Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself

by Daniel R. Ortiz*

The last twenty-five years have witnessed a revolution in voting rights. Before 1962, the Constitution protected minority groups from only the most obvious forms of disenfranchisement. Federal legislative efforts to ensure access to the ballot were ineffective and malapportionment claims were not even justiciable under the Constitution. Since 1962, however, the law has changed dramatically. In that year the Supreme Court ruled that federal courts had power to hear malapportionment claims and two years later it announced that the Constitution required that congressional and state legislative districts be apportioned on a one-person, one-vote basis. In 1965, Congress passed the Voting Rights Act, arguably the most important legislative product of the civil rights movement. Far-reaching from the start, the Act extended the franchise even further through periodic amendments and favorable judicial interpretations. Finally, in 1986, the Supreme Court held that extreme forms

* Assistant Professor of Law, University of Virginia. I would like to thank Professors Saul Levmore, Glen Robinson, and William Stuntz for helpful comments on earlier drafts of this article and Daniel Savris, Celeste deLorge, Augustus Herbert, and Lin Truckess for their research assistance.

3 Colegrove v. Green, 328 U.S. 549, 552-56 (1946).
9 See, e.g., Perkins v. Matthews, 400 U.S. 379 (1971) (holding that the Voting Rights Act covers

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of political gerrymandering violate equal protection. The law has moved clearly, if not always smoothly, from judicial and legislative nonintervention to wide-ranging federal regulation of the state political process.

This regulation has greatly reshaped the states' political processes. Previously, for example, no matter how badly malapportioned they were, state legislatures did not have to reapportion themselves, even if their constitutions required it. Failure to reapportion simply was not justiciable. Now the states are required to reapportion themselves at least every ten years unless the distribution of their population has not significantly changed since the last census. The Voting Rights Act has forced even greater changes. In addition to invalidating traditional electoral systems (like at-large voting) in many places, the Act has required some jurisdictions to obtain prior approval from the attorney general of the United States or the United States District Court for the District of Columbia for any changes in their voting systems. In extreme circumstances, the Voting Rights Act even allows the United States Attorney General to supplant the state's own voter registration system. Although he cannot change the state's voting eligibility requirements, when he has reason to believe that the state is applying them discriminatorily, he may direct the appointment of federal voting examiners. The federal voting examiners then register individuals meeting the state standards, even if the state itself already has refused to register them.

Critics make three major charges against this federal protection of voting rights. First, they assert that the voting rights revolution has worked a fundamental and improper redistribution of political power in the states. The one-person, one-vote rule has shifted power from rural to urban interests, while the Voting Rights Act


11 See Baker v. Carr, 369 U.S. at 320 & n.133 (Frankfurter, J., dissenting).
14 Id. at § 1973a(a).
15 A. Bowman & R. Kearney, The Resurgence of the States 17, 92 (1986). For a debate about the
has shifted power towards blacks and other minorities. This empowerment of new groups and increased representation of certain interests greatly colors politics. For instance, some have argued that the Voting Rights Act was partly responsible for the Senate's recent refusal to confirm Judge Robert Bork for the Supreme Court.

Second, they argue that voting rights law usurps state sovereignty by intruding on the very heart of the states' political process. Because electoral rules control the composition of the legislative, executive, and often the judicial branches of government, federal regulation of these rules intrudes upon state sovereignty even more than does displacement of an area of law traditionally left to the states. Considering the fury with which members of the Court and some commentators have argued over the latter, more common type of federal intervention, it is not surprising that the changes in voting rights law have caused great controversy.

Third, this expansion of federal control over state authority has occurred in a way that worries some. To intentionalists, those who


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See M. Eds, Free At Last (1986). See also T. O'Rourke, supra note 15; Feig, Expenditures in the American States: The Impact of Court-Ordered Reapportionment, 6 Am. Pol. Q. 309 (1978); Firestone, supra note 15.

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See, e.g., Dworkin, From Bork to Kennedy, N.Y. Rev. of Books, Dec. 17, 1987, at 36 ("Black groups were undoubtedly particularly effective [in opposing Judge Bork], especially in influencing southern senators like Howell Heflin, a key member of the judiciary committee, who had been elected with 80% of the black vote. The nomination was lost, in part, in the civil rights marches and voting registration drives of the Sixties.").

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The various opinions in the Court's recent cases concerning state immunity under the commerce clause best reveal the depth of this disagreement. Compare Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) with id. at 557 (Powell, J., dissenting), id. at 579 (Rehnquist, J., dissenting), and id. at 580 (O'Connor, J., dissenting); compare FERC v. Mississippi, 456 U.S. 742 (1982) with id. at 771 (Powell, J., concurring in part and dissenting in part), and id. at 775 (O'Connor, J., concurring in judgment in part and dissenting in part). See also The Status of Federalism in America, supra note 19, at 2-3 (identifying the commerce clause cases as "perhaps the greatest blow to federalism," and Garcia as "the nadir in the decline of federalism").
believe that the Constitution must be interpreted according to the framers' specific intentions, the development of voting rights law represents a great mistake. They believe that the one-person, one-vote rule, for example, clearly lacks legitimacy. As intentionalists and some others see it, the one-person, one-vote rule merely replaces the state's choice of an appropriate basis for representation with a choice the judiciary prefers as a matter of debatable political theory.

The cases upholding the constitutionality of the Voting Rights Act pose even greater problems. In these cases, the Court upheld various provisions of the Act as valid exercises of Congress's power under section five of the fourteenth amendment to "enforce" the equal protection clause. Further, in some of these cases the Court upheld Congress's power to outlaw voting systems that the Court itself either refused to find unconstitutional or had actually found to be constitutionally permissible. Commentators of all persuasions worry that by so broadly interpreting Congress's enforcement power, the Court may have called into question Marbury v. Madison's statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is." In their view, the development of voting rights law has unsettled one of the

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84 Section five states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.
87 See R. Bork, Constitutionality of The President's Busing Proposals 10 (1972) ("The Morgan decision embodies revolutionary constitutional doctrine, for it over-turns the relationship between Congress and the Court."); Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81, 132 ("For the Court . . . to acknowledge that Congress has some role in defining the constitutional imperatives that limit its own authority is truly to turn Marbury v. Madison on its head.").
88 5 U.S. (1 Cranch) 137 (1803).
89 Id. at 177.
deedst features of American constitutional structure: judicial review.

It is no surprise, then, that the voting rights revolution has sparked much controversy. What is surprising is the focus of the fight. Nearly all of the debate concerns either the scope of the rules imposing liability or their constitutional legitimacy.  To be sure, these issues raise serious questions about the relationship between state governments and the federal government. It is remedy, however, that most directly affects the states. The remedy actually reorders the state political process and determines what the electoral system will be. The court-imposed remedy represents the most visible exercise of federal power and is the focus of much litigation. Given that fact, why have remedial issues provoked little discussion of any type?

I have two goals in this article. First, I hope to open remedial issues up to fuller discussion by putting forward a particular argument about how reapportionment, perhaps the most common and intrusive voting rights remedy, works. Even those who disagree with my particular conclusions will, I hope, find that the argument suggests a promising general approach for looking at remedial issues in this area.

Second, I hope to explain the puzzle of neglect: Why has remedy, the area of voting rights law that most directly intrudes upon state sovereignty, raised almost no discussion? The question is interesting by itself, but more importantly, its answer reveals the unusual way in which the reapportionment remedy works. The answer to this puzzle rests on the political implications of reapportionment. I believe that remedy has not provoked criticism because of the unique political dynamic that the interplay of liability and remedy rules

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80 Constitutional legitimacy refers to both a statutory rule's constitutionality and a constitutional rule's validity under generally accepted interpretive theories.

81 E.g., Still, Alternatives to Single-Member Districts, in Minority Vote Dilution 249 (C. Davidson ed. 1984); Note, Alternative Voting Systems as Remedies for Unlawful At-Large Systems, 92 Yale L.J. 144 (1982).

82 The terms reapportionment and redistricting will be used interchangeably. Technically speaking, "reapportionment" refers to "the allocation of a finite number of representatives among a fixed number of pre-established areas," while "redistricting" usually refers to "the drawing of district line[s]." Davis v. Bandemer, 106 S. Ct. 2797, 2825 n.1 (1986) (Powell, J., concurring in part and dissenting in part) (quoting Backstrom, Robins & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121 n.1 (1978)).
creates between legislatures and the courts. Liability rules are those that legislatures must follow in reapportionment, while remedy rules are those that courts must follow whenever legislatures violate a liability standard. The two are very different.

My argument, in short, runs as follows. Liability and remedy rules place different restrictions on legislatures and courts in redistricting. In particular, liability rules allow a legislature to protect incumbents while remedy rules do not permit a court to do so. Because of this difference, a court-imposed remedy for an invalid redistricting plan will often impose costs in foregone incumbency advantage that a valid legislative plan would not. Remedy doctrine thus penalizes individual legislators if the legislature as a whole fails to act lawfully. By so threatening individual legislators’ private interests, remedy doctrine prods the legislature as a whole into pursuing the public good as defined by law. Thus, reluctant to risk losing their seats, legislators try to get reapportionment “right” so as to keep reapportionment out of the hands of the courts.

The argument proceeds in several steps. Part one describes and contrasts the different rules that legislatures and courts must follow in redistricting. Liability rules impose a few strict requirements on legislatures, while remedy rules impose more and stricter requirements on courts. Part two discusses the particular redistricting goals that liability rules allow legislatures, but not courts, to pursue. The major one is protecting incumbents. This goal, though of obvious utility to the individual legislator, is of questionable value to society as a whole. By drawing on recent economic analysis of agency costs and monopolization, I argue that advantaging incumbents impairs representation without creating any clear counterbalancing advantages. Part three then explains the effect of this difference between liability and remedy rules. By dangling the carrot of incumbency protection in front of individual legislators, this difference creates a highly effective legislative self-policing mechanism. Legislators value incumbency advantage so highly that they will think twice before drafting an apportionment plan that a court might strike down. This reaction is born of the realization that if the court redrafts the plan itself, incumbents are likely to lose much of their own protection. This novel form of regulation helps explain why remedy doctrine has largely escaped criticism even though it governs the most directly intrusive step in the voting rights suit. Legislatures
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take special care to avoid creating situations in which the courts must act, so the issue arises less often than might be expected. Compared to other regulatory mechanisms, self-policing appears to respect federalism values because it minimizes case-by-case intervention by the federal courts. The argument concludes with a short discussion of some obstacles to the effective operation of this self-policing mechanism.

I. The Rules of Reapportionment

To understand the dynamic between courts and legislatures in reapportionment, we must initially understand the different standards each must meet. First are described liability standards, which govern legislatures, and then remedy standards, which govern courts. Liability standards are only briefly discussed because a detailed understanding is not necessary and because much commentary already discusses them. The discussion of remedy standards is more elaborate because the rules are rarely discussed and appear deceptively simple. With two significant exceptions, the remedy standards appear to require the courts to defer to the legislature. For various reasons, however, this simple command is difficult to follow. The courts have instead applied more definite and uniform criteria that generally follow the practice of many states, but which actually blind the courts to one of the most important and common concerns of the legislature.

A. Liability Standards

Constitutional and statutory liability standards primarily regulate three concerns: (i) population disparities between districts, (ii) racial vote dilution, and (iii) political gerrymandering. The one-person, one-vote rule determines the degree to which districts can vary in population. In congressional reapportionment, this rule requires that district populations be as equal as is practicable. In practice,

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33 See, e.g., B. Cain, The Reapportionment Puzzle, in Minority Vote Dilution, supra note 31; Representation and Redistricting Issues (B. Grofman, A. Lijphart, R. McKay & H. Scarrow eds. 1982); Alfange, Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last, 1986 Sup. Ct. Rev. 175.

this means that states must adhere to extremely precise mathematical equality between districts. For example, in one case the Supreme Court held unconstitutional a deviation of as little as .6984% between the largest and smallest congressional districts in New Jersey.\textsuperscript{35} Although the Court has stated that a state can make minor deviations from strict equality in order to promote "legitimate state objective[s],"\textsuperscript{36} such as making districts compact and respecting the boundaries of political subdivisions,\textsuperscript{37} the courts have not allowed more than minimal deviation in any modern cases.

In state and local redistricting, the one-person, one-vote rule allows more substantial population deviation between districts. Districts may deviate by as much as ten percent without any justification\textsuperscript{38} and even larger deviations can sometimes be justified by "rational state policy."\textsuperscript{39} In one case, in fact, the Court upheld an eighty-nine percent difference between the largest and smallest districts for the lower house of a state legislature because the legislature had followed a longstanding state constitutional policy granting each county at least one representative.\textsuperscript{40} The Court justifies treating state and federal reapportionment differently on primarily two grounds: the greater number of seats in state legislatures and the need to grant political subdivisions some voice \textit{qua} political subdivisions.\textsuperscript{41}

The liability rules governing racial vote dilution are more complex. First, the fourteenth and fifteenth amendments prohibit the intentional dilution of any racial minority's vote.\textsuperscript{42} Although it is generally difficult to prove intent, the Court has relaxed this re-
requirement somewhat in voting cases. Second, section two of the Voting Rights Act prohibits any voting practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Congress specifically intended this "results" standard to overrule the Supreme Court's interpretation of the prior section two as requiring a showing of discriminatory intent. In addition, section five of the Voting Rights Act requires certain states and localities to preclear any changes in their voting systems with either the United States attorney general or the District Court for the District of Columbia. In deciding whether to grant preclearance, these entities must apply, among other things, the substantive standards of section two and a separate rule prohibiting any decline in the level of minority representation.

The third kind of liability standard regulates gerrymandering against political groups. The equal protection clause requires that an electoral system not be "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 terms of redistricting, equal protection requires that there be no "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." Because it requires evidence of "continued frustration," this standard effectively prohibits only egregious political gerrymandering. It allows the legislature much leeway to gerrymander, but not an unlimited amount.

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43 In Rogers v. Lodge, 498 U.S. at 623-27, for example, the Court inferred discriminatory intent from the following factors: (i) substantial minority underregistration; (ii) racial bloc voting; (iii) failure of black candidates to be elected; (iv) effect of past discrimination on blacks' ability to participate effectively in the political process; (v) past discrimination against blacks in education, in political parties, in grand jury selection, and in employment; (vi) elected officials' unresponsiveness to needs of the black community; (vii) blacks' depressed socio-economic status; (viii) large geographic size of the jurisdiction; (ix) majority vote requirement; (x) lack of local residency requirement; and (xi) posting requirement. Id. As one of the dissenters argued, none of these factors bears directly on intent as motivation. Id. at 628-31 (Powell, J., dissenting). Indeed, the Court itself quoted the district court's finding that the electoral system was "neutral in origin." Id. at 626.
47 28 C.F.R. § 51.59 (1982).
50 Id. at 2811 (emphasis added).
B. Remedy Standards

1. The Doctrine

Remedy rules have a quite different character. There are two types: (1) rules defining the timing and scope of judicial intervention, and (2) rules defining the substantive standards courts must meet. Rules of the first type aim to minimize judicial intrusion into the state’s political process. The most important of these rules makes courts the reapportioner of last resort. The Supreme Court has always emphasized that redistricting is a legislative task into which courts should not intrude unless absolutely necessary. Thus, courts do not move immediately to remedy invalid voting systems, but rather invalidate the system and give the legislature a second chance to correct it. Only when the legislature cannot act, refuses to act, or again acts illegally does the court itself create a remedy. By regulating the timing of court intervention in order to give the state the first crack atremedying the violation, courts respect state sovereignty as much as possible while ultimately vindicating supreme federal law.

The Court has similarly limited the scope of federal court intervention. If the state fails to remedy a violation and a court must act, the court can change no more of the legislature’s plan than is necessary to correct the violation. For example, if a state’s reapportionment plan for the state legislature dilutes the black vote in two districts, a court cannot redraw any other districts unless it must do so to remedy the two particular violations. When the violations do not infect the plan as a whole, or have “ripple effects” beyond the individual districts, this rule limits the courts to making surgical strikes. This approach promotes federalism by minimizing the disruption to the legislative plan.

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82 Upham v. Seamon, 456 U.S. at 41 ("[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.") (quoting White v. Weiser, 412 U.S. 783, 794-95 (1973) (quoting Reynolds v. Sims, 377 U.S. 533, 586 (1964))).
84 Id.
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The rules defining the substantive standards courts must meet are harder to characterize. Some appear to promote federalism; others to violate it. The most deferential rule requires the courts to follow the state plan or policy embodied in the invalid districts as much as possible.\textsuperscript{56} This rule tries to minimize federal intrusion by placing courts in the position of the legislatures. The reviewing court can redo the legislature's work, but it must always try to pursue the legislature's aim. In other words, the court must try to create the plan that the legislature itself would have created had it not acted illegally. Ideally, the court would not significantly intrude upon state sovereignty, even though it supplants the legislature. In theory, the court is merely doing what the state would have done itself had it acted properly. In reality, this works only if the court can meaningfully place itself in the shoes of the legislature.

The other two substantive rules governing courts are of a different character. The first requires a court to adhere more strictly than a state legislature to the one-person, one-vote standard in reapportioning state offices.\textsuperscript{58} While a state can create moderate population disparities among state legislative districts, a court cannot. A court must offer "some compelling justification" for deviations that the legislature does not even need to justify.\textsuperscript{57} Paradoxically, this rule appears to require the court to violate state policy. Even if the court can identify a policy which would entail moderate population disparity between districts, it cannot pursue that policy. To the contrary, it must sacrifice state policy to strict adherence to the one-person, one-vote principle.

The remaining rule also forbids a court from putting itself in the shoes of the legislature by severely restricting the court's authority to impose at-large voting districts. Many states employ or permit at-large voting, especially within political subdivisions.\textsuperscript{58} Although at-large systems tend to submerge racial and ethnic minorities by en-

\textsuperscript{56} White v. Weiser, 412 U.S. at 795-97; see Upham v. Seamon, 456 U.S. at 41-42 (quoting White v. Weiser, 412 U.S. at 795).


\textsuperscript{57} Connor, 431 U.S. at 417. See also Chapman, 420 U.S. at 26-27.

\textsuperscript{58} The most common examples are the commission form of city and county government and many local school boards. Sanders, The Government of American Cities: Continuity and Change in Structure, 1982 Mun. Y.B. 178, 179-80 (66% of American cities elect all council members at large, while another 19% elect some at large).
suring that the majority takes all the seats, at-large systems are not unconstitutional per se or even necessarily violative of the Voting Rights Act. States often can legally employ them, but courts cannot. Even if state policy favors them, the courts cannot employ them without “articulat[ing] . . . a ‘singular combination of unique factors’” supporting their use. In only one case, involving the special problems posed by military reservations, has the Supreme Court approved of them in court-ordered plans.

The Court justifies not allowing lower federal courts to follow state policy in these two limited situations on the ground that the judiciary lacks the “political authoritativeness” to do so. These words imply that courts simply lack the political competence necessary to favor state policy over constitutional value. This cannot be quite what is meant, however, for the Constitution is a statement of fundamental law binding courts and legislatures alike. The difference in “political authoritativeness” must, therefore, refer to something else. In part, it appears to reflect a heightened sensitivity on the part of courts to the values underlying constitutional rules even when the rules themselves do not actually prohibit an asserted state policy. Thus, when courts act, the value underlying a rule can trump state policy, whereas, when a legislature acts, only the rule itself can. This heightened sensitivity, however, cannot stem from any concern about the relative political competencies of courts and legislatures because the Constitution binds both the same. It must stem instead from courts’ prudential concerns about the dangers posed by at-large voting systems and lessened adherence to equipopulousness.

This difference in “political authoritativeness” may worry the Court for another reason. Under the remedy rules, courts are never free to “make” the policy choices underlying redistricting decisions,

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but must discover and faithfully apply the state's own choices. While the creation of state policy is political, its discovery and application presumably should not be. Political authoritativeness should thus be irrelevant to the courts' task, which is merely to apply determined state policy. The Court's concern, however, may reflect doubt over whether things really work this way. Does discovering and applying policy greatly differ from creating it? Is the courts' task any less political than the legislatures'? Given the difficulty of meaningfully reconstructing the content and strength of state legislative policy, the Supreme Court is right to worry about whether lower courts can really ascertain what the state would have done. To the extent they cannot, there is less reason to deviate from strict equality of population or to employ voting systems that tend to submerge minority interests. In this view, the courts' lack of "political authoritativeness" warrants departing from state policy not because of any uncertainty in balancing identified policy against values embodied in federal law, but rather because of the fear that the courts cannot accurately determine state policy in the first place.\footnote{65}

2. Reasons for Doubt

The courts rightly doubt their ability to identify state policies in reapportionment, for this task is even more difficult than that of discerning the original intent behind statutes and constitutions, a task fraught with notorious problems.\footnote{66} For instance, in redistricting, the text itself, which contains the redistricting plan, provides little help in finding meaningful state policy. Scrutinizing the plan may tell the court whether the legislature generally respected politi-

\footnote{65 In Connor, id. at 414-15, the Court described the difference in "authoritativeness" as follows: [A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework for substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name. Id. (emphasis added). The difference in "authoritativeness," then, stems from the courts' inability to identify and weigh different state policies and to balance them against each other, not from any relative inability to reconcile these policies with federal law.}

cal subdivisions, followed some natural boundaries, and observed compactness and contiguity, but it tells the court little more and, in any event, nearly all legislatures follow most of these factors to some extent. The real issue is not whether the state follows these policies, but rather how much it weighs them against other policies and against each other. By finding a policy of respecting the integrity of political subdivisions and blindly following it, for example, a court may actually violate more important state policies that are difficult to discern from the face of the reapportionment plan.

If the court is to look outside the plan itself for policy, where is it to find it? Few would quarrel with allowing courts to read state constitutional or statutory reapportionment rules, but these are rarely helpful. They either give no guidance or give little idea of how the guidelines they do contain are to be balanced against each other and against other goals the legislature may consider. Looking to the legislative history of the redistricting plan poses similar

68 Examples of such policies include preserving existing communities of interest or preserving the balance of power in the legislature between the two major political parties.
69 The Hawai‘i Constitution, for example, gives many reapportionment criteria without telling how they should be weighed against each other. It states that reapportionment “shall be guided by the following criteria”:

1. No district shall extend beyond the boundaries of any basic island unit.
2. No district shall be so drawn as to unduly favor a person or political faction.
3. Except in the case of districts encompassing more than one island, districts shall be contiguous.
4. Insofar as practicable, districts shall be compact.
5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and, when practicable, shall coincide with census tract boundaries.
6. Where practicable, representative districts shall be wholly included within senatorial districts.
7. Not more than four members shall be elected from any district.
8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Haw. Const. art. IV, § 6. The first three criteria and the seventh are presumably absolute in the sense that a reapportionment plan can never violate them. The use of terms like “insofar as practicable” in the others suggests that a plan may violate these criteria to an uncertain extent. The constitution itself thus gives little guidance as to the proper mix of policy. Accord Vt. Stat. Ann. tit. 17, § 1903 (1982) (districts shall conform to one-person, one-vote rule and then “insofar as practicable” follow policies of (1) preserving existing political subdivision lines; (2) maintaining patterns of geography, social interaction, trade, political ties and common interests; and (3) observing compactness and contiguity).

The constitutions and statutes of some states, including Florida and Kansas, give no reapportionment criteria.
problems. If the legislative history exists, it is unlikely to weight the various policies it mentions. Because of their political sensitivity, many of the concerns most important to the legislative majority would probably never even appear in the legislative history. 70 Additionally, there are all the usual difficulties of imputing policy to the legislature as a whole on the basis of committee reports or statements made by individual legislators. 71

Some courts look beyond the plan and its legislative history to other legislative enactments for signs of state policy. Expanding the inquiry in this way leads to different problems. Following the latest decennial census, for example, Minnesota failed to reapportion its congressional districts. Because of population changes from the time of the earlier census upon which its districting plan had been based, the existing congressional plan failed to meet the strict one-person, one-vote standard. After the legislature failed to agree on a new plan, the district court imposed a new one, which created four districts with large urban majorities and four with large rural majorities. 72 The previous plan, however, had maintained rural dominance in all but one of the state's congressional districts by diluting most of the Twin Cities' vote among three different districts and packing the rest of their vote into one district with an overwhelming urban majority. The district court justified departing from the existing legislative plan on the ground that other recent Minnesota legislation, particularly the laws establishing a comprehensive regional planning agency, a regional metropolitan transit commission,

70 Davis v. Bandemer, 106 S. Ct. 2797 (1986), reveals the difficulty of determining policy from the legislature's actions and records. In that case, a conference committee composed entirely of Republicans reapportioned both houses of the Indiana state legislature. A private firm hired by the Republican State Committee performed the actual computer work of redistricting on the basis of information provided by the conference committee. No Democrats or outsiders had access to the equipment, the programs, the data provided by the committee, or the computer's output. The conference committee's proposal was introduced in and passed by both houses of the state legislature on the final day of the legislature's session. Democrats had only 40 hours to review the drafting of more than 4,000 precincts and debate was extremely limited. Bandemer v. Davis, 603 F. Supp. 1479, 1483-84 (S.D. Ind. 1984) (three-judge court), rev'd, 106 S. Ct. 2797 (1986).


a metropolitan revenue distribution authority, and a metropolitan council, demonstrated a "policy to recognize the metropolitan area as a distinct region of the State with unique governmental concerns." The district court was clearly right. Establishing these metropolitan authorities did recognize urban interests, but not necessarily in reapportionment. As a result of following state policy established in an arguably different context, the court fundamentally reallocated power in the state and forced incumbent congressmen to run in unfamiliar districts.

3. The Practice

Perhaps because of the difficulty of ascertaining state policy, the lower courts have adopted more definite guidelines to follow in reapportionment. The Supreme Court's boiler-plate may speak of deferring to state policy and of the courts placing themselves in the shoes of the legislature, but lower court practice is somewhat different. Unsurprisingly, the reapportionment values the lower courts most strictly observe are those embodied in the constitutional and statutory liability rules: population equality, avoidance of racial vote dilution, and, to a lesser extent, avoidance of partisan advantage. Next in importance lies a collection of geographic and structural criteria like compactness, contiguity, and respecting natural boundaries and political subdivisions. Less uniformly, courts sometimes

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28 Id. at 148.


26 The clearest and most forceful statement of this doctrine appears in Wyche, 635 F.2d at 1163 (5th Cir. 1981):

[After considering the requirement of one-person, one-vote, the district judge] must be mindful of the impact of a proposed plan on different racial groups. He must analyze the plan and determine that it does not dilute minority voting strength but he must avoid a strict proportionality brought about by the manipulation of district lines. He should fix boundaries that are compact, contiguous and that preserve natural, political
seek to preserve existing communities of interest and the core of existing districts.\textsuperscript{76} In a very few cases, they have even tried to avoid pitting incumbents against one another.\textsuperscript{77} Often they also will consider one or two policies important to the individual state.\textsuperscript{78}

Some of these criteria are more controversial than others. On the one hand, there can be little argument over whether liability standards should guide courts in reapportionment. The courts can, after all, hardly violate a set of rules to which they carefully hold legislatures. In fact, the courts have applied some of these rules more strictly to themselves than to the legislatures.\textsuperscript{79} On the other hand, use of the remaining criteria has provoked much controversy in the one area where they have been discussed: the related context of judging the fairness or legality of legislative plans.\textsuperscript{80} Proponents of


\textsuperscript{77} Jordan v. Winter, 604 F. Supp. 807 (N.D. Miss.) (per curiam) (seeking, among other things, to retain the core of existing districts and to create districts containing voters with similar interests), aff'd mem. sub nom. Allain v. Brooks, 469 U.S. 1002 (1984); Carstens v. Lamm, 543 F. Supp. at 82 (seeking to preserve communities of interest); Shayer v. Kirkpatrick, 541 F. Supp. at 934 (giving communities-of-interest criterion some, but little, weight); O'Sullivan v. Brier, 540 F. Supp. at 1204 ("[T]he loadstar of . . . analysis [is] the grouping together of as many major communities of common economic, social, and cultural interests as possible without breaking county lines, if the resulting district realignment would not result in unconstitutional population deviations"); South Carolina State Conference of Branches of the NAACP v. Riley, 533 F. Supp. 1178, 1180-81 (D.S.C.) (per curiam) (three-judge court) (seeking to preserve communities of interest and the core of existing districts), appeal dismissed, 459 U.S. 1026 (1982).


\textsuperscript{80} See supra text accompanying notes 56-63.

See Common Cause, supra note 67; Alfange, supra note 33, at 178-79; Lowenstein & Steinberg, The Quest For Legislative Districting in The Public Interest: Elusive Or Illusory?, 33 UCLA L. Rev. 16-20 (1985).
these additional criteria praise them for their "neutrality" and admire the way they comport with our basic notions of representation. The policy against fragmenting political subdivisions, for example, as well as the policy favoring the preservation of existing communities of interest, tends to promote representation of groups with certain shared interests. The geographic criteria, like compactness and contiguity, also serve to promote interest-based representation, although they did so far more effectively in the past when local communities were more cohesive and insular.

Much of the attraction of these criteria is purely negative. Their virtue lies not so much in what they accomplish as in what they prevent. Supporters point out that if a legislature follows these extra-liability standards, it will find it more difficult to gerrymander politically. In this view, the more strictly legislatures must follow these standards, the less room they will have to consider other, more objectionable criteria. Indeed, in some states the courts use these criteria to test for impermissible political objectives.

Critics point out that these criteria may make political gerrymandering more difficult, but hardly impossible. In an age of computers and detailed census data, the legislature can follow all these rules and still gerrymander effectively. More important, opponents argue that the criteria themselves are antiquated and arbitrary. In earlier times, when people travelled by horse and foot and the press was more localized, compactness and contiguity made sense. Then, campaigning was much easier in a geographically compact and contiguous region, and the press could more effectively report on campaign positions and other political activities in compact and contiguous districts. In recent years, with speedier transportation and the

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82 See Grofman & Scarrow, supra note 81, at 441.
84 Grofman, supra note 67, at 88 ("The commonly held view that reliance on formal criteria such as compactness or equal population can prevent gerrymandering is simply wrong."); Lowenstein & Steinberg, supra note 80, at 12-64.
85 The most forceful and extended criticisms of these criteria appear in Grofman, supra note 67, and Lowenstein & Steinberg, supra note 80.
rise of the regional press, these concerns have much less relevance. Campaigning in a sprawling district is no longer as difficult as it once was and the press is more likely to cover political activity over a larger area. Likewise, in an age of more limited geographical mobility and communication, defining the basis of representation geographically made sense. Much more than today, the geographic community would define the community of shared interests. Now, however, cultural, occupational, class, or ethnic ties, none of which are necessarily geographic, may provide a greater commonality of interest.

Although the arguments against using these criteria have some force in the liability context, they have little force where remedy is concerned. It is one thing to criticize the courts for requiring legislatures to follow these criteria when the legislatures' own policies might be equally valid. It is quite another, however, to criticize the courts for using these criteria when the legislature defaults and the courts must issue a remedy. A court must have some principles on which to redistrict and the above criteria, though not uncontestable, appear to be the most commonly accepted ones available. That they may foreclose use of other possible principles of reapportionment should not weigh against their use by courts unless the other principles have better reasons favoring their use in general. No one makes this claim. Furthermore, the argument that these criteria do not absolutely prevent political gerrymandering, while perhaps valid in the legislative context, has little relevance here. Since the courts cannot aim to advantage either political party, the uncertain prophylactic value of these criteria creates no difficulty.\footnote{But see Schuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325, 1329 n.25 (1987) ("question[ing] the . . . assumption that . . . federal courts are . . . immune from . . . effects of party politics").}

C. The Differences Between Legislative and Judicial Reapportionment

Although doctrine instructs courts to place themselves in the shoes of the legislature, the difficulty of meaningfully ascertaining state policy has led courts to approach redistricting differently from legislatures. Courts both adhere to the values underlying the liabil-
ity rules more strictly than legislatures must and courts generally follow geographical and interest-based criteria, which legislatures may, but are not required to, follow. Most generally, the difference between legislative and judicial reapportionment is that the legislature is confined by liability rules, which specify primarily what it cannot consider, while the judiciary is confined by remedy rules, which specify nearly all that it can consider. The important difference, then, between the two kinds of reapportionment lies in what liability rules permit that remedy rules forbid. In practical terms, what does a legislature consider in reapportionment that a court cannot? The next section explores this question.

II. The Aims of Legislative Redistricting

Legislatures, of course, often do consider those factors that the courts are limited to considering in redistricting. Most legislative redistricting plans, for example, exhibit some degree of compactness and contiguity and to some extent respect natural boundaries and the lines of political subdivisions. Some state constitutions and governing statutes, in fact, require the legislature to follow these criteria, particularly those, like compactness and contiguity, that promote the traditional geographical basis of apportionment. Some other factors, like preserving the existing balance between political parties and preserving historical boundaries, occasionally enter into the legislative judgment. One of the most important factors that the legislature may consider that the courts cannot, however, is one never expressly authorized by law and one only seldom admitted: protection of incumbents.

A. Incumbency Protection As a Legislative Goal

Legislative action to protect incumbency is hardly surprising. It has received little attention, however, partly because it is difficult to

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See Common Cause, supra note 67, at 80-127 (summarizing state apportionment laws); Grofman, supra note 67, at 177-83 (presenting table of state apportionment requirements).


One state, however, does not allow legislators to favor themselves. Iowa Code Ann. § 42.4(5) (West Supp. 1987).
distinguish between the legislative pursuit of private and public interests. In recent years, a growing literature in such diverse areas as law and economics and organization theory has explored the conflict between one's private interests and one's public role. The focus on agency costs in the law and economics literature, for example, reflects awareness of the conflict between the agent's responsibility to the principal and the agent's own self-interest. Whenever he might pursue his self-interest at the expense of his principal's interest, agency costs arise. Much recent discussion of takeovers in corporate law springs from the unavoidable conflict between management self-interest and the owners' interest in obtaining the highest return on their investment. In this view, the threat of takeover prevents management from pursuing its own interests at the expense of the owners'. If management impairs the corporation's value by pursuing management's own interests or by acting incompetently, an outsider will see an opportunity in the depressed share price, buy the corporation, and run it more efficiently. In this way, the market for corporate control disciplines errant, self-interested management.

The best application so far of this type of analysis to the political system is the use of organization theory to explain some of the pathologies of bureaucratic and political behavior. Organization theory's concern with the divergence between an organization's

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81 See, e.g., Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981).
83 Agency costs arise in the principal-agent relationship because the principal's interest and the agent's self-interest often diverge. The principal can limit such divergences by establishing appropriate incentives and penalties for the agent and by monitoring the agent's activities. Sometimes it will pay the agent to post a bond to ensure that he will follow the principal's interests. Even with the optimal level of monitoring and bonding, however, some divergence between the principal's and agent's interests will occur. Agency costs are defined classically as the sum of (1) monitoring costs, (2) bonding costs, and (3) any residual loss. Jensen & Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 308 (1976); see Fama, Agency Problems and the Theory of the Firm, 88 J. Pol. Econ. 288 (1980).
85 E.g. Easterbrook & Fischel, supra note 91; Manne, Mergers and the Market for Corporate Control, 73 J. Pol. Econ. 110 (1965); R. Winter, Government and the Corporation (1978).
86 R. Arnold, Congress and the Bureaucracy (1979); A. Downs, supra note 92; W. Niskansen, supra note 92; G. Tullock, supra note 92.
goals and those of the individuals who constitute it resembles the economic analysis of agency costs. Just as a firm's owners lose when management pursues its own interests at the expense of the owners', society loses when the management of a public agency pursues private goals, like increased power, wider jurisdiction, heightened public recognition, and plusher offices, at the expense of those goals Congress set or imagined for it. 97

The campaign finance literature also reflects this concern with agency costs. 98 Many proponents of increased regulation of campaign finance argue that deregulation would undermine representation itself. 99 Whether one believes that the representative is supposed to act as agent or trustee for his constituents, 100 the availability of private campaign contributions poses a threat that the representative will place the contributor's interests over the constituents'. Of course, there is no problem if these interests coincide or if the representative believes that the contributor does not want to affect his decisionmaking. Yet there is little reason to believe that the former is usually true, and the latter surely reflects a naive understanding of politics. 101 As Congressman Barney Frank once com-

97 In at least one respect, the agency cost problem is more worrisome in the bureaucratic context, since the "market for bureaucratic control" disciplines management less effectively than does its corporate counterpart. Whenever a different administration comes into office or the executive appoints a new agency head, a bureaucratic "takeover" occurs. The problem is that this market works less efficiently than does its private counterpart. Federal presidential elections, for example, occur only once every four years and there is no well-functioning "pricing" system to reflect how well the agency is pursuing the public's interest. Executive appointments may, of course, occur more frequently, but, at least in the case of independent agencies, the president's authority to remove agency heads is severely limited. See Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

98 Agency costs can be viewed as a form of political corruption which campaign finance regulation should guard against. See M. Johnston, Political Corruption and Public Policy in America 4 (1982); S. Rose-Ackerman, Corruption: A Study in Political Economy 7 (1978); Banfield, Corruption as a Feature of Governmental Organization, 18 J.L. & Econ. 587, 587-88 (1975); Nicholson, The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures, 65 Cornell L. Rev. 945 (1980).

99 They also argue that even the present limited regulatory scheme undermines this concept. See, e.g., Leventhal, Courts and Political Thickets, 77 Colum. L. Rev. 345, 362 (1977) (Restrictions are needed "to prevent the erosion of democracy which comes from a popular view of government as responsive only or mainly to special interests.").

100 These are the two predominant models of representation. See H. Pitkin, The Concept of Representation 144-56 (1967).

101 See L. Sabato, PAC Power (1984); Adamany, The New Faces of American Politics, 486 Annals 12, 25-32 (1986) (summarizing studies). But see BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Calif. L. Rev. 1045, 1083-84 (1985) ("Because it is the representative who will pay the price at the polls if his record is unacceptable to his
plained, politicians "are the only human beings in the world who are expected to take thousands of dollars from perfect strangers on important matters and not be affected by it."^{102}

Reapportionment provides an opportunity for legislators to pursue a different type of private interest. 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. Incumbency advantage effectively lengthens the electoral leash and allows legislators more freedom to roam away from the path their constituents would have them follow. In this sense, incumbency advantage works much like increasing the length of a representative's term of office. The longer the term, the less pressing the representative's worry about reelection, particularly at the term's beginning. In economic terms, redistricting can help create monopolies of political power in local areas. By making districts less competitive, redistricting heightens the barriers to entry by potential opponents.^{103}

The situation resembles that of a group of economic competitors who agree to segment a market on a geographical basis.^{104} Like the local economic monopolist, each political incumbent has a closed market for his product and can exact monopoly rents because he does not have to worry as much about competition. In the political context, these rents consist of an increased ability to deviate from the representational role. In other words, the representative can more fully pursue his private interests because he realizes that the district will tolerate higher agency costs. And the more difficult entry is for a potential competitor, the larger the rents — the tolerated agency costs — that the incumbent can exact from the constituents. Monopoly and agency costs are reciprocal in this context.

\[^{102}\text{L. Sabato, supra note 101, at 126 (1984).}\]
\[^{103}\text{But cf. Schuck, supra note 86, at 1337-47 (denying similar argument in context of partisan gerrymandering).}\]
Describing incumbents who advantage themselves through redistricting as political monopolists may at first appear inapposite. Although both traditional economic monopolists and their political counterparts rely on barriers to entry to maintain their position, the barriers are completely different. The economic monopolist achieves its position through barriers, like initial high capital investment requirements and licensing requirements, which are exogenous to consumers’ preferences. The political monopolist, on the other hand, relies on barriers defined by the aggregation of consumer preferences themselves. Such endogenous barriers raise no concern in economic markets. In fact, they represent nothing more than the disadvantage of having to compete with someone who has a better product. This presents no danger to society so long as other producers are free to enter the market.

Endogenous barriers do sometimes raise concern in political markets, however, for two reasons. First, voting involves the aggregation of individual preferences through a social decision rule and imposes the resulting social preference on all voters regardless of their individual desires. Individual purchasing on the market does not. In the political context, one cannot claim the right to have one’s own preferences control in the face of a different social preference. Such a demand would make representation of large groups of people impossible. One can, however, claim the right to have one’s vote fairly counted in the aggregation process. Formalistically, this right encompasses nothing more than access to the poll. More substantively, it encompasses the right not to have one’s vote aggregated with others in a way designed to minimize its influence. Under this approach, incidentally reducing a particular vote’s influence by districting according to traditionally legitimate factors, such as compactness and contiguity, would cause no problem. But reducing a particular vote’s influence merely to reduce its impact on an election would. In other words, most endogenous barriers would pose no problems, but those few reflecting a purpose to disadvantage a particular group would.

Second, and more important, this type of endogenous barrier to entry works ultimately by relying on exogenous ones. By drawing district lines to his own advantage, an incumbent usually aims to minimize the threat of competition from the other party. Creating an endogenous barrier to entry thus shifts the arena of competition
from the general election to the party primary. As long as competition occurs there, the seat would still be contestable in an important sense. The problem is that other forms of incumbency advantage, like the franking privilege in congressional elections, control over party machinery, and large fundraising advantages, make competition in the primary even more difficult than in the general election.\textsuperscript{108} In fact, primary competition, at least for federal representatives, is much rarer than competition in the general election.\textsuperscript{106} As one academic who himself lost a primary election has stated: "The lesson here seems quite clear. Incumbent members of Congress are difficult to beat. If they are difficult to beat in general elections, they are even more difficult to beat in primaries. Therefore, the smart politician does not try."\textsuperscript{107} The result of incumbency advantage in reapportionment appears to be to shift competition from one arena to another with even greater structural barriers to entry. Even if it is an endogenous barrier that causes this initial shift, the overall result is to restrict competition because of factors exogenous to the individual voter’s choice.

The two other major differences between local economic monopolies and political ones suggest that social concern should be greater in the political context. First, the lack of substitutes for political power heightens the danger of monopoly. For example, although a coffee distributor may enjoy a local monopoly, the extent to which he can appropriate consumer surplus is limited by the consumer’s ability, at little cost, to switch to a different drink: tea. If tea and coffee are perfect substitutes, in fact, no exclusive distributor of either product will be able to appropriate any consumer surplus, for any move towards monopoly price in one product will cause demand to shift to the other product.\textsuperscript{108} In economic terms, the two comprise a single relevant market. In politics, however, the con-

\textsuperscript{106} L. Maisel, From Obscurity to Oblivion: Running the Congressional Primary 141 (rev. ed. 1986).

\textsuperscript{108} In the election years 1978, 1980, 1982, and 1984, for example, an average of 40 ultimately successful incumbents ran without opposition in either the primary or general elections; an average of 13 ran without opposition in the general election but faced opposition in the primary; an average of 211 ran without opposition in the primary but faced opposition in the general election; and an average of 93 faced opposition in both races. Id. at 140.

\textsuperscript{107} Id. at 141.

\textsuperscript{108} See generally H. Hovenkamp, supra note 104, at § 3.3.
sumer of representational services — the constituent — cannot easily switch to any other "product." Since politics has no good substitutes, the constituent must vote with his feet to seek the only alternative: representation in a different district.109

Second, the impossibility of cheating on the agreement to segment the political market geographically alsoheightens the dangers of political monopoly. In the economic context, cartels dividing a market geographically are restrained somewhat by the various cartel members' ability to cheat on the agreement defining the boundaries of their markets.110 A cartel member in one area may secretly sell in another, thus depressing to some extent the prices one of the other members may charge. This type of cheating not only pushes prices down towards their competitive level but also creates distrust which helps undermine the marketing agreement itself. This is particularly true when violations are hard to detect and when there is no effective way to enforce the agreement even when violations are detected. In politics, however, the situation is different: cheating on the cartel agreement involves voting fraud.111 Because the territorial divisions are voting districts specified by law, selling to someone in a different area requires that the constituent vote for someone she is not entitled to. Far from refusing to enforce agreements that create territorial divisions, the law itself protects them.

Reapportionment is an attractive way for an incumbent to capture constituent surplus for two reasons. For one thing, it combines low visibility with significant effects. Although the press sometimes reports on it, reapportionment that favors incumbents appears to enjoy relatively little popular interest112 and it often occurs secretly

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109 As Charles Tiebout has argued, voters can "shop" for public goods, including representation. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956). In order for this type of shopping to make the market work efficiently, however, voters must be fully mobile, have full information about representatives' behaviors, have many representatives to choose from, and not be prevented from moving by employment and personal commitments. See id. at 419. Finally, representation itself must create no cost or benefits outside the individual district. Id. In practice, none of these conditions is more than partially met and some, like the last condition, are hardly approached at all.

110 Id. at 89.


112 Some reapportionments, of course, draw much public interest, but these appear either to involve political gerrymandering or have been the subject of court scrutiny. In both cases, the reapportionment plan is newsworthy in a way that a plan protecting incumbents is not. Political gerrymandering pits one state political party against the other and the loser is apt to try to publicly expose the plan as
where it is hard for the press to follow. This combination of low accessibility and low popular interest makes reapportionment an unlikely target for extended press scrutiny. By contrast, campaign contributions are relatively visible, at least in federal elections. Because of the disclosure laws regulating federal elections, the press can easily find out who contributed a substantial amount to whom or how else someone has spent money.\textsuperscript{113} Second, responsibility for reapportionment falls diffusely. Unlike a campaign contribution, which is focused on an identifiable incumbent, reapportionment involves the legislature as a whole or at least a majority of it. This difference makes blame difficult to pin on a single incumbent, especially since his interests may have been protected by a special committee to which he did not belong.

One might expect that political parties and other interest groups within the legislature would act to prevent this kind of monopolization. In this view, incumbency protection would pale as a goal when parties and other groups try to reapportion to their own group advantage. The only incumbents protected in pursuit of these other goals would be the ones of the party or of the groups who won the reapportionment battle. Other incumbents could expect their seats to become more competitive against them since this would advantage those who won in the legislature.\textsuperscript{114} Unfortunately, this view has several problems. For one thing, it can work well only if the same party or group controls both houses of the legislature and the governorship. Whenever control is split, one party or group can block the other. For instance, a plan favorable to Democrats passed by a Democratic legislature likely would be vetoed by a Republican governor. In addition, equal protection forbids extreme forms of political gerrymandering. Although less extreme forms are permissi-

\textsuperscript{113} The Federal Election Campaign Act requires political committees to identify all contributors (along with the date and amount of the contribution) of more than $200 to campaigns of federal candidates. 2 U.S.C. § 434(b)(3) (1983). The Federal Election Commission makes these records available for public inspection. Id. at § 438(a)(4).

ble, the fear of a court striking down a plan and imposing another may create a chilling effect which works against the legislature taking some milder forms of political advantage.\footnote{116} Most important, political science studies suggest that legislators will seek to advantage themselves before their party or any other group to which they belong.\footnote{116} One recent study shows that in the post-1980 congressional reapportionments, legislatures were nearly one-and-a-half times more likely to pursue incumbency protection than party advantage.\footnote{117} This result is particularly striking since the incumbency effects were indirect — that is, the incumbents advantaged were not the state legislators who reapportioned, but rather incumbent federal congressmen. The only incentives state legislators had to protect federal incumbents were informal ones, such as loyalty to political party, personal friendships, and political debts.\footnote{118} Incumbency protection can be of only greater concern when the state legislators’ own seats are affected.

Other studies confirm the importance of incumbency in reapportionment. One might think, for example, that incumbents would fear reapportionment because it might require them to compete for voters who would not recognize their names and who might prefer policy positions different from those the incumbent previously took. Reapportionment that did not look to incumbency could certainly have this effect. Two studies of the post-1970 congressional reapportionments suggest, however, that the control incumbents have over the reapportionment process, even when only indirect, may make redistricting attractive. One study reveals that congressional turnover rates actually declined immediately after the post-1970 reapportionments.\footnote{119} The other finds that the overall competitive-


\footnote{117} Cain, Assessing the Partisan Effects of Redistricting, 79 Am. Pol. Sci. Rev. 320, 331 (1985); accord Schuck, supra note 86, at 1375-76 (speculating that incumbency advantage may be more important to legislators than party advantage).

\footnote{118} Ayers & Whiteman, supra note 114, at 310. This study finds that of the 44 states entitled to more than one congressional district after the 1980 decennial census, 8 retained their existing districting plan; 18 others pursued incumbency protection as the dominant value; 13 pursued party advantage; 4 pursued racial goals and 1 pursued ideological ones.


ness of congressional seats similarly declined in this period.\textsuperscript{120} Both suggest that redistricting, far from necessarily harming incumbents, may present opportunities for them to increase their sway. Instead of lowering the barriers to entry facing potential opponents, changing the electoral base may sometimes actually raise them higher than before.\textsuperscript{121} One political scientist reports, in fact, that some redistricting computer programs available to states in the early 1970s were designed to maximize incumbency advantage within the constraints imposed by liability rules.\textsuperscript{122}

B. Incumbency Protection as a Social Value

Commentators divide over whether incumbency protection endangers democratic politics.\textsuperscript{123} Critics argue that in addition to undermining representation by allowing the representative to pursue his own private interests at the expense of his constituents', incumbency protection can damage the heart of the democratic process. In this view, uncompetitive districts lead to political apathy and alienation as voters no longer feel that their participation matters.\textsuperscript{126} When the constituent believes that his vote is ineffective, he loses faith in the political process and democracy suffers, even if the representative faithfully performs his role. In one sense, political apathy and alienation pose a more fundamental threat to the legitimacy of government than do representatives pursuing their own private interests. Since both these feelings weaken any notion of consent of the governed upon which the twin ideas of political obligation and governmental legitimacy rest, political apathy and alienation threaten the very underpinnings of classical liberalism, our reigning political theory.

Other commentators recognize these arguments but argue that in-

\textsuperscript{121} Id. at 551-53.
\textsuperscript{122} Id. at 554.
\textsuperscript{123} Representative critics include Common Cause, supra note 67, and Weinstein, Partisan Gerrymandering: The Next Hurdle in the Political Thicket?, 1 J.L. & Pol. 357, 378 (1984). Those who question the critics' position include Alfange, supra note 33, at 224-28, and Lowenstein and Steinberg, supra note 80, at 44-49.
\textsuperscript{126} Common Cause, supra note 67, at 23.
cumbency protection has several good effects. First, it promotes experience in the legislature, which enables the legislature as a whole to work more effectively. Representation, like most other functions, requires knowledge and skills, some of which can be learned only on the job. Experience thus aids representation. Furthermore, if the legislature allocates power among its members according to seniority, continued incumbency can bring distinct benefits to the representative's individual district. Second, incumbency provides some stability. Continuity of membership may provide some continuity of policy from one legislative session to the next, which would allow constituents to plan their affairs. Third, incumbency protection can prevent small swings in the popular vote from having huge effects on the composition of the legislature. If, for example, every seat in a state legislature were perfectly competitive, a small swing of votes away from a prior small majority in each district could replace every representative in the legislature. The political effect of such a change would be tremendous. On the other hand, if incumbents of different persuasions were protected, diverse views would remain represented in the legislature despite small swings.

Commentators have also argued that incumbency protection has a "reverse" advantage: it helps keep the legislature from considering other, less savory, factors. The more strongly a legislature pursues incumbency goals, for example, the less flexibility it will have to engage in political or racial gerrymandering. In many cases, pursuing the one goal will partially oust the others. Incumbency pro-

126 Alfange, supra note 33, at 224-28; Lowenstein & Steinberg, supra note 80, at 44-49.
127 Alfange, supra note 33, at 226-27; Dixon, Fair Criteria and Procedures for Establishing Legislative Districts, in Representation and Redistricting Issues, supra note 33, at 17; Lowenstein & Steinberg, supra note 80, at 45.
128 Lowenstein & Steinberg, supra note 80, at 39-40.
129 Grofman & Scarrow, supra note 81, at 446; Lowenstein & Steinberg, supra note 80, at 39-40.
130 Andrew Hacker best describes how pursuing one goal makes others more difficult:

Gerrymandering is [still] possible when districts are equal in size. . . . Indeed, the artistry of the political cartographer is put to its highest test when he must work with constituencies of equal population. At such times, his skills can be compared to those of a surgeon, for both work under fixed and arduous rules. However, if the mapmaker is free to allocate varying populations to different districts, then the butcher's cleaver replaces the scalpel; and the results reflect sharply the difference in the method of operation.

tection also frustrates political gerrymandering more directly by ensuring reelection of incumbents of both parties.\textsuperscript{181} It may preserve existing partisan advantage, but it does not exacerbate it.

Finally, at least one commentator has argued that making elections competitive increases the difficulty of recruiting strong candidates.\textsuperscript{183} In this view, a candidate who knows he will have to campaign hard in future elections will be less willing to run for office in the first place. This argument assumes that the demands of campaigning and raising money are so heavy that denying the incumbent advantage would make the job unattractive. According to this view, a built-in advantage in future elections is necessary to make the job worth the initial effort to some of the most qualified people.

All these arguments have a flip side, however, for they ignore values at least equal in importance to the ones they champion. A legislature composed largely of "experienced" legislators might know better how to pass laws, how the agencies of government operate, and how to serve constituents, but new blood and, more important, new ideas would be missing. Similarly, a legislature based upon the ideal of stability might produce more consistent policy over time, but could it produce dynamic and considered change when necessary? Experience and stability are not, as the defenders of incumbency advantage suggest, absolute goods.\textsuperscript{183} The legislature needs a varying mixture of old hands and new blood to strike the right balance between change and continuity. There is no reason to believe that favoring incumbents strikes this balance better than not considering incumbency at all.

One might be suspicious of the arguments for experience and sta-

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  \item[181] B. Cain, supra note 33, at 159; Alfange, supra note 33, at 225.
  \item[183] Alfange, supra note 33, at 226.
  \item[183] James Madison argued in the Federalist Papers that a balance between energy and stability was necessary for good government:
    
    \begin{quote}
      Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government. . . . \textit{Energy in government} is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government. \textit{Stability in government} is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society.
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\end{footnotesize}
bility for another reason: they smack of the economic monopolist's traditional justifications for monopoly power. Monopolists have historically defended their position by claiming that their dominance improves customer service and promotes market stability by preventing so-called "cut-throat" competition. It is all for the customers' benefit, they argue; their own gain is selfless and purely incidental. Economists rightly question these justifications. They point out that in most situations the competitive market ensures the most socially beneficial level of stability, service, and cost. To economists, "promoting market stability" is little more than a euphemism for appropriating consumer surplus. It politely masks the monopolist's ambition for extra-competitive profits at the expense of social welfare. In the political context where constituent surplus represents minimized agency costs — in particular the faithful adherence of the representative to his role — one should be at least as suspicious of self-serving euphemism as is the economist.

One should question the other defenses of incumbency advantage just as much. For instance, although it is true that in perfectly competitive districts small swings of the vote from one party to another may result in a large change in the composition of the whole legislature, this small theoretical possibility is no reason to favor incumbents. Failing to systematically favor incumbents is not the same as affirmatively disfavoring them or even trying to neutralize their advantage. Simply ignoring the goal of incumbency advantage could be expected to produce a mix of highly competitive, less competitive, and uncompetitive districts rather than just the perfectly competitive districts some of the commentators may fear. The overall composition of the legislature, then, would not be likely to change dramatically with small swings or perhaps even larger swings in the popular vote. Even if this were a small danger and one wanted to ensure that different viewpoints would continue to be represented in the legislature despite small swings in the vote, this insurance comes at a high price. Protecting incumbents perpetuates the effects of any prior racial and political discrimination. Moreover, since protecting incumbents preserves only those viewpoints already existing in the legislature, it would stifle new voices. It trades away the possibility of a new diversity to ensure the continuation of an existing one. The commentators point to no normative theory supporting this choice.

The "reverse" advantage incumbency protection supposedly pro-
vides is also suspect. Although it is true that promoting incumbency makes it more difficult — though not impossible — to promote other, less savory goals, like discrimination against racial and political groups, so does pursuing many other values like compactness, contiguity, and all the other geographical and interest-based factors courts usually consider in redistricting. In fact, following almost any arbitrary goals would have this same “reverse” advantage. Districting alphabetically, for example, by apportioning representation according to the first letters of voters’ last names would make gerrymandering along political and racial lines even more difficult. Yet, this fact would hardly justify such an arbitrary basis of apportionment.

One should also view with some suspicion any arguments defending incumbency advantage on the ground that it frees representatives from the drudgery of casework and the hassles of campaigning. For one thing, if the voters’ themselves view the representative’s role as including constituent service, it is unclear whether casework really represents a “distraction.” Even if one believes that it does, however, the supposed benefits of incumbency advantage do not necessarily follow. To the extent incumbency protection frees the representative from casework, it also frees him from the rest of the role that his constituents imagine for him — in other words, all the aspects of representation as they define it, including legislation. Unless defenders of incumbency protection can persuade us both that the role the representative defines for himself is somehow better than that imagined by his constituents and that he would actually pursue this role rather than his own private interests, they cannot win their argument.

The campaign finance and campaign burdensomeness justifications for incumbency protection are equally as troubling. First, even if representatives do spend too much time raising money for their reelection campaigns and must indebted themselves to the interests that fund them, incumbency protection proves a poor solution. Like the most effective solution to this particular problem, life tenure for representatives, incumbency protection undermines democratic ac-

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\[1\] In fact, this rule is so strict that such gerrymandering would become impossible unless there were some surprising correlation between race and politics, on the one hand, and the alphabet, on the other.
countability. It may cure the disease, but it kills the patient. Second, it may be true that the rigors of campaigning impose burdens that discourage many potential candidates from running and that distract elected representatives from performing their proper roles, however they are defined. These facts by themselves, however, do not provide an argument for favoring incumbents. For one thing, it is unclear that the burdens of future campaigning discourage potential candidates more than incumbency protection itself does. A potential candidate who believes that every election after his first will be a walk-over may well be more eager to run in the initial election for that reason. At the same time, however, he will realize that incumbency protection will make the first election itself more difficult. The tradeoff is clear: protecting incumbents makes future elections easier by making present elections generally more difficult. But which way does the tradeoff cut?

Even answering this question would not settle the larger issue because attracting good candidates is just one interest among many. The social cost of discouraging potential candidates, just like the social cost of diverting representatives’ time and energy away from casework and legislation, must be balanced against the social costs on the other side: those, like increased agency costs, that derive from protecting incumbents. To decide whether society should protect incumbents, one must look at all sides of the issue and take into account all the social costs, many of which run in different directions.

Luckily, it is unnecessary to settle this issue for the purposes of the article’s larger argument. Even if incumbency advantage is socially beneficial, the article’s description of how the remedy process works still holds. The article has discussed the value of incumbency protection at such length, not because it is necessary for describing the course the courts have taken in remedy doctrine, but rather because it is necessary for judging how sensible that course is.

III. The Interplay of Legislative and Judicial Standards

As we have seen, the law constrains courts and legislatures differently. Remedy standards tell the courts what factors they must consider in redistricting, while liability standards tell the legislature what it must not. So long as it does not violate the one-person, one-vote rule, racially discriminate, or politically gerrymander too ex-
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...tremely, the legislature is free to consider many values that courts may not. One of the most important of these is protecting incumbency, and we should not be surprised that legislatures actually pursue it. Representatives, just like businesses, stand to gain from restricting competition. What remains to be seen is the effect that this particular difference between liability and remedy rules has on reapportionment. This inquiry may seem unrelated to the question originally posed — why has the issue of remedy in voting rights cases escaped discussion — but it is the different positions liability and remedy rules take towards incumbency protection that lead to the avoidance of the state-federal and legislative-judicial conflicts which would ordinarily raise concern.

A. Leading the Legislature to Police Itself

The gap between liability and remedy standards regulates reapportionment in a novel way. Most remedies for illegal legislative enactments work by enjoining enforcement or implementation of a statute. The court rules that the legislature acted unlawfully and stops the executive from carrying out the statute or simply serves notice that future courts will refuse to enforce it. Less often, the court will grant damages against the official who tried to enforce the statute or, in those few situations where the state may have waived sovereign immunity for statutorily authorized actions, the court will award damages against the state itself. All these different types of remedies have the effect of nullifying the law without penalizing the legislature either collectively or individually. Any damages paid come from the state treasury or the enforcement officials, if they are not insured or indemnified. The legislature and its members escape penalty completely.

The reapportionment remedy works quite differently. It achieves its effect not simply by invalidating the reapportionment plan — which it does — but also by penalizing individual legislators. When

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125 Tufte, supra note 120, at 552.
126 A court ruling striking down a statute can, of course, indirectly penalize a legislator by harming his public standing, just as a court ruling can sometimes boost it. Because these indirect effects vary according to the public support the statute enjoys and because other remedies, including ordinary tort remedies against private individuals, can generate these same indirect effects, I do not attempt to analyze them.
a court imposes a remedy, it redraws the lines to meet the strict remedy standards without aiming to protect incumbents. Thus, incumbents are more likely to find their seats at risk if a court acts. The difference between liability and remedy standards presents legislators with a simple choice: they can redistrict to protect themselves so long as they meet liability standards or they can risk losing this personal advantage by violating these rules. The gap between the standards thus imposes a penalty in foregone incumbency advantage on individual legislators when the legislature as a whole acts unlawfully.\footnote{Two remedy doctrines qualify this statement somewhat. The first, the rule giving legislatures the first crack at correcting invalid reapportionment plans, allows the legislature one chance, if it has time, to repair the plan. Thus, a legislature might reapportion unlawfully in the belief that, if it is caught, it can create another, lawful plan protecting incumbents before the court will step in. Such a strategy would be quite risky, however, because the legislature has no control over when a plaintiff brings suit and how fast the court will hear it. If filing deadlines for the next election are near at hand when the court strikes down the plan, the legislature will lose its opportunity to redistrict without penalty. The second doctrine, the one limiting a court’s remedy to the scope of the particular violation, also appears greatly to mitigate the penalty. This rule would appear to impose an incumbency penalty on only those legislators who will run in the unlawful districts, for it requires the court to leave the other districts and the incumbency advantage they bestow intact. As a practical matter, however, this rule has a limiting effect in only one type of reapportionment case. Since most one-person, one-vote and political gerrymandering claims are by their nature brought statewide rather than against individual districts, these types of claims visit the penalty on all legislators. Racial vote dilution challenges are admittedly different. Since they are usually made against individual districts, they would appear to affect only a few legislators. Remedies in these cases, however, often have ripple effects. A court often cannot satisfactorily reshape one district without redrawing others across all or large parts of the state.}

This penalty should have obvious effects in reapportionment. Realizing that courts will not protect incumbency, legislators can be expected to work hard to keep redistricting out of the judges’ hands and so will strive more than they would otherwise to satisfy liability standards. Only in this way can they work to save their own seats in the next election.

This incentive changes the character of legislative regulation completely. Instead of nullifying, replacing, or blocking the enforcement of an outcome of the legislative process — the courts’ usual means of regulation in this area — remedy doctrine serves to restructure the legislative process itself. By penalizing individual legislators if the legislature as a whole acts unlawfully, remedy doctrine reorders legislators’ private incentives so that the legislature is more likely to get things right on its own. It creates a sharp stick with which to
prod legislators if they fail to agree on a plan meeting liability standards and thus somewhat aligns their self-interest with the public good as defined by law. This approach represents a shift away from traditional regulatory technique towards self-regulation. By forcing legislators to pay for violating liability standards with their own incumbency advantage, the remedy rules lead the legislature to police itself.

This regulatory approach is both effective and anomalous. It works effectively because it places the penalty directly on the individuals responsible for the governmental action. It may, in fact, more effectively deter unlawful behavior than does traditional official liability for three reasons. First, the legislator must pay the penalty in a very dear coin. When a governmental official is held liable for illegal activity in a Bivens action\textsuperscript{138} or under section 1983,\textsuperscript{139} he must pay compensatory money damages to those injured. By forcing him to internalize the cost of his illegal actions, official liability deters him from violating the law in the future. Reapportionment liability, by contrast, exacts a penalty in incumbency. Although it is hard to place a monetary value on this penalty, if one assumes that one of a legislator's greatest goals is reelection,\textsuperscript{140} loss of incumbency advantage represents a heavy penalty indeed.

Second, the legislator, unlike ordinary government officials, has no way to shift the cost of liability. An ordinary government official faced with the possibility of liability may shift all or part of it in three ways: through (i) bargaining, (ii) indemnification, and (iii) insurance.\textsuperscript{141} Through bargaining, for example, a public employee can insist on a risk premium for work that involves a high exposure to liability. Police officers can thus bargain in advance to receive as added compensation the expected value of any future liability from suit. It may be difficult for some government officials to make such a bargain, but for legislators it is impossible. Politics will simply not

\textsuperscript{140} Schuck, supra note 86, at 1336 ("Legislators are manifestly self-interested; indeed, in most modern versions of liberal political theory, the legislator's desire for reelection is the fuel that drives and legitimates democratic representation.") (citing D. Mayhew, Congress: The Electoral Connection (1974)).
\textsuperscript{141} P. Schuck, Suing Government 82-88 (1983).
allow them to extract this kind of risk premium from the treasury. Indeed, legislators often feel unable to raise their salaries for less controversial reasons without uncomfortably increasing their political vulnerability.\textsuperscript{142} If only because of doubt about the social value of incumbency protection, a legislator would have a hard time invoking it in support of a special risk premium. Indemnification and insurance\textsuperscript{143} pose even greater problems. Since there is no way to pay a failed incumbent in the coin of elective office, only monetary indemnification or insurance would be possible. But if it is hard to imagine a politician arguing for an incumbency risk premium, a political argument for paying money to incumbents who lose an election is unthinkable. The legislators' inability to shift these costs should heighten the sting of the penalty.

Third, and most anomalously, federal common law immunity doctrines do not shield legislators in this situation. Because of social concern that penalizing public servants will chill vigorous decisionmaking,\textsuperscript{144} federal common law immunizes them in varying degree from suits for civil damages. Legislators, prosecutors, judges, and others exercising similar functions usually receive so-called "absolute" immunity.\textsuperscript{145} It protects them from liability for all acts performed "within the outer perimeter of [their] official line of duty."\textsuperscript{146} Other officials receive only "qualified" immunity,\textsuperscript{147} which protects them from liability for civil damages insofar as their performance of discretionary functions "does not violate clearly established statutory or constitutional rights of which a reasonable

\textsuperscript{142} Id.
\textsuperscript{143} Indemnification and insurance both shift liability to another source. The difference is that insurance can offer the plaintiff fuller recovery. Indemnification repays the government official whatever he paid the plaintiff. If he was wealthy enough to pay the whole judgment, indemnification repays all of it. If the official could satisfy only part of it, however, indemnification repays only that partial amount. The difference between the full judgment and what the defendant could pay remains unsatisfied — the plaintiff's loss. Insurance, by contrast, would satisfy the whole judgment — whether or not the official could have afforded to pay it — unless the terms of the insurance contract provide for co-insurance of some sort. Id. at 109; Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 Yale L.J. 1, 45-64 (1980).
\textsuperscript{144} See P. Schuck, supra note 141, at 88-89.
\textsuperscript{146} Barr v. Matteo, 360 U.S. 564, 575 (1959) (plurality opinion).
person would have known.” Together these immunities promote vigorous decisionmaking by preventing the victim from shifting the cost of injury to the official in the first place.

Under immunity doctrine, legislators are normally entitled to the highest level of protection. As long as they are acting “in the sphere of legitimate legislative activity” they are immune from civil damages. So important is this protection, in fact, that the Constitution partially enshrines it. Even though the Constitution nowhere mentions executive or judicial immunity, the speech and debate clause expressly protects congressmen from suit for speeches and debates and, by implication, for statements in reports, voting, and any other “thin[g] generally done in [Congress] by one of its members in relation to the business before it.” The incumbency penalty, then, appears quite anomalous. Since it is not a monetary penalty imposed under ordinary governmental liability doctrines, neither absolute nor qualified immunity shields legislators from it. They can neither avoid its cost nor shift it. Yet should not the same concerns apply? Should society not worry that imposing this cost so effectively will harm vigorous legislative decisionmaking?

A government official threatened by liability can try to protect himself in four ways: through inaction, delay, making a less risky decision, and formalism. In each case, the official becomes “passive,” makes socially suboptimal, but self-protective decisions, and thus causes a loss of social welfare. To avoid these dangers, officials must be able either to shift or to avoid liability or they must be penalized for acting passively. Federal common law has largely taken the former course by shielding officials from much liability. Where it has not, the legislature often makes formal or informal arrangements to shift liability instead. Federal and state law largely ignore the latter method — penalizing passive decisionmak-

149 Tenney v. Brandhove, 341 U.S. at 376.
150 The speech and debate clause states that “for any speech or debate in either house [Senators and Representatives] shall not be questioned in any other place.” U.S. Const. art. I, § 6, cl. 1.
152 P. Schuck, supra note 141, at 71-77. By “formalism,” Schuck means building an otherwise unnecessary record, increasing proceduralization, and practicing defensive decisionmaking.
153 Id. at 82-88.
ing—perhaps because existing principles of tort liability make such a course difficult and perhaps because such penalties could backfire by subjecting officials to more suits than they otherwise would suffer.\textsuperscript{184}

The incumbency penalty avoids all the dangers of ordinary official liability. In reapportionment, the first three forms of legislative passivity—inaction, delay, and making a less risky decision—themselves violate the liability rules and so would subject legislators to the same penalty that any unlawful reapportionment would. Inaction and prolonged delay in reapportionment, for example, most often lead to violation of the one-person, one-vote rule because the population has usually shifted within the jurisdiction from the time of the last census. Indeed, it was such passive malapportionment that originally led the Supreme Court to intervene in this area.\textsuperscript{185} Inaction and delay, moreover, impose their own incumbency costs because they prevent legislators from shoring up their districts for the next series of elections. And since legislators cannot substitute any other kind of action for reapportionment, any attempt to make a less risky decision will constitute inaction and lead to a penalty as before. In all these ways, reapportionment doctrine, unlike other areas of law, does penalize officials’ passivity.

Formalism, the last means of general avoidance, poses no danger for a different reason. Although it leads to no separate penalty for passive behavior, it does not help legislators avoid liability either. Trying to proceduralize reapportionment, building a record to support reapportionment decisions, and using more objective criteria for decisionmaking—all means of formalization which officials employ to protect themselves in other situations\textsuperscript{186}—offer no protection to legislators here, for the liability rules already minimize the importance of considerations like legislative motive, subjective judgment, and good faith, which formalization guards against.

Thus, in many ways the incumbency penalty represents a very effective deterrence mechanism. On the one hand, since legislators cannot avoid or shift it, it creates great disincentives against unlaw-

\textsuperscript{184} Id. at 77-79 (discussing problem of extending existing tort principles and subjecting officials to more suits).


\textsuperscript{186} P. Schuck, supra note 141, at 73-75.
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ful reapportionment. On the other, since it also penalizes self-protective behavior, it creates similar disincentives against socially suboptimal decisionmaking. By treating both unlawful and self-protective activity in the same way, the incumbency penalty deters effectively without chilling vigorous decisionmaking.

B. Obstacles to Self-Regulation

Despite the powerful incentives the rules provide for legislators to produce a plan satisfying liability standards, two common sources of difficulty may block agreement. First, the legislature may deadlock to produce no plan at all. When different parties control the different houses of the state legislature, it is sometimes impossible for them to agree on any plan. The impossibility stems not from any difficulty in meeting liability standards, for this is no harder in two houses than one. Rather, the impossibility springs from the incompatible partisan objectives of the different houses. The party in control of one house may wish to advantage itself in redistricting while the party in control of the other house may want to pursue the opposite objective. Since the constitutional prohibitions against political gerrymandering are relatively weak, each house may feel that it can pursue this strategy without great fear of court intervention. If deadlock prevents agreement, however, changes in the population distribution since the last decennial census will likely make the existing plan violate the one-person, one-vote principle and the courts will intervene. The choice, then, is between compromise and deadlock. If the different houses compromise, they will be able to achieve incumbency protection but no party advantage. If they do not compromise, the court will take the case and any incumbency protection or party advantage will be accidental.

The second obstacle to reapportionment is legislative-executive deadlock. Since the governor is elected from the state as a whole, reapportionment can in no direct way affect his incumbency. He is likely to weigh party concerns in reapportionment more heavily than does the legislature both because strong party support can make his job much easier and because he is often the party's de facto head. Thus, even if legislators of different parties reach a reapportionment compromise, the governor may not acquiesce. He may insist that members of his party weigh party concerns more
heavily then they would otherwise. Furthermore, because the composition of the legislature is so critical to the success of the governor’s agenda, it is difficult to imagine what the legislature could offer the governor to convince him to approve an apportionment plan against his interests. Presumably, the governor would demand passage of large parts of his agenda in return for his approval of such a plan. This price might well be too high for legislators of the other party to pay and thus might make agreement impossible. In addition, the governor’s knowledge that he would have no real way to enforce the legislature’s part of the bargain later might very well make him reluctant even to pursue a compromise.

IV. Conclusion

We can now offer an answer to the initial puzzle: why remedy doctrine, the most directly intrusive area of voting rights law, has raised the least concern. Part of the reason stems from the deference courts give to legislative plans. Once an apportionment plan has been found to violate the law, the courts give the legislature the first crack at correcting it. Only if the legislature fails does the court intervene. This measure of deference, together with the rule limiting the scope of the remedy to the scope of the violation, mitigates the force of court intervention to some extent.

Even more important, however, is the unique regulatory approach taken by the courts in this area. Instead of merely invalidating unlawful results of the political process, the courts restructure the political incentives to which legislators respond. By threatening legislators with the loss of incumbency protection, the courts turn a private interest of doubtful social value to society’s advantage. This approach is at once both deferential and deeply intrusive. It is deferential in the sense that it minimizes case-by-case court intervention in reapportionment; it is intrusive in that it deeply changes the structure of legislative politics. The mere threat of judicial intervention helps induce legislatures to apportion in accordance with the public values reflected in liability rules.

The lack of concern about remedy, then, may be explained, but perhaps still not justified. Should we worry less about this novel approach towards regulating the political process because it hides itself? If one believes that incumbency advantage has little or no
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social value, turning the private interests of legislators to the public's benefit should cause no concern. If, on the other hand, one believes that failing to protect incumbency entails significant social costs, it should cause worry. The article's goal is not to resolve this issue, but rather to show that the question of remedy resolves unexpectedly into it. Through a positive, descriptive approach towards the remedial process, I hope to have made fruitful normative argument possible.