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FOREWORD: REPRESENTATION WITHOUT PARTY: LESSONS FROM STATE CONSTITUTIONAL ATTEMPTS TO CONTROL GERRYMANDERING

*James A. Gardner**

ABSTRACT

Since the founding, all gerrymandering of election districts, at both the state and congressional levels, has been accomplished by state actors operating almost exclusively under state law. State constitutions have often served as a first line of defense against publicly disfavored practices, and the treatment of gerrymandering is no exception. The state constitutional record reveals a gradual introduction, diffusion, and evolution of a wide variety of provisions intended to control gerrymandering, including requirements of contiguity, compactness, respect for local political boundaries, and preservation of communities of interest, among others. Indeed, such provisions have been validated by the U.S. Supreme Court and folded into its redistricting jurisprudence under the banner of "traditional districting

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principles” to which states are constitutionally free to adhere. Yet it is clear that these principles, intended to constrain legislative discretion in drawing district lines, have been generally unsuccessful at restricting partisan gerrymandering, which has become not only routine, but impressively effective. Why have these provisions failed to impede this almost universally condemned practice?

A close examination of the history of state constitutional attempts to control gerrymandering and the emergence of a state-level jurisprudence of apportionment suggests an answer. The existing panoply of state constitutional controls on redistricting cannot effectively control partisan gerrymandering because it was, and still is, aimed at a completely different problem: ensuring fair representation in the legislature of local economies and the individuals who inhabit them. The principles of representation that emerged at the founding, and that have been carried forward in state constitutions ever since, are rooted in two important beliefs: first, that a community of interest entitled to representation is formed by participation in a shared economy; and second, that such economies are inherently local, and thus properly defined territorially—indeed, by reference to local political units, predominantly counties, which were understood to comprise fundamentally distinct economic units.

On this account of political representation, it is clear why state constitutional apportionment controls are defenseless against gerrymandering motivated by partisan ends: state constitutions to this day contemplate a kind of republican politics in which party plays no overt role, and in which gerrymandering consists of the artificial division of naturally occurring economic communities. Any attempt to control partisan manipulation of representation requires a constitutional system of representation that contemplates some proper role in representative politics for parties and partisanship—precisely what dominant state constitutional conceptions lack. This is not to say that state constitutions therefore lack any resources whatsoever to control partisan gerrymandering. It simply means that any such resources cannot be drawn from “traditional districting principles,” but must find their source in more recent principles of equal protection or structural regulation of political parties.

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I. INTRODUCTION

Politics is often thought of as the antithesis of law, yet the two are intimately connected: politics inevitably takes place within an arena defined and structured by law. Law establishes the ground rules of democratic politics; it creates the offices to be filled, prescribes the powers officials may exercise, decrees the times and formats of elections, establishes procedures

for voting and campaigning, and in general sets the outer boundaries of permissible behavior for participants in the enterprise of democratic contestation for power.

Lately, the interaction between the law and politics of legislative apportionment has attracted considerable attention, most of it negative. Apportionment, otherwise known as redistricting,¹ refers to the familiar and often contentious process by which state authorities—usually legislatures²—divide the state into districts for purposes of electing members of Congress and the state legislature. Much of the contentiousness surrounding recent redistricting cycles arises from charges that state legislatures have engaged in gerrymandering, either by exercising their power of apportionment so as to obtain or to expand a partisan advantage in legislative elections, or by using

1. On the federal level, a distinction is sometimes made between "apportionment" and "districting" or "redistricting," with the former used to refer to the allocation of representatives among the states in proportion to their population as required by U.S. CONST. art. I, § 2, cl. 3, and amend. XIV, § 2, and the latter terms used to refer to the post-apportionment division of the state into the proper number of congressional election districts. This terminological distinction has not been observed on the state level since the Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), which required state legislative districts to adhere to the population equality principle of one person, one vote. Prior to *Reynolds*, states sometimes used a two-stage process similar to the federal process, in which representatives were first apportioned among counties and cities by population, and then those units were sometimes further subdivided into districts. See *infra* Part III.A. After *Reynolds*, however, all state election districts must contain roughly equal numbers of citizens, see *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973), and therefore the process of apportioning legislators among state legislative districts necessarily occurs simultaneously with redrawing district boundaries to comply with the one person, one vote standard.

2. Thirty-four state constitutions allocate apportionment authority to the legislature, either through express delegation or omission to provide otherwise, although a substantial minority of sixteen provides for an independent redistricting commission. ALASKA CONST. art. VI, § 8; ARK. CONST. art. 8, § 1; ARIZ. CONST. art. 4, pt. 2, § 1(3); COLO. CONST. art. V, § 48(1)(a); CONN. CONST. art. 3, § 6(a); DEL. CONST. art. II, § 2A; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2(2); ME. CONST. art. IV, pt. 3, § 1-A; MICH. CONST. art. IV, § 6; MO. CONST. art. III, §§ 2, 7; MONT. CONST. art. V, § 14(2); N.J. CONST. art. II, § II, para. 1, art. IV, § III, para. 1; OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17; WASH. CONST. art. II, § 43(1). Not all of these states utilize the commission in the same way. The Connecticut redistricting commission is convened only as a backup procedure in case the legislature fails to make a timely apportionment. CONN. CONST. art. 3, § 6(b). The work of the Maine commission is advisory only. Some states combine the two apportionment models by using different methods to redistrict different bodies. For example, Colorado and Missouri designate a commission to redistrict the state legislature, but require the state legislature to conduct congressional redistricting. COLO. CONST. art. V, § 48(1)(a); MO. CONST. art. III, §§ 2, 7. However, the constitutional allocation of redistricting authority to the legislature does not necessarily preclude the legislature from redelegating that authority by statute to an independent commission, as in Iowa. See IOWA CODE §§ 42.5, 42.6 (1999).

it to protect incumbent members of the legislature from serious electoral competition by drawing them into “safe” districts dominated by partisan supporters.³

Charges of gerrymandering, and associated complaints about the drawing of tortured election districts, have of course been around for years, especially on the federal level. What seems new in the present round of complaints about gerrymandering is not merely the depth of concern, but the linkage of gerrymandering to other ailments of the political system. For example, a growing body of literature contends that the rise of gerrymandering has all but eliminated meaningful electoral competition in the United States.⁴ State legislatures, moreover, seem to redistrict with

3. See *infra* note 4 for examples.

4. The literature on gerrymandering is voluminous. Works specifically arguing that redistricting practices are responsible in some degree for a decline in the competitiveness of elections include GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002); Bruce E. Cain, Karin MacDonald & Michael McDonald, *From Equality to Fairness: The Path of Political Reform since Baker v. Carr, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 6*, 21-23 (Thomas E. Mann & Bruce E. Cain eds., 2005); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 *ELECTION L.J.* 179 (2003); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *HARV. L. REV.* 593 (2002); David Lublin & Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 *ELECTION L.J.* 144 (2006). Other scholars have reached the opposite conclusion. See, e.g., Alan I. Abramowitz, Brad Alexander & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 *J. POL.* 75 (2006) (finding no link between redistricting and declining competitiveness); Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 *ELECTION L.J.* 315, 326-28 (2002) (finding a growing incumbency advantage in races for all offices, including gubernatorial and senatorial races, thereby undermining the conclusion that declining competitiveness is due to gerrymandering); JOHN N. FRIEDMAN & RICHARD T. HOLDEN, *THE RISING INCUMBENT REELECTION RATE: WHAT’S GERRYMANDERING GOT TO DO WITH IT?* (2006), available at <http://www.people.fas.harvard.edu/~jnfriedm/incumbents.pdf> (finding that recent redistricting practices have actually made elections more competitive); see also Justin Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 *J. THEORETICAL POL.* 431 (2005) (arguing that maximizing the number of competitive districts may lead to an undesirably unrepresentative legislature); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 *AM. POL. SCI. REV.* 541, 553-54 (1994) (arguing that redistricting enhances electoral competitiveness compared to not redistricting). Numerous recent reports calling for reform of the redistricting process assume a strong link between legislative control over the redistricting process, gerrymandering, and a decline in electoral competitiveness. See, e.g., CAMPAIGN LEGAL CTR. & COUNCIL FOR EXCELLENCE IN GOV’T, *THE SHAPE OF REPRESENTATIVE DEMOCRACY: REPORT OF THE REDISTRICTING REFORM CONFERENCE* (2005); DOUGLAS JOHNSON ET AL., *ROSE INST. OF*

increasing boldness, barely bothering to disguise efforts to secure partisan advantage. The recent advent of “re-redistricting”—the practice of revising districting plans for a second time between censuses following a change in partisan control of the state legislature—seems to exemplify this trend.⁵ Public concern over these practices has led increasingly to calls for reform of the redistricting process, and to a search for solutions characterized by a renewed seriousness of purpose.⁶

The fact that many of the most visible instances of alleged chicanery in redistricting have occurred in the drawing of federal congressional districts has, however, tended to obscure an important fact about the redistricting process: these districts, like all congressional districts, were drawn not by federal officials, but by state actors operating under state law. Indeed, by far the most important source of law structuring the American political arena is state law. State law provides the structural framework and rules of engagement not only for state and local politics, but also for national politics. Although the United States Constitution grants Congress ultimate authority to regulate most aspects of congressional elections, it gives that power in the first instance to state legislatures, subject to revision by Congress.⁷ In actual practice, Congress has used this power sparingly, meaning that virtually the

STATE & LOCAL GOV'T, RESTORING THE COMPETITIVE EDGE: CALIFORNIA'S NEED FOR REDISTRICTING REFORM AND THE LIKELY IMPACT OF PROPOSITION 77 (2005); ARI WEISBARD & JEANNIE WILKINSON, CTR. FOR GOVERNMENTAL STUDIES & DEMOS, DRAWING LINES: A PUBLIC INTEREST GUIDE TO REAL REDISTRICTING REFORM 3, 6 (2005) (internet citations omitted; all reports available in PDF format).

5. See League of United Latin Am. Citizens (*LULAC*) v. Perry, 126 S. Ct. 2594 (2006) (permitting the Texas state legislature to override a court-drawn redistricting plan mid-decade); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (invalidating Colorado General Assembly's re-redistricting under provisions of the state constitution).

6. Among the more serious and thoughtful calls for reform by private groups are reports by the Campaign Legal Center; Council for Excellence in Government; Rose Institute of State and Local Government; Center for Governmental Studies; and Demos. See generally CAMPAIGN LEGAL CTR. & COUNCIL FOR EXCELLENCE IN GOV'T, *supra* note 4; JOHNSON ET AL., *supra* note 4; WEISBARD & WILKINSON, *supra* note 4.

7. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .”). The congressional power to regulate presidential elections is much more limited. See U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”). No express power of congressional revision is granted, although a limited congressional regulatory power has been inferred for the purpose of controlling serious threats to the integrity and legitimacy of national democratic processes. *United States v. Classic*, 313 U.S. 299, 314-15 (1941); *Burroughs v. United States*, 290 U.S. 534, 545 (1934).

entire body of law structuring and regulating every aspect of the national political process—including the law structuring legislative apportionment—has been created, and is overseen and implemented, by the states.

American state legislatures have a long history of gerrymandering; the practice got its name, after all, from an 1812 districting plan designed by Republicans to keep the Massachusetts state senate from falling into Federalist hands.⁸ And notwithstanding all the attention given recently to gerrymandering on the federal level, many of the most egregious, yet less publicly visible, gerrymanders have occurred on the state level in the drawing of state legislative districts. A notorious example is New York's collusive, bipartisan gerrymander that for thirty years has allocated iron-clad control of the state assembly to Democrats and of the state senate to Republicans⁹ in a state in which registered Democrats outnumber registered Republicans by approximately five to three.¹⁰

Any discussion of how to control gerrymandering, then, must begin by considering how to control state legislatures, and any consideration of how to control state legislatures stands to benefit from consulting the extensive body of state constitutional law that for the last 230 years has taken as perhaps its main objective the control of state legislative behavior. In seeking solutions to the problems of gerrymandering, an examination of state constitutions has much to recommend it. First, state constitutional law is not only hierarchically superior to other forms of state law that structure the American political process, but also typically deals directly, deliberately, and in detail with the structure and regulation of politics. Unlike the U.S. Constitution, which has very little to say about politics and electoral structures,¹¹ every

8. GEORGE ATHAN BILLIAS, *ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN* 316-17 (1976); ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 19-20, 64-74 (photo. reprint, Arno Press 1974) (1907).

9. Gerald Benjamin, *Reform in New York: The Budget, the Legislature, and the Governance Process*, 67 ALB. L. REV. 1021, 1052-53 (2004). For earlier accounts, see CALVIN B.T. LEE, *ONE MAN, ONE VOTE: WMCA AND THE STRUGGLE FOR EQUAL REPRESENTATION* (1967); RICHARD LEHNE, *LEGISLATING REAPPORTIONMENT IN NEW YORK* (1971).

10. N.Y. STATE BD. OF ELECTIONS, COUNTY ENROLLMENT TOTALS 01-APR-06, http://www.elections.state.ny.us/NYSBOE/enrollment/county/county_apr06.htm (last visited Nov. 1, 2006).

11. For example, the clause of the U.S. Constitution prescribing a democratically elected House of Representatives provides only: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. Absolutely no details of this process of electoral selection are specified. This is not to say that the U.S. Constitution has no role in structuring American politics; on the contrary, the Constitution is the source of some extremely important principles of democratic self-governance, including the principle of one person, one vote, *see* Reynolds

state constitution contains numerous provisions self-consciously intended to frame and to direct political processes occurring within the state, including apportionment.¹²

Second, the American states have a long history of using their state constitutions to institutionalize restrictions on publicly disfavored practices,¹³ and as we shall see, gerrymandering follows this common pattern. If states are the main locus of the gerrymandering problem, they may also be the source of solutions to the problem, insofar as any ideas or lessons can be drawn from the extensive history and jurisprudence of state attempts to constrain gerrymandering through state constitutional restrictions.

Finally, state constitutional approaches to constraining gerrymandering are of additional interest on the federal level. In the recent case of *Vieth v. Jubelirer*,¹⁴ the U.S. Supreme Court attempted to articulate a standard under the federal Equal Protection Clause to limit partisan gerrymandering. However, as in its only previous encounter with the issue, *Davis v. Bandemer*,¹⁵ the Court splintered badly, and in a way that left state legislators, political operatives, lower courts and the election law bar entirely without meaningful guidance. In a ruling that produced five separate opinions and advanced four different standards for evaluating the constitutionality of redistricting plans (none of which commanded more than two votes), Justice Kennedy provided the critical swing vote. While refusing to endorse any of the standards proposed by his colleagues, Justice Kennedy argued that "there are yet no agreed upon substantive principles of fairness in districting," and that as a result, "we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."¹⁶ Nevertheless, Justice Kennedy preferred to wait to see "[i]f suitable

v. Sims, 377 U.S. 533 (1964); a prohibition on racial discrimination in electoral regulation, see *White v. Regester*, 412 U.S. 755, 767-70 (1973); *Gomillion v. Lightfoot*, 364 U.S. 339, 346-47 (1960); and rules strongly favoring free speech in political campaigns, see, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). These principles, however, have either been teased out of the Constitution on very thin evidence (one person, one vote), or represent applications in the political arena of principles of far broader application (freedom of speech).

12. For an overview of state constitutional regulation of political processes, see James A. Gardner, *Voting and Elections*, in *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 145 (G. Alan Tarr & Robert F. Williams eds., 2006).

13. For a catalogue of representative examples, see G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 118-21 (1998).

14. 541 U.S. 267 (2004).

15. 478 U.S. 109 (1986).

16. *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in judgment).

standards with which to measure the burden a gerrymander imposes on representational rights [do] emerge.”¹⁷ *Vieth*, and an equally inconclusive decision last Term in *LULAC v. Perry*,¹⁸ thus implicitly invite an examination of the long history of state constitutional apportionment regulation to determine whether it might provide any guidance not only for state-level solutions to the problem of partisan gerrymandering, but also for federal equal protection jurisprudence in the pursuit of a uniform, nationwide standard for fair redistricting.¹⁹

Since the earliest days of the republic, states have developed and constitutionalized numerous well-known methods for constraining gerrymandering, including requirements that election districts be composed of contiguous territory, that they be geographically compact, that they respect local political boundaries, and that they preserve communities of interest. In this paper, I propose to examine these and a host of other, related provisions. Where did they come from? At what abuses were they aimed? How are they deployed? And, most importantly, do they hold any promise for constraining the almost universally condemned practice of partisan gerrymandering?²⁰

My answer to this final question, in brief, is that they do not. These kinds of constraints—what the U.S. Supreme Court calls “traditional districting principles”²¹—are not adequate to the task of restricting *partisan* gerrymandering because they do not speak to gerrymandering undertaken for

17. *Id.* at 313.

18. 126 S. Ct. 2594 (2006).

19. I initially raised this question in James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643 (2004). Here, I attempt to take the first, very preliminary step in answering it.

20. In the analysis that follows, I do not follow the increasingly common practice of distinguishing between a “partisan gerrymander,” the goal of which is maximize the strength of one political party at the expense of the other, and an “incumbent gerrymander,” the goal of which is to return to office as many incumbents of both parties as possible. I do not view these as distinct problems; drawing a district that is safe for an incumbent does not involve a problem any different from drawing one that is safe for any other member of the incumbent’s party, though the margin of safety may be lower where the goal is merely to return an incumbent. Both enterprises are possible only insofar as redistricters may rely on the partisan predispositions of the district’s voters. Even if this were not the case, both kinds of gerrymanders are thought to deviate from the proper working of a system of democratic representation, and it is an understanding of the baseline conception of proper representation that I am after here. Consequently, it is not necessary for me to distinguish these two strategies.

21. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 647 (1993) (cautioning states against “disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions”).

partisan gain. Rather, they emerged historically and jurisprudentially to guard against other kinds of distortions in representation and they reflect an older, largely republican theory of representation that still survives in today's state constitutions and that embraces theories of politics and representation in which political parties play no significant role. Consequently, the traditional districting principles widely constitutionalized at the state level to regulate the drawing of election district boundaries hold out little hope as a source of rules, or even inspiration, for contemporary efforts to find and implement workable constitutional constraints on gerrymandering motivated by partisan considerations.

The balance of the paper proceeds as follows. Part II introduces the subject by defining gerrymandering and surveying the panoply of anti-gerrymandering provisions contained in contemporary state constitutions. Part III undertakes an historical examination of the origin and development of these provisions, finding the record inconclusive in that it turns up no clear historical event or paradigm concern that might be said to motivate, and in consequence to guide our understanding of, the most common state constitutional provisions aimed at controlling gerrymandering. In an effort to get some greater purchase on the meaning of state constitutional anti-gerrymandering provisions, Part IV turns to the case law to determine how state courts have interpreted them. I conclude based upon this inquiry that state constitutions tend to embrace a fairly clear—but to modern sensibilities, unfamiliar—model of representation in which the basic units to be represented are not individuals, but local political units, which are in turn conceived as distinct, coherent groupings of economic and administrative activity, giving rise for the most part to communities of shared economic interest. The historically most common anti-gerrymandering provisions contained in state constitutions are primarily aimed, therefore, at preventing forms of representation that fragment local economies.

Part V delves deeper into the conception of politics implicitly framed by state constitutional apportionment provisions, concluding that the dominant conception presupposes three main features that state constitutional provisions are meant to preserve: a delegate model of representation; an intradistrict electoral politics that is harmonious; and a state-level legislative politics that is pluralistic, conflictual, and oriented toward the resolution of competing local claims regarding economic issues. In so doing, Part V offers a partial explanation of why partisan gerrymandering is so difficult to control within the framework of politics created by the traditional districting principles commonly found in state constitutions. The article concludes by suggesting other resources contained in state constitutions that might prove more effective in constraining partisan gerrymandering.

II. STATE CONSTITUTIONAL CONTROLS ON GERRYMANDERING

A. *Gerrymandering in Its Procedural Context*

Today, the term “gerrymandering” has come to have a rather narrow meaning confined to the manipulation of election district lines for political advantage.²² While this usage is certainly correct, it obscures the important fact that gerrymandering is only one manifestation of a much more general phenomenon: the opportunistic manipulation of the rules of governance to increase or consolidate power for political gain.

Although gerrymandering concerns the manipulation of election district lines, it is no different in principle from the manipulation of any other rule governing the procedures by which political power is exercised. Electoral rules specifying the qualifications of voters, registration requirements, ballot access requirements, and vote aggregation methods, for example, all can be—and have been—manipulated to favor those in power.²³ Wholly apart from elections, rules of legislative procedure such as those allocating committee assignments and chairmanships, and rules controlling committee voting and floor debate can also be manipulated by those in power to perpetuate their own control of the legislature. During the mid-twentieth century, for example, congressional seniority rules were every bit as important as district malapportionment in securing the long dominance in Congress of conservative rural Democrats until their overthrow by the post-Watergate class of 1974.²⁴ Even constitutional meta-rules can affect the exercise of power. During the early nineteenth century, battles over the state constitutional amendment process frequently were proxies for fights over regional malapportionment: beneficiaries of malapportionment sought to

22. For example, the Random House Dictionary defines “gerrymander” as “the dividing of a state, county, etc., into election districts so as to give one political party a majority in many districts while concentrating the voting strength of the other party into as few districts as possible.” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 801 (2d unabridged ed. 1987).

23. See, e.g., ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 54-67, 129-59 (2000) (qualifications, registration); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 47-72 (1974) (registration, qualifications, taxes); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 667-74 (1998) (ballot access restrictions); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 139, 351-53 (1999) (at-large voting systems).

24. See STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 41, 46-49, 120 (2d ed. 1990) (describing the rise and fall of the congressional seniority system).

freeze their advantage by making constitutional amendment difficult, while victims of malapportionment supported easier amendment in the hope of facilitating more equitable reapportionment in the future.²⁵ Nothing, therefore, distinguishes in principle the opportunistic drawing of district lines from any other opportunistic manipulation of the rules of democratic governance.

The manipulation of representation is a very old activity even within the relatively short history of American self-government. In colonial times, governors occasionally manipulated the rules of representation in colonial legislatures to obtain the legislative outcomes they preferred by blocking the establishment of election districts in newly settled areas "whenever they feared the new members would not support their policy."²⁶ This practice reached its apogee in New Hampshire, where by 1773 two-thirds of the colony's towns lacked legislative representation.²⁷ Legislatures dominated by representatives from older, more established areas had their own reasons for declining to authorize representation for newly settled areas in the interior: new legislative representation of such areas would dilute their own influence. For example, as Rosemarie Zagarri reports, "[b]y 1775 Pennsylvania's three eastern counties had twenty-six delegates whereas the eight western counties, with over half the population, had only fifteen delegates."²⁸ This is not gerrymandering in the colloquial sense, but it is a method of manipulating representation to which gerrymandering is intimately related.

Given this history, it is no surprise that disputes over the basis of legislative representation under the U.S. Constitution plagued the 1787 constitutional convention. One of the main points of contention concerned whether states would be represented in Congress as individual corporate political bodies or by population, resulting in the Great Compromise in which representation was by state in the Senate and by population in the

25. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 32-34, 37-47 (2006).

26. GRIFFITH, *supra* note 8, at 26; *see also* WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 234 (Rita & Robert Kimber trans., Rowman & Littlefield Publishers, expanded ed. 2001) (1973) ("In Massachusetts, the royal governors had incorporated new towns without granting them any representation.").

27. *See* MARC W. KRUMAN, *BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 68 (1997) ("101 of 147 towns were unrepresented in the assembly in 1773, although they paid more than a third of the province's taxes.").

28. ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850* (1987), at 43.

House—a gerrymander, as it were, in favor of the less populous states.²⁹ The Three-Fifths Clause of Article I, Section 2, under which state populations were to be calculated for purposes of House representation “by adding to the whole Number of free Persons . . . three fifths of all [slaves],”³⁰ resulted from a similar dispute about the basis of representation and amounted to a kind of gerrymander in favor of the slave states.³¹ Until Congress enacted the Apportionment Act of 1842,³² which required state congressional delegations to be elected by district rather than at large, it was not uncommon for state legislatures to switch opportunistically between the two methods depending upon which method would produce results more favorable to the party in power.³³

Although rigging district lines through gerrymandering was a tool generally available to state legislatures,³⁴ it was, in comparison to other practices that produced similar results, unsubtle and often unnecessary. Gerrymandering in the modern sense requires making affirmative changes to district lines—changes, that is, to the legal status quo. Yet changing the status quo is usually more difficult than preserving it, and shifting voters in and out of districts is the kind of thing they cannot help but notice. Thus, legislative partisans often lacked any good reason to resort to gerrymandering when doing nothing, or making less noticeable kinds of changes to electoral rules, might produce the desired effect.

29. For the composition of the Senate, see U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1. For the composition of the House, see U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2. For an excellent account of the debate preceding the Great Compromise, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 57-79 (1996).

30. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

31. This turned out to be an extremely important adjustment. According to Garry Wills, the additional representation provided to slave-owning states under the Three-Fifths Clause, replicated in the Electoral College, provided Jefferson with his winning margin over Adams in the election of 1800. GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER 1-3 (2003). It also allowed the South to dominate federal offices before 1850, pass the gag rule, and otherwise prevent congressional confrontation over issues related to slavery. *Id.* at 4-13.

32. Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491.

33. See GRIFFITH, *supra* note 8, at 101-02; ZAGARRI, *supra* note 28, at 115-17.

34. It was not always available. To prevent legislative gerrymandering, a few state constitutions have resorted to complete enumerations of the number and boundaries of election districts. See, e.g., DEL. CONST. art. II, § 2 (1897). Of course, such provisions do not preclude the possibility that the desired gerrymandering was performed at the constitutional convention rather than by the legislature.

Not until the U.S. Supreme Court decided in 1964 that all congressional and state legislative districts must contain equal numbers of voters³⁵ and that redistricting to preserve population equality would be required following each decennial census, did gerrymandering as a tool of electoral manipulation attract the kind of interest it enjoys today. After the Court's rulings, redistricting became a routine practice rather than an unusual one, and the mandatory redrawing of district lines to achieve interdistrict population equality provided convenient cover for the pursuit of other, more partisan goals. At the same time, other constitutional rulings and statutory reforms outlawed practices such as poll taxes,³⁶ literacy tests,³⁷ and at-large voting³⁸ that had previously been used in some places by dominant groups to preserve their political power.

In light of this history, it would be a mistake to view gerrymandering as a practice somehow distinct in kind from the many other forms of opportunistic manipulation of electoral rules to which politically dominant groups have resorted to entrench their dominance.³⁹ In the balance of my analysis, and in particular throughout my investigation of the historical evolution of state constitutional anti-gerrymandering provisions in Parts III and IV, I therefore attend to numerous aspects of state constitutional development relating to methods of manipulating representation that do not involve the direct legislative alteration of election district boundaries, but nevertheless are capable of achieving similar results.

B. Contemporary State Constitutional Anti-Gerrymandering Provisions

For purposes of orientation, a useful place to begin is with a quick overview of the panoply of anti-gerrymandering constraints contained in contemporary state constitutions. By far the most common, and oldest, anti-gerrymandering provisions are those requiring election districts to be "contiguous," a provision appearing today in thirty-seven state

35. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964).

36. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666-70 (1966).

37. Voting Rights Act of 1965, 42 U.S.C. § 1971(2)(c) (2000).

38. See *White v. Regester*, 412 U.S. 755, 765-66 (1973).

39. On the manipulation of legal rules for purposes of political entrenchment, see generally Issacharoff & Pildes, *supra* note 23 (discussing manipulation of primary eligibility rules, ballot access rules, the two-party system, and campaign finance rules, among other techniques).

constitutions,⁴⁰ and “compact,” a requirement imposed by twenty-four constitutions.⁴¹ Although the Equal Protection Clause of the U.S. Constitution imposes a binding population equality requirement on all state legislative districts,⁴² thirty state constitutions presently have provisions that independently require election districts to have equal or approximately equal populations.⁴³ Two of these, Colorado’s and Ohio’s, explicitly impose a

40. ALASKA CONST. art. VI, § 6; ARIZ. CONST. art. 4, pt. 2, § 1(14)(C); ARK. CONST. art. 8, § 3 (senate districts); CAL. CONST. art. XXI, § 1(c); COLO. CONST. art. V, § 47(1); CONN. CONST. art. 3, §§ 3, 4; DEL. CONST. art. II, § 2A; GA. CONST. art. III, § II, para. II; HAW. CONST. art. IV, § 6; ILL. CONST. art. IV, § 3(a); IND. CONST. art. 4, § 5; IOWA CONST. art. III, §§ 34, 37; ME. CONST. art. IV, pt. 1, § 2; MD. CONST. art. III, § 4; MASS. CONST. amend. art. CI, § 1; MICH. CONST. art. IV, §§ 2, 3 (“contiguous by land”); MINN. CONST. art. IV, § 3; MISS. CONST. art. 13, § 254; MO. CONST. art. III, §§ 2, 5 (Congress); MONT. CONST. art. V, § 14(1); NEB. CONST. art. III, § 5; N.H. CONST. pt. II, art. 26 (senate); N.J. CONST. art. IV, § II, paras. 1, 3; N.Y. CONST. art. III, §§ 4, 5; N.C. CONST. art. II, §§ 3, 5; N.D. CONST. art. IV, § 2; OHIO CONST. art. XI, § 7(A); OKLA. CONST. art. V, § 9A (senate); OR. CONST. art. IV, § 7; PA. CONST. art. II, § 16, art. VII, § 9 (election districts), art. IX, § 11 (local); S.D. CONST. art. III, § 5; TEX. CONST. art. III, § 25; VT. CONST. ch. II, §§ 13, 18; VA. CONST. art. II, § 6; WASH. CONST. art. II, §§ 6, 43(5); W. VA. CONST. art. I, § 4 (requiring contiguous counties for the election of representatives to Congress), art. VI, § 4 (state senatorial districts); WIS. CONST. art. IV, §§ 4, 5.

41. ALASKA CONST. art. VI, § 6; ARIZ. CONST. art. 4, pt. 2, § 1(14)(C); COLO. CONST. art. V, § 47(1) (legislative districts), art. VI, § 10(1) (judicial districts); HAW. CONST. art. IV, § 6; ILL. CONST. art. IV, § 3(a); IOWA CONST. art. III, § 34; ME. CONST. art. IV, pt. 1, § 2; MD. CONST. art. III, § 4; MICH. CONST. art. IV, §§ 2, 3; MO. CONST. art. III, §§ 2, 5 (Congress); MONT. CONST. art. V, § 14(1) (1984 amendment); NEB. CONST. art. III, § 5; N.J. CONST. art. IV, § II, para. 3 (Assembly); N.Y. CONST. art. III, §§ 4, 5; N.D. CONST. art. IV, § 2; OHIO CONST. art. XI, § 7(A); OKLA. CONST. art. V, § 9A; PA. CONST. art. II, § 16, art. VII, § 9 (election districts), art. IX, § 11 (local); R.I. CONST. art. VII, § 1, art. VIII, § 1; S.D. CONST. art. III, § 5; VT. CONST. ch. II, §§ 13, 18; VA. CONST. art. II, § 6; WASH. CONST. art. II, § 43(5); W. VA. CONST. art. I, § 4 (Congress), art. VI, § 4 (state senate); WIS. CONST. art. IV, § 4 (assembly); WYO. CONST. art. III, § 49 (congressional). For a collection of mostly recent judicial decisions interpreting and applying state constitutional compactness requirements to redistricting, see Kurtis A. Kemper, Annotation, *Application of Constitutional “Compactness Requirement” to Redistricting*, 114 A.L.R.5th 311 (2003).

42. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

43. ALA. CONST. art. IX, § 200; ALASKA CONST. art. VI, § 6; ARIZ. CONST. art. 4, pt. 2, § 1(14)(B); ARK. CONST. art. 8, § 3 (senatorial), amend. 55, § 2(a) (County Quorum Courts); CAL. CONST. art. XXI, § 1(b); COLO. CONST. art. V, § 46; DEL. CONST. art. II, § 2A; HAW. CONST. art. IV, § 6; ILL. CONST. art. IV, § 3(a); KY. CONST. § 33; ME. CONST. art. IV, pt. 1, § 2; MD. CONST. art. III, § 4; MASS. CONST. amend. art. CI, § 1; MICH. CONST. art. IV, §§ 2, 3; MO. CONST. art. III, §§ 2, 5 (Congress); MONT. CONST. art. V, § 14(1); NEB. CONST. art. III, § 5 (legislature); N.H. CONST. pt. II, art. 26; N.J. CONST. art. IV, § II, para. 3; N.Y. CONST. art. III, § 4; N.C. CONST. art. II, §§ 3, 5; OHIO CONST. art. XI, §§ 3, 4; OKLA. CONST. art. V, § 9A; PA. CONST. art. II, § 16, art. IX, § 11 (local); R.I. CONST. art. VII, § 1; S.D. CONST. art. III, § 5;

more stringent population equality requirement than does the U.S. Constitution.⁴⁴ Twenty state constitutions also contain some kind of restriction on the division of local government units or the crossing of local government boundaries in the creation of election districts.⁴⁵ Six state constitutions require districts to be "convenient,"⁴⁶ a now archaic term usually understood to refer to the ability of citizens or candidates to travel easily about the district.⁴⁷

In addition to these older provisions, a new generation of more precise and sophisticated anti-gerrymandering provisions began to appear in state constitutions during the last half-century, introducing a new vocabulary and stock of legal concepts for assessing the validity of state legislative election districts. The first of these, requiring districts to contain "a relatively

TENN. CONST. art. II, § 4; VT. CONST. ch. II, §§ 13, 18; WASH. CONST. art. II, § 43(5); W. VA. CONST. art. I, § 4 (Congress), art. VI, § 4 (state senate).

44. Under Supreme Court precedents, state legislative districts will generally be upheld if the population deviations among districts do not exceed ten percent. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). *But see Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (summarily affirming a lower court's ruling that a districting plan may be invalid even if it is within the ten percent deviation range if such deviations cannot be justified by a legitimate state interest other than partisan gerrymandering). Colorado and Ohio, however, prohibit district population deviations in excess of five percent. *See* COLO. CONST. art. V, § 46; OHIO CONST. art. XI, §§ 3, 4.

45. Providing that local government boundaries are to be respected as a factor to consider in apportionment: ALASKA CONST. art. VI, § 6; ARIZ. CONST. art. 4, pt. 2, § 1(14)(E); CAL. CONST. art. XXI, § 1(e); COLO. CONST. art. V, § 47(2); MD. CONST. art. III, § 4; MICH. CONST. art. IV, §§ 2, 3; OKLA. CONST. art. V, § 9A; TENN. CONST. art. II, § 4. Providing that local government units are not to be divided: ALA. CONST. art. IX, § 200; COLO. CONST. art. V, § 47(1); KY. CONST. § 33 (except for multi-district counties); MASS. CONST. amend. art. CI, § 1 (restricting the division of towns containing fewer than 2500 inhabitants when drawing representative districts); N.H. CONST. pt. II, arts. 9, 26. Local government boundaries to be used to create election district boundaries: OHIO CONST. art. XI, § 6; WASH. CONST. art. II, § 43(5); WIS. CONST. art. IV, § 4 (assembly); *see also* ME. CONST. art. IV, pt. 1, § 2 (political subdivision boundaries to be crossed the least number of times possible); NEB. CONST. art. III, § 5, art. VII, § 10 ("county lines to be followed whenever practicable"); N.J. CONST. art. IV, § II, para. 3 (counties and municipalities to be divided into the fewest possible number of districts when drawing assembly districts); PA. CONST. art. II, § 16 (local government units not to be divided unless absolutely necessary); VT. CONST. ch. II, § 18 (legislature to seek to adhere to local boundaries).

46. MICH. CONST. art. IV, §§ 2, 3; MINN. CONST. art. IV, § 3; MO. CONST. art. III, § 5; N.Y. CONST. art. III, § 5; WASH. CONST. art. II, §§ 6, 43(5); WIS. CONST. art. IV, § 5.

47. *E.g.*, *People ex rel. Smith v. Bd. of Supervisors*, 42 N.E. 592, 593 (N.Y. 1896); *In re Livingston*, 160 N.Y.S. 462, 469 (Sup. Ct. 1916). Today, the requirement of easy travel around a district is more often subsumed under the requirements of contiguity or compactness. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992); *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002).

integrated socio-economic area,” appeared in 1959 in the Alaska Constitution.⁴⁸ Soon thereafter, Oklahoma (1964) required that consideration be given in drawing districts to “economic and political interests”;⁴⁹ Colorado (1974) required preservation of “communities of interest,” which it defined to include “ethnic, cultural, economic, trade area, geographic, and demographic factors”;⁵⁰ Hawaii (1978) discouraged the “submergence” of distinct “socio-economic interests”;⁵¹ and Arizona (2000) required “respect [for] communities of interest.”⁵² The new generation of provision, however, that most directly addresses the problem of partisan gerrymandering is found in the constitutions of Delaware (1963), Hawaii (1978), and Washington (1983), and expressly forbids discrimination in districting against any person, group, or political party.⁵³ This trend culminated in the recent initiative amendment to the Arizona Constitution (2000), which provides: “To the extent practicable, competitive districts should be favored”⁵⁴

While there can be little doubt that provisions such as the ones just reviewed are intended to prevent gerrymandering, this intuition is confirmed directly by state courts that have interpreted them. For example, the Alaska Supreme Court has bluntly held that “[t]he requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering,”⁵⁵ and the New York Court of Appeals has described the requirements of compactness, contiguity, and convenience as “the State Constitution’s anti-gerrymander provisions.”⁵⁶

48. ALASKA CONST. art. VI, § 6.

49. OKLA. CONST. art. V, § 9A.

50. COLO. CONST. art. V, § 47(3).

51. HAW. CONST. art. IV, § 6.

52. ARIZ. CONST. art. 4, pt. 2, § 1(14)(D).

53. DEL. CONST. art. II, § 2A (districts may not “unduly favor any person or political party”); HAW. CONST. art. IV, § 6 (districts may not “unduly favor a person or political faction”); WASH. CONST. art. II, § 43(5) (districts may “not be drawn purposely to favor or discriminate against any political party or group”).

54. ARIZ. CONST. art. 4, pt. 2, § 1(14)(F).

55. *Hickel v. Se. Conference*, 846 P.2d 38, 45 (Alaska 1992).

56. *Schneider v. Rockefeller*, 293 N.E.2d 67, 71 (N.Y. 1972); *see also In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d 1237, 1244-45 (Colo. 2002) (stating that Colorado constitutional provisions limiting interdistrict population deviations; requiring the minimization of the aggregate linear distance of district boundaries; encouraging the preservation of communities of interest; and discouraging the splitting of cities and towns were aimed at “reducing both partisan politics and gerrymandering”); *People ex rel. Woodyatt v. Thompson*, 40 N.E. 307, 315 (Ill. 1895) (finding that “requirement of compactness” was added in 1870 “to guard, as far as practicable . . . against a legislative evil commonly known

Yet to know that these provisions exist, and that they are meant to constrain gerrymandering, tells us comparatively little about precisely what kinds of district lines will pass constitutional muster. To answer that question, we need to know more. Where did these provisions come from? To what specific problems were they addressed? What system or theory of representation do they seek to implement? And perhaps most important of all, why have they had such little success in controlling partisan gerrymandering? I attempt to answer these questions in two ways: first, through an historical examination of the emergence and evolution of state constitutional anti-gerrymandering provisions from 1776 to the present (Part III, below); and second, through examination of judicial decisions interpreting and applying such provisions (Part IV).⁵⁷

as the 'gerrymander'"); *In re* Legislative Districting of State, 475 A.2d 428, 436 (Md. 1984) ("[T]he contiguity and compactness requirements . . . are intended to prevent political gerrymandering."); *In re* Apportionment of Mich. Legislature, 137 N.W.2d 495, 499 (Mich. 1965) (concluding that constitutional convention "selected a plan which, with its adherence to county, city and township lines, compactness, rectangular or nearly uniform or square lines, *et cetera*, would make gerrymandering most difficult"); *State ex rel. Barrett v. Hitchcock*, 146 S.W. 40, 61 (Mo. 1912) (stating that contiguity and compactness requirements were adopted "to guard, as far as practicable, . . . against a legislative evil, commonly known as the 'gerrymander'"); *Jackman v. Bodine*, 262 A.2d 389, 393 (N.J. 1970) (noting that adherence to "existing county and municipal lines does not foreclose partisan selection of district lines, but it does limit that opportunity"); *In re Dowling*, 113 N.E. 545, 548 (N.Y. 1916) (state constitutional provision limiting interdistrict population deviations to less than the population of any adjoining town or block was intended to prevent districting "outrages . . . perpetuated on the State by partisan legislatures" (quoting unidentified member of 1894 constitutional convention)); *Opinion to the Governor*, 221 A.2d 799, 802 (R.I. 1966) ("Undoubtedly a principal inducing factor for . . . adoption [of the compactness requirement] was the desire to avoid the political gerrymander."); *Parkinson v. Watson*, 291 P.2d 400, 412 (Utah 1955) (McDonough, C.J., dissenting) (finding that provision of state constitution requiring senatorial districts to be composed of contiguous counties was "probably adopted to prevent use of the device of 'gerrymandering' by future legislatures").

57. In conducting this study, I have had to make some difficult choices about what sources to consult. Among the sources I have not examined in any systematic way are the records of state constitutional conventions, which I have consulted only in a very limited way, and state legislation dealing with apportionment, which I have not consulted at all. It is possible that examination of these sources might alter the analysis presented here, and I hope that future studies will include such resources.

III. THE EMERGENCE AND EVOLUTION OF STATE CONSTITUTIONAL CONSTRAINTS ON GERRYMANDERING

As students of state constitutionalism well know, commonplace provisions constraining legislative power that are found widely among the constitutions of the various states often have their source in some specific and readily identifiable historical event or series of events. Attention to the historical origin of such provisions often aids in their interpretation, as it is reasonable to assume that they should be understood as devices designed primarily to prevent any repetition of the particular legislative behavior that prompted their initial adoption. When it comes to state constitutional constraints on gerrymandering, however, the historical record is, unfortunately, inconclusive; there is no “smoking gun,”⁵⁸ no clear event or sequence of events that we can unequivocally identify as the source of these provisions, or the motivating event or paradigm case to which they are directed.

Given the provenance of the term “gerrymandering” in just such a specific and easily identifiable event, one might naturally suspect the infamous 1812 Massachusetts redistricting law signed by Governor Elbridge Gerry to be just the kind of smoking gun we might hope to find. This turns out not to be the case. Provisions restricting state legislatures’ ability to manipulate the size and shape of election districts appear in state constitutions well before 1812, and the rate at which such provisions spread from one state constitution to another bears no relation to the events of 1812. Instead, constraints on legislative discretion in apportionment appear to have percolated steadily throughout the states, often without any clear motivating incident; indeed, many such provisions appear to have been adopted even before specific problems of the type to which they were addressed had ever arisen.⁵⁹ The story of the constitutional evolution of anti-gerrymandering provisions is not without interest, and I propose to relate it here; but instrumentally-minded readers more interested in answers than a good yarn might do well to skip now to the next Part.

58. I am grateful to Fred Konefsky for suggesting this formulation.

59. Or, at least, so it appears from readily identifiable sources such as standard histories of apportionment and judicial accounts of state constitutional anti-gerrymandering provisions. It is of course possible that apportionment chicanery occurred more widely than is commonly recognized, and that the adoption of state constitutional provisions controlling gerrymandering therefore responds more directly to specific acts of malfeasance than is readily revealed by the historical record.

In the account that follows, I focus on five different, yet closely related types of provisions structuring legislative representation. I begin with an examination of (1) the unit of representation (e.g., county, town, individual, etc.); (2) formulae for allocating legislators among the represented units; (3) the total number of legislators allowed to each legislative chamber; and (4) whether election is from single-member or multi-member districts. Only after examining the development and evolution of these types of provisions do I turn to the main event: (5) restrictions targeted specifically at the drawing of election district lines (e.g., contiguity and compactness requirements, limitations on the division of local government units, etc.). Although only the last type of provision is commonly thought of today as a method for controlling gerrymandering, all of the first four factors, as we shall see, can be manipulated for partisan gain by those in power without ever changing, or even drawing, a single election district line.

A. The Unit of Representation

Nowadays, the abstract and almost infinitely flexible "election district" serves as the basic unit of electoral representation in state legislatures and Congress. This was not always the case. Until about 1845, state constitutions overwhelmingly designated the county as the primary unit of representation in the house of representatives, or lower chamber, of the state legislature; that is, representatives were by constitutional direction elected from counties rather than from other territorial divisions of the state. Thus, for example, the New York Constitution of 1777 specified that the members of the state assembly were "to be annually chosen in the several counties," and then went on to specify the number of representatives to be elected from each county;⁶⁰ the Delaware Constitution of 1831 decreed that "[t]here shall be seven representatives chosen in each county,"⁶¹ and so on. Of the fifty-two state constitutions or pertinent apportionment-related amendments adopted between 1776 and 1844, twenty-two designated counties as the exclusive basis of representation in the state house;⁶² six used counties as the basic unit

60. N.Y. CONST. of 1777, art. IV.

61. DEL. CONST. of 1831, art. II, § 2.

62. See DEL. CONST. of 1776, art. 3; N.J. CONST. of 1776, art. III; VA. CONST. of 1776, para. 25; GA. CONST. of 1777, arts. IV, V; N.Y. CONST. of 1777, art. IV; GA. CONST. of 1789, art. I, § 6; DEL. CONST. of 1792, art. II, § 2; KY. CONST. of 1792, art. I, §§ 4, 6; TENN. CONST. of 1796, art. I, § 2; GA. CONST. of 1798, art. I, § 7; N.Y. CONST. of 1777, amend. II (1801); OHIO CONST. of 1802, art. I, § 2; LA. CONST. of 1812, art. II, § 5; IND. CONST. of 1816, art. III, § 2; MO. CONST. of 1820, art. III, §§ 2, 4; N.Y. CONST. of 1821, art. I, § 7; DEL. CONST. of

of representation, but also granted separate representation to the state's major cities (Philadelphia, Annapolis, Baltimore)⁶³ or to other cities or towns of sufficient size;⁶⁴ five constitutions used towns, New England's functional equivalent of counties, as the exclusive unit of representation;⁶⁵ and four used some combination of counties, towns, and cities.⁶⁶ A minority of fifteen state constitutions during that period used districts for purposes of representation, either exclusively⁶⁷ or in combination with fixed local units such as counties, parishes, and towns.⁶⁸

After 1850 or so, the trend in state house representation moved distinctly toward the use of districts; by 1890, the constitutions of only twelve of the nation's forty-four states still required the use exclusively of whole local government units.⁶⁹ Apparently, the move away from fixed units of local governments and toward districts as the unit of representation resulted from a

1831, art. II, § 2; N.C. CONST. of 1776, art. I, § 2 (1835); ARK. CONST. of 1836, art. IV, § 34; FLA. CONST. of 1838, art. IX, § 1; N.J. CONST. of 1844, art. IV, § III.

63. See MD. CONST. of 1776, arts. II, IV, V; PA. CONST. of 1790, art. I, § 4; MD. CONST. of 1776, art. XVIII, §§ 9, 10 (1837).

64. See KY. CONST. of 1799, art. II, § 5; ALA. CONST. of 1819, art. III, §§ 8, 9; MISS. CONST. of 1832, art. III, §§ 8, 9.

65. See VT. CONST. of 1777, ch. II, § XI; MASS. CONST. of 1780, pt. II, ch. I, § III, art. II; VT. CONST. of 1786, ch. II, § VII; VT. CONST. of 1793, ch. II, § 7; CONN. CONST. of 1818, art. III, § 3.

66. See N.C. CONST. of 1776, art. III (counties and towns); N.H. CONST. pt. II, art. 9 (towns, wards); VA. CONST. of 1830, art. III, §§ 2, 4 (counties, cities, towns, boroughs); R.I. CONST. art. V, § 1 (towns and cities).

67. See S.C. CONST. of 1790, art. I, § 3; MD. CONST. of 1776, art. VI, § 1 (1799); MD. CONST. of 1776, art. X (1807); S.C. CONST. of 1790, art. I, § 3 (1808).

68. See PA. CONST. of 1776, ch. II, § 17 (counties and city of Philadelphia); S.C. CONST. of 1776, art. XI (parishes and districts); S.C. CONST. of 1778, art. XIII (parishes and districts); N.H. CONST. pt. II, art. 9; MISS. CONST. of 1817, art. III, §§ 8, 9; ILL. CONST. of 1818, art. II, §§ 3, 5 (counties and districts); ME. CONST. of 1819, art. IV, pt. 1st, §§ 2, 3 (counties, towns, and districts); TENN. CONST. of 1834, art. II, § 5 (counties and districts); MICH. CONST. of 1835, art. IV, § 3 (counties and districts); MASS. CONST. amend. art. XII (1836) (towns, cities, districts); MASS. CONST. amend. art. XIII (1840) (towns, cities, districts).

69. See ALA. CONST. of 1875, art. IX, § 2 (counties); ARK. CONST. art. VIII, § 1 (counties); DEL. CONST. of 1831, art. II, § 2 (counties); FLA. CONST. of 1885, art. VII, § 3 (counties); GA. CONST. of 1877, art. III, § III, para. I (counties); LA. CONST. of 1879, art. 16 (parishes); N.H. CONST. pt. II, art. 9 (towns, wards); N.J. CONST. of 1844, art. IV, § III, para. 1 (counties); N.C. CONST. of 1868, art. II, § 5 (counties); R.I. CONST. art. V, § 1 (towns, cities); S.C. CONST. of 1868, art. II, § 4 (counties); VT. CONST. of 1793, ch. II, § 7 (towns). By 1913, one scholar could write that "[t]he dominant tendency is clearly in favor of single member districts unconnected with any other civil division. The county is no longer favored as an apportionment unit." Chester Lloyd Jones, *The County in Politics*, 47 ANNALS AM. ACAD. POL. & SOC. SCI. 85, 88 (1913).

desire to maintain population equality among represented units; concentrated population increases in certain regions could be accommodated by permitting the division of large counties into districts,⁷⁰ and acceptable ratios of representation across counties could be maintained by permitting counties in sparsely populated or slow-growing areas to be combined into multicounty districts.⁷¹

With respect to state senates, or upper chambers, the earliest state constitutions generally also designated counties as the basic unit of representation,⁷² but the movement toward the use of districts for senate representation occurred much earlier, gathering momentum as early as the 1790s. So, for example, the Tennessee Constitution of 1796 and the Kentucky Constitution of 1799 employed districts as the unit of senatorial representation while basing representation in the house on counties, and the New Hampshire Constitution of 1784 (as amended in 1792) similarly bifurcated between districts for the senate and towns for the house.⁷³ After about 1800, the use of counties or other local government units as the basis of senatorial representation declined rapidly, and the district became the representational unit of choice.⁷⁴ The evident reason for this change was to preserve the small size of state senates by permitting representation from multicounty senatorial districts. As settlement proceeded and state population grew, an insistence upon separate senatorial representation for each county might well have required either a considerably larger senate than

70. *See, e.g.*, KY. CONST. § 33 (permitting division of multi-representative counties into districts); MO. CONST. of 1865, art. IV, § 2 (requiring such division).

71. In some instances as many as seven counties might be combined into a single representative district. *See, e.g.*, KAN. CONST. art. 10, § 3 (1859).

72. *See, e.g.*, MD. CONST. of 1776, art. XIV (counties and cities); N.J. CONST. of 1776, art. III (counties); N.C. CONST. of 1776, art. II (counties); GA. CONST. of 1789, art. I, § 2 (counties); DEL. CONST. of 1792, art. II, § 3 (counties); KY. CONST. of 1792, art. I, § 9 (counties).

73. TENN. CONST. of 1796, art. I, §§ 2, 3; KY. CONST. of 1799, art. II, §§ 5, 12; N.H. CONST. pt. II, arts. 9 (house), 26 (1792 amendment providing for the formation of single-member senate districts).

74. After 1799, only a handful of senatorial apportionment provisions continued to insist on the election of senators from individual local units. For example, between 1799 and 1867, only five states adopted such provisions. *See* DEL. CONST. of 1831, art. II, § 3 (counties); IOWA CONST. of 1846, art. 3, § 31 (counties); MD. CONST. art. III, § 3 (setting the representation of the counties and "each of the three legislative districts of the city of Baltimore," prior to 1972 amendment); MD. CONST. of 1864, art. III, § 3 (counties and Baltimore); MD. CONST. of 1851, art. III, § 2 (counties and Baltimore); MD. CONST. of 1776, art. XVIII, § 3 (1837) (counties and Baltimore); N.J. CONST. of 1844, art. IV, § II, para. 1 (counties); R.I. CONST. art. VI, § 1 (towns and cities).

constitutional drafters desired, or serious population inequities across represented counties. The switch to districts addressed both problems at once.

Generally speaking, the use of districts as the representational unit rather than local governments gives legislatures greater flexibility in structuring representation, but of course, that very flexibility also creates opportunities for manipulation. Within these parameters, legislators seeking to influence electoral outcomes can create election districts either by subdividing populous local government units such as counties or by aggregating underpopulated local government units together; but in each case, legislators may have considerable discretion about how to perform the necessary subdivision or aggregation.

For example, the eponymous Massachusetts gerrymander of 1812 was made possible by the terms of the Massachusetts Constitution, which provided that senators were “to be chosen by the Inhabitants of the *districts*, into which the commonwealth may from time to time be divided by the [legislature].”⁷⁵ Although the constitution also provided that senatorial districts would coincide with the various counties as an initial matter, it permitted departures when “the [legislature] shall determine it necessary to alter the said districts.”⁷⁶ Since the constitution’s adoption in 1780, the legislature had not departed from the constitution’s initial structuring of senatorial districts. In the 1812 session, however, a legislature controlled by Republicans divided Essex County into two senatorial election districts, and reallocated the town of Chelsea, located in neighboring Suffolk County, to one of the new Essex County districts. The purpose of this legislation was to carve out of Essex County, solidly Federalist in the 1811 elections, new districts that would elect several Republican state senators.⁷⁷

On the other hand, it would be wrong to conclude that constitutionally requiring election districts to be fashioned from whole local government units precludes any kind of gerrymandering. It does not. Unless the boundaries of local governments are themselves fixed permanently by the constitution—virtually never the case⁷⁸—legislatures can gerrymander in at

75. MASS. CONST. of 1780, pt. II, ch. I, § II, art. I (emphasis added).

76. *Id.*

77. See BILLIAS, *supra* note 8, at 316-17; GRIFFITH, *supra* note 8, at 19-20, 64-74.

78. For example, the Alabama Constitution of 1875 provided: “The boundaries of the several counties of this State, as heretofore established by law, are hereby ratified and confirmed.” ALA. CONST. of 1875, art. II, § 2. However, the provision went on to permit alteration of existing county boundaries by two-thirds vote of the legislature. *Id.* The Hawaii

least two ways. First, they can simply by law alter the boundaries of existing counties or municipalities. This occurred in 1816, for example, when the Maryland legislature increased the size, and thus the population, of the City of Baltimore without providing it with any additional representatives; as a result, Baltimore gained a population equivalent to that of a county, but under constitutional rules was entitled to only half as many representatives.⁷⁹ Similarly, in 1824, the Massachusetts legislature enacted a law removing a portion of the town of Dighton and reassigning it to the neighboring town of Wellington to secure a Republican representative from both.⁸⁰

Second, even when election districts correspond to local government units, unless the number of localities is constitutionally fixed—again, almost never the case—legislatures can manipulate representation simply by creating new counties or towns. This also occurred, for example, in the Massachusetts legislative session of 1812, when the legislature carved the new, Republican-leaning towns of South Reading and North Brookfield out of the existing, solidly Federalist towns of Reading and Brookfield.⁸¹ Two new towns—two new representatives.

B. Representation Allocation Rules

Once the unit of representation has been specified, the next question is how to allot representatives among the units entitled to legislative representation. In the Anglo-American tradition, the legislative lower chamber has generally been understood as the organ of government in which the people are most immediately represented, and representation in lower chambers has therefore generally been linked more or less directly to

Constitution creates permanent representational units known as “basic island units,” which are comprised of combinations of whole islands. HAW. CONST. art. IV, § 4.

79. GRIFFITH, *supra* note 8, at 94. However, linking election districts to towns had the anomalous effect of making every alteration of town boundaries, including relatively routine actions such as annexation, into reapportionments. In Maine and Massachusetts, this meant that alterations to town and county lines had to be made in conformity with the constitutional requirements of apportionment. *See* Opinion of the Justices, 33 Me. 587 (1851) (holding that the legislature could not alter town boundaries except at the time of reapportionment); *Warren v. Mayor of Charleston*, 68 Mass. (2 Gray) 84, 101-04 (1854) (invalidating annexation of Charleston by Boston on similar grounds).

80. *See* GRIFFITH, *supra* note 8, at 102.

81. *See id.* at 73.

population.⁸² The critical question has always been how best to accomplish this goal.

The earliest American state constitutions tended to use fixed allocation rules to determine the number of representatives to which each represented unit—as indicated above, typically a county—was entitled. Thus, for example, the Delaware Constitution of 1776 allocated seven representatives to each county, the New Jersey Constitution of 1776 allocated three representatives to each county, the Virginia Constitution of 1776 entitled each county to elect two representatives, and so on.⁸³ Unless population growth is relatively uniform across the state, however, this method will soon lead to large disparities in population, and the states, probably as a result, soon abandoned the fixed allocation method in favor of allowing the number of representatives to which a represented unit was entitled to float with its population.

The most common approach, clearly the consensus choice by the 1830s or 1840s, was to allocate representation in the lower house purely on the basis of population. The Kentucky Constitution of 1799, for example, provided that representatives “shall be apportioned . . . among the several counties and towns in proportion to the number of qualified electors”;⁸⁴ the Indiana Constitution of 1816 similarly provided that representatives be “apportioned among the several counties, according to the number of white male inhabitants, above twenty-one years of age in each.”⁸⁵

82. Britain’s so-called “rotten boroughs” are of course the great counter-example, *see, e.g.*, GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* 15-16 (1966), but the fact that they were considered illegitimate deviations demonstrates the general proposition that population was viewed, or at least eventually came to be viewed, as the proper principle for representation in the Commons. Some of the worst inequities of Britain’s rotten boroughs were mitigated by the Reform Act of 1832. For an account, *see* J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* 494-99 (1966).

83. DEL. CONST. of 1776, art. 3; N.J. CONST. of 1776, art. III; VA. CONST. of 1776, para. 25; *see also* MD. CONST. of 1776, arts. II, IV, V (four per county, two for Annapolis and Baltimore); N.C. CONST. of 1776, art. III (two per county, one for each of six named towns); PA. CONST. of 1776, ch. II, § 17 (six per county and Philadelphia); VT. CONST. of 1777, ch. II, § XVI (one per town).

84. KY. CONST. of 1799, art. II, § 6.

85. IND. CONST. of 1816, art. III, § 2; *see also* TENN. CONST. of 1796, art. I, § 2 (“number of taxable inhabitants”); N.Y. CONST. of 1777, amend. II (1801) (“number of electors”); OHIO CONST. of 1802, art. I, § 2 (“number of white male inhabitants above twenty-one years of age”); LA. CONST. of 1812, art. II, § 6 (“number of qualified electors”); MISS. CONST. of 1817, art. III, § 9 (“number of free white inhabitants”); ILL. CONST. of 1818, art. II, § 5 (“number of white inhabitants”); TENN. CONST. of 1834, art. II, § 5 (“number of qualified voters”); ARK. CONST. of 1836, art. IV, § 34 (“number of free white male inhabitants”); PA.

The problem with allowing the number of representatives to float freely with population, however, is that it can lead, as population increases, to an unwanted and potentially rapid expansion in the size of the legislature. To hold the line on legislative size, some states chose to sacrifice strict population equity across represented units. One common method was to require ever larger population increments to qualify for additional representatives. Under Missouri's 1875 Constitution, for example, a "ratio of representation" was calculated by dividing the population of the state by two hundred. Each county having one ratio of representation, or less, was entitled to one representative in the state house of representatives. To earn a second representative, however, a county needed a population of two-and-one-half ratios. A third representative was allowed to counties having a population of four ratios, a fourth to counties with six ratios, and so on.⁸⁶ Another common method of restraining growth in the size of lower houses was to impose caps on the number of representatives to which represented units were entitled. Thus, under the Georgia Constitution of 1798, counties were entitled to between one and four representatives depending upon their population, but no amount of population could entitle a county to more than four representatives.⁸⁷ Under the Vermont Constitution of 1786 and an 1874 amendment to the Connecticut Constitution, towns were entitled to either one or two representatives—but never more than two—again according to their population.⁸⁸

Although neither of these methods requires drawing or redrawing a single election district line, both methods are, of course, a kind of gerrymander in favor of less populous areas—or to put it less pejoratively, both allocation formulae give significant weight to considerations other than population. Moreover, these kinds of restraints on the size of legislative delegations were not always imposed equitably, even on their own terms; sometimes they were deployed selectively, and the most frequent victims, especially as the nineteenth century wore on, were large cities. For example, under the Maryland Constitution of 1851, Baltimore was limited to "four more delegates than are allowed to the most populous county,"⁸⁹ regardless

CONST. of 1838, art. I, § 4 ("number of taxable inhabitants"); TEX. CONST. of 1845, art. III, § 29 ("number of free population"); IOWA CONST. of 1846, art. 3, § 31 ("number of white inhabitants"); WIS. CONST. of 1848, art. IV, § 3 ("number of inhabitants").

86. MO. CONST. of 1875, art. IV, § 2; *see also* MD. CONST. of 1864, art. III, § 4; MD. CONST. art. III, § 4 (1867, pre-1972 amendment); N.H. CONST. pt. II, art. 9 (1877 amendment).

87. GA. CONST. of 1798, art. I, § 7.

88. VT. CONST. of 1786, ch. II, § VII; CONN. CONST. of 1818, art. XV (1874).

89. MD. CONST. of 1851, art. III, § 3.

of its actual population. Under the Rhode Island Constitution of 1842, no town or city, regardless of its population, was entitled to more than one-sixth of the total number of representatives,⁹⁰ a restriction doubtless aimed at Providence.⁹¹

The evolution of representation allocation provisions follows a similar pattern for state senates, but with two main—and conflicting—differences. First, state constitutions started to converge on population as the preferred method for allocating senators around 1800, several decades earlier than was the case with representatives. As indicated in the previous section, state constitutions began to converge during the 1790s on the use of districts as the basic unit of senatorial representation, a shift that allowed state legislatures more readily to maintain population equality among senatorial districts by disengaging them from local government units, such as counties and towns, which often contained widely disparate populations. At the same time, however, state constitutional drafters were much more ready to sacrifice population equality among senatorial districts for the sake of keeping the body small than was the case with state legislative lower chambers, for which a larger number of representatives was preferred.

The tension between these two conflicting impulses was most often resolved by granting the legislature the discretion to create senatorial districts, but constraining its discretion by defining senatorial districts as composites of fixed local government units, most often counties. Perhaps the most common approach of this kind was to prohibit the division of counties in the formation of senatorial districts,⁹² or to require affirmatively that senatorial districts be “bounded by county lines.”⁹³ Most state constitutions, moreover, established a provisional set of districts and apportionment of

90. R.I. CONST. art. V, § 1; *see also* LA. CONST. of 1845, tit. II, art. 15 (“no parish shall be entitled to more than one-eighth of the whole number of senators”). For a discussion of the impact of this kind of provision (and other kinds) on apportionment in the mid-twentieth century, *see generally* Malcolm E. Jewell, *Constitutional Provisions for State Legislative Apportionment*, 8 W. POL. Q. 271 (1955).

91. In 1840, Providence had a population of just over 23,000, *see* CAMPBELL GIBSON, U.S. CENSUS BUREAU, WORKING PAPER NO. 27, POPULATION OF THE 100 LARGEST CITIES AND OTHER URBAN PLACES IN THE UNITED STATES: 1790 TO 1990, at tbl.7 (1998), *available at* <http://www.census.gov/population/documentation/twps0027/tab07.txt>, and the entire state of Rhode Island had a population of nearly 109,000, *see* U.S. CENSUS BUREAU, POPULATION: 1790 TO 1990, <http://www.census.gov/population/censusdata/table-16.pdf>, which would ordinarily have entitled Providence to about one-fifth of the state’s legislators.

92. *E.g.*, ALA. CONST. of 1819, art. III, § 11; MISS. CONST. of 1817, art. III, § 13; MO. CONST. of 1820, art. III, § 6.

93. W. VA. CONST. of 1862, art. IV, § 4; *see also* ME. CONST. of 1819, art. IV, pt. 2d, § 2 (senatorial districts to be formed of whole counties “as near as may be”).

legislators, subject to alteration following the next census after ratification of the constitution, and the overwhelming majority of these initial apportionments created senatorial districts out of one or more whole counties.⁹⁴ This exceedingly common practice also suggests strongly that state constitutional drafters generally contemplated that legislatures would maintain population equality across senatorial districts primarily by aggregating counties in combinations that produced roughly equitable results. The responsibility to aggregate counties into senatorial districts in this way, however, obviously left state legislatures with considerable discretion that they might exercise for partisan purposes; counties might be grouped this way rather than that, with presumably predictable consequences.

C. Size of the Legislature

Before 1800, state constitutions rarely fixed the number of legislators to be elected; instead, this figure floated freely with the number of representatives to which the various represented units cumulatively were entitled. For example, if the constitutional formula for allocating representatives allotted one senator per county,⁹⁵ the number of legislators depended solely on the number of counties rather than on the size of the population represented or on any deliberate determination about the most desirable size of the legislature. As we have seen, this kind of allocation formula created opportunities for gerrymandering by permitting the legislature to create new counties or towns which were then entitled under the formula to separate representation. On the other hand, the proliferation of new units of local government accompanying new settlement often placed unwanted upward pressure on the size of the legislature.

Between 1800 and about 1880, the most common state constitutional approach to this dilemma was to establish a range—a minimum and maximum size—for one or both legislative chambers, and to authorize the legislature to establish by law the precise number of legislators within the range. For example, an 1801 amendment to the New York Constitution of 1777 provided: “[T]he number of the members of the assembly hereafter to be elected shall be one hundred, and shall never exceed one hundred and fifty”;⁹⁶ the Missouri Constitution of 1820 established a senate of between

94. Among the dozens of examples of this practice are, *e.g.*, ARK. CONST. of 1836, art. IV, § 31; FLA. CONST. of 1838, art. IX, § 5; TEX. CONST. of 1845, art. III, § 32.

95. *E.g.*, GA. CONST. of 1798, art. I, § 3.

96. N.Y. CONST. of 1777, amend. I (1801).

fourteen and thirty-three members;⁹⁷ and the Michigan Constitution of 1835 required a house of between forty-eight and one hundred representatives.⁹⁸

A common variation on this approach, first appearing in Tennessee in 1796 and increasingly common by the 1830s, was to establish a numerical range for the house, but to set the size of the senate as a ratio, or a range of ratios, of the size of the house. Thus, under the Tennessee provision, the number of representatives was to be set by the legislature between twenty-two and twenty-six,⁹⁹ and “[t]he number of senators shall . . . be fixed by the legislature . . . and shall never be less than one-third nor more than one-half of the number of representatives.”¹⁰⁰ The Mississippi Constitution of 1832 established a house of between thirty-six and one hundred representatives, and a senate of between one-fourth and one-third the number of representatives.¹⁰¹

In the newer and less densely populated states, state constitutions sometimes set two ranges in anticipation of population increases. The Iowa Constitution of 1846, for example, provided: “the house of representatives shall never be less than twenty-six, nor greater than thirty-nine, until the number of white inhabitants shall be one hundred and seventy-five thousand; and after that event, at such ratio such that the whole number of representatives shall never be less than thirty-nine nor exceeding seventy-two.”¹⁰²

By allowing the size of the legislature to vary, but only within a predetermined range, all of these approaches successfully mediated between competing public interests in population equality, and a reasonable legislative size in relation to represented population. The constitutional ceiling on the number of representatives prevented the legislature from growing so large as to cultivate what James Madison called “the confusion of a multitude.”¹⁰³ At the same time, permitting the size of the legislature to vary considerably beneath the ceiling created the flexibility necessary to distribute representatives among represented units in a way that

97. MO. CONST. of 1820, art. III, § 6.

98. MICH. CONST. of 1835, art. IV, § 2.

99. TENN. CONST. of 1796, art. I, § 2.

100. *Id.* § 3.

101. MISS. CONST. of 1832, art. III, §§ 9, 10.

102. IOWA CONST. of 1846, art. 3, § 31.

103. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

corresponded—certainly roughly, but doubtless in many cases with some fair degree of accuracy—to their populations.¹⁰⁴

On the other hand, any detail not specified by the state constitution is one necessarily left to the legislature,¹⁰⁵ and leaving to the legislature the task of determining its own size created opportunities for gerrymandering. For a legislature of any size below the constitutional cap, the question always arises whether the legislature might profitably be increased in size by one additional representative. No matter what the constitutional formula for allocating representatives among represented units, legislators will either have some discretion about where to add the additional representative, or, if they lack such discretion, will certainly know to which county, town, or district the next representative must be allocated—and the one after that, and the one after that. In consequence, decisions concerning legislative size are inevitably highly politicized.¹⁰⁶

104. While not exactly relevant, it is perhaps worth noting that population equality among congressional districts was greater during the mid-nineteenth century than at any other time in United States history. See Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 SOC. SCI. HIST. 159, 173-79 (1998). The number of representatives per state could not, of course, be varied by the state legislature to resolve population inequality across districts, but this fact may indicate a general desire among nineteenth-century state legislatures to honor population equality when possible to do so.

105. Unlike the U.S. Constitution, state constitutions are generally understood to provide general grants of legislative authority except as limited in the document. Consequently, where state constitutions are silent about the existence of a power, state legislatures are assumed to possess it. See TARR, *supra* note 13, at 7-8.

106. For example, following the 1920 census, separate proposals were made in Congress to increase the size of the House of Representatives from 435 members to 450, 460, and 483, as well as to decrease it to 300, 304, and even 65. See generally CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920s*, at 32-84 (1990). The impact that these proposals would have had on the size of each state's legislative delegation caused such bitter infighting that Congress was unable to enact any reapportionment law at all based on the 1920 census—a direct violation of the Constitution—and managed in 1929 to agree only on a reapportionment method to apply to the 1930 census. *Id.* The tenor of the debate can be gleaned from the following passage:

Maine Republican Carroll L. Beedy, a member of the Census Committee, accused the committee members of having abandoned principle in favor of protecting their own seats. Beedy opposed the Siegel bill [which would have increased the size of the house to 460 members] and questioned, "By what process of ratiocination did the committee conclude to increase the membership of the House but to put the brakes at 460?" He explained that the committee contained two powerful congressmen from Kentucky and Iowa—John W. Langley, an eight-term veteran from Pikeville, Kentucky, . . . and Iowa's Horace M. Towner Beedy suggested that Langley "long since discovered that a House of 459 would save Kentucky a Congressman"

In apparent recognition of this dynamic, by the late nineteenth century the dominant method for determining legislative size changed again, to the familiar, modern approach whereby the number of legislators is fixed directly by the state constitution. For example, the California Constitution of 1879 established a house of eighty and a senate of forty; the Kentucky Constitution of 1891 established a house of one hundred and a senate of thirty-eight; and the Delaware Constitution of 1897 created a house of thirty-five and a senate of seventeen.¹⁰⁷ This approach to legislative size takes one form of discretion to allocate representatives away from the legislature, but only at the cost of creating a conflict between adhering to local government lines to define represented units, on one hand, and population equality in representation, on the other. Under the former system, population inequalities among counties or towns could be smoothed out by sprinkling a few additional representatives where they were most needed. If each chamber must be of a fixed size, however, population inequality can no longer be addressed by the discretionary addition of representatives, leaving the full burden of smoothing out population inequality to either the constitutional formula for allocating representatives, or to the discretionary grouping of local government units into districts by the legislature. The former were generally too blunt to eliminate substantial malapportionment, and the latter returned authority to the legislature that it might abuse for partisan purposes.

D. Method of Election: Single-Member or Multimember Districts

The use of counties and towns as units of representation, coupled with the widespread use of population as the preferred criterion for allocating representatives among them, often meant that individual, represented units were entitled to more than one representative or senator. This required that a choice be made between subdividing the unit and electing legislators individually from single-member districts, or electing the entire legislative

and that Towner similarly knew that “a House of 460 would save Iowa a Congressman.”

Id. at 49. A bill recently introduced in Congress, albeit of doubtful constitutionality, would increase the size of the House of Representatives by two, with one member going to the District of Columbia and the next to Utah. Mary Beth Sheridan, *House Panel Endorses D.C. Vote; Bill Needs Approval from Judiciary Committee*, WASH. POST, May 19, 2006, at B1. This measure obviously represents a political compromise intended to soften long-standing resistance by Republicans to full D.C. voting rights in Congress. *Id.*

107. CAL. CONST. art. IV, §§ 2(a), 6; KY. CONST. § 35; DEL. CONST. art. II, § 2.

delegation from a single multimember district, a method now generally called election at large, but known during the eighteenth and nineteenth centuries as the "general ticket."

The choice between these two systems, however, presented a significant opportunity for a kind of gerrymandering. On one hand, elections at large tend to overrepresent the majority as compared to election by single-member districts,¹⁰⁸ making it a potentially attractive choice for any party temporarily in power. On the other hand, at-large systems can magnify small changes in public opinion into dramatic swings in legislative control, and determining whether an at-large or single-district system is in the long-term interest of any party requires rather fine calculations about the geographical distribution of supporters and the likely success of party candidates in future elections. In any event, opportunistic switching between these two systems was common during the early nineteenth century, especially for the election of congressional delegations and slates of presidential electors. New Hampshire, for example, switched its mode of electing congressional representatives twice within seven months in 1824-25, from general ticket to single-member districts in late 1824, and back to a general ticket the following July, as control of the state legislature changed hands.¹⁰⁹ New Jersey elected its congressional delegation by general ticket before 1798; switched to districted elections for the election of 1798; returned to the general ticket for elections between 1800 and 1810; used districts in 1812; and elected by general ticket from 1814 through 1826, all depending upon how the party in control of the state legislature assessed its political fortunes.¹¹⁰

108. This is because political minorities may be sufficiently numerous to control the outcome in one or several election districts, but not sufficiently numerous to control the outcome throughout the jurisdiction. As a result, under an at-large electoral system, it is theoretically possible for 51% of the populace to control the outcomes for 100% of the seats. That is why one of the first institutions to fall under the Voting Rights Act after its 1982 amendment was the use of at-large legislative districts. See *Thornburg v. Gingles*, 478 U.S. 30, 46-52 (1986). As Justice O'Connor observed, at-large elections have a tendency to "submerge" racial minorities. See *id.* at 87 (O'Connor, J., concurring in judgment) ("[T]he at-large or multimember district has an inherent tendency to submerge the votes of the minority."). Indeed, where at-large systems have been used for discriminatory purposes, division of the multimember jurisdiction into equipopulous districts has long been the Court's remedy of choice. See *Chapman v. Meier*, 420 U.S. 1, 17-19 (1975); *Mahan v. Howell*, 410 U.S. 315, 333 (1973); *Connor v. Williams*, 404 U.S. 549, 551 (1972) (*per curiam*); *Connor v. Johnson*, 402 U.S. 690, 692 (1971) (*per curiam*).

109. See GRIFFITH, *supra* note 8, at 101-02.

110. See ZAGARRI, *supra* note 28, at 115-17.

For state legislative elections, the dominant approach until about the middle of the nineteenth century was to require multimember districts for both chambers, although a minority of states used single-member districts to elect senators. In 1842, for example, every state elected representatives by general ticket, and seventeen out of twenty-seven elected senators by general ticket as well.¹¹¹ In a typical case, the election of representatives by general ticket meant that a particular county might elect, say, two or three representatives at large. In some cases, the number of representatives elected by general ticket could be considerably larger; for example, the South Carolina Constitution of 1868 allocated eighteen representatives to Charleston County and the Nevada Constitution of 1864 allocated twelve representatives to Storey County.¹¹²

In 1842, Congress passed the Apportionment Act,¹¹³ requiring all congressional representatives to be elected from single-member districts. This halted the practice of opportunistic switching between at-large and districted congressional elections. At the same time, however, compliance with the Apportionment Act required all states to draw congressional election districts, thereby opening the door to the kind of line-drawing gerrymanders prevalent today. It is ironic that this federal law, enacted originally at least in part to put a stop to one kind of very potent manipulation of the rules of representation,¹¹⁴ created the conditions that today enable a very different kind of manipulation.

111. In reaching this result, I count among the general-ticket states those that authorized the creation of single-legislator districts for the least populous units if other units were entitled to more than one legislator based on their greater populations. In a population-based system of district elections by general ticket, there is no logical requirement that every district have more than one representative. Most systems were of this sort; very few affirmatively required more than one representative or senator in every district. For a rare example, see CONN. CONST. of 1818, art. II (1828) ("no county shall have less than two senators").

The ten states that elected senators from single-member districts were Alabama, Florida, Georgia, Kentucky, Maryland, New Jersey, North Carolina, Rhode Island, South Carolina, and Virginia. See ALA. CONST. of 1819, art. III, § 10; FLA. CONST. of 1838, art. IX, § 2; GA. CONST. of 1798, art. I, § 3 (1843); KY. CONST. of 1799, art. II, § 14; MD. CONST. of 1776, art. XVIII, § 3 (1837); N.J. CONST. of 1844, art. IV, § II, para. 1; N.C. CONST. of 1776, art. I, § 1 (1835); R.I. CONST. art. VI, § 1; S.C. CONST. of 1790, art. I, § 3 (1808); VA. CONST. of 1830, art. III, § 3.

112. S.C. CONST. of 1868, art. II, § 4; NEV. CONST. art. XVII, § 6.

113. Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491.

114. The other reason had to do with the politics of slavery. Given the antebellum division of public opinion in the North over slavery, Southern politicians generally believed that if northern elections were held by district, it was likely that a good number of northern legislators would not support measures to end slavery. A requirement of single-member

Although the Apportionment Act applied only to representation in Congress, it seems to have precipitated a gradual shift in state approaches toward the use of single-member districts for elections to both chambers of the state legislature. Single-member districting for both chambers was constitutionally adopted, for example, in New York (1846), Wisconsin (1848), Michigan (1850), Kansas (1858), Missouri (1875), California (1879), and Kentucky (1891),¹¹⁵ although multimember districts continued to be widely utilized in many states well into the twentieth century.¹¹⁶

Nevertheless, constitutional authority to utilize single-member districts was typically granted subject to constraints, mainly because it conflicted with the almost universally accepted principle that local government units should be kept intact for purposes of representation. Single-member districting was therefore authorized only when necessary to subdivide counties, and later cities, into districts when their population entitled them to more than one representative. The result was a two-stage process in which legislators were first allocated to whole represented units, such as counties or cities, and these larger units were then subdivided into a number of election districts equal to their allocation of legislators.¹¹⁷ For example, the Michigan Constitution of 1850 provided: "In every county entitled to more than one Representative, the board of supervisors [of the county] shall assemble . . . and divide the same into representative districts, equal to the number of Representatives to which such county is entitled by law"¹¹⁸ At no time before the U.S. Supreme Court's 1964 decision in *Reynolds v. Sims*¹¹⁹ did state constitutions

districts would thus preserve a pro-slavery majority in Congress. See, e.g., CONG. GLOBE, 27th Cong., 21st Sess. 448 (Apr. 27, 1842) (statement of Rep. Garrett Davis); *id.* at 464 (May 2, 1842) (statement of Rep. Wm. Cost Johnson); *id.* at 469, 470 (May 3, 1842) (statement of Rep. Ferris); *id.* at 567-68 (June 2, 1842) (statement of Sen. Woodbury); see also ZAGARRI, *supra* note 28, at 140.

115. N.Y. CONST. of 1846, art. III, §§ 3, 5; WIS. CONST. of 1848, art. IV, §§ 4, 5; MICH. CONST. of 1850, art. IV, §§ 2, 3; KAN. DRAFT [LEAVENWORTH] CONST. of 1858, art. IV, § 3; MO. CONST. of 1875, art. IV, §§ 3, 5, 6; CAL. CONST. art. IV, § 6; KY. CONST. § 31.

116. West Virginia to this day elects senators from two-senator districts. W. VA. CONST. art. VI, § 4. Arizona elects two representatives from each state house district. ARIZ. CONST. art. 4, pt. 2, § 1(1).

117. This method is familiar on the federal level as well. Under the U.S. Constitution, Representatives are allocated among the states on the basis of population. U.S. CONST. art. I, § 2, cl. 1, amend. XIV, § 2. Under the Apportionment Act of 1842, the states are then divided into the appropriate number of districts. Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491.

118. MICH. CONST. of 1850, art. IV, § 3; see also KY. CONST. of 1850, art. II, § 5 (multi-representative cities to be divided into equal districts); N.Y. CONST. of 1846, art. III, § 5 (board of supervisors to divide multi-member counties into equal districts).

119. 377 U.S. 533 (1964).

authorize the creation of single-member districts that crossed local government boundaries.¹²⁰

Finally, the constitutional choice between single-member and multimember districts was not always made in a way that applied the same rules to all represented units. One such practice was to adopt different rules for counties and large cities in ways evidently intended to disadvantage the latter. For example, an 1857 amendment to the Pennsylvania Constitution of 1838 provided that “no county shall be divided in the formation of a [representative] district,” but that “[a]ny city containing a sufficient [population] to entitle it to at least two representatives, shall have a separate representation assigned it, and shall be divided into convenient districts . . . each of which districts shall elect one representative.”¹²¹ To drive the point home, the amendment went on to provide: “The city of Philadelphia shall be divided into single senatorial districts”¹²² This arrangement doubtless was thought to strengthen the influence of counties in the legislature by uniting their delegations and to weaken the influence of cities by splitting them.¹²³

E. Direct Restrictions on Gerrymandering

We have seen thus far that constitutional systems of legislative representation contain a host of variables, and that many of these variables, such as units of representation, representative allocation rules, the size of the legislature, and the type of electoral system, may be manipulated opportunistically by legislative majorities to enhance their power without ever drawing or altering a single district boundary line—without, that is, engaging in what we would be inclined today to call overt gerrymandering. Nevertheless, the manipulation of district lines is a tool that has often been

120. This does not, of course, mean that it was not done. For example, “the Wisconsin Constitution had for over 40 years been interpreted by the Wisconsin Legislature as permitting Assembly districts to cross county lines before the Wisconsin Supreme Court in 1892 ruled that county lines had to be regarded as inviolable in the first *Cunningham* case.” H. Rupert Theobald, *Equal Representation: A Study of Legislative and Congressional Apportionment in Wisconsin*, in STATE OF WISCONSIN BLUE BOOK 71, 204 (1970). The case referred to is *State ex rel. Attorney General v. Cunningham*, 51 N.W. 724 (Wis. 1892).

121. PA. CONST. of 1838, art. I, § 4 (1857).

122. *Id.* § 7.

123. During the nineteenth century, states that elected congressional delegations (or slates of presidential electors) at large were sometimes said to have more influence than, or disproportionate influence compared to, states that elected by district. See ZAGARRI, *supra* note 28, at 130-33.

available to state legislatures, and provisions have frequently been placed in state constitutions for the purpose of constraining directly the practice of gerrymandering in its narrowest, contemporary sense—as a form of manipulation of election district boundaries. I therefore turn finally to this family of direct anti-gerrymandering constraints.

The most basic method of preventing legislative gerrymandering is simply constitutional specification: the more the state constitution says about how districts are to be structured, the less discretion the legislature has, and thus the more limited its opportunities to gerrymander. The most extreme and therefore foolproof version of constitutional specification is to constitutionalize the actual boundaries of all legislative election districts, thereby depriving the legislature of all discretion whatsoever. This has been done on a few occasions. The Delaware Constitution of 1897, for example, specified the precise boundaries of all thirty-five house and all seventeen senatorial districts, down to the level of individual streets,¹²⁴ but this is an extremely rare strategy, and one that suffers heavily from all the disadvantages associated with constitutional overspecification, including inflexibility and, often, rapid obsolescence.¹²⁵ Moreover, the constitutionalization of district boundaries hardly means that inequitable representation will never be created under the constitutional scheme; it means only that any such inequities will be created by the constitutional convention rather than the legislature.

A much more common approach to constraining gerrymandering was to constitutionalize constraints on the ways in which legislative districts could be drawn by the apportioning legislature. The very first provision establishing restrictions on the exercise of legislative discretion in district line-drawing appeared surprisingly early, in the Pennsylvania Constitution of 1790. This provision contained two restrictions that were subsequently widely copied by other states. It provided, first, that “[w]hen a district shall be composed of two or more counties they shall be adjoining”; and second,

124. DEL. CONST. art. II, § 2. In some cases, state constitutions even defined districts in reference to individual dwellings. The Kansas Constitution of 1855 defined one district's boundary by “a direct line to the west side of Johnson's house,” and another as lying along a line “on the east side of the house of Charles Matney.” KAN. DRAFT [TOPEKA] CONST. of 1855, sched. 6th, 1st dist., 3d dist. Unlike the Delaware districts, however, the districts so defined could be altered by the legislature. *Id.*

125. Constitutional overspecification has a long history among state constitutions. For critique, see Charles R. Adrian, *Trends in State Constitutions*, 5 HARV. J. ON LEGIS. 311, 323 (1968); William F. Swindler, *State Constitutions for the 20th Century*, 50 NEB. L. REV. 577, 590-99 (1971); Note, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279, 280-81 (1949).

that “[n]either the city of Philadelphia, nor any county, shall be divided in forming a district.”¹²⁶

The appearance in this constitution of a requirement that counties in the same district be “adjoining” is itself somewhat surprising in that there does not seem to be any evidence to suggest that the requirement responded to any specific problem in Pennsylvania—or in any other state, for that matter—prior to 1790 involving the formation of legislative districts out of nonadjoining counties. In *The Rise and Development of the Gerrymander*, which covers line-drawing chicanery from colonial times until 1842, Elmer C. Griffith reports exactly one example of the formation of a state legislative district out of nonadjoining counties. The example turns out to be from Pennsylvania, but it dates from 1829—nearly forty years *after* the initial adoption of the constitutional prohibition.¹²⁷

The genesis of Pennsylvania’s prohibition on dividing counties is also somewhat murky. Griffith reports that some counties in Pennsylvania had been divided into election districts in 1785 and restored the following year,¹²⁸ but finds no hard evidence to suggest either that the division was made for partisan purposes, or that the 1790 prohibition on dividing counties was adopted specifically to prevent gerrymandering.¹²⁹ The only evidence on this point is very indirect: during the Pennsylvania constitutional convention of 1837—nearly fifty years after the fact—one delegate referred to the prohibition on dividing counties as a device to prevent gerrymandering.¹³⁰ On the other hand, counties had been divided in New York in 1789 in drawing *congressional* election districts¹³¹—the first instance since 1776 in any state, according to Griffith, of the division of political units in such

126. PA. CONST. of 1790, art. I, § 7. The provision was by its own terms limited to senatorial districts, and no similar restriction applied to representative districts.

127. According to Griffith, in 1829 the Pennsylvania legislature created a senatorial district out of three counties in the central part of the state: Lycoming, Centre, and Northumberland. See GRIFFITH, *supra* note 8, at 115. Lycoming and Northumberland Counties share a border, but Centre County misses touching Lycoming by about 1.5 miles according to present-day maps.

128. *Id.* at 45.

129. *Id.* at 44.

130. *Id.* at 45.

131. *Id.* at 42. Westchester County was split up between the second and third congressional districts. See KENNETH C. MARTIS, THE HISTORICAL ATLAS OF UNITED STATES CONGRESSIONAL DISTRICTS 1789-1983, at 247 (Kenneth C. Martis & Ruth Anderson Rowles eds., 1982) (citing Cong. Dist. Law, C. 12 (Jan. 27, 1789)). The county’s boundaries were quite different then than they are today. See ATLAS OF HISTORICAL COUNTY BOUNDARIES: NEW YORK 207-09 (Kathryn Ford Thorne compiler, John H. Long ed., 1993).

districting¹³²—but if the 1790 Pennsylvania prohibition on dividing counties was meant as a response to this episode, it was poorly crafted indeed, for it applied only to state senatorial districts and not to congressional districts at all. In fact, just one year later, in 1791, the Pennsylvania legislature did, in drawing congressional districts, precisely what the state constitution forbade it to do in drawing state senatorial districts: it divided a county by joining the city of Philadelphia, a part of Philadelphia County, with Delaware County to make one congressional district and by joining the rest of Philadelphia County to Bucks County to make another.¹³³

In the end, then, we can be certain, at most, of two things. First, there can be no doubt that both of the techniques banned by the 1790 Pennsylvania Constitution could have been used opportunistically, and that prohibiting them deprived the legislature of two potential tools of gerrymandering. Second, the prohibition on dividing counties is consistent with what we have already seen over and over in examining state constitutional structures of representation: outside of New England, the basic unit of legislative representation was widely understood throughout the eighteenth and nineteenth centuries to be the county. Thus, even if it did not respond to some specific instance of line-drawing malfeasance, the 1790 Pennsylvania prohibition on dividing counties certainly responded to the belief that counties—or at any rate, county populations—were discrete and whole entities entitled individually to separate representation in the legislature.

In any event, whatever its motivations, Pennsylvania's 1790 anti-gerrymandering provisions proved influential in the spread and evolution of state constitutional constraints on gerrymandering. Language requiring counties within an election district to be "adjoining" percolated slowly through the state constitutional world, turning up, for example, in Tennessee (1796) and Kentucky (1799).¹³⁴ A slightly different formulation, first appearing in Mississippi in 1817, provided: "When a senatorial district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district . . .".¹³⁵ This prohibition on districts containing "entirely separated" counties later turned up in the constitutions

132. See GRIFFITH, *supra* note 8, at 42.

133. *Id.* at 45.

134. TENN. CONST. of 1796, art. I, § 4; KY. CONST. of 1799, art. II, § 12; *see also* MASS. CONST. amend. art. XXII (1857) ("adjacent territory").

135. MISS. CONST. of 1817, art. III, § 13.

of Alabama (1819), Missouri (1820), Florida (1838), and Iowa (1846),¹³⁶ and similar provisions banning “separated” counties appeared in Texas (1845) and California (1849).¹³⁷ These formulations, however, were soon overtaken by different language getting at the same idea: the requirement that senatorial districts be composed of “contiguous” territory.¹³⁸ The contiguity requirement first appeared in the New York Constitution of 1821,¹³⁹ and spread rapidly to Connecticut (1828), Michigan (1835), Arkansas (1836), Illinois (1848), Wisconsin (1848), Indiana (1851), Pennsylvania (1857), and numerous other states.¹⁴⁰ Interestingly, at the same time as contiguity requirements in *state* legislative districting spread, so did the practice of cobbling together *congressional* districts out of noncontiguous counties. In virtually every Congress between 1793 and 1842, when Congress finally imposed its own contiguity requirement on congressional districts,¹⁴¹ at least a few districts consisted of counties that were noncontiguous.¹⁴² No state

136. ALA. CONST. of 1819, art. III, § 11; MO. CONST. of 1820, art. III, § 6; FLA. CONST. of 1838, art. IX, § 3; IOWA CONST. of 1846, art. 3, § 32; *see also* FLA. CONST. of 1865, art. IX, § 3.

137. TEX. CONST. of 1845, art. III, § 10; CAL. CONST. of 1849, art. IV, § 30.

138. There is no similar restriction for house districts, probably because it was unnecessary given that state house districts tended to be defined as whole counties.

139. N.Y. CONST. of 1821, art. I, § 6.

140. CONN. CONST. of 1818, art. II (1828); MICH. CONST. of 1835, art. IV, § 6; ARK. CONST. of 1836, art. IV, § 32; ILL. CONST. of 1848, art. III, § 9; WIS. CONST. of 1848, art. IV, § 5; IND. CONST. of 1851, art. IV, § 6; PA. CONST. of 1838, art. I, § 4 (1857). Contiguity provisions continued to spread, appearing in: MINN. CONST. of 1857, art. IV, § 24; OR. CONST. art. IV, § 7; MASS. CONST. amend. art. XXI (1857); W. VA. CONST. of 1862, art. IV, § 4; GA. CONST. of 1868, art. III, § 2; N.C. CONST. of 1868, art. II, § 5; ALA. CONST. of 1875, art. IX, § 4; COLO. CONST. of 1876, art. V, § 47, and others.

141. Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491, provided: “[I]n every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory”

142. For example, from 1793 to 1799, New York’s Third Congressional District comprised the noncontiguous counties of Richmond and Westchester, and its Seventh Congressional District consisted of the noncontiguous counties of Rensselaer and Clinton. MARTIS, *supra* note 131, at 52-54, 247. North Carolina’s Tenth Congressional District contained noncontiguous counties from 1793 to 1803. *Id.* at 52-56, 256. Massachusetts’ First and Thirteenth Congressional Districts contained noncontiguous counties from 1803 to 1813. *Id.* at 57-61, 235. New York’s Second District was noncontiguous from 1823 to 1841. *Id.* at 67-76, 247. In a few instances, states also complied with the contiguity principle only technically, by drawing congressional districts that touched at only a single point. This was the case, for example, with Pennsylvania’s Fifth District from 1795 to 1801, *id.* at 53-55, 263, and New York’s Seventeenth District from 1813 to 1821, *id.* at 62-65, 247. The great majority of states, however, never drew any noncontiguous congressional districts. *See Altman, supra*

constitutional adjacency or contiguity requirement, however, applied to congressional districting during this period.¹⁴³

The 1790 Pennsylvania prohibition on the division of counties in drawing districts also spread rapidly, first to Tennessee (1796), and then to Kentucky (1799), Mississippi (1817), Alabama (1819), Missouri (1820), New York (1821), Michigan (1835),¹⁴⁴ and many others, becoming eventually one of the most frequently adopted anti-gerrymandering provisions in state constitutional law. The same provision also caught on in New England, though it had to be adapted to local circumstances by prohibiting the division of towns rather than counties.¹⁴⁵

As population density increased in older areas through the nineteenth century, however, the prohibition on dividing large local political units such as counties became unwieldy, as it required voters in populous counties to elect dauntingly large legislative delegations.¹⁴⁶ As a result, the units of local government to which prohibitions on division extended became smaller. In New York, for example, the 1846 constitution permitted the division of populous counties into multiple senatorial districts,¹⁴⁷ but prohibited the division of towns in the creation of assembly districts.¹⁴⁸ The Michigan

note 104, at 179 ("[W]ith one exception every decadal redistricting between 1789 and 1913 contained at least one district of questionable contiguity. . . . On the other hand, most of the noncontiguous districts were concentrated in a few states; of the 43 questionable or noncontiguous districts in the decadal redistrictings of this period, 16 belonged to New York, 7 to South Carolina, 6 to North Carolina, and 5 to Massachusetts.").

143. Congress required congressional districts to be contiguous from 1842-50, and from 1862-1919. LAURENCE F. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 134-35 (1941).

144. TENN. CONST. of 1796, art. I, § 4; KY. CONST. of 1799, art. II, § 12; MISS. CONST. of 1817, art. III, § 13; ALA. CONST. of 1819, art. III, § 11; MO. CONST. of 1820, art. III, § 6; N.Y. CONST. of 1821, art. I, § 6; MICH. CONST. of 1835, art. IV, § 6. Prohibitions on dividing counties subsequently spread to: ARK. CONST. of 1836, art. IV, § 32; FLA. CONST. of 1838, art. IX, § 3; LA. CONST. of 1845, tit. II, art. 15 ("No parish shall be divided in the formation of a senatorial district, the parish of Orleans excepted."); IOWA CONST. of 1846, art. 3, § 32; CAL. CONST. of 1849, art. IV, § 30; IND. CONST. of 1851, art. IV, § 6 ("[N]o county for senatorial apportionment shall ever be divided."); IOWA CONST. art. III, § 37; OR. CONST. art. IV, § 7; COLO. CONST. of 1876, art. V, § 47, and others; *see also* ILL. CONST. of 1848, art. III, § 9 (districts to be "bounded by county lines"); W. VA. CONST. of 1862, art. IV, § 4 (same).

145. CONN. CONST. of 1818, art. II (1828); ME. CONST. of 1819, art. IV, pt. 1st, § 3; N.H. CONST. pt. II, art. 26.

146. In at least one case, as many as eighteen to a single county. *See* S.C. CONST. of 1868, art. II, § 4 (Charleston County); *see also* NEV. CONST. art. XVII, § 6 (twelve assemblymen allocated to Storey County).

147. N.Y. CONST. of 1846, art. III, § 4.

148. *Id.* § 5.

Constitution of 1850 similarly permitted the subdivision of counties into senatorial districts, but prohibited the division of towns and cities in the formation of house districts.¹⁴⁹ Kentucky (1850) and Pennsylvania (1857) required the division of cities into single-member districts, but prohibited the division of wards in performing the required districting.¹⁵⁰ By 1894, the New York Constitution had watered down its prohibition on districts that divide local government units to a ban on the division of city blocks.¹⁵¹

Another early measure aimed at least in part at gerrymandering prohibited the creation of new, sparsely populated counties. Such a provision also appeared for the first time in the Pennsylvania Constitution of 1790: "no county hereafter erected, shall be entitled to a separate representation, until a sufficient number of taxable inhabitants shall be contained within it to entitle them to one representative."¹⁵² This provision prevented the practice, alluded to earlier, of manipulating representation through the opportunistic creation of new counties which were then entitled to elect representatives under prevailing constitutional allocation rules.¹⁵³ Such prohibitions spread widely; similar provisions appeared in Kentucky (1792), New York (1821), Michigan (1835), Arkansas (1836), Georgia (1843), Louisiana (1845), Missouri (1849), Ohio (1851), and Kansas (1859), among others.¹⁵⁴ An especially notable version of this prohibition appears in an 1877 amendment to the New Hampshire Constitution:

149. MICH. CONST. of 1850, art. IV, §§ 2, 3.

150. KY. CONST. of 1850, art. II, § 5 (creating narrow exception to this rule); PA. CONST. of 1838, art. I, §§ 4, 7 (1857).

151. N.Y. CONST. art. III, § 4, cl. 1.

152. PA. CONST. of 1790, art. I, § 4.

153. Given that for much of the country's history new counties were most likely to be created in sparsely populated and frontier areas, it is possible that the adoption of these provisions also reflects a wish by older, more established, or "eastern" areas of the state to secure their dominance of state politics, *see, e.g.,* ZAGARRI, *supra* note 28, at 43, though I have seen no evidence to this effect.

154. KY. CONST. of 1792, art. I, § 6; N.Y. CONST. of 1821, art. I, § 7; MICH. CONST. of 1835, art. IV, § 4; ARK. CONST. of 1836, art. IV, § 29; GA. CONST. of 1798, art. I, § 3 (1843) (newly created counties to be annexed to existing counties); LA. CONST. of 1845, tit. II, § 8; MO. CONST. of 1820, art. III (1849); OHIO CONST. art. II, § 30; KAN. CONST. art. IX, § 4; *see also* ALA. CONST. of 1875, art. II, § 2; NEB. CONST. of 1875, art. X, § 1; CONN. CONST. of 1818, art. XVIII (1876) (new towns under 2500 residents not entitled to separate representation); TEX. CONST. art. III, § 26; IDAHO CONST. art. XVIII, § 4; N.D. CONST. of 1889, art. 10, § 167; S.D. CONST. art. IX, § 1; WASH. CONST. art. XI, § 3; WYO. CONST. art. XII, § 2; S.C. CONST. art. VII, § 3; ALA. CONST. of 1901, art. II, § 39.

Provided, That no town shall be divided, or the boundaries of the wards of any city so altered, as to increase the number of representatives to which such town or city may be entitled by the next preceding census: *And provided further*, That to those towns and cities which since the last census have been divided, or had their boundaries or ward lines changed, the general court, in session next before these amendments shall take effect, shall equitably apportion representation in such manner that the number shall not be greater than it would have been had no such division or alteration been made.¹⁵⁵

The provision, that is, appears to undo an opportunistic division of towns and cities into smaller units so as to increase the number of representatives sent to the legislature by the divided areas.

Several other formulations also sprung up here and there, aimed at prohibiting the division of local government units to form districts, or forming districts out of dispersed local government units. The Ohio Constitution of 1851, for example, contained an apparently unique provision that provided: "All territory, belonging to a county at the time of any apportionment, shall, as to the right of representation and suffrage, remain an integral part thereof, during the decennial period [until the next apportionment]."¹⁵⁶ The Maine Constitution of 1819 required senatorial districts to "conform, as near as may be, to county lines"¹⁵⁷ and the

155. N.H. CONST. pt. II, art. 9 (1877). According to the record of the 1876 constitutional convention, the single most important purpose of the convention was to reduce the size of the house, which, under the state constitution's system of representation by town, had become excessively large. Although the delegates did not specifically discuss the provisos quoted in the text, they clearly did disagree about the impact of proposals to reduce the size of the house, and in particular whether the impact of reductions would fall more heavily on large or small jurisdictions. It seems clear, from this debate, that at least some delegates thought that the larger cities had unfairly and opportunistically divided themselves into wards, an action that, because wards were treated for purposes of representation as the equivalent of towns, had the effect of increasing their representation beyond what it would have been had the cities remained undivided. *See, e.g.*, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW HAMPSHIRE 234 (1877) (remarks of Mr. Marston of Exeter). Representatives from the large cities argued in response that subdividing the jurisdiction into wards neither increased representation, nor insulated cities from absorbing a proportionate share of any loss of delegates associated with the convention's goal of reducing the size of the legislature. *See, e.g., id.* at 240-41 (remarks of Mr. Gallinger of Concord).

156. OHIO CONST. art. XI, § 10.

157. ME. CONST. of 1819, art. IV, pt. 2d, § 2; *see also* ILL. CONST. of 1848, art. III, § 9 (senatorial and representative districts to be "bounded by county lines").

Wisconsin Constitution of 1848 required assembly districts “to be bounded by county, precinct, town, and ward lines.”¹⁵⁸

However, as we have seen, merely requiring that local units of government be kept intact and arranged contiguously did not prevent them from being grouped and regrouped opportunistically, for partisan gain, so restrictions also eventually arose on the shapes into which legislatures might torture otherwise contiguous districts. The first of these, which required senatorial districts to be drawn in a way that was “convenient,” appeared first in Missouri (1820), before turning up in Arkansas (1836), New York (1846), Wisconsin (1848), Minnesota (1857), Pennsylvania (1857), and Washington (1889).¹⁵⁹ The convenience referred to was apparently the convenience of voters and candidates in communicating with one another.¹⁶⁰ The requirement that districts be “compact” did not appear until 1848, in Wisconsin, before spreading to West Virginia (1862), Missouri (1865), Illinois (1870), Pennsylvania (1873), Colorado (1876), and other states.¹⁶¹

A few state constitutions have contained provisions that are even more specific and restrictive. Kentucky’s 1850 constitution, for example, required that cities and towns entitled to two or more representatives be “divided, by squares which are contiguous, so as to make the most compact form.”¹⁶² A provision added to the Michigan constitution in 1963 requires senatorial districts to be “as rectangular in shape as possible.”¹⁶³ This trend culminated in what is surely the most specific and demanding shape restriction of all, a 1974 Colorado provision requiring that “the aggregate linear distance of all district boundaries shall be as short as possible.”¹⁶⁴

158. WIS. CONST. of 1848, art. IV, § 4.

159. MO. CONST. of 1820, art. III, § 6; ARK. CONST. of 1836, art. IV, § 31; N.Y. CONST. of 1846, art. III, § 5; WIS. CONST. of 1848, art. IV, § 5; MINN. CONST. of 1857, art. IV, § 24; PA. CONST. of 1838, art. I, § 4 (1857) (limited to representative districts created by subdivision of cities); WASH. CONST. art. II, § 6.

160. See *supra* note 47 and sources cited therein.

161. WIS. CONST. of 1848, art. IV, § 4; W. VA. CONST. of 1862, art. IV, § 4; MO. CONST. of 1865, art. IV, § 2; ILL. CONST. of 1870, art. IV, § 6; PA. CONST. of 1873, art. II, § 17 (limited to representative districts created by subdivision of cities); COLO. CONST. of 1876, art. V, § 47; see also MONT. CONST. of 1889, art. VI, § 3; N.D. CONST. of 1889, art. 2, § 29; N.Y. CONST. art. III, § 4.

162. KY. CONST. of 1850, art. II, § 5.

163. MICH. CONST. art. IV, § 2. This provision did not impose some new and highly burdensome compactness requirement; it merely reflected the requirement that districts follow city and township lines, and the fact that, in Michigan, “[c]ities are, in general, made up of all or parts of townships which are generally perfect squares.” *In re Apportionment of State Legislature*—1982, 321 N.W.2d 565, 580 (Mich. 1982) (per curiam).

164. COLO. CONST. art. V, § 47(1).

Chronologically the last anti-gerrymandering principle to make an initial appearance in a state constitution is the one that is today considered paramount in federal apportionment jurisprudence: the requirement of population equality, which was not affirmatively required by any state constitution until 1857.¹⁶⁵ As indicated in Part III.B above, state constitutions provided early on for the allocation of legislators among represented units on the basis of population. Before 1800, Massachusetts (1780), New Hampshire (1784 and 1792), Vermont (1786 and 1793), Pennsylvania (1790), Kentucky (1792 and 1799), and Tennessee (1796) all founded representation in at least one branch of the legislature on population rather than territory.¹⁶⁶ Evidently, however, state legislatures did not necessarily interpret the requirement of representation by population to require population *equality* among districts, but only to require representation proportional to such population as the legislature saw fit to include in such districts it happened to draw. As a result, many states eventually adopted additional, more specific provisions expressly requiring that districts contain equal populations. The first such provisions were adopted by Massachusetts in 1857, and required multi-legislator counties to be subdivided into districts "equally, as nearly as may be, according to the relative number of legal voters" in those districts.¹⁶⁷ Equal population requirements were soon thereafter adopted by West Virginia (1862), Louisiana (1864), Maryland (1864), Missouri (1865), Alabama (1867), and several other states.¹⁶⁸

165. MASS. CONST. amend. arts. XXI, XXII (1857). The requirement of interdistrict population equality does, however, have a considerably older statutory history. The Northwest Ordinance, enacted by Congress in 1787 to provide for the governance of non-state territories, provided for the creation of territorial legislatures with members to be elected from counties or townships in proportion to their population. Northwest Ordinance, § 9 (July 13, 1787), reprinted in 1 THE FOUNDERS' CONSTITUTION 27-28 (Philip B. Kurland and Ralph Lerner eds., 1987).

166. KY. CONST. of 1799, art. II, § 6; KY. CONST. of 1792, art. I, § 6; MASS. CONST. of 1780, pt. II, ch. I, § III, art. II; N.H. CONST. pt. II, art. 9 (1784); N.H. CONST. pt. II, art. IX (1792); PA. CONST. of 1790, art. I, § 4; TENN. CONST. of 1796, art. I, §§ 2, 3; VT. CONST. of 1793, ch. II, § 7; VT. CONST. of 1786, ch. II, § VII.

167. MASS. CONST. amend. arts. XXI, XXII (1857).

168. See W. VA. CONST. of 1862, art. IV, §§ 4, 5; LA. CONST. of 1864, tit. III, art. 10; MD. CONST. of 1864, art. III, § 2 (dividing Baltimore into "three several districts, of equal population and contiguous territory"); MO. CONST. of 1865, art. IV, § 2; ALA. CONST. of 1867, art. VIII, § 3; see also N.C. CONST. of 1868, art. II, § 5; ILL. CONST. of 1870, art. IV, § 6; PA. CONST. of 1873, art. II, § 16; CAL. CONST. art. XXI, § 1(b); N.D. CONST. of 1889, art. 2, § 29; N.Y. CONST. art. III, § 4.

F. Conclusions

What characteristics must an election district have in order to pass constitutional muster? Why must a district be “contiguous” or “compact,” and how do we know when these requirements are satisfied? We began this examination of the historical evolution of state constitutional approaches to apportionment in the hope of answering these questions by identifying some specific motivating event or large-scale pattern that would illuminate the meaning of the most common contemporary anti-gerrymandering provisions. The results, unfortunately, have been meager.

It is clear enough that apportionment has been a constant and significant concern in framing state governments; that changing circumstances have sometimes required states to juggle a variety of competing considerations in crafting apportionment rules; and that states have been willing to innovate, as well as to borrow or adapt constitutional rules developed in other jurisdictions. But it is equally clear that state constitutional drafters have, since as early as 1790 and probably earlier, been well aware of the potential for opportunistic, partisan manipulation of the rules of representation and have slowly adjusted state constitutional apportionment rules to contain various kinds of abuses. It is impossible, however, to identify a specific historical incident or moment when this concern arose. State constitutional provisions controlling gerrymandering and other forms of opportunistic manipulation of representation have instead spread slowly and steadily from one state constitution to another for more than two centuries, often in a way that suggests they were adopted as a form of generalized advance precaution rather than as a regulatory response to specific motivating abuses. Gerrymandering, to be sure, was understood to be improper, but precisely how—and compared to what—remains unclear.

If the provisions themselves do not yield any clear clues as to their meaning, the next place to turn is to the judicial decisions authoritatively construing them. The next Part takes up this inquiry.

IV. JUDICIAL INTERPRETATION OF ANTI-GERRYMANDERING PROVISIONS

It must be frankly acknowledged at the outset that a search of the case law for guidance as to the meaning of state constitutional anti-gerrymandering provisions faces several significant obstacles. First, notwithstanding the age of these provisions, their significance for the structure of democratic self-governance, and the historical prevalence of opportunistic manipulation of constitutional rules of representation, very few state courts have a well-developed jurisprudence of apportionment.

Seventeen states, in fact, have no state constitutional apportionment jurisprudence at all—none. In these states not a single judicial decision interprets any of the provisions that structure and regulate legislative representation.¹⁶⁹ This is not to say that legal challenges have never been filed to redistricting plans in these states; redistricting plans in these states, particularly those in the South, have been the subject of frequent litigation, but it has been litigation in federal court under the U.S. Constitution and the Voting Rights Act rather than litigation in state court under provisions of the state constitution.¹⁷⁰ Another twenty-seven states have some minimal state constitutional jurisprudence of apportionment.¹⁷¹ In these states, courts have decided at least one case, and sometimes a few cases, interpreting some apportionment provisions of the state constitution, but in general have not squarely addressed the difficult problems posed by gerrymandering and other forms of representation manipulation.

Only six states—Alaska, Colorado, Illinois, Maryland, New Jersey, and Vermont—have anything like a rich, well-developed state constitutional jurisprudence of apportionment, with either numerous or especially well-reasoned decisions squarely construing the important state constitutional provisions that structure legislative representation. Of these, Alaska's is by far the most sophisticated and best-developed—not surprising given the way in which Alaska's unusual ethnic diversity and oddly clumped population

169. These states are Alabama, Arkansas, Delaware, Georgia, Indiana, Louisiana, Mississippi, Minnesota, Montana, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Wyoming.

170. For example, redistricting in Mississippi has taken place under the supervision of federal courts for nearly forty years. A partial listing of such litigation includes cases, held before three-judge panels, from every decennial redistricting cycle since the introduction of the one-person, one-vote principle. *See, e.g.*, *Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003); *Watkins v. Fordice*, 791 F. Supp. 646 (S.D. Miss. 1992); *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991) (per curiam), *aff'd in part*, 502 U.S. 954 (1991); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.) (per curiam), *aff'd sub nom. Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984); *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (per curiam), *vacated sub nom. Brooks v. Winter*, 461 U.S. 921 (1983); *Connor v. Finch*, 469 F. Supp. 693 (S.D. Miss. 1979) (per curiam); *Connor v. Finch*, 419 F. Supp. 1089 (S.D. Miss. 1976) (per curiam), *rev'd*, 431 U.S. 407 (1977); *Connor v. Johnson*, 330 F. Supp. 506 (S.D. Miss. 1971), *vacated sub nom. Connor v. Williams*, 404 U.S. 549 (1972) (per curiam); *Connor v. Johnson*, 265 F. Supp. 492 (S.D. Miss.), *aff'd per curiam*, 386 U.S. 483 (1967).

171. These states are Arizona, California, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.

centers, spread across an immense expanse of territory, intensify all the problems typically associated with territorial districting.¹⁷²

Second, in a pattern familiar to students of state constitutions, all of the significant state decisions construing state constitutional anti-gerrymandering provisions are relatively recent.¹⁷³ The earliest state supreme court decision invalidating a legislative district under an apportionment provision of any state constitution was *State ex rel. Attorney General v. Cunningham*, an 1892 decision of the Wisconsin Supreme Court striking down a state legislative districting plan for creating severe population disparities among districts and for carving up counties in violation of provisions of the Wisconsin Constitution.¹⁷⁴ Even in the first half of the twentieth century, similar decisions are sparse, and the vast bulk of the state constitutional jurisprudence of apportionment did not arise until after 1962, when the U.S. Supreme Court's decision in *Baker v. Carr*¹⁷⁵ opened the subject of apportionment as a matter of federal jurisprudence.

This pattern has two consequences of relevance here. First, the entire body of state constitutional provisions structuring state legislative representation between 1776 and 1892—the period in which most of the important evolution of these provisions occurred¹⁷⁶—has been judicially construed, if at all, long after the fact, and most of these provisions are completely uninterpreted by any court. Second, because most state courts did not begin to construe their own constitutions until after federal courts had already begun to construe related provisions of the U.S. Constitution, state courts often simply imported the terminology and conceptual templates of

172. As the Alaska Supreme Court has observed: "When Alaska's geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task [of redistricting] assumes Herculean proportions commensurate with Alaska's enormous land area. The problems are multiplied by Alaska's sparse and widely scattered population and the relative inaccessibility of portions of the state." *Egan v. Hammond*, 502 P.2d 856, 865 (Alaska 1972).

173. Much of the present level of activity in state constitutional law is attributable to the federal rights revolution of the 1960s and 1970s, which prompted state judges to devote renewed attention to their state constitutions, especially corresponding individual rights provisions. For an account of this period, see JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 36-41 (2005).

174. 51 N.W. 724, 730 (Wis. 1892). In a second case decided six months later, the court struck down a revised apportionment plan on the ground that it still contained excessive population deviations. See *State ex rel. Lamb v. Cunningham*, 53 N.W. 35, 56 (Wis. 1892).

175. 369 U.S. 186 (1962).

176. By Tarr's count, states adopted a total of ninety-four constitutions during the nineteenth century, but only twenty-three constitutions during the twentieth century. TARR, *supra* note 13, at 96, 137.

federal constitutional law into the state constitutional jurisprudence when an independent inquiry into the meaning of state constitutional provisions might have been more illuminating, thereby diminishing the utility and persuasiveness of their analyses.¹⁷⁷

Finally, the most direct discussions by state courts of gerrymandering—like similar discussions by federal courts—are simply not very helpful in elucidating the precise ways in which gerrymandering violates constitutional norms of representation, or indeed the content of the norms from which gerrymandering is said to deviate.¹⁷⁸ By and large, state courts that have directly addressed the practice of gerrymandering have tended to speak in tautologies: gerrymandering is said, for example, to deviate from “true” representation,¹⁷⁹ or “natural” and “logical” representation,¹⁸⁰ or to produce

177. This is a common complaint in state constitutional law. See generally Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

178. As Professor Briffault has recently written, “[I]t is astonishing how little attention the Supreme Court has given, in either *Bandemer* or *Vieth*, to the question of why partisan gerrymandering might be unconstitutional.” Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 397, 399 (2005). Similarly, Professor Lowenstein has argued, “The true source of confusion in interpreting *Bandemer* is . . . an incomplete definition and explanation of the nature of the constitutional violation that may inhere in a partisan gerrymander.” Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in POLITICAL GERRYMANDERING AND THE COURTS 64, 66 (Bernard Grofman ed., 1990); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1083-84 (2d ed. 1988); Guy-Uriel E. Charles, *Democracy & Distortion*, 92 CORNELL L. REV. (forthcoming 2007) (criticizing the Court’s failure, in both *Vieth* and *Bandemer* to develop a coherent theory of the harm of gerrymandering). Similarly, Adam B. Cox has recently argued for the incoherence of the Court’s attempt to identify representational harms caused by congressional gerrymandering while simultaneously confining itself to the consideration, in isolation, of the redistricting plans of individual states. See generally Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409.

179. *Hickel v. Se. Conference*, 846 P.2d 38, 44 (Alaska 1992) (“[T]he goal of all apportionment plans is . . . adequate and true representation by the people in their elected legislature, true, just, and fair representation.” (quoting and endorsing statement from the 1956 constitutional convention)); *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 425 (Mo. 1975) (compactness and contiguity requirements “were found to be necessary to the preservation of true representative government” (quoting *Preisler v. Doherty*, 284 S.W.2d 427, 435 (Mo. 1955))).

180. *Hickel*, 846 P.2d at 45 (“The constitutional requirements help to ensure that the election district boundaries fall along natural or logical lines rather than political or other lines.”).

results that are not “politically fair,”¹⁸¹ or to involve the “dilution” of votes.¹⁸² But what is “true” or “natural” or “logical” or “politically fair” representation that does not “dilute” the value of votes? Gerrymandering deviates from something—that is surely why it alarms us—but from what?

To answer these questions we need to know the theory of representation from which state courts proceed when they adjudicate gerrymandering claims under state constitutions. Given the difficulties presented by the decisional law in this area, it is unreasonable to expect state courts to lay out clearly their assumptions about what theory of representation their state constitutions embrace. Consequently, I shall proceed indirectly, attempting to infer a theory of representation from the various pronouncements and rulings of state courts in interpreting and applying state constitutional provisions aimed at controlling gerrymandering. The place to begin, then, is with a different question, one that is related only indirectly to the problem of gerrymandering: under state constitutions, what, exactly, do state courts think is being represented in the state legislature?¹⁸³

A. *What Is Represented in State Legislatures under State Constitutions?*

Ask a federal court what is represented in the halls of American legislatures and you will get a crisp and immediate (though not necessarily completely accurate) answer: people are represented in legislatures. As the United States Supreme Court has directly, concisely, and unequivocally held, “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”¹⁸⁴ Perhaps unsurprisingly, given the constitutional history of legislative representation related in Part

181. *People ex rel. Burris v. Ryan*, 588 N.E.2d 1023, 1028 (Ill. 1991) (“The very essence of districting is to produce a different—a more politically fair—result.”) (citations and internal quotation marks omitted); *see also* *Wilson v. Eu*, 823 P.2d 545, 558 (Cal. 1992) (redistricting plans that “follow the various state standards and criteria . . . will necessarily produce plans at least as ‘fair,’ politically or otherwise, as [other methods]” (quoting *Legislature v. Reinecke*, 492 P.2d 385, 390 (Cal. 1972))); *Opinion to the Governor*, 221 A.2d 799, 802 (R.I. 1966) (gerrymandering may “nullif[y]” “political equality”).

182. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987) (stating that interest at stake in a challenge to gerrymandering is “the interest of individual members of a geographic group or community in having their votes protected from disproportionate dilution by the votes of another geographic group or community”).

183. Given the thinness of the decisional record, answers to these questions cannot be definitive, and I shall content myself here with merely offering a hypothesis. It is a hypothesis, however, that finds much to support it, and little to contradict it, in the admittedly meager body of state constitutional law on point.

184. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

III, state courts take a rather different, and certainly more nuanced view. In the jurisprudence of apportionment arising under state constitutions, representation of persons is by no means excluded as a constitutional foundation of representation, but it is significantly demoted in the framework that emerges from an examination of the state decisions.

State courts, to be sure, often acknowledge that legislative representation is in part of persons, but this is most commonly viewed as a second-order purpose, or even an incidental artifact of a representational structure aimed fundamentally at achieving other goals. Thus, despite the fact that the constitutions of thirty states explicitly require population equality for at least some kinds of election districts,¹⁸⁵ maintaining strict population equality among districts has been held to be the top priority in election district line-drawing by the courts of only four states—Colorado, Kentucky, New York, and Washington¹⁸⁶—and the constitutions of three of these states contain unusual provisions explicitly elevating the importance of population equality.¹⁸⁷ In contrast, the highest courts of Alaska, Michigan, New Jersey, and Utah have all held explicitly that maintaining population equality is *not* a high priority under the state constitution,¹⁸⁸ and the supreme courts of

185. See *supra* note 43.

186. See *In re* Reapportionment of Colo. Gen. Assembly, 647 P.2d 209, 210 (Colo. 1982) (per curiam) ("The Colorado Constitution lists a hierarchy of criteria for measuring the adequacy of a reapportionment plan. . . . [T]hey are: [(1)] the requirement of substantial equality of population . . ."); *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 774 (Ky. 1997) ("We have long held that when the goals of population equality and county integrity inevitably collide, the requirement of approximate equality of population must control."); *People ex rel. Smith v. Bd. of Supervisors*, 42 N.E. 592, 593 (N.Y. 1896) (identifying that main purpose of New York Constitution of 1894 was "to prevent those gross discrepancies in apportionment and representation that had long been a public scandal and a reproach to the good name of the state"); *State ex rel. O'Connell v. Meyers*, 319 P.2d 828, 829 (Wash. 1957) ("[T]he basic concept of our representative form of state government . . . is . . . that legislative districts be established according to the number of inhabitants.").

187. The Colorado Constitution restricts the maximum population deviation among legislative districts to five percent, see COLO. CONST. art. V, § 46, and the Kentucky Constitution expressly provides that in drawing districts "the principle requiring every district to be as nearly equal in population as may be shall not be violated," KY. CONST. § 33. The New York Constitution contains a provision, first introduced in 1894, that prohibits population deviations between adjoining districts to exceed the population of any immediately adjoining town or ward. N.Y. CONST. art. III, § 4.

188. See *Wade v. Nolan*, 414 P.2d 689, 692 (Alaska 1966) ("It is clear . . . that representation in the Senate is determined by area rather than population."); *In re* Apportionment of State Legislature—1982, 321 N.W.2d 565, 575 (Mich. 1982) (per curiam) (state constitution "contemplated substantial population inequality between the districts"); *Jackman v. Bodine*, 205 A.2d 713, 716-17 (N.J. 1964) ("[A]s to the Senate, it is perfectly

Connecticut, Maryland, Missouri, and Wisconsin have ruled that population equality, though not unimportant under the state constitution, is subordinate in priority to other considerations.¹⁸⁹

If population equality is not the predominant consideration in apportionment under state constitutions—and in consequence representation in the state legislature cannot be said to be mainly of persons—what is represented there? Among the state courts to have addressed the question, the most common answer is that the characteristics principally represented in state legislatures under state constitutional rules of representation are (1) territory and (2) interests.

Given the relentless emphasis in state constitutions on counties as the unit of representation, it seems only logical for courts to recognize geographical territory as a leading, or even the dominant, basis of legislative representation. As the Alaska Supreme Court, for example, has acknowledged, “representation in the [state] Senate is determined by area rather than population.”¹⁹⁰ The Utah Supreme Court has similarly held that the allocation of representatives by county regardless of population reveals the state constitution’s “approval [of] the idea of area representation.”¹⁹¹ As

plain that the apportionment basis is indifferent to population.”); *Parkinson v. Watson*, 291 P.2d 400, 404 (Utah 1955) (Utah’s constitution, like that of most western states, “indicates that equality of representation is not the general rule”). Following consideration of the U.S. Supreme Court’s decision in *Reynolds*, which effectively invalidated the New Jersey Constitution’s apportionment scheme, the Supreme Court of New Jersey held that under the remaining valid provisions “recognition of county lines will not justify any deviation” from population equality, but also ruled that municipal boundaries should nevertheless be respected when possible. *Scrimminger v. Sherwin*, 291 A.2d 134, 142 (N.J. 1972).

189. See *Cahill v. Leopold*, 103 A.2d 818, 824 (Conn. 1954) (“In view of the provisions that each county shall have at least one senator, that no district shall cross county lines and that no town shall be divided . . . equality is impossible.”); *Md. Comm. for Fair Representation v. Tawes*, 180 A.2d 656, 667 (Md. 1962) (“We do not think it possible (or advisable if it were possible) to state a precise, inflexible and intractable formula for constitutional representation in the General Assembly. . . . In Maryland, there is no requirement, constitutional or otherwise, that such representation be based upon a mathematical ratio of population, or of eligible voters”); *State ex rel. Barrett v. Hitchcock*, 146 S.W. 40, 55 (Mo. 1912) (“[A]ny departure from the limitation of equality in population must be made for the sake of securing greater compactness”); *State ex rel. Lamb v. Cunningham*, 53 N.W. 35, 57 (Wis. 1892) (determining that only compliance with contiguity, compactness, boundary preservation, and other state constitutional requirements can excuse departures from population equality).

190. *Wade*, 414 P.2d at 692.

191. *Parkinson*, 291 P.2d at 405; see also *State ex rel. Fletcher v. Ruhe*, 52 P. 274, 277 (Nev. 1898) (“[I]t is impracticable to apportion representation by any other method than by geographical lines.”).

recently as 1962, the Maryland Court of Appeals ruled that "representation in the State Senate of Maryland has traditionally been based more upon area and geographical location (one from each county and each legislative district of Baltimore City) than upon the relationship of population, or eligible voters[.]"¹⁹² although it subsequently endorsed—without necessarily rejecting its prior view—the proposition that legislatures "represent people."¹⁹³ It has even been argued that the people of New Jersey historically did not comprise a meaningful political community, and that the state's counties had distinct sectional interests that the state constitution was deliberately designed to represent:

"It would be misleading to depict the Jerseys as one general community. In fact, there were sharp contrasts between East and West Jersey, contrasts which have not disappeared even today. . . ." [The state constitution's] balancing of legislative power between the two divisions . . . [reflected the fact that they were] composed of peoples with differing economic interests, religious affiliations and national origins. Thus was established the precedent for legislative representation based upon territory as distinguished from population. This colonially-instituted mode of apportionment has been perpetuated in the equal representation of counties in one house of the legislature under our State Constitutions of 1776, 1844 and 1947.¹⁹⁴

Even state courts that have construed their constitutions to recognize population as a factor of at least some significance in apportionment typically recognize that the question of what is represented in the legislature is one of much greater complexity than federal courts generally acknowledge. The Michigan Supreme Court, for example, has construed its state constitution to institute a formula for representation based on land and population, in which both must be weighed.¹⁹⁵ The New Jersey Supreme Court recognized that population plays a role in redistricting because the

192. *Tawes*, 180 A.2d at 668.

193. *Legislative Redistricting Cases*, 629 A.2d 646, 649, 657 (Md. 1993) (implicitly endorsing statements to this effect of chairman of redistricting advisory commission and special master).

194. *Jackman v. Bodine*, 205 A.2d 713, 729 (N.J. 1964) (Haneman, J., concurring) (quoting RICHARD P. MCCORMICK, *NEW JERSEY FROM COLONY TO STATE* 56-57 (1964)).

195. *See In re Apportionment of State Legislature—1982*, 321 N.W.2d 565, 567, 575 (Mich. 1982) (per curiam). This dual relationship was especially pronounced in the Michigan Constitution of 1963, which created a complex apportionment formula based explicitly on area and population. MICH. CONST. art. IV, § 2.

process “apportion[s] the power to elect among clusters of citizens,” but went on to observe that “[t]hose clusters . . . are constituted solely on the basis of geography.”¹⁹⁶ A decision like that of the Wisconsin Supreme Court holding that “[t]he constitution contains no consciously built-in standard of apportionment that reflects area or any other geographical factor”¹⁹⁷ is as exceedingly rare in the body of state constitutional apportionment jurisprudence as it is common in decisions of federal courts construing the Equal Protection Clause.

The other basis of representation in state legislatures most commonly mentioned by state courts is interest. Thus, in Utah the state constitution’s provisions structuring representation are understood to grapple with the “question as to how urban—rural interests could be properly balanced and protected.”¹⁹⁸ As one Wisconsin Supreme Court justice put it in a nineteenth-century case: “The city has its peculiar interests, and the country has its interests, and they generally conflict.”¹⁹⁹ In New Jersey, the representation of counties has been held to effectuate a kind of interest representation on the ground that “the counties reflect different economic interests.”²⁰⁰ According to the Virginia Supreme Court of Appeals, Virginia’s regions are distinguished by the interests of their inhabitants: in the north, “the interests of its people are primarily centered in Washington[,]” while further south the “interests of its people are largely agricultural.”²⁰¹

This view of the matter certainly lacks the clarity of the U.S. Supreme Court’s univocal emphasis on the legislative representation of individuals, and one might therefore at this point be tempted to ask, on what conceivable account of representation can it possibly be said that geographic areas *and* interests *and*, to a lesser degree, persons are all represented simultaneously in a legislature? The answer implicit in the cases is surprisingly clear. Among state courts that have considered the question, territory and interest—the interest, that is, of persons residing in the territory—typically are thought to coincide. People who live in the same place, in other words, are thought to have similar interests—interests that arise from common residency and that

196. *Scrimminger v. Sherwin*, 291 A.2d 134, 138 (N.J. 1972).

197. *State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551, 558 (Wis. 1964).

198. *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955).

199. *State ex rel. Lamb v. Cunningham*, 53 N.W. 35, 63 (Wis. 1892) (Winslow, J., dissenting).

200. *Jackman v. Bodine*, 205 A.2d 713, 718 (N.J. 1964); *see also In re Reapportionment Plan for Pa. Gen. Assembly*, 442 A.2d 661, 671 (Pa. 1981) (Larsen, J., dissenting) (“Each of the political subdivisions sought to be protected by Article II, § 16 of the state constitution has unique interests . . .”).

201. *Wilkins v. Davis*, 139 S.E.2d 849, 853 (Va. 1965).

are sufficiently similar to justify representing them in the legislature by territorial groupings. This idea is, in fact, a venerable one in the Anglo-American history of legislative representation, dating back to medieval times, yet in state constitutional law it is given a surprisingly modern and coherent defense.

B. Territorial Representation as Interest Representation

The roots of Anglo-American political representation lie in the representation of communities, not individuals.²⁰² Originally, representation in Parliament was a metaphorical representation of the land itself. Landholding in feudal England carried with it certain obligations, among them the duty to provide various forms of aid to the crown, including, upon request, financial assistance.²⁰³ Because, by tradition and under the Magna Carta, financial impositions could not be assessed without the consent of those tenured in the lord's land, representatives of the land were summoned to parliament for the purpose of giving their consent to taxation.²⁰⁴

By the early fourteenth century, the rise of wealth derived from sources other than land created new potential sources of royal revenue, and representation in parliament was accordingly expanded to include representatives from corporate towns and boroughs. Although town representatives may have been understood to represent roughly the interests of non-geographic mercantile classes,²⁰⁵ they were nevertheless selected, in keeping with the universal practice, from "geographically defined communities."²⁰⁶ In England, "political geography was deemed to determine something essential,"²⁰⁷ and as a result, representation was based on the unit from which consent was required, irrespective of its actual characteristics, including who or how many happened to live there, or even the amount of

202. The next several paragraphs draw freely on James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1243-45 (2002).

203. M.V. CLARKE, *MEDIEVAL REPRESENTATION AND CONSENT* 253 (1964).

204. 2 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT* 199-201 (1880); G.L. Harriss, *The Formation of Parliament, 1272-1377, in THE ENGLISH PARLIAMENT IN THE MIDDLE AGES* 29, 41 (R.G. Davies & J.H. Denton eds., 1981).

205. 2 STUBBS, *supra* note 204, at 210.

206. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 41 (1988).

207. CLARKE, *supra* note 203, at 285; *see also* ANDREW REHFELD, *THE CONCEPT OF CONSTITUENCY: POLITICAL REPRESENTATION, DEMOCRATIC LEGITIMACY, AND INSTITUTIONAL DESIGN* 72 (2005) ("Territory was a seemingly 'natural' part of representation . . .").

revenue due from the taxable unit.²⁰⁸ Thus, by the late fourteenth century, representatives in parliament consisted of two knights from each county and two citizens or burgesses from each city or borough within the represented counties, regardless of population, wealth, or property value.²⁰⁹

This model was duly exported to America, where representation in colonial legislatures was allocated, as we have seen, not to individuals but to towns and counties. As the Massachusetts Supreme Judicial Court said in 1811, “[t]he right of sending representatives [to the state legislature] is corporate, vested in the town.”²¹⁰ By the time this method of representation became entrenched in the colonies, however, its justification had evolved from one based on feudal obligations in land to one based on the common characteristics of the inhabitants of represented units:

The corporate method of representation presumed that physical proximity generated communal sentiment. Each geographic unit was thought to be an organic, cohesive community, whose residents knew one another, held common values, and shared compatible economic interests. The smaller the community, the more likely that its citizens would identify with one another. . . . Large distances, in contrast, bred a diversity of peoples and values. Although actual settlements were never as unified in practice as in theory, the idea contained some truth. Sharing a common history and future reinforced the sense of communal identity among inhabitants.²¹¹

By the time of the Revolution, the founding generation fully accepted this account of representation. The idea that the political interests of communal groups of individuals correlated strongly with territory served, for example, as an axiom in Madison’s famous defense of the large republic in *The Federalist No. 10*. “[F]actionous combinations,” Madison argued, are “less

208. For a thorough discussion of medieval taxation policies, see G.L. HARRISS, *KING, PARLIAMENT, AND PUBLIC FINANCE IN MEDIEVAL ENGLAND TO 1369* (1975).

209. See A.L. Brown, *Parliament, c. 1377-1422*, in *THE ENGLISH PARLIAMENT IN THE MIDDLE AGES*, *supra* note 204, at 109, 117-18.

210. *In re Opinion of Justices*, 7 Mass. (6 Tyng) 523, 526 (1811). In 1857, an amendment to the state constitution changed the method of allocating representatives among the towns from an uncapped constitutional entitlement based roughly on taxpaying population to one in which a fixed number of representatives was apportioned by the legislature on the basis of population. MASS. CONST. amend. art. XXI (1857). This change, in the court’s view, destroyed the former system of corporately vested representation rights. See *Stone v. City of Charlestown*, 114 Mass. 214, 226 (1873).

211. ZAGARRI, *supra* note 28, at 37-38 (footnote omitted); see also REHFELD, *supra* note 207, at 73-77.

to be dreaded" in a large republic than in a small one because of the greater variety of interests found among a larger populace, a characteristic that is entirely an artifact of geographical scale: "Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens" ²¹²

The idea that territorially defined local communities may reliably serve as proxies for the shared, collective interests of the individuals who inhabit them has remained a fixture in American political thought ever since. ²¹³ So, for example, a Cattaraugus County delegate to the New York constitutional convention of 1846 complained about the large size of the senatorial district to which his county was assigned, which stretched nearly 230 miles to Chenango County, on the ground that

for all practical purposes of representation, Cattaraugus might as well have been connected with Suffolk and the counties on Long Island [more than twice as far away]. There was no communion of feeling between the people of Cattaraugus and Chenango. There was no union of interest between them except upon those great questions that affect and interest the state as a whole. The people of these counties on questions of a local character, often the most deeply felt, were antipodes of each other. ²¹⁴

Among delegates to the Wisconsin constitutional convention of 1851, "[t]he leading idea seems to have been that each county was regarded in the nature of 'a small republic,' or 'in the light of a family,' and 'each organized county had a separate interest.'"²¹⁵ More than a century later, precisely the same idea was expressed by a Pennsylvania state senator testifying before the U.S. Senate Judiciary Committee in favor of a constitutional amendment that would have overturned *Reynolds v. Sims* by permitting representation in state senates to remain on the basis of counties rather than population:

212. THE FEDERALIST NO. 10 (James Madison), *supra* note 103, at 83.

213. For a strong critique of this phenomenon, see THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 4-8 (1978).

214. SHERMAN CROSWELL & R. SUTTON, DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION 316 (1846).

215. State *ex rel.* Attorney Gen. v. Cunningham, 51 N.W. 724, 739 (Wis. 1892) (Pinney, J., concurring) (quoting JOURNAL OF DEBATES 219-24 (1851)); see also 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1244 (1850) (remarks of Mr. Dobson) ("[E]ach average county having a separate interest, ought to have a separate representation in the Legislature.").

Carbon County is in the heart of the anthracite coal fields. Pike and Wayne Counties are in the heart of the Pocono resort area. Susquehanna, Wyoming, and Sullivan are up in the north woods. So you have three distinct groups of people with three distinctly different interests all represented by one senator [when senatorial districts are based on population].²¹⁶

In its more modern incarnation, the belief that place and interest coincide centers on the idea of a “community of interest.” This term is widely used in federal reapportionment jurisprudence, but it is usually used there so broadly and indiscriminately as to include virtually any group of people who share some trait or characteristic that has the potential to be salient politically—their socioeconomic status,²¹⁷ for example, or their education,²¹⁸ employment,²¹⁹ politics,²²⁰ health,²²¹ religion,²²² or ethnicity²²³—and which

216. United States Senate, Committee on the Judiciary, Hearings before the Subcommittee on Constitutional Amendments, 89th Cong., 1st Sess. (1965), at 208 (statement of Hon. E. Elmer Hawbaker).

217. *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 581-82 (1997) (affirming the lower court’s finding that a “predominantly urban, low-income population” could constitute a community of interest); *Miller v. Johnson*, 515 U.S. 900, 919 (1995) (evidence of “fractured . . . social, and economic interests” refuted contention that district contained a community of interest); *see also* *Chen v. City of Houston*, 206 F.3d 502, 513 (5th Cir. 2000) (suggesting that satisfactory evidence of socio-economic status could demonstrate the existence of a community of interest, but finding that the plaintiffs did not provide it); *Session v. Perry*, 298 F. Supp. 2d 451, 512 (E.D. Tex.) (three-judge panel) (finding “evidence of differences in socio-economic status” was properly, though not persuasively, deployed to undermine the existence of a community of interest), *vacated and remanded sub nom.* *Henderson v. Perry*, 543 U.S. 941 (2004).

218. *Theriot v. Parish of Jefferson*, 185 F.3d 477, 486 (5th Cir. 1999) (concluding that “less-educated” citizens comprised a community of interest on the basis of “common social and economic needs”); *Session*, 298 F. Supp. 2d at 512 (finding “evidence of differences in . . . education” was properly, though not persuasively, deployed to undermine the existence of a community of interest).

219. *Theriot*, 185 F.3d at 486 (citizens “more often unemployed” than voters in other districts comprised a community of interest on the basis of “common social and economic needs”); *Session*, 298 F. Supp. 2d at 512 (finding “evidence of differences in . . . employment” relevant to existence of a community of interest).

220. *Miller*, 515 U.S. at 919 (evidence of “fractured political . . . interests” refuted contention that district contained a community of interest).

221. *Session*, 298 F. Supp. 2d at 512 (finding “evidence of differences in . . . health” relevant to existence of a community of interest).

222. *See, e.g., Kelley v. Bennett*, 96 F. Supp. 2d 1301 (M.D. Ala.) (three-judge panel) (“There are no doubt religious, class, and social communities of interest that cross county lines and whose protection might be a legitimate consideration in districting decisions.”), *vacated on other grounds sub nom.* *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (per curiam).

may therefore provide a justification for grouping them together in a single election district. On this understanding, however, the existence of a community of interest is not linked in any particular way to a *specific* piece of territory or geographically defined local governmental unit; the federal conception of community of interest, that is to say, does not contemplate the inevitable development of a community of interest with particular characteristics in a particular location.²²⁴ The poor, for example, may on this view constitute a community of interest, but the poor may live here or there, and a district could be drawn around them in any place they happen to be found in sufficient numbers. What therefore justifies grouping the poor in a territorial election district is their poverty, and presumably the shared political interests to which their poverty gives rise, not their common habitation of a specific place. On this view, then, the existence of a community of interest is anything but inevitable: the idea is not that residents of a piece of territory share a connection to it, and that this shared connection in due course gives rise to a community of interest, but that certain people who, for reasons unrelated to residency, happen to share a politically salient

223. See, e.g., *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) (assuming that Latinos comprise a community of interest); *Meza v. Galvin*, 322 F. Supp. 2d 52, 75 (D. Mass. 2004) (three-judge panel) (“the Hispanic community” can comprise “an ethnically-based community of interest”). However, the Supreme Court has been quite careful and emphatic in holding that race does not by itself give rise to a constitutionally cognizable community of interest; in the Court’s view, the only way to connect race and interest is to make demeaning and stereotypical, and therefore constitutionally forbidden, judgments about the homogeneity of political views among members of racial groups. See *Miller*, 515 U.S. at 920. In view of this holding, it is not entirely clear that the Court would approve the use of ethnicity, without more, as the basis for a community of interest deserving of protection in redistricting, as other lower courts seem to have recognized. See, e.g., *Session*, 298 F. Supp. 2d at 513 (applying *Miller* in a way that would require a non-ethnic basis for district communities of interest).

224. The conceptual breadth of the idea of a community of interest, and its lack of a necessary relation to a particular place, may be undermined to some degree by the actual practice of redistricting, in which the availability of data, and its relation to existing geographical understandings of the state, may significantly constrain the willingness of the state to recognize certain kinds of communities of interest and to provide them with representation. See Benjamin Forest, *Information Sovereignty and GIS: The Evolution of “Communities of Interest” in Political Redistricting*, 23 POL. GEOGRAPHY 425, 428 (2004) (arguing that the practice of Texas redistricters in the 1990s of relying on existing data to identify communities of interest “reproduced and reinforced a relatively narrow concept of a ‘community of interest,’ one limited to spatially defined, territorially bounded communities about which the state already possessed a great deal of systematized information”).

characteristic also happen, adventitiously, to live in close physical proximity.²²⁵

In the apportionment jurisprudence of the states, however, the concept of community of interest is very different, retaining much of its older connotation of a strong and inevitable linkage between a place and the people who collectively inhabit it. The dominant notion in state constitutional jurisprudence is in fact quite specific and robust: the inhabitants of a county or town most commonly are *presumed* to comprise a community of interest, thereby justifying the constitutional designation of local governments—rather than geographically untethered, equipopulous groupings of individuals—as the fundamental units of legislative representation.²²⁶

Why should we think that the inhabitants of a county comprise a community of interest? What is it about common habitation of a unit of local government that creates a community of interest among the residents? State courts generally give two distinct, though not unrelated answers to this question. First, the inhabitants of a county or similar local government unit share a common local economy and economic life. Second, county residents participate together in the public life of a shared unit of political and governmental administration. I take up each of these propositions in turn.

C. Territory and Interest (I): County Economies

The linkage in state constitutional apportionment jurisprudence between counties as the basic constitutional unit of representation and the shared

225. As Benjamin Forest has observed in contemplating a similar tension in the federal jurisprudence of racial redistricting, “the ‘placelessness’ of numeric representation challenges some of the basic tenets of the American system of governance. Its reliance on the autonomous individual severs any necessary connection between identity and location, and fatally undermines the theoretical justification for territorial representation itself.” Benjamin Forest, *Mapping Democracy: Racial Identity and the Quandary of Political Representation*, 91 ANNALS ASS’N AM. GEOGRAPHERS 143, 160 (2001).

226. This conception has very deep roots. In colonial Massachusetts, for example, collective harmony and consensus were considered such vital and indispensable conditions for communal life that it was widely assumed that the formal extent of a governing unit had to correspond closely to the extent of the community in which harmony and consensus could antecedently be found: “So long as the maintenance of an effective community required widespread consent of the governed, the unit of government had to be one in which such united public opinion could be obtained. . . . When harmony and homogeneity were broken, the territorial integrity of the town itself often had to be ruptured accordingly.” MICHAEL ZUCKERMAN, *PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY* 138-39 (1970).

economic life of county residents has never been expressed more clearly than in a 1964 opinion of the New Jersey Supreme Court:

Anciently, and still today, the counties reflect different economic interests, although of course these economic interests are not perfectly contained or separated by any political line, municipal, county or State. So, certain counties have a dominant concern with manufacturing and commerce; others have a large stake in agriculture; still others lean heavily upon the resort industry; and finally a few counties have a special interest in the products of the sea.²²⁷

The idea here, clearly, is that counties are not arbitrary territorial units, random shapes on a map, to be ignored or rearranged on a whim, but rather contain populations that have distinctive interests, and these interests are primarily economic; each county, that is to say, comprises a distinct local economy. The correspondence between counties and local economies is not, of course, exact—there is some cross-border slippage—but it is close enough so that, if the constitutional system of legislative representation is meant to secure representation for the distinctive local economic interests of the state's citizens, then allocating legislative representation to counties rather than other groupings is amply justified.

The kind of direct language employed by the New Jersey Supreme Court is nowadays rare, however, due mainly to the influence of the U.S. Supreme Court's one-person, one-vote decisions. By forcefully denying that local government units have any intrinsic claim to separate representation in state legislatures—never really the actual claim—the Court delegitimized state representational systems that protected the integrity of local governments in

227. *Jackman v. Bodine*, 205 A.2d 713, 718 (N.J. 1964); see also *In re Reapportionment Plan for Pa. Gen. Assembly*, 442 A.2d 661, 671 (Pa. 1981) (Larsen, J., dissenting) ("Each of the political subdivisions sought to be protected by Article II, § 16 of the state constitution has unique interests . . ."). In *Wilkins v. Davis*, the Virginia Supreme Court of Appeals reached a similar conclusion about multi-county districts:

The evidence shows a greater community of interest among the people of the Tenth District, which is a part of metropolitan Washington, than between the people of that district and those of the adjoining Eighth. The Tenth District is the second smallest in area of the ten districts, containing only 446 square miles, and the interests of its people are primarily centered in Washington. The only district contiguous to the Tenth is the Eighth, which is the second largest district in area, covering 7,170 square miles, containing twenty counties and two cities, and the interests of its people are largely agricultural.

139 S.E.2d 849, 853 (Va. 1965).

the crafting of legislative election districts. After *Reynolds*, a state still “may legitimately desire to maintain the integrity of various political subdivisions,” but to do so the state must demonstrate that “[v]alid considerations . . . underlie such [an] aim[.]”²²⁸

This requirement has prompted state courts to speak of county representation using a language that refers to its underlying justifications, and the terminology of choice has been the language of “communities of interest.” Consequently, since *Reynolds*, state courts have tended to justify state constitutional provisions making counties (or towns, in New England) the fundamental units of legislative representation on the ground that counties circumscribe communities of interest, and that it is these communities of interest, rather than the counties containing them, that are entitled legitimately to representation. This change in terminology did not, however, alter the basic account that state courts give of counties. They are still understood as distinct local economies, but the account now contains an extra term: county-based local economies give rise to a community of interest, the community of interest coincides roughly with the county, and, therefore, county boundaries should be respected in drawing legislative election districts.²²⁹

228. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

229. I must here offer a proviso: there is a split of opinion among state courts, though overall a relatively minor one, concerning whether the preservation of communities of interest is even an important consideration in reapportionment. The constitutions of five states—Alaska, Arizona, Colorado, Hawaii, and Oklahoma—specifically require that some consideration be given to communities of interest in the reapportionment process, *see supra* notes 48-52 and accompanying text, and the preservation of communities of interest has been endorsed as a reasonably important, or at least valid, consideration by the highest courts of California, Maine, and Vermont. *See Wilson v. Eu*, 823 P.2d 545, 556 (Cal. 1992) (approving districting plan of special masters in part on ground that their refusal to divide census tracts contributed to preservation of communities of interest); *In re 2003 Legislative Apportionment of House of Representatives*, 827 A.2d 810, 814-15 (Me. 2003) (implicitly approving a state statute directing redistricting commission to give weight to local communities of interest in drawing districts); *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323, 330 (Vt. 1993) (strongly endorsing importance of preservation of communities of interest). On the other hand, preserving communities of interest has been specifically held *not* to be a constitutionally important consideration by the highest courts of Florida, Iowa, Maryland, New Jersey, Virginia and—remarkably, given the apparently clear language of the state constitution—Hawaii. *See In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 831 (Fla. 2002) (“[N]either the United States nor the Florida Constitution requires that the Florida Legislature . . . preserve communities of interest.”); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784, 789 (Iowa 1972) (agreeing that “avoiding joining part of a rural county with an urban county” was one of several “unjustifiable purposes” that required invalidation of plan); *In re Legislative Districting of State*, 805 A.2d

As a result, although state courts adjudicating apportionment schemes now speak the language of communities of interest, an open-ended term that could conceivably describe communities arising from almost any kind of shared interest, in case after case, the critical indicator in the state cases that an election district contains a constitutionally cognizable community of interest turns out to be the presence of significant economic interaction among the people of the district. For example, in invalidating a Vermont representative district that placed the town of Montgomery in a district

292, 297, 298 (Md. 2002) (framers of state constitution deliberately chose not to make preservation of communities of interest a factor in apportionment, nor may the court "define what a community of interest is and where its boundaries are"); *Jackman v. Bodine*, 231 A.2d 193, 200 (N.J. 1967) (following Supreme Court's one-person, one-vote decisions, state constitution must be construed to mean that "matters . . . such as so-called community interests" "are wholly irrelevant to the subject and cannot support [population] deviations of any kind"); *Jamerson v. Womack*, 423 S.E.2d 180, 184 (Va. 1992) ("[T]he reapportionment polic[y] . . . of recognizing communities of interest [is] a custom [that] was not . . . spelled out in the Constitution."); *see also* *Kawamoto v. Okata*, 868 P.2d 1183, 1187 (Haw. 1994) (complaining about the vagueness of the boundaries of informally defined communities, and arguing that "[t]he lack of defined boundaries precludes reapportionment based upon a strict recognition of community interests").

The Maryland Court of Appeals, in particular, has been overtly hostile to the concept of communities of interest, complaining that the idea is "nebulous and unworkable," and that "the number of such communities is virtually unlimited and no reasonable standard could possibly be devised to afford them recognition in the formulation of districts." *In re Legislative Districting of State*, 475 A.2d 428, 445 (Md. 1984). More recently, the Maryland high court seems to have softened its views somewhat, moving closer to the position taken by the Virginia Supreme Court to the effect that legislative recognition of communities of interest, although not constitutionally recognized as an important consideration in reapportionment, is nevertheless not improper so long as the districting plan otherwise complies with all relevant constitutional requirements. *In re Legislative Districting of State*, 805 A.2d at 297 (permitting the Governor and General Assembly to consider "countless other factors" beyond constitutionally required ones, so long as they comply with constitutional minima); *Jamerson*, 423 S.E.2d at 184 (preserving communities of interest, although not constitutionally required, is nevertheless a "custom" and "one of several factors to be considered in reapportionment cases"). The courts of the remaining states have not directly addressed the question as a matter of state constitutional law, but nothing in their jurisprudence suggests that they in any way discourage respect for communities of interest, even though they may not affirmatively encourage it.

As a result, the ensuing analysis rests primarily on the apportionment jurisprudence of a comparatively small number of states (Alaska, Colorado, New Jersey (pre-1966), Vermont, and Virginia) in which (1) the preservation of communities of interest is thought to be an important or legitimate consideration for the redistricting authority to take into account in crafting legislative apportionment plans, and (2) the state's highest court has said so directly. Though this limitation necessarily makes the analysis suggestive rather than conclusive, the evidence is nonetheless sufficiently clear, consistent, and rich to justify careful attention.

located mainly to its east, the Vermont Supreme Court found it significant that “trade and commerce generally moves westward from Montgomery, . . . and except for a few Montgomery residents who work at the Jay Peak ski area, the work force moves in a westerly direction.”²³⁰ Courts frequently look to common participation in local markets as evidence of the kind of interaction that gives rise to a community of interest for purposes of apportionment. Thus, in Colorado the presence within a district of “a common employment base” provides evidence of a community of interest;²³¹ in Alaska, shared patronage of “professionals and financial institutions serv[ing] the needs of . . . major industrial activities” furnishes similar evidence.²³² In Vermont, common reliance on “large commercial areas” and participation in medical service markets, along with reciprocal commuting patterns, all count as evidence of a community of interest among residents of proximate areas.²³³

In some states, the existence of a dominant local industry also counts as evidence of a community of interest entitled to legislative representation. In New Jersey and Virginia, the dominant industry is generally defined broadly—“manufacturing,”²³⁴ or “agriculture,”²³⁵ for instance. In Alaska, a dominant industry capable of constituting a community of interest is often defined with greater particularity: “fishing, fish processing, forest products, and tourism” are such industries,²³⁶ as is “the timber industry.”²³⁷ Even a local dependence on “the operation of state government”²³⁸—an industry of public employment, as it were—provides evidence of a constitutionally sufficient community of interest.

230. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d at 331.

231. *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 191, 195 (Colo. 1982) (per curiam) (quoting report of state redistricting commission).

232. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1362 (Alaska 1987); *accord Hickel v. Se. Conference*, 846 P.2d 38, 47 (Alaska 1992).

233. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d at 340.

234. *Jackman v. Bodine*, 205 A.2d 713, 718 (N.J. 1964).

235. *Id.*; *Wilkins v. Davis*, 139 S.E.2d 849, 853 (Va. 1965) (“[T]he interests of its people are largely agricultural.”).

236. *Groh v. Egan*, 526 P.2d 863, 879 (Alaska 1974) (quoting Advisory Board’s findings).

237. *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983).

238. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1356 (Alaska 1987) (describing the economy of Juneau).

A shared dependence on a common urban center likewise is viewed as evidence of a cognizable community of interest,²³⁹ and a districting plan that "separates the downtowns of two major cities from the rest of the cities," or even "splits two closely interrelated cities"²⁴⁰ may therefore fail to observe communities of interest coinciding with metropolitan areas. Shared reliance on public services, such as "state offices . . . [or a] regional hospital and airport,"²⁴¹ has also been mentioned as evidence of a community of interest.

"Transportation," the U.S. Supreme Court has held, "is essential to commerce,"²⁴² and it is therefore no surprise to find that courts searching for a community of interest within a challenged election district have often thought it important to consider whether the various parts of the district are well connected by transportation links. Thus, the presence within a district of "a network of roads connecting the [parts of the district]"²⁴³ or a well-developed highway system such as "the U.S. 50 transportation corridor"²⁴⁴ furnishes evidence of a community of interest, as do "daily scheduled air flights and frequent ferry service."²⁴⁵ Even a "highway connection" that has only been "planned" but not yet built has been deemed relevant.²⁴⁶ Similarly, among the factors that state courts have found to impede the formation or maintenance of a community of interest are various physical barriers to regular and convenient transportation among parts of a district, including the presence of a river²⁴⁷ or a mountain range,²⁴⁸ and the lack of good quality roads connecting parts of the district.²⁴⁹

239. *Hickel v. Se. Conference*, 846 P.2d 38, 50-51 (Alaska 1992); *Wilkins*, 139 S.E.2d at 853; *see also Groh*, 526 P.2d at 879 ("[H]istorically the three communities have always been closely linked, with Juneau serving as an economic hub for Haines and Skagway.").

240. *Hickel*, 846 P.2d at 50-51.

241. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323, 340 (Vt. 1993).

242. *Reading R.R. Co. v. Pennsylvania*, 82 U.S. (15 Wall.) 232, 281 (1872).

243. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d at 340.

244. *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 191, 195 (Colo. 1982) (quoting Colorado Reapportionment Commission's conclusion).

245. *Groh v. Egan*, 526 P.2d 863, 879 (Alaska 1974).

246. *Id.*

247. *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 209, 212 (Colo. 1982) (per curiam) (Platte River).

248. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d at 331 (Green Mountains).

249. *Id.* ("Although there are two roads that run east from Montgomery over the spine, one is a seasonal road and the other is difficult to travel in the winter."); *id.* at 342 (noting that the only connection between two towns in another proposed district was a "graded gravel road, which is passable only six months of the year"); *see also In re Reapportionment of Colo.*

Finally, in enumerating the kinds of shared concerns and interests among a district population that, if found, would provide evidence of a community of interest, state courts have tended to focus heavily on the economic. These include a common interest in “growth issues,”²⁵⁰ the local “tax rate,”²⁵¹ the “development of [a] ski area”²⁵² or “a common port facility,”²⁵³ “fisheries development, fish processing quality and safety, and forest management,”²⁵⁴ as well as “a common interest in the management and disposition of state lands.”²⁵⁵

This is not to say that courts never consider social factors in deciding whether an election district contains a community of interest. Historical connections between areas;²⁵⁶ cultural commonalities,²⁵⁷ including shared participation in local entertainment and media markets;²⁵⁸ housing patterns;²⁵⁹ and patterns of social interactions among district inhabitants²⁶⁰ all come up from time to time. Even recreational patterns are sometimes taken into account; in one case, a state high court thought it significant that two

Gen. Assembly, 828 P.2d 185, 195 (Colo. 1992) (“[T]here is no improved road directly connecting principal population centers in Gunnison County to Pitkin County, and the only access from Aspen to the eastern slope counties is across Independence Pass, which . . . is closed for about six months each year.” (footnote omitted)).

250. *In re* Reapportionment of Colo. Gen. Assembly, 45 P.3d 1237, 1251 (Colo. 2002).

251. *In re* Reapportionment of Towns of Hartland, Windsor & W. Windsor, 624 A.2d at 340; *see also id.* at 343 (issues of “disproportionate tax burdens”).

252. *Id.* at 343.

253. *Groh v. Egan*, 526 P.2d 863, 877 (Alaska 1974) (internal quotation marks omitted); *see also Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983) (“port development”).

254. *Carpenter*, 667 P.2d at 1215.

255. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 (Alaska 1987).

256. *Hickel v. Se. Conference*, 846 P.2d 38, 46 (Alaska 1992) (“historical links”).

257. *Id.* at 53-54 (discussing the lack of social and economic integration between the Inupiaq and Athabaskan cultures).

258. *Hickel*, 846 P.2d at 47 (sharing dependence on urban center for “entertainment” and “news”); *Kenai Peninsula Borough*, 743 P.2d at 1363 (finding social link when residents “share the same news and entertainment media”). Shared participation in a common media market is one of the few factors recognized by the U.S. Supreme Court to evidence a community of interest. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) (one “manifestation[] of community of interest” is “shared broadcast and print media”).

259. *Groh v. Egan*, 526 P.2d 863, 879 (Alaska 1974).

260. *Carpenter v. Hammond*, 667 P.2d 1204, 1215 n.25 (Alaska 1983) (“occasional social gatherings” and “some intervisitation . . . via air mail and ferry transport”); *Kenai Peninsula Borough*, 743 P.2d at 1363 (“residents of the area . . . visit each other frequently”); *In re* Reapportionment of Towns of Hartland, Windsor & W. Windsor, 624 A.2d 323, 331 (Vt. 1993) (“social interaction”).

towns in a proposed district shared "bowling tournaments [and] interscholastic sports competition."²⁶¹

Nevertheless, it is clear that these kinds of social factors take a back seat to economic ones in determining the existence of a community of interest. Even in Alaska, where the state constitution specifically requires preservation of "socio-economic area[s]" in apportionment,²⁶² the "socio" gets short shrift compared to the "economic." Relying on statements made at the 1956 constitutional convention, the Alaska Supreme Court has construed "socio-economic area" to mean a place "where people live together and work together and earn their living together," an "economic unit inhabited by people," and "a group of people living within a geographical unit . . . following, if possible, similar economic pursuits."²⁶³ Conversely, the social factors that tend to dominate the community-of-interest inquiry on the federal level—especially race and ethnicity—come up only very rarely in state apportionment jurisprudence,²⁶⁴ and play a distinctly minor role in the analysis compared to economic considerations. Of course, one needs to be somewhat cautious in drawing inferences about the lack of attention to race and ethnicity in state apportionment jurisprudence given the federal dominance of the subject under the Fourteenth Amendment and the Voting Rights Act. But even so, the states' judicial record of dealing with apportionment criteria is weighted strikingly in favor of the economic over the social.²⁶⁵

261. *Carpenter*, 667 P.2d at 1215 n.25.

262. ALASKA CONST. art. VI, § 6.

263. *Groh*, 526 P.2d at 878.

264. *See, e.g., id.* (alluding to "patterns of . . . minority residency"); *Wilson v. Eu*, 823 P.2d 545, 556 (Cal. 1992) (referring approvingly to special masters' attempt to draw a plan that "assure[s] full participation by minority groups in the reapportionment process"); *Beauprez v. Avalos*, 42 P.3d 642, 652 (Colo. 2002) (holding that division of economically defined community of interest was justified "to preserve the historical Hispanic community of interest in that part of the state"); *see also* Legislative Redistricting Cases, 629 A.2d 646, 667 (Md. 1993) (approving a plan even though it split a "tightly-knit Jewish community . . . between three different legislative districts").

265. There is also a long legacy on the state level of the Progressive belief that race and ethnicity are not only improper but dangerous bases for organizing politics. On the Progressive hostility toward ethnic, machine-based, urban-style politics, *see, for example, RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 9* (1955) (arguing that Progressivism reacted against a conception of politics embraced by many immigrants that "took for granted that the political life of the individual would arise out of family needs, interpreted political and civic relations chiefly in terms of personal obligations, and placed strong personal loyalties above allegiance to abstract codes of law or morals"); *DENNIS R. JUDD, THE POLITICS OF AMERICAN CITIES: PRIVATE POWER AND PUBLIC POLICY* 88-92 (1988) (describing Progressive concern about municipal corruption caused by the lower classes and

D. Territory and Interest (II): Administrative and Political Construction of County Communities of Interest

We normally think of communities of interest as conceptually prior to election districts: we create or recognize an election district precisely because it contains a community of interest, thereby providing political voice to a group with an antecedent claim to legislative representation. The practice of recognizing counties as election districts on the ground that they generally contain discrete, local economic communities of interest accords well with this view. The arrow of causality, however, need not always point in this direction. As Benedict Anderson has persuasively argued, the act of drawing boundaries can sometimes precede the emergence of a community, and indeed can under the right circumstances serve as a kind of armature upon which new, politically coherent communities crystallize; “administrative units,” Anderson argues, can “over time, come to be conceived as fatherlands.”²⁶⁶ This more subtle and sophisticated conception of a community of interest also finds expression in the state constitutional jurisprudence of apportionment, in two ways.

First, state courts have frequently found that residency in a county creates what might very well be called an “administrative” community of interest among the inhabitants, in virtue of their common experience under the county’s administration of governmental programs. Counties have historically occupied a significant place in the structure of state government. In North Carolina, they “serve as the State’s agents in administering statewide programs, while also functioning as local governments that devise rules and provide essential services to their citizens.”²⁶⁷ In Maryland,

immigrants, manifested in a reform agenda dedicated to abolishing machine politics). For an account of the influence of the Progressives on state-level political reform during the early twentieth century, see James A. Gardner, *Madison’s Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 118-19 (2000).

266. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 53 (rev. ed. 1991). For an application of this concept to the American states, see Russell Kirk, *The Prospects for Territorial Democracy in America*, in *A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM* 42, 43 & n.2 (Robert A. Goldwin ed., 1963) (“[W]hile the highly arbitrary and abstract boundaries of the Western states represent nothing but cartographers’ and Congressmen’s convenience, still the institution and practice of territorial democracy have given to Montana and Arizona and Kansas, say, some distinct and peculiar character as political territories, by fixing loyalties and forming an enduring structure of political administration. . . . [T]he stabilizing and conservative influence of the pattern of territorial democracy has . . . [made] sensible political territories of what originally were mere parallelograms of prairie and desert and forest.”).

267. *Stephenson v. Bartlett*, 562 S.E.2d 377, 385 (N.C. 2002).

counties “have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice,” and they therefore play a role in state governance “analogous to [the role of] the states, in relation to the United States.”²⁶⁸ This extensive administrative activity establishes significant relationships both between county residents and their government, and among county residents, thereby forging a community of interest even where one might not otherwise exist. As the Colorado Supreme Court recently observed, “[c]ounties and the cities within their boundaries are already established as communities of interest in their own right, with a functioning legal and physical local government identity on behalf of citizens that is ongoing.”²⁶⁹ Or, in the words of the New Jersey Supreme Court, “[t]he citizens of each county have a community of interest by virtue of their common responsibility to provide for public needs and their investment in the plants and facilities established to that end.”²⁷⁰ Representation by county is further justified, on this view, by the need for each administrative community of interest to have “a separate voice in its relations with the State.”²⁷¹

Second, state courts have often found that common participation by a county’s inhabitants in its electoral politics, and in the reciprocal relationships established between those inhabitants and their elected officials, gives rise to a political community of interest entitled to recognition. The Virginia Supreme Court, for example, has held that maintaining the stability of a “district’s configuration” is an important consideration in redistricting because it “allow[s] development of relationships and communities of interest relative to election of delegates.”²⁷² The Vermont Supreme Court has

268. *In re Legislative Districting of State*, 805 A.2d 292, 319 (Md. 2002) (quoting *Md. Comm. for Fair Representation v. Tawes*, 184 A.2d 715, 718 (1962)). Although many states deliberately utilized a “federal plan” in which representation in the state senate was, as in the federal model, by territorial subunit rather than by population, see PAUL T. DAVID & RALPH EISENBERG, *STATE LEGISLATIVE REDISTRICTING: MAJOR ISSUES IN THE WAKE OF JUDICIAL DECISION 5-13* (1962), any analogy between the national method of electing senators by state and the state method of electing state senators by county was flatly rejected by the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 571-76 (1964).

269. *In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d 1237, 1248 (Colo. 2002).

270. *Jackman v. Bodine*, 205 A.2d 713, 718 (N.J. 1964); see also *In re Reapportionment Plan for Pa. Gen. Assembly*, 442 A.2d 661, 672 (Pa. 1981) (Larsen, J., dissenting) (stating that residents of local government units have “common interests in the economic, residential, recreational and educational betterment of their communities”).

271. *Scrimminger v. Sherwin*, 291 A.2d 134, 141 (N.J. 1972).

272. *Wilkins v. West*, 571 S.E.2d 100, 110 (Va. 2002); see also *Wilkins v. Davis*, 139 S.E.2d 849, 850-51 (Va. 1965) (“[I]n Virginia, it has been the unbroken custom to refrain

similarly held that “the preservation of town and county boundaries is important ‘because the sense of community derived from established governmental units tends to foster effective representation.’”²⁷³ The North Carolina Supreme Court has gone even further, holding that these relations give rise not merely to a community of interest, but to a significant and independent political identity:

[P]eople identify themselves as residents of their counties and customarily interact most frequently with their government at the county level. Based on the clear identity and common interests that counties provide, the impetus for the preservation of county lines [under the state constitution] is easily understood within the redistricting context.²⁷⁴

On this view, then, even if local political boundaries do not coincide precisely with the physical extent of a local economy, administrative and political dynamics are at work within counties and towns to create communities of interest among the residents that are entitled to representation in the state legislature.²⁷⁵

from dividing any county or city into separate districts. From the early history of Virginia, even in Colonial days, the community of interests in the respective counties has been recognized, and in no division of the state for any governmental purpose has any county line been broken.” (quoting *Brown v. Saunders*, 166 S.E. 105, 107-08 (Va. 1932))).

273. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323, 330 (Vt. 1993) (quoting *Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982)); see also *id.* (“[T]he ability of representatives to relate effectively to their constituency” is “fostered through . . . membership in a political community” (quoting *Wilson v. Eu*, 823 P.2d 545, 553 (Cal. 1992))).

274. *Stephenson v. Bartlett*, 562 S.E.2d 377, 386 (N.C. 2002) (citation omitted).

275. This view of the matter does not merely reflect some kind of tautology of apportionment itself, i.e., that election districts become communities of interest because they are election districts and therefore elect representatives. Although such a dynamic is certainly possible, and election districts may be logically viewed as communities of interest for certain limited purposes, the decisions discussed here seem to contemplate a community of greater thickness. An election “district,” by itself, has no functions of administration or governance. The account given in the text seems to apply, rather, to local governments with autonomous powers of governance that therefore have the capacity, through the activity of local self-governance, to constitute a meaningful community. A district that has no existence other than the election of a legislator presumably would not generate the same breadth of community-inducing activity.

E. Summary

In sum, the state constitutional jurisprudence of apportionment expresses a reasonably clear, dominant, and historically continuous view: representation in the state legislature is of local political units, which are conceived to embrace distinct, coherent groupings of people engaged in shared economic activity—and, to a lesser extent, administrative and political activity—thereby giving rise to communities of primarily economic interest entitled to separate legislative representation.

It is worth stressing once more the considerable differences between the federal and state views of the nature of communities of interest. The dominant state view is what might be called an “inductive,” or “bottom-up” theory of community: it proceeds upon the fundamentally republican or communitarian premise that people who live in close physical proximity inevitably share certain kinds of activities, and that the bonds created through these shared activities give rise to a community of interest that is deeply connected to, built upon the matrix of, even induced by, the particular locality in which the members live.²⁷⁶ The dominant federal approach²⁷⁷ is

276. See Forest, *supra* note 225, at 157 (“Under the theory of regional community representation propinquity is important because political interests, preferences, and identity—as well as moral obligations—are formed and defined by local geographic communities, rather than existing a priori in autonomous individuals.”).

277. A view more akin to the state position has occasionally been advanced, generally without much success, on the federal level. For example, in *Karcher v. Daggett*, Justice Stevens argued that “[r]esidents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services,” 462 U.S. 725, 758 (Stevens, J., concurring), but did not attract any other votes. A few lower federal courts have occasionally expressed the view that local governments can form a constitutive matrix for the formation of cognizable communities of interests. See, e.g., *Cantwell v. Hudnut*, 566 F.2d 30, 35-36 (7th Cir. 1977) (“[A]ll residents of the county share a community of interests in the proper operation of the police and fire districts as well as the city-county government of which they are a part.”); *Smith v. Cobb County Bd. of Elections*, 314 F. Supp. 2d 1274, 1306 (N.D. Ga. 2002) (“[S]trong communities of interest . . . exist around the attendance zones for the high schools in the County, as well as the elementary and middle ‘feeder schools’ that send students to those high schools.”); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 648 (D.S.C. 2002) (three-judge panel) (“Many governmental services, such as fire and police protection, are organized along political subdivision lines, and counties and cities are often representative of a naturally existing community of interest.”). On the other hand, at least one lower court has expressly rejected any connection between place and community of interest on the ground that it would make any requirement of geographical compactness redundant. See *Chen v. City of Houston*, 206 F.3d 502, 516 (5th Cir. 2000) (rejecting argument that “communities of interest were inherently linked to geography” on the ground that “this statement would make communities of interest a mere subset of geographic compactness”).

more “deductive,” or top-down, to say nothing of classically liberal and cosmopolitan. On the federal view, individuals, who are not intrinsically connected to any particular locality, happen to share political interests—often defined in terms of interests salient to national politics—and then happen to reside in a particular place.²⁷⁸ In the federal jurisprudence, the place or local community is therefore of no great importance, at least in comparison to the community of interest constituted by an individual’s membership in territorially cross-cutting groups organized by politics, ideology or other kinds of interests.

The bottom-up dynamic contemplated by the state approach is perhaps easiest to see in the case of governmental administration, in which all residents of an established county or town, whatever their other characteristics, are understood to coalesce into a community of interest by virtue of living under the same regime of governmental administration. On this view, the community of interest constituted by Franklin County could not exist anywhere but in Franklin County because living together in Franklin County, under Franklin County’s administration of state policies and Franklin County’s policies of local governance, is precisely what gives rise to the community. That makes the relevant community not only intrinsically local, but intrinsically connected to a particular locality.

The same is just as true of the state view of counties as economic communities of interest. The idea is not that people who live in a county happen to share the trait of being economic actors, and that a county is as good a way as any other to group economic actors for purposes of representation. Instead, the idea seems to be that people who live in close physical proximity inevitably engage in economic relations *with each other*, and that this relationship, multiplied many times over for some decent interval, gives rise to both a local economy *in that place*—which consequently possesses unique attributes that distinguish it from any other local economy in any other place—along with a corresponding community of interest comprised of the people whose activity constitutes the local economy, and whose prosperity is therefore linked directly to it.²⁷⁹ For

278. Again, Forest has put the point well: “[judicial approaches to districting] share the assumption that an individual voter (or census block) has no inherent place in any particular district. That is, the placement of a voter in a district reflects the optimal solution to an allocation problem, not a normative judgment about the membership of that voter in a particular community.” Forest, *supra* note 225, at 156.

279. Ironically, on this republican account of commerce, the economic behavior of individuals in the marketplace, which is usually conceived on a liberal view as atomistic and destructive of community, is here conceived as constitutive of community. Yet the assumption

purposes of representation, on this view, it therefore makes no sense to conceive of the residents of Franklin County as individuals with an interest in the prosperity of local economies. Their interest is in the prosperity of the Franklin County local economy, and the only way to represent that interest in the state legislature—assuming, of course that this is the kind of interest that *should* be represented there, a subject to which I shall return shortly—is to provide representation to the county community of economic interest.²⁸⁰

To be sure, one might dispute this state approach to legislative representation as unrealistic. First, it may no longer be true, if indeed it ever was, that county boundaries demarcate the limits of local economies. Even in 1776, urban merchants and town and village tradesmen across any given state may well have had more economic interests in common with one another than they had with farmers and agricultural workers in their home counties.²⁸¹ And of course there is nothing intrinsic to the structure of counties or towns that impedes the spread of local economies across their borders.²⁸² Furthermore, the conflation of territory and economic interest may well overstate the extent to which the interests of participants in a local

of an underlying harmony of American economic interests was pervasive in the late nineteenth century. *See generally* MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* (1977).

280. Writing of the national constitutional experience, Zagarrri claims that “[d]espite the Federalists’ ultimate triumph, spatial assumptions about representation died hard.” ZAGARRRI, *supra* note 28, at 104. I would amend this. In the state constitutional realm, Antifederalist assumptions about representation did not die at all, but have lingered on, albeit in a weakened condition.

281. This may depend in part on when one looks. In colonial times, although “[e]ven the smallest village had some trade beyond its immediate neighborhood[,]” the lives of villagers “were not shaped or even touched by participation in an abstract and competitive market society; they were in the market, but not of it.” BENDER, *supra* note 213, at 66. “The local village or neighborhood, integrated by face-to-face and intimate relationships, often based upon kinship networks, was the colony’s basic economic unit.” *Id.* at 70. By the antebellum period, divergences in economic interests between town and countryside may, according to at least one account, have been so strong as to provide an armature for the emergence of the competitive political parties of the second party system. *See generally* HARRY L. WATSON, *JACKSONIAN POLITICS AND COMMUNITY CONFLICT: THE EMERGENCE OF THE SECOND AMERICAN PARTY SYSTEM IN CUMBERLAND COUNTY NORTH CAROLINA* (1981). Certainly, by the time of the runup to the Civil War, economic differences could serve as the basis for highly meaningful political cleavages. *See, e.g.,* CLEMENT EATON, *THE MIND OF THE OLD SOUTH 60-62* (1964) (describing the conflict over secession between Southern planters, who profited from slavery and therefore supported secession, and Southern merchants, who did not profit from slavery and therefore opposed secession as financially harmful).

282. Indeed, official attempts to prevent the spread of economies in accordance with market forces would very likely run afoul of the Commerce Clause of the U.S. Constitution. *See, e.g.,* *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

economy coincide. One of the realities of economic life is that one person's gain may be another's loss—when business is good at the sunglasses shack, the umbrella vendor may be languishing—and where participants in a local economy compete, their interests may conflict.

Second, it might be the case, as Justice John Dooley of the Vermont Supreme Court has argued, that the interests along which the residents of a town or county are in fact most likely to cleave politically are not local economic interests, but cross-cutting economic issues of statewide political concern:

I think the majority has accepted a shallow and incomplete notion of community of interest that ignores the reality of the tasks facing the legislators who represent these districts. This opinion is issued at the start of a legislative session in which the major concerns are the level of state taxation and the nature of those taxes, the level of state spending and the areas in which the spending occurs, creating jobs and income growth to counteract the effect of the recession, and regulatory reform. There is absolutely nothing in the sparse evidence produced by [the Town of] Montgomery to show that the residents of that town have a common interest in how these issues are resolved with the residents of [neighboring] towns in the adjoining district.²⁸³

If this view is correct, communities of interest may be much less likely than state courts assume to coalesce along county lines.

Third, the belief expressed in the cases that local administration and political life give rise to meaningful communities of interest may be overly, or even wildly, optimistic. Contemporary American political life is largely characterized by disengagement;²⁸⁴ Americans dislike politics, and have no

283. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323, 350 (Vt. 1993) (Dooley, J., dissenting in part).

284. If a lack of knowledge of politics is an indicator of disengagement, then Americans are highly disengaged: volumes of political science research have documented American voters' lack of knowledge and understanding of politics and political issues. The *locus classicus* is ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960). For more recent evidence, see MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996). For a more interpretive, sociological account, see ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 336-49 (2000) (describing the impact of declining social capital on democratic participation and citizenship skills).

great enthusiasm for having it forced upon them,²⁸⁵ and this phenomenon is more pronounced in every respect the more local the politics. Voter turnout, for example, is low enough in national elections, but is even lower in state and local elections,²⁸⁶ and the salience of state-level issues for voters is lower than for national issues.²⁸⁷ Thus, to claim that local activities of governmental administration and politics constitute communities of interest may overstate the case.

My goal here, however, is not so much to explore the empirical realities of state legislative representation as it is to uncover the theories of legislative representation upon which state constitutional apportionment provisions rest. Constitutions often incorporate design assumptions about politics and human behavior that are later contradicted by the facts, and if that is the case here, it is certainly nothing new. For present purposes, I am therefore much less interested in the possibility that communities of local economic interest organized around county or town economies might not exist, or might exist only weakly, than I am in the fact that state courts seem to assume that such communities exist, consider such communities to play an extremely important role in apportionment, and generally deduce that role from the scheme of legislative representation established in their state constitutions.

For these reasons, I want to extend the analysis another step by moving from consideration of state constitutional systems of apportionment to state constitutional systems of politics, broadly conceived. Apportionment is not an end in itself; it is a mechanism, like many other legal mechanisms, designed to institutionalize some kind of politics that the society in question considers desirable. Consequently, if we know something about a society's rules of legislative representation and apportionment—and we now know a

285. This point is made with great force in JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEF ABOUT HOW GOVERNMENT SHOULD WORK* 85-159 (2002).

286. Since 1980, voter turnout in presidential election years has hovered just above fifty percent, while during the same period voter turnout in non-presidential election years (i.e., years in which elections for state offices need share the ballot only with federal congressional or senatorial races) has on only one occasion been as high as forty percent, and typically hovers in the mid-thirty-percent range. HAROLD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS, 2001-2002*, at 13 tbl.1-1 (2001).

287. Examples are legion; here is one. In a March, 2006, CBS News poll, respondents were asked to name "the most important problem facing this country today." By far the most common response was the war in Iraq, followed by the economy and jobs, terrorism, health care, energy issues, foreign policy, and immigration. *PollingReport.com, Problems and Priorities*, <http://www.pollingreport.com/prioriti.htm> (last visited Apr. 3, 2006). This is a list heavily weighted toward national issues.

considerable amount about such rules for the American states—we can probably make some fair inferences about the kind of political life these rules are meant to achieve. In the next Part, I therefore ask the following question: given the assumptions about legislative *apportionment* woven through the jurisprudence described above, what kind of state-level *politics* is contemplated by this system of representation?

My answer, in brief, is this: state constitutional apportionment rules seem to contemplate a state-level politics that is classically republican, and that therefore holds no meaningful place for political parties. This will turn out to be a useful piece of information when we finally address the main question posed in this paper: do state constitutional anti-gerrymandering provisions hold any promise for controlling *partisan* gerrymandering? The answer, I suggest, is that they do not.

V. STATE CONSTITUTIONAL CONCEPTIONS OF POLITICS

What kind of state politics, then, are state constitutional apportionment provisions, and the court-made apportionment jurisprudence construing them, intended to create? From the many provisions and judicial decisions examined above, it is possible to extract three closely related main features: (1) a delegate model of representation; (2) an intradistrict politics that is harmonious rather than conflictual; and (3) a state-level politics that is pluralistic, conflictual, and oriented toward resolution of local, economic issues. Taken together, these features gesture strongly toward a politics that is fundamentally republican, and bears a strong family resemblance to the anti-party kind of politics closely associated with eighteenth century American political thought.²⁸⁸

A. *The Delegate Model of Representation*

In a democracy, it is to be expected that on many or most issues citizens will hold a wide variety of views and that many of these views will conflict. Every democratic system of governance therefore faces the fundamental question of how to reduce a multiplicity of citizen views to a single view, or set of views, expressed in collectively determined legislative policies. One of

288. For an overview of early American antipathy toward political parties, see generally RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* (1969); GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* (2002).

the main distinctions between forms of democracy concerns where within the system, and by what means, the necessary conflict resolution occurs.

In representative democracies, one variable that affects how conflicting views are resolved is the homogeneity of legislative constituencies. If voters within the various districts are relatively homogeneous, and therefore have similar political opinions, then the selection by the people of the district of a legislative representative does not resolve any conflicts because as yet there are none to be resolved; the representative will necessarily hold the same views as his or her constituents. Assuming that representatives so elected are themselves politically heterogeneous, then conflicting political views will be resolved in the legislature by bargaining or debate among the legislators. Such a system, characterized by intradistrict homogeneity and interdistrict heterogeneity, corresponds to a theory of representation—commonplace during the eighteenth century and best articulated by John Adams and The Essex Result—in which the legislature is said to “be in miniature an exact portrait of the people at large[,]” and will therefore act precisely as the people would were they able to be physically present themselves.²⁸⁹

A different kind of system is established if election districts are constructed so as to be heterogeneous, composed of voters who hold diverse political views. In such a system, the election of a representative by the people of a district will itself constitute a first-pass resolution of conflicting views by the voters themselves, resulting in the election of a representative whose positions already embody some degree of political compromise. If, after district elections, representatives still hold heterogeneous views in the legislature—as will surely be the case—there will then be another round of conflict resolution when the representatives deliberate and bargain among themselves. In this system, however, we would expect the range of conflict among the legislators to be narrower, because a first round of compromise has already occurred among the electorate in the district elections. This model corresponds roughly to the median voter theory of contemporary political science.²⁹⁰

289. John Adams, *Thoughts on Government: Applicable to the Present State of the American Colonies*, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 287, 288-89 (C. Bradley Thompson ed., 2000); see The Essex Result (Apr. 29, 1778), reprinted in 1 THE FOUNDERS' CONSTITUTION, *supra* note 165, at 112-18. For a discussion of this theory of “descriptive representation,” see HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60-91 (1967).

290. The classic statement of the median voter theory appears in ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). For more recent elaborations of the theory, see generally MICHAEL D. McDONALD & IAN BUDGE, ELECTIONS, PARTIES, DEMOCRACY:

A society may very well end up with more or less the same ultimate policies regardless of which of these conflict-resolution systems it chooses, but the function of representatives in each system will be quite different. In the first model, where district voters are homogeneous, all conflict resolution occurs in the legislature and none in the electorate, essentially making representatives delegates of their respective constituencies:²⁹¹ their function in the legislature is to represent and pursue the interests of their districts in bargaining and deliberation with other representatives of other homogeneous districts. Because their constituents do not disagree among themselves and share a unity of interest, representatives have little occasion to exercise independent discretion; they function more as agents whose job is to represent and advance the interests of their constituents. In the second model, however, where district voters are heterogeneous and have conflicting interests and political opinions, representatives are necessarily conciliators among different interest groups within their own constituencies. They cannot simply represent their constituents' opinions and interests because those opinions and interests conflict, and representatives must therefore use some independent judgment to decide which set of conflicting views to take up, or how to fashion a synthetic position to advance in the legislature that will provide the greatest overall benefit to their various constituencies. The precise position taken by such representatives may in many cases correspond to a position that is held by very few voters in the district, or even by none.²⁹²

The many state constitutional apportionment provisions and judicial decisions reviewed in Parts III and IV suggest fairly strongly that the dominant state constitutional model of legislative representation corresponds closely to the delegate model. First, it is implicit in the commonplace view of political subdivisions as naturally occurring, homogeneous communities of economic interest. Each county or town is understood in this jurisprudence to be unique, yet unified—unique because each unit is its own local economy, as well as its own administrative and political community, but internally

CONFERRING THE MEDIAN MANDATE (2005); G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS (2000).

291. See PITKIN, *supra* note 289, at 133-34, 146-47, 150-51, for a discussion of the delegate model of representation.

292. The prediction of Downsian voting theory is that the representative will take up the position of the median voter, even if that person is the only one in the district to hold that precise opinion, provided that voter preferences are single-peaked. DOWNS, *supra* note 290, at 117-19.

unified because all who participate in these communities of interests have, by definition, the same interests.²⁹³

This view of the matter finds additional support in the belief, expressed occasionally by state courts, that counties and other local government units should not be divided because doing so impairs the efficacy of legislative representation. For example, according to the Maryland Court of Appeals, “[t]he danger lurking in legislative districts which cross jurisdictional boundaries . . . is that representatives from those districts may face conflicting allegiances as to legislative initiatives which benefit one of their constituencies at the expense of the other.”²⁹⁴ The Vermont Supreme Court has expressed a similar concern: “Voters in a community are less effectively represented when their elected representative’s principal constituency lies outside their community and has interests different from their own.”²⁹⁵ This kind of concern clearly presupposes that each county is a coherent whole and that a district that crosses county lines is therefore a congeries of unrelated, or at least heterogeneous interests, creating a potential conflict. But a representative can have a professional conflict of interest in such a situation only if it is not a legitimate function of representatives to resolve competing claims and interests arising from within their own districts—if, that is to say, their job is simply to follow the instructions of their constituencies, something that is possible to do without “conflict” only if the instructions

293. See BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 64 (1984) (“If a legislator represents an area with a single, well-defined interest, then his mandate will be unambiguous.”).

294. *Legislative Redistricting Cases*, 629 A.2d 646, 666 (Md. 1993).

295. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323, 330 (Vt. 1993). Similar opinions have been expressed by dissenting justices in Pennsylvania and Colorado. See *In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d 1237, 1263 (Colo. 2002) (Bender, J., dissenting) (criticizing system of assigning representatives to more populous counties and splitting up less populous counties to round out district populations as resulting in superior representation for the more populous counties); *In re Reapportionment Plan for Pa. Gen. Assembly*, 442 A.2d 661, 672 (Pa. 1981) (Larsen, J., dissenting) (“[O]nce political subdivisions have been split, there is little chance that the interests of their residents will be represented effectively so long as their elected representatives also represent other areas with different interests.”). On the other hand, the New Jersey Supreme Court has flatly denied that dividing a county impairs its representation: “[I]f the county is ignored in drawing district lines, its interests will not go unrepresented. A Senator must be mindful of the interests of the county or counties in which his constituents live.” *Scrimminger v. Sherwin*, 291 A.2d 134, 142 (N.J. 1972). But see *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 775 (Ky. 1997) (“[T]he delegates [to the 1890 constitutional convention] did not intend to guarantee that a county must be represented by a resident of that county.”).

issue from constituencies that are themselves without conflicting interests, i.e., homogeneous.

The delegate model of representation is further supported by the commonplace notion, set out in Part IV.D, of counties as administrative subdivisions of the state. If the counties are the chief downward conduits for the implementation of state policy—the vehicles by which state power is transmitted to the local level—it is not unreasonable to conceive of them simultaneously as reciprocal upward conduits for the transmission of local interests to the state level. Such an arrangement makes state legislators more like shuttling messengers than like trustees entitled to exercise independent judgment.

Finally, the delegate model is squarely implicated in the venerable belief that the people in a democracy retain a right to “instruct” their legislative representatives, an idea that was squarely rejected on the national level,²⁹⁶ but that made significant headway in the states. The right to instruct appeared in numerous early state constitutions,²⁹⁷ and to this date appears in the

296. As Madison famously observed, one of the most significant features of the U.S. Constitution is its “total exclusion of the people in their collective capacity, from any share in [governance].” *THE FEDERALIST* NO. 63 (James Madison), *supra* note 103, at 387 (emphasis omitted). Instead, government is to be conducted by men of wisdom and virtue pursuing independently “the true interest of their country.” *Id.*, NO. 10, at 82. Later, as a representative in the First Congress shepherding the Bill of Rights through the House, Madison was even more direct: “If gentlemen mean to go further [than to say that citizens have a right to communicate their sentiments to their representatives], and to say that the people have a right to instruct their representatives in such a sense as that the delegates were obliged to conform to those instructions, the declaration is not true.” *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 167 (Helen E. Veit et al. eds., 1991).

297. See, e.g., N.C. CONST. of 1776, Declaration of Rights, art. XVIII; PA. CONST. of 1776, Declaration of Rights, art. XVI; VT. CONST. of 1777, ch. I, § XVIII; MASS. CONST. of 1780, pt. I, art. XIX; N.H. CONST. pt. I, art. I, § XXXII (1784); ME. CONST. of 1819, art. I, § 15. For discussions of the right to instruct in its early American context, see KRUMAN, *supra* note 27, at 76-81; POLE, *supra* note 82, at 541-42; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 189-96, 379-83 (1969); see also PITKIN, *supra* note 289, at 133-35 (discussing the instruction of representatives as a matter of the theory of representation).

constitutions of fourteen states,²⁹⁸ although such provisions have generally been construed by state courts to have little real bite.²⁹⁹

B. Harmonious Intradistrict Politics

As suggested in the preceding section, a delegate model of representation generally goes hand in hand with the belief that district constituencies are basically homogeneous, and that they therefore contain populations whose interests are fundamentally similar. This view of constituencies is linked to the delegate model because a district constituency that contains diverse and conflicting interests is not easily capable of settling on a single, clear, internally consistent set of instructions for delegate-representatives to follow. Also implicit in this model of representation, however, is an important conception of the kind of politics that will prevail in such a district: it will be harmonious. If the citizens of a district have homogeneous interests, there will be little of substance for them to disagree about in intradistrict politics, and their main challenge at election time will be not to reach agreement on the substantive policies they wish to see advanced in the state legislature, but merely to agree upon who is the person best qualified to advance the interests and policies upon which they ought in principle readily to agree.

The state constitutional jurisprudence of apportionment by and large follows this general pattern. First, as indicated in Part IV.C, state courts construing state constitutional apportionment provisions generally conceive of the inhabitants of counties and other local government units as coherent communities of economic interest, thereby attributing to them a homogeneity of interest corresponding to a perceived unity of county-based local economies. The dominant interests of the district polity, that is to say, are homogeneous, and we would therefore on this view expect the district's internal politics to be reasonably harmonious. Second, the idea of a unity of district interest is further reinforced by the commonplace state constitutional practice, described in Part III.B, of providing for separate treatment in the apportionment process of counties and large cities, especially the practice of

298. CAL. CONST. art. I, § 3; IDAHO CONST. art. I, § 10; IND. CONST. art. 1, § 31; KAN. CONST. Bill of Rights, § 3; ME. CONST. art. I, § 15; MASS. CONST. pt. I, art. XIX; MICH. CONST. art. I, § 3; NEV. CONST. art. 1, § 10; N.C. CONST. art. I, § 12; OHIO CONST. art. I, § 3; OR. CONST. art. I, § 26; TENN. CONST. art. I, § 23; VT. CONST. ch. I, art. 20; W. VA. CONST. art. III, § 16.

299. See, e.g., *Fuller v. Haines*, 112 N.E. 873, 874 (Mass. 1916) (refusing to find that Article 19 of the Massachusetts Declaration of Rights authorized the citizens of a locality to bind the actions of their municipal representatives).

confining them to separate election districts. This practice reflects the belief, widespread during the eighteenth, nineteenth, and early twentieth centuries (and persisting to some extent even today), that residents of urban and rural areas have distinct—though internally homogeneous—interests.³⁰⁰

A third indication that state constitutions have historically presupposed an internally harmonious district-level politics is the widespread use of at-large elections from areas sufficiently populous to elect more than one legislator. As we saw in Part III.D, multimember districting was, until the 1840s, the preferred method of election for both state legislative chambers, and persisted in many places well into the twentieth century. An electoral system in which residents of a single area collectively elect multiple representatives presupposes a significant unity of interest and a strong foundation of substantive agreement among voters. Subdistricting of populous areas, in contrast, is warranted only if the district contains a multiplicity of interests that must be separately represented.³⁰¹

C. State-Level Politics: Conflictual, Economic, and Local

The final piece of this conceptual system concerns the nature of politics at the state level. In the system most often constructed by state constitutional apportionment provisions, the state legislature is likely to serve as the main

300. Jefferson, certainly, was one of the earliest and most influential proponents of this view: "Those who labor in the earth are the chosen people of God, . . . whose breasts He has made his peculiar deposit for substantial and genuine virtue. . . . The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body." Thomas Jefferson, *Notes on Virginia*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 185, 280 (Adrienne Koch and William Peden eds., 1944). For an account of urban-rural conflict in Congress during the early twentieth century, see generally EAGLES, *supra* note 106; for accounts of how such conflict played out in reapportionment, see GORDON E. BAKER, *RURAL VERSUS URBAN POLITICAL POWER: THE NATURE AND CONSEQUENCES OF UNBALANCED REPRESENTATION* 11-25, 40-52 (1955); ROYCE HANSON, *THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY* 19-28 (1966); MALCOLM E. JEWELL, *THE STATE LEGISLATURE: POLITICS AND PRACTICE* 18-19 (1962).

301. See, e.g., ZAGARRI, *supra* note 28, at 59 ("[U]nder corporate representation a legislator represented the general interests of the whole community rather than the particular interests of its more specialized parts."). Another justification occasionally advanced for subdividing districts, particularly during the nineteenth century, was that they were either so large or so populous that residents of different parts of the district could not possibly know and evaluate candidates drawn from other parts of the district. See REHFELD, *supra* note 207, at 79-80; ZAGARRI, *supra* note 28, at 20-21, 88-89, 91-93, 101-03. But since interest was in this period understood as intimately related to place, such a situation was, for the most part, understood as the equivalent of a divergence of interest within the district, thereby requiring subdivision. See ZAGARRI, *supra* note 28, at 98-99.

locus for the emergence and resolution of political conflict. Given the contemplated composition of local communities of interest, moreover, the primary basis of conflict within the state legislature will likely concern the resolution of competing local economic claims.

This view of state legislative politics follows readily from the characteristics of state legislative representation already described. First, any system in which election districts contain homogeneous, reasonably unified communities of interest will likely shift the locus of political conflict from the district to the legislative level. Since district residents have shared interests, they will by definition have few political conflicts among themselves, and each district's internal politics may be harmonious. The diversity of interest statewide, however, is represented in the legislature, which serves essentially as a meeting place for representatives of internally homogeneous, but collectively diverse communities of interest.³⁰² The typical structure of state constitutional apportionment provisions thus appears to contemplate a state political life that is harmonious at the local level but conflictual at the state level. This arrangement is also consistent with the conception of representatives as delegates, for it appears to be a system in which the task of resolving political conflict is everywhere delegated from the people to their representatives. The people, on this view, apparently wish to be spared the burden of political conflict; they prefer to live harmoniously among themselves in homogeneous and politically peaceful local communities, and send their representatives off to the state capital to do battle on their behalf.³⁰³

Second, given the contemplated composition of the districts, the main subject of state legislative conflict is likely to be economic, and because the representatives are delegates of the interests of unique county economies, the main source of conflict is likely to revolve around competing claims advanced in the service of local economic prosperity. As a result, state politics on this model might well involve consideration of demands by localities concerning such matters as the investment of statewide resources,

302. An extreme example of this phenomenon is given by Zuckerman in his account of the politics of eighteenth-century Massachusetts: "Independent towns, each straining for its own internal accord, could not support political parties which cut across town lines. The very same premium on peace which precluded pluralism within the towns almost assured it in the capital, where pluralism ran rampant The result was a milling and pushing politics of individuals in Boston which was probably dignified rather than demeaned by the label of factionalism." ZUCKERMAN, *supra* note 226, at 224-25. Pole makes a similar point about Virginia. See POLE, *supra* note 82, at 125 ("The Assembly gradually came to represent a sort of federation of county oligarchies . . .").

303. See HIBBING & THEISS-MORSE, *supra* note 285, at 85-159.

including public works and economic development projects; requests for state regulatory intervention favorable to local economic conditions, such as tax relief or assistance to local industries; or public programs beneficial to local residents, such as health, education, or housing programs. In short, structuring democratic politics in this way seems calculated to produce a politics dealing predominantly with issues that are particular to the various economic units that make up the state, and are therefore by definition highly local; it is a bottom-up kind of politics well suited to a bottom-up conception of political community.

The state constitutional structure also suggests a fairly strong conception of what democratic self-rule means, in the sense of what it means for a constituency to control its fate: in this structure, self-rule for a community means having the opportunity to defend or advance its economic interests and prosperity in the corridors of state government. Although this is by contemporary standards perhaps a somewhat narrow conception of the meaning of collective democratic self-rule, it is a conception that resonates strongly through American history: the belief that representation is valuable because of the opportunity it offers individuals and communities to protect their financial and commercial interests stretches as far back as the Revolution.

D. State Constitutional Conceptions of Gerrymandering

With this outline of state constitutional conceptions of politics sketched in, we are finally in a position to ask directly the question around which we have slowly been circling: what, according to the dominant state constitutional jurisprudence of apportionment, is gerrymandering, and what, precisely, is wrong with it? The answer is threefold. First, gerrymandering is the artificial division of natural local economic communities. Second, gerrymandering is the destruction of a harmonious local politics and its replacement with an artificially created local politics of conflict. Third, gerrymandering is the displacement of a state politics that revolves, appropriately, around issues of local economic concern in favor of a state politics that revolves, inappropriately, around false and manufactured issues of ideology, party, and faction.

When all is right with an apportionment scheme, on this view, election district lines match up with naturally occurring, distinct local economies, something that happens, for the most part, when district lines coincide with the counties, cities, or towns that comprise the various local economies. This arrangement of its own force then produces the desired politics: harmonious at home due to the unity of local economic interest; conflictual far away in

the state legislature due to the diversity of local economic communities and the consequent diversity of the interests represented by legislative delegates; and economic in both places because constituencies have been constructed around economic interests.³⁰⁴

A gerrymandered district—one that does not respect the boundaries of economic communities of interest—destroys all three of these qualities at once. By dividing local economies and grouping them in ways that fail to track the patterns of naturally occurring economic interactions, the economic coherence of election districts is by definition undermined. That much is clear. But what kinds of districts are produced in their place? More to the point, what happens to the politics of a district gerrymandered so as to contain incomplete portions of two or more local economies? One inevitable result would seem to be that the internal politics of the district will become conflictual. At the very least, those district residents whose lives are centered in separate local economies may find their interests in conflict during district electoral politics, and the resolution of these conflicts, a task previously delegated to representatives, will suddenly become the immediate business of the voters themselves, to be attended to in the selection of the district's representative or senator. As a result, political harmony is sacrificed and replaced with a politics of conflict and public contestation that is presumably infinitely less pleasant and neighborly than the ideal politics contemplated by the dominant state constitutional model.

Even worse from the point of view of this model, however, is that gerrymandering may very well produce another undesirable consequence: partisanship. This is not, to be sure, how we conventionally understand the relationship between partisanship and gerrymandering. The conventional contemporary view is that partisanship causes gerrymandering by furnishing incentives to the politicians who perform reapportionment to draw district lines for political advantage. This is of course undeniable, and many state courts have readily acknowledged that partisan considerations routinely factor into apportionment decisions.³⁰⁵ However, on the set of assumptions

304. On the relationship between the structure of election districts and the characteristics of their politics, see REHFELD, *supra* note 207, at 7.

305. See, e.g., *Burris v. Ryan*, 588 N.E.2d 1023, 1028 (Ill. 1991) ("Politics and political considerations are inseparable from districting and apportionment.") (citations and internal quotation marks omitted); *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997) ("Apportionment is primarily a political and legislative process."); *In re* 2003 Legislative Apportionment of House of Representatives, 827 A.2d 810, 815 (Me. 2003) ("Apportionment legislation does not become invalid because it takes into account political considerations or is politically motivated."); *In re* Legislative Districting of State, 805 A.2d 292, 326 (Md. 2002) ("[B]ecause the process is partly a political one, . . . political

that typically characterize state constitutional apportionment regimes, the reverse also seems to be true: gerrymandering is not merely a symptom of partisanship, but a cause of it. How can this be?

Gerrymandering, on this view, causes partisanship precisely because it disregards the “natural” territorial cleavages—local economic ones—that divide the state populace. The disregard of natural cleavages necessarily impedes the emergence of a politics organized along natural lines, and the only kind of politics capable of emerging in such an environment must by definition be one organized around cleavages that are false and artificially constructed. What might these cleavages be? The most likely cleavage is one of party, or its close cousin, ideological partisanship. This conclusion follows from two different accounts, one historical and the other functional.

The state constitutional approaches to apportionment that we have been examining are rooted firmly in eighteenth-century American political thought.³⁰⁶ In this body of thought, parties and partisanship were viewed with deep suspicion and hostility.³⁰⁷ Political parties, according to the prevailing

considerations and judgments may be, and often are, brought to bear.”); *Davenport v. Apportionment Comm’n*, 319 A.2d 718, 722 (N.J. 1974) (“Political considerations are inherent in districting.”); *People ex rel. Carter v. Rice*, 31 N.E. 921, 928 (N.Y. 1892) (redistricting is “[i]n its nature . . . political”); *Jamerson v. Wornack*, 423 S.E.2d 180, 182 (Va. 1992) (“reapportionment ‘is, in a sense, political’” (quoting *Brown v. Saunders*, 166 S.E. 105, 107 (Va. 1932))); cf. *Kawamoto v. Okata*, 868 P.2d 1183, 1189 (Haw. 1994) (redistricting to protect incumbents is not per se improper).

306. Part III, *supra*, demonstrated a fundamentally continuous state constitutional approach to gerrymandering originating with provisions devised in the late eighteenth century. For works specifically discussing the influence of eighteenth-century political thought on state constitutions, see ADAMS, *supra* note 26 (explaining the influence of eighteenth-century republican ideology on the earliest state constitutions); KRUMAN, *supra* note 27 (discussing applications of republican political theory to state constitutional handling of questions of constitutional theory, popular sovereignty, representation, suffrage, and other matters); TARR, *supra* note 13, at 90 (observing that the U.S. Constitution had limited influence on early state constitutions, which had been drafted under the influence of antifederalist principles); WOOD, *supra* note 297, at 134 (describing the first wave of American state constitution making as proceeding under an idea of politics “conceived in conventional Whig terms”); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999) (arguing that aspects of antifederalist political theory have survived in many state constitutions).

307. See HOFSTADTER, *supra* note 288, at 9 (arguing that the “root idea” of Anglo-American political thought concerning parties was that “parties are evil”); see also, e.g., George Washington, *Farewell Address*, in DOCUMENTS OF AMERICAN HISTORY 169, 172 (Henry Steele Commager ed., 8th ed. 1968) (warning against “the baneful effects of the spirit of party”). This view was revived in the early twentieth century by the Progressives, who believed that partisanship was an artificial distraction from the ideologically neutral, scientific administration of public affairs, and who implemented their vision with a highly successful

dogma of eighteenth-century republicanism, were little more than the vehicles by which organized factions sought control of the organs of government for the purpose of pursuing their own self-interest at the expense of the common good.³⁰⁸ The factional pursuit of self-interest in turn had its source in a strikingly postlapsarian view of human nature. On this view, perhaps best expressed by Madison, human beings are inclined to “self-love” and “passion,” “fallible” in their reason, and prone to misusing reason in the service of passion rather than the other way around.³⁰⁹ These weaknesses

have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.³¹⁰

This account provides two relevant pieces of information. First, partisanship, along with the ideologies that parties invoke in defense of their programs, are by definition false because they represent nothing more than intellectual rationalizations of what are fundamentally manifestations of human weakness—capitulations to the pursuit of irrational and self-interested passion. Second, the world, on this view, is an exceedingly dangerous place. The human capacity for self-interested venality is like a loaded gun lying around, available for misuse upon the slightest provocation. Any occasion might conceivably provide all the excuse necessary to trigger a full-blown political conflict in which the participants form themselves into parties and wage a contest in which the common good of society is ignored and overwhelmed.

campaign to introduce nonpartisanship into democratic processes at the local level, and to a lesser extent at the state level. For a discussion of Progressive tenets and reforms, see James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 118-19 (2000), and sources cited therein.

308. On Madison's theory of factions, see THE FEDERALIST NO. 10 (James Madison), *supra* note 103, at 78.

309. *Id.* Madison is sometimes said to have derived this idea from Hume, see DAVID HUME, A TREATISE OF HUMAN NATURE, bk. II, § 5 (1739), *reprinted in* HUME'S MORAL AND POLITICAL PHILOSOPHY 23-27 (Henry D. Aiken ed., 1948), although it was undoubtedly commonplace in the eighteenth century.

310. THE FEDERALIST NO. 10 (James Madison), *supra* note 103, at 79.

Gerrymandering—the drawing of false and unnatural political boundaries—provides just the kind of “frivolous and fanciful distinction[]” of which Madison warned, the kind capable of “kindl[ing] unfriendly passions and excit[ing] violent conflicts.” Instead of conforming to natural divisions, gerrymandered districts group people in artificial combinations, causing them to chafe and grate against one another, and suggesting artificial cleavages that human weakness and passion will find difficult to resist as principles for organizing political contestation. Reason will supply an ideological justification for the cleavage, and parties will arise to reify the ideological justifications.³¹¹ As candidates appeal for votes in ideological or partisan terms, voters align themselves along these divisions, further reifying and strengthening any latent divisions among them. Thus, in a district comprising heterogeneous interests, normal processes of democratic responsiveness are likely to result in an electorate divided along ideological and partisan lines.

VI. CONCLUSIONS

Recent experience with redistricting has made it painfully obvious that state constitutional anti-gerrymandering provisions have been largely ineffective at constraining attempts to gerrymander for partisan gain.³¹² In an age of powerful computers and detailed, widely available data about voting patterns, well-worn state constitutional requirements of district contiguity, compactness, and respect for local government boundaries and communities of interest are easily evaded by redistricters intent on partisan gerrymandering.³¹³

311. See POLE, *supra* note 82, at 247 (“One of the habitual sentiments offended by this famous gerrymander law was that of community. Voters did not think of themselves as mere numbers; the petitions complained that old connections had been sundered by the new divisions. Genuine ‘interests’ had been divided. The only interest served was that of the party.”).

312. See *supra* note 4.

313. For example, as one commentator has observed, “cleverly executed, compactness could either divide or pack any community of interest—geographic, partisan, or racial.” Richard Morrill, *A Geographer’s Perspective*, in *POLITICAL GERRYMANDERING AND THE COURTS*, *supra* note 178, at 212, 214-15. Another observes: “mathematical contiguity does not reflect a constraint on electoral manipulation, as any given noncontiguous district . . . can be made contiguous by adding arbitrarily thin connecting lines, without materially changing the results of an election held in that district.” Altman, *supra* note 104, at 164; see also Micah Altman, *The Computational Complexity of Automated Redistricting: Is Automation the Answer?*, 23 RUTGERS COMPUTER & TECH. L.J. 81 (1997) (explaining why automated computer algorithms are incapable of providing value-neutral redistricting).

The preceding analysis of state constitutional conceptions of representative politics suggests at least one reason why this is the case. The problem is not merely the persistence and intensity of partisan motivations, nor the use of sophisticated, computerized districting tools. The problem is that state constitutional anti-gerrymandering provisions—the so-called “traditional districting principles”—have no real utility in preventing *partisan* gerrymandering because they are aimed at a completely different problem: preserving the integrity of local economies in a political system based on the representation of homogeneous local communities of economic interest. The traditional districting principles typically enshrined in state constitutions offer no help in crafting redistricting plans in which political parties and their adherents are represented *fairly* because the traditional districting principles do not contemplate that parties or their adherents will be represented *at all*. Indeed, the representation of parties and partisan interests under these provisions is ruled out entirely as a failure of proper principles of representation, and they consequently offer no guidance whatsoever about what might even count as a “fair” distribution of partisan electoral influence. To invoke such provisions in the hope that they will yield “politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights”³¹⁴ is therefore to use the wrong tool for the job.

This analysis, however, still leaves unanswered an important question. Do state constitutions have *other* resources (besides the usual panoply of anti-gerrymandering restrictions) that might provide a sound basis for controlling partisan gerrymandering? There are reasons to think so.

The present federal constitutional theory of fair political representation derives less from any analysis of the provisions of the United States Constitution that structure the political process than from the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment’s prohibition on racial discrimination in voting.³¹⁵ These

314. *Vieth v. Jubelirer*, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring in judgment).

315. *Reynolds v. Sims*, 377 U.S. 533 (1964), which established the one-person, one-vote doctrine for state legislative districts, and *White v. Regester*, 412 U.S. 755 (1973), which validated a theory of racially discriminatory submersion of the minority vote, both rested on Fourteenth Amendment principles of equal protection. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), sustained the Voting Rights Act’s powerful prohibitions on racial discrimination in voting on Fifteenth Amendment grounds. *City of Mobile v. Bolden*, 446 U.S. 55 (1980), found intentional discrimination to be constitutionally required to make out voting rights claims under the Fourteenth and Fifteenth Amendments. About the only exception to this trend is *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 17 (1964), in which the Court relied on

provisions, the U.S. Supreme Court has repeatedly held, introduced into the Constitution a principle of representation vastly different from the one previously recognized in state constitutions: the representation of persons.³¹⁶ The application of this principle of representation to state constitutional systems structured along very different principles of representation played havoc with those systems and contributed significantly to the emergence of the present problems of partisan gerrymandering.

However, state constitutions have not remained static during this time. Indeed, among the defining characteristics of state constitutions are their ease of amendment, the frequency with which they are in fact amended, and their consequent amenability to doctrinal and conceptual evolution,³¹⁷ processes capable of creating layers of constitutional meaning that Alan Tarr has likened to geological strata.³¹⁸ In the course of this evolutive process, many state constitutions have acquired provisions that might well prove more fruitful resources for constraining partisan gerrymandering than the set of traditional provisions I have examined here. Many state constitutions, for example, contain equal protection clauses of their own, or other, similar provisions that might be understood to constitutionalize principles of equality, fair representation, or fair politics.³¹⁹ An evolving new generation

Article I, Section 2 to invalidate malapportionment in congressional districting. For a critique of the Court's frequent reliance in electoral cases on the Constitution's individual rights provisions rather than its structural provisions, see generally Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

316. As indicated earlier, the Court's equal protection jurisprudence holds that the theory of representation embodied in the Fourteenth Amendment is representation of persons. *Reynolds*, 377 U.S. at 562. Indeed, the Court has explicitly rejected the proposition that representation of groups plays any role in the constitutional structure of politics. See *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

317. See TARR, *supra* note 13, at 23-26.

318. *Id.* at 193.

319. For example, many state constitutions have provisions requiring elections to be "free," e.g., N.C. CONST. art. I, § 10; UTAH CONST. art. I, § 17, or "free and equal," e.g., ARIZ. CONST. art. II, § 21; IND. CONST. art. 2, § 1. These are potentially promising sources of political rights that could implicate fair party competition. Not all state courts, however, have been amenable to looking beyond the traditional districting principles as constraints on gerrymandering. The New York Court of Appeals, for example, has held that "the [state] constitutional requirements of compactness, contiguity and convenience . . . were adopted for the salutary purpose of averting the political gerrymander and at present are the *only* means available to the courts for containing that pernicious practice." *Schneider v. Rockefeller*, 293 N.E.2d 67, 72 (N.Y. 1972) (emphasis added). The Vermont Supreme Court has reached a similar conclusion. *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323, 343-44 (Vt. 1993) (rejecting a challenge to gerrymandering under the state

of state constitutional provisions aimed explicitly at partisan districting may also hold some promise.³²⁰ Finally, an extensive historical legacy on the state level of egalitarian and process-oriented political reform movements such as Progressivism and populist democracy³²¹ might also contain resources that could be mined in an effort to locate constitutional principles capable of restraining partisan excesses in the redistricting process. That, however, is a project for another day.

constitution's "common benefit" clause, its equivalent of the federal Equal Protection Clause, and holding that "[t]he constitutional provisions governing reapportionment are self-contained; there is no indication that additional limits on legislative prerogatives were intended to be applied from other parts of the constitution"); see also *Stephenson v. Bartlett*, 562 S.E.2d 377, 390 (N.C. 2002) (ruling that the legislature may take account of "partisan advantage and incumbency protection" in redistricting, but that "it must do so in conformity with the State Constitution," thereby suggesting in context that the state constitution does not contain any constraints on gerrymandering other than provisions implementing traditional districting principles). Some other state courts may have foreclosed other state constitutional avenues for controlling gerrymandering by reading the state constitution to have the same meaning as the U.S. Constitution and to contain precisely the same standards for adjudicating gerrymandering claims, and only those standards. See, e.g., *In re Reapportionment Plan for Pa. Gen. Assembly*, 442 A.2d 661, 665 (Pa. 1981) ("the federal constitutional requirement of equal protection . . . is incorporated as a matter of state constitutional law in" provisions of the state constitution requiring compactness, contiguity, and population equality in redistricting, thereby committing the court to follow federal gerrymandering jurisprudence); *Erfer v. Commonwealth*, 794 A.2d 325, 331-32 (Pa. 2002) (expressly adopting *Bandemer* standard for adjudicating partisan gerrymandering); *In re Senate Bill No. 220*, 593 P.2d 1, 5-6 (Kan. 1979) (holding, in a case of first impression under the state constitution's reapportionment provisions, that the relevant principles are found in federal reapportionment jurisprudence under the Fourteenth Amendment); see also *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 820 P.2d 497, 503 (Wash. 1991) (en banc) (applying *Bandemer* standard to what may be a state constitutional claim of political gerrymandering). Doubt as to the existence of any independent state constitutional jurisprudence of gerrymandering beyond that required by provisions implementing traditional districting principles is also raised in *Legislative Redistricting Cases*, 629 A.2d 646, 664 (Md. 1993) (suggesting that general claims of unfairness about redistricting plans otherwise in compliance with constitutional standards will be received skeptically).

320. See *supra* note 319.

321. As Laura J. Scalia has observed, in distinguishing state constitutionalism from its federal counterpart: "At the state level, the living determined which principles and procedures reflected society's reasoned understanding of the good state. As a result, constitutional content evolved in accordance with the manners, opinions, and circumstances of the postfounding generation." LAURA J. SCALIA, *AMERICA'S JEFFERSONIAN EXPERIMENT: REMAKING STATE CONSTITUTIONS, 1820-1850*, at 5 (1999). Among the many postfounding movements to leave their mark on state constitutions, few had more influence than Progressivism, and its close cousin, Populism. See, e.g., TARR, *supra* note 13, at 94 (noting that Populism is one of several nineteenth-century movements that "produced fundamental shifts in state constitutions"), 150-53 (reviewing the impact of Progressivism on state constitutional reform).