WHAT IS "FAIR" PARTISAN REPRESENTATION, AND HOW CAN IT BE CONSTITUTIONALIZED? THE CASE FOR A RETURN TO FIXED ELECTION DISTRICTS

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I. INTRODUCTION

When the U.S. Supreme Court ruled in 1964 that states are constitutionally required to redraw congressional and legislative districts every ten years to equalize district populations,[1] the Court's decision, which at a stroke banished malapportionment from the electoral system, was widely hailed as a long-overdue "revolution" in American politics.[2] Four census cycles later, the process of redrawing election districts has fallen into considerable disrepute. Complaints are heard from all quarters that redistricting has become an exercise in unfair partisanship in which district lines are deliberately manipulated by legislatures to protect incumbents and to maintain or extend advantages enjoyed by the dominant party.[3] The redistricting process, once viewed as a

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

2. The term "revolution" in this context is usually credited to GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT (1966).

3. For just the briefest flavor of what has been a tidal wave of complaints and commentary, see, for example, Rachel Morris, *The Race to Gerrymander*, WASH. MONTHLY, Nov. 2006, at 15; Opinion, *Gerrymander Blues: Practice Helps Define Political Deviancy Down*, SAN DIEGO UNION-TRIB., Nov. 2, 2006, at B-10:C; Tony Perry, *Of 53 Races, Only 3 Offer Ray of Hope to Non-Incumbent Party's Candidates*, L.A. TIMES, Oct. 15, 2006, at S4. Among more substantial reports urging reform, see 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., CLAREMONT MCKENNA COLL., RESTORING THE COMPETITIVE EDGE: CALIFORNIA'S NEED FOR REDISTRICTING REFORM AND THE LIKELY IMPACT OF PROPOSITION 77 (2005), *available at* http://ccdl.libraries.claremont.edu/col/ric (search "Competitive Edge"); ARI

salutary antidote to the rise of American "rotten boroughs,"[4] is now frequently scorned as little more than an open invitation to gerrymandering. Redistricting has been widely blamed for a precipitous decline in the number of competitive election districts around the nation,[5] a phenomenon said in turn to undermine the responsiveness of government to the popular will,[6] thereby alienating large numbers of voters who feel that their votes count for essentially nothing.[7]

WEISBARD & JEANNIE WILKINSON, CTR. FOR GOVERNMENTAL STUDIES, DRAWING LINES: A PUBLIC INTEREST GUIDE TO REAL REDISTRICTING REFORM (2005), *available at* http://www.cgs.org/publications/docs/DRAWING_LINES_FINAL_6.20.05.pdf.

4. *Wesberry*, 376 U.S. at 15–16; J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 494–99 (1966).

5. 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 Bruce E. Cain, Karin Mac Donald & 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); GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION (2002); 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). Some scholars, however, 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 (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).

To put the problem of uncompetitive elections in perspective, here is the Wisconsin data from 2004. In the 2004 statewide elections, the presidential race in Wisconsin was highly competitive, with the Democratic candidate receiving 49.7% of the vote and the Republican receiving 49.3%. The Senate race was less competitive, with the race decided by a margin of 55.4% to 44.1%. However, of the eight contests for seats in the U.S. House of Representatives, in only two races did the winner poll less that 65%; none of these races was close as political scientists typically use the term, meaning that the winner received 55% or less of the vote. In the sixteen state senate races in 2004, six were uncontested, five were won by a landslide (i.e., 60% or more), and only four were decided by votes of less than 55%. All ninety-nine state house seats were up for election. Forty-three were uncontested, twenty-three were decided by a landslide, and only sixteen were close. Wis. State Elections Board: Elections & Results, http://165.189.88.185/docview.asp?docid=1429&locid= (last visited Feb. 4, 2007). Overall, then, the great majority of 2004 legislative elections in Wisconsin were not competitive. *See id.*

6. *Compare* John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. POL. 911 (2006) (finding that legislators are more responsive to constituents' interests in competitive districts), *with* Girish J. Gulati, *Revisiting*

Critics have called with increasing urgency for reform. Among the suggestions are various substantive constitutional standards of fair political competition;[8] sophisticated measures of district compactness;[9] and procedural reforms such as the use of independent districting commissions.[10] The U.S. Supreme Court has meanwhile affirmed on three occasions that partisan gerrymandering can under certain circumstances violate the Constitution, yet it has been unable to settle on a constitutional standard for identifying when the normal political give and take of redistricting crosses the line into unconstitutionally unfair manipulation of representation.[11] As Justice Kennedy observed in his concurring opinion in *Vieth v. Jubelirer*, "there are yet no agreed upon substantive principles of fairness in districting," and 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."[12]

In this Article, I wish to take up Justice Kennedy's challenge: when, exactly, and under what circumstances, is the representation of political

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the Link between Electoral Competition and Policy Extremism in the U.S. Congress, 32 AM. POL. RES. 495 (2004) (finding no such effect).

7. *E.g.*, Editorial, *Texas Massacre*, BOSTON GLOBE, June 29, 2006, at A14 (the "certain result" of uncontrolled gerrymandering "will be still fewer contested elections, and more alienated voters"); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 112 (2000) (gerrymandering "contributes to the popular perception that elections do not matter").

8. For example, the plaintiffs in *LULAC* argued that a districting plan could be invalidated as a partisan gerrymander "when solely motivated by partisan objectives." League of United Latin Am. Citizens (LULAC) v. Perry, 126 S. Ct. 2594, 2609 (2006). Grofman and King have argued for a standard of symmetrical partisan bias for evaluating the constitutionality of districting plans. *See* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 ELECTION L.J. 2 (2007); *see also* Hirsch, *supra* note 5, at 212–13 (arguing for a standard of partisan fairness, responsiveness, and accountability); Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 443 (2005) (distinguishing between offensive and defensive gerrymandering).

9. *E.g.*, Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155 (1990); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 339–51 (1991).

10. *E.g.*, CAMPAIGN LEGAL CTR. & COUNCIL FOR EXCELLENCE IN GOV'T, *supra* note 3; Issacharoff, *supra* note 5; JOHNSON ET AL., *supra* note 3; WEISBARD & WILKINSON, *supra* note 3.

11. The Court has taken up the issue in *Davis v. Bandemer*, 478 U.S. 109 (1986), *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *LULAC*, 126 S. Ct. 2594. In none of these decisions did any approach to the adjudication of partisan gerrymandering claims command more than a plurality.

12. *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring).

parties and their supporters "fair"? Suggesting reforms to the representational process is all very well, but what are these reforms designed to accomplish? How *should* a well-functioning, fair system of partisan representation operate? What exactly does fairness mean in the context of legislative representation?

In fact, we do not lack for simple, well-established, appealing conceptions of fairness in legislative representation. The problem is that most of them are associated with non-territorial systems of proportional representation, systems that have never found much favor in the United States[13] and that American courts have consistently held are not constitutionally required.[14] The real question, then, is not how to define fair partisan representation in general, but how to do so within a system of representation committed to territorial districts. That is the question I propose to address here.

The balance of the Article proceeds as follows. Part II lays out several prominent conceptions of fair partisan representation and explains how they are subverted by the use of territorial districts. The reason for this subversion, I argue, is that party and territory are conflicting and for the most part incommensurable principles upon which to found a system of legislative representation. Part III takes the nearly universal American commitment to territorial forms of representation as given, and asks on what grounds, if any, it might be justified. I conclude that a commitment to territoriality can be justified by a normative commitment to localness and local issues as the proper subject of state politics. Part IV then inquires how a representational system might be structured both to honor the commitment to territoriality on its own terms and simultaneously to satisfy other requirements of fairness in legislative representation. I argue that the

13. For a discussion of the experiences of some of the few American jurisdictions ever to adopt proportional representation, see KATHLEEN L. BARBER, PROPORTIONAL REPRESENTATION AND ELECTION REFORM IN OHIO (1995).

14. *See, e.g.*, *LULAC*, 126 S. Ct. at 2610 (Kennedy, J.) ("[T]here is no constitutional requirement of proportional representation."); *Bandemer*, 478 U.S. at 130 (plurality opinion) ("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."); White v. Regester, 412 U.S. 755, 765–66 (1973) ("[I]t is not enough [to make out a successful claim] that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."). Similarly, Congress in Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b) (2000), specifically disclaimed creating any statutory right to proportional representation: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

best solution may be to revive what was in the nineteenth century the dominant form of legislative representation: instead of permanently fixing the number of legislators and varying the boundaries of their districts, as we now do, we may be better off to fix permanently the boundaries of the legislative districts and vary the number of legislators each district elects. Using local government units such as counties and towns as election districts, I argue, best honors the normative justifications for territorial districting while still permitting considerations of fairness in both population equality and partisan representation to be satisfied. The Article concludes with a brief discussion of the applicability of this solution to the possibly unusual situation of Wisconsin.

II. THE INCOMMENSURABILITY OF PARTISAN AND TERRITORIAL FORMS OF REPRESENTATION

A. Conceptions of Fair Partisan Representation

The idea that territorial forms of legislative representation must comport with certain standards of fairness was ushered onto the national stage by a series of U.S. Supreme Court rulings in the early 1960s.[15] In the most consequential of these cases, *Wesberry v. Sanders* and *Reynolds v. Sims*, the Court applied a constitutional principle of one-person, one-vote to invalidate disparities in the populations of congressional and state legislative districts.[16] Such disparities were unfair, the Court held, because "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people."[17]

The idea that legislative districts should contain equal numbers of people is, however, much older; many state constitutions required population equality in representation long before the Supreme Court discovered that principle in the U.S. Constitution. The first express constitutional requirement of interdistrict population equality appeared

15. Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964). *Avery v. Midland County*, 390 U.S. 474 (1968), later extended the one-person, one-vote doctrine to local governments as well.

16. *See Wesberry*, 376 U.S. 1; *Reynolds*, 377 U.S. 533. The Court subsequently held that congressional districts must contain precisely equal numbers of voters, Kirkpatrick v. Preisler, 394 U.S. 526 (1969), but that state legislative districts may deviate slightly from strict equality, Brown v. Thomson, 462 U.S. 835 (1983); Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973).

17. *Reynolds*, 377 U.S. at 560–61.

in an 1857 amendment to the Massachusetts Constitution,[18] and numerous states soon followed suit.[19] Indeed, the very first judicial decision, state or federal, to invalidate a districting plan on constitutional grounds was an 1892 decision of the Wisconsin Supreme Court striking down a state legislative districting plan for, among other things, creating severe population disparities among districts in violation of the Wisconsin Constitution.[20] Even long before any state required legislative election districts to contain equal numbers of voters, many states constitutionally provided that the voters of each election district, whatever its population, were entitled to elect a number of representatives proportional to the district's population.[21]

In state constitutions, however, population equality was usually only one of many requirements governing legislative apportionment, and it frequently applied alongside other requirements with which it was in tension, most prominently requirements that representatives be allocated among districts of fixed territory, typically counties or towns.[22] In its reapportionment decisions, the U.S. Supreme Court resolved this tension for federal constitutional purposes by holding squarely that population equality trumps all other considerations, including adherence to fixed territorial boundaries such as county lines;[23] as the Court put it,

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18. The provision required multi-legislator counties to be subdivided into districts "equally, as nearly as may be, according to the relative number of legal voters in the several districts." MASS. CONST. amends. XXI, XXII (1857). Even this requirement is predated by the Northwest Ordinance, enacted by Congress in 1787, which provided for the creation of territorial legislatures with members to be elected from towns and counties in proportion to their population. Northwest Ordinance, July 13, 1787, § 9, *in* 1 THE FOUNDERS' CONSTITUTION 27–28 (Philip B. Kurland & Ralph Lerner eds., 1987).

19. *See* W. VA. CONST. art. IV, §§ 4–5 (1862); LA. CONST. tit. III, arts. 10–11 (1864); MD. CONST. art. III, §§ 2, 4 (1864); MO. CONST. art. IV, § 2 (1865); ALA. CONST. art. VIII, §§ 1, 3 (1867); N.C. CONST. art. II, § 5 (1868); ILL. CONST. art. IV, § 6 (1870); PA. CONST. art. II, § 16 (1873); CAL. CONST. art. IV, § 6 (1879); N.D. CONST. art. 2, § 29 (1889); N.Y. CONST. art. III, § 4 (1894).

20. State *ex rel.* Att'y Gen. v. Cunningham, 81 Wis. 440, 51 N.W. 724 (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. State *ex rel.* Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1892).

21. In the eighteenth century alone, see MASS. CONST. pt. 2d, ch. I, § III, art. II (1780); N.H. CONST. pt. II, House of Representatives (1784); VT. CONST. ch. II, § VII (1786); PA. CONST. art. I, § 4 (1790); N.H. CONST. pt. II, § IX (1792); KY. CONST. art. I, § 6 (1792); VT. CONST. ch. II, § 7 (1793); TENN. CONST. art. I, §§ 2, 3 (1796); KY. CONST. art. II, § 6 (1799).

22. For an overview, see James A. Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881 (2006).

23. States are, however, permitted a small amount of wiggle room when they attempt to adhere to local government boundaries. Brown v. Thomson, 462 U.S. 835, 842 (1983) (establishing what amounts to a presumption of constitutionality for district population

"[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities . . . ."[24] State districting authorities subsequently interpreted this judicial mandate to require that any state commitment to territorial election districts thereafter be implemented through the use of geographically variable districts, detached when necessary from fixed local government boundaries, and redrawn every decade—or perhaps even more frequently[25]—to equalize inter-district populations.

It has since become painfully clear, of course, that population equality does not by any means exhaust public conceptions of fairness in representation. Indeed, the federal constitutional requirement of decennial redistricting seems, if anything, to have created regular opportunities for just the kind of gerrymandering of which so many now complain. This gerrymandering is perceived as unfair not because it distributes voting influence unequally among individuals—a problem that the one-person, one-vote doctrine successfully eradicated—but because it is said to provide the occasion for parties and officials in power to deliver unfair treatment to minority parties, their candidates, and the voters who comprise their rank-and-file membership.[26] Concerns about unfairness have thus shifted from the unfair treatment of individuals to the unfair treatment of partisans.

Blame for the appearance of this kind of unfairness in representation cannot, however, be laid at the feet of the one-person, one-vote doctrine, for nothing in that doctrine requires an electorate to be carved up into districts; to the contrary, the one-person, one-vote doctrine is satisfied by definition when elections are held at large.[27] The source of the difficulty in creating a system of fair partisan representation lies,

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deviations up to ten percent when created to permit adherence to local government boundaries and for certain other reasons); Mahan v. Howell, 410 U.S. 315, 329 (1973).

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

25. In *LULAC v. Perry*, 126 S. Ct. 2594, 2609 (2006), the Court affirmed a mid-decade Texas redistricting that was the second redistricting plan responding to the 2000 census. Although the Court did not directly address the merits of "re-redistricting," it suggested strongly that nothing in the U.S. Constitution would bar the practice of multiple redistrictings within a single census cycle. *Id.* at 2610.

26. Thus, the essence of a partisan gerrymandering claim has long been the denial of equal protection to candidates, parties, and voters. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 127 (1986) (plurality opinion of White, J.) ("[T]he claim made by the appellees in this case is a claim that the 1981 apportionment discriminates against Democrats on a statewide basis."); Vieth v. Jubelirer, 541 U.S. 267, 272 (2004) (plurality opinion of Scalia, J.) ("The complaint alleged . . . that the legislation . . . constituted a political gerrymander, in violation of . . . the Equal Protection Clause of the Fourteenth Amendment.").

27. Wesberry v. Sanders, 376 U.S. 1, 8 (1964).

then, in our commitment on both the federal and state levels to the use of single-member, territorial election districts.[28] Indeed, relaxation of this commitment would immediately make possible several appealing versions of partisan fairness in legislative representation through the use of mechanisms of proportional representation ("PR").[29]

Perhaps the most common, and common-sense, metric of partisan fairness asks whether the electoral system produces a legislature in which political parties achieve representation in proportion to their support in the electorate. On this view, a party that is supported by fifty-five percent of the voters should earn roughly fifty-five percent of the legislative seats—not sixty-five or forty-five percent, results that can sometimes be produced by clever gerrymandering.[30] PR electoral systems tend to produce the required proportionality much more reliably than the prevailing American system, but they do so through the use of multimember election districts.[31] Such districts can be as large as an entire nation, as in the case of Israel,[32] but are usually considerably smaller, typically electing between three and ten representatives per district.[33]

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28. Congress has, almost continuously since 1842, by statute required representatives to be elected from single-member, territorial districts. *See* LAURENCE F. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 132–35 (reprint ed. 1976) (1941). About half of the state constitutions similarly require that members of the state legislature be elected from single-member, territorial districts. *See, e.g.*, CAL. CONST. art. IV, § 6; FLA. CONST. art. III, § 1; N.M. CONST. art. IV, § 3.

29. Good overall accounts of PR can be found in DOUGLAS J. AMY, REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES (1993); MICHAEL DUMMETT, PRINCIPLES OF ELECTORAL REFORM (1997); and ROBERT A. NEWLAND, COMPARATIVE ELECTORAL SYSTEMS (1982).

30. For example, in the 1992 Texas congressional election, held under a plan enacted following the 1990 census by a Democratic-controlled state legislature, Democrats and Republicans split the statewide congressional vote almost evenly, yet Democrats won ten of the fourteen seats (71%). AMY, *supra* note 29, at 44. Of course, not every attempted gerrymander is successful. Grofman and Brunell recently coined the term "dummymander" to describe what happens when the party in control of redistricting overreaches. *See* Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistricting on the Partisan Makeup of Southern House Seats*, *in* REDISTRICTING IN THE NEW MILLENNIUM 183 (Peter F. Galderisi ed. 2005).

31. AMY, *supra* note 29, at 14.

32. *See* AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 218 (1984).

33. *See, e.g.*, ROBERT A. NEWLAND, COMPARATIVE ELECTORAL SYSTEMS 86 (1982) (listing district sizes in nations that use the single transferable vote form of PR). Evidence suggests that the marginal increase in the proportionality of representation declines rapidly as the number of representatives to be elected from each district increases. DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS ch. 7 (1967).

Another somewhat more sophisticated conception of fair legislative representation favored by political scientists requires a correspondence between the policy preferences of the median legislator and those of the median voter.[34] This conception, rooted in economic theories of democracy, holds that the purpose of a well-functioning electoral system is to produce a legislature committed to implementing the wishes of the people. The wishes of the people, in this model, are generally represented by the preferences of the median voter, a hypothetical person whose political opinions lie at the precise center of public opinion.[35] Governments, in turn, are more likely to respond to and implement the wishes of the median voter when the distribution of political opinion in the legislature matches its distribution in the electorate, and specifically when the positions of the median legislator—that legislator whose positions lie at the center of opinion among all legislators—correspond to those of the median voter.[36] This theory generates a robust and highly specific conception of what, precisely, is wrong with gerrymandering: it skews the distribution of opinion in the legislature in the direction of the party responsible for the gerrymander, thereby making the legislature less likely to respond to genuine public opinion, a practice that is not only unfair on this model to other parties and their supporters but also diminishes overall social welfare. Recent studies confirm what intuition suggests: PR is much more successful than the American system of single-member, territorial districts at producing a legislature with the optimal policy preference profile.[37]

In fact, PR is more successful at producing representation that is fair or otherwise proper, regardless of how these concepts are defined, under any aggregative theory of democracy. Contemporary theories of democracy may usefully be divided roughly into two camps: the aggregative and the deliberative. "[A]ggregative theorists," according to one prominent scholar, "regard [voter] preferences as given and concern themselves with how best to tot them up. . . . Deliberative theorists, by contrast, . . . tak[e] a transformative view of human

34. The classic statement of the median voter theory appears in ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). For a recent, clear, and very accessible account of the theory, see REBECCA B. MORTON, ANALYZING ELECTIONS 91–95 (2006).

35. MORTON, *supra* note 34, at 94.

36. Or is at least part of the governing coalition. *See* MICHAEL D. MCDONALD & IAN BUDGE, ELECTIONS, PARTIES, DEMOCRACY: CONFERRING THE MEDIAN MANDATE (2005).

37. *Id.*; G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS (2000).

beings . . . [and] concern themselves with the ways in which deliberation can be used to alter preferences so as to facilitate the search for a common good."[38] The reason why aggregative theories of democracy consistently favor PR over single-member districting is because such theories by definition treat the *entire* electorate—not merely a majority of the electorate—as the point of reference both for calculating the content of the popular will and for evaluating the responsiveness of government to that will. Aggregative theories, that is, aggregate the preferences of *all* citizens, not just citizens who support those in power or who, under the rules of the electoral system, happen to vote successfully for a winning candidate.[39] Applied to an American state, such theories rest on a conception of the voters of the state as individuals, not as members of any particular group or party, and thus arrive at their evaluations of democratic responsiveness by aggregating the preferences of all eligible voters statewide.

Territory, then, by definition, plays no role whatsoever in constituting a fair system of aggregative democratic representation, and according to such theories PR is therefore far superior to single-member districting at producing the desired aggregations because it treats all members of the electorate as equivalent, regardless of their partisan affiliation or place of residence. Subdividing an electorate into territorial groupings may be tolerated in such systems, but only as an administrative necessity,[40] and is perceived to have no meaningful implications of any kind for the status or treatment of voters, candidates, or parties.

Attractive and simple as these conceptions of partisan fairness may be, however, they have not been constitutionalized in the United States. No one, including American courts that have considered the question, seems to suggest that proportional systems of representation are *not* fair; courts simply maintain that this particular brand of fairness is not

38. IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 3 (2003). Michelman refers to aggregative theories as "responsive," and usefully analogizes public opinion in these theories to vector inputs: "The agency of each is diluted but preserved in a stream of political results that 'respond' like vector sums to each and every input vector." Frank I. Michelman, *Must Constitutional Democracy Be "Responsive"?*, 107 ETHICS 706, 708 (1997).

39. That is why William Riker famously dismissed such theories. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982).

40. That is, to prevent voters from having to select candidates for every seat in the legislature. The use of multimember districts then reduces the number of candidates to be elected to a manageable number. *See* BARBER, *supra* note 13.

constitutionally required.[41] Proportional representation could, of course, be constitutionalized at the *state* level; nothing in the federal constitution bars a state or locality from replacing its system of territorial districting with PR, and indeed some American localities adopted PR systems early in the twentieth century before eventually abandoning them.[42] But the prospects of such a reform today seem exceedingly dim.

B. The Unsuccessful Attempt to Apply Measures of Partisan Fairness to Territorial Districts

It is, then, our national commitment to territorial districting that complicates any attempt to achieve legislative representation comporting with the kinds of partisan fairness described above, those associated with aggregative theories of democracy. Territoriality does not by itself guarantee partisan unfairness in legislative representation, but it does create the conditions under which fairness can, on these definitions, be undermined.

The most common situation in which territoriality undermines the proportionality of partisan representation in the legislature is the familiar one in which partisans are distributed unevenly across the electorate—as they almost inevitably are. In our time, the most prominent example of this phenomenon is probably the tendency toward geographical clumping of Democrats in cities and Republicans in rural and suburban areas.[43] Territoriality can also undermine the influence of the median voter on the composition of the legislature, and thus legislative responsiveness and utility maximization, when a legislative majority can be consistently assembled that departs from the median, especially when the legislator whose positions correspond to

41. *See supra* note 14.

42. *See* BARBER, *supra* note 13. Few cases have adjudicated the constitutionality of PR; one reason for the paucity of cases is certainly that the use of PR in the United States has been so rare. In a small burst of cases decided during the 1920s and '30s, the highest courts of New York and Ohio upheld PR against challenges grounded in their state constitutions. *E.g.*, Johnson v. City of New York, 9 N.E.2d 30 (N.Y. 1937); Reutener v. City of Cleveland, 141 N.E. 27 (Ohio 1923). Courts in California and Michigan struck down PR as not then permitted under extant state constitutional provisions, People *ex rel.* Devine v. Elkus, 211 P. 34 (Cal. Dist. Ct. App. 1922); Wattles v. Upjohn, 179 N.W. 335 (Mich. 1920), but obviously nothing in these cases would bar an amendment to the state constitution to permit PR.

43. The actual distribution is of course somewhat more complicated than the basic rule of thumb would indicate. For a sophisticated analysis, see, for example, Stephen Ansolabehere & James M. Snyder, Jr., *Reapportionment and Party Realignment in the American States*, 153 U. PA. L. REV. 433 (2004).

those of the median voter is not a member of the majority party or coalition of parties.[44] Territorial districting makes this more likely because, again, voters of particular viewpoints are more likely to cluster unevenly than they are either to be distributed uniformly across the jurisdiction or to be completely segregated geographically by residence. This unevenness can be exploited by districting authorities to create a legislature that overrepresents certain points of view, thereby skewing legislative opinion as compared to popular opinion.[45]

What we need, then, is a definition of partisan fairness that takes into account both the commitment to partisan proportionality in legislative representation *and* the commitment to territorial election districts. Attempts to construct such a definition have, however, been generally unsatisfying.

Proportional representation rests its claim to partisan fairness on a concept of equality of outcome: what makes proportionality fair is the fact that a party's representation in the legislature is equal to its support in the electorate, as demonstrated through actual voting by its supporters; inputs, that is, are translated faithfully by PR systems into outputs. Equality of outcome is of course a robust and highly appealing conception of fairness,[46] but for the reasons already mentioned, it is a type of fairness the achievement of which is severely impeded by the use of territorial election districts. In territorial systems, inputs—electoral support in terms of votes cast—simply do not translate well into partisan legislative representation because voters' partisanship and their geographical location rarely match up sufficiently closely to mimic the operation of a non-territorial proportional system.[47]

As a result, evaluations of the fairness of territorial districting arrangements have tended to focus not on equality of outcome, but on

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44. MCDONALD & BUDGE, *supra* note 36, at 229–30.

45. A good discussion of this kind of policy distortion appears in Thomas W. Gilligan & John G. Matsusaka, *Public Choice Principles of Redistricting*, 129 PUB. CHOICE 381 (2006). However, it must be noted that this analysis presupposes, perhaps unrealistically, no minority influence or bargaining leverage at either the electoral or legislative phases.

46. See, for example, Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 855–57 (1985), who argues that equality of opportunity is most often a second-best concept compared to equality of results, and to which resort is justified only under conditions of scarcity. Rae makes a similar point in DOUGLAS RAE ET AL., EQUALITIES 85–86, 105–06 (1981) (arguing that identity of lots is sufficient but not necessary for "lot-regarding equality," and suggesting "absolute equality" is typically available only under restrictive circumstances).

47. *See, e.g.*, AMY, *supra* note 29, at 50–51 (describing how geographic concentrations of partisans can result in gerrymandering, even unintentionally).

equality of opportunity. On this view, the problem with gerrymandering (and by implication with territorial districting) is said to be its capacity to stack the deck, to deprive the party out of power not of legislative seats to which it is in some sense "entitled," but of a fair opportunity to compete successfully with the party in power for those seats.[48] In a gerrymandered district, in other words, which party will capture the seat is foreordained; even worse, because the party that will control individual seats is foreordained, the party that will control the legislature also may in many cases be determined before a single vote is cast. It is this aspect of predestiny, then, and the futility of resistance through any of the means typically available to parties—campaigning, fundraising, voter mobilization efforts, and so on—that makes gerrymandering unfair on this view. Consequently, most attempts to define partisan fairness in a system of territorial districts focus on the degree to which parties have a realistic chance to compete for individual legislative seats, and ultimately to compete on equal terms for control of the legislature and the power to make public policy that such control confers.

This seems like a promising definition of partisan fairness, but it is in fact fatally flawed, for two reasons. First, the definition is conceptually incoherent because it is almost never genuinely possible, except in a very abstract and thus largely irrelevant sense, for parties to be able to compete equally for votes in any given jurisdiction. Second, even where such competition might in principle be possible, it would in most cases be normatively undesirable.

In a territorial electoral system, political parties compete for control of the legislature by appealing to voters in the various districts. In economic theories of democracy, any party can in principle win any district, regardless of the political opinions of the district's voters, simply by tailoring its positions to appeal to such voters as the district actually happens to contain.[49] In the real world, however, parties seem to be unable to tailor their positions with the necessary sensitivity, or are at least unable to do so in the relatively short period between redistricting

48. *E.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) (both arguing that anticompetitive political structures, particularly incumbent self-entrenchment, are the main evils to be avoided in electoral regulation).

49. DOWNS, *supra* note 34, at 28–31, 97–98, 100–03.

cycles,[50] and consequently tend to compete in all districts, season after season, on similar grounds consisting mainly of their central, long-standing policy commitments.[51] As a result, it is never the case that *any* party, regardless of its ideological commitments, candidates, resources, and other characteristics, will have an "equal" chance to compete for votes in any given district. In the real world, the opportunity to compete successfully for legislative seats simply is not equally distributed. The Communists and the Nazis do not have an "equal" or "fair" chance of electoral success because no one will talk to them, much less vote for them. Their chances are equal only in the most abstract and formal sense that they are as free as anyone else to approach and attempt to persuade any voter, to solicit signatures for ballot access, and to raise campaign funds—all of which will be of no avail in any legislative district in the United States. The same is true of Republicans and Democrats: a Democratic candidate does not have an "equal" chance to compete successfully for votes in an overwhelmingly Republican district because what makes the district an identifiably Republican one is precisely the degree to which the district's voters predictably will support candidates who run as Republicans. Critics of gerrymandering consequently must, and do, reject the idea that equality of political opportunity is satisfied when each party has nothing more than the equally futile opportunity to compete for seats in districts stacked against it.[52]

It follows that if each party is to have a genuinely meaningful opportunity to compete for a particular seat, reliable partisans must be distributed roughly equally within the district. Since many voters are

50. That they can do it sometimes is shown by their ability to do it in jurisdictions that do not change boundaries. For example, the Republicans held the governorship of Massachusetts from 1991 to 2006 (Weld, Celucci, Swift, Romney) and New York from 1994 to 2006 (Pataki), both Democratic strongholds, and have held the mayoralty of New York City, an overwhelmingly Democratic jurisdiction, since 1994 (Giuliani, Bloomberg).

51. This is certainly a central assumption of the responsible party model. AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE (1954); *see also* MALCOLM E. JEWELL & DAVID M. OLSON, AMERICAN STATE POLITICAL PARTIES AND ELECTIONS (1978) (documenting the ways in which national political and party trends create convergence in the positions and commitments of state political parties).

52. *See, e.g.*, CAMPAIGN LEGAL CTR. & COUNCIL FOR EXCELLENCE IN GOV'T, *supra* note 3, at 12 (arguing against the desirability of a "sweetheart gerrymander . . . that is equally fair to each major party by giving each as many safe seats as possible"). Interestingly, proponents of the partisan bias standard for evaluating districting plans do not share this squeamishness; in their view, the only thing that counts is equal treatment of the parties, including equal futility. *See* Grofman & King, *supra* note 8.

independent or unaffiliated with a major party,[53] this will in most cases mean that a territorial election district offers each major party a meaningfully equal opportunity to compete for the seat only when the district contains roughly equal numbers of reliable Democrats and reliable Republicans and the balance of power in the district is held by voters who are independent, unaffiliated, or unreliable; in other words, swing voters—voters who might in the right circumstances support either party.[54] That this is the dominant conception of partisan fairness is reflected not only in the frequency with which charges of gerrymandering rest upon complaints about the unequal distribution of reliable partisans—"packing" and "cracking," for example[55]—but also in the recent stress on the "competitiveness" of districts as a criterion of partisan fairness.[56]

Yet this conception of equality of political opportunity suffers from several serious flaws. First and most obviously, it will rarely be possible to design a redistricting plan in which every district contains equal numbers of Democrats and Republicans simply because the voters of a state do not ordinarily sort themselves conveniently into equal numbers of supporters of each party.[57] Where partisans are not evenly balanced,

53. In 2000, forty percent of voters identified themselves as independent. HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS, 2001–2002, at 114 tbl.3-1 (2001).

54. Wattenberg, for example, describes such voters as being "*neutral* toward both parties," a phenomenon the growth of which he calls "dealignment." MARTIN P. WATTENBERG, THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980S, at 42, 31–46 (1991); *see also* PHILIP D. DALTON, SWING VOTERS: UNDERSTANDING LATE-DECIDERS IN LATE-MODERNITY 8 (2006) (describing swing voters as "politically nonhabitual, neither partisans nor nonvoters"). According to Campbell, "late deciding voters . . . are likely to divide [among the parties] fairly evenly." JAMES E. CAMPBELL, THE AMERICAN CAMPAIGN: U.S. PRESIDENTIAL CAMPAIGNS AND THE NATIONAL VOTE 47 (2000).

55. "Packing" refers to stuffing a district as full as possible of the other party's supporters and conceding the district, thereby taking opposing voters out of other districts in which their votes might be more effectively used. "Cracking" refers to dispersing the opposing party's supporters so that they are in the minority in a large number of districts rather than in the majority in a smaller number of districts. In both cases, votes by the opposition are "wasted," in the first case by concentrating them into an unnecessary supermajority, and in the latter by diluting them into ineffective minorities.

56. For example, in 2000 the Arizona Constitution was amended by initiative to require expressly that election districts be drawn so as to be competitive. ARIZ. CONST. art. 4, pt. 2, § 1(14)(F) ("To the extent practicable, competitive districts should be favored.").

57. In a 2005 Harris Poll, approximately one-third of voters surveyed nationally identified themselves as Republicans and another one-third identified themselves as Democrats. Harris Interactive, Harris Poll #19, Party Affiliation and Political Philosophy

districting authorities can make every district competitive only until the point at which they run out of reliable partisans of one stripe or the other, meaning that at least some, and possibly a considerable number of districts within the state must simply be awarded, without the opportunity for meaningful competition, to the party with the more numerous supporters.[58] Moreover, the underlying conception of equal opportunity to compete offers no resources to determine how many districts within a state may be rendered uncompetitive before the districting plan becomes "unfair" on the ground that it offers insufficient opportunities for meaningful partisan competition.[59]

Second, even if it were possible, due to a fortuitously precise balance of Democrats and Republicans within a state, to make every district competitive by filling it with equal numbers of major party supporters and topping it off with a layer of swing voters to hold the balance of power, each party still would not have a truly equal chance to compete for control of each district and of the legislature. In theory, perhaps, all parties have an equal chance to compete for the support of swing voters. In the real world, however, no party ever has precisely the same chance as every other party to compete for the support of swing voters because swing voters swing for many different reasons—the state of the domestic economy, foreign policy challenges, the price of gasoline, the personal characteristics of the candidates available to each party, and so on—and

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Show Little Change, According to National Harris Poll (Mar. 9, 2005), http://www.harrisinteractive.com/harris_poll/index.asp?PID=548 (last visited Mar. 23, 2007).

58. A requirement to draw competitive districts is evidently very difficult to satisfy. In Arizona, a 2000 state constitutional amendment affirmatively requiring districting plans to be competitive where possible, ARIZ. CONST. art. 4, pt. 2, § 1(14)(F), has had little effect in producing competitive districts. In the 2004 congressional elections, for example, the *closest* of Arizona's eight congressional races was decided by a margin of more than twenty percentage points. Two congressional districts so favored the Republicans that the Democrats did not even bother to field a candidate. Sixteen out of thirty state senate seats were uncontested by one party or the other, and no candidate in a contested race won by fewer than ten percentage points; most contested seats were decided in landslides. Arizona Secretary of State: 2004 General Election Results, http://www.azsos.gov/election/2004/General/2004_General_results_query.htm (last visited Jan. 19, 2007).

59. There is some evidence to suggest that public conceptions of sufficiently widespread competition require a fairly large proportion of genuinely competitive districts. For example, in a recent editorial criticizing the Electoral College for suppressing competition in presidential elections, the *New York Times* complained that "[i]n 1960, 24 states, with 327 electoral votes, were battleground states. . . . In 2004, only 13 states, with 159 electoral votes, were." Editorial, *Drop Out of the College*, N.Y. TIMES, Mar. 14, 2006, at A26. This suggests that elections will not be considered adequately competitive unless there are close races in substantially more than one-fourth of all jurisdictions, a result that can be difficult to obtain in jurisdictions that tilt strongly toward a particular party.

some of these considerations tend to favor candidates from one party or the other. As a result, the ability of parties to compete for actual swing voters in any actual district is contingent on many variables, including the specific mix of characteristics of the swing voters found in that district, which may differ from the mix of characteristics of swing voters in other districts.

Moreover, many of the factors that might influence the parties' relative abilities to compete for swing votes in a district are neither foreseeable nor susceptible to control by either the parties or the officials who draw district lines. If the U.S. is suddenly threatened militarily from abroad, for example, Democrats will probably not compete among swing voters as well as Republicans, and vice versa in the event of an unexpected domestic environmental disaster. Because we can never know in advance how political conditions will develop and thus what will be necessary to appeal successfully to a district's swing voters, it is impossible to construct a district in which each party has, ex ante, a truly equal chance to win the district.[60]

Such an arrangement might nevertheless be deemed "fair" in the sense that the issues capable of moving swing voters are both unpredictable and outside the control of the parties, and in consequence, the chance that any particular party will be the beneficiary of unforeseen developments during the period immediately preceding the election is essentially random. Yet it is by no means clear that an electoral system in which control of the legislature is driven almost entirely by the short-term responses of swing voters to randomly occurring events outside the control of political actors is a normatively desirable one. Surely it is better to construct a system of legislative representation that responds to the well-considered, long-term wishes of the great mass of the citizenry than one that responds mainly to short-term lurches in the opinions of a comparatively small slice of the electorate. Indeed, a system of representation in which control of legislative seats is systematically determined by swing voters is one that vests decisive power to determine the composition of the legislature almost entirely in the hands of a group of voters notorious for their ignorance of, inattentiveness to, and emotional and intellectual detachment from all things political.[61] Such a system is not well

60. As Campbell notes, "Unsystematic aspects or unique events of particular campaigns may be decisive in close elections." CAMPBELL, *supra* note 54, at 182.

61. MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 172–73 (1996); PAUL F. LAZARSFELD, BERNARD

calculated to produce either good governance or meaningful democratic accountability based on actual governmental performance, often said to be important conditions of democratic legitimacy.[62]

Finally, as many have pointed out, a districting plan in which every district is evenly balanced by party and thus genuinely competitive runs the risk of producing a normatively undesirable result: massive swings in the partisan composition of the legislature in response to small fluctuations in public opinion.[63] If every district is split evenly among Republicans and Democrats, then even a slight general shift in voter preferences toward one party can permit that party to win every seat, even if it is supported by only fractionally more than half the electorate. This is not, however, an objection based on a lack of equal opportunity to compete but one based on a lack of equality of outcome; it says that an electoral system can be *too* competitive for its own good, and that there are consequently limits to how far an electoral system should pursue a conception of equal opportunity to compete. Once again, though, the source of this conflict lies not in the underlying conceptions of fairness but in a commitment to territorial districting. Non-territorial systems of proportional representation provide parties with an "equal" opportunity to compete[64] *and* equality of outcome in converting votes to seats. It is the commitment to single-member territorial districts that pits these otherwise commensurable conceptions of equality against one another.

C. The Conflict Between Territoriality and Partisan Fairness

I have suggested thus far that recent attempts to apply measures of partisan fairness to single-member territorial districts are badly flawed. Yet this should not be surprising: the reason why it has proven difficult to come up with a workable definition of electoral fairness that accommodates both partisan competition and territorial districting is

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BERELSON & HAZEL GAUDET, THE PEOPLE'S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN chs. 6–10 (3d ed. 1968); Philip E. Converse, *Information Flow and the Stability of Partisan Attitudes*, 26 PUB. OPINION Q. 578 (1962).

62. This is the key assumption of the responsible party model, *see, e.g.*, American Political Science Association, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. (SUPPLEMENT) 15–24 (1950); RANNEY, *supra* note 51, and models of retrospective voting, *see* MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981).

63. *E.g.*, Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1321 (2002) (describing tradeoff between competitiveness and representativeness).

64. Equal, that is, given the actual policy preferences of the electorate.

that they are conflicting and indeed incommensurable principles upon which to base a system of legislative representation. Party and territory are completely different mechanisms for constructing a democratically representative legislature. In its simplest terms, the difference amounts to this: to represent voters by territory is to organize the electorate according to bonds of local community and interest; to represent voters by party, in contrast, is to represent them according to bonds and interests that are found statewide, and that by definition transcend the boundaries of any single district.

Political parties represent groups of people who share politically salient interests and policy preferences.[65] Yet parties, especially in a two-party system such as ours, do not ordinarily represent interests that are organized territorially. Indeed, on those rare occasions when parties do represent interests organized territorially—as in a politics of sectionalism—such an arrangement is viewed as a pathology of party politics and, especially in light of the United States election of 1860, a harbinger of serious social and political problems.[66]

According to prevailing contemporary models of party politics, political parties in a two-party system compete for the allegiance of voters. This competition in turn allows the electorate to exercise some degree of indirect control over the substance of government policy by turning out of office a party that has not performed up to public expectations.[67] However, when only two parties contest for power within a state, the coalitions embraced by each party's organization are necessarily broad—in fact, by definition, statewide. Party competition is aimed, after all, at political control of the entire state, not merely of individual localities, and achieving that goal requires that a party gain the adherence of very large segments of the state polity. Control of the

65. See, for example, the many cases treating parties as expressive associations entitled to First Amendment protections, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), and *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

66. In the election of 1860, Lincoln, the Republican candidate, was elected president without earning a single electoral vote from any southern state, which went overwhelmingly for the Southern Democratic candidate, John Breckinridge. This result is widely viewed as one of the precipitating events leading up to the Civil War. For an account, see, among many possible sources, DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 405–47 (1963).

67. This view, usually associated with JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1950), later evolved into the so-called "responsible party model." *See* RANNEY, *supra* note 51, at 10–14 (describing how a two-party system ensures governmental responsiveness); American Political Science Association, *supra* note 62, at 15–19 (criticizing parties as not fulfilling their responsibilities to two-party democracy).

apparatus of state government, moreover, is useful mainly for implementing policies of uniform statewide applicability.[68] Representation based on party is thus a way of creating and exploiting the power of coalitions that *cross* district lines; it is a method of gaining control over many districts at once by appealing to cleavages that cut across most or all election districts throughout the state. It follows that a party-based system of representation is most appropriate where, to achieve their goals, voters *need* to form alliances and coalitions on a broad scale, a scale that transcends local district boundaries. In this sense, a two-party system is a top-down system of political organization: it begins with competition for the allegiance of a majority of the statewide electorate; advances toward that goal when parties differentiate themselves along cleavages that divide huge coalitions of voters that cut across local and district boundaries; and ends with the election of a party committed to implementing statewide policies that correspond to the positions it took to differentiate itself from competing parties.[69]

Territorial representation is, by contrast, more of a bottom-up method of representation; it presupposes that the interests that ought to be represented in the legislature are those that are held in common by people living in a particular place. But interests that people have in common only in virtue of where they live are not especially likely to be shared by people living in other places, and there is consequently no particular reason to think that the voters of one district would derive any great benefit from forming alliances with voters in more than at most a small number of neighboring districts to advance their objectives in the legislature. In short, if the issues of interest to a district's voters are truly local, and thus neither require nor invite alliance with anyone outside the district (or perhaps at most require alliance with residents of immediately neighboring districts), then party is essentially useless as a vehicle for advancing voters' interests.

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68. Many state constitutions expressly forbid special legislation, a form of legislation of limited applicability that affects only specific locations or individuals within the state, thereby forcing state legislatures to deal with problems using only general legislation, by definition of statewide applicability. For an overview, see ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 802–23 (3d ed. 1999).

69. It is no coincidence that the two-party system is often thought of as an elite-driven system. Schumpeter, one of its early and most influential theorists, claimed after all that "the electoral mass is incapable of action other than a stampede." SCHUMPETER, *supra* note 67, at 283.

Indeed, using partisanship as a vehicle for representation may actually *impede* the satisfaction of local, territorially-defined interests. If the introduction of a statewide party system means anything, it means that legislators are no longer exclusively delegates of the district communities that elect them. Because they are members of statewide political parties, representatives are no longer responsive only to the voters in their districts, but are linked through party membership to representatives of the same party from districts across the state.[70] In pursuing, as they must, goals established at least in part by their parties, representatives will necessarily pursue policies that are of broad-based benefit to large segments of their parties' constituent coalitions. Party thus intermediates between the representative and represented interests, necessarily undermining to at least some degree the congruity between the community of interest captured in a representative's district and the community of interest of party policy beneficiaries. That is to say, party membership operates, and is designed to operate, to place pressure on each representative to act in ways that will not benefit *solely* the people of his or her home district; the menu of items on the party's agenda will benefit people in all parts of the state. This is, of course, precisely the benefit that party as a mode of political organization is meant to confer; on the assumptions underwriting the two-party system, party organization is seen as a way of pursuing the common good of the entire polity more effectively and efficiently.[71] Even so, such a system is very different from one of direct representation of local interests, where the benefits of policies sought by representatives are meant to accrue to the inhabitants of the district, and nowhere else (or at least nowhere else of interest to district residents).

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70. Indeed, since state parties are almost never distinct from national parties, representatives are typically linked into a *national* party coalition that further influences and constrains the content of their positions, further eroding representatives' direct accountability to district citizenries.

71. Or at least the good of the majority, which in contemporary theories of party government is typically equated with the good of all: "party government is a proposal for implementing majority-rule, no matter what the majority may decide to do with its power. Any decision made in accord with the majority's wishes is, by definition, a 'democratic' decision." RANNEY, *supra* note 51, at 11. *Cf.* American Political Science Association, *supra* note 62, at 15 ("The party system . . . serves as the main device for bringing into continuing relationship those ideas about liberty, majority rule and leadership which Americans are largely taking for granted.").

III. JUSTIFYING TERRITORIAL MODES OF REPRESENTATION

If the foregoing analysis is correct, then the reason why we have been unable to identify redistricting practices that consistently produce fair representation of political parties and their supporters in the legislature is not, as Justice Kennedy suggested in *Vieth*, that we have yet to "agree[] upon substantive principles of fairness in districting."[72] Such principles exist, and are uncontroversial. The real reason is that our ability to achieve fair partisan representation is consistently thwarted by our commitment to territorial representation. But if territorial representation is the problem, why are we so strongly committed to it, especially when it frustrates the achievement of fairness in partisan representation, a goal of great importance? Is territoriality merely a piece of historical baggage? What kind of representation does territoriality aim to achieve? How, in other words, can it be justified?

Despite its critical importance in structuring the American political system, how to justify the single-member territorial election district is a question that has received startlingly little attention.[73] To the extent this question has been addressed at all, the most commonly given answers seem to be that single-member territorial districts facilitate the effective delivery of constituent service, and that they make it easier for candidates to communicate with and campaign among voters.[74] In the modern world, however, these are at best makeweight justifications. Assistance in obtaining government services would be no more difficult for voters to request or for representatives to provide if voters were sorted into districts alphabetically instead of geographically. And in an age when face-to-face campaigning is essentially dead, complaints about

72. Vieth v. Jubelirer, 541 U.S. 267, 307 (2004).

73. Among the very few theoretical works to address the question directly are NANCY L. SCHWARTZ, THE BLUE GUITAR: POLITICAL REPRESENTATION AND COMMUNITY (1988), which favors them, and ANDREW REHFELD, THE CONCEPT OF CONSTITUENCY: POLITICAL REPRESENTATION, DEMOCRATIC LEGITIMACY, AND INSTITUTIONAL DESIGN (2005), which argues against them.

74. These justifications are sometimes found in cases dealing with district compactness and contiguity requirements. *See, e.g.*, Prosser v. Elections Bd., 793 F. Supp. 859, 863 (W.D. Wis. 1992); Wilson v. Eu, 823 P.2d 545, 553 (Cal. 1992); Wilkins v. West, 571 S.E.2d 100, 109 (Va. 2002); *In re* Reapportionment of Hartland, Windsor & West Windsor, 624 A.2d 323, 330 (Vt. 1993); *see also* Holmes v. Farmer, 475 A.2d 976, 985 (R.I. 1984) (stating that the purpose of the compactness requirement is "'to provide an electorate with effective representation'") (quoting Opinion to the Governor, 221 A.2d 799, 802 (R.I. 1966)).

the difficulty of getting out to meet the people are unconvincing, to say the least.[75]

Nevertheless, the American practice of legislative representation clearly is dominated by a widely shared, long-standing expectation that the people of each *place* will have what amounts to "their own" representative. It is this emphasis on the representation of citizens organized as residents of particular places that, in my view, not only provides the best account of the practice of territorial districting as a historical matter, but also furnishes its most coherent normative justification, for a legislature constituted by the representation of people according to the place in which they live will differ significantly from a legislature constituted by the representation of citizens grouped according to other criteria.[76] In particular, as I shall explain, territorial representation can be justified by a certain kind of commitment to localness and local issues as the proper subject of statewide politics.

If territorial representation is justifiable by any principle stronger than the administrative need to process the votes of large numbers of people, the best justification for the practice is certainly that the people who reside in a particular place, such as a town or a county, comprise a distinct and coherent community of interest that is entitled to separate representation in the legislature. Historically, this has in fact been the dominant justification. Originally, the belief that every local community was both unique and internally homogeneous arose from the very real isolation and insularity of seventeenth- and eighteenth-century town

75. "[P]hysical access [of the type promoted by contiguity and compactness requirements] . . . in today's world of mass media and technology, is not necessary for communication among the residents of the district or between such residents and their elected representative." *Wilkins,* 571 S.E.2d at 109; *see also* Jamerson v. Womack, 423 S.E.2d 180, 185–86 (Va. 1992) (rejecting the contention that a lack of district compactness impaired the ability of a state senator to communicate with constituents). It is, however, somewhat more plausible to think that communication within a district and between a representative and his or her constituents might be impaired when the district's lack of compactness becomes so severe that it spans multiple media markets. *See* Richard N. Engstrom, *District Geography and Voters*, *in* REDISTRICTING IN THE NEW MILLENNIUM, *supra* note 30, at 66 (finding that a district's conformity to the boundaries of local media markets is much more important than its conformity to local government boundaries in affecting voter turnout within the district). *But see* REHFELD, *supra* note 73, at 174–76 (arguing that "broadcast media" are being replaced by "direct media," and that in consequence "[c]ommunication to a dispersed group scattered across the nation is readily becoming as easy . . . as buying ads in a local media market").

76. REHFELD, *supra* note 73, at 7–8.

life.[77] In the vast, sparsely settled landscape of early America, "[t]he local community provided within itself a focus for the economic, political, social, and religious lives of the townspeople."[78] Life in American towns was, in other words, largely self-contained, and there was consequently "infrequent resort to outside institutions,"[79] including the state itself.[80]

As the nineteenth century wore on and advances in transportation and communication began slowly to break down the starkest forms of social and cultural isolation, the basis of the belief in local distinctiveness shifted gradually toward the notion that each local community was a unique, self-contained economic unit.[81] But whatever its basis, the idea that localities such as towns and counties are distinct communities of interest presupposes an organizing set of interests that are both local (rather than statewide) and unique. Were it otherwise, the relevant interests entitled to legislative representation would cut across formal local boundaries, and the proper unit of representation would be coalitions that are not confined by community lines.[82]

Throughout most of American history, the idea of the socially and economically independent locality was woven deeply into the structure of political institutions through the nearly universal practice of allocating state legislative representatives to fixed units of local government.[83] Until the mid-twentieth century, the most common practice by far was to assign representatives to counties (towns in New England), usually in numbers bearing some rough proportion to their respective populations.[84] Legislators thus derived their professional identities, and to a great extent their missions, from the fact that they

77. *See, e.g.*, THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 61–78 (1978); MICHAEL ZUCKERMAN, PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY 46–48 (1970).

78. BENDER, *supra* note 77, at 65.

79. *Id.*

80. ZUCKERMAN, *supra* note 77, at 29, 37–38, 124, 229.

81. Gardner, *supra* note 22, at Part III.C.

82. The Supreme Court has often deemed the maintenance of communities of interest an important consideration in redistricting. *E.g.*, Lawyer v. Dep't of Justice, 521 U.S. 567, 581 (1997) (a "low-income population" was properly conceived as 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). Just last term, the Court relied on a lack of genuine community of interest within a redrawn Texas district to invalidate it under Section 2 of the Voting Rights Act. LULAC v. Perry, 126 S. Ct. 2594 (2006).

83. *See*, Gardner, *supra* note 22, at 900.

84. *Id.* at 900–01.

had been elected to represent the interests of the residents of a particular place, interests that had long been understood to be unique and thus distinct from the interests represented by other legislators elected from other counties, cities, and towns.

This method of constructing legislative constituencies also has significant consequences for the kind of politics that is practiced within the state legislature.[85] A key variable in the construction of democratic legislatures is the homogeneity of legislative constituencies. When voters within the various districts are relatively homogeneous, and therefore have similar political opinions, the representative will necessarily hold the same views as his or her constituents. In this situation, representatives have no real occasion to exercise independent political judgment in the formulation of positions to advance within the legislature, and their main function will be to act as delegates or agents of their constituents to promote the univocal interests of their home districts in legislative deliberation and bargaining. Such a system, characterized by intradistrict homogeneity and interdistrict heterogeneity, corresponds closely to the "portrait in miniature" theory of representation commonplace during the eighteenth century.[86] Where, in contrast, election districts are constructed so as to contain a heterogeneity of public opinion, the job of representatives is different and involves the use of greater discretion. Representatives from heterogeneous districts must initially forge compromises among coalition partners to win election in the first place, and then exercise some degree of judgment in legislative deliberation and bargaining to decide which among the many interests contained in their districts they will attempt to satisfy on any given occasion.[87] The belief that localities such as counties and towns are discrete and homogeneous communities of interest strongly implicates the former model of representation.

The construction of a system of representation in which legislators are delegates of homogeneous local communities of interest has important consequences not only for the way politics is practiced within

85. The following analysis is spelled out in greater detail in Gardner, *supra* note 22.

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

87. This model corresponds roughly to the median voter theory of contemporary political science. *See* Gardner, *supra* note 22, at 956.

the legislature, but also for the subject matter of legislative deliberation and action. Because legislators in this model represent communities that are constituted fundamentally by their localness—by the residents' condition of living common and interdependent lives together in a particular place—the interests that define and constitute the constituent-legislator relationship, and that legislators may consequently be expected to represent and advance in the legislature, are necessarily and correspondingly local. This means that we should expect a state legislature constructed around principles of territorial representation to focus its attention primarily on issues of predominantly local concern rather than on issues of general concern throughout the state. Such a legislature may therefore be expected to spend most of its time solving problems that arise in particular localities and resolving conflicting demands and claims on state resources made by localities.[88]

In contrast, a legislative system built around the representation of parties or other ideological groupings would be much more likely to produce a legislature focused on boundary-crossing issues of statewide concern. Legislators in such a system would be elected by cross-cutting coalitions constituted by shared interests that, by definition, are not local and territorial but statewide and ideological. Such a legislature would be much more likely to devote most of its attention to issues that voters throughout the state share in common by virtue of their common membership in a community that is itself statewide. Where a legislature designed to represent local, territorial communities of interest might thus be more likely to take up roads, bridges, and local economic development projects, a legislature designed to represent parties might be more likely to concern itself with social welfare programs, crime, education, and statewide issues of economic prosperity.[89] Indeed, territorial representation might well provide a kind of institutional formula for promoting governmental minimalism, one that is consistent with eighteenth- and antebellum nineteenth-century conceptions of the very limited functions that ought to be assigned to any central

88. Some evidence of this phenomenon may be found in the largely successful twentieth century movement to obtain home rule for localities—that is, to take the state legislature out of the business of micro-managing the conduct of local affairs. For an overview, see, for example, U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION (1993).

89. *See, e.g.*, REHFELD, *supra* note 73, at 21, 152 (arguing that congressional porkbarrel politics focuses on the local—roads and bridges, community centers and playgrounds—only and contingently because electoral constituencies are local, thereby furnishing representatives with incentives to deliver to their constituents benefits in a form that can be enjoyed through physical proximity rather than in other ways).

government. Perhaps it is no coincidence that party-based, proportional systems of representation tend to be found in nations that favor policies associated with the modern social welfare state.[90]

My point here is by no means to suggest that legislatures constituted by the representation of territory are somehow better designed than those constituted by the representation of party. The opposite might well be true. It is possible, for example, that the time and effort of a state legislature is best spent on issues of statewide concern and that issues of purely local interest are best dealt with at the local level. It is equally possible that we no longer live in a world in which the residents of towns and counties have interests that are meaningfully distinct from the interests of other citizens residing throughout the state, or even throughout the entire nation, and that the premises on which a system of territorial representation originally rested have therefore been falsified. My point, rather, is that it is possible to discern a fair and plausible justification for territorial districts, sounding in considerations of institutional design, and resting on a certain set of assumptions about the nature of American social and economic life, and the desirability of certain kinds of government activity.

This analysis also reveals that an extremely serious problem with state legislative representation in the post-*Reynolds* era has been the refounding of territorial representation on transient districts whose boundaries change every decade, if not more frequently. If I am right that the best available conceptual justification for territorial representation is that localities comprise distinctive and internally coherent communities of interest, then it is essential to the institutional integrity of the representational system that territorial election districts coincide with actual communities of interest.[91] Yet local communities of

90. According to Powell, systems of pure proportional representation are found in Austria, Belgium, Denmark, Finland, Germany, Greece, Italy, Netherlands, Norway, Sweden, and Switzerland. POWELL, *supra* note 37, at 28 tbl.2.1.

91. Federal courts seem to recognize this through a jurisprudence of communities of interest, although the federal conception of community of interest is extremely broad, encompassing commonalities of socioeconomic status, education, employment, politics, health, religion, and ethnicity. *See, e.g.*, Lawyer v. Dep't of Justice, 521 U.S. 567 (1997) (a "low-income population" was properly conceived as 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); Theriot v. Parish of Jefferson, 185 F.3d 477, 486 (5th Cir. 1999) ("[L]ess-educated" citizens comprised a community of interest on the basis of "common social and economic needs" and citizens "more often unemployed" than voters in other districts comprised a community of interest on the basis of "common social and economic needs."); Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) (Latinos comprise a community of interest); Meza v. Galvin, 322 F. Supp.

interest do not spring up wherever and whenever a legislature happens to draw a line; even under the best of circumstances, no community can long maintain a distinctive identity nor its residents forge and maintain common bonds and interests unless the community's dimensions, and thus its population, are comparatively stable.[92] That is undoubtedly why American states clung for so long to a method of territorial representation that allocated representatives to fixed units of local government, units that had in many states existed without change for a century or more even before the state settled on a representational system in its initial constitution.[93] The present system of territorial districting thus carries on an old practice, but in a way that makes impossible the vindication of the practice's actual justification.

IV. FIXED DISTRICTS: AN EARLY NINETEENTH-CENTURY SOLUTION TO A TWENTY-FIRST CENTURY PROBLEM?

Our search for a standard of fair partisan representation capable of operating within a system of territorial districting has led us, it seems, to a sorry pass. The Supreme Court's apportionment jurisprudence raised the achievement of interdistrict population equality above a state's desire to adhere to stable district boundaries of social, political, and historical significance. States could have solved this problem by abandoning territorial representation altogether, but evidently found their commitment to territoriality too strong to let go. Yet the practice that has emerged seems to offer the worst of all possible worlds. Adherence to territorial districting has impaired the representation of political parties, a principle of representation with which territoriality conflicts. Yet the practice of territorial representation has been so transformed by the need to comply with federal apportionment requirements that it is no longer faithful to the principles that justify it in the first place. We are trying, in other words, to adapt a

2d 52, 57 (D. Mass. 2004) (three-judge court) ("[T]he Hispanic community" can comprise "an ethnically-based community of interest."); Session v. Perry, 298 F. Supp. 2d 451, 512 (E.D. Tex. 2004) (three-judge court), *aff'd in part, rev'd in part*, LULAC v. Perry, 126 S. Ct. 2594 (2006) ("evidence of differences in . . . health" relevant to existence of a community of interest); Kelley v. Bennett, 96 F. Supp. 2d 1301, 1321 (M.D. Ala. 2000) (three-judge court), *vacated on other grounds*, 531 U.S. 28 (2000) ("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.").

92. *See* James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237 (2002).

93. For an account of the evolving political role of New England towns, see ZUCKERMAN, *supra* note 77.

representational system designed for one purpose to achieve other objectives that it is poorly suited to achieve.

Is there any way out of this trap? Possibly, but only by rethinking the enterprise. I would put the problem like this. Suppose we take the American commitment to territorial representation as non-negotiable, but demand that territorial representation be practiced in a way that is faithful to its underlying justifications. We may now reformulate the relevant question: Is there any way to create a system of *well-justified* territorial districting that also produces results that are fair to political parties and still satisfies the requirements of population equality? I believe there is, and that the model may be found in a practice of representation that was extremely common in the early nineteenth century but has since fallen out of favor. In this system, instead of holding legislative size constant and varying the configuration of election districts, as we do today, the configuration of election districts was held constant but the size of the legislature was permitted to vary as necessary to satisfy requirements of interdistrict population equality. I shall call this a "fixed district" system of representation.[94]

In the most common early-nineteenth-century version of the fixed district format, election districts coincided with established units of local government—most often counties, but sometimes towns and cities as well.[95] Each district was then assigned a certain number of representatives. Although the earliest state constitutions allocated a fixed and equal number of representatives to each representational unit, by the 1830s or 1840s, each county's allocation of representatives was linked to its population.[96] Unlike present systems, in which the size of

94. For a similar analysis, see McConnell, *supra* note 7, at 103, 115 (arguing that adhering to local government boundaries and varying the number of legislators elected from the local government unit according to its population would minimize opportunities for gerrymandering and make district more heterogeneous, limiting political polarization).

95. Counties were the exclusive unit of state legislative representation under DEL. CONST. art. 3 (1776); N.J. CONST. art. III (1776); VA. CONST. ¶ 25 (1776); GA. CONST. arts. IV, V (1777); N.Y. CONST. art. IV (1777); GA. CONST. art. I, § 6 (1789); DEL. CONST. art. II, § 2 (1792); KY. CONST. art. I, §§ 4, 6 (1792); TENN. CONST. art. I, § 2 (1796); GA. CONST. art. I, § 7 (1798); N.Y. CONST. amend. II (1801); OHIO CONST. art. I, § 2 (1802); LA. CONST. art. II, § 5 (1812); IND. CONST. art. III, § 2 (1816); MO. CONST. art. III, §§ 2, 4 (1820); N.Y. CONST. art. I, § 7 (1821); DEL. CONST. art. II, § 2 (1831); N.C. CONST. amend. I, § 2 (1835); ARK. CONST. art. IV, § 34 (1836); FLA. CONST. art. IX, § 1 (1838); GA. CONST. art. I, § 7 (1843); N.J. CONST. art. IV, § III (1844). Towns were the unit of representation under VT. CONST. § XI (1777); MASS. CONST. Part the Second, ch. I, § III, art. II (1780); VT. CONST. ch. II, § VII (1786); VT. CONST. ch. II, § 7 (1793); CONN. CONST. art. 3d, § 3 (1818).

96. *Compare* DEL. CONST. art. 3 (1776), N.J. CONST. art. III (1776), VA. CONST. ¶ 25 (1776), MD. CONST. arts. II, IV, V (1776), N.C. CONST. art. III (1776), PA. CONST. § 17

the state legislature is typically fixed, the size of the legislature was not established in advance; the legislature simply consisted of all the representatives to which each county was entitled, whatever that number turned out to be.[97]

A fixed district system of representation has, for present purposes, three very significant advantages.[98] First, it does justice to the idea of territorial representation. As discussed above, territorial representation, if it is to be justified at all, must rest on the fact that the residents of represented territories comprise distinct and coherent local communities of interest. This condition can be satisfied, however, only when the community's dimensions, and thus its population, are sufficiently stable to allow a genuine community of interest to arise, forge the relevant ties, and maintain those bonds over time.[99] Using fixed units of local government as election districts satisfies these conditions because the represented territory has the permanence sufficient to allow communal ties to solidify. Moreover, local governmental units are a good choice for another reason: common residency in a working, functioning, self-governing locality by itself can give rise to a political and administrative community of interest entitled to recognition. 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."[100] This autogenerative process of community formation cannot occur in a floating district that has no function other than to elect a representative; such a district has no real identity even as a merely administrative community because the district has no function beyond

(1776), *and* VT. CONST. ch. II, § XVI (1777) (all allocating a constitutionally fixed number of legislators to represented units), *with* TENN. CONST. art. I, § 2 (1796), N.Y. CONST. amend. II (1801), OHIO CONST. art. I, § 2 (1802), LA. CONST. art. II, § 6 (1812), MISS. CONST. art. III, § 9 (1817), ILL. CONST. art. II, § 5 (1818), TENN. CONST. art. II, § 5 (1834), ARK. CONST. art. IV, § 34 (1836), PA. CONST. art. I, § 4 (1838), TEX. CONST. art. III, § 29 (1845), IOWA CONST. art. 3, § 31 (1846), *and* WIS. CONST. art. IV, § 3 (1848) (all linking the size of a represented unit's legislative delegation to its population).

97. Gardner, *supra* note 22, at 905–06.

98. The following discussion is limited to state legislative districts. States could also return to a fixed district system of congressional redistricting but only if Congress repeals the Apportionment Act, which since 1842 (with a few interruptions) has required that members of Congress be elected from single member districts. 2 U.S.C. § 2c (2000). SCHMECKEBIER, *supra* note 28, at 132–35.

99. Gardner, *supra* note 92, at 1238–39.

100. *In re* Reapportionment of the Colo. Gen. Assembly, 45 P.3d 1237, 1248 (Colo. 2002). For a fuller discussion, see Gardner, *supra* note 22, at Part III.D.

the self-referential one of electing representatives, and its denizens thus share no human bond or activity other than the duty to perform a single public act every two or four years.

Second, using counties, cities, and towns as permanent election districts immediately dissolves any possible objection on the grounds of unfair partisan representation. This is not because a fixed district representational system has any necessary tendency to produce proportional representation of the parties in the state legislature—any such tendency will be purely coincidental—but because the objection has no force against a representational system that deliberately resolves the conflict between partisan and territorial modes of representation in favor of the representation of territory. In a system of fixed districts, that is to say, a design choice is made to construct the legislature out of building blocks consisting of citizens grouped into territorial communities of local interest rather than into boundary-crossing communities of ideological, and therefore partisan, interest.

The significance for partisan fairness of the difference between fixed local government boundaries and the floating boundaries of contemporary election districts is in fact universally recognized. While people might routinely complain in some rhetorical sense that Chicago is "too" Democratic, or that Cobb County, Georgia, is "too" Republican, nobody ever suggests that the proper remedy for these imbalances would be to make these jurisdictions "more competitive" by altering their boundaries. Demands are not heard to require Chicago to annex politically conservative suburbs to "pick up" more Republicans, or to extend Cobb County into Atlanta to "pick up" more Democrats. We simply do not draw city or county lines for the purpose of making city and county elections competitive; such jurisdictions are understood to have political identities distinct from and far more important than the mere partisan affiliation of the residents who happen to inhabit them at any given moment. Consequently, cities, towns, and counties are understood simply to have the partisan profiles that they happen to have acquired, and changing a jurisdiction's profile would never count as a legitimate reason to alter its boundaries.[101]

101. During the nineteenth century, legislatures did occasionally gerrymander by creating new towns and counties. Gardner, *supra* note 22, at 903–04. State constitutional prohibitions soon arose to limit such practices, including banning the creation of new counties with suspiciously low populations, *e.g.*, N.Y. CONST. art. I, § 7 (1821); MICH. CONST. art. IV, § 4 (1835); ARK. CONST. art. IV, § 29 (1836); LA. CONST. tit. II, art. 8 (1845), and making the express approval of a county's residents a condition for dividing the county or altering its

Nevertheless, although it is in no way a goal of a fixed-district representational system to enhance partisan fairness, there is, ironically, good reason to believe that such a system would in fact *increase* the ability of parties to compete fairly for control of districts. As indicated earlier, contemporary theories of democracy claim that parties should, in principle, be able to compete successfully for any office by modifying their positions to appeal to the relevant electorate. However, where the identity of the electorate changes every ten years, sometimes dramatically, parties may well find it impossible in many districts to undertake the retooling necessary to compete. When the election is from a district that never changes, however, parties may well be able to take a longer view and invest in gradually making the alterations necessary to mount a successful appeal to the district's voters. Consider, for example, that in Massachusetts and New York, two bastions of statewide Democratic strength, Republicans have occupied the governor's chair since 1990 and 1994, respectively. New York City, an even more overwhelmingly Democratic jurisdiction, has elected Republican mayors since 1994. While many factors doubtless account for these results, one of them, surely, is the permanence of the "districts" that elect chief executives and other jurisdiction-wide officials,[102] a stability that has permitted Republicans to stake out electorally successful positions.

Finally, a fixed district representational system satisfies the federal constitutional requirement of one-person, one-vote because each county or town can be allocated a number of representatives proportional to its population. This distinguishes the fixed district systems of the early nineteenth century from those of the early twentieth century, which were invalidated by the Supreme Court in its reapportionment rulings. By the early twentieth century, most states had moved to legislatures of mandatory fixed size.[103] This meant that a fixed number of legislators had somehow to be parceled out among the counties, leading inevitably to population disparities even if a state regularly and diligently

boundaries, *e.g.*, OHIO CONST. art. II, § 30 (1851); MICH. CONST. art. VII, § 2 (1908); OKLA. CONST. art. XVII, § 4 (1907).

102. Evidence from Japan suggests that the use of fixed districts by itself so constrains partisan gerrymandering that such districts display very little partisan bias. Ray Christensen, *Redistricting in Japan: Lessons for the United States*, 5 JAPANESE J. POL. SCI. 259 (2004). Whether this result is an artifact of demographics peculiar to Japan is less clear, although the author believes similar results would be obtained in at least some parts of the U.S. *Id.* at 281–84.

103. Gardner, *supra* note 22, at 911.

attempted to equalize interdistrict populations. The problem, in other words, was not created by the use of fixed districts, but by the use of fixed districts combined with a legislature of fixed size. The kind of fixed district system discussed here does not share this infirmity because the size of the legislature is free to float as needed to maintain proportionate representation of districts.

There are, however, two potential disadvantages of a fixed district system. First, maintenance of strict population proportionality in the size of district legislative delegations can in certain circumstances cause the legislature to grow very large, perhaps to the point of unwieldiness.[104] For example, if a state with a population of five million uses counties as fixed election districts, but its smallest county has a population of only five thousand, it will need a legislature of one thousand representatives to maintain population equality. In the nineteenth century, a commonplace solution to this problem was to create the occasional multicounty district, either by combining small counties into a single district,[105] or by assigning small counties to a larger neighboring county for purposes of representation.[106] Although this practice is less than ideal if the assumption motivating territoriality is that each county comprises a distinct community of interest, so long as any multicounty districts so formed are fixed and permanent, the compromise is not wholly inconsistent with the premises of territorial districting.

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104. This is probably what caused states to impose caps on legislative size in the first place. For example, according to the record of the 1876 New Hampshire 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 very large. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW HAMPSHIRE *passim* (1877).

105. This was extremely common, and was often accomplished by an initial constitutional specification of representative districts, typically subject to legislative change based on new population data. *See, e.g.*, TENN. CONST. ord. § V (1834); N.C. CONST. amend. I, § 2 (1835); N.Y. CONST. art. III, §§ 3, 4 (1846); OHIO CONST. art. XI, § 7 (1851); MISS. CONST. art. XI, § 2 (1868) (all creating multi-county senatorial districts).

106. *See, e.g.*, ME. CONST. art. IV, § 3 (1819) (towns too small to be entitled to their own representative to be "classed," or grouped together to form districts of sufficient population); MASS. CONST. art. XII (1836) (towns too small to be entitled to their own representative may voluntarily group themselves together for purposes of electing representatives); LA. CONST. tit. II, art. 15 (1845) (new parishes to be attached for purposes of senatorial representation to parish from which they were created); CONN. CONST. art. XVIII (1876) (new towns too small to be entitled to their own representative to be joined for purposes of representation to town from which their territory was taken). The New England provisions authorizing "classing" of small towns do not appear to impose any contiguity requirement on districts formed in this way.

The second potential problem with fixed districts is that the number of representatives allocated to a very populous county or other local government unit may be large, and at some point the sheer amount of information voters must process may exceed the capacity and interest even of well-informed and highly motivated voters. It is one thing to ask voters to select, say, four or five representatives, and quite another to expect them to make an intelligent choice of fifteen or twenty. In these cases, the best course may be to subdivide the county, city, or town into districts. In the nineteenth century, such partition was often permitted, but the blow to principles of territorial representation was typically softened by requiring the larger jurisdiction to be carved into subdivisions that were themselves constructed out of permanently fixed, but smaller, jurisdictions. Thus, a county might be divided into districts comprised of one or more whole towns, or a large city might be divided into districts comprised of whole wards.[107]

This strategy unquestionably strains the assumptions that justify territorial districting. If counties are by hypothesis discrete and internally coherent communities of interest, there is no particular reason to suppose that several adjacent towns within a county might themselves form an equivalently coherent and organic community of interest. On the other hand, very large counties and cities by their sheer size alone equally call into question the assumptions behind territorial districting: it is far from clear that a jurisdiction containing a million or more people can really be deemed a single community of local interest, much less an internally coherent one. Where plans of institutional design must simultaneously satisfy numerous potentially conflicting goals, however, it seems overly fussy to demand that no compromise impugn any design assumption.

The subject of fussiness brings me back to the Supreme Court. The one-person, one-vote doctrine is surely one of the Court's fussiest, for the Court has required that states justify any deviation from exact population equality among districts greater than about ten percent,[108] and the Court has rarely found state interests sufficient to justify much

107. *E.g.*, CONN. CONST. amend. II (1828) (subdivisions of multi-senator counties to be comprised of whole towns); N.Y. CONST. art. III, § 5 (1846) (subdivisions of multi-representative counties to be comprised of whole towns); MICH. CONST. art. IV, § 3 (1850) (subdivisions of multi-representative counties to be comprised of whole towns and cities); PA. CONST. art. II, § 16 (1873) (subdivisions of multi-senator counties to be comprised of whole wards, boroughs, and townships).

108. Brown v. Thomson, 462 U.S. 835 (1983).

more of a deviation.[109] This has struck many observers as misguidedly formalistic.[110] I certainly have reason to feel aggrieved when your vote is worth more than mine by fifteen or twenty orders of magnitudes, but it is less clear that the Constitution ought to be concerned when your advantage is in the vicinity of fifteen or twenty percent. In any event, the more rigid the standard of population equality, the more readily fixed districting leads to the twin problems of overly large legislatures and overly large legislative delegations. On the other hand, population deviations larger than ten percent are not prohibited; they merely must be supported by some rational justification.[111] I would hope that the justification for fixed districts I have laid out here would count as the kind of reason that federal courts might find capable of justifying deviations from strict population equality, and that they would therefore permit states using fixed districts a bit more latitude to avoid compromising the system's underlying justifications.[112] There can be no state interest, it seems to me, more compelling than the interest in constructing a political system satisfactory to the state's citizens, and if the people of a state prefer a state politics that is oriented toward the solution of local problems, I can think of nothing in the U.S. Constitution that could properly be understood to deny them that choice.[113]

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109. One of the few exceptions is *Mahan v. Howell*, 410 U.S. 315, 319, 329 (1973), in which the Court upheld a districting plan containing a maximum deviation of 16% from strict equality, although the average district deviation in that plan was a mere 3.89%. In *Brown v. Thomson*, 462 U.S. at 846, the Court went as far as it has ever gone by upholding a plan containing an average deviation of 16% and a maximum deviation of 89%. This was justified, the Court held, by the state's desire to give each county at least one representative.

110. *See, e.g.*, ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 21–22 (1968); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002); McConnell, *supra* note 7, at 107–09.

111. *Mahan*, 410 U.S. at 325, 328; Reynolds v. Sims, 377 U.S. 533, 579 (1964).

112. There is reason to be optimistic that this would be the case. In *Brown v. Thomson*, 462 U.S. 835, the Court upheld Wyoming's system of county representation against a one-person, one-vote challenge where it resulted in one very small county receiving the state constitutionally mandated minimum of one representative even where that allocation created a deviation from strict population equality of eighty-nine percent: "There . . . can be no question that Wyoming's constitutional policy . . . of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate state concerns." *Id.* at 843.

113. On the other hand, the Court has shown little sensitivity or deference to state choices regarding the structure and operation of state democratic institutions. *Bush v. Gore*, 531 U.S. 98 (2000), is certainly the prime example, but *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), in which the Court afforded no deference to a state decision to establish a system of nonpartisan judicial elections, is another. On the Court's lack of

Finally, there is little reason to fear that a system of fixed districts would run afoul of Section 2 of the Voting Rights Act, which prohibits the use of voting practices and procedures that result in an abridgement of the right to vote on account of race.[114] First, it is by no means clear that Section 2 would even apply to a state's choice to adopt a representation system of fixed districts where those districts coincide with established local governments. Despite its broad language, Section 2 has not been construed to reach each and every state decision on how to structure its electoral system; instead, federal courts have tended to view some of the most basic decisions about the structure of governance as antecedent to, and thus outside the scope of, any application of Section 2. Such decisions include state and municipal choices concerning the basic form of representation and those locating the boundaries of local governments.[115] It thus seems unlikely that Section 2 would be construed to prohibit a state from basing its system of legislative representation directly on local government units. Second,

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deference in this area, see James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467 (2003).

114. 42 U.S.C. § 1973 (2000) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."). The fear would be that minority populations are distributed among counties or their subdivisions in a way that would unduly diminish their representation in the legislature. The seminal case is *Thornburg v. Gingles*, 478 U.S. 30 (1986), in which the Court required an at-large system of representation to be broken up into single-member districts.

115. *See* Holder v. Hall, 512 U.S. 874 (1994) (rejecting a Section 2 challenge to a county's use of a single-commissioner form of government where use of a five-member commission would allow blacks a voice in governance decisions, on the ground that black voting power under an alternative form of governance did not furnish a proper point of comparison); City of Richmond v. United States, 422 U.S. 358 (1975) (city's decision to annex outlying, overwhelmingly white areas was not subject to Section 2 on the ground that black voting power before and after the annexation could not be compared because the city, following the annexation, was a different entity). As the Eleventh Circuit explained, Section 2 implies "a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system. Nothing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government . . . ." Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir. 1994); *see also* Burton v. City of Belle Glade, 178 F.3d 1175, 1192 (11th Cir. 1999) (court refused to order a city to change its boundaries by annexing territory to alter the racial balance of the city's population); African-American Citizens for Change v. St. Louis Bd. of Police Comm'rs, 24 F.3d 1052 (8th Cir. 1994) (Section 2 inapplicable to municipality's decision to make certain offices appointive rather than elective). For a critique of this approach to Section 2, see Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1 (1991). Of course, any decision, including the choice of government structures and local boundaries, may run afoul of the Constitution if it is made purposefully to discriminate against racial minorities. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

even if Section 2 did apply to the use of fixed districts, any violation could easily be avoided by using multimember districts for the more populous jurisdictions, so long as the voting system avoided features that have the effect of suppressing the ability of minorities to elect representatives of their choice.[116]

V. CONCLUSIONS: FIXED DISTRICTS AND THE WISCONSIN CONSTITUTIONAL TRADITION

Given the focus of this conference, I want to conclude by considering very briefly the relation between the system of fixed districts I have described and a fairly unusual feature of Wisconsin constitutional jurisprudence. In the great majority of states, for the great majority of their constitutional history, interdistrict population equality was viewed as a goal subordinate to the representation of permanent units of local government. Until the Supreme Court put a stop to the practice, most states were well willing to tolerate population deviations that were extreme by modern standards so as to preserve the separate representation of individual localities, and indeed many states wrote into their constitutions rules for allocating representatives that all but guaranteed sometimes gross disparities in the number of people represented by legislators elected from the various counties, cities, and towns.[117]

Wisconsin, apparently alone among the states, has a constitutional tradition that might be said to differ from the norm. Like the constitutions of many other states, the Wisconsin Constitution has long contained provisions providing both for the allocation of representatives by district population ("according to the number of inhabitants")[118] and for the separate representation of local government units, a requirement implemented by a prohibition on drawing assembly districts that divide counties, towns, precincts, or wards.[119] However, in a series of rulings stretching back more than a century, the Wisconsin Supreme Court has

116. For example, one such device is a place system, in which candidates compete head-to-head for designated seats. For a description, see White v. Regester, 412 U.S. 755 (1973).

117. These included caps on the number of representatives a district could elect, *see, e.g.*, VT. CONST. ch. II, § VII (1786) (no more than two representatives per town); GA. CONST. art. I, § 7 (1798) (no more than four representatives per county); CONN. CONST. art. XV (1874) (no more than two representatives per town), and requiring increasing increments of population for a jurisdiction to earn additional representatives, *see, e.g.*, MD. CONST. art. III, § 4 (1864); MO. CONST. art. IV, § 2 (1875); N.H. CONST. pt. II, § 9 (1877).

118. WIS. CONST. art. IV, § 3.

119. *Id.* art. IV, § 4.

interpreted these potentially conflicting provisions to make the achievement of population equality the paramount goal of the apportionment process.[120] As recently as 1964, the court ruled categorically that the primary aim of the constitutional apportionment scheme is "per capita equality of representation," and that the constitutional provision barring the crossing of local boundaries is not to be understood to contain any "consciously built-in standard of apportionment that reflects area or any other geographical factor."[121] The Wisconsin Supreme Court, in other words, seems to have construed Wisconsin's system of representation to be designed primarily to represent equipopulous groups of individuals rather than residents of particular fixed places.

If Wisconsin in fact has a tradition of non-territorial representation in the state legislature, a resort to fixed districts consisting of permanent local government units may not be the best approach. Indeed, in these circumstances one might well ask why Wisconsin, with a system of representation more suitable to the representation of statewide parties than communities of local interest, should not fully implement its own deeply held commitments at a stroke by adopting a system of proportional representation? If the answer, however, is that such a method would likely prove unpopular, then perhaps the representational tradition purportedly identified by the Wisconsin Supreme Court is not as deeply rooted as that court's assertions would suggest. Perhaps the people of Wisconsin, like Americans elsewhere, really do expect that they will be represented in the state legislature, along with their neighbors, as residents of a particular place who share a locally constituted community of interest. In that case, constitutional reform in the direction of fixed districts, though it might represent a larger change for Wisconsin than for other states, might be worth considering.

120. State *ex rel.* Att'y Gen. v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892); State *ex rel.* Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1892).

121. State *ex rel.* Reynolds v. Zimmerman, 22 Wis. 2d 544, 556, 126 N.W.2d 551, 558 (1964); *see also id.* at 566, 126 N.W.2d at 563 ("This requirement does not build a competing geographical or autonomy of local unit standard of apportionment into the constitution.").