they otherwise would have lost." David Ian Lublin, *Race, Representation and Redistricting*, in CLASSIFYING BY RACE 111, 116–17 (Paul E. Peterson ed., 1995); see also *supra* notes 160–161 and accompanying text.

permeates the racial gerrymandering cases, especially those involving the protection of minority incumbents.¹⁸⁸ Even the contorted district configurations that the Court spoke to in *Shaw I* reflect more than an excessive concern with race.¹⁸⁹ The history of the ill-fated majority-minority districts demonstrates the ubiquity of partisan politics in redistricting battles. Because legislatures and redistricting authorities turned to the problem of minority representation only *after* incumbent powers had been satisfied, the minority districts were patched together from the remnants and leavings of more commanding political players. The result was that minority districts looked tattered and badly stitched together, generally reflecting the fact that they had been “squeezed into a map that had already taken shape.”¹⁹⁰ By contrast, in California, where special masters drew minority districts first, it was several of the *non-minority* districts that “had to be constructed around the periphery” and as a consequence “became rather elongated.”¹⁹¹

The second, and more salient, detrimental incentive the Court established was that opponents of the post-1990 districts had to construct their racial challenges after the fact, once *Shaw I* had given a green light to such claims. Imagine the effect on redistricting debates in the post-2000 round now that any salting of the record with racial issues may enhance the prospects of judicial oversight,¹⁹² and as legis-

¹⁸⁸ Cf. Charles & Fuentes-Rohwer, *supra* note 185, at 280 (citing *Shaw v. Hunt*, 517 U.S. 899, 936 (1996); *Miller v. Johnson*, 515 U.S. 900, 942 (1995) (Ginsburg, J., dissenting) (considering state legislators’ influence on districting decisions from which they benefit); and *Shaw I*, 509 U.S. at 673 n.10 (White, J., dissenting) (noting that a majority-minority district was created in the northern part of North Carolina, rather than the southern part of the state, in order to protect a Democratic incumbent)).

¹⁸⁹ See Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, “Bizarre Districts,” and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) (describing how the much-maligned North Carolina highway district resulted from the efforts of state Democrats to protect white Democratic incumbents); Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 653 (1993) (reporting how North Carolina legislators turned to the creation of minority districts only after ensuring reelection of incumbents).

¹⁹⁰ Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1576 (2002).

¹⁹¹ *Wilson v. Eu*, 823 P.2d 545 app. at 579–80 (Cal. 1992) (special masters’ report); see also Karlan, *supra* note 190, at 1576 (describing the process by which minority districts are “squeezed in[]” after incumbent interests are protected).

¹⁹² This is a particularly precarious situation for those jurisdictions subject to the preclearance provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (2000). Under the nonretrogression doctrine enunciated in *Beer v. United States*, 425 U.S. 130, 141 (1976), these jurisdictions are required to ensure that no alterations of any electoral practices, including the redrawing of district lines, have an adverse effect on minority electoral prospects. Additionally, these jurisdictions must submit all changes to the Justice Department for approval prior to implementation — the “preclearance” requirement — together with documentation that the proposed change was free of any adverse effect or malevolent purpose. See *id.* (establishing the nonretrogression stan-

lators from both parties (and their advisors) recognize both the loopholes and pitfalls of the current *Shaw/Davis* divide.¹⁹³ The legislative process of redistricting does not occur within a sterile environment where reasoned deliberation is the norm. Rather, redistricting reveals "the bloodsport of politics," as self-interest overwhelms any claims of "ideology, social purpose, or broad policy goals."¹⁹⁴ Those on the losing side of the redistricting battles may well be tempted to compromise the constitutional viability of the redistricting plans by inserting claims of racial purpose into the legislative record.¹⁹⁵ It is difficult to conjure up a more harmful set of incentives for state actors.

Third, even assuming that racial gerrymandering is an independent constitutional harm, the bizarre post-*Cromartie* inquiry gives no guidance at all for the next round of litigation. The constitutional distinction between the redistricting plan upheld in *Cromartie* and the one rejected in *Vera* turns on an assessment of the state of mind of the legislature. This assessment is inherently problematic, because a racially motivated legislature and one concerned only with politics could easily produce identical results. For example, the Court in *Vera* relied heavily on the fact that the state of Texas drew its district lines using population data that were "uniquely detailed" with regard to race but relatively general with regard to other demographic factors.¹⁹⁶ After *Vera*, it is clear that such express reliance on racial data would trigger withering constitutional scrutiny. But a careful redistricter armed with data showing only partisan predilections of the city of Houston, to take an example, could easily create a virtually identical map. The heavy

dard); see also ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 599–632 (setting out case law on nonretrogression and scrutiny for discriminatory motive). A covered jurisdiction engaged in redistricting could not possibly create this record without paying attention to the effect on minority electoral constituencies. That condition, of course, would create precisely the record of attention to the racial composition of districts that would presumably run afoul of *Vera* and *Cromartie*.

¹⁹³ Consider the examples of *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992); and *Hays v. Louisiana*, 839 F. Supp. 1188, 1200–01 (W.D. La. 1993). In *Pope*, the predecessor case to *Shaw I* itself, the challengers claimed political gerrymandering. When they lost, see 809 F. Supp. at 399, they challenged the district on racial gerrymandering grounds. Once *Shaw I* had been decided, defenders of the plan in *Hays*, who had previously admitted to racial gerrymandering, unsuccessfully attempted to convince the court that their motivations had really been political all along, see 839 F. Supp. at 1199.

¹⁹⁴ T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993).

¹⁹⁵ One insight into how savvy redistricters are already planning around *Shaw* considerations is found in J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431 (2000). For example, Hebert advises, "[i]f a state is able to create an explicit record of these race-neutral considerations, it is more likely than not to defeat a *Shaw* claim in the post-2000 redistricting litigation battles. . . . Where a state seeks to engage in constitutional political- or partisan-gerrymandering, the *Shaw* line of cases make it critical that the state use non-racial political data to achieve that goal." *Id.* at 450, 453.

¹⁹⁶ See *Bush v. Vera*, 517 U.S. 952, 961–62 (1996) (plurality opinion).

overlap of predominantly Democratic precincts with black population centers and predominantly Republican precincts with white population centers could yield a map whose contours looked surprisingly like the suspect race-derived ones. So long as no redistricting authorities uttered the forbidden words of race, would the plan then survive challenge under *Vera* and *Cromartie*? I suggest, without further elaboration, that the final act in the 1990s North Carolina redistricting saga did little to bring clarity to the standards for redistricting in the next decennial cycle.¹⁹⁷

C. *Altering the Process of Redistricting*

Redistricting is not the first area that confronts courts with a recognizable pattern of misconduct by official actors that defies easy judicial oversight. Such patterns of official misconduct may prove difficult to detect for evidentiary reasons or may pose obstacles to after-the-fact judicial scrutiny for any number of reasons, including the potential intrusiveness of an inquiry into motive. The Court's response in many such cases has been to use a species of constitutional common law¹⁹⁸ to develop rules of prohibition as a shield against the temptation for state actors to cross the constitutional line. The emergence of these constitutional rules of prophylaxis is by now well established,¹⁹⁹ with leading examples being the one-person, one-vote rule of apportionment²⁰⁰ and

¹⁹⁷ The porous quality of the line between race and politics is well summarized by Justice Souter in his dissent in *Vera*:

The plurality seems to assume that incumbents may always be protected by drawing lines on the basis of data about political parties. But what if the incumbent has drawn support largely for racial reasons? What, indeed, if the incumbent was elected in a majority-minority district created to remedy vote dilution that resulted from racial-bloc voting? It would be sheer fantasy to assume that consideration of race in these circumstances is somehow separable from application of the traditional principle of incumbency protection, and sheer incoherence to think that the consideration of race that is constitutionally required to remedy Fourteenth and Fifteenth Amendment vote dilution somehow becomes unconstitutional when aimed at protecting the incumbent the next time the census requires redistricting.

517 U.S. at 1061 (Souter, J., dissenting) (citation omitted). It would not be an uncharitable reading of the state of the law after *Vera* and *Cromartie* to say that the Court has arrived at just the state of incoherence anticipated by Justice Souter.

¹⁹⁸ See Monaghan, *supra* note 23, at 2-3 (defining constitutional common law as "a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions").

¹⁹⁹ For leading discussions of the prevalence of such prophylactic rules, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 899-904 (1999), arguing that the "real" constitutional right is indistinguishable from its "remedial" or prophylactic component, and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988), arguing that prophylactic rules are "a central and necessary feature of constitutional law."

²⁰⁰ See Levinson, *supra* note 199, at 883.

the famous *Miranda* warnings.²⁰¹ As Professor Saunders describes, the key to these rules is their clarity in prohibiting the conduct likely to lead to unconstitutional results:

In retrospect . . . *Miranda*'s specificity has emerged as one of its chief virtues. Because the Court has defined the contours of the per se rule so precisely, state actors have little doubt about what they must do to avoid triggering it, and courts reviewing their conduct after the fact have little doubt about when they should apply it. The result has been a substantial degree of compliance with the Fifth Amendment ex ante and a substantial reduction in the administrative costs incurred to enforce the Fifth Amendment ex post. A less specific rule would not have produced these benefits.²⁰²

Oddly, Professor Saunders tries to find such a prophylactic rule emerging from within the *Shaw* line of cases. This search is doomed precisely because these cases lack the very rule-specificity that she identifies as the chief virtue of *Miranda*. Instead, a successful prophylactic strategy must set aside the doctrinal tests for impermissible gerrymandering that have failed to give clear guidance to redistricting officials and have failed to deter improper behavior.

What would happen if the Court were to look to *Miranda* and the use of prophylactic rules to extricate itself from *Shaw*'s self-generated morass? The first step would be to focus more clearly on the harm identified in the racial gerrymandering cases. Here the manifestation of the harm is twofold. First, race-based redistricting involves state officials assigning opportunities for representation based on race. Second, racial gerrymandering reinforces the "racialization" of politics, since race is the coin by which redistricting prospects are allocated.²⁰³ The next step requires returning to the initial premise of this Article. The *Shaw* line of cases imposes constitutional scrutiny on only one particular outcome in the process of insider-controlled districting but leaves the structural problems of incumbent entrenchment and the erosion of political competition uncorrected. It is perhaps unsurprising that the majority-minority districts that emerged in the 1990s are among the least competitive in the country and boast margins of in-

²⁰¹ See Strauss, *supra* note 199, at 190.

²⁰² Saunders, *supra* note 23, at 1632-33 (footnotes omitted).

²⁰³ For example, in *Miller v. Johnson*, 515 U.S. 900 (1995), the Court stated that "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Id.* at 911-12 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Professor Pildes summarizes the Court's concern that state involvement in creating racially identifiable districts "expresses a view of political identity inconsistent with democratic ideals . . . [and] might have the consequentialist effect of encouraging citizens and representatives increasingly to come to experience and define their political identities and interests in partial terms." Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 119, 121 (2000).

cumbent victory resembling those of Massachusetts.²⁰⁴ To the extent that the *Shaw* cases concern the purposeful packing of minority voters, *Miranda*'s logic recommends a better approach: the Court should forbid ex ante the participation of self-interested insiders in the redistricting process, instead of trying to police redistricting outcomes ex post.

The focus on ex ante rules of process has a direct payoff beyond the question whether any particular district is made competitive as a result. It is important to recognize that even if the Court were to accept the competition-enhancing metric for redistricting, there would still be a strong argument for the use of a prophylactic rule of preclusion in the redistricting process. Not every district could have a roughly equal number of registered Democrats and Republicans, and even a purely unmanipulated process would create some safe districts. The distortion comes not from the fact that some districts are safe, but from the fact that some districts are deliberately made noncompetitive to feather the nests of incumbent officials.

The advantages of an ex ante process-focused approach extend beyond the ability to foster competitive elections. The racial gerrymandering cases from the 1990s were, without exception to the best of my knowledge, the product of intense partisan struggles in which contorted minority districts were created either by Democrats seeking to preserve Democratic incumbent districts, or by Republicans seeking to pack likely Democratic voters into some districts and thereby tilt the balance of power in other districts. In other words, the racial considerations that troubled the Court were not independent of "normal" partisan divides, as *Vera* and *Cromartie* suggest, but were the direct consequence of partisan battles that were clinically "normal."²⁰⁵ If the overracialization of redistricting is not the consequence of an absence of "normal" redistricting practices, but is instead the byproduct of normal practices in the context of partisan and racial strife, then the

²⁰⁴ See generally Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001) (providing data on the ability of black voters to have a reasonable chance to elect candidates of their choice in districts with significantly lower black voter concentrations); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002) (analyzing data on the packing of black voters in majority black districts); see also *supra* p. 623.

²⁰⁵ Courts have recognized this observation even in those cases that have struck down redistricting results because of an excessive reliance on race in the redistricting process. See, e.g., *Vera v. Richards*, 861 F. Supp. 1304, 1334 (S.D. Tex. 1994) ("The Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts. The final result seems not one in which the people select their representatives, but in which the representatives have selected the people." (citation omitted)).

target of *Shaw* should be the process that produces these pressures to racialize rather than the ill-defined end result of that process.²⁰⁶

There is already a significant body of experience from across the country of alternatives to redistricting conducted by partisan officials. Various approaches to nonpartisan redistricting, such as blue-ribbon commissions, panels of retired judges, and Iowa's computer-based models, recommend themselves as viable alternatives to the pro-incumbent status quo.²⁰⁷ Although the track record of such nonpartisan alternatives is uneven, the general trend so far is that plans drawn outside the partisan arena produce less litigation, less contortion, and less opportunity for insider manipulation than do partisan processes. For example, it is striking that, as noted above,²⁰⁸ political insiders considered four of the five Iowa congressional races to be competitive — compared to the less than ten percent figure that prevails nationwide.²⁰⁹ Nonpartisan redistricting, at least through the 1990s, also seems to have allowed for adequate levels of minority representation, thereby avoiding vote dilution claims under the Voting Rights Act. Moreover, by upholding every commission-based redistricting plan challenged in the 1990s, the Court has tacitly hinted that commission-based redistricting allays its *Shaw* concerns.²¹⁰

On the flip side, one might ask what possible justification can be offered for permitting insiders to engage in self-dealing districting. Once we accept that the process of redistricting is subject to manipula-

²⁰⁶ For earlier applications of the theory of partisan capture of constitutional claims in the political arena, see Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1733–35 (1993) [hereinafter Karlan, *The Rights To Vote*], describing partisan strategic uses of one-person, one-vote doctrine and the Voting Rights Act; Karlan, *supra* note 175, at 297 n.60, stating that many racial gerrymandering cases are “simply ‘stalking horse’ cases in which disappointed aspirants for elective office use whatever statutory handle is available to challenge otherwise unreviewable outcomes of the political process”; and Pildes, *supra* note 20, at 1608–09, discussing the exploitation of one-person, one-vote litigation by partisan organizations. For discussions of the extent to which judges can inflect *Shaw* claims to partisan ends, see, for example, J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 426–39 (1999). But see Heather K. Gerken, *Morgan Kousser's Noble Dream*, 99 MICH. L. REV. 1298, 1326–31 (2001) (book review) (criticizing Kousser's analysis of the post-*Shaw I* holdings as an oversimplification of Voting Rights Act jurisprudence).

²⁰⁷ See, e.g., *DeWitt v. Wilson*, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994) (upholding a redistricting plan created by three retired judges). For a consideration of blue-ribbon commissions and computer-based models, see Issacharoff, *supra* note 29, at 1693–1702. The extremes in 2002 even propelled the *Wall Street Journal*, “often suspicious” of nonpartisan commissions, to support them. See *The Gerrymandered Democrats*, *supra* note 118.

²⁰⁸ See *supra* p. 626.

²⁰⁹ See *Rigged Voting Districts Rob Public of Choice*, *supra* note 133.

²¹⁰ See cases cited *infra* note 218. Indeed, Justice Souter has suggested that the logic of *Shaw* may lead to the abolition of traditional districting practices, perhaps through random districting or nondistricted elections (although Souter goes on to oppose such measures). *Bush v. Vera*, 517 U.S. 952, 1071–72 (1996) (Souter, J., dissenting).

tion, what possible legitimacy can there be for giving control over the process to those who are most likely to abuse it? Or worse, what could possibly justify giving the insiders license to protect themselves at the expense of accountability to the voters?²¹¹ For example, the argument that partisan control of the redistricting process might somehow be central to the stability of political parties²¹² provides no convincing rationale for insider control. This line of argument would have had more force in defense of party prerogatives such as patronage that failed to withstand constitutional scrutiny.²¹³ It provides even feeble support in this context, where the link between redistricting practices and party vitality is so much more attenuated. Even the claim of stability cannot dispel the lingering notion that a deep corruption threatens the core democratic enterprise when elections are formally channeled to yield predetermined outcomes. As the great British parliamentarian Aneurin Bevan once said: "I can think of nothing that could undermine the authority of Parliament more than that people outside should feel that the constitutional mechanism by which the House of Commons is elected has been framed so as to favour one party in the State."²¹⁴ The passage of time suggests that the same sentiment could be extended to the manipulation of the rules of the game toward predetermined ends, whether the ends favor only one party or all incumbents in a "sweetheart gerrymander."

V. CONCLUSION: ABANDONING THE PRETENSE OF POLICING REDISTRICTING

Several straightforward conclusions should emerge from the foregoing. First, the current doctrines of individual rights of access and protection against discrimination do not capture the potential risk to the competitive legitimacy of the political process. Second, the combination of the recognition that *something can go wrong* in redistricting with the absence of doctrinal tools to address that recognition leads to great pressure on antidiscrimination doctrine to fill the void. This in turn leads to the overracialization of redistricting law through the

²¹¹ For a forceful discussion of this point, see Kristin Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913 (1996).

²¹² Justice O'Connor's opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), suggests a version of this argument: "The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level." *Id.* at 145 (O'Connor, J., concurring in the judgment).

²¹³ See *Elrod v. Burns*, 427 U.S. 347 (1976) (granting public employees First Amendment protection from discharge and replacement by patronage-based hires). For an assessment of the impact that the loss of patronage had on American political parties, see LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 134-35, 142-53 (1986).

²¹⁴ 535 PARL. DEB., H.C. (5th ser.) (1954) 1871-72.

Shaw line of cases. Third, the *Shaw* line has itself been stuck in a bizarre fact-based inquiry into the extent to which racial factors "predominate" in redistricting decisions,²¹⁵ as well as the evidentiary disentanglement of the inevitably intertwined considerations of race and politics. Fourth, there exists an escape move with a considerable constitutional pedigree that would allow the Court to extricate itself from the entire morass of after-the-fact review of the fruits of the redistricting process. Here, the Court could turn to the sorts of prophylactic rules employed in other domains in which there is a considerable risk of unconstitutional behavior but a high level of difficulty in policing it after the fact.

One further consideration should be added in concluding. It may well be that the Court is already stumbling toward the prophylactic solution. As a result of the invasive yet unsettled doctrines on the redistricting process, and as a result of the clear partisan gain to be had by replaying the political process in the litigation arena,²¹⁶ a huge amount of the redistricting in the United States already finds its way into the courts.²¹⁷ Those who actually try to carry out redistricting in good faith complain frequently about the lack of any safe harbors: the same conduct that seems compelled by the Voting Rights Act invites a *Shaw* challenge, and vice versa, whereas unfair partisan gain is presumptively unconstitutional under *Davis* but is a defense to a *Shaw* claim.

Yet there is some prospect of relief from potential liability so long as redistricting is carried out at some remove from self-interested governmental actors. In addition to *Cromartie*, the Supreme Court has upheld three other plans against *Shaw* claims.²¹⁸ Notably, none of these plans involved district lines drawn by overtly political actors. In one case, the Florida state Senate district map was the product of a federal court settlement reviewing the work of the Florida Supreme Court;²¹⁹ in another, the California state legislative reapportionments were the work of three retired California judges appointed by the Cali-

²¹⁵ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

²¹⁶ See Karlan, *The Rights To Vote*, *supra* note 206 (documenting the use of Voting Rights Act litigation for partisan gain).

²¹⁷ See Issacharoff, *supra* note 29, at 1689-90 (pointing out that roughly one-third of all redistricting after the 1980 census was done either directly by federal courts or under federal judicial supervision, but that there were virtually no successful challenges to reapportionments performed by nonpolitical actors, such as districting commissions); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 861-72 (1997) (suggesting that state and federal courts are more likely to uphold the products of commission-run reapportionments).

²¹⁸ See *King v. Ill. Bd. of Elections*, 522 U.S. 1087 (1998), *summarily aff'g* 979 F. Supp. 619 (N.D. Ill. 1997); *Lawyer v. Dept. of Justice*, 521 U.S. 567 (1997); *DeWitt v. Wilson*, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994).

²¹⁹ *Lawyer*, 521 U.S. at 569-72.

for California Supreme Court as special masters;²²⁰ and in the third, the so-called "earmuff district" was designed by a court to create a Hispanic district in Chicago.²²¹ A review of the facts in these cases reveals that the district lines were drawn with clear attention to providing some significant measure of racial representation in the legislature. Yet that racially inspired purpose did not rise to the level of "predominance" required by the Supreme Court's *Shaw* jurisprudence.²²² The Court thus suggests that placing the power to redistrict at one remove from active partisan officials provides a safe harbor from the harsh litigation battles that have consumed so many states, with North Carolina as the poster child.

There is a substantial literature in the legal academy on the fine line between safe harbors and prophylactic rules.²²³ In general the distinction tends to describe the rule's state of evolution rather than describing any of its fixed characteristics. Over time, safe harbors that become sufficiently accepted by relevant actors serve as prophylactic rules and may even, as in *Dickerson v. United States*,²²⁴ become indistinguishable from the constitutional right at stake.²²⁵ Unfortunately, there is reason to believe that the safe harbor approach will not work in the redistricting context. So long as the 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.²²⁶ 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 constitu-

²²⁰ *DeWitt*, 856 F. Supp. at 1410.

²²¹ *King*, 979 F. Supp. at 625-26. The challenged district line was originally drawn by the court in *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991).

²²² In *DeWitt* the court noted that the redistricting lines were drawn with race as "one of the many factors" considered. *DeWitt*, 856 F. Supp. at 1413. However, the court upheld the plan because "[t]he Masters did not draw district lines based deliberately and solely on race." *Id.* Justice Souter reported in *Lawyer* that the Florida Supreme Court had "acknowledged that the district was 'more contorted' than other possible plans and that black residents in different parts of the district might have little in common besides their race." *Lawyer*, 521 U.S. at 571. The Supreme Court upheld the plan despite this racial element because "traditional districting principles had not been subordinated to race." *Id.* at 582.

²²³ See, e.g., Dorf & Friedman, *supra* note 23, at 82 (analyzing *Miranda* as a strong safe harbor that should be read as leaving open an invitation to other constitutional actors to provide alternative and adequate measures of protection).

²²⁴ 530 U.S. 428, 444 (2000) (affirming the *Miranda* warnings as a constitutional obligation).

²²⁵ See Levinson, *supra* note 199, at 899-904.

²²⁶ See Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 COLO. L. REV. 1029, 1033 (2001) ("In my experience, the prospect that the state might be forced to spend hundreds of thousands, or even millions of dollars, to defend redistricting adventurism plays an astonishingly small role in the decision-making process of both legislatures and commissions. There is a certain luxury, no doubt, in spending other peoples' money.").

tional values. Not only does it provide an exit strategy from the Court's entanglement with the bruising world of race and politics, but it also returns the core constitutional value in judicial oversight of the political process to what, at least aspirationally, it has been for over a century: securing the selection of representatives that as fully as possible stand for the "free and uncorrupted choice of those who have the right to take part in that choice."²²⁷

²²⁷ *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884).