THE BRIGHT SIDE OF PARTISAN GERRYMANDERING

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During conference deliberations for *Davis v. Bandemer*, a partisan redistricting case in which the majority party had gerrymandered its way to 57 percent of state house seats with only 48 percent of the vote, Justice O'Connor remarked that any politician who does not exploit the redistricting process for partisan purposes "ought to be impeached."[1] Few politicians today would lose their jobs under Justice O'Connor's standard. Indeed, redistricters in several states have broken from longstanding precedent with multiple mid-decade redistrictings, while aggressive partisan gerrymanders successfully helped dislodge minority party incumbents in Texas, Pennsylvania, and Michigan. Critics across the country responded by protesting that in a democracy, voters should pick their representatives, not the other way around.[2]

The United States Supreme Court nonetheless refused an invitation to intervene against partisan gerrymandering in *Vieth v. Jubelirer*.[3] Many hoped that *Vieth* would clarify the Court's decision of almost twenty years ago, *Davis v. Bandemer*, in which the Supreme Court initially announced the justiciability of partisan gerrymandering claims.[4] In the absence of a clear standard for unconstitutional gerrymandering under *Bandemer*, no redistricting plan had been invalidated as a partisan gerrymander during the eighteen years since the decision.[5] In *Vieth*, the

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1 THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 866 (Del Dickson ed., 2001) (quoting Justice Brennan's notes from Davis v. Bandemer, 478 U.S. 109 (1986)).

2 *See, e.g.*, Jay Bookman, *Democracy Backward Spells Trouble*, ATLANTA. J.-CONST., Feb. 28, 2005, at A11 (arguing that a system in which leaders choose their voters is "democracy backward").

3 Vieth v. Jubelirer, 541 U.S. 267 (2004).

4 Davis v. Bandemer, 478 U.S. 109 (1986).

5 The one caveat is that a district court found an unconstitutional partisan gerrymander in *Republican Party of N.C. v. Hunt*, No. 94-2410, 1996 WL 60439 (C.A. 4 Feb. 12, 1996) (per curiam) (unpublished decision). The Fourth Circuit reversed after Republican candidates for superior court judgeships, the gerrymandered plaintiffs below, won every contested seat in elections just five days following the district court decision. Republican Party of N.C. v. Hunt, 77 F.3d 470 (1996) (per curiam) (unpublished decision).

Court reiterated the justiciability of partisan gerrymandering claims but failed again to decide upon a meaningful standard for such claims.[6]

I argue that consideration of partisan gerrymandering is best served by distinguishing between two different strategies in legislative redistricting: (i) offensive gerrymandering; and (ii) defensive gerrymandering. Simply stated, offensive gerrymandering refers to a redistricting strategy aimed at making re-election more difficult for the opposition party. The gerrymandering is "offensive" in the sense that it attacks the opposition. In contrast, defensive gerrymandering refers to a redistricting strategy aimed at making re-election safer for one's own party. It is "defensive" in the sense that it defends what the redistricters already have. Without a doubt, offensive and defensive gerrymandering are related, often coincide, and are referred to alternately and collectively as partisan gerrymandering. However, I argue that distinguishing between the two, perhaps as opposing poles along a single continuum, illuminates discussion of partisan gerrymandering.

Once I distinguish offensive from defensive gerrymandering, several points quickly emerge. First, I argue that *Vieth* addressed only one component of partisan gerrymandering: offensive gerrymandering. It thus did not address incumbent entrenchment through defensive gerrymandering, the more important problem today in redistricting. *Vieth* cannot be blamed for doing nothing to curb incumbent protection—the issue was not before the Court in the case.

Second, *Vieth* is not all bad as a policy outcome, because offensive gerrymandering is not all that bad. I argue that defensive gerrymandering, by entrenching incumbents and reducing accountability, is the worst form of gerrymandering. In contrast, offensive gerrymandering decreases reelection security for incumbents of both parties. Incumbents, the least responsive class of candidates for office, are thus forced to become more responsive to the electorate. By allowing offensive gerrymandering to continue for the time being,[7] *Vieth* may have increased

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[6] *See Vieth*, 541 U.S. at 267. The legal upshot of *Vieth*, I would argue, is that *Bandemer* is still good law. *See* Daniel H. Lowenstein, Vieth*'s Gap: Has the Supreme Count Gone From Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J. L. & PUB. POL'Y 367 (2005).

[7] Last Term, the Supreme Court vacated and remanded another partisan gerrymandering case for further proceedings consistent with *Vieth*. *See* Jackson v. Perry, 125 S.Ct. 351 (2004), *remanded sub nom. to* Henderson v. Perry, No. 2:03-CV-00354-TJW (E.D. Tex. June 9, 2005) (holding again on remand concluded that the 2003 redistricting plan was constitutional), available at http://www.campaignlegalcenter.org/attachments/1396.pdf. The Court's summary affirmance in *Cox v. Larios*, 124 S.Ct. 2806 (2004), also signals that courts may be active in striking against partisan gerrymandering through "second-order" claims like one person, one vote. *See, e.g.* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 567 (2004) ("[W]hile *Vieth* essentially cuts off first-order political gerrymandering claims—that is, plaintiffs cannot get a plan struck down simply by showing that it constitutes an excessively partisan gerrymander—*Cox v. Larios* restores an opportunity for second-order judicial review of political gerrymanders.").

democratic responsiveness in an indirect way. The bright side of *Vieth* is that it did nothing to curb offensive gerrymandering, a healthy dose of which can be good, and it might help indirectly to reduce defensive gerrymandering, less of which would be great.

If *Vieth* had restricted offensive gerrymandering, redistricters would focus exclusively on entrenching themselves and their co-partisans in office. Partisanship in redistricting is inevitable. If limited in one direction, it must go somewhere else. Rather than pushing redistricting toward an exclusive focus on defensive gerrymandering, *Vieth* channeled redistricting toward healthier directions and left offensive gerrymandering unrestricted.

In Part I, I describe current developments in partisan gerrymandering and how *Vieth* disappointed critics dissatisfied with partisan gerrymandering today. In Part II, I distinguish between offensive and defensive gerrymandering as two different strategies of partisan gerrymandering. I argue that *Vieth* dealt only with offensive gerrymandering and therefore was unresponsive to the troubling problems of defensive gerrymandering. In Part III, I explain that a contrary decision in *Vieth* to restrict offensive gerrymandering actually would have led to more defensive gerrymandering, which is far worse. In fact, I contend that offensive gerrymandering has overlooked virtues that ought to be encouraged, most prominently the effect of countering the incumbency advantage.

Finally, in Part IV, I close by discussing new developments that suggest offensive gerrymandering may increase in the future. Party leaders at the national level in particular have become increasingly involved in redistricting matters and pushed state legislators to become more aggressive in gerrymandering offensively. These developments, coupled with *Vieth*, promise more offensive gerrymandering in the years to come.

I. TODAY'S WORLD OF PARTISAN GERRYMANDERING

A. CONTEMPORARY DISSATISFACTION WITH PARTISAN GERRYMANDERING

Popular dissatisfaction with partisan gerrymandering has reached an apex. The director of Common Cause Boston recently complained that partisan gerrymandering was "killing democracy."[8] The Economist editorialized that gerrymandering has transformed United States congressional races into a "travesty of democracy," whose sheer uncompetitiveness "takes one's breath away."[9] Proposals have popped

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[8] Pamela Wilmot, *Gerrymandering Began Here; Let's End It Here*, BOSTON GLOBE, Apr. 16, 2004, at A15.

[9] *Pyongyang on the Potomac?: The Congressional Elections*, ECONOMIST, Sept. 18, 2004, at 33-34.

up in several states to reform the process by taking redistricting authority away from partisan actors. Samuel Issacharoff has argued that redistricting conducted by partisan actors ought to be held unconstitutional per se.[10]

The first of two major complaints about redistricting is that partisan gerrymandering has virtually eliminated competitive elections.[11] Redistricting by self-interested politicians in many states has helped ensure that they face little serious opposition from challengers. Incumbents rig their re-election prospects by packing their own districts with friendly voters, which scares off or trounces challengers attempting to take their seats. As a result, many legislative races are one-sided, uncompetitive, or uncontested. The executive director of FairVote – The Center for Voting and Democracy characterizes recent U.S. House elections as "the least competitive in history."[12] Another commentator, the executive director of Common Cause, alleges the state of competition in congressional races to be "on a par with elections [in] Cuba and the old Soviet Union."[13]

In 2004, only five of 401 House incumbents running for re-election were defeated.[14] This 99 percent re-election rate was matched during the postwar era by only the 99 percent re-election rate in 2002.[15] In California, none of 153 congressional and state legislative seats at stake in 2004 changed party control.[16] One redistricting scholar called the California gerrymander "surely the most complete and effective . . . gerrymander in American history."[17] Moreover, congressional races in the past two election years were the least competitive in recent memory. The proportion of House races decided by competitive margins was lower in 2002 and 2004 than in any other election years during the postwar period.[18]

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10 *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 601 (2002) (arguing that "redistricting conducted by incumbent powers is constitutionally intolerable").

11 *See* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after* Vieth, 3 ELECTION L. J. 626, 626-27 (2004) (noting two principal concerns surrounding partisan gerrymandering in the run-up to *Vieth*: lack of competition and aggressive partisanship).

12 David S. Broder, *No Vote Necessary: Redistricting is Creating a U.S. House of Lords,* WASH. POST, Nov. 11, 2004, at A37 (quoting Rob Ritchie).

13 Wilmot, *supra* note 8.

14 *See* Alan I. Abramowitz, Brad Alexander, & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections* (paper delivered at the Annual Meeting of the Southern Pol. Sci. Ass'n, New Orleans, La., Jan. 6-8, 2005).

15 *See id.* at 2.

16 *See Governor Adds Propositions to His String of Success*, SAN DIEGO UNION TRIB., Nov. 4, 2004, at A20.

17 Jeff Jacoby, *Power to the People*, BOSTON GLOBE, Feb. 20, 2005, at D11 (quoting Alan Heslop of Claremont McKenna College).

18 *See* Abramowitz, Alexander, & Gunning, *supra* note 14.

The second, and distinct, complaint about gerrymandering is that partisanship has run out of control in the process. This complaint, as I will argue further in this article, is quite different from the first. The allegation is that the redistricting process is taking partisanship to unprecedented levels of viciousness in several states. Political actors are taking every advantage of their redistricting authority for the purpose of injuring their partisan opponents.

The claim is partisan gerrymandering produces redistricting that is unfair and biased overwhelmingly against the minority party. By fixing the district lines just so, the majority party in control of the redistricting process can dilute the minority party's vote and require the minority party to win more votes for the same number of seats. During the current redistricting cycle, Democrats alleged that Republicans went too far in exploiting their control of redistricting in a number of key states, including Pennsylvania, Michigan, Colorado, and Texas. Sam Hirsch argues that partisan gerrymandering "may well conspire to keep Republicans in the majority and Democrats in the minority for the next five Congresses—even if, nationally, Democrats repeatedly capture more congressional votes."[19] Citing what they saw as an egregious case in the recent Republican gerrymander of Pennsylvania, Democrats argued that it is "unconstitutional to give a State's million Republicans control over ten seats while leaving a million Democrats with control over five."[20]

The Republican redistricting of Pennsylvania was at the heart of *Vieth v. Jubelirer*. Following the 2000 census reapportionment, Republicans controlled the Pennsylvania General Assembly and held an eleven-to-ten advantage in the state's congressional delegation. At the strong urging of Republican national leaders, Pennsylvania Republicans locked out their Democratic counterparts from the redistricting process. After internal wrangling, the Republicans produced a new redistricting map that was expected to wrest away from Democratic control at least four, perhaps five congressional seats.[21] The minority leader for the Pennsylvania Senate, a Democrat, alleged angrily that "[t]his is strictly meant to guarantee as many Republican members of Congress as possible.[22] State House minority leader H. William DeWeese, also a Democrat,

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19 Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L. J. 179, 202 (2003).

20 Brief for Appellants at 23, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580).

21 Republicans expected the new map to produce a thirteen Republican-six Democrat split in the state's House delegation. *See* John M.R. Bull, *Congress District Re-Map Settled: GOP Dominated Legislature to Vote on Plan Maximizing Republican Strength*, PITT. POST-GAZETTE, Jan. 3, 2002, at A1; Thomas B. Edsall, *Republicans Gain in Pennsylvania's Redistricting Plan*, WASH. POST, Jan. 6, 2002, at A04.

22 John L. Micek & Jeff Miller, *GOP Readies Redistricting Vote*, MORNING CALL (Allentown, PA), Jan. 3, 2002, at A1, First Edition (quoting state senator Robert J. Mellow).

called the Republican gerrymander a "colossal bastardization" of the state's political landscape.[23] Ultimately, the Republican map expanded the Republican advantage over Democrats in the House delegation from one seat to five, from an eleven-to-ten ratio to a twelve-to-seven after the 2002 elections, in a state where registered Democrats outnumber registered Republicans.

B. *VIETH v. JUBILIRER*

Amid the popular outcry over partisan gerrymandering, the Supreme Court last Term decided *Vieth v. Jubelirer*.[24] *Vieth* addressed complaints by Pennsylvania Democrats about the partisan gerrymander executed against them and described above. The Court faced the question whether partisan gerrymandering can ever go too far as to warrant judicial intervention. As Justice Scalia's opinion in *Vieth* put it, "How much political motivation and effect is too much?"[25]

The Court's collective answer in *Vieth* was ambivalence, giving little guidance about what might constitute actionable partisan gerrymandering. The Court initially announced the justiciability of partisan gerrymandering claims almost twenty years ago in *Davis v. Bandemer*, the subject of Justice O'Connor's remark quoted above.[26] The Court in *Bandemer* articulated the justiciability of a legal claim for partisan gerrymandering but failed to identify a neutral baseline against which courts and litigants could measure partisan unfairness. In *Vieth*, the Court again failed to formulate clear standards by which to judge unconstitutional gerrymandering. The Justices struggled to identify a judicially manageable distinction between permissible and excessive use of redistricting authority for partisan purposes.

On one hand, the Court refused to find excessive partisan gerrymandering under the facts presented in *Vieth*. The Court rejected the plaintiffs' claim of partisan gerrymandering in the Pennsylvania redistricting and affirmed the district court's dismissal of the case.[27] Indeed, Justice Scalia, speaking for four Justices, argued that partisan gerrymandering presented a political question that should be nonjusticiable per se.[28]

On the other hand, Justice Kennedy, speaking for the Court on this point, refused to foreclose completely future recognition of a partisan gerrymandering claim. Although Justice Kennedy agreed that no judi-

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[23] John L. Micek, *GOP-run Legislature Approves Redistricting Map*, MORNING CALL (Allentown, PA), Jan. 4, 2002, at B2, First Edition.

[24] *Vieth* 541 U.S. at 267 (2004).

[25] *Id.* at 297.

[26] *See* Davis v. Bandemer, 478 U.S. 109, 109 (1986).

[27] *Vieth*, 541 U.S. at 305-06.

[28] *Id.*

cially manageable standard currently exists to adjudicate such claims, he also explained that the absence of judicially manageable standards today was no reason for the Court permanently to bar future claims of partisan gerrymandering.[29] Justice Kennedy urged caution and suggested that new technology and judicial experience might bring about a manageable standard to assess these claims.[30]

Vieth thus disappointed critics of partisan gerrymandering.[31] In the face of an obvious gerrymander that critics protested as "one of the most partisan plans anywhere in the country,"[32] *Vieth* did little to curb partisan gerrymandering. *Vieth* left in place the *Bandemer* standard for adjudicating partisan gerrymanders and left in place the Pennsylvania redistricting map imposed by the Republican party. As a result, *Vieth* promised to do nothing about the lack of competition in legislative elections or the escalating levels of partisanship in redistricting for a number of states.

II. OFFENSIVE AND DEFENSIVE GERRYMANDERING

The contemporary debate over partisan gerrymandering conflates two distinct concerns about partisan gerrymandering. In this Part, I develop the distinction between concerns about excessive partisanship on one hand and concerns about incumbency protection and uncompetitive elections on other hand. I argue that these concerns run in opposite directions on several counts and that *Vieth* addressed only the latter.

A. OFFENSIVE AND DEFENSIVE GERRYMANDERING AND THE TENSION BETWEEN THEM

Partisan redistricters are motivated to advance two principal goals. As Samuel Issacharoff put it, "at bottom, the gerrymander is a willful attempt to advance one's own interests and harm one's rivals."[33] First, the party in control of redistricting attempts to win over the seats held by the minority party—a tactic that I call offensive gerrymandering. Offensive gerrymandering encompasses the first complaint about partisan gerrymandering—vicious and excessive partisanship in redistricting.

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[29] *Id.* at 311 (Kennedy, J., concurring).

[30] *Id.* at 312-13 (Kennedy, J., concurring).

[31] *See, e.g.*, Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 433 (2004) (noting that *Vieth* "did little to stem the concern over the loss of competitive accountability in American politics"); Jeffrey Toobin, *The Great Election Grab*, THE NEW YORKER, Dec. 8, 2003, at 63 (citing *Vieth* as the "one chance to change the cycle").

[32] *Redistricting: Six House Democrats Pitted Against Each Other in Pa.*, CONGRESS DAILY, Dec. 11, 2001, *available at* 2001 WL 29917909 (quoting state senator Allen Kukovich, a Democrat).

[33] Issacharoff, *supra* note 10, at 612-13.

In offensive gerrymandering, the majority party attacks minority party incumbents, a strategy that requires the majority party to transfer enough reliable majority party voters into the districts of those targeted incumbents.[34] Moving majority party voters into districts held by the minority party makes those seats less secure and weakens those incumbents' chances for re-election. The majority party rigs the redistricting map systematically to place the minority party at a disadvantage, and take away the minority party's seats.[35]

The second and distinct goal in partisan gerrymandering is that the majority party aims to protect its seats—a tactic that I refer to as defensive gerrymandering. Defensive gerrymandering thus encompasses the second complaint about partisan gerrymandering—incumbent protection and uncompetitive elections. When gerrymandering defensively to insulate one's own incumbents, the majority party increases the likelihood of retention by moving majority party voters into its incumbents' districts. As the number of reliably friendly voters in an incumbent's district increases, the safer the incumbent becomes for the next election. Defensive gerrymandering helps insulate incumbents from serious challenges. It has also contributed to the overwhelming re-election rate in the U.S. House.[36]

Offensive and defensive gerrymandering are intrinsically in tension. Both strategies operate on the assumption that the majority party has a finite number of secure party voters upon which it can rely. To gerrymander defensively, the majority party needs to keep its voters in its own incumbents' districts to reinforce their chances of holding these seats. However, to gerrymander offensively and defeat the minority party's in-

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[34] Redistricters can estimate the probability, based on their demographic characteristics and voting profile, that voters will vote for a particular party. Although redistricters cannot predict people's votes with absolute certainty, "in-party" or "out-party" voters are voters who carry a higher likelihood of a particular vote choice. The availability of rich demographic data on individual voters makes this task easier and more precise than ever. *See* Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 GEO.WASH. L. REV. 1070 (2005) (describing the major parties' development and use of sophisticated voter databases).

[35] Another offensive gerrymandering tactic, not discussed in this Article, is arranging district lines to force minority party incumbents to run against other incumbents or in unfamiliar districts. This tactic is called several different names, including "pairing," "kidnapping," and "shacking." It can be effective in injuring opposition incumbents without affecting the majority party's ability to protect its own incumbents. The Pennsylvania gerrymander, described above, forced six incumbents, five of whom were Democrats, to run against one another.

[36] *See* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 127-205 (2002); *but see* Stephen Ansolabehere & James M. Snyder, *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L. J. 315, 328-29 (2002) (finding similar incumbency advantage in statewide gubernatorial elections).

cumbents, redistricters must do exactly the opposite with only a limited number of voters to redistribute.

Thus, at the margin, the majority party must choose whether to make its incumbents safer or make the opposition's incumbents less safe.[37] The majority party should prefer not to win any district by extremely large margins of victory because any vote not needed to keep an incumbent's seat could be a vote that helps defeat an opposition incumbent. It then can spread those otherwise wasted votes across other districts where they might boost the majority party's candidate from narrow defeat to narrow victory. If it hopes to maximize new seats gained through offensive gerrymandering, the majority party therefore must reduce the margin of safety for its own incumbents. The reward of more seats requires increased risk.[38]

In short, the majority party hopes to achieve an efficient distribution of its voters across districts.[39] When offensive gerrymandering is permitted, the majority party must balance between the goals of seats and security. Offensive gerrymandering forces redistricters to balance between making one's opponents more vulnerable and making one's own incumbents more vulnerable.[40] Offensive gerrymandering, as a

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37 Others have made a related claim that partisan gerrymandering is a self-regulating and inherently unstable strategy in the sense that greater partisan bias built into a redistricting map brings greater risk that the map will disadvantage the majority party over time as demographics and voting preferences change. *See* BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 151-59 (1984) ("[D]emographic considerations such as whether the areas of growth or decline are in Democratic or Republican strongholds and whether existing trends will continue should affect the party's thinking"); *see also* Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). Recently, commentators have questioned whether gerrymandering is self-regulating. *See* Hirsch, *supra* note 19, at 210 (arguing that O'Connor's assumption in her *Bandemer* concurrence that gerrymandering is a "self-limiting enterprise" has been shown to be false in recent congressional-level gerrymandering).

I take no position on this self-regulation question, though I agree that advanced technology makes offensive gerrymandering far less risky for the majority party. I claim only that, at the margin, the majority party faces important tradeoffs between offensive and defensive gerrymandering, such that more of one requires less of the other and vice versa.

38 Between the major parties, redistricting is a zero-sum game. The Democrats can gain a new seat only by taking it away from Republican control, and vice versa. Of course, there are exceptions. When a state gains extra representation after reapportionment, new open seats that were previously unheld by either party become available. Conversely, when a state loses seats after reapportionment, one party loses seats without the other gaining any. However, in the main, redistricting requires a party to take from its opposition.

39 To maximize the number of seats, the majority party seeks efficiency in the sense that it needs to minimize the number of wasted votes. "Wasted votes" are votes inside a particular district in excess of the number needed to win the election. *See* CAIN, *supra* note 37, at 148; Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 321 (1985).

40 *See* Cox & KATZ, *supra* note 36, at 37-38; Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 543 (1994); *see also* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 786 (2004) ("In order to introduce partisan bias into a districting scheme, the party in control of

consequence, makes majority party incumbents proportionally less safe.[41]

Optimal partisan redistricting requires a careful balance between offensive and defensive gerrymandering. Aided by computer technology and rich demographic data, redistricters attempt to maximize the usefulness of every voter to reinforce a fellow incumbent or undermine an opponent. Clearly, redistricters achieve partisan gerrymanders that incorporate some offensive and some defensive gerrymandering, such that the offensive and defensive gerrymanders are not dichotomous types. A dose of defensive gerrymandering always accompanies offensive gerrymandering in ways that redistricters make more efficient every day. But depending on the case at hand, partisan redistricting might be directed more toward incumbent protection or more toward aggressive attacks on the opposition—there is no typical case. A successful partisan gerrymander accomplishes both competing goals to varying degrees, but whether a new redistricting map does more to increase partisan bias or protect incumbents depends on the tradeoff struck between offensive and defensive gerrymandering.[42]

B. *VIETH* AND OFFENSIVE GERRYMANDERING

Vieth addressed only one side of this redistricting tradeoff—offensive gerrymandering, but not defensive gerrymandering. The plaintiffs' claim in *Vieth* was that the majority party in charge of redistricting, the Pennsylvania Republicans, unfairly ensured that Republicans needed fewer votes to get the same number of congressional seats as would the Democrats. The Republicans redistricted such that their candidates would win by smaller margins but in a larger number of districts. And they made sure that the Democrats won fewer seats but by larger margins in each district. Republicans thus made their own party's distribution of votes far more efficient than the Democrats' vote distribution. This was the picture definition of an offensive gerrymander. Only offensive gerrymandering achieves this kind of partisan bias in redistricting.[43] Offen-

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redistricting generally is forced to make districts that it controls less secure and therefore more responsive to changes in the voting behavior of the electorate.").

41 *See* CAIN, *supra* note 37, at 87-89, 148-49. Of course, redistricters often can make any distribution of in-party votes more efficient to some degree without necessarily jeopardizing their own incumbents. However, at the margin, redistricters face tradeoffs and must make those tradeoffs to gerrymander for significant gains.

42 There is rarely a partisan redistricting without some efforts to protect majority party incumbents, or defensive gerrymandering. However, purely defensive gerrymanders, designed to protect majority party incumbents without any attempt to undermine minority party incumbents, are relatively common. In fact, I argue in Part IV that they are all too common.

43 "Partisan bias" refers to the "degree to which an electoral system unfairly favors one political party in the translation of statewide (or nationwide) votes into the partisan division of the legislature." Gelman & King, *supra* note 40, at 543. In other words, partisan bias measures

sive gerrymandering allows the majority party to spread its voters more efficiently than the other side, just as the Republicans did in *Vieth*.

The plaintiffs' complaint that the Republican distribution of votes was unfairly more efficient makes clear that *Vieth* was not about defensive gerrymandering. Defensive gerrymandering generally makes the distribution of votes less efficient. Incumbents win by larger margins, therefore less efficiently from their party's standpoint. Defensive gerrymandering may lock in the majority party's incumbents, but it does not reduce the number of votes the majority party needs for the same number of seats—the heart of the gerrymandering claim in *Vieth*. The *Vieth* plaintiffs did not complain that Republican incumbents were entrenched in their districts. Instead, they complained that Democratic incumbents were offensively gerrymandered out of their seats.

Indeed, the Court did not overrule or even mention in *Vieth* earlier decisions in which it repeatedly endorsed incumbent protection as a legitimate districting goal. The Court has treated offensive and defensive gerrymandering as clearly distinct, scrutinizing the permissibility of the former in *Vieth* but unconditionally approving of the latter. In *Gaffney v. Cummings*, the Court held that a redistricting scheme that divided the state of New Jersey into safe districts for incumbents of both major parties was perfectly constitutional.[44] The Court resolved that "judicial interest should be at its lowest ebb" when partisan redistricting splits the state among incumbents and achieves such a "more politically fair result."[45] Similarly, the Court repeatedly held in reapportionment cases that protection of incumbent legislators was a legitimate government interest to pursue in redistricting.[46]

The question whether redistricters could redraw district lines to protect incumbents, or could go too far in doing so, was not raised in *Vieth*. There was virtually no hope that *Vieth* would redress the noncompetitiveness of elections as a result of partisan gerrymandering. *Vieth* was nonresponsive to these important complaints. *Vieth* was squarely about the permissibility of offensive gerrymandering. On that question, *Vieth* stopped short of providing meaningful restrictions on the ability of redis-

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the extent to which a redistricting scheme requires one party to garner more votes than the other party to win the same number of seats. A highly biased system stacks the deck against the minority party and requires the minority party to win significantly more votes than the majority to take over control of the legislature. A neutral bias system treats both parties equally, requiring roughly the same number of votes to win the same number of seats. I argue for a more robust conception of responsiveness in Part III.C.

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

45 *Id.*at 753-54.

46 *See* Abrams v. Johnson, 521 U.S. 74, 84 (1997); Bush v. Vera, 517 U.S. 952,e964 (1996); Karcher v. Daggett, 462 U.S. 725, 740 (1983); White v. Weiser, 412 U.S. 783, 795-97 (1973).

tricters to undercut opposition incumbents and skew district lines for partisan gain.

III. FINDING A BRIGHT SIDE TO *VIETH*

Finding a bright side to *Vieth* demands an inquiry into whether judicial restriction of offensive gerrymandering would have produced a better state of affairs than what we have today. The bright side is that the Court's decision in *Vieth* helped direct redistricting toward marginally better outcomes than would have a decision to restrict offensive gerrymandering. I argue that offensive gerrymanders in fact offer overlooked and important benefits that I will describe in this Part. Conversely, restriction of offensive gerrymandering would have encouraged a further turn to defensive gerrymandering—a far worse state of affairs.[47]

A. HOW A CONTRARY DECISION IN *VIETH* WOULD HAVE PRODUCED MORE INCUMBENT PROTECTION

If offensive gerrymandering were restricted considerably, as the Court might have done in *Vieth*, the majority party would focus solely on the goal of entrenching its own incumbents. The majority party would not balance seats and security. Given that offensive and defensive gerrymandering are competing goals, a restriction in *Vieth* on offensive gerrymandering might have simply encouraged redistricters to pursue the unrestricted partisan goal of defensive gerrymandering as a substitute.

A contrary decision in *Vieth* to restrict offensive gerrymandering therefore would have guaranteed a nonaggression pact between the major parties in which neither threatens the incumbents of the other.[48] Without any incentive to trade off security for seats, the majority party would single-mindedly pad its incumbents' districts with surplus votes, thereby increasing the security of the minority party incumbents as well. The opportunity for offensive gerrymandering invites the majority party to place its incumbents at greater re-election risk in the pursuit of winning new seats from the opposition. Absent this temptation, the problem of incumbent self-protection simply gets worse than it stands today.

Why not prohibit both offensive and defensive gerrymandering? Samuel Issacharoff would go further to restrict both. He proposes that

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47 *Gaffney*, 412 U.S. at 735, featured a redistricting map that technically was drawn by a nonpartisan expert, but the resulting map is routinely cited as the classic bipartisan gerrymander. In *Gaffney*, New Jersey divided into safe districts for sitting representatives of both parties such that each party enjoyed roughly proportional representation in the congressional delegation relative to their voting strength.

48 I borrow the characterization of what I call a defensive gerrymander as "nonaggression pact between the parties" from Issacharoff, *supra* note 10, at 599 and Issacharoff & Karlan, *supra* note 7, at 572.

redistricting controlled by partisan actors should be unconstitutional per se.[49] He would remove redistricting authority from the political process and require nonpartisan decisionmakers to redistrict in a way that would force the major parties to compete in close races.[50] Issacharoff is correct to assume that political redistricting nearly guarantees partisan gerrymandering. But no court has ruled that the involvement of political actors in redistricting is in any way impermissible,[51] nor did the Court in *Vieth* come close even to suggesting that the basic choice to commit redistricting to political actors, by itself, is unconstitutional. Indeed, the Court in the past suggested almost the opposite that redistricting is a special responsibility of political institutions.[52] Remember as well that the goal of the plaintiffs in *Vieth* was not to cleanse partisanship of every kind from redistricting.[53] *Vieth* asked the Court to decide only whether one particular partisan goal, offensive gerrymandering, could go too far in redistricting. The Court accepted implicitly throughout that other partisan goals, most prominently defensive gerrymandering, might fill the void if offensive gerrymandering were restricted. Issacharoff's proposal was thus never on the table in *Vieth*.

The question, then, is whether *Vieth* channels strategic behavior by political redistricters into more structurally beneficial directions than they otherwise would pursue if offensive gerrymandering were restricted. My answer is that *Vieth* does so. *Vieth* helped promote responsiveness and competition, even stopping short of requiring nonpartisan redistricting by judicial fiat.

In fact, offensive gerrymandering offers important benefits that are often overlooked. Rather than bemoaning partisanship in redistricting, we ought to be alert to the ways that partisanship, in the form of offensive gerrymandering, produces greater responsiveness and competition.

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49 *See* Issacharoff, *supra* note 10.

50 Many commentators question the institutional competence of courts to assess district lines and question the nonpartisanship of putatively apolitical experts or commissions. *See, e.g.*, Hirsch, *supra* note 19, at 180 (advising against "pretending to 'take politics out of the process' by creating supposedly apolitical redistricting commissions"); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders,* 116 HARV. L. REV. 649, 674 (2002) ("[I]t is almost impossible to design institutions to be authentically nonpartisan and politically disinterested.").

51 *But see* Issacharoff, *supra* note 10 (proposing a constitutional presumption against redistricting by self-interested insiders).

52 *See* Growe v. Emison, 507 U.S. 25 (1993); Connor v. Finch, 431 U.S. 407 (1977); White v. Weiser, 412 U.S. 783 (1973). Moreover, the Court has tried to extricate itself from the *Shaw v. Reno* thicket by excusing gerrymandering that appears race conscious to the degree that redistricters justify those redistricting choices with reference to partisan motivations. *See* Easley v. Cromartie, 532 U.S. 234 (2001); *see also* Melissa L. Saunders, *A Cautionary Tale:* Hunt v. Cromartie *and the Next Generation of* Shaw *Litigation*, 1 ELECTION L. J. 173, 191-92 (2002).

53 *See* Brief for Appellant at 32 in *Vieth*, (No. 02-1580) (acknowledging that "[p]olitics will always be a part of redistricting").

In the following sections, I explain two benefits of offensive gerrymandering. First, offensive gerrymandering makes incumbents less secure and more vulnerable to challenge. Second, offensive gerrymandering produces greater ideological diversity among elected officials and represents both ideological extremes as well as the political center.

B. INCUMBENCY ADVANTAGE AS AN OBSTACLE TO RESPONSIVENESS

Offensive gerrymandering threatens incumbents. First, offensive gerrymandering places majority party incumbents at greater risk as the majority party moves friendly voters out of their districts to pursue new seats elsewhere. Second, offensive gerrymandering places at risk incumbents of the minority party, the targets of offensive gerrymandering. Offensive gerrymandering, if successful, defeats minority party incumbents, forces them to retire, or otherwise deposes them from office.

By threatening incumbents, offensive gerrymandering increases responsiveness.[54] Responsiveness tracks the degree to which the districting map induces representatives to be responsive to the electorate's political preferences.[55] In short, a responsive system produces faithful representation of the electorate's preferences. An unresponsive system allows representatives to stray from the electorate's preferences without punishment. While many commentators decry the partisan bias flowing from gerrymandering, declining responsiveness presents a greater normative threat. Responsiveness ensures the jettisoning of elected representatives who earn public disapproval and fail to satisfy the public's demands as a precondition for public office.

The greatest threat to responsiveness is the overwhelming magnitude of the incumbency advantage in American politics. It is a truism within political science that incumbents, on average, enjoy major advantages over challengers. Incumbents boast greater name recognition and initial favorability than challengers.[56] For instance, congressional in-

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[54] Indeed, studies have confirmed exactly this resulting combination of increased partisan bias and increased responsiveness after partisan redistricting, at least at the state level. *See, e.g.*, Janet Campagna & Bernard Grofman, *Party Control and Partisan Bias in 1980s Congressional Redistricting*, 52 J. POL. 1242 (1990).

[55] King and Gelman explain accordingly that "incumbency largely explains the aggregate level of responsiveness." Gary King & Andrew Gelman, *Systemic Consequences of Incumbency Advantage in U.S. House Elections*, 35 AM. J. POL. SCI. 110, 130 (1991). Political scientists employ a technical definition of "electoral responsiveness," which measures sensitivity to changes in the partisan affiliation of the electorate. Under this definition, a highly responsive system is likely to produce a change in the partisan composition of the legislature when a concomitant change occurs in the partisan composition of the electorate. An unresponsive system is likely not to produce changes in the partisan composition of the legislature when there are changes in the partisan composition of the electorate.

[56] *See, e.g.*, Thomas E. Mann & Raymond E. Wolfinger, *Candidates and Parties in Congressional Elections*, 74 AM. POL. SCI. REV. 617 (1980).

cumbents are almost universally recognized, and nine out of ten voters have had contact with their representative.[57] In addition, compared to challengers, incumbents have a much easier time raising campaign financing.[58]

Incumbents benefit from the advantages of the office in other ways as well.[59] Incumbents curry favor from voters of all partisan stripes by providing casework and procuring pork barrel benefits for the district.[60] Morris Fiorina argued that these material benefits from incumbents helped increase the incumbency advantage since the 1960s, as officeholders became increasingly adept at "building a personal base of support, one dependent on personal contacts and favors."[61] Political campaigns, the critical fora within which candidates reaffirm policy commitments to the electorate, simply matter far less for incumbents than for nonincumbents and challengers.[62] As a result, party affiliation matters far less for incumbents than for nonincumbents.[63] Along all measures, inpartisans rate their representative roughly 15 percent more favorably than out-partisans, but when a voter's partisanship and candidate preferences conflict, the voter tends to defect from her party and vote for her incumbent.[64]

Of course, many incumbents are elected in the first place because they closely represented the interests and preferences of their constituents. However, over time, it becomes easier for incumbents to stray from their constituents' wishes and win re-election based on the major advantages of incumbency. Incumbency helps shield officeholders from seri-

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57 *See id.*

58 *See* Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV. 401, 409 (1998) ("Since typical incumbents spend much more than their opponents, the larger campaign budget of incumbents translates into a large electoral advantage."); *see also* Janet M. Box-Steffensmeier, *A Dynamic Analysis of the Role of War Chests in Campaign Strategy*, 40 AM. J. POL. SCI. 352 (1996) (demonstrating through empirical evidence that large war chests deter high quality candidates from challenging incumbents). In addition, campaign finance restrictions have a net effect of advantaging incumbents over challengers. *See* William P. Marshall, *The Last Best Chance for Campaign Finance Reform,* 94 NW. U. L. REV. 335, 338 (2000).

59 *See generally* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?,* 40 AM. J. POL. SCI. 478 (1996); Gary W. Cox & Scott Morgenstern, *The Increasing Advantage of Incumbency in the U.S. States,* 18 LEGIS. STUD. Q. 495 (1993).

60 *See* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1989); Patrick J. Sellers, *Strategy and Background in Congressional Campaigns*, 92 AM. POL. SCI. REV. 159 (1998).

61 FIORINA, *supra* note 60, at 57.

62 *See id.*

63 *See, e.g.,* Barry C. Burden & David C. Kimball, *A New Approach to the Study of Ticket Splitting,* 92 AM. POL. SCI. REV. 533 (1998); Mann & Wolfinger, *supra* note 56, 620-621; Sellers, *supra* note 60.

64 *See* Burden & Kimball, *supra* note 63; Mann & Wolfinger, *supra* note 56, at 623-26.

ous challenges and allows them leeway in their ideological and policy choices. As a consequence, incumbents generally become less and less responsive over time, as they gain increasing security in office.

Offensive gerrymandering of the sort examined in *Vieth*, for whatever its faults, helps threaten incumbents, the least responsive class of candidates, and forces them to worry about re-election. Offensive gerrymandering, by making incumbents of both parties more vulnerable, helps counterbalance the advantages of incumbency that insulate officeholders from challenge. By forcing incumbents to worry about re-election, offensive gerrymandering encourages greater responsiveness from those with the greatest institutional advantages and otherwise least likely to be responsive.

As a result, turnover in legislatures historically has been greatest in the first elections following a redistricting. In the 1972, 1982, and 1992 elections, the first ones after the usual once-a-decade redistrictings, turnover in the U.S. House of Representatives averaged 45 percent higher than turnover in other election years.[65] The major exception to the historical pattern is the 2002 elections that, as widely reported, featured dramatically less turnover than previous post-redistricting Congresses. The 2002 elections unseated only fifty-four incumbents, fewer than the average of sixty in the usual election year and far fewer than the average of eighty-seven following redistricting.[66] This decrease in turnover, however, is symptomatic of *too little* offensive gerrymandering, not too much. As Gary Jacobson explains, "marginal incumbents of both parties got safer districts" in 2002, with three out of four marginal districts made safer as a result of redistricting.[67]

If anything, this was defensive gerrymandering that reinforced the incumbent party, rather than offensive gerrymandering that sought to unseat the other side. If *Vieth* significantly restricted offensive gerrymandering, as some commentators urged it to do, the likely and perhaps ironic result would have been even less turnover and greater incumbent insulation.

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65 In the 1972, 1982, and 1992 elections, the first ones after the usual once-a-decade redistrictings, turnover in the U.S. House of Representatives averaged 45 percent higher than turnover in other election years. *See* Hirsch, *supra* note 19, at 183.

66 *See id.*

67 Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10 (2003).

C. BEYOND PARTY: IDEOLOGICAL REPRESENTATION

Offensive gerrymandering provides another advantage over defensive gerrymandering—ideological diversity in the legislature.[68] Offensive gerrymandering produces a nice mix of safe and competitive districts and thus produces a nice mix of ideologically extreme and centrist legislators. In contrast, defensive gerrymandering produces an overabundance of safe districts, resulting in an excess of ideologically extreme legislators. Faced with a choice between the array of ideological diversity produced by offensive or defensive gerrymandering, offensive gerrymanders wins out again.

First, as explained above, offensive gerrymandering creates competitive districts because the majority party seeks to knock out minority party incumbents. Competitive districts, in which the incumbent faces serious challenge, tend to contain closely divided districts in which Republicans and Democrats, conservatives and liberals, are matched evenly. These districts serve ideological centrism, as both parties field candidates who gravitate toward the decisive median voter. They nominate moderate candidates with centrist appeals that will win the median voter's vote.

Second, offensive gerrymandering also leaves room to preserve a number of safe districts for both parties. The majority party maintains safe districts for certain of its own incumbents and protects seats where it can. The majority party also tries to waste opponent party votes by packing an excess number of opponent party voters in certain districts. This packing of opposition votes incidentally creates a few safe districts for the minority. In the absence of vigorous competition in the general election, the strongest electoral competition in these safe districts occurs in the party primary.[69] The dominant party's nominee will gravitate toward the ideological extreme of the party's electorate to win the primary vote. The parties will nominate and advance more ideological candidates in these safer districts.

As a result, a healthy dose of offensive gerrymandering helps to generate redistricting maps that produce representation of ideological centrists *and* both ideological extremes. Because offensive gerrymandering tends to produce a mixture of safe and competitive districts, it is likely to produce a concomitant mixture of ideological and centrist districts as well. The balance sought by the majority party between protec-

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[68] *See* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) (arguing in favor of "second-order diversity" in legislative districting by achieving diversity across districts rather than within districts).

[69] Safe districts are those in which one party is clearly favored by a lopsided distribution of in-party voters. Competition occurs within the district's dominant party rather than across the two parties.

tion of its own incumbents and subversion of opposition incumbents produces an associated balance of ideological extremism and centrism in representation.

Defensive gerrymandering, by contrast, leads only to greater ideological polarization, as both parties secure themselves safe one-party districts. To create safer districts for each party, defensive gerrymandering dictates the placement of disproportionately greater numbers of reliably conservative voters to Republican districts and reliably liberal voters to Democratic districts. In a world in which offensive gerrymandering is restricted, neither party has incentive to trade off this safety for the prospect of winning new seats. The result is a collection of districts that reflects less ideological diversity. Districts tend to be either reliably conservative or reliably liberal, without districts that are distinctly centrist and within which both parties compete for moderate voters.[70]

It might seem strange to argue that offensive gerrymandering produces better legislative representation and diversity. In a partial defense of defensive gerrymandering, Nathaniel Persily asserts that defensive gerrymandering produces faithful representation because it yields something closer to proportional representation in the legislature for the major parties.[71] As he puts it, "When the parties divide a state into politically homogeneous constituencies, the composition of the legislature is more reflective of the underlying partisan composition of the electorate."[72] In Persily's view, partisan competition may be injurious to representation, because a competitive district of voters divided half and half between the major parties "promises to make the greatest number of voters unhappy with the outcome of the election."[73] Nearly half the voters will be represented by a candidate they did not support.

While Persily is correct that offensive gerrymandering is less likely to produce proportional representation for the parties, he places undue emphasis on partisanship as his gauge of political representation. The major parties are merely large coalitions of myriad interests only loosely connected ideologically to one another.[74] It is insufficiently precise to judge whether a jurisdiction is represented faithfully with respect to ide-

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70 *See* Issacharoff, *supra* note 31, at 427-31 (arguing that gerrymandering results in partisan distortion, decreased competition, and reduced electoral accountability).

71 Persily, *supra* note 50.

72 *Id.* at 668.

73 *Id.* Of course, I do not argue that party identification is not at all meaningful, just not as meaningful as Persily contends. Party identification provides a useful guide, as a heuristic cue, for deciding how to vote in a rough and general way. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 UCLA L. REV. 1141, 1149-51 (2003).

74 *See* Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005).

ology and public policy by looking too narrowly at partisanship.[75] There are centrist Republicans and Democrats and more ideological ones, to say nothing of the growing number of independent voters. Proportional representation between the parties does not necessarily indicate faithful representation because defining representation with respect to partisanship, without looking to ideology or policy preferences (or other deeper measures of political substance), fails to admit that Republicans may poorly represent Republicans, and Democrats may poorly represent Democrats. While defensive gerrymandering may increase the likelihood that a voter is represented by an official of the same party, it also decreases the representation of centrists in the legislature relative to the representation of the more ideologically extreme. A dose of offensive gerrymandering makes it more likely that the legislature will contain a diverse mix of elected officials representing districts all along the ideological spectrum, including ideologically extreme representatives from safer partisan districts but also ideologically moderate representatives from competitive centrist districts.

None of this is to say that offensive gerrymandering, or partisan bias, is entirely unproblematic. Party identification and loyalty in the electorate and legislature matter a great deal. But an analysis of offensive gerrymandering more realistically assesses the problems when it does not overemphasize the meaningfulness of party identification and keeps in focus the importance of ideological representation all along the ideological continuum.

IV. THE NEED FOR MORE OFFENSIVE GERRYMANDERING

If anything, we should wish for more offensive gerrymandering, rather than less. Offensive gerrymandering provides underrated benefits, whereas contemporary redistricting already features an excess of defensive gerrymandering by self-interested incumbents. We need more offensive gerrymandering, and *Vieth* would only have exacerbated things if the Court had decided to restrict it meaningfully.

Although partisan redistricting should produce a healthy balance of offensive and defensive gerrymandering, it often does not in practice. Individual members of the legislature in charge of redistricting tend to prioritize defensive gerrymandering over offensive gerrymandering, protection of their own seats over potential party gains. Rather than seeking

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[75] *See, e.g.*, ROBERT S. ERIKSON, GERALD C. WRIGHT, & JOHN P. MCIVER, STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES (1993) (finding that the major parties' ideological character varies dramatically from state to state). Cross-partisan affinity, as a partial function of ideological kinship, accounts for ticket-splitting between congressional and presidential elections. *See* Burden & Kimball, *supra* note 63.

to expand their party's delegation by attacking opposition incumbents, majority party incumbents frequently are content to insulate themselves.

Nevertheless, there are signs besides *Vieth* that might encourage more offensive gerrymandering for congressional redistricting in particular. National party leaders, especially among Republicans, have taken a keen interest in redistricting and spurred state-level politicians in the direction of offensive gerrymandering. National party leaders, representing their national party's institutional interests in more congressional seats, are forcing incumbents to assume greater electoral risk in the interest of expanding the party's overall representation.

A. TOO MUCH DEFENSIVE GERRYMANDERING, TOO LITTLE OFFENSIVE GERRYMANDERING

Redistricting occurs at least once a decade for both the state legislature and the state's congressional delegation. The majority party in state government, at least in jurisdictions where redistricting is not handled by an independent commission, controls the redrawing of district lines both for itself and for the state's congressional representatives. However, the majority party in state government tends to be far more concerned with state redistricting than congressional redistricting.

When the majority party redistricts its own districts for the state legislature, the self-interest motivation is obvious. State legislators of the majority party want to retain their individual seats, and they want to retain their party's control of the state legislature. These state legislators care intensely about state redistricting, but the motivation of self-interest encourages them to be intensely risk averse both individually and party-wide. The majority party already holds a majority of legislative seats and does not need to win over new districts to control the legislature. The incumbents in charge of the legislature and redistricting have little to gain from adding risk in search of winning new seats away from the minority. The majority party seeks to maximize the likelihood of the retention of its majority rather than to maximize the total number of seats won.[76] Defensive gerrymandering, as a result, dominates over offensive gerrymandering in state redistricting.

For congressional redistricting, the interests of the state legislators line up differently. Here, self-interest is only indirect at best. State legis-

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[76] It is important to note that defensive gerrymandering at times can require district line-drawing exactly like that needed for offensive gerrymandering. When reapportionment reduces the number of districts in the state, or the demographics of a state shift dramatically, the majority party may need to gerrymander aggressively against the minority party just to retain the same number of seats. *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461 (2003) (addressing a Georgia redistricting in which Democrats gerrymandered aggressively to retain control of a state sliding demographically toward the Republican Party).

lators are not affected dramatically by their party's congressional fortunes in the state. Although state legislators, as redistricters, hope to advance party-wide interests by increasing their party's representation in Congress, they gain little individually if their party wins a majority of the state's congressional delegation.[77] What is more, state legislators are redistricting other people's districts at a different level of government—congressional representatives at the federal level. The personal self-interest in incumbent protection is therefore absent.[78] State legislators, in sum, have less at stake in congressional redistricting.

Consequently, state legislators in charge of redistricting tend to focus foremost on state redistricting and generally try to respect their federal-level counterparts' requests with regard to congressional redistricting.[79] Congressional redistricting is influenced heavily by the efforts of the state's in-party congresspersons to lobby their state counterparts. Congressional incumbents, of course, want primarily for redistricting to entrench them in office. The incentives for congressional redistricting thus push toward defensive gerrymandering and incumbent protection, but not because of the direct self-interest of state legislators. Instead, state legislators tend to accede to congressional counterparts who desire more defensive gerrymandering.

Congressional redistricting in fact has historically overemphasized defensive gerrymandering at the expense of offensive gerrymandering. Michael Lyons and Peter Galderisi found that congressional redistricting during the 1990s preserved incumbency protection as the foremost value whether redistricting occurred under single-party or bipartisan control.[80] Similar studies of redistricting during the 1980s reached the same con-

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77 Winning a handful of new seats for the party is also unlikely to be decisive in shifting the partisan balance in Congress as a whole.

78 State legislators may personally prefer to pursue aggressive offensive gerrymandering for congressional redistricting. Such a strategy would make in-party congressional incumbents more vulnerable, but state-level legislators would not be placing their own jobs at risk. The most ambitious of them might be able to ascend to congressional seats vacated by incumbents of either party weakened from offensive gerrymandering. *See* Marshall, *supra* note 58, at 378 (explaining a similar divergence of interest between state and congressional representatives with respect to campaign finance reform). Robust defensive gerrymandering simply locks everyone into place at the congressional level.

79 *See, e.g.*, Richard E. Cohen, *Texas Democrats Outplayed Rivals*, NAT'L J., Dec. 1, 2001 (describing how Texas state legislators were "consumed" with state redistricting and neglected congressional redistricting but for lobbying by their congressional counterparts). Of course, state politicians still press their own priorities in congressional redistricting, even if not directly related to their re-election fortunes. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 942 (1995) (Ginsburg, J., dissenting) (describing accommodations in congressional redistricting made to satisfy state legislators' requests).

80 *See* Michael Lyons & Peter F. Galderisi, *Incumbency, Reapportionment, and U.S. House Redistricting*, 48 POL. RES. Q. 857, 868 (1995).

clusions[81]—congressional redistricting insulates incumbents through defensive gerrymandering and is less aggressive in attacking the minority party through offensive gerrymandering. During the last redistricting cycle, party leaders in several large states, most notably California and Illinois, agreed to essentially bipartisan gerrymanders, calculated to protect both parties' incumbents from meaningful competition.[82]

This tendency is illustrated by the politics of Governor Arnold Schwarzenegger's proposal to submit California redistricting to an independent commission. The effect of the proposal would likely be positive for the Republicans, if anything. Democrats control the state legislature, which currently handles redistricting, and Democrats outnumber Republicans thirty-three to twenty in the state's congressional delegation. Nonetheless, Republican congresspersons from California reportedly oppose the governor's proposal by a ratio of four-to-one.[83] The Los Angeles Times reported, "Even with California Republicans confined to minority status in both the legislative and congressional delegations, many members would rather keep the existing lines than gamble on a plan that could plunk them in unfriendly districts where they would have trouble getting reelected."[84]

B. OFFENSIVE GERRYMANDERING: A FUNCTION OF PARTISAN LEADERSHIP

The actors with the strongest incentives to encourage state legislators to gerrymander offensively in congressional redistricting are federal-level party leaders who have the national party's institutional interests at heart. While rank-and-file congressional representatives are overwhelmingly concerned with their individual welfare and personal re-election, party leaders attend to the party's collective welfare. They try to organize their rank-and-file to capture gains from partisan coordination and solve the collective action problems that arise when representatives focus too narrowly on their individual self-interest. Their special responsibili-

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[81] *See* Q. Whitfield Ayres & David Whiteman, *Congressional Reapportionment in the 1980s: Types and Determinants of Policy Outcomes*, 99 POL. SCI. Q. 303, 311-13 (1984); Cain, *supra* note 39, at 331; *see also* Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J. L. & POL. 653, 679-81 (1988).

[82] *See* Jacobson, *supra* note 67, at 10-11 (discussing the bipartisan gerrymander in California); John Fund, *Gerry-Rigged Democracy*, AM. SPECTATOR, June-July 2003 (describing deals cut in California and Illinois that led to only one competitive congressional race in each state); *see generally* Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 63-64 (2005).

[83] *See* Peter Nicholas, *GOP Fears a Redistricting Backfire*, L.A. TIMES, Feb. 8, 2005, at A1; *see generally* Nancy Vogel, *Looking to Design a Fairer Map*, L.A. TIMES, Feb. 13, 2005, at B1; T.R. Reid, *Texans Back Colo. Democrats in Redistricting Case*, WASH. POST, Sept. 9, 2003, at A02.

[84] Nicholas, *supra* note 83.

ties include the promotion of the party's reputation, extension of the party's representation in government, and coordination of the party membership. Party leaders "internalize the collective electoral fate of the party."[85]

Party leaders can play exactly this institutional role in redistricting. Effective party leadership pushes redistricters to optimize the returns from gerrymandering, balancing defensive gerrymandering with a healthy dose of offensive gerrymandering. Redistricters usually need no reminders to gerrymander defensively and lock themselves or their friends in office. However, party leaders remind redistricters of party-wide interests. Leaders encourage the rank-and-file to accept re-election risks concomitant with offensive gerrymandering designed to increase the party's overall representation. While state legislators typically accede to the individual self-interest of congressional incumbents in defensive gerrymandering, national party leaders can intervene and push state legislators instead to prioritize party-wide interests in offensive gerrymandering.

It follows that the most aggressive offensive gerrymanders during the recent cycle of congressional redistricting occurred after energetic intervention by federal-level party leaders. The offensive gerrymander by Republicans in Pennsylvania was part of a coordinated strategy by the national party to advance Republican congressional interests through redistricting in several states, including Colorado, Ohio, and Texas.[86] In Pennsylvania, U.S. Speaker of the House Dennis Hastert, Senator Rick Santorum, and presidential advisor Karl Rove pressured state Republicans to increase G.O.P. representation in the state's congressional delegation. Santorum, in particular, traveled to Harrisburg and lobbied the Pennsylvania House majority leader, John Perzel, to pass an aggressive offensive gerrymander that became known as the "Santorum Plan."[87] The spokesman for the National Republican Congressional Committee crowed, "The Pennsylvania plan goes a long way to solidifying our net gain of eight to ten seats nationally."[88]

An even clearer case of intervention by self-interested federal officials came in the most aggressive gerrymander of the cycle, the Texas

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[85] GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 133 (1993).

[86] *See* Sasha Abramsky, *The Redistricting Wars*, THE NATION, Dec. 29, 2003, at 15; Edsall, *supra* note 21, at A04.

[87] *See generally* Chris Cillizza, *GOP Aims for Six Seats in Penn.*, ROLL CALL, Dec. 17, 2001; Peter L. DeCoursey, *Continual Lobbying Carried GOP-crafted Shift*, SUNDAY PATRIOT-NEWS (Harrisburg, PA), Jan. 6, 2002, at B01; Larry Eichel, *GOP Redistricting Gamble Looks Safe*, PHILADELPHIA INQUIRER, Oct. 16, 2002, at A15; Claude R. Marx, *National Parties Flex Muscles During Redistricting Fight*, ASSOCIATED PRESS NEWSWIRE, Jan. 5, 2002.

[88] Chris Cillizza, *Republicans Score Big in Pa.*, ROLL CALL, Jan. 7, 2002 (quoting Carl Forti).

congressional redistricting in 2003. In Texas, House majority leader Tom DeLay played a pivotal role in pushing the Texas legislature, controlled by the Republicans in 2003, to take the unprecedented step of redistricting the state's congressional map for the second time during the decade. DeLay's involvement in the Texas legislature's redistricting process dated back to 2001, before Republican control of the state legislature.[89] Handicapped by Democratic control of the Texas legislature, DeLay set about to change the legislature's composition. He dispatched his political aide Jim Ellis to organize a political action committee named "Texans for a Republican Majority," which would raise $1.5 million toward electing new Republicans to the state legislature.[90] DeLay and Ellis were instantly successful in a state already tilting toward the Republicans,[91] winning G.O.P. control of the legislature in the 2002 elections for the first time in 130 years.

Even so, redistricting by the Republican-controlled legislature seemed quite unlikely as the end of the 2003 term approached. A second redistricting during the decade would have been unprecedented, and many state Republicans worried about the divisiveness that another redistricting would incite. Although the Texas House appointed a redistricting committee, its chairman, Representative Joe Crabb, introduced a bill that would have continued the then-current districts drawn by the court.[92] Tom Craddick, Speaker of the Texas House, acknowledged that he supported a second redistricting, but admitted, "I'm not pushing it."[93] The Texas Senate did not even name a redistricting committee to consider the issue. When Representative Crabb asked the Texas attorney general to opine on the necessity of a new redistricting, the Republican attorney general responded that a new congressional redistricting was permissible but unnecessary. Republican Lieutenant Governor David

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89 DeLay testified before the legislative redistricting committee to urge Democrats to elect congressional Republicans who would advance President Bush's agenda. *See* R.G. Ratcliffe, *Plan Shuffles Millions of Texans; DeLay's Investment Pays Off*, HOUSTON CHRON., Oct. 10, 2003, at A01. The legislature ultimately failed to reach agreement on a new redistricting map, but the task fell to a federal district court that redrew congressional districts favorably to state Democrats.

90 *See* LOU DUBOSE & JAN REID, THE HAMMER 203 (2004); Chuck Lindell, *DeLay's Point Man Led Charge on Redistricting*, AUSTIN AM.-STATESMAN, Sept. 22, 2004, at A13. Not only did DeLay's political action committee fund legal work on redistricting, his daughter served as a fundraiser for it. *See* Abramsky, *supra* note 86, at 15; Lou Dubose & Jan Reid, *The Man with the Plan*, TEX. MONTHLY, Aug. 2004, at 98, 101.

91 In 2002, Republicans held 27 statewide offices; the Democrats none. *See* Connie Mabin, *Political Revolution in Texas as Campaign Season Kicks Off*, ASSOCIATED PRESS STATE & LOCAL NEWSWIRE , Jan. 6, 2002.

92 *See* Dave McNeely, *Redistricting Groundswell Is Missing*, AUSTIN AM.-STATESMAN, Apr. 24, 2003, at B1.

93 Dave McNeely, *DeLay Pushes Legislature to Redo Congressional Maps*, AUSTIN AM.-STATESMAN, Apr. 25, 2003, at B6 (internal quotations marks omitted).

Dewhurst described a new round of redistricting as welcome as a "contagious flu."[94] Even Governor Rick Perry dismissed redistricting with a football metaphor: "It's like, 'Do you want to go run your wind sprints again?'"[95]

DeLay personally flew to Austin in April and began an intense lobbying effort to resuscitate congressional redistricting.[96] He met with Dewhurst, Craddick, and Perry to press state Republicans on congressional redistricting.[97] When Texas Democrats fled the state to deprive the Texas House of a quorum on redistricting, DeLay's office contacted the Department of Justice and Federal Aviation Administration to help search for the absent Texas Democrats.[98] In October, after the governor called a third special session of the legislature on the redistricting issue, DeLay again flew to Austin for several days of intense negotiations that produced agreement among squabbling state Republicans.[99] "If Tom DeLay hadn't been there, it wouldn't have happened," declared U.S. Representative Thomas Reynolds, chairman of the National Republican Congressional Committee.[100] Other national party figures intervened as well. Karl Rove and White House spokesperson Karen Hughes spoke personally with Texas Republicans to emphasize the importance of the congressional redistricting to President Bush.[101] The final redistricting

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[94] R.G. Ratcliffe, *Plan Shuffles Millions of Texans; DeLay's Investment Pays Off*, HOUSTON CHRON., Oct. 10, 2003, at A01 (quoting Lt. Gov. David Dewhurst). Dewhurst explained, as late as June 10, 2003, that he had repeated "over and over again that [he saw] no consensus [in the Senate] for a redistricting measure" and that he was "not going to take the lead on redistricting." *See* Patricia Kilday Hart, *The Unkindest Cut*, TEX. MONTHLY, Oct. 2003, at 44. At DeLay's prodding, Dewhurst later became one of the Republican ringleaders on the 2003 redistricting. *See* McNeely, *supra* note 92.

[95] Dubose & Reid, *The Man with the Plan*, *supra* note 90, at 162.

[96] *See* Ratcliffe, *supra* note 94.

[97] Jim Ellis reinforced DeLay's efforts, flying down to Austin several days a week from April through October. *See* Lindell, *supra* note 90.

[98] Eric Lichtblau, *Justice Dept. Rejected Idea of Joining Texas Dispute*, N.Y. TIMES, Aug. 13, 2003, at A16; Chuck Lindell, *DPS Telephone Call to Feds Comes Under U.S. Scrutiny*, AUSTIN AM.-STATESMAN, May 23, 2003, at B1; Leif Strickland, *Texas Showdown*, NEWSWEEK, Aug. 21, 2003.

[99] Shuttling between offices, DeLay spent at least three days brokering a deal among Craddick, Perry, and Dewhurst, the latter of whom Craddick refused to meet personally. *See* Lee Hockstader, *Texas GOP Has Intraparty Dispute Over Redistricting*, WASH. POST, Sept. 18, 2003, at A03; Guillermo X. Garcia & Peggy Fikac, *DeLay Tours Austin in Bid to Get a Map*, SAN ANTONIO EXPRESS-NEWS, Oct. 8, 2003, at 1A; Chuck Lindell, *DeLay Defends his Texas Redistricting Role*, AUSTIN AM.-STATESMAN, Oct. 16, 2003, at A5; R.G. Ratcliffe, *supra* note 94.

[100] Richard E. Cohen, *The Evolution of Tom DeLay*, NAT'L J., Nov. 15, 2003, at 3478 (internal quotations marks omitted).

[101] *See* DUBOSE & REID, *supra* note 90, at 202, 218-19; Abramsky, *supra* note 86, at 15. The national parties' interest in congressional redistricting might increase with the adoption in more states of the congressional district method of allocating electoral votes for presidential elections. Only Nebraska and Maine currently assign an electoral vote to each congressional

plan went into effect for the 2004 elections and successfully won five new Republican seats in the House.

The offensive gerrymander in Texas took place only because of relentless intervention by federal-level party leaders, most prominently Tom DeLay. DeLay embodied the GOP's national party's interests during the Texas redistricting process. As he put it, "I'm the majority leader, and we want more seats."[102] One internal Republican memorandum insisted that "major adjustments must be made to ensure that the map reflects the priorities of the congressional delegation and not the [Texas] Legislature."[103] The Texas congressional redistricting, in short, reflected the priorities of the Republican national party leadership, which emphasized offensive gerrymandering in a way that state-level Republicans were unlikely to produce if left alone.[104]

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district and award it to the candidate who receives a plurality of votes in the respective district. Thanks to the staff of the Cornell Journal of Law & Public Policy for this obvservation.

102 David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1 (quoting DeLay). DeLay's interventions into Texas congressional redistricting also led to a civil suit and House ethics charges for possible violations of campaign finance law. *See* Sylvia Moreno & R. Jeffrey Smith, *Treasurer of DeLay Group Broke Texas Election Law*, WASH. POST, May 27, 2005, at A01; Maeve Reston, *Can DeLay Ride Out the Storm?*, PITT. POST-GAZETTE, Apr. 17, 2005, at A1; R.G. Ratcliffe, *Political Funding Debate to Play Out*, HOUSTON CHRON., Feb. 27, 2005, at B1; Julie Mason & Gebe Martinez, *DeLay Legal Fund Returns $3500 in Contributions*, HOUSTON CHRON., Dec. 8, 2004, at A7.

103 R.G. Ratcliffe, *Redistricting Memo Leaked on Eve of Trial; DeLay's Intervention Blasted,* HOUSTON CHRON., Dec. 11, 2003, at A37 (internal quotations marks omitted). The memo continued, "The (state) House map, in particular is flawed because it is dominated with largely insignificant state legislative agendas. . . We need our map, which has been researched and vetted (by the Republican National Committee and the National Republican Congressional Committee) for months." *Id.* (alterations in original); *see also DeLay's Involvement in Texas Redistricting: Pure Partisan Politics,* AUSTIN AM.-STATESMAN, Dec. 12, 2003, at A22. Jim Ellis insisted that "a map that returns [Democratic incumbents] Frost, Edwards, and Doggett is unacceptable and not worth all the time invested into this project." DUBOSE & REID, *supra* note 90, at 220.

104 Regardless how aggressive the gerrymander, redistricting is limited by the underlying ideological preferences of voters in the state. Gerrymandering can convert a conservative Democratic district into a Republican one, but it cannot convert every Democratic seat in an evenly divided state into a Republican one. The gains from gerrymandering occur at the margin. Gains at the margin are important, no doubt. Elections and partisan control can be decided at the margin. However, it is easy to overstate the ultimate results from gerrymandering in any direction. Losses by longtime incumbents like Charlie Stenholm and Martin Frost spark publicity and partisan outrage, but research indicates that the effects of offensive gerrymandering are impermanent and fade away more quickly than assumed. *See, e.g.*, Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in POLITICAL GERRYMANDERING AND THE COURTS 64 (Bernard Grofman ed., 1990); DAVID BUTLER & BRUCE E. CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 32 (1992); Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s,* 54 J. POL. 565, 570-71 (1992).

V. CONCLUSION

Any consideration of political redistricting must assume that redistricting will be driven by partisan motivations, unless courts are willing to take the drastic step of prohibiting political actors from participating in the process at all.[105] Partisan actors will act in a partisan fashion, and redistricting is no exception to the rule. Political actors try to achieve political ends through whatever available means.[106] Resourceful political actors find ways—whatever ways that remain open—to influence the political environment in a direction favorable to them and unfavorable to their opponents. Moreover, pursuing political ends through election law increases in relative cost-effectiveness as achieving the same ends through campaigning and winning elections becomes more expensive.[107]

The remaining question, then, is whether judicial decisions that constrain the discretion of partisan actors involved in redistricting will channel their strategic activity in positive directions rather than worse ones. *Vieth* passes this test. *Vieth*, accepting that gerrymandering is political, directed redistricting toward balancing offensive and defensive gerrymandering. This is a better state of affairs than the exclusive focus on defensive gerrymandering that would have resulted from restriction of offensive gerrymandering.

After *Vieth*, redistricters who might be tempted to focus overwhelmingly on defensive gerrymandering are now free to pursue offensive gerrymandering without restriction. And they will shift further toward offensive gerrymandering when national party leaders actively promote party-wide interests. Instances of national party intervention, at least on the congressional level, appeared more common during the recent, and ongoing, redistricting cycle.[108] In sum, redistricting today still suffers

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105 *See* Issacharoff, *supra* note 10; *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L. J. 491, 534 (1997). However, the Court in *Vieth* did not give serious consideration to holding that political motivations in redistricting are invidious per se. As Justice Scalia put it later in his dissent to *Cox v. Larios*, "[A]ll but one of the Justices agreed that [partisan advantage] *is* a traditional criterion [for redistricting], and a constitutional one, so long as it does not go too far." *Larios*, 124 S.Ct. at 2809 (2004) (Scalia, J., dissenting). The Court in essence recognized that handing over redistricting to political actors begets politically motivated decision-making.

106 Indeed, when election administrators fail to apply election law in a decidedly partisan manner, they may become pariahs within their party for disloyalty. *See* David Postman, *Republican Reed Faces GOP Wrath over Recount Decisions*, SEATTLE TIMES, Jan. 3, 2005, at A1.

107 A Republican strategist noted that the National Republican Campaign Committee would spend upwards of $60 million on House races nationwide in 2004, but could pick up five House seats basically for free as the result of the 2003 redistricting. *See* Fred Barnes, *Texas Chainsaw Gerrymander*, WEEKLY STANDARD, Oct. 13, 2003 at 15.

108 A new trend in redistricting is the "re-redistricting," a second or even third redistricting in the same decade. *See generally* Cox, *supra* note 40. Republicans conducted a third congressional redistricting of Georgia, while Democrats contemplated a round of re-redistrict-

from a deficit of offensive gerrymandering, but more offensive gerrymandering seems more likely post-*Vieth*.

ing in other states as retaliation. *See* Mary McDonald & Sonji Jacobs, *Making Law*, ATLANTA J.-CONST., May 4, 2005, at 2B; Chris Cillizza, *Democrats Eye Remap Payback, Leaders Target Illinois, N.M.*, ROLL CALL, Feb. 22, 2005; Josh Kurtz, *Remap Revenge in New York*, ROLL CALL, Mar. 1, 2005; Lauren W. Whittington & Chris Cillizza, *Illinois Remap Discussed,* ROLL CALL, Mar. 1, 2005 at 11.