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Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing

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INTRODUCTION

Supreme Court rulings of the 1960s required legislative districts to be of equal population, and thus redistricting became a decennial obligation for the states following the release of new federal census population data. But in 2003,

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a Republican-controlled Texas state government drew new congressional district boundaries to replace those adopted by a federal court in 2001—without any intervening new census information. The action was highly contentious, and, thanks in part to a salacious side story of legislators twice fleeing the state to deny the governing majority a quorum, drew mainstream media coverage to a process that is usually ignored.[1] And while all eyes were on Texas, state governments in Colorado, Georgia, New Hampshire, North Carolina, and South Carolina also drew new congressional or state legislative district boundaries mid-decade to replace existing legal maps.[2] Illinois, New Mexico, and Oklahoma threatened to do the same.[3] Most recently, a well-funded new political committee announced that it planned to devote its energies entirely to redistricting at the state and federal level, with substantial attention apparently devoted to preparing for the possibilities of mid-decade redistricting.[4]

This wave of re-redistricting activity has swiftly provoked court challenges—but at least in the federal courts, the challenges to mid-decade redistricting were just as swiftly rejected. Most recently, in *League of United Latin American Citizens (LULAC) v. Perry*,[5] the Supreme Court refused to invalidate the Texas legislature's decision to redraw district lines that had been created just two years before to conform to new census data.[6] The Court did not hear argument on the pure question of the curious timing,[7] and no Justice accepted amici's invitation

1. *See* David Barboza & Carl Hulse, *Texas' Republicans Fume; Democrats Remain AWOL*, N.Y. TIMES, May 14, 2003, at A17; Ralph Blumenthal, *After Bitter Fight, Texas Senate Redraws Congressional Districts*, N.Y. TIMES, Oct. 13, 2003, at A1; Editorial, *The Soviet Republic of Texas*, WASH. POST, Oct. 14, 2003, at A22; *Texas: Democrats on the Run, Again*, N.Y. TIMES, July 29, 2003, at A18; *Texas Search for Democrats is Ruled Illegal*, N.Y. TIMES, July 12, 2003, at A7.

2. Act of May 9, 2003, ch. 247, § 1, 2003 Colo. Sess. Laws 1645, 1645–58 (codified at COLO. REV. STAT. § 2-1-101 (2006)); 2006 Ga. Laws Act 436 (S.B. 386) (codified at GA. CODE ANN. § 28-2-2 (Supp. 2006)); 2004 N.H. Laws ch. 18 (H.B. 1292) (codified at N.H. REV. STAT. ANN. § 662:5 (LexisNexis Supp. 2006); Act of Nov. 25, 2003, ch. 434, §§ 1, 3, 2003 N.C. Sess. Laws ch. 434 (H.B. 3) (codified at N.C. GEN. STAT. §§ 120-1 to -2)); 2003 S.C. Laws Act 55 (S.B. 591) (codified at S.C. CODE ANN. §§ 2-1-45 to -75 (2005)). Others, such as Rhode Island and Virginia, made "technical adjustments" to their existing state legislative maps. *See, e.g.*, 2005 Rhode Island Laws Ch. 05-367 (05-S 1111) (codified at R.I. GEN. LAWS § 22-1-2 (Supp. 2006)); 2006 Va. Laws ch. 261 (H.B. 773) (codified at VA. CODE ANN. §§ 24.2-303.02, -304.02 (2006)); 2004 Va. Laws ch. 932 (H.B. 1427) (codified at VA. CODE § 24.2-303.2 (2006)). Finally, the Arizona independent redistricting commission redrew, in 2002, district lines set by a federal court earlier that year, but the federal court had designated its plan as valid for the 2002 elections only. *See* Navajo Nation v. Ariz. Ind. Redistricting Comm'n, 230 F. Supp. 2d 998, 1016 (D. Ariz. 2002).

3. *See* Editorial, *Deep in the Heart of New Mexico*, N.Y. TIMES, Sept. 9, 2003, at A30; David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1; Lynn Sweet, Editorial, *Jones Puts Remap on Drawing Board*, CHI. SUN-TIMES, Nov. 20, 2003, at 43.

4. *See* Will Lester, *Union Backing Redistricting Fights*, ASSOCIATED PRESS, Aug. 17, 2006; Pamela M. Prah, *First Salvos Prepared for Statehouse Redistricting Battles*, STATELINE.ORG, Aug. 23, 2006, http://www.stateline.org/live/details/story?contentId=136505.

5. 126 S. Ct. 2594 (2006).

6. *Id.* at 2626.

7. The Court granted argument in four consolidated appeals focusing on the partisan and racial motives for, and effect of, the plan. Three appellants touched on the issue of mid-decade redistricting in different ways, but none briefed the mid-decade timing as a violation in and of itself. *See* Brief for

to strike the plan down based on the timing alone.[8] Moreover, a majority of the Court resoundingly rejected the notion that the legislature's mid-decade decision to replace a valid map revealed any constitutionally improper legislative intent.[9] Instead, the Court found the Texas legislature's decision to revisit the existing court lines to be fully within the legislature's discretion. It recognized no prohibition in the federal Constitution or in federal statute limiting the Texas legislature's ability to adopt a new congressional map at any time, even if a valid plan was already in place.

The *LULAC* decision likely takes federal courts out of the business of regulating redistricting timing,[10] but the legal front is not all quiet. Many state constitutions regulate the timing of redistricting, and in most states, the constitutional language is sufficiently ambiguous to provoke an underappreciated dispute.[11] Actual or contemplated mid-decade redistricting activity in states with permissive or ambiguous redistricting timing language suggests that this redistricting timing will be a point of contention in the near future.

Appellants at 17–30, Jackson v. Perry, 126 S. Ct. 2594 (2006) (No. 05-276) (claiming that the mid-decade redistricting indicated improper partisanship); Brief for Travis County Appellants at 18, Travis County, Tex. v. Perry, 126 S. Ct. 2594 (2006) (No. 05-254) (claiming that the mid-decade redistricting indicated improper use of old population figures, and thereby violated the "one person, one vote" rule); Appellant's Brief on the Merits at 19–22, *LULAC*, 126 S. Ct. 2594 (2006) (raising both partisanship and population variance).

Two related cases arising out of the Texas re-districting argued that the mid-decade timing was itself illegal, *see* Jurisdictional Statement at 15–19, Henderson v. Perry, 126 S. Ct. 2976 (2006) (No. 04-10649); Jurisdictional Statement at 12–14, Lee v. Perry, 126 S. Ct. 2978 (2006) (No. 05-460), but the Court did not hear argument on these cases, and decided the cases summarily after issuing the *LULAC* decision. *See Henderson*, 126 S. Ct. 2976; *Lee*, 126 S. Ct. 2978.

8. *See* Brief of Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae Supporting Appellants at 1–3, *LULAC*, 126 S. Ct. 2594 (Nos. 05-204, 05-254, 05-276, 05-439); Brief of Samuel Issacharoff et al. as Amici Curiae in Support of Appellants at 21–27, *LULAC*, 126 S. Ct. 2594 (Nos. 05-204, 05-254, 05-276, 05-439).

9. *See LULAC*, 126 S. Ct. at 2612 (Kennedy, J., joined by Souter and Ginsburg, JJ.) ("In sum, we disagree with appellants' view that a legislature's decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders."); *id.* at 2652 (Roberts, C.J., joined by Alito, J., concurring in part) (agreeing that the plaintiffs presented no "reliable standard for identifying unconstitutional political gerrymanders," including the mid-decade nature of the claim); *id.* at 2663 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) (finding political gerrymandering claims—including claims based on the mid-decade nature of the claim—nonjusticiable). Justices Stevens and Breyer, in contrast, would have found the mid-decade timing to be persuasive evidence of improper partisan motive. *See id.* at 2632 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part).

10. In its most narrow construction, *LULAC* found no indication of impermissible partisanship in a legislature's decision to redistrict in mid-decade existing valid lines drawn by a court. It is possible that future courts confronting mid-decade redistricting of valid lines drawn by a *legislature* might distinguish *LULAC* on that basis, or that a future court squarely presented with a pure challenge to the mid-decade timing of a redistricting plan might find different constitutional grounds to invalidate such a plan. Still, *LULAC* offered no promising indications that the Supreme Court would be receptive to such claims.

11. It remains true that "[s]tate court decisions and state constitutional materials are too frequently ignored by both commentator and counsel." Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 620 (1951).

Here, we focus for the first time in the scholarly literature on the states' constitutional language and case law regarding redistricting timing.[12] States have a dizzying array of redistricting rules and procedures, which may even be different within the same state for state legislative and congressional redistricting.[13] Rules governing redistricting timing are no different. State constitutions range from explicit language prohibiting redistricting more than once following a federal census to explicit language permitting redistricting at a redistricting authority's pleasure. Some state constitutions are simply silent. Many constitutions require redistricting immediately following the decennial federal census; state Supreme Courts or Attorneys General have at times interpreted these requirements to prohibit repeated redistricting, and at other times have not done so. Some states have explicit exceptions, for example, permitting a state government to produce a plan to replace one drawn by a court or allowing the state to conduct its own census,[14] thereby permitting a new redistricting.

In this Article, we examine these constitutional provisions to chart the likely fault lines of future attempts to re-redraw the lines. In Part I, we begin with an overview of the broad context for redistricting: federal requirements, old and somewhat newer, that there be district lines and that the lines periodically be redrawn. In Part II, we turn to the state constitutional provisions regulating the timing for redrawing the lines. We offer a typology of such timing, noting the case law that has developed thus far and the areas that seem to be especially fruitful sources of future litigation. In Part III, we discuss some of the most common scenarios in which disputes over re-redistricting arise, and discuss their implications for how ambiguous state constitutional provisions are likely to be construed. Finally, in Part IV, we identify some of the effects of overly frequent redistricting, and offer some tentative conclusions about the future of redistricting timing regulation.

I. FEDERAL BACKGROUND

As Justice Kennedy noted in *LULAC*, no constitutional provision or federal statute explicitly prohibits mid-decade redistricting.[15] This is not to say, however, that federal law is entirely silent on redistricting timing.

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12. In an article concerning the ability of restrictions on mid-decade redistricting to promote procedurally some measure of partisan fairness in drawing district lines, Professor Adam Cox noted that some provisions in state constitutions and statutes regulate the timing of redistricting. *See* Adam Cox, Commentary, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 791–92 & nn.151–52 (2004). And in a new survey of state court decisions regarding reapportionment, Professor David Schultz summarized some of the most recent cases concerning the timing of redistricting. *See* David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L.J. 1087 (2006). Neither article seeks to analyze in detail the variety of redistricting timing provisions across the fifty states.

13. *See* Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 ST. POL. & POL'Y Q. 371, 377–85 (2004).

14. *See infra* note 48 and accompanying text.

15. 126 S. Ct. 2594, 2608 (2006).

First, there are provisions simply providing for the existence of districts, which created the occasional need for drawing district lines. Although Article I of the U.S. Constitution apportions congressional representatives to states according to the decennial census, it imposes no limitation on the geographic reach of Representatives' territory other than the state bounds.[16] Under the Constitution, states were able to provide for at-large statewide elections for their congressional delegations if they wished.[17] It was not until 1842 that Congress required each Representative to be elected from a single district.[18] With the advent of the single-district requirement, if an apportionment of congressional representation following a federal census changed the size of a state's congressional delegation,[19] the state had the responsibility to redraw district lines to accommodate the appropriate number of Representatives.

In the aftermath of the Civil War, Congress recognized that states might not immediately fulfill their duty to redistrict if their congressional delegation

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16. *See* U.S. CONST. art. I, § 2, cl. 3. Indeed, Justice Joseph Story noted one reason for the territorial freedom:

> It is observable, that the inhabitancy required [of a Representative] is within the state, and not within any particular district of the state, in which the member is chosen. In England, in former times, it was required, that all the members of the house of commons should be inhabitants of the places, for which they were chosen. But this was for a long time wholly disregarded in practice, and was at length repealed. . . . It was found by experience, that boroughs and cities were often better represented by men of eminence, and known patriotism, who were strangers to them, than by those chosen from their own vicinage. And to this very hour some of the proudest names in English history, as patriots and statesmen, have been the representatives of obscure, and, if one may so say, of ignoble boroughs.

2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 618, at 94 (Boston, Hilliard, Gray & Co. 1883).

17. Moreover, states frequently did so, at least until 1842. For example, six states elected their representatives at-large to the 27th Congress, which went into session on March 4, 1841. KENNETH MARTIS, THE HISTORICAL ATLAS OF UNITED STATES CONGRESSIONAL DISTRICTS: 1789–1983, at 76 (1982).

18. *See* Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491; Wesberry v. Sanders, 376 U.S. 1, 7–8 & n.11 (1964). The requirement was omitted in 1850, *see* Act of May 23, 1850, ch. 11, 9 Stat. 428, 432–33, but reinstated in 1862, *see* Act of July 14, 1862, ch. 170, 12 Stat. 572. The requirement was again omitted in the Reapportionment Act of June 18, 1929, ch. 28, 46 Stat. 21, 26–27, *see* Wood v. Broom, 287 U.S. 1, 6–8 (1932), and was reinstated in 1967, *see* Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (codified at 2 U.S.C. § 2c (2000)). *See generally* Colegrove v. Green, 328 U.S. 549 (1946).

Curiously, in 1843, one year after Congress required elections for Representatives from single-member districts, Georgia, Mississippi, Missouri, and New Hampshire elected their delegations at large. After vigorous debate, including challenges to the constitutionality of the Act of June 25, 1842, the House of Representatives ultimately decided to seat the delegations from these four states. 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 309–10, at 170–73 (1907), *available at* http://www.gpoaccess.gov/precedents/hinds/vol1.html.

19. Until 1929, the size of each state's congressional delegation was determined by its absolute population; in 1929, Congress failed to agree on a new apportionment increasing the size of the House of Representatives and as a compromise capped the total number of Representatives at the then-current number of 435, so that each state's congressional delegation is now determined by its proportion of the total national population. *See* Reapportionment Act of June 18, 1929, ch. 28, 46 Stat. 21, 26–27. The number was temporarily increased by two in the 1950s when Alaska and Hawaii were admitted to the Union and reverted back to 435 after the 1960 apportionment. *See* Hawaii Statehood Act, Pub. L. No. 86-3, § 8, 73 Stat. 4, 8 (1959); Alaska Statehood Act, Pub. L. No. 85-508, § 9, 72 Stat. 339, 345 (1958).

changed size.[20] Congress therefore provided that in the event that a state became entitled after a census to an additional Representative, but did not redistrict before the next election, the additional congressmember was to be elected at large.[21] The federal code still contemplates the possibility that a state might wait to redraw its congressional district lines until several years after a census changes the size of its allotted congressional delegation.[22]

It is unlikely, though, that provisions governing the timing of redistricting upon a change in apportionment would be invoked today, given the development of a more powerful constitutional mandate for the periodic redrawing of district lines. The same 1872 Act, contemplating the possibility of a late redistricting, specified that each district must contain "as nearly as practicable an equal number of inhabitants,"[23] but that requirement lapsed in 1929.[24] Then, in 1964, the Supreme Court decided *Wesberry v. Sanders*[25] and *Reynolds v. Sims*.[26] These cases articulated a constitutional equipopulation standard for congressional and state legislative districts, respectively, commonly known as the "one person, one vote" guarantee.[27]

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20. At the time, Congress would not have thought the federal courts amenable to compelling reapportionment or imposing new lines on their own if the states did not fulfill this duty to redistrict; until *Baker v. Carr*, 369 U.S. 186 (1962), federal courts generally refused to interfere with the process of drawing district lines. *See, e.g.*, *Colegrove*, 328 U.S. at 552, 556 (Frankfurter, J., plurality opinion) (finding the issue "not meet for judicial determination," and refusing to enter the "political thicket"); *id.* at 565 (Rutledge, J., concurring in the result) (finding reason to dismiss for "want of equity"); *see also Baker*, 369 U.S. at 280–97 (Frankfurter, J., dissenting) (cataloguing doctrine regarding judicial refusal to engage in political processes like the drawing of district lines).

21. *See* Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28; *see also* Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 13, 14. A contingency in the event that a state did not immediately redistrict after *losing* the right to a Representative in the census was not provided in the federal apportionment statute until 1941. *See* Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761, 762.

22. *See* 2 U.S.C. § 2a(c) (2000). Though it is still technically possible that congressional elections might be conducted under the at-large provisions of 2 U.S.C. § 2a(c), a related statute and the Court's decision in *Branch v. Smith*, 538 U.S. 254 (2003), ensure that such a possibility is exceedingly remote. The most recent version of the single-member district statute, codified at 2 U.S.C. § 2c, mandates that Representatives be elected "only" from single-member districts. *See supra* note 18 and accompanying text. A plurality of the *Branch* Court resolved the apparent conflict between § 2c (requiring single-member districts) and § 2a(c) (contemplating at-large elections) by holding that, under § 2c, courts must attempt to impose single-member congressional districts if a legislature fails to redistrict after apportionment causes a change in the size of the delegation. Only when, "on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one" will the at-large provisions of § 2a(c) govern. *Branch*, 538 U.S. at 275.

23. Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28.

24. *See* Wood v. Broom, 287 U.S. 1, 6–7 (1932).

25. 376 U.S. 1 (1964).

26. 377 U.S. 533 (1964).

27. *Avery v. Midland County, Texas*, 390 U.S. 474, 484–85 (1968), extended the equipopulation rule to local government elections. *Gray v. Sanders*, 372 U.S. 368, 376–81 (1963), implemented the "one person, one vote" standard for statewide offices, by striking down a system that aggregated votes within counties and then tallied the counties to determine a winning candidate. Under such a system, the statewide offices were effectively elected by county "districts" of unequal population.

The equipopulation standard of *Wesberry* and *Reynolds* has evolved since 1964. *See* Karcher v. Daggett, 462 U.S. 725, 730–31, 740–41 (1983) (requiring a good-faith attempt to achieve absolute

The Supreme Court's rulings on equal population tied redistricting more closely to the census. Before *Wesberry* and *Reynolds*, and aside from the fifty-seven years from 1872 through 1929, federal provisions regulating the timing of congressional redistricting applied only in the event of dramatic statewide population shifts changing the size of the state's congressional delegation. Since the "one person, one vote" cases, any change causing substantial inequality among the districts within a state will render redistricting—for both federal and state legislative lines—constitutionally necessary.[28]

The Supreme Court, however, also recognized that although population changes continuously, in order to preserve stability of representation, states need not subject districts to constant readjustment. Rather, the *Reynolds* Court held that it would suffice to tie the redistricting process to new decennial census numbers:

> That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. . . . While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. . . . [I]f reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.[29]

For all practical purposes, *Wesberry* and *Reynolds* require a state to redistrict

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population equality for congressional districts, while acknowledging the potential for small deviations required by permissible and consistently applied legislative policies); Brown v. Thomson, 462 U.S. 835, 842–43 (1983) (noting that state legislative districts may generally vary in population by up to ten percent without establishing a prima facie case under the Fourteenth Amendment); *see also* Cox v. Larios, 542 U.S. 947, 949 (2004) (summarily affirming a district court decision that deviation in state legislative districts of less than ten percent violates the Equal Protection Clause when deviation is not justified by a permissible purpose).

28. The "one person, one vote" cases and 2 U.S.C. § 2a(c) are not necessarily in conflict, but it is extremely unlikely that the federal statutory procedure for congressional elections absent redistricting would be invoked today. Theoretically, if a state's population grew sufficiently large to merit an additional Representative, but did so with perfect equality, such that the population in each legislative district remained substantially equal to the population in every other district, there would be no constitutional mandate to redraw the lines. In such a case, 2 U.S.C. § 2c would still require redistricting to accommodate the additional Representative in a single-member district. If, however, no responsible body were able to redraw the lines before the eve of an election, the additional congressperson could be elected at-large under 2 U.S.C. § 2a(c). *See supra* note 22.

Practically, of course, population growth within a state will be uneven, and the resulting disparity in district size will require redistricting before either of the above statutory procedures is considered.

29. *Reynolds*, 377 U.S. at 583–84.

immediately following a census—absent some other decennial timetable.[30] Should the state redistricting authority fail to fulfill its federal constitutional obligation, courts have proved willing to provide at least interim relief. Therefore, at least once following a census, district lines will be redrawn.

This federal tie to the census, however, is thus far a floor rather than a ceiling. Despite arguments advanced under the Guarantee Clause,[31] the Census Clause,[32] and the Elections Clause,[33] among others,[34] there is currently no recognized federal limit on redistricting more often than once per decade. As Justice Kennedy recently stated in *LULAC*: "With respect to a mid-decade redistricting to change districts drawn earlier in conformance with a decennial census, the Constitution and Congress state no explicit prohibition."[35] For this reason, the battleground over re-redistricting has largely shifted to the states.

II. STATE CONSTITUTIONAL PROVISIONS AND INTERPRETATIONS

As explained in Part I, under the "one person, one vote" cases, states are effectively required to revisit their district lines—both for Congress and their

30. Maine, for example, conducts its redistricting not immediately after a census, but rather in the third year of the decade. *See* ME. CONST. art. IV, pt. 1, § 2; *id.* pt. 2, § 2. The Hawaii Constitution once required state legislative redistricting every eight years, starting in 1973. *See* HAW. CONST. of 1968, art. III, § 4. However, the provision was amended in 1978 to track the federal census: "The year 1973, the year 1981, and every tenth year thereafter shall be reapportionment years." HAW. CONST. of 1978, art. IV, § 1. See *infra* note 48 for a discussion of mid-decade state census provisions in place before the "one person, one vote" cases.

31. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government. . . . "). Although the vast majority of cases brought under the Guarantee Clause have been found nonjusticiable, the Supreme Court has reserved the possibility that some such cases might in the future present justiciable questions. *See* New York v. United States, 505 U.S. 144, 184–85 (1992); *cf. In re* Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308, 315–18 (Colo. 1975) (holding that the Guarantee Clause *demands* that the court give effect to an initiative measure giving the judiciary a role in redistricting); Ryan P. Bates, Note, *Congressional Authority To Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 366–67 (2005) (arguing that Congress might rely on the Guarantee Clause in regulating state redistricting).

32. U.S. CONST. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.").

33. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.").

34. *See* Brief of Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae Supporting Appellants, *supra* note 8; Brief of Samuel Issacharoff et al. as Amici Curiae in Support of Appellants, *supra* note 8; Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 272–75 (2006) (arguing for a limit on mid-decade federal redistricting under Article I of the Constitution and the First Amendment).

35. LULAC v. Perry, 126 S. Ct. 2594, 2608 (2006) (Kennedy, J.); *see also* Burns v. Richardson, 384 U.S. 73, 96 (1966) (contemplating more frequent reapportionment in assessing the legitimacy of district size based on voter registration figures); Reynolds v. Sims, 377 U.S. 533, 584 (1964) ("And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable.").

state legislature—at least once per decade following the federal census. It is not surprising, therefore, to find that several states—particularly those apportioning a minimum number of legislative seats to each county—revisited the apportionment provisions of their constitutions in the 1960s in order to codify the federal equipopulation requirement.[36]

In states such as California, Illinois, Indiana, Michigan, North Carolina, and Wisconsin, among others, the obligation to redistrict periodically predated *Wesberry* and *Reynolds*.[37] These states' constitutions contained explicit provisions requiring districts to be drawn or apportioned by population, and required redistricting to occur in a timely manner following either a federal or state census.[38]

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36. *See, e.g.*, I. Ridgeway Davis, *Connecticut*, *in* REAPPORTIONMENT POLITICS: THE HISTORY OF REDISTRICTING IN THE 50 STATES 63, 65 (Leroy Hardy et al. eds., 1981) [hereinafter REAPPORTIONMENT POLITICS] ("The [Connecticut] constitutional convention met in July and recommended changes. . . . consistent with federal constitutional standards."); Manning J. Dauer et al., *Florida*, *in* REAPPORTIONMENT POLITICS, *supra*, at 74, 76 ("The 1965 [Florida] legislature had authorized creation of a Constitution Revision Commission [that recommended]. . . . districts . . . be equal in population."); Paul Chapman, *Maine*, *in* REAPPORTIONMENT POLITICS, *supra*, at 141, 144 ("In November 1966 the voters of Maine approved a constitutional referendum which revised the reapportionment system for the state Senate. . . . establish[ing] an ideal population size of 30,000 for districts."); Ernest Reock, *New Jersey*, *in* REAPPORTIONMENT POLITICS, *supra*, at 216, 217–18 ("The [New Jersey] legislature also authorized the calling of a constitutional convention in March 1966 to draw up the required permanent plan. . . . The new provisions . . . which still stand as the official constitutional language, stipulated that . . . the Assembly districts shall be composed of compact, contiguous territory having no less than 80 percent nor more than 120 percent of the average statewide population per member. . . . The constitutional limits for population variation were found to be too broad. . . . "); J. Allen Singleton, *Oklahoma*, *in* REAPPORTIONMENT POLITICS, *supra*, at 266, 268 ("Sections 9, 10, and 11 of Article V of the Oklahoma constitution were replaced in 1964 with new sections more in keeping with the U.S. Supreme Court's recent reapportionment decisions."); Sidney Wise, *Pennsylvania*, *in* REAPPORTIONMENT POLITICS, *supra*, 276, 277 ("When the delegates to the [Pennsylvania] constitutional convention of 1967–68 confronted the several U.S. Supreme Court decisions on reapportionment, and the subsequent decision by Pennsylvania courts, they were compelled to reexamine the 1874 system in its entirety."); Richard L. Wilson, *Tennessee*, *in* REAPPORTIONMENT POLITICS, *supra*, at 302–03 ("[T]he 1965 [Tennessee] Constitutional Convention produced a new provision that allowed for the splitting of urban counties . . . it was possible finally for legislative districts inside the urban counties to be substantively equal in population."); *see also* OHIO CONST. art. XI cmt. (West 2006) (recognizing that Ohio's 1967 constitutional amendments were "adopted in the wake of the mandate of the US Supreme Court that apportionment of legislative seats must follow the 'one person-one vote' principle").

37. At the time that *Reynolds* was decided, "[r]eallocation of legislative seats every 10 years coincide[d] with the prescribed practice in 41 of the States." *Reynolds*, 377 U.S. at 583 (citation omitted).

38. *See, e.g.*, IND. CONST. of 1851, art. IV, §§ 4–5 (providing for an enumeration of adult white male inhabitant every six years, and directing that legislators be "apportioned among the several counties" "at the session next following each period of making such enumeration"), *cited in* Denney v. State *ex rel.* Basler, 42 N.E. 929, 931–32 (Ind. 1896); MICH. CONST. of 1835, art. IV, § 3 ("The Legislature shall provide by law for an enumeration of the inhabitants of this state in the years [1837] and [1845], and every ten years after that said last mentioned time; and at the first session after each enumeration so made as aforesaid and also after each enumeration made by the authority of the United States, the legislature shall apportion anew the representatives and senators among the several counties and districts, according to the number of white inhabitants."); WIS. CONST. of 1848, art. IV, § 3 (requiring that "[t]he legislature shall provide by law for an enumeration of the inhabitants of the state in the year 1855, and at the end of every ten years thereafter; and at their first session after such enumeration, and

Until the 1960s, however, enforcement of states' textual redistricting obligations was spotty. State courts, like their federal counterparts, were hesitant to intervene when the state had not redistricted in a timely manner. Even when state courts found a justiciable controversy,[39] and then a violation of the state constitution, they were loathe to force the creation of new districts when a state's redistricting authority failed to act.[40] For example, the Kentucky Supreme Court struck down a 1906 state legislative plan under the state constitu-

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also after each enumeration made by the authority of the United States, shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants."), *cited in* State *ex rel*. Lamb v. Cunningham, 53 N.W. 35, 36 n.1 (Wis. 1892); Wheeler v. Herbert, 92 P. 353, 358 (Cal. 1907) (noting that article IV, section 6, of the California Constitution provided in 1879 that "[t]he census taken under the direction of the Congress of the United States in the year [1880], and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first session after each census, adjust such districts and re-apportion the representation so as to preserve them as near equal in population as may be"); People *ex rel*. Mooney v. Hutchinson, 50 N.E. 599, 601 (Ill. 1898) (stating that article IV, section 6, of the Illinois Constitution of 1870 likewise provided that "[t]he general assembly shall apportion the state every ten years . . . by dividing the population of the state, as ascertained by the federal census, by the number 51, and the quotient shall be the ratio of representation in the senate"); Comm'rs of Granville County v. Ballard, 69 N.C. 18 (1873) (noting that the N.C. CONST. of 1868, art. II, § 5, provides that "after each census the Legislature shall divide the State into districts, each of which shall elect one or more Senators, as may be prescribed, and the districts so laid off shall remain unaltered until after another census").

In most states, the district lines followed county boundaries where possible, so district lines would change only to embrace new combinations of counties or subdivide counties that had grown too large to encompass only one district. *See, e.g.*, *Wheeler*, 92 P. at 358 (noting the requirement that "[i]n the formation of such districts, no county, or city and county, shall be divided, unless it contain sufficient population within itself to form two or more districts; nor shall a part of any county, or of any city and county, be united with any other county, or city and county, in forming any district"). In some states, county boundaries were absolute, and representatives were simply reapportioned to the counties after each census, without any need to redraw district lines. *See, e.g.*, N.Y. CONST. of 1822, art. I, § 7 ("The members of the assembly shall be . . . apportioned among the several counties of the state, as nearly as may be, according to the numbers of their respective inhabitants. . . . An apportionment of members of assembly shall be made by the legislature, at its first session after the return of every enumeration; and when made, shall remain unaltered until another enumeration shall have been taken.").

39. "In 1938, the courts of twenty-two states had exercised the power, or had stated that they had the power, to review legislative apportionment acts upon constitutional grounds, and no court had denied that it possessed such power." Jones v. Freeman, 146 P.2d 564, 570 (Okla. 1943).

40. *See, e.g.*, *id*. at 569–72 (finding jurisdiction to review the legislature's failure to apportion, and finding a "plain" constitutional violation, but refusing to draw lines or demand that the legislature do so); Denney v. State *ex rel*. Basler, 42 N.E. 929, 940 (Ind. 1896) (same).

Though state courts generally refused to draw district lines or force the legislature to act, they found no impropriety in restraining the effect of overly frequent legislative action. For example, the California legislature drew new district lines, following county boundaries, according to the state's constitutional command, in 1901. When the California legislature adjusted the underlying county boundaries in mid-decade in 1907, however, the California Supreme Court ruled that the existing legislative district boundaries would remain in effect. The court construed California's constitution to prohibit the adoption of a new legislative map in mid-decade to replace a constitutionally acceptable map drawn following the last census; as such, the legislative bounds could not move even upon a change in the underlying county lines. *See Wheeler*, 92 P. at 357–60; *see also Mooney*, 50 N.E. at 601–04 (finding that the Illinois constitution prohibited redistricting more than once per decade, and striking down an attempted apportionment in 1898, given that the legislature had already drawn valid district lines in 1893).

tion[41] because the largest district had a population seven times greater than the smallest.[42] Rather than draw new lines, however, the court reverted back to the 1893 districts, which it acknowledged were also of unequal population. The court expressed the hope that "[t]he next Legislature . . . impelled by their sense of duty, the obligations of their oath of office, together with that spirit of justice which is the heritage of the race, will redistrict the State as the Constitution requires."[43]

Then came *Baker v. Carr*,[44] the case that famously led federal courts into the "political thicket"[45] by holding claims involving differentially populated legislative districts justiciable under the Fourteenth Amendment.[46] Since *Baker*, the gloves are off. Courts, state and federal, have devoted more time to construing state constitutional provisions, both new and old, governing redistricting—including the timing of redistricting efforts.

It is the legal construction of these provisions—now the only substantial regulation on the timing of redistricting—that is this Article's concern.[47] These provisions show extreme variation from state to state. Some states redistrict immediately after a census; some wait for a year or two. Some states provide for a state census process to supplement the federal census (potentially allowing population figures—and new lines—outside of the federal decennial cycle);[48]

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41. Kentucky's constitution, adopted in 1891, provided that districts be "as nearly equal in population as may be without dividing any county." KY. CONST. § 33.

42. Ragland v. Anderson, 100 S.W. 865, 866 (Ky. 1907).

43. *Id*. In fact, the legislature did not produce another valid apportionment until 1918. E. LYNN AUBREY ET AL., LEGISLATIVE RESEARCH COMM., INFORMATIONAL BULLETIN NO. 137, KENTUCKY GOVERNMENT 45 (2003), *available at* http://www.lrc.ky.gov/lrcpubs/IB137.pdf.

44. 369 U.S. 186 (1962).

45. Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) (explaining that, given the textual reservation of authority to Congress of control over federal elections, "[c]ourts ought not to enter [the] political thicket" of remedying unfairness in federal districts).

46. *Baker*, 369 U.S. at 237.

47. This Article considers only constitutional restrictions. Statutory restrictions, like a redistricting plan itself, may be replaced if one party has control of the legislative process. Constitutional barriers provide higher hurdles, but those hurdles are also not irrevocable: they may be torn down through constitutional revision or where courts perceive that an unseverable portion of a provision regulating timing conflicts with federal law. Many state redistricting provisions that were insufficiently able to accommodate equal-population districts, for example, were struck down in the immediate wake of the "one person, one vote" cases. *See, e.g.*, Roman v. Sincock, 377 U.S. 695 (1964) (striking down portions of the Delaware Constitution inconsistent with the "one person, one vote" cases); Connor v. Johnson, 256 F. Supp. 962 (S.D. Miss. 1966) (same for Mississippi); Yancey v. Faubus, 238 F. Supp. 290 (E.D. Ark. 1965) (same for Arkansas); Buckley v. Hoff, 234 F. Supp. 191 (D. Vt. 1964) (same for Vermont); Harris v. Anderson, 400 P.2d 25 (Kan. 1965) (same for Kansas); Jackman v. Bodine, 205 A.2d 713 (N.J. 1964) (same for New Jersey).

48. State census provisions were once much more common. For example, Ohio's 1802 constitution provided for an enumeration of "white male inhabitants, above twenty-one years of age," to be conducted every four years—and tied representation in the state legislature to this census. OHIO CONST. of 1802, art. I, § 2; *see also* IND. CONST. of 1851, art. IV, §§ 4–6 (establishing an enumeration every six years, and providing for apportionment of representatives after each such enumeration); KAN. CONST. of 1859, art. X, § 2 (providing for apportionment based on a census conducted every five years); MICH. CONST. of 1835, art. IV, § 3 (providing for a state census in 1845, and every ten years thereafter, to

most do not. Some states allow only one round of redistricting per decade; some give carte blanche to redraw at will. And on this last axis in particular, most states' laws exhibit a substantial degree of ambiguity.

This Article places state constitutional provisions regarding redistricting timing into four categories: (1) those that make no reference to redistricting timing, (2) those that expressly permit redistricting at any time, (3) those that expressly limit redistricting to once a decade following the federal census, and (4) those that require a state to draw districts following the census but do not have an explicit prohibition on redistricting at other times. As discussed in Part II.D, this last category is where ambiguity creates the largest potential for a new front of litigation. As a result, this Article examines the limited litigation that has already arisen: court rulings and attorneys general opinions that further interpret state constitutional provisions on redistricting timing.[49] A summary of the constitutional citations, state supreme court rulings, and attorney general opinions regarding redistricting timing are presented in Appendix 1 and Appendix 2, for state legislative and congressional redistricting, respectively.

A. NO TIMING PROVISION

All states except Michigan have some constitutional language regarding the timing of state legislative redistricting. Michigan had such language, but the relevant constitutional sections were invalidated by courts and have not been replaced.[50] In contrast to state legislative provisions, only fourteen state constitutions mention the timing of *congressional* redistricting.[51] In Kentucky and

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supplement the federal census, and requiring reapportionment after each enumeration); S.D. CONST. art. III, § 5 (requiring, in 1889, a state census in 1895, and every ten years thereafter, to supplement the federal census, and requiring redistricting after each five-year period), *quoted in In re* State Census, 62 N.W. 129, 130 (S.D. 1895); WIS. CONST. art. IV, § 3 (requiring, in 1848, a state census "in the year 1855, and at the end of every ten years thereafter" to supplement the federal census, and requiring redistricting after each five-year period), *quoted in* State *ex rel*. Lamb v. Cunningham, 53 N.W. 35, 36 n.1 (Wis. 1892). Only Maine, New Hampshire, New York, and Ohio now permit state legislative redistricting to be based on a state census supplementing or substituting for the federal census. *See* ME. CONST. art. IV, pt. 1, § 2; N.H. CONST. pt. 2, art. 9; N.Y. CONST. art. III, § 4; OHIO CONST. art. XI, § 2 (providing for the use of state census data only if the federal census data is unavailable).

49. In placing state constitutional provisions into these categories, this Article adopts a theory of state constitutional interpretation placing primacy on the given text. When the text is ambiguous—itself a judgment open to question—the Article notes the ambiguity and provides the relevant interpretations of the authoritative interpretive bodies in the state. The Article does not purport to suggest any particular methodology for resolving the ambiguity where it exists; states have in the past compared current text with prior provisions or failed amendments, addressed the structure of the redistricting section as a whole, reviewed legislative history, surveyed sister state decisions, and looked to state and federal public policy to address ambiguous provisions governing redistricting timing.

50. *See In re* Apportionment of State Legislature—1982, 321 N.W.2d 565, 582 (Mich. 1982).

51. *See* ARIZ. CONST. art. 4, pt. 2, § 1; CAL. CONST. art. XXI, § 1; COLO. CONST. art. V, § 48; CONN. CONST. art. III, § 6; HAW. CONST. art. IV, §§ 1, 2, 9; IDAHO CONST. art. III, § 2; MO. CONST. art. III, § 45; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2; S.C. CONST. art. VII, § 13; UTAH CONST. art. IX, § 1; VA. CONST. art. II, § 6; WASH. CONST. art. 2, § 43; WYO. CONST. art. III, § 49; *see also infra* note 158 for a discussion of legal arguments concerning the ability of state constitutions to regulate congressional redistricting.

Nebraska, where the state constitutions make no such mention, courts have interpreted the silence to mean that there is no limit on the frequency of permissible congressional redistricting activity.[52] In the remaining thirty-four states without explicit provisions governing the timing of congressional redistricting, the courts have not yet spoken—either to limit legislative authority based on some other state constitutional provision or to give affirmative sanction to a free-for-all.

B. EXPRESSLY PERMITTED

In a few states, the legislature's plenary power over the timing of redistricting is explicit. South Carolina and Wyoming clearly permit redistricting at any time for congressional lines.[53] Mississippi, South Carolina, Tennessee, and Vermont do the same for state legislative districts.[54]

Missouri presents an unusual case: its constitution appears to contain an express reservation of redistricting authority at any time, but this provision has been upended by a contrary judicial interpretation. The Missouri Constitution states: "The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. Such districts may be altered from time to time as public convenience may require."[55] Normally, such language permits redistricting at any point.[56] The Missouri Supreme Court, however, found that "because the decennial census is made the basis of reapportionment," "only one valid appor-

52. *See* Exon v. Tiemann, 279 F. Supp. 603, 608 (D. Neb. 1967); Richardson v. McChesney, 108 S.W. 322, 323 (Ky. 1908). *But see* Op. Neb. Att'y Gen. No. 02003 (Jan. 28, 2002), *available at* 2002 WL 171234 (criticizing the *Exon* court for relying on a comparison with a provision of the Nebraska Constitution that the court did not recognize as obsolete).

53. *See* S.C. CONST. art. VII, § 13 ("The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts . . . as it may deem wise and proper. . . . "); WYO. CONST. art. III, § 49 ("Congressional districts may be altered from time to time as public convenience may require."). Like many other state constitutions, South Carolina's redistricting provision provided for apportionment of representatives among counties. *See supra* note 38. In the wake of the "one person, one vote" cases, such provisions were generally construed to conform to federal constitutional requirements (e.g., expressing a general preference for maintaining county boundaries, but subject to the need to provide substantial population equality), rather than being struck down entirely. *See* S.C. State Conference of Branches of NAACP, Inc. v. Riley, 533 F. Supp. 1178, 1180 (D.S.C. 1982). The redistricting timing provisions of such constitutional sections generally remain valid.

54. *See* MISS. CONST. art. 13, § 254 ("The legislature . . . may, at any other time, . . . apportion the state . . . into consecutively numbered senatorial and representative districts of contiguous territory."); S.C. CONST. art. III, § 3 ("[T]he General Assembly may at any time, in its discretion . . . make the apportionment of [state legislative districts]."); TENN. CONST. art. II, § 4 ("Nothing in this . . . Article II shall deny to the General Assembly the right at any time to apportion one House of the General Assembly. . . . "); VT. CONST. ch. II, § 73 ("[A]t such other times as the General Assembly finds necessary, it shall revise the boundaries of the legislative districts. . . . ").

55. MO. CONST. art. III, § 10.

56. *See, e.g.*, People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1225 (Colo. 2003) (interpreting constitutional language permitting redistricting "from time to time" as containing no limitation on mid-decade redistricting).

tionment is intended for each decennial period."[57] As such, Missouri is now subject to a once-per-decade rule.[58]

C. REDISTRICTING ONCE PER DECADE

Although Missouri's experience above shows that express language is no guarantee, it appears clear from constitutional text that state legislative redistricting may occur not more than once per decade in ten states,[59] and that congressional redistricting is similarly restricted in two states.[60] The particular language in each state varies. In states like New Mexico, the constitution clearly establishes a once-per-census limit without mandating a particular schedule: "Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its member-

57. Preisler v. Doherty, 284 S.W.2d 427, 436–37 (Mo. 1955). The court also found it significant that redistricting power was committed to a commission, which was empowered to act in the year following the census; the court implied that the explicit grant of power to act in the given time period was exclusive. *See id.* at 436; *see also* MO. CONST. art. III, § 7.

58. It is also worth noting that although portions of the Missouri Constitution's redistricting procedures have been amended since 1955, the basic commission structure remains the same, as does the language in article 3, section 10 construed by the *Preisler* court. The court's holding should therefore still govern today.

59. *See* ALA. CONST. art. IX, § 198 ("[The] apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken."); *id.* § 200 ("[S]uch districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken. . . . "); ALASKA CONST. art. VI, § 10 ("The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States."); CONN. CONST. art. III, § 6 ("The assembly and senatorial districts and congressional districts as now established by law shall continue until the regular session of the general assembly next after the completion of the next census of the United States."); N.J. CONST. art. IV, § 3, para. 3 ("[S]uch establishment and apportionment shall be used thereafter for the election of members of the Legislature and shall remain unaltered until the following decennial census of the United States for New Jersey shall have been received by the Governor."); N.M. CONST. art. IV, § 3 ("Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership."); N.Y. CONST. art. III, § 4 ("Such districts . . . shall remain unaltered until the first year of the next decade. . . . "); N.C. CONST. art. II, § 3 ("When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress."); *id.* § 5 (same for Representatives); OHIO CONST. art. XI, § 6 ("District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census. . . . "); PA. CONST. art. II, § 17 ("[T]he districts . . . provided [in a final plan] shall be used thereafter in elections to the General Assembly until the next reapportionment as required under this section seventeen."); W. VA. CONST. art. VI, § 10 ("When [the districts are] so declared they shall apply to the first general election for members of the legislature, to be thereafter held, and shall continue in force unchanged, until such districts shall be altered, and delegates apportioned, under the succeeding census.").

60. *See* CONN. CONST. art. III, § 6 ("The assembly and senatorial districts and congressional districts as now established by law shall continue until the regular session of the general assembly next after the completion of the next census of the United States."); N.J. CONST. art. II, § 2, para. 8 ("The establishment of Congressional districts shall be used thereafter for the election of members of the House of Representatives and shall remain unaltered through the next year ending in zero in which a federal census for this State is taken.").

ship."[61] In such a state, even if the redistricting authority fails to produce a map for the first election following a census, it is still constitutionally guaranteed one—but only one—opportunity to redraw the lines.

Other states, such as New Jersey, specify not only that the redistricting authority has only one opportunity per decade to draw the lines ("shall remain unaltered until the following decennial census") but also that the lines shall be drawn in a specific year ("on or before November 15 of the year in which such census is taken").[62] In such states, the redistricting authority may have forfeited its one chance to draw the lines if it fails to produce a map during the designated period. In Colorado, the state supreme court held that the 2001 legislature forfeited its sole opportunity to draw congressional lines in precisely such a scenario.[63]

The Washington State Constitution establishes a notable variant of the once-per-decade rule for both congressional and state legislative districts. In Washington, a redistricting commission is the primary redistricting body of the state; a legislature may amend the commission's plan, but may only do so by a two-thirds supermajority.[64] The constitution expressly provides that once a districting plan is in place, a legislature may reconvene the redistricting commission to start again—even in mid-decade—but such reconvening also requires a two-thirds supermajority in the legislature.[65]

D. TIE TO THE CENSUS

In the remaining states—thirty-three states for state legislative districts and nine states for congressional districts—the state constitution provides a given period for redistricting, but the language neither expressly forbids nor expressly permits redrawing the lines outside of the contemplated redistricting period.[66] Most of these states simply tie redistricting activity in some manner to an official census. Consider, for example, the provision governing redistricting in California: "In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts. . . . "[67] Clearly, this provision requires the legislature to redistrict in the year after each federal census. But does it also prohibit a redistricting authority from revisiting the district lines later in the decade?

The only definitive answer lies in the construction of each state's constitution by state courts and attorneys general. In this arena, it is very difficult to draw general lessons, or even lessons from one state to another. Unlike constitutional

61. N.M. CONST. art. IV, § 3.
62. N.J. CONST. art. IV, § 3, paras. 1, 3.
63. *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1226–27 (Colo. 2003); *infra* Part III.B.
64. WASH. CONST. art. II, § 43(7).
65. *Id.* § 43(8).
66. *See infra* apps.1 & 2.
67. CAL. CONST. art XXI, § 1.

provisions pressed on states in waves—like the Blaine Amendments of the nineteenth century[68] or the more recent series of constitutional amendments regulating victims' rights[69] or marriage[70]—few states' redistricting provisions seem to be driven by the same precise model, especially in the details of timing. And unlike state constitutional provisions derived from federal constitutional guarantees, there is little federal jurisprudence of the timing of redistricting that a state may adopt as an aid—or departure point—in interpreting its own constitution.[71] Even where states share particular phrases tying the redistricting process to a census, the provision's context in one state may drive an interpretation different from a very similar provision's construction in another state.[72] As the Nebraska Attorney General recognized, one state's rule on mid-decade redistricting cannot be inferred from a general rule in other states "where a unique provision of a state constitution is at issue."[73]

Therefore, we turn to the state-by-state details. The clarifying interpretations of facially ambiguous timing provisions can be classified in a similar manner as their express counterparts above: (1) states in which the ambiguous language has been construed to permit repeated mid-decade redistricting, (2) states in which the language has been construed to prohibit repeated mid-decade redistricting, and (3) states in which no actor has clarified the ambiguous provision currently in effect.

1. Mid-Decade Redistricting Permitted

Only three states have thus far construed constitutional language requiring

68. *See* Martin H. Belsky, Locke v. Davey*: States' Rights Meet the New Establishment Clause*, 40 TULSA L. REV. 279, 282 n.18 (2004). The Blaine Amendments generally ban the use of public funds for support of educational institutions with a religious affiliation. *Id.* at 282.

69. *See* Jennifer Friesen, *The Ghost of Initiatives Yet To Come*, 34 WILLAMETTE L. REV. 639, 639–44 (1998). Most of the state victims' rights amendments "secur[e] opportunities for citizens injured by a crime to participate fairly in the criminal justice process," and specifically include mandates that prosecutors consult crime victims at various stages of a prosecution. *Id.* at 641–42.

70. *See* Cynthia M. Davis, *"The Great Divorce" of Government and Marriage: Changing the Nature of the Gay Marriage Debate*, 89 MARQ. L. REV. 795, 795 (2006). These state constitutional amendments generally limit the definition of "marriage" to a recognized legal union between a man and a woman. *Id.*

71. *Cf.* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (urging states to view judicial interpretation of the federal Bill of Rights as a point of departure in interpreting similar state guarantees, which might contain more robust protection of individual liberties).

72. *But cf.* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1152, 1156 (1993) (critiquing the "doctrine of unique state sources, under which the authority of the state court is tied to its responsibility to interpret state constitutional text, state history, and the particular values of the state community," and suggesting that states look for guidance in interpreting their constitutions to greater shared principles). It is also true that despite differing constitutional language, state courts often take pains to catalog the like-minded decisions of sister states in interpreting the timing of redistricting provisions—though such catalogs may be heavy on citation and light on analysis. *See, e.g.*, Legislature v. Deukmejian, 669 P.2d 17, 23–24 (Cal. 1983); People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1240–42 (Colo. 2003).

73. Op. Neb. Att'y Gen. No. 02003 (Jan. 28, 2002), *available at* 2002 WL 171234.

redistricting after a census to permit further redistricting at any time. In both Louisiana and Nebraska, the state Attorney General has interpreted the state's constitutional timing provisions to permit state legislative redistricting at the legislature's pleasure; in Georgia, the state supreme court has done so.[74] The Georgia decision hinges primarily on the current state constitutional text.[75] The relevant constitutional section states that "[t]he apportionment of the Senate and of the House of Representatives shall be changed by the General Assembly as necessary after each United States decennial census."[76] The Georgia Supreme Court found that although this provision set a once-per-decade floor on the frequency with which the legislature may redistrict, the fact that redistricting was required after a census did not imply any limitation on the frequency with which additional redistricting might be permitted.[77] Mid-decade redistricting, in the court's opinion, is solely a matter of "unfettered legislative discretion."[78]

Nebraska, in contrast, provides an example of how the particular historical context of a specific provision governs its interpretation. Since 1875, the Nebraska Constitution had strictly limited the frequency of redistricting efforts to "once in ten years"; 1962 amendments to the state constitution maintained these limits.[79] In 1965, however, the section was amended to read, "The Legislature shall redistrict the state after each federal decennial census"—without the "once in ten years" limitation.[80] In construing the meaning of this ambiguous provision, the Nebraska Attorney General was careful to abide by state laws of constitutional construction, tying his search for legislative intent to a state court's approval of the practice.[81] His opinion then cited floor debate regarding a withdrawn amendment to this 1965 revision, which would have

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74. Op. La. Att'y Gen. No. 99-54 (Apr. 14, 1999), *available at* 1999 WL 288874; Op. Neb. Att'y Gen. No. 02003 (Jan. 28, 2002), *available at* 2002 WL 171234; *see also* Blum v. Schrader, 637 S.E.2d 396 (Ga. 2006).

75. *Cf.* Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *13 (N.D. Ga. May 16, 2006) (noting the Georgia state courts' primary responsibility for construing the relevant constitutional text).

76. GA. CONST. art. III, § 2, para. 2.

77. *Blum*, 637 S.E.2d at 398–399.

78. *Id.* at 399. Scholars and practitioners have noted that unlike the federal Constitution, which "is structured as a grant of limited and enumerated powers, . . . state constitutions serve as limitations on the otherwise plenary power of state governments." Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996) (citing Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 241 (Bradley D. McGraw ed., 1985)). This general principle has been used to support the argument that ambiguous state provisions providing for decennial redistricting should be construed so as to preserve legislative power to redistrict at other times. *See, e.g.*, Op. Neb. Att'y Gen. No. 02003, *available at* 2002 WL 171234 (Jan. 28, 2002) (finding that because state constitutions generally restrict plenary state legislative power, the legislature is free to act where the constitution imposes no specific restriction, and therefore construing an ambiguous constitutional provision to permit greater legislative authority); Op. La. Att'y Gen. No. 99-54 (Apr. 14, 1999), *available at* 1999 WL 288874 (same).

79. Op. Neb. Att'y Gen. No. 02003 (Jan. 28, 2002), *available at* 2002 WL 171234.

80. NEB. CONST. art. III, § 5; 1965 Neb. Laws 856–57 (L.B. 923).

81. Op. Neb. Att'y Gen. No. 02003 (Jan. 28, 2002), *available at* 2002 WL 171234 ("When a constitutional provision is ambiguous, it is also appropriate to search for intent. 'Effect must be given to

inserted the word "once" into the phrase.[82] Based on the legislative history of the constitutional amendment—and in particular, based on the withdrawal of the limiting amendment—the Attorney General concluded that the legislature intended to permit redistricting at the legislature's pleasure.[83]

2. Mid-Decade Redistricting Prohibited

Where the Nebraska Attorney General found no limits on mid-decade redistricting by contrasting the present provision with a more restrictive alternative, the Supreme Court of Colorado came to the opposite conclusion to limit mid-decade redistricting when faced with seemingly similar language[84] by contrasting its redistricting provision with a more permissive alternative.[85] The court examined Colorado's 1876 constitution, which expressly permitted state legislative redistricting "from time to time,"[86] whereas congressional redistricting was to occur "when a new apportionment shall be made by Congress."[87] It found the comparison instructive in interpreting the current congressional redistricting provision, which maintains the limiting clause.[88] The Supreme Court of Colorado, finding a prohibition on mid-decade congressional redistricting, reasoned that "[h]ad the framers wished to have congressional district boundaries redrawn more than once per census period, they would have included the 'from time to time' language contained in the legislative redistricting provision. They did not."[89]

California language was similarly found by that state's supreme court to prohibit mid-decade congressional and state legislative redistricting.[90] The California Supreme Court confronted a ballot initiative that attempted to redraw valid lines passed by the legislature just a few years before. The state constitu-

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the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions.'" (quoting *In re* Applications A-16027, 495 N.W.2d 23, 25 (Neb. 1993))).

82. *Id.*

83. *Id.*

84. *But see* Blum v. Schrader, 637 S.E.2d 396, 399 (Ga. 2006) (determining that the operative phrase "after each federal decennial census"—also the operative phrase in Nebraska—is not meaningfully similar to Colorado's requirement to draw districts "when a new apportionment shall be made by Congress").

85. *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1242–43 (Colo. 2003).

86. COLO. CONST. of 1876, art. V, § 47.

87. *Id.* art. V, § 44; *Salazar*, 79 P.3d at 1235–36. In 1975, the constitution was amended, which placed state legislative redistricting into the hands of a commission while the congressional redistricting process was unaltered. For more information, see Colorado Ballot Initiative No. 9 (1974), *available at* http://www.leg.state.co.us/lcs/ballothistory.nsf/ (expand "1974" list; then expand "Initiative" folder; then follow "No. 9" hyperlink).

88. *See* COLO. CONST. art. V, § 44; *Salazar*, 79 P.3d at 1242–43.

89. *Salazar*, 79 P.3d at 1225. Colorado's current provision governing the timing of state legislative districting calls for districts to be "established, revised, or altered" "[a]fter each federal census of the United States." COLO. CONST. art. V, § 48. Although this provision also contains no explicit textual prohibition on mid-decade redistricting, given the court's analysis in *Salazar*, it is likely that courts would construe the constitutional language to impose such a bar.

90. *See* Legislature v. Deukmejian, 669 P.2d 17, 22–25 (Cal. 1983).

tion, meanwhile, stated only that "[i]n the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts."[91] Examining this provision in light of a long history of litigation regarding mid-decade redistricting, the court concluded that in tying redistricting to the census, "the drafters [of the constitutional provision] intended thereby that the state be redistricted immediately after each decennial census and not again thereafter until the next census."[92]

In three other states—New Hampshire, South Dakota, and Wisconsin—courts have also construed the current state constitutional language to restrict state legislative redistricting to once per decade following the census.[93] In Illinois, the state constitution has been amended since such a court decision, but because the current provision tying redistricting to the census is similar,[94] if not more strongly indicative of a mid-decade prohibition, the court's 1898 construction is still likely to be persuasive.[95] The Kansas Supreme Court's earlier decision is also likely to remain valid law in Kansas, not because the language of the superseded provision construed by the court is similar to its present equivalent, but rather because the court expressed its mid-decade re-redistricting prohibi-

91. CAL. CONST. art. XXI, § 1.

92. *Deukmejian*, 669 P.2d at 22. In particular, the court focused on article IV, section 6, of the state's 1879 constitution—which was quite similar to its present counterpart—and previous constructions of that constitutional provision. *See* CAL. CONST. of 1879 art. IV, § 6 ("The census taken under the direction of the Congress of the United States, in the year [1880], and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first session after each census, adjust such districts and re-apportion the representation so as to preserve them as near equal in population as may be."); Wheeler v. Herbert, 92 P. 353, 359 (Cal. 1907) (using the familiar maxim *expression unius est exclusion alterius* to find that the express grant of power to redistrict in the first session after the census precluded further redistricting within the decade). This provision was repealed in 1980. *Deukmejian*, 669 P.2d at 24–25.

93. *See infra* text accompanying notes 121–129; *infra* note 120; State *ex rel.* Smith v. Zimmerman, 63 N.W.2d 52, 56 (Wis. 1954) ("It is now settled that without a constitutional change permitting it no more than one legislative apportionment may be made in the interval between two federal enumerations."); State *ex rel*. Thomson v. Zimmerman, 60 N.W.2d 416, 424 (Wis. 1953) ("[N]o more than one valid apportionment may be made in the period between the federal enumerations."). Although portions of the relevant Wisconsin constitutional provision have been amended since 1954, the operative language in *Smith* and *Thomson* remains: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." WIS. CONST. art. IV, § 3.

94. *Compare* ILL. CONST. of 1870, art. IV, § 6 ("The general assembly shall apportion the State every ten years, beginning with the year 1871. . . . "), *with* ILL. CONST. art. IV, § 3 ("In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.").

95. *See* People *ex rel.* Mooney v. Hutchinson, 50 N.E. 599 (Ill. 1898) (construing the Illinois Constitution of 1870 to prohibit state legislative redistricting more frequently than once per decade); *cf. Deukmejian*, 669 P.2d at 22 (construing a provision using court interpretations of earlier, repealed language).

tion as a general rule.[96] In addition to these judicial interpretations, the Indiana Attorney General has issued an opinion restricting state legislative redistricting to once a decade.[97]

3. No Clarifying Interpretation . . . Yet

In many states, however—twenty-three states with state legislative redistricting timing provisions and six states with congressional redistricting timing provisions—the ambiguous constitutional language has not yet been construed. These states, and the states that are simply silent,[98] represent the likely battleground of future litigation.

III. COMMON RE-REDISTRICTING SCENARIOS

To the extent that the ambiguous provisions above are given greater shape, through litigation or otherwise, it is certainly possible that the issue will arise in the face of a naked legislative attempt to redraw valid lines adopted by another legislature earlier in the decade. In such circumstances, there will be little guidance for a court other than the state's constitutional provision itself—and policy arguments to fill in the interstices.[99] In several other scenarios, however, the particular context of the attempt to redistrict may drive a court's interpretation of the constitutional timing provision. Here, we discuss three particular circumstances in which the impulse to re-redistrict may arise, and which may influence a court's decision on whether such re-redistricting is permissible.

A. DEFECTIVE MAPS OR COURT SUBSTITUTES FOR DEFECTIVE MAPS

The most common scenario for re-redistricting is a redistricting body's out-of-sequence attempt to correct legal defects in a timely plan. There is no longer any dispute that once a redistricting provision is found to be invalid, a court may act to remedy the violation.[100] The nature of that remedy and its

96. Harris v. Shanahan, 387 P.2d 771, 779–80 (Kan. 1963) ("It is the general rule that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period prescribed by the Constitution. . . . [Such] acts are not subject to change by the legislature until the next constitutional apportionment period unless held to be invalid.").

97. Op. Ind. Att'y Gen. No. 95-1 (Mar. 23, 1995), *available at* 1995 WL 612594. As in Illinois, the Indiana Constitution has been amended since a late nineteenth-century court decision prohibiting re-redistricting; the Attorney General found it significant that the framers of the constitutional amendment expressed no desire to depart from that court's ruling. *See id.* (citing Denny v. State *ex rel.* Basler, 42 N.E. 929 (Ind. 1895)).

98. *See supra* Part II.A.

99. *See, e.g.*, *infra* text accompanying notes 147–153.

100. "It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." Reynolds v. Sims, 377 U.S. 533, 585 (1964). The principle applies to statutory defects as well: "The Court has never hinted that plaintiffs claiming present Voting Rights Act violations should be required to wait until the next census before they can receive any remedy." Garza v. County of Los Angeles, 918 F.2d 763, 772–73 (9th Cir. 1990).

limiting or enabling of further redistricting, however, is occasion for some dispute.

At least six state constitutions—Colorado, Idaho, Kansas, Missouri, Ohio, and Oklahoma—reserve to the primary redistricting body the authority and responsibility to produce a new state legislative map in the event that a court invalidates a first attempt on state constitutional grounds.[101] Federal courts, as well, are subject to a general obligation to allow state redistricting bodies the first opportunity to remedy an invalid plan.[102] In these cases, a court may find a violation, but the primary redistricting authority is tasked with remedial action. The court's hand will not actually wield the redrawing pen unless absolutely necessary.

However, when a court is not compelled to send an invalid plan back to the redistricting body in the first instance, or when due to the exigencies of impending elections there exists no time to do so and the court supplies its own substitute plan, the construction of a constitutional provision governing redistrict-

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101. Colorado and Oklahoma explicitly call for remand to the redistricting body. *See* COLO. CONST. art. V, § 48(e) ("The supreme court shall either approve the plan or return the plan and the court's reasons for disapproval to the commission. If the plan is returned, the commission shall revise and modify it to conform to the court's requirements and resubmit the plan to the court within the time period specified by the court."); OKLA. CONST. art. V, § 11D ("In the event the Supreme Court shall determine that the apportionment order of said Commission or legislative act is not in compliance with the formula for either the Senate or the House of Representatives as set forth in this Article, it will remand the matter to the Commission with directions to modify its order to achieve conformity with the provisions of this Article.").

In Idaho, Kansas, Missouri, and Ohio, there is no express remand requirement, but the redistricting body is explicitly given the responsibility to draw new lines in the event of an adverse court order. In such circumstances, it is extremely unlikely that a court would usurp that prerogative with its own plan. *See* IDAHO CONST. art. III, § 2(2) ("Whenever there is reason to reapportion the legislature or to provide for new congressional district boundaries in the state, or both, because of a new federal census or because of a decision of a court of competent jurisdiction, a commission for reapportionment shall be formed. . . . "); KAN. CONST. art. X, § 1(b) ("Should the supreme court determine that the reapportionment statute is invalid, the legislature shall enact a statute of reapportionment conforming to the judgment of the supreme court within 15 days."); MO. CONST. art. III, § 2 (stating that "in the event that a reapportionment has been invalidated by a court of competent jurisdiction, within sixty days after notification by the governor that such a ruling has been made," redistricting commissioners are to be nominated); OHIO CONST. art. XI, § 13 ("In the event that . . . any plan of apportionment . . . is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid.").

In Oregon, in the event that a legislative plan is declared invalid by the state supreme court, the Secretary of State is directed to produce a corrected plan; the court is then granted the authority to adjust the Secretary of State's plan as necessary. *See* OR. CONST. art. IV, § 6(2).

102. *See, e.g.*, Wise v. Lipscomb, 437 U.S. 535, 540 (1978) (White, J., joined by Stewart, J.) ("When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."); *cf.* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . . ").

ing timing may play an especially important role in determining the validity of subsequent mid-decade action by a legislature or commission. When re-redistricting is expressly permitted at the pleasure of the redistricting body, that body may simply enact a superseding plan once again, whether or not a court has imposed expressly temporary or purportedly permanent plans.[103] But when there are state constitutional limits on mid-decade redistricting, a redistricting authority may not be empowered under a strict reading of the timing provision to revisit its earlier illegal decisions.

For example, consider a state like Indiana, which textually commits the power to redistrict only to "[t]he General Assembly elected during the year in which a federal decennial census is taken."[104] Under a strict reading of the state constitution, if a legislative plan were invalidated in 2014, the legislature would not be empowered to erect a new plan in its place.

Most courts are uneasy with the ramifications of such a rule, which would force the court to draw district lines effective at least until the next census. Instead, courts generally prefer to commit difficult redistricting decisions back to the political branches.[105] For federal courts, this hesitation doubtless flows in part from the Elections Clause, which expressly commits the power to regulate federal elections to the "Legislature" of each state when not otherwise pre-empted by Congress.[106] For state courts, the preference likely reflects the conception that the act of redistricting is inherently political, and not well-suited to the judicial role.

Such considerations could, in turn, affect how courts construe the timing

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103. In *LULAC*, Justice Kennedy noted that the Supreme Court has generally "assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own." LULAC v. Perry, 126 S. Ct. 2594, 2608 (2006) (Kennedy, J.). The cases that he cites to support this proposition, however, arose in states where there was either no constitutional limitation on the timing of redistricting, or where the legislature was granted explicit permission to re-redistrict at will. *See, e.g.*, Upham v. Seamon, 456 U.S. 37 (1982) (Texas congressional redistricting); *Wise*, 437 U.S. 535 (Texas city council redistricting); Connor v. Finch, 431 U.S. 407 (1977) (Mississippi state legislative redistricting); Burns v. Richardson, 384 U.S. 73 (1966) (Hawaii state senate redistricting pursuant to a plan passed expressly as a temporary measure pending likely constitutional amendments).

104. IND. CONST. art. IV, § 5.

105. *See, e.g.*, *In re* Below, 855 A.2d 459 (N.H. 2004); Bone Shirt v. Hazeltine, 700 N.W.2d 746 (S.D. 2005); State *ex rel.* Smith v. Zimmerman, 63 N.W.2d 52 (Wis. 1954).

106. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); *see also supra* note 102 and accompanying text.

Despite the assignment to the "Legislature," few have argued that since *Baker* was decided this clause entirely precludes courts from drawing federal district lines. Courts have certainly imposed their own congressional redistricting plans when necessary. This practice need not be inconsistent with the Elections Clause: Congress, "by Law," regulated federal elections by reserving federal courts' ability to redraw federal districts, when it granted federal courts jurisdiction to hear redistricting cases without limiting the remedies they are able to provide. *See* 28 U.S.C. § 1331 (2000). Similarly, it could be argued that those state legislatures that have not expressly reserved the power to redistrict after a plan has been invalidated have validly delegated their power under the Elections Clause by failing to restrict the general remedial authority of their state courts.

provisions of their state constitutions. A court wary of its own authority to draw district lines—or loathe to engage in the political calculations required to do so—will be more apt to find ways to return the responsibility to a legislature or commission, construing the state constitution flexibly rather than strictly in order to do so.[107] It could, for example, determine that a constitutional delegation of redistricting authority enabling a particular body to draw lines at particular times merely establishes a continuing duty for that body to draw lines until it gets the answer right.[108] In other words, the court might decide that a legislature's drawing appropriate lines in the invalid time period is better than drawing invalid lines in the appropriate time period—and that any legislative action is preferable to court-drawn lines for the duration of the decade.

In this regard, courts should tread carefully, and should not allow their assessment of their own institutional limitations to trump the given constitutional structure. There are good reasons why constitutional framers might have wanted legislatures to draw district lines only immediately after a census. For example, districts drawn in the middle of the decade must rely either on outdated census population figures or less precise updated estimates, while those drawn immediately after a census can be tailored to the most accurate population counts available. In addition, mid-decade redistricting allows political parties to choose to redistrict whenever they manage to secure unitary control of state government—and thereby maximize partisan gain—while districting tied to the census introduces at least an element of political chance.[109]

The nature of ambiguous constitutional text will also govern courts' leeway. Some ambiguous provisions will be more amenable to flexible interpretations than others.[110] In the event of such interpretations, courts should carefully cabin their rulings. A loose construction of constitutional restrictions that effectively nullifies limiting text—for example, "at the first session after the federal census"—if not constrained to the off-cycle replacement of an invalid plan, might facilitate repeated intradecade action by a redistricting body replacing one valid

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107. *See, e.g.*, Stephenson v. Bartlett, 562 S.E.2d 377, 384, 398 & n.9 (N.C. 2002) (permitting the General Assembly to enact new redistricting plans to replace remedial court plans despite the state constitution's provision that "[o]nce established, the senate and representative districts and the apportionment of Senators and Representatives shall remain unaltered until the next decennial census of population taken by order of Congress"); *see also* Stephenson v. Bartlett, 595 S.E.2d 112, 119–20 (N.C. 2004) (approving a statute codifying the 2002 *Stephenson I* remedial process).

108. *See, e.g.*, *Bone Shirt*, 700 N.W.2d at 753; *see also* Yorty v. Anderson, 384 P.2d 417, 419 (Cal. 1963) (construing a portion of the California State Constitution that has since been repealed); State *ex rel.* Lein v. Sathre, 113 N.W.2d 679, 687 (N.D. 1962) (construing a portion of the North Dakota State Constitution that has since been invalidated).

109. *See* Cox, *supra* note 12, at 779. This limitation, of course, limits only the partisan gerrymander; bipartisan incumbent-protection gerrymanders do not depend on legislative control.

110. *Compare* N.D. CONST. art IV, § 2 ("The districts . . . determined after the 1990 federal decennial census shall continue until the adjournment of the first regular session after each federal decennial census, or until changed by law."), *with* WIS. CONST. art. IV, § 4 ("*At its first session* after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." (emphasis added)).

plan with another. In the event that courts are predisposed to interpret constitutional provisions to give themselves an escape route from the messy business of redistricting, they should take care lest the underlying constitutional design of the timing provision be overturned entirely.

B. COURT-DRAWN MAPS CAUSED BY LACK OF TIMELY ACTION

Re-redistricting also commonly occurs when a court is forced to draw valid lines after a redistricting body has simply failed to act by a constitutional deadline.[111] When this situation arises, may the redistricting institution then revisit the court-made lines at a time not expressly delineated in the state constitution? The Texas re-redistricting of 2003 presented precisely this factual scenario. The *LULAC* case could not find help in the Texas constitution, which, like many other states, is silent on congressional redistricting timing. Nevertheless, the arguments advanced by the parties in the case nicely frame the debate: the *LULAC* plaintiffs averred that by its failure to act, the Texas legislature had forfeited its opportunity to draw new lines after a census; in response, the State claimed that the Texas legislature had the authority to redraw the lines at least once, even if it had failed to act and deferred the initial redistricting to a court. And as in similar cases, the *LULAC* case involved allegations that the legislature's initial failure to act immediately following the census was intentional—implying that the initial legislative action was blocked by those who saw an opportunity for more favorable redistricting in several years, after a court's intervention.[112]

A 2003 case in the Colorado Supreme Court—*People ex rel. Salazar v. Davidson*[113]—interpreted the Colorado constitution in the manner pressed by the *LULAC* plaintiffs. After the 2001 census gave Colorado an additional Representative, the Colorado General Assembly[114] was unable to produce a

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111. Such scenarios need not represent the "failure" of any single governmental entity: in a state with divided government, a gubernatorial veto may cause a stalemate, requiring court intervention to produce a constitutionally valid map in a timely fashion.

112. For example, as *The New York Times* reported in July of 2003:

> John R. Alford, a professor at Rice University who was an expert witness for Governor Perry in the 2001 redistricting litigation, said the Republican Party knew at the time that the state Legislature, with its own new district map, was about to swing to Republican control in 2002.
>
> "Republicans used the court-drawn plan as a place to park redistricting until they could address the issue when they were in control of the House and obviously better off in the Senate," Professor Alford said. "You give it to the courts knowing that, after 2002, you'll take it back."

David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1.

113. 79 P.3d 1221 (Colo. 2003).

114. Although a commission is charged with drawing Colorado's state legislative lines, the Colorado General Assembly is responsible for drawing congressional districts. *See* COLO. CONST. art. V, § 44.

valid redistricting plan in time for congressional elections;[115] a state court was therefore forced to draw new district lines.[116] Then, in 2003, as in Texas, the Colorado General Assembly redrew the lines, replacing the court's existing map. And as in Texas, litigation swiftly followed. The crux of the litigation involved the provision of Colorado's constitution regulating the timing of redistricting following a new congressional apportionment[117]:

> The general assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district. When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly.[118]

After a review of the provision's text and legislative history, and of comparative rulings in other states, the Colorado Supreme Court interpreted this section of the constitution—in particular, the word "[w]hen" —to permit redistricting "after and only after a census," and to forbid redistricting at other times.[119] Having failed to redraw the lines after the census and before the next congressional elections, the Colorado legislature forfeited its single opportunity to do so.[120]

The New Hampshire Supreme Court has taken the opposite view in a case

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115. The Republican-controlled Colorado House and the Democrat-controlled Colorado Senate could not agree on a plan in time. *See* John Sanko, *Map Issue Lands in Judge's Lap: Legislature Misses Redistricting Deadline, So Court Gets the Job*, ROCKY MOUNTAIN NEWS (Denver), Jan. 25, 2002, at 5A.

116. *Salazar*, 79 P.3d at 1226–27.

117. The 2001 congressional redistricting cycle happened to take place after an increase in Colorado's congressional delegation. However, the Colorado Supreme Court specifically noted that Colorado law defines "apportionment" as the process of allocating legislators that "occurs after *each* federal decennial census." *Id.* at 1237 (emphasis added) (quoting COLO. REV. STAT. § 2-2-901(1)(a) (2002)). Therefore, the Colorado Supreme Court's construction of the state redistricting provision should apply in every decennial redistricting cycle, whether or not the census demands a change in the size of the congressional delegation.

118. COLO. CONST. art. V, § 44.

119. *Salazar*, 79 P.3d at 1238.

120. South Dakota's Constitution combines a tie to the census, *see* S.D. CONST. art. III, § 5 ("Such [legislative] apportionment shall be accomplished by December first of the year in which the apportionment is required."), with an explicit commitment of redistricting authority to the judiciary, *see id.* ("If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment."). The South Dakota Supreme Court has construed this combination to prohibit mid-decade legislative redistricting, in the event that the supreme court exercised its redistricting authority due to initial legislative inaction. *See* Bone Shirt v. Hazeltine, 700 N.W.2d 746, 752 (S.D. 2005) (citing Emery v. Hunt, 615 N.W.2d 590, 596 (S.D. 2000)).

Curiously, in South Dakota, both successful legislative action and legislative inaction preclude further mid-decade attempts to redraw the lines. *See Bone Shirt*, 700 N.W.2d at 752. However, unlawful legislative action does not preclude the legislature from making another attempt. *See id.* at 753.

known as *In re Below*.[121] In 2002, the Republican state legislative plan was vetoed by a Democratic governor,[122] and the state Supreme Court stepped in "reluctantly" to draw district lines.[123] Then, in 2004, now with a Republican governor, the legislature agreed on a state legislative redistricting plan to replace the court's existing scheme.

As in Colorado, the state supreme court reviewed the text and legislative history of the constitutional provision governing redistricting timing. It found that the state's ambiguous provision—which directs reapportionment by the legislature "at the regular session following [each] decennial federal census"[124]—prevents the legislature from replacing its *own* valid plan during some other legislative session.[125] Moreover, the court believed that a literal reading of the constitutional text would also preclude the legislature from acting off-cycle to replace a timely judicial plan.[126] However, it rejected such a reading in favor of a construction more reliant on constitutional structure.[127] The court explicitly distinguished *Salazar*'s incorporation of the judiciary into the natural redistricting process, claiming that the legislature alone is best situated to reconcile the competing incentives for drawing district lines.[128] If legislative inaction forced the judiciary to supply an initial valid plan, the legislature would be "neither deprived of its authority nor relieved of its obligation to redistrict" later in the cycle.[129]

Thus, as in states with express provisions like New Mexico,[130] the New Hampshire legislature has but one opportunity per decade to redraw district lines but may still exercise this authority even if it initially fails to redistrict and a court intervenes with a constitutionally acceptable map.

New Hampshire's example shows that courts forced to step in when a redistricting body has failed to act will face many of the same pressures discussed in Part III.A, and that such pressures are likely to influence their construction of constitutional language. As in New Hampshire, for example, a court may be uncomfortable performing what it believes to be a legislative task[131] and may seek to ensure that the lines it is forced to draw in the

121. 855 A.2d 459, 462 (N.H. 2004) (holding that if the legislature fails to redistrict, it has not forfeited its authority).

122. Norma Love, *Shaheen Vetoes House Redistricting Plan*, CONCORD MONITOR, Apr. 4, 2002.

123. *Below*, 855 A.2d at 462.

124. N.H. CONST. pt. 2, arts. 11, 26.

125. *See Below*, 855 A.2d at 470, 473.

126. *See id.* at 470.

127. *See id.* at 472–73.

128. *Id*.

129. *Id.* at 462. The court recognized that with too much time, the potential for strategic use of obsolete population disparities might arise. Therefore, it noted that "[h]ad the legislature not enacted its own redistricting plan during [the] session [immediately after the post-census judicial redistricting], it might well have been precluded from doing so at a future session." *Id*. at 472.

130. *See supra* Part II.C.

131. *See Below*, 855 A.2d 472; *see also, e.g.*, Wise v. Lipscomb, 437 U.S. 535, 540 (1978) ("[W]hen those with legislative responsibilities do not respond, or the imminence of a state election makes it

legislature's stead are temporary only.[132]

It may seem that a court acting in the absence of legislative or commission action should be more inclined to permit off-cycle revision by that body than a court striking down the body's last illegal act. Yet there is a strong argument that there is actually *more* reason to resist a judicial loophole when the constitution requires once-per-decade redistricting action in a given time window, and the redistricting body defaults. To illustrate this argument, consider legislators who know that they will be allowed to supersede a court plan. At the first redistricting opportunity following a census, those legislators may intentionally drive the redistricting process to the courts if the balance of power is likely to change following the next election.[133] Without attracting undue controversy, it is relatively difficult to create a plan so dependably illegal that the drafters can count on it being struck down and returned for a second look. But with a modicum of political power in any given redistricting body, it is relatively straightforward to ensure that that body deadlocks.[134] This provides an opportunity for mischief of the sort alleged in *LULAC*, in which the redistricting body deliberately fails to draw a plan "on time" in order to take advantage of electoral trends in drawing the lines at a later point in the decade.[135] A strict interpretation of a once-per-decade constitutional rule would better force compromise because participants with the incentive to deadlock the process would know that they will not get a second opportunity to draw the district lines.[136]

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impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan . . . " (citation omitted) (quoting Connor v. Finch, 431 U.S. 407, 415 (1977))). *But see, e.g.*, FLA. CONST. art. III, § 16 (expressly reserving redistricting authority to the Florida Supreme Court in the event that the legislature is unable to create a plan).

132. *See Below*, 855 A.2d at 473. Indeed, some believe such restraint to be required. *See, e.g.*, Michael A. Carvin & Louis K. Fisher, *"A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 37–48 (2005); *cf.* Colo. Gen. Assembly v. Salazar, 541 U.S. 1093, 1093 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari) (expressing desire to consider the question); *Wise*, 437 U.S. at 540 (allowing a federal court to "devise and impose an apportionment plan *pending later legislative action*" (emphasis added)).

133. *See, e.g.*, Pildes, *supra* note 34, at 275.

134. For example, on a bipartisan commission without a tiebreaker, *see, e.g.*, MO. CONST. art. III, § 2, either party can force a deadlock—as occurred in Missouri in the 2001 round of redistricting. And in a legislative system, unless one party has unified control of both legislative houses and the governor's mansion, either party can force a deadlock—as occurred in Minnesota, New Hampshire, and South Carolina in the 2001 round of redistricting.

135. Indeed, Professor Cox argues that mid-decade plans drawn after an initial deadlock will systematically reveal greater partisan bias, given that deadlock is likely under divided partisan control, while mid-decade redistricting is more likely under unitary control. Cox, *supra* note 12, at 779–81. The historical record validates Cox's argument, at least with regard to the conditions under which mid-decade redistricting will occur. "Between 1840 and 1940, [before the federal decennial redistricting obligation], only twice did a state, unprompted by a seat change, redistrict when there was divided partisan control." Erik Engstrom & Jason Roberts, The Politics of Congressional Redistricting, Past and Present (2006) (unpublished manuscript, on file with authors), *available at* http://www.hhh.umn.edu/img/assets/19781/Roberts%20_Engstrom.pdf.

136. Though the South Dakota Supreme Court did not analyze the distinction in this manner, its resolution of the legislature's power to re-redistrict follows the model described above: permitted when

C. COMMISSIONS

States with independent redistricting commissions ("commission states") present particular variants of the problems above. Most of these commissions are convened for a constitutionally specified period of time following a census and then disbanded. There are three types of commission procedures: a commission used as a backup if the regular legislative process fails to produce a map, a commission with sole authority to redistrict, and a commission that serves in an advisory capacity to the legislative decisionmakers.[137] For different reasons, the features of each type of commission model counsel against allowing a subsequent legislature, by statute alone, to override, in mid-decade, a commission's initial handiwork.[138]

In those states that use a commission only in the event the legislature fails to act, only Connecticut's constitution contains an explicit prohibition on congressional and state legislative redistricting more than once per decade.[139] Mississippi, which adopts state legislative districts through a joint resolution, does the opposite, granting the legislature permission to change previous lines "at any other time."[140] In the other states with a backup commission—Oklahoma, Oregon, and Texas—the relevant timing language is ambiguous.[141] Given that a commission in these states determines district lines only in the event that a legislature cannot pass an initial plan, it might seem logical to presume that the simple fact of a commission's involvement alone would not preclude subsequent redistricting if a legislature were later to take action. However, the ability to rely on future legislative revision of a backup commission plan presents the same perverse incentives noted in Part III.B—legislators may strive to create

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the legislature has drawn an invalid map, but prohibited when it has drawn either one valid map or no map at all. *See, e.g.*, Bone Shirt v. Hazeltine, 700 N.W.2d 746, 752–53 (S.D. 2005); *see also supra* note 120.

137. *See* McDonald, *supra* note 13, at 380–82, 384.

138. Even if a legislature may not simply pass a statute to redraw a commission's existing lines, it might seek to reconstitute a commission in mid-decade in order to redraw the valid lines of a previous commission. In such a case, the distinction between the nature of legislative action and the nature of commission action seems less relevant to the validity of redrawing the lines. That is, the viability of such an attempt under the state constitution would depend on the constitutional *timing* provision rather than the type of commission-based structure, and would therefore follow the analysis of Part II, *supra*.

139. *See* CONN. CONST. art. III, § 6(a). A prior provision of Illinois's constitution was similarly construed. *See supra* notes 94–95 and accompanying text.

140. MISS. CONST. art. 13, § 254.

141. *See* OKLA. CONST. art. V, § 11C; OR. CONST. art. IV, § 6(4); TEX. CONST. art III, § 28. *But see* ILL. CONST. art. IV, § 3(b); People *ex rel.* Mooney v. Hutchinson, 50 N.E. 599, 603–04 (Ill. 1898) (construing the state constitution to permit apportionment only every ten years); *supra* text accompanying note 95. There is an argument that when the work of backup commissions is called "law" in state constitutions, one might infer that another law—enacted by the legislature—could subsequently overturn a commission's map. However, states in which a commission is vested with *sole* redistricting authority also refer to commission plans as "law." *See* HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14(3). Given the express transfer of redistricting authority from the legislature to an independent commission in these states, we think it clear that such plans are not amenable to later revision by the legislature despite the fact that they are called "law," and that courts are therefore unlikely to grant the label attached to commission activity much meaning in this context.

deadlock in an initial redistricting round if the future looks like it will yield more advantageous fruit. Therefore, courts evaluating the propriety of re-redistricting after a backup commission has drawn district lines should analyze the constitutional language with the same caution described above.

In states where a commission is granted sole express authority to redistrict, the legislature plays a different role entirely. Three states—Alaska, New Jersey, and Ohio—expressly prohibit redrawing established commission lines more than once per decade.[142] Even when there is no express prohibition on off-cycle redistricting, it is difficult to believe that those vesting redistricting authority solely in an independent commission would have intended to allow override by a legislature simply refusing to follow the express redistricting schedule. There is even further reason to imply a prohibition on off-cycle legislative action when state law, as in Hawaii, requires a commission to complete its redistricting work by a specific deadline—as discussed in Part II.C.[143]

Finally, in some states, a redistricting commission serves an advisory capacity: the commission presents its plan to the legislature, which may choose to modify the plan before passage. Usually, such states force the legislature to conduct several up-or-down votes on commission maps before it is able to adjust a commission's handiwork.[144] In such states, the commission exists to set a baseline, usually with some degree of independence from the political considerations of individual legislators, and to force the legislature to justify publicly—with some increased prominence—any departure from the commission's recommendations. As in states in which commissions have final authority to redraw district lines, and unlike the states in which commissions serve merely as a backup mechanism, commissions in these states serve a function that the legislature cannot serve on its own. Courts in such states should therefore be wary of permitting off-cycle legislative override, though the question is admittedly closer than in states where redistricting authority is reserved to a commission alone.

CONCLUSION

In the last four years, after the initial round of census-mandated redistricting, redistricting bodies in six states attempted to redraw existing valid district lines.[145] Most of these involved a legislative decision to redraw lines imposed by a court—but in permitting such a re-redistricting in Texas, the U.S. Supreme

142. *See* ALASKA CONST. art. VI, § 10 ("The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States."); N.J. CONST. art. IV, § III, para. 3 ("[A]pportionment . . . shall remain unaltered until the following decennial census of the United States."); OHIO CONST. art. XI, § 6 ("[B]oundaries . . . shall not be changed until the ensuing federal decennial census.").

143. *See* HAW. CONST. art. IV, § 2.

144. *See* WASH. CONST. art. II, § 43(7); IOWA CODE § 42.3 (Supp. 2006).

145. *See supra* note 2 and accompanying text.

Court gave no indication that the rules would be any different for a legislature revisiting its own districting decisions. To the extent that there was a cultural taboo on re-redistricting in the middle of a decade, it has been broken, and with computers able to draw—and redraw—constitutionally acceptable maps at will, there is no technological barrier.[146] Absent state constitutional provisions restricting re-redistricting, we expect that political parties and incumbent legislators with political control of the redistricting process will be drawn to redraw the lines for maximum advantage with increasing frequency.

Almost a century ago, the California Supreme Court recognized that "great abuses might follow a too frequent exercise of the [redistricting] power."[147] There are several potential costs to overly frequent redistricting. Natural population shifts over the course of a decade inject a degree of uncertainty into the broad calculations of those who draw the lines, and generally moderate the effects of an initial redistricting;[148] where there is no barrier to re-redrawing, those in control can repeatedly tweak their handiwork so as to achieve and maintain maximum advantage. In states where one party controls the redistricting process, partisan gerrymandering becomes more effective;[149] in states with split control, re-redistricting increases the strength of a gerrymander that protects incumbents. Overly frequent redistricting allows insiders to thwart specific challengers more reliably by drawing lines to punish or exclude with increased precision, as was done to a 2006 candidate for the Georgia state senate;[150] it may also thwart challengers in general by limiting the challengers' ability to plan an effective bid far in advance. Where significant population shifts have occurred, it allows parties to overpack districts by justifying lines with old census data, while relying on the most recent voter registration and turnout statistics to measure the current voting population.[151] Overly frequent alteration

146. For a review of the history of computer use in redistricting, see Micah Altman, Karin MacDonald & Michael McDonald, *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 SOC. SCI. COMPUTER REV. 334–46 (2005).

147. Wheeler v. Herbert, 99 P. 353, 359 (Cal. 1907).

148. *See, e.g.*, Cox, *supra* note 12, at 774 (describing how the effects of an initial gerrymander gradually erode due to "the instability of voting behavior").

149. *See id.* at 770, 775. Cox also notes that unlimited redistricting allows parties to choose the year in which they exert maximum control over the redistricting process, and therefore increases the probability in legislative redistricting states that redistricting will occur when one party controls both the legislature and the executive. *Id.* at 779.

150. Greg Bluestein, *Senate District Lawsuit Hangs on Three Lines in Georgia Constitution*, ASSOCIATED PRESS, Oct. 16, 2006. Three senate districts in the Athens area were redrawn to fragment Democratic voters after a Democratic representative announced her candidacy for an open seat. *See* Blum v. Schrader, 637 S.E.2d 396, 399 (Ga. 2006) (upholding the reapportionment as "a matter of unfettered legislative discretion").

151. In *LULAC*, three Justices recognized this issue, but found no specific evidence that the re-redistricting body had intentionally exploited a population variance. *See* LULAC v. Perry, 126 S. Ct. 2594, 2612 (2006) (Kennedy, J., plurality opinion). Such specific evidence is likely to be difficult to procure; unlike other examinations into legislative intent, the intentional exploitation of old census data to pack districts will rarely be visible from the face of a redistricting statute, and may not be apparent from other readily available detritus of the legislative process. *Cf.* McCreary County v. ACLU of Ky.,

of districts also disrupts the critical link between a representative and his or her constituency: constituents shuffled into and out of districts become unconnected to particular representatives and unable to hold them accountable in elections.[152] Frequent redistricting may force similarly frequent changes to precinct boundaries, and may therefore foster confusion among voters forced to vote in a polling place different from the polling location to which they have become accustomed. And finally, repeated re-redistricting detracts from the political legitimacy of the districting process and distracts legislative attention from other substantive matters.[153]

There will be instances, certainly, in which a redistricting authority may inadvertently produce an unconstitutional map that requires a redistricting remedy. There may also be instances in which the redistricting body inadvertently leaves some bit of geography non-contiguous or unassigned to a district. In instances where states describe their districts in terms of "metes and bounds"—political and physical geographic features—districts may become unconstitutional as a result of acts of man or god unrelated to redistricting.[154] Such cases present few of the dangers identified above, and should be recognized by any prohibition on re-redistricting, whether constitutional, statutory, or judicial.

For those seeking to secure greater stability of district lines, there are several available options. A federal constitutional amendment on the issue seems impractical at best. Several arguments relating to existing constitutional provisions have been offered but have not been directly confronted by the courts; in any event, given the sweeping rejection of a federal constitutional re-redistricting claim in *LULAC*,[155] such arguments seem unlikely to succeed at present.

Rather, at least for congressional redistricting, a more feasible starting point is federal law. Representative Maxine Waters introduced legislation in the 109th Congress aptly entitled "To limit the redistricting that States may do after an apportionment of Representatives," which would prohibit re-redistricting of congressional lines except by federal court order.[156] Only four co-sponsors had

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125 S. Ct. 2722, 2734 (2005) (noting that in Establishment Clause cases premised on a predominantly religious governmental purpose, "an understanding of official objective emerges from readily discoverable fact").

152. *See* Reynolds v. Sims, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system. . . . "); Legislature v. Deukmejian, 669 P.2d 17, 27 (Cal. 1983) (noting the "value of repose" in maintaining existing districts for the full decennial period); People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1242 (Colo. 2003) (reasoning that legislators in re-redistricting systems "would be torn between effectively representing the current constituents and currying the favor of future constituents").

153. *See* Cox, *supra* note 12, at 769 n.69.

154. In part for this reason, states using metes and bounds should be encouraged to consider drawing districts based on geographic information systems (GIS) technology, such as the Census Bureau's TIGER boundaries.

155. *See supra* text accompanying notes 8–10, 31–35.

156. *See* H.R. 830, 109th Cong. (2005).

signed on, however—all in the immediate wake of the *LULAC* decision.[157]

Constitutional amendments in the states offer the potential for a more comprehensive remedy, covering districts of both state legislators and federal representatives.[158] Because prohibitions on re-redistricting are by definition restrictions on legislative excess, constitutional amendments are more effective than state statutes, which could be repealed or superseded at the same time a new redistricting plan is enacted. Enactment of state constitutional amendments—often possible only with supermajorities or after passing multiple consecutive legislatures—would undoubtedly be a slow process as battles are waged across

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157. *See* All Information for H.R. 830, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00830:@@@L&summ2=m& (last visited Nov. 13, 2006).

Two other bills, the Fairness and Independence in Redistricting Act of 2006, H.R. 2642 and S. 2350, 109th Cong. (2005), and the Redistricting Reform Act of 2005, H.R. 4094, 109th Cong. (2005), had both garnered greater support. *See* Steve Kornacki, *Redistricting Reformers Renew Push*, ROLL CALL, July 18, 2006. These bills not only restricted multiple attempts to redraw congressional lines within one decade, but also required States to use independent commissions to draw the lines. It is likely that despite the bills' greater initial support, the independent commission portion of the bill would have generated substantial resistance from representatives of states favoring a legislative redistricting process and would render similar bills less likely to pass. At the time this Article went to print, no similar bills had been introduced in the 110th Congress.

158. Some believe that when federal districts are concerned, state constitutions cannot validly impose *any* timing limitations specific to redistricting legislation. Carvin and Fisher, for example, argue that the Constitution's textual commitment of redistricting power for federal elections in each state to "the Legislature thereof," U.S. CONST. art. I, § 4, prevents state constitutions from restricting a state legislature's plenary authority to redraw federal districts whenever it wishes. *See* Carvin & Fisher, *supra* note 132, at 42–47. In their view, "[a] duly enacted statute, rather than the state constitution, is controlling" in the event that the state legislature wishes to disregard its state constitutional mandate. *Id.* at 47.

Such a reading of the Elections Clause seems unduly cramped. A state legislature legislates by the process set out in its state constitution; though the legislature may have plenary power to legislate as it pleases when the state constitution is silent, it may not lawfully contravene either substantive or procedural demands of the constitution where they exist. Nor is redistricting one of the rare instances in which a legislature acts but does not legislate. In *Hawke v. Smith*, 253 U.S. 221 (1920), the Supreme Court directly contrasted the regular legislative process involved in election regulation with the process by which state legislative bodies ratify proposed federal constitutional amendments. A state legislative body must assent or dissent to federal constitutional amendments on its own, without gubernatorial veto or referendum or any other normal legislative process decreed by the state constitution, because ratification is not truly an act of legislation. *Id*. at 229–30. In contrast, "Article I, section 4 plainly gives authority to the state to legislate. . . . " *Id*. at 231. The legislative process involved in redistricting, then, occurs subject to the constraints of the state constitution. Just as the legislature must draw federal districts that conform to the substantive demands of the state constitutional language, so too must a state legislature abide by procedural demands of the state constitution, including limitations on redistricting timing.

It is worth noting, however, that while Carvin and Fisher's Elections Clause argument may not support invalidating timing restrictions on state legislative redistricting of federal lines, it may impact an independent state commission's authority to conduct federal redistricting. *See* Brady v. N.J. Redistricting Comm'n, 622 A.2d 843, 849–51 (N.J. 1992) (reviewing the power of the New Jersey Redistricting Commission to draw congressional districts); *cf.* Smith v. Clark, 189 F. Supp. 2d 548, 551–58 (S.D. Miss. 2002) (reviewing the power of a Mississippi chancery court to draw congressional districts); Grills v. Branigin, 284 F. Supp. 176, 180 (S.D. Ind. 1968) (reviewing the power of the Election Board of Indiana to draw congressional districts). *But cf.* Carvin & Fisher, *supra* note 132, at 43 (distinguishing independent commissions from other non-legislative institutions under the Elections Clause). Full examination of such a theory is beyond the scope of this Article.

the at-risk states. But as states continue to consider constitutional amendments to reform redistricting practices—through the initiative process or through enlightened legislative leadership—drafters should carefully consider clear and unambiguous language restraining legislative ability to redraw, at will, the lines by which they are elected. Such an amendment was introduced in Texas in November of 2006.[159] Perhaps the Texas controversy will ultimately breed a wave of restraint instead of a wave of excess.

Most redistricting plans must endure court challenge. One new frontier of redistricting—and thus of redistricting litigation—is likely to be the timing and frequency of efforts to redraw district lines. Given the current ambiguity of many states' redistricting codes, it appears as though a race to re-redistrict will leave much room for argument.

159. *See* H.R.J. Res. 31, 2007 Leg. 80th Sess. (Tex. 2006) (seeking to prohibit mid-decade redistricting of state legislative and federal districts except to replace districts invalidated by a court).

APPENDIX I: STATE CONSTITUTIONAL PROVISIONS REGARDING TIMING OF STATE LEGISLATIVE REDISTRICTING

State	Redistricting Authority	Timing	Citation	Further Interpretation	Citation
Alabama	Legislature	Once following census	ALA. CONST. art. IX, §§ 198, 200		
Alaska	Commission	Once following census	ALASKA CONST. art. VI, § 10		
Arizona	Commission	Tied to census	ARIZ. CONST. art. IV, pt. 2, § 1		
Arkansas	Commission	Tied to census	ARK. CONST. art. VIII, § 4		
California	Legislature	Tied to census	CAL. CONST. art. XXI, § 1	Once following census	Legislature v. Deukmejian, 669 P.2d 17 (Cal. 1983)
Colorado	Commission	Tied to census	COLO. CONST.		art. V, § 48
Connecticut	Legislature + Commission	Once following census	CONN. CONST. art. III., § 6(a)		
Delaware	Legislature	Tied to census	DEL. CONST. art. II, § 2A		
Florida	Legislature + State Supreme Court	Tied to census	FLA. CONST. art III, §16		
Georgia	Legislature	Tied to census	GA. CONST. art. III, § II, para. II	Permitted at any time	Blum v. Schrader, 637 S.E.2d 396 (Ga. 2006)
Hawaii	Commission	Tied to census	HAW. CONST. art. IV, § 2		
Idaho	Commission	Tied to census	IDAHO CONST. art. III, § 2		
Illinois	Legislature + Commission	Tied to census	ILL. CONST. art. IV, § 3(b)	Once following census	People *ex rel.* Mooney v. Hutchinson, 50 N.E. 599 (Ill. 1898)
Indiana	Legislature	Tied to census	IND. CONST. art. IV, § 5	Once following census	1995 Ind. Op. Att'y Gen. No. 1
Iowa	Legislature	Tied to census	IOWA CONST. art. III, § 35		
Kansas	Legislature + State Supreme Court	Tied to census	KAN. CONST. art. X, § 1(a)	Once following census	Harris v. Shanahan, 387 P.2d 771 (Kan. 1963)

State	Redistricting Authority	Timing	Citation	Further Interpretation	Citation
Kentucky	Legislature	Tied to ten-year interval	KY. CONST.§ 33		
Louisiana	Legislature	Tied to census	LA. CONST. art. III, § 6	Permitted at any time	La. Op. Att'y Gen. No. 99-54 (1999)
Maine	Commission + Legislature	Tied to census	ME. CONST. art. IV, pt. 1, § 2; pt. 2, § 2		
Maryland	Governor + Legislature	Tied to census	MD. CONST. art. III, § 5		
Massachusetts	Legislature	Tied to census	MASS. CONST. amend. CI		
Michigan	Legislature	None			
Minnesota	Legislature	Tied to census	MINN. CONST. art. IV, § 3		
Mississippi	Legislature + Commission	Permitted at any time	MISS. CONST. art. XIII, § 254		
Missouri	Commission	Permitted at any time	MO. CONST. art. III, §§ 2, 7, 10	Once following census	Preisler v. Doherty, 284 S.W.2d 427 (Mo. 1955)
Montana	Commission	Tied to census	MONT. CONST. art. V, § 14(2)		
Nebraska	Legislature	Tied to census	NEB. CONST. art. III, § 5	Permitted at any time	Neb. Op. Att'y Gen. No. 02003 (2002)
Nevada	Legislature	Tied to census	NEV. CONST. art. IV, § 5	Legislature's authority continues even if it fails to act in a previous session, if governor calls special session	2001 Nev. Att'y Gen. Op. No. 14
New Hampshire	Legislature	Tied to census	N.H. CONST. pt. 2, art. IX	Once following census, Legislature's authority continues even if it fails to act in a previous session	*In re* Below, 855 A.2d 459 (N.H. 2004)
New Jersey	Commission	Once following census	N.J. CONST. art. IV, § 3, paras. 1, 3		

State	Redistricting Authority	Timing	Citation	Further Interpretation	Citation
New Mexico	Legislature	Once following census	N.M. CONST. art. IV, § 3		
New York	Legislature	Once following federal or state census, but no later than year ending in '6'	N.Y. CONST. art. III, § 4		
North Carolina	Legislature	Once following census	N.C. CONST. art. II, §§ 3, 5		
North Dakota	Legislature	Tied to census	N.D. CONST. art. IV, § 2		
Ohio	Commission	Once following census, required if court invalidates map	OHIO CONST. art. XI, § 6		
Oklahoma	Legislature + Commission	Tied to census	OKLA. CONST. art. V, § 11A		
Oregon	Legislature + Secretary of State	Tied to census	OR. CONST. art. IV, § 6		
Pennsylvania	Commission	Once following census	PA. CONST. art. II, § 17		
Rhode Island	Legislature	Tied to census	R.I. CONST. art. VII, § 1		
South Carolina	Legislature	Permitted at any time	S.C. CONST. art. III, § 3		
South Dakota	Legislature	Tied to census	S.D. CONST. art. III, § 5	Once following census; Legislature's authority continues if court invalidates map	Bone Shirt v. Hazeltine, 700 N.W.2d 746, (S.D. 2005); Emery v. Hunt, 615 N.W.2d 590 (S.D. 2000)
Tennessee	Legislature	Permitted at any time	TENN. CONST. art. II, § 4		
Texas	Legislature + Commission	Tied to census	TEX. CONST. art. III, § 28		
Utah	Legislature	Tied to census	UTAH CONST. art. IX, § 1		

State	Redistricting Authority	Timing	Citation	Further Interpretation	Citation
Vermont	Legislature	Permitted at any time	VT. CONST. ch. II, § 73		
Virginia	Legislature	Tied to census (as of 2011)	VA. CONST. art. II, § 6		
Washington	Commission	Permitted by supermajority vote	WASH. CONST. art. II, § 43		
West Virginia	Legislature	Once following census	W. VA. CONST. art. VI, § 10		
Wisconsin	Legislature	Tied to census	WIS. CONST. art. IV, § 3	Once following census	State *ex rel.* Smith v. Zimmerman, 266 Wis. 307 (1954)
Wyoming	Legislature	Tied to census	WYO. CONST. art. III, § 48		

APPENDIX II: STATE CONSTITUTIONAL PROVISIONS REGARDING TIMING OF CONGRESSIONAL REDISTRICTING

State	Redistricting Authority	Timing	Citation	Further Interpretation	Citation
Alabama	Legislature	None			
Alaska	Legislature	None			
Arizona	Commission	Tied to census	ARIZ. CONST. art. 4, pt. 2, § 1		
Arkansas	Legislature	None			
California	Legislature	Tied to census	CAL. CONST. art. XXI, § 1	Once following census	Legislature v. Deukmejian, 34 Cal.3d 658 (1983)
Colorado	Legislature	Tied to census	COLO. CONST. art. V, § 44	Once following census	People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003)
Connecticut	Legislature + Commission	Once following census	CONN. CONST. art. III, § 6(a)		
Delaware	Legislature	None			
Florida	Legislature	None			
Georgia	Legislature	None			
Hawaii	Commission	Tied to census	HAW. CONST. art. IV, §§ 1, 2, 9		
Idaho	Commission	Tied to census	IDAHO CONST. art. III, § 2		
Illinois	Legislature	None			
Indiana	Legislature	None			
Iowa	Legislature	None			
Kansas	Legislature	None			
Kentucky	Legislature	None		Permitted at any time	Richardson v. McChesney, 108 S.W. 322 (1908)
Louisiana	Legislature	None			
Maine	Legislature	None			
Maryland	Legislature	None			
Massachusetts	Legislature	None			
Michigan	Legislature	None			
Minnesota	Legislature	None			
Mississippi	Legislature	None			

State	Redistricting Authority	Timing	Citation	Further Interpretation	Citation
Missouri	Legislature	Tied to census	MO. CONST. art. III, § 45		
Montana	Commission	Tied to census	MONT. CONST. art. V, § 14(2)		
Nebraska	Legislature	None		Permitted at any time	Exon v. Tiemann, 279 F. Supp. 603 (D. Neb. 1967)
Nevada	Legislature	None			
New Hampshire	Legislature	None			
New Jersey	Commission	Once following census	N.J. CONST. art. II, § 2, para. 8		
New Mexico	Legislature	None			
New York	Legislature	None			
North Carolina	Legislature	None			
North Dakota	Legislature	None			
Ohio	Legislature	None			
Oklahoma	Legislature	None			
Oregon	Legislature	None			
Pennsylvania	Legislature	None			
Rhode Island	Legislature	None			
South Carolina	Legislature	Permitted at any time	S.C. CONST. art. VII, § 13		
South Dakota	Legislature	None			
Tennessee	Legislature	None			
Texas	Legislature	None			
Utah	Legislature	Tied to census	UTAH CONST. art. IX, § 1		
Vermont	Legislature	None			
Virginia	Legislature	Tied to census (as of 2011)	VA. CONST. art. II, § 6		
Washington	Commission	Permitted by supermajority vote	WASH. CONST. art. II, § 43		
West Virginia	Legislature	None			
Wisconsin	Legislature	None			
Wyoming	Legislature	Permitted at any time	WYO. CONST. art. III, § 49		