Contrary to the thrust of the case law we cited in Chapter 30, defendants in *Miller v Ohio* and other gerrymandering cases have asserted an exception to the electoral neutrality principle. In *Miller* the Defendants said that “protecting the seats of incumbents [has] long been [a] legitimate goal of redistricting.” How has this novel doctrine insinuated itself into our jurisprudence?

*As the Framers Saw It*

The writer of *The Federalist* No. 53 addressed the issue of whether the proposed two-year term of office for members of Congress is sufficiently brief to protect the Republic from the “tyranny” that might ensue were congresspersons able to perpetuate themselves in office. He begins the essay by quoting a “current observation ‘that where annual elections end tyranny begins.’” This evidenced a widespread feeling at that time, a mood that manifested itself in the fact that only one of the 13 colonies allowed its legislators to have terms of office exceeding one year—two of them permitting their legislators terms of only six months.

Much of No. 53 is devoted to reassuring the skeptical reader that the proposed “term limit” is sufficiently brief, and biennial elections sufficiently frequent, to prevent entrenchment and consequently, “tyranny.” The writer naively believed that the prophylactic was frequent elections. Little could he have foreseen how, in the next two centuries, congresspersons would find ways to entrench themselves despite frequent elections.

The constitutional question here is what was the intent of those who wrote the Constitution concerning the issue of incumbent protection? Would the framers, had they
foreseen that states could enhance the re-election prospects of congresspersons by manipulating the boundaries of their districts, have authorized this practice? The answer is obviously, and emphatically “no.” The concept of incumbent protection was antithetical to their philosophy of government.

A Troublesome Footnote

Burns. For 176 years the High Court said nothing that could be construed as authorizing states to pass electoral laws favoring incumbents over challengers. Then, in 1965, the Court considered an appeal from a district court ruling voiding an interim plan for the Hawaii senate that consisted of multi-member districts. Since the unchallenged plan for the Hawaii House was also comprised of multi-member districts the district court, believing that at least one house of a bicameral legislature must consist of single-member districts, refused to allow the senate plan. The Supreme Court vacated that ruling and upheld the multi-member senate plan as an interim measure.

The island of Oahu was divided into four 4-member senate districts and one 3-member SD. One of the State’s reasons for not dividing these districts into single-member districts is that it would cause difficulties for incumbents and might force some to run against each other. Pointing out that multi-member districts are constitutional if they do not “operate to minimize or cancel out the voting strength of racial or political elements of the voting population” the Court, in a footnote, went on to say:

We reject the suggestion that the districts are arbitrarily or invidiously defined.

The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.
Viewed in context, all this passage says is that a state is not forced to abolish otherwise constitutional multi-member districts just because they have the incidental effect of being convenient for incumbent legislators. We agree.

_Weiser._ Eight years later the High Court sustained a lower court in voiding a Texas congressional districting plan (with 4.13 percent total deviation) on equal population grounds. At issue was which of two alternative plans proffered by plaintiffs should be adopted in its stead: Plan S which followed the configuration of the voided plan, but split 18 more counties in reducing the total deviation to 0.149 percent; Plan C which “substantially disregarded the configuration of the districts in” the voided plan, was “significantly more compact than” the voided plan or Plan S, achieving a total deviation of 0.284 percent. The district court, in opting for Plan C, articulated no rationale but to say, “Plan C best effectuates the principle of ‘one man, one vote’…”

The High Court reversed the lower court as to its selection of Plan C, ordering implementation of Plan S, instead. It gave as its primary reason the fact that the district configurations of Plan S more closely followed “the policies and preferences of the State” than did Plan C and that federal courts should defer to these “policies and preferences” “whenever adherence” to them “does not detract from the requirements of the Federal Constitution…” In addition, the Court noted, “Plan S achieved the goal of population equality to a greater extent than did Plan C.”

Salient among these state “policies and preferences” is the promotion of:

‘constituency-representative relations,’ a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State’s delegation have
achieved in the U.S. House of Representatives. We do not disparage this Interest.\textsuperscript{7}

Justice White, writing for the Court, then quoted the passage from Note 16 of \textit{Burns v. Richardson} we quoted above. In the foregoing passage from \textit{Weiser} the Court seems to edge closer to affirming that “protection” of congressional incumbents from challengers is a legitimate state interest that justifies an exception to the electoral neutrality principle. “Promoting constituency-representative relations” implies ensuring that incumbents receive high population carryover from their old districts whenever redistricting becomes necessary. Such carryover is the first priority in crafting an incumbent-protecting gerrymander.

\textit{Gaffney}. The day the Supreme Court handed down \textit{Weiser} was also the day it issued \textit{Gaffney}. The authors of the Gaffney plans acknowledged they had drawn districts to facilitate the re-election of some incumbents. The trial court had noted:

> In one or more House and one or more Senate districts some accommodation was also made in the interest of retaining in office a particular incumbent.\textsuperscript{8}

Because the High Court concluded the Gaffney plans were constitutional some now cite this sentence as proof that it sanctioned incumbent-protecting gerrymandering. This fact had little, if anything, to do with the outcome of the case, either at trial court level or on appeal. The trial court struck down the plan on grounds of population inequality. The High Court upheld the plan because (1) it concluded the population deviations were not large enough to require justification, and (2) concluded the plan was not a partisan gerrymander. The issue of “protecting” incumbents was discussed neither in the opinion of the Court nor in the 11-page dissent which, as we noted earlier, dealt entirely with the issue of population equality. The word “incumbent” appears only once in the decision and then, not in the context of incumbent “protection.”\textsuperscript{9}
The fundamental unity of *Gaffney*, *Bandemer*, and *Badham* is that in each case members of a major party alleged harm to them, as a group, claiming under one guise or another deprivation of “fair and proportionate representation.” In dismissing an allegation of violation of group rights in *Gaffney* the High Court did not affirm that “protection” of incumbents was a legitimate state interest that would justify an exception to the electoral neutrality principle.

*Karcher*. Ten years after *Gaffney* and *Weiser* the High Court again spoke words that have been construed as endorsing the “protection” of incumbents. In listing four examples of legislative policies that might justify population deviations from the ideal Justice Brennan included two that can be construed as sanctioning favoritism towards incumbents: (3) “preserving the cores of prior districts;” (4) “avoiding contests between incumbent representatives.” Footnote 16 from *Burns* is cited in support of the latter. “Cores of prior districts” is too vague a term to be a criterion for districting. It implies maximizing population carryover of prior districts when redistricting becomes necessary. As noted in our discussion of *Weiser*, high carryover is the most important component of an incumbent-protecting plan. It suggests that even if the “prior” district were a contrivance of grotesque shape, crafted to advantage a particular candidate, preservation of its “core” serves a legitimate state interest.

“Avoiding contests between incumbent representatives” also suggests a lack of evenhandedness in application of the law, because there is no symmetrical policy of “avoiding contests between challengers.” However, such a policy is substantively meaningless. Plans can be drawn that would “avoid contests between” incumbents, yet subject them to considerable risk of defeat. On the other hand, plans can be drawn that will set up contests between incumbents by “pairing” them in the same districts, yet still “protect” them. “Protecting” an incumbent requires not so much avoiding being paired with another incumbent as it means having a geographically proximate district that (1) contains a high carryover, (2) has a favorable partisan
index, (3) does not contain wholly within it the districts of state legislators who are potential challengers, and (4) does contain within it office buildings and corporate headquarters which may provide sources of campaign contributions.

Consequently, “avoiding contests between” and “protecting” are not congruent terms. Defendants in districting litigation use them interchangeably and would like very much for the High Court to do the same. Until 1996, neither the High Court nor any lower court employed the word “protect” in the context desired by these defendants. Even though Karcher policies (3) and (4) smack of incumbent protection, this suggestion is undercut by the next sentence, which speaks of “nondiscriminatory criteria.” Plaintiffs in gerrymander litigation will urge the High Court to resolve the ambiguity in favor of “nondiscriminatory.”

Anne Arundel. In the 1990s redistricting cycle two lower courts, in decisions summarily affirmed by the High Court, employed language, which can be interpreted as endorsing incumbent protection as an exception to the electoral neutrality principle. Anne Arundel County v. State Administrative Board 12 involved a Karcher challenge to the State’s new congressional districting plan, which had a total deviation of ten (10) persons. However, an alternative plan demonstrated that the spread could be reduced to nine (9) persons. The three-judge panel concluded that this one-person differential required justification by the State. The State proffered three justifications, all of which were accepted by the panel:

1. keeping intact the three major regions that surround the center of the state
2. creating a minority voting district, and
3. recognizing incumbent representation, with its attendant seniority, in the [U.S.] House of Representatives

In making justification (3) the State cited the same passage from Weiser we quoted in our discussion of that case above. The incumbent congressman whose seniority had to be
“preserved” was understood to be Steny Hoyer. This Court summarily affirmed, with Justice Stevens noting probable jurisdiction. Such affirmation could mean (a) that the deviation did not require justification, or (b) that it did require justification and that one or more of the three proffered justifications was accepted. If (b) was what was meant, was Justification (3) accepted? Only the Court can answer that question.

*Arizonans.* The second case in the 1990s cycle containing language which can be construed to “endorse incumbent protection” is *Arizonans for Fair Representation vs. Symington.* This is a case where the legislature deadlocked over redistricting and a court had to resolve the impasse. Essentially, it chose one of the five plans offered by contending parties, and made a few modifications to it. Before making that choice, however, it formulated a list of criteria that it said would govern its choice. These criteria included three “neutral principles of redistricting:” (1) preserving communities of interest, (2) compact and contiguous districts, and (3) avoiding unnecessary or invidious out districting of incumbents. In amplifying its rationale for the third principle the panel said:

the maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering.

After examining all the plans, the panel chose the Indian Compromise Plan as best meeting the court’s criteria, modified it, and adopted it. Hispanic interests, who had favored one of the other plans, appealed to the High Court, but the panel’s actions were summarily affirmed.

We have no quarrel with a districting criterion that calls for “avoiding unnecessary or invidious out districting of incumbents” (emphasis added). There is no reason the Court should not have approved a district court-ordered plan under the circumstances here described. The
passage from the panel’s opinion, quoted above, calling for “maintenance of incumbents” does suggest approval of incumbent protection. But the High Court’s affirmation of that decision does not imply any more endorsement of incumbent protection than can be inferred from *Weiser*. *Arizonans*, therefore, adds little or nothing to the case law bearing on the neutrality principle and incumbent protection.

*Bush v. Vera.* In 1996 the High Court inched closer to affirming that the “protection” of incumbent representatives is a legitimate state interest when it ruled in *Bush v. Vera*. Speaking for the Court, Justice O’Connor wrote:

> “And we have recognized incumbency protection, at least in the limited form of ‘avoiding contests between incumbent[s],’ as a legitimate state goal.”

This marked the first time the words “incumbent” and “protection” appeared adjacent to each other in a pronouncement of the Supreme Court. But note how Justice O’Connor was careful to insert the qualifying words “at least in the limited form of…” The question now is will the High Court take the final step of dropping O’Connor’s qualifying words and write “incumbent protection” into the Constitution? Or will an electoral neutrality principle be recognized first? And will it trump “incumbency protection?”

**Conclusion**

After close scrutiny of the seven foregoing cases, we see that only one of them even comes close to approving of discriminatory districting to help incumbents defeat challengers: *White v. Weiser*. What the passage we quoted from *Weiser* overlooks is that within every district there is a minority, ranging from about 15 to 49 percent, that does not wish to “maintain its relationship” with the incumbent and would welcome a serious prospect of having someone else as their representative. This maintaining-existing-relationships-preserving-seniority policy says
that those constituents who want to keep the incumbent have greater rights than do those who
want to get rid of the incumbent.

But four pages further on in *Weiser* is language which qualifies a state’s “adherence” to
such a policy—language we emphasized in first quoting it: “*whenever adherence to state policy
does not detract from the requirements of the Federal Constitution...*” Plaintiffs in some future
case should ask the High Court to consider whether the Constitution’s electoral neutrality
principle is not “detracted from” when a state engages in “redistricting legislation...extremely
irregular on its face...without regard for traditional districting principles...”19 for the purpose of
“maintaining existing relationships” and “preserving seniority” that facilitates the re-election of
incumbents to Congress. For the moment we are saddled with a new constitutional principle of
incumbent “Protection” that has evolved in just 31 years through the process of “interpretation
creep:” A reference in *Burns* to minimizing “the number of contests between present
incumbents” is cited in *Weiser* to sanction a “state policy” of promoting “constituency-
representative relations.” The same reference is cited again in *Karcher* to legitimize a state
legislative policy of “avoiding contests between incumbent representatives.” Then in *Bush* the
*Karcher* passage is cited in support of “incumbency protection.” It all happens subtly and among
the responsible jurists are many who would recoil at being labeled “judicial activists.”

Notes

1 *Miller v. Ohio* Defendants’ Motion to Dismiss: 26.
2 *Burns v. Richardson* 384 U.S. 73.
4 384 U.S. at 79 note 16.
6 412 U.S. at 795 [emphasis added].
7 412 U.S. at 791.
9 “Redistricting may pit incumbents against each other or make very difficult the election of the most experienced
legislator.” 412 U.S. at 753.
10 *Cummings v. Meskill* U.S. District Court (D. Conn.) Civil Action No. 14,736 Allegation No. 16.
11 462 U.S. at 740.
15 828 F.Supp. at 688.
16 Ibid.
19 Shaw v. Reno 113 S.Ct. 2816, 2826.