

REDISTRICTING AND THE NEW JUDICIAL FEDERALISM: REAPPORTIONMENT LITIGATION UNDER STATE CONSTITUTIONS

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I. INTRODUCTION

Since the New Deal, redistricting and reapportionment litigation has been dominated by the United States Constitution and the federal courts.¹ While initially, in *Colegrove v. Green*,² the Supreme Court declared nonjusticiable the constitutionality of redistricting of legislative seats, stating, in the words of Justice Frankfurter that they should not venture into that “political thicket,”³ it subsequently reversed itself on this matter. It did so first in *Gomillion v. Lightfoot*,⁴ where it held that a suit filed under the

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1. See, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 50-53 (2003) (noting how the origins of recent federal court intervention begin with cases such as *Reynolds v. Sims*, 377 U.S. 533 (1964), and efforts to locate a manageable standard for evaluating the constitutionality of legislative redistricting); DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* 228-48 (2004) (describing the role of the federal courts, and especially the Supreme Court under Earl Warren, as pushing the reapportionment revolution).

2. 328 U.S. 549 (1946).

3. *Id.* at 556 (“To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.”).

4. 364 U.S. 339 (1960).

Fifteenth Amendment challenging the failure to reapportion seats could be heard in federal court.⁵ But more importantly, in *Baker v. Carr*,⁶ the Court directly overruled *Colegrove*.⁷ It declared that questions regarding the malapportionment of legislative and other elected positions were justiciable issues properly before the federal courts.⁸ Whether a decision to intervene into this political thicket was premised upon *United States v. Carolene Products*⁹ jurisprudence or upon other factors,¹⁰ the reality has been that since the 1960s the federal courts have been major players in resolving questions addressing redistricting, whether it be in the area of the Voting Rights Act,¹¹ the use of race in line drawing, or in seeking to uncover political motives in the gerrymandering of seats.¹² In its decisions, the federal courts have drawn upon federal law and, moreover, when state courts have been called upon to act, they too have drawn upon the same jurisprudence when it comes to addressing issues of malapportionment.

However, the federal court and federal law dominance has not gone unchallenged. Increasingly in the last few years, and especially since the 2000 decennial census, state courts, using their own state constitutions, have become more important players in the redistricting process.¹³ Perhaps the reason for this state court intervention and jurisprudence is connected to the withdrawal of the federal courts from the protection of individual rights and the rise of the new judicial federalism that Justice William Brennan urged to combat this perceived retreat.¹⁴ Or perhaps it is due to a maturing of state constitutional jurisprudence in this area of law and a reverting to the states their historic responsibility to address gerrymandering issues. Exploring the

5. *Id.* at 347.

6. 369 U.S. 186 (1962).

7. *See Baker*, 369 U.S. at 231-32, 237.

8. *Id.* at 187, 237.

9. 304 U.S. 144 (1938).

10. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74-77 (1980) (describing the Warren Court move into redistricting as premised upon the logic of footnote number four of *Carolene Products*); DAVID A. SCHULTZ AND CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA* 22-24 (1996) (describing the labeling of the legal philosophy of the New Deal and Warren Court as a “*Carolene Products* jurisprudence”).

11. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2000)).

12. STEPHENSON, *supra* note 1, at 228-40.

13. *See* discussion *infra* Part III.C.

14. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-04 (1977).

forces driving this new state court intervention into the redistricting process, and assessing its jurisprudence, is the focus of this Article.

To undertake this assessment, part two of this Article briefly outlines how the federal courts developed their constitutional jurisprudence to address malapportionment issues since the 1960s.¹⁵ It will describe the path from *Colegrove v. Green*¹⁶ to *League of United Latin American Citizens v. Perry* (“LULAC”),¹⁷ seeking to show how especially the Supreme Court came to define the law governing decennial redistricting. Part three of the Article then switches to the state courts. It first looks to state case law on voting and redistricting in the 1990s, with the goal of discussing how state courts used their constitutions in comparison to the United States Constitution to address these issues. Yet the majority of part three will be to examine the role of state courts since the 2000 census in adjudicating gerrymandering issues under their own constitutions, and then to make some assessments regarding how effective they have been in resolving redistricting issues absent federal constitutional law.

Overall, the argument will be that in the 1990s a second judicial federalism unique to redistricting was potentially launched by the Supreme Court in *Grove v. Emison*,¹⁸ and that state courts, as a result, are beginning to use their authority to assume an increasingly important role in policing the redistricting process. However, while there are signs that state courts and constitutions are more actively being used to address redistricting issues, the Article concludes by indicating that the evidence of a new judicial federalism in this area is mixed. If the concept “new judicial federalism” is characterized by a turning to state constitutions to resolve disputes (instead of the Federal Constitution) or using the former to grant more rights than found under the latter,¹⁹ then its impact in redistricting litigation has been thus far muted.

II. REDISTRICTING AND THE FEDERAL COURTS

The federal courts entered the political thicket of Justice Frankfurter as a result of a long history of state legislative intransigence with regard to reapportionment and redistricting. The road to *Colegrove v. Green*, *Baker v.*

15. Since the emphasis is upon the constitutional analysis, cases decided under the 1965 Voting Rights Act, as amended, are excluded from this study.

16. 328 U.S. 549 (1946).

17. 126 S. Ct. 2594 (2006) (plurality opinion).

18. 507 U.S. 25 (1993).

19. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161-62 (1998).

Carr, and *Reynolds v. Sims* is a long one, dating back to the earliest days of the American republic.

A. *Gerrymandering in the States*

State politics dating back to the earliest days of the republic reveal twin characteristics: first, continued efforts to gerrymander; and second, persistent responses to control those gerrymanders.²⁰ As is often forgotten, the term “gerrymander” is an amalgam of Elbridge Gerry and salamander.²¹ Gerry was a second term governor of Massachusetts in 1810 when his political party attempted (much like Tom DeLay in Texas nearly 200 years later) to redraw district lines to their advantage in order to retake control of the state legislature.²² The resulting shape of one of the districts looked like a salamander to some, leading Gilbert Stuart to label it and other similarly-shaped districts a “gerrymander.”²³ Besides giving birth to a new word, this incident confirmed that efforts to control the districting process for partisan or other reasons has a long history in the states.

Alan Tarr and James Gardner document many of the ways that state constitutions historically have tried to address gerrymandering.²⁴ Provisions such as requiring that districts be contiguous or compact are often constitutionally mandated,²⁵ or that the districts have equal or near equal populations.²⁶ Other states also stipulate that local governments cannot be divided in some situations,²⁷ while others such as Iowa have turned the districting duties over to a non- or bi-partisan redistricting commission.²⁸ Overall, factors referred to as “traditional districting principles” and used for apportionment in *Shaw v. Reno*,²⁹ along with structural requirements such as commissions, were legislated as responses to gerrymandering.

20. James A. Gardner, *Representation Without Party: Lessons From State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 887-88 (2006).

21. STEPHENSON, *supra* note 1, at 243-44.

22. *Id.* at 244.

23. *Id.*

24. TARR, *supra* note 19, at 118-21; Gardner, *supra* note 20, at 891-925.

25. Gardner, *supra* note 20, at 894-95.

26. *Id.* at 895.

27. *Id.* at 897.

28. See James A. Gardner, *Voting and Elections*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 145, 163 (G. Alan Tarr & Robert F. Williams eds., 2006).

29. 509 U.S. 630, 642 (1993).

But beyond more naked efforts to gerrymander districts by cutting them into irregular geographic shapes or sizes, other types of malapportionment became more common in the late nineteenth and early twentieth centuries. One was the failure of states to redraw boundaries or allocate representatives based upon the shift in population from rural to urban areas. Another was efforts to carve up districts to disempower freed slaves and African-Americans after the Civil War.

In the first case, as urban populations swelled from immigration and from an exodus of people from farms to the city, once populous rural districts lost residents.³⁰ Had normal redistricting followed the decennial census, political power and representation would have flowed to the urban centers with more members of Congress (i.e., House of Representatives) and state legislators being apportioned to represent these areas. However, this was not the case. Rural legislators in control of reapportionment refused to redraw district lines to reflect the demographic shifts in population. Often this failure to redistrict lasted decades.³¹

In the second case, while the Fifteenth Amendment granted freed slaves (males, at least) the right to vote, many states, mostly in the south, undertook a variety of measures to ensure that they did not exercise this franchise.³² Notorious among measures to discourage African-Americans from voting were poll taxes, literacy tests, grandfather clauses, felon disenfranchisement laws, and outright intimidation and lynching by the Ku Klux Klan.³³ Lesser known, but still widely used, was the practice of racial gerrymandering. Specifically, the technique was to use race in redistricting to limit the ability of African-Americans to form a voting block sufficiently large enough to elect a representative of their own.³⁴ The failure to reapportion after a census and the use of racial gerrymandering came to a head after World War II, pressuring the Supreme Court to address these problems.

30. STEPHENSON, *supra* note 1, at 228-48.

31. *Id.*

32. *See generally, e.g.*, C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974) (discussing the issues of segregation and voting, among others, from the Civil War through the early 1970s).

33. DAVID T. CANON, *RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS* 61-62 (1999).

34. *See id.*

B. The Supreme Court Responds

The jurisprudence that the United States Supreme Court created for the federal courts to address reapportionment and gerrymandering is long and detailed, and has been covered elsewhere in more depth.³⁵ However, a summary of that law is needed to set the context for state constitutional adjudication in the 1990s and 2000s.

While initially, in *Colegrove v. Green*, the Supreme Court ruled that redistricting issues were not justiciable in federal court,³⁶ it soon reversed itself in cases such as *Gomillion v. Lightfoot*, where it ruled that districting issues could be heard under the Fifteenth Amendment³⁷ and *Baker v. Carr*, where it reversed *Colegrove*.³⁸

Justice Brennan, writing for the majority in *Baker*, undertook a detailed analysis of the political question doctrine,³⁹ which was the basis for the decision of non-justiciability in *Colegrove*.⁴⁰ Brennan contended that the political question doctrine was really a matter of separation of powers, asking whether the constitutional text had committed the resolution of a specific issue to any particular branch of the national government.⁴¹ More exactly, the Court outlined several characteristics regarding what constituted a political question:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

35. See generally, e.g., HASEN, *supra* note 1.

36. 328 U.S. 549, 555 (1946).

37. 364 U.S. 339, 346-47 (1960).

38. 369 U.S. 186, 231-32, 237 (1962).

39. *Id.* at 217-32.

40. *Colegrove*, 328 U.S. at 555.

41. *Baker*, 369 U.S. at 217.

potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁴²

Overall, unless the Constitution clearly committed the issue to another branch for resolution, or the issue required the Court to make a prior policy judgment, or there were no clear standards for resolving the matter, the federal courts were not precluded from hearing the case.⁴³ In the dispute at hand in *Baker*, the Court did not find any of these conditions to pertain, thereby freeing the lower courts to hear the redistricting claim.⁴⁴ Thus, malapportionment claims could now be addressed by the judiciary.

Following *Baker*, the Court first, in *Gray v. Sanders*,⁴⁵ struck down a voting procedure that, while counting each vote the same, weighed rural votes more heavily than those from other areas of the state, such as cities.⁴⁶ In this “county unit system” for voting, each county was given a unit vote equal to that of the size of its representation in the state house. This yielded a situation where the largest counties received three units and others lesser votes. Then, in *Wesberry v. Sanders*,⁴⁷ the Court mandated that congressional districts must be of equal population.⁴⁸ But in neither of these cases did the Court declare a clear standard for judging the constitutionality of apportionment systems.⁴⁹

In *Reynolds v. Sims*, the Court did finally describe its manageable standard: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”⁵⁰ In reaching its conclusion, the Court noted that “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests”⁵¹ and that it was the right to vote that was diluted.

After *Reynolds*, “one-person, one-vote” was the general standard for all of the Court’s apportionment decisions. Subsequently, the Court subjected the standard to refinement and articulation. First, in *Lucas v. Forty-Fourth*

42. *Id.*

43. *Id.*

44. *Id.*

45. 372 U.S. 368 (1963).

46. *Id.* at 381.

47. 376 U.S. 1 (1964).

48. *Id.* at 18.

49. HASEN, *supra* note 1, at 51-53.

50. 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

51. *Id.* at 562.

General Assembly of Colorado,⁵² the Court confronted a districting schema similar to that found at the congressional level.⁵³ By that schema, while the lower house of the Colorado legislature would be apportioned by population, the upper house, or senate, would be apportioned like the U.S. Senate in that geography would be a factor in the allocation of seats.⁵⁴ As it did in *Reynolds*,⁵⁵ the Court in *Lucas* rejected the federal analogy,⁵⁶ finding no logical basis for apportioning one house by population and another by a different method.⁵⁷ Finally, in *Avery v. Midland County*,⁵⁸ the Court mandated that the one-person, one-vote standard also be extended to local government units.⁵⁹

While one-person, one-vote was the official mathematical standard, the Court applied it differently to congressional versus state and local government seats. In *Kirkpatrick v. Preisler*,⁶⁰ *White v. Weiser*,⁶¹ and most notably *Karcher v. Daggett*,⁶² the Court rejected even minor deviations from the one-person, one-vote standard for congressional seats, appearing to mandate near mathematical equality.⁶³ However, when it came to apportionment of state and local government seats, the Court seemed more willing to tolerate some variance—10% from the least to the most populous districts—if needed to prevent the dividing up of subunits of government.⁶⁴

A final question when it comes to the one-person, one-vote standard relates to timing. Specifically, how often must redistricting occur in order to be compliant with the *Reynolds* standard? On the one side, even though the Supreme Court has not ruled on this issue, several federal courts have held that while adherence to the one-person, one-vote standard is mandatory, the interests of stability and letting incumbents complete their current terms do not require immediate elections based upon new population figures obtained

52. 377 U.S. 713 (1964).

53. *See id.* at 719.

54. *See id.* at 717-18.

55. *See* 377 U.S. at 571-76.

56. STEPHENSON, *supra* note 1, at 234.

57. *Lucas*, 377 U.S. at 738-39.

58. 390 U.S. 474 (1968).

59. *Id.* at 485-86.

60. 394 U.S. 526 (1969).

61. 412 U.S. 783 (1973).

62. 462 U.S. 725 (1983).

63. *Karcher*, 462 U.S. at 742-44; *White*, 412 U.S. at 790; *Kirkpatrick*, 394 U.S. at 530; *see also* STEPHENSON, *supra* note 1, at 236-37.

64. *See, e.g.,* *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Mahan v. Howell*, 410 U.S. 315, 327 (1973); *Abate v. Mundt*, 403 U.S. 182, 187 (1971).

in the most recent decennial census.⁶⁵ Yet conversely, the Supreme Court, in the recently decided *LULAC*,⁶⁶ held that the Constitution does not bar mid-decade redistricting, even when done solely for partisan motives.⁶⁷ Thus, states are free to redistrict more frequently than once per decade to meet the one-person, one-vote standard, but they also have some freedom beyond the decennial period to depart from it if promoting the stability of existing districts and letting incumbents finish terms are offered as competing interests.

A second issue the federal courts ventured into when they waded into the reapportionment waters was the matter of political or partisan gerrymandering. First, in *Davis v. Bandemer*,⁶⁸ at issue was a suit brought by Indiana Democrats contesting the constitutionality of a 1981 state redistricting plan.⁶⁹ The specific allegation was that the plan drew legislative lines and seats in such a way as to disadvantage Democrats. It did so by dividing up cities such as South Bend in unusual ways.⁷⁰ The Democrats filed suit, contending that these districts violated their rights as Democrats, under the Equal Protection Clause.⁷¹ The district court had ruled in favor of the Democrats, in part, because of evidence and testimony suggesting that the Republican Party had in fact drawn the lines to favor their own members.⁷² When the case reached the Supreme Court, a central issue was whether this was a justiciable controversy.⁷³ The Court held that it was.⁷⁴

To support its conclusion, the Court returned to the discussion of the political question doctrine that it had examined in *Baker v. Carr*.⁷⁵ It quoted from *Baker* its famous formulation of its view on what a political question was,⁷⁶ noting that unless a matter was textually committed to another branch, or it required a specific type of policy determination not appropriate for the Court, or there were missing manageable standards for resolving the

65. See, e.g., *Political Action Conference of Ill. v. Daley*, 976 F.2d 335, 341 (7th Cir. 1992); *French v. Boner*, 963 F.2d 890, 891-92 (6th Cir. 1992).

66. 126 S. Ct. 2594 (2006) (plurality opinion).

67. *Id.* at 2609-11.

68. 478 U.S. 109 (1986) (plurality opinion).

69. *Id.* at 113-15.

70. *Id.* at 113.

71. *Id.* at 115.

72. See *id.* at 117.

73. *Id.* at 118.

74. *Id.* at 127.

75. *Davis*, 478 U.S. at 121-23.

76. *Id.* at 121-22; see also *supra* text accompanying note 42.

controversy, the issue should be addressed by the federal judiciary.⁷⁷ Finding that none of the characteristics outlined in *Baker* existed in the political gerrymandering case before it, the Court held that the matter was justiciable.⁷⁸

Yet while the case was deemed justiciable, it did not uphold *in toto* the lower court's determination that there was a constitutional violation in *Bandemer*.⁷⁹ Instead, the Court articulated several stipulations that had to be met to sustain a political gerrymandering claim.⁸⁰ First, there had to be proof of intentional discrimination against the one party; here, the Democrats.⁸¹ Second, "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult"⁸² Instead, the Court stated that the political process must frustrate political activity in a systematic fashion:

[A]s in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.⁸³

Finally, the Court contended that showing frustration or dilution of political influence in one election was also insufficient.⁸⁴ Instead, one needed to show that it took place over several elections.⁸⁵ In sum, to support a constitutional claim for partisan gerrymandering the *Bandemer* Court stated that one would have to demonstrate intentional discrimination against a party that systematically frustrated and diluted their ability to influence the political process across several elections.⁸⁶ What emerged from *Bandemer* was perhaps the manageable standards called for in *Baker* that would allow the federal judiciary to resolve a controversy. Yet the three conditions of the case proved to be anything but manageable, and furthermore the federal courts

77. *Davis*, 478 U.S. at 121-22.

78. *Id.* at 126-27.

79. *See id.* at 129.

80. *See id.* at 127-35.

81. *Id.* at 127-28.

82. *Id.* at 132.

83. *Id.* at 133.

84. *Id.* at 135.

85. *See id.*

86. *See id.*; *see also* STEPHENSON, *supra* note 1, at 246.

had never invalidated a redistricting plan as a partisan gerrymander.⁸⁷ This led to demands for the Court to rethink the question of the justiciability of partisan gerrymandering. It did that first in *Vieth v. Jubelirer*,⁸⁸ and then again in *LULAC*.⁸⁹

In *Vieth*, at issue was the constitutionality of a Pennsylvania districting plan that drew the seats for its congressional delegation after the 2000 census.⁹⁰ Prior to the census the state had twenty-one representatives, but after 2000 it was only entitled to nineteen seats.⁹¹ Republicans controlled both houses of the Pennsylvania legislature as well as the governor's office.⁹² State Democrats contended that the district lines drawn constituted both a violation of the one-person, one-vote standard and, more importantly here, a partisan gerrymander.⁹³ A four person plurality opinion written by Justice Scalia reviewed the history of partisan gerrymandering in the United States, concluding that such a practice went back to the early days of the republic.⁹⁴ The Court then keyed in on the *Baker* discussion that judicially manageable standards or a clear rule was needed for the courts to resolve a controversy.⁹⁵ Scalia argued that the standards for addressing partisan gerrymandering in *Bandemer* had proved unworkable and the case should be overturned.⁹⁶ In effect, partisan gerrymanders were not justiciable.

However, only four Justices agreed that the Democrats had not proven that a partisan gerrymander existed in the case and that this type of issue was not justiciable.⁹⁷ Justice Kennedy concurred that there was no partisan gerrymander here, but he refused to go along with overruling *Bandemer*.⁹⁸ He agreed that neutral rules for resolving and adjudicating partisan gerrymanders were needed, but he did not agree with the majority that it would never be possible to find them.⁹⁹ Thus, this created a five Justice majority to reject the plaintiffs' claims. However, four Justices in several dissents, in addition to Kennedy, refused to overrule *Bandemer*, retaining at

87. STEPHENSON, *supra* note 1, at 246-47.

88. See 541 U.S. 267, 271-72 (2004) (plurality opinion).

89. See 126 S. Ct. 2594, 2604-05 (2006) (plurality opinion).

90. 541 U.S. at 272.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 274-77.

95. *Id.* at 278-79.

96. *Id.* at 278-81.

97. *Id.* at 270 (listing judges joining Justice Scalia in plurality opinion).

98. *Id.* at 306-07, 310 (Kennedy, J., concurring).

99. *Id.* at 306-07.

least in theory partisan gerrymanders as justiciable issues.¹⁰⁰ What the dissenters could not agree on was what constituted manageable standards for adjudicating a partisan gerrymander dispute. The hope was that *LULAC*¹⁰¹ would provide that. It did not.¹⁰²

LULAC arose out of a high-profile partisan battle in the Texas legislature that involved U.S. Representative Tom DeLay and a battle for the state legislature and its congressional delegation.¹⁰³ The 2000 census indicated that Texas should receive two additional seats in Congress beyond the current thirty that it had.¹⁰⁴ At the time of redistricting, the Texas Republican Party controlled the State Senate and governor's office, but the Democrats controlled the State House of Representatives.¹⁰⁵ Unable to agree to a redistricting scheme, litigation eventually led to the creation of a court-ordered one.¹⁰⁶ This plan produced a seventeen-to-fifteen Democratic majority in the Texas congressional delegation.¹⁰⁷ But in 2003, state elections gave Republicans control of both houses of the state legislature as well as control of the governor's office.¹⁰⁸ With the encouragement of Tom DeLay, and after a long struggle, the state passed a new redistricting plan in 2003.¹⁰⁹ In 2004, elections using this new plan gave Republicans 58% of the statewide vote compared to 41% for Democrats.¹¹⁰ Republicans also captured twenty-one of the congressional seats to the eleven won by the Democrats.¹¹¹ The 2003 plan was challenged in court, on a claim that it was a partisan gerrymander and that the state and federal constitutions barred a second redistricting scheme following a decennial census.¹¹² Judgment was for the appellees, but in light of *Vieth v. Jubelirer*, the Supreme Court vacated that decision and remanded to reconsider.¹¹³ The district court solely considered the political gerrymandering claim and again ruled in favor of the

100. See *id.* at 317-42 (Stevens, J., dissenting); *id.* at 343-55 (Souter, J., dissenting) (dissenting opinion joined by Justice Ginsburg); *id.* at 355-68 (Breyer, J., dissenting).

101. 126 S. Ct. 2594 (2006) (plurality opinion).

102. *Id.* at 2609.

103. *Id.* at 2605-06.

104. *Id.* at 2605.

105. *Id.*

106. *Id.* at 2606.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 2607.

113. *Id.*

appellees.¹¹⁴ Now before the Supreme Court were arguments that the 2003 redistricting schema was a partisan or political gerrymander, that it violated the Voting Rights Act (“VRA”),¹¹⁵ and that the mid-decade redistricting violated the one-person, one-vote requirement under the Fourteenth Amendment.¹¹⁶ While the Court did find that one of the districts did violate the VRA,¹¹⁷ it rejected claims that a mid-decade redistricting violated the Constitution, and it also ruled that the appellants had failed to state a claim upon which relief could be granted for the political gerrymander claim.¹¹⁸

Justice Kennedy, writing for yet another divided Court when it came to the partisan gerrymander claim, specifically noted that the theory of the plaintiffs was that a mid-decade redistricting, when solely motivated by partisan objectives, violated the Fourteenth Amendment.¹¹⁹ A majority of the Court rejected this claim,¹²⁰ stating that not every line drawn was based on partisan objectives.¹²¹ Yet even if mixed motives were not present in this case, Kennedy asserted that one challenging a gerrymander as partisan would have to show how it burdened, according to a reliable standard, their representational rights.¹²² The simple fact that a mid-decade redistricting schema took place was rejected as a per se standard to show burden.¹²³ Similarly, the claim that mid-decade redistricting, if done for partisan purposes, violates the one-person, one-vote requirement was also rejected.¹²⁴ Overall, while Kennedy clearly stated that this decision did not revisit the justiciability of partisan gerrymandering, it rejected the tests offered in this case to define a standard for resolving disputes averring this as a claim.¹²⁵

The decision in *LULAC* appears to offer little clarification on what a partisan gerrymander is when it is compared to *Jubelirer*. Partisan gerrymandering is still justiciable, but no manageable standard exists upon

114. *Id.*

115. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2000)).

116. *LULAC*, 126 S. Ct. at 2605.

117. *Id.* (finding that district 23 did violate the VRA). For purposes of this Article, the VRA claim shall not be discussed.

118. *Id.*

119. *Id.* at 2609.

120. *Id.* at 2610.

121. *See id.*

122. *See id.* at 2609-10.

123. *Id.* at 2610.

124. *Id.* at 2611-12.

125. *Id.* at 2607.

which the Court can provide relief.¹²⁶ The Court also appears as fractured as before regarding justiciability, and there is still no majority willing to overturn *Bandamer*.¹²⁷ Perhaps the only clarity to result from the decision is that it does not appear that mid-decade redistricting is barred by the Constitution, whether done from mixed motives or only for partisan purposes.¹²⁸

Finally, while through the early 1990s the Supreme Court appeared to covet resolution of redistricting issues for the federal courts, in *Grove v. Emison*,¹²⁹ it declared that federalism requires “federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.”¹³⁰ Phrased otherwise, once states have begun to undertake reapportionment the federal courts must defer to them. The implication of this decision is that it gives states, including their courts, the opportunity to act in redistricting if they begin the process before the federal courts can step in.

Overall, commencing with *Gomillion v. Lightfoot* in 1960, the Supreme Court and the federal judiciary launched a reapportionment revolution in the states. Using the Fourteenth and Fifteenth Amendments, often alongside the VRA, federal courts applied the concept of one-person, one-vote to a constitutional examination of state legislative and congressional districting schemas in order to root out malapportionment. But for purposes of this Article, one of the more curious characteristics of much of the reapportionment revolution was its federal nature. It was the federal courts, mostly applying the United States Constitution or federal law, that drove redistricting. Where were state courts and their constitutions in this revolution? For the most part, they were absent until the 1990s, for reasons specified in part three of this Article.

126. *Id.* at 2607, 2609-11.

127. *See, e.g., id.* at 2607; *Vieth v. Jubelirer*, 541 U.S. 267, 278-81 (2004) (plurality opinion).

128. *LULAC*, 126 S. Ct. at 2609-10.

129. 507 U.S. 25 (1993).

130. *Id.* at 33.

III. THE TURN TO STATE COURTS AND CONSTITUTIONS

A. *Launching the New Judicial (Reapportionment) Revolution*

Several forces drove state courts to address redistricting question in the 1990s and following the 2000 census. First, while Chief Justice Earl Warren may have considered his reapportionment decisions to be the most important ones to be decided under his tenure,¹³¹ such a sentiment was not necessarily shared by the Burger and Rehnquist courts. They were more preoccupied with issues such as crime or property rights.¹³²

Second, until the 1970s, the federal courts, especially the Supreme Court under Chief Justice Earl Warren, were where the action was when it came to issues such as reapportionment, voting rights, criminal due process, and a host of other issues.¹³³ But beginning in the 1970s state courts became new and active players in protecting individual rights and settling policy disputes. In part because he saw the Burger Supreme Court as retreating from the liberal activism of the Earl Warren era, Justice Brennan in 1977 urged state courts to use their own constitutions and authority to protect individual rights.¹³⁴ It is from this article that what has come to be called the “new judicial federalism” developed.¹³⁵

Using their own state constitutions, state courts have decided cases differently from those reached by the federal courts, often providing more constitutional protection for rights than found at the federal level.¹³⁶ As social issues such as gay rights or same-sex marriage are being litigated at the state level, state constitutions and courts have become important players,

131. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 279 (1993); *see also* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 286-87 (2000) (discussing the Warren Court’s approach to regulating and protecting the right to vote).

132. *See generally, e.g.*, STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* (2000); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992); MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003) (discussing the agendas of the post-Warren Supreme Courts).

133. *See, e.g.*, ELY, *supra* note 10, at 73-74; BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* (unabr. ed. 1983) (discussing the impact and importance of the Warren Court upon American politics).

134. *See* Brennan, *supra* note 14, at 502-04.

135. TARR, *supra* note 19, at 161-62.

136. *See generally* TARR, *supra* note 19, at 171-209 (discussing how states have constructed more rights or protections than those found under the Federal Constitution).

drawing significant attention in the cultural wars.¹³⁷ Political parties also have come to recognize state courts as important players in addressing reapportionment of state legislatures and congressional seats.¹³⁸

Third, *Grove v. Emison*¹³⁹ may have served as an important impetus for states to enter the redistricting field. As a result of this 1993 Supreme Court decision, federal courts should defer to state tribunals if they were already at work on a redistricting schema.¹⁴⁰ This decision, a nod to judicial federalism when it came to redistricting,¹⁴¹ gave significant new power to state courts to enter the reapportionment revolution in ways that may not have been possible before because of federal preemption or supremacy in this policy area. As a result, by the 1990s, state courts had an opportunity to take the lead in redistricting and to develop alternative remedies and plans to address malapportionment as well as political gerrymandering.¹⁴²

*B. State Constitutional Litigation in the 1990s*¹⁴³

Following the 1990 decennial census several state courts became involved in state redistricting controversies. However, not all of them drew upon their state constitutions in their (majority) opinions. For example, in *In re Constitutionality of Senate Joint Resolution 2G*,¹⁴⁴ the Florida Supreme Court was called upon to review a state legislative resolution proposing a

137. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (striking down, on state constitutional grounds, the Massachusetts ban on same-sex marriages).

138. See, e.g., *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1243 (Colo. 2003) (holding that the second redistricting after the 2000 census violated the state constitution).

139. 507 U.S. 25 (1993).

140. *Id.* at 42.

141. See *id.* at 33.

142. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 5, 64-97 (2006) (discussing various ways states have historically innovated to address representation needs and how states represent a conscious attempt to depart from the federal constitutional model in many areas). Dinan's model suggests that state courts should feel free to depart from the federal model when addressing representation and redistricting issues. *Contra* JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 195-98 (2005) (contending that state courts should only turn to their constitutions when there is a belief that the national government has abused its authority).

143. See generally *REAPPORTIONMENT POLITICS: THE HISTORY OF REDISTRICTING IN THE 50 STATES* (Leroy Hardy et al. eds., 1981) (examining reapportionment politics and history at the state level); Robert M. Sukol, *Legislative Branch Reapportionment: Decennial State Constitutional Controversies*, 24 RUTGERS L.J. 1106, 1106-32 (1993) (reviewing 1990s state constitutional law and court reapportionment adjudication).

144. 601 So. 2d 543 (Fla. 1992).

new redistricting plan.¹⁴⁵ Its opinion drew mostly on the VRA.¹⁴⁶ In *Harvey v. Clinton*,¹⁴⁷ the Arkansas Supreme Court was asked to determine if a state redistricting plan that included both single- and multi-member districts violated the state constitution.¹⁴⁸ The opinion here, for the most part, avoided any substantive use of the Arkansas Constitution.¹⁴⁹ Third, in *People ex rel. Burris v. Ryan*,¹⁵⁰ the Illinois Supreme Court upheld a state redistricting map with only minimal reference to its constitution.¹⁵¹ Fourth, in *In re Stephan*,¹⁵² the Kansas Supreme Court upheld, on substantive and procedural grounds, the constitutionality of a legislative redistricting plan.¹⁵³ The entire use of the state constitution here seems more perfunctory than real, confined to the constitutional role of the court to review redistricting plans.¹⁵⁴ As the review below indicates, other state supreme courts did reference their constitutions with varying levels of discussion.

1. Nebraska

Nebraska appears to be the only one of two state supreme courts to use its constitution to invalidate a reapportionment plan in the 1990s. In *Day v. Nelson*,¹⁵⁵ at issue was a challenge to the 1991 Nebraska reapportionment plan enacted after the 1990 census.¹⁵⁶ In the challenge, the plaintiffs contended that the plan violated the Fourteenth Amendment as well as article III, section 5 of the Nebraska Constitution.¹⁵⁷ Section 5 requires district lines to follow county lines as much as “practical.”¹⁵⁸ After noting that the lines conformed with the one-person, one-vote requirement of *Baker* and *Reynolds*, the Nebraska Supreme Court declared that there were other possible plans that would not have divided Madison County into two districts and that since the state constitution required (i.e., used “shall,” not “may”)

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145. *See id.* at 544-45.
 146. *See id.* at 546-47.
 147. 826 S.W.2d 236 (Ark. 1992).
 148. *See id.* at 238.
 149. *See id.* at 236-39.
 150. 588 N.E.2d 1033 (Ill. 1992).
 151. *See id.* at 1035-36.
 152. 836 P.2d 574 (Kan. 1992) (per curiam).
 153. *See id.* at 578-81.
 154. *See id.* at 578.
 155. 485 N.W.2d 583 (Neb. 1992) (per curiam).
 156. *Id.* at 584.
 157. *See id.*
 158. *Id.* at 585 (referring to NEB. CONST. art. III, § 5 (amended 2000)).

lines to follow county boundaries, the existing plan was enjoined.¹⁵⁹ The extent of the constitutional analysis was confined to this “shall versus may” requirement for redistricting plans.¹⁶⁰ No state case law was cited and no real constitutional discussion occurred. Instead, the plan was invalidated when it was compared to others which did not divide Madison County.¹⁶¹

2. Texas

Following the 1990 census a state redistricting plan was challenged as a violation of the Texas Constitution. In *Terrazas v. Ramirez*,¹⁶² the Supreme Court of Texas was called upon to approve a plan adopted by the state legislature.¹⁶³ Two parts of article III, section 28 of the Texas Constitution were important in this decision. First, the court cited the state constitution for the proposition that while the state legislature has the responsibility of apportionment,¹⁶⁴ the court has the authority to review, and if need be impose, a redistricting plan if a satisfactory one was not adopted by the state legislature.¹⁶⁵ Although the court addressed this by citing article III, section 28 of the constitution,¹⁶⁶ the court also cited to *Reynolds v. Sims* and *Baker v. Carr* to support its points,¹⁶⁷ making it unclear the extent to which the Texas Constitution was really controlling. Second, the court noted how this same article and section of the constitution required the legislature to “reapportion legislative districts in the first regular session after each United States decennial census is published.”¹⁶⁸ In language that may have prevented use of the Texas Constitution to challenge the mid-decade redistricting in the state in 2004, the court stated that “neither that section nor any other

159. *Id.* at 585-86.

160. *Id.* at 586.

161. *Id.*

162. 829 S.W.2d 712 (Tex. 1991).

163. *See id.* at 713-14.

164. *Id.* at 717.

165. *Id.* (“A judicial determination that an apportionment statute violates a constitutional provision is no more an encroachment on the prerogative of the Legislature than the same determination with respect to some other statute. The Legislature, as well as the judiciary, must comply with the United States Constitution and the Texas Constitution.”).

166. *Id.*; *see also* TEX. CONST. art. III, § 28 (amended 2001) (“The Supreme Court of Texas shall have jurisdiction to [address] . . . the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law.”).

167. *Ramirez*, 829 S.W.2d at 717.

168. *Id.* at 726.

constitutional provision prohibits the Legislature from acting in later special or regular sessions.”¹⁶⁹

3. California

In *Wilson v. Eu (Wilson I)*,¹⁷⁰ the Governor of California asked the state supreme court to draft reapportionment plans for the legislature and its congressional delegation.¹⁷¹ This request was made because the state legislature had, in 1991, sent a plan to the governor, which he vetoed, and the legislature had adjourned, leaving in doubt whether an acceptable plan would be in place for the 1992 elections.¹⁷²

In *Wilson I*, the court issued a memorandum order indicating that it would produce a plan.¹⁷³ In this order, the court also stated that while article XXI, section 1 of the California Constitution delegated to the legislature responsibility to produce a redistricting plan,¹⁷⁴ nothing in the language of the constitution appeared to foreclose the court from developing its own.¹⁷⁵ Little, if any, constitutional analysis was performed in this opinion. In *Wilson v. Eu (Wilson II)*,¹⁷⁶ the California Supreme Court approved the special master’s redistricting plan.¹⁷⁷ The court noted that article XXI, section 1 requires each

new district[] to include (1) consecutively numbered single-member districts, (2) ‘reasonably equal’ populations among districts of the same type, (3) contiguous districts, and (4) ‘respect’ for the ‘geographical integrity of any city, county, or city and county, or of any geographical region’ to the extent possible without violating the other standards.¹⁷⁸

However, much of the decision reviewing the special master’s report either highlighted the VRA,¹⁷⁹ discussed the mandate of equal population for

169. *Id.*
 170. 816 P.2d 1306 (Cal. 1991) (per curiam) (mem.).
 171. *Id.* at 1306.
 172. *Id.*
 173. *Id.* at 1306-07.
 174. *Id.* at 1306.
 175. *Id.*
 176. 823 P.2d 545 (Cal. 1992) (en banc).
 177. *Id.* at 559-60.
 178. *Id.* at 549 (quoting CAL. CONST. art. XXI, § 1 (1980)).
 179. *Id.* at 549-51.

districts with reference to federal precedent,¹⁸⁰ or merely cited the state constitution for the requirement that districts must be compact and contiguous.¹⁸¹ Again, little discussion or reliance on the California Constitution occurred.

4. New York

In *Wolpoff v. Cuomo*,¹⁸² the New York Court of Appeals was called upon to adjudicate the constitutionality of a 1992 reapportionment passed by the legislature and signed into law by the Governor.¹⁸³ Almost immediately after the plan had been approved by the Governor it was challenged in court, with the claim that the Senate plan was a “rank partisan and personal-interest gerrymander” that violated article III, section 4 of the state constitution, which requires that all districts be compact and contiguous and that they should avoid unnecessary fragmentation of local units of government.¹⁸⁴ While the litigation in this case involved several suits that included both the federal and state courts,¹⁸⁵ it was the New York Court of Appeals that finally resolved the controversy, seeing it as an exercise in reconciling conflicting federal and state constitutional mandates.¹⁸⁶

According to the court, there was no question that there was a state constitutional violation.¹⁸⁷ Yet that violation was only the beginning of the inquiry:

The issue before us on these appeals is not whether the Senate redistricting plan technically violates the express language of the State Constitution. No one disputes that such a technical violation has occurred, and in *Matter of Orans*, we recognized that such violations were inevitable if the Legislature was to comply with Federal constitutional requirements. Indeed, each of the four alternative plans submitted by the petitioners technically violates the State Constitution as well. Rather, we examine the balance struck by the Legislature in its effort to harmonize competing Federal and State requirements. The test is whether the Legislature has “unduly departed” from

180. *Id.* at 551-52.

181. *Id.* at 552-53.

182. 600 N.E.2d 191 (N.Y. 1992).

183. *Id.* at 192.

184. *Id.* at 193.

185. *Id.* at 192-93 (reviewing the procedural history of the case).

186. *Id.* at 193-94.

187. *Id.*

the State Constitution's requirements regarding contiguity, compactness and integrity of counties in its compliance with Federal mandates.¹⁸⁸

In beginning its analysis, the court noted that there was a presumption that the plan was valid and that it would invalidate it only if it could be shown beyond a reasonable doubt that it violated fundamental law.¹⁸⁹ The court found that the plaintiffs did not carry their burden.¹⁹⁰ In affirming the plan, the majority drew upon *Reynolds v. Sims* to point out that even though there was a technical violation of the state's constitutional requirements for compactness, contiguity, and respect for local government subdivisions,¹⁹¹ it would uphold the judgment of the legislature in how they balanced competing federal and state constitutional mandates.¹⁹²

5. Virginia

In *Jamerson v. Womack*,¹⁹³ the Virginia Supreme Court upheld the constitutionality of the 1991 legislative redistricting plan.¹⁹⁴ Here, the challenge was whether it violated the "compactness requirements of [a]rticle II, section 6 of the Constitution of Virginia."¹⁹⁵ Section 6 requires "[e]very electoral district [to] be composed of contiguous and compact territory"¹⁹⁶ As part of its analysis, the court notes the requirements of equal protection (*Reynolds*) as well as VRA considerations that may affect a reapportionment plan,¹⁹⁷ and that the legislature had the primary responsibility to develop a plan that would be given a "strong presumption of validity."¹⁹⁸ Given these considerations, the court upheld the plan, stating that while some of the districts were not compact they nonetheless did conform with state constitutional requirements.¹⁹⁹

188. *Id.* (citation omitted in original) (citation omitted).

189. *Id.* at 194.

190. *Id.* at 195.

191. *Id.* at 194-95.

192. *Id.* at 195.

193. 423 S.E.2d 180 (Va. 1992).

194. *Id.* at 186.

195. *Id.* at 181.

196. *See id.* at 181 n.1 (emphasis in original omitted) (quoting VA. CONST. art. II, § 6 (amended 2005)).

197. *Id.* at 183-84.

198. *See id.* at 182 (quoting *Caldwell v. Seaboard Sys. R.R.*, 380 S.E.2d 910, 912 (Va. 1989)).

199. *Id.* at 186.

6. Connecticut

*Fonfara v. Reapportionment Commission*²⁰⁰ parallels other state constitutional law cases, such as *Wolpoff v. Cuomo*,²⁰¹ in that the Connecticut Supreme Court was called upon to reconcile conflicting demands between the state and federal constitutions.²⁰² Although in *Fonfara* the court did not invalidate the redistricting plan,²⁰³ it was one of the few state courts to engage in a serious and detailed discussion of the state constitution as it applied to redistricting.²⁰⁴

In *Fonfara*, at issue was the constitutionality of a 1991 redistricting plan for the Connecticut House of Representatives drawn up by the state's Reapportionment Commission.²⁰⁵ On the one hand, article 3, section 4 of the Connecticut Constitution has a town integrity rule that mandates "[f]or the purpose of forming assembly districts no town shall be divided except for the purpose of forming assembly districts wholly within the town."²⁰⁶ However, the Court then stated that "[t]he following section goes on to mandate that '[t]he establishment of . . . districts in the general assembly shall be consistent with federal constitutional standards.'²⁰⁷ As the court saw it, it was impossible to comply fully with the state-mandated town integrity principle while also complying with the federal one-person, one-vote standard as mandated in *Reynolds v. Sims*.²⁰⁸ Thus one issue that the Connecticut court had to address was whether the legislature effected a reasonable balance between the state and federal constitutional mandates.²⁰⁹ But another issue was a question of what authority or power the state supreme court had to correct a redistricting plan drawn up by another branch

200. 610 A.2d 153 (Conn. 1992).

201. See *supra* notes 182-92 and accompanying text.

202. *Fonfara*, 610 A.2d at 154-55.

203. See *id.* at 166.

204. Compare *id.* at 156-58 (discussing CONN. CONST. art. III, §§ 4 (amended 1970, 1980), 6(d) (1976)), with, e.g., *Wilson II*, 823 P.2d 545, 552-53 (Cal. 1992) (citing, without discussion, CAL. CONST. art. XXI, § 1 (1980)).

205. *Id.* at 154-56.

206. *Id.* at 158 (alteration in original) (quoting CONN. CONST. art. III, § 4 (amended 1970, 1980)).

207. *Id.* at 158 (alteration in original) (quoting CONN. CONST. art. III, § 5 (amended 1980)).

208. *Fonfara*, 610 A.2d at 158.

209. See *id.* at 159-60.

of the government.²¹⁰ This issue necessitated a discussion of the state constitution that addressed separation of powers issues.²¹¹

The Connecticut Supreme Court was asked to review the plan of the Reapportionment Commission²¹² premised upon article 3, section 6(d) of the Connecticut Constitution, which states that

[o]riginal jurisdiction is vested in the supreme court to be exercised on the petition of any registered voter whereby said court may compel the commission, by mandamus or otherwise, to perform its duty or to correct any error made in its plan of districting, or said court may take such other action to effectuate the purposes of this article, including the establishing of a plan of districting if the commission fails to file its plan of districting by the thirtieth day of November as said court may deem appropriate. Any such petition shall be filed within thirty days of the date specified for any duty or within thirty days after the filing of a plan of districting. The supreme court shall render its decision not later than forty-five days following the filing of such petition or shall file its plan with the Secretary of the State not later than the fifteenth day of February next following the time for submission of a plan of districting by the commission. Upon receiving such plan the secretary shall publish the same forthwith, and, upon publication, such plan of districting shall have the full force of law.²¹³

The first issue for the court was whether this language of the constitution allowed the court to review and correct the commission's plan.²¹⁴ Here, the Court noted how, until the adoption of the state's first constitution in 1818, all judicial, legislative, and executive power was centered in the assembly.²¹⁵ The court noted that article 2 of the first constitution instituted a distribution of powers that separates authority into the three branches of government.²¹⁶ This separation of powers rule has historically prevented judges from performing nonjudicial duties, subject to alteration by constitutional amendment.²¹⁷ Has section 6(d) altered judicial duties to include the power to review and correct a redistricting plan authored by the commission? The

210. *Id.* at 156-57.

211. *Id.*

212. *Id.* at 155-56.

213. CONN. CONST. art. III, § 6(d) (1976).

214. *Fonfara*, 610 A.2d at 156-58.

215. *Id.* at 156-57.

216. *Id.* at 157.

217. *See id.* at 157.

court said the text was unclear,²¹⁸ but its analysis suggests not.²¹⁹ Specifically, the court stated that section 6(d) only allows it to act as a “superlegislature” and construct a plan *de novo* when the commission fails to promulgate its own.²²⁰ However, the court contended that its power to craft a plan when the commission did not act did not give the court the power to craft a new plan *de novo* when one had already been promulgated by that body.²²¹ Thus, in the case of its review of the 1991 plan, the court saw the state constitution as limiting its role to determining whether the plan devised by the commission complied with state and federal mandates.²²²

Having decided the scope of its review, the court then turned itself to whether the commission’s plans complied with state and federal mandates.²²³ The court noted that its own case law demanded that a presumption of validity must attach to decisions authored by other state actors and agencies, and that the plaintiffs carry the burden to show unconstitutionality beyond a reasonable doubt.²²⁴ Here, the court stated that plaintiffs did not carry their burden to show that the commission abused their discretion in seeking to reconcile the state-mandated town integrity principle with the federal one-person, one-vote standard, or even the VRA requirements.²²⁵ Thus, the Connecticut Supreme Court ruled that the plan did not violate the state constitution and it rejected the petition to overturn it.²²⁶

7. Colorado

Finally, in *In re Reapportionment of Colorado General Assembly*,²²⁷ the Colorado Supreme Court reviewed the constitutionality of the 1991 state redistricting plan.²²⁸ As required by the state constitution, the Colorado Supreme Court noted it was required to review redistricting plans created by the state’s Reapportionment Commission.²²⁹ In addition to the state

218. *Id.*

219. *See id.* at 157-58.

220. *See id.* at 157.

221. *Id.*

222. *Id.* at 158.

223. *Id.* at 158-65.

224. *Id.* at 158-59.

225. *Id.* at 158-66.

226. *Id.* at 166.

227. 828 P.2d 185 (Colo.) (en banc), *appeal after remand*, 828 P.2d 213 (Colo. 1992) (en banc); *see id.* at 188-89 (remanding redistricting plan to the Colorado Reapportionment Commission for “revision, modification, and resubmission” to the Colorado Supreme Court).

228. *See id.* at 188-89.

229. *Id.* at 188 (citing COLO. CONST. art. V, § 48(1)(e) (amended 2000)).

constitutional requirements of compactness and contiguous²³⁰ and equal population division mandates,²³¹ it also saw its role as reviewing the plan for conformity with federal constitutional and statutory mandates, including the VRA.²³² As the court saw it:

[T]he Final Plan must be consistent with six parameters (in the following hierarchy from the most to the least important): (1) the Fourteenth Amendment Equal Protection Clause and the Fifteenth Amendment; (2) section 2 of the Voting Rights Act; (3) article V, section 46 (equality of population of districts in each house); (4) article V, section 47(2) (districts not to cross county lines except to meet section 46 requirements and the number of cities and towns contained in more than one district minimized); (5) article V, section 47(1) (each district to be as compact as possible and to consist of contiguous whole general election precincts); and (6) article V, section 47(3) (preservation of communities of interest within a district).²³³

Initially, the court noted that no one claimed there to be a violation of either the Equal Protection Clause, the Fifteenth Amendment, or section 46.²³⁴ The court then found no violation under the VRA,²³⁵ and therefore it proceeded to an analysis of section 47.²³⁶ It noted that only six counties had been split and the commission justified that on the grounds of complying with the one-person, one-vote requirement.²³⁷ Here, the court generally agreed, except for Douglas and Pitkin counties (the latter including the city of Aspen), where they saw unnecessary division of communities of interest.²³⁸ Thus, using the Colorado Constitution, the court invalidated the division of two separate house districts into four under section 47.²³⁹ However, the discussion here was devoid of legal analysis, and instead it was more a questioning of how communities of interest were affected in the

230. *See id.* at 190 (referring to COLO. CONST. art. V, § 47(1)-(2) as amended).

231. *See id.* (referring to COLO. CONST. art. V, § 46 as amended).

232. *See id.* (referring to Equal Protection Clause, the Fifteenth Amendment, and section 2 of the Voting Rights Act).

233. *Id.* (footnotes omitted).

234. *Id.* at 190.

235. *Id.* at 193.

236. *Id.* at 193-94.

237. *Id.* at 194.

238. *Id.* at 194-96.

239. *Id.* at 194, 196.

drawing of the lines. Upon resubmission of the plan, the court upheld it, even though one county was still split.²⁴⁰

8. Summary

Of the eleven state supreme courts examined that reviewed reapportionment plans under their state constitutions in the 1990s, only two invalidated all or a portion of a plan under them.²⁴¹ In both cases, the invalidation was under the political subdivision integrity clauses, yet the discussion did little to build state constitutional case law or engage in significant legal analysis. Given this pattern, it is hard to argue that state reapportionment litigation in the 1990s demonstrated any serious characteristics which would indicate a new judicial federalism in this area.

C. *Post 2000 State Constitution Reapportionment Litigation*

The state constitutional litigation that occurred after the 2000 census contrasted in numerous ways to the litigation that occurred at the same level in the 1990s. The differences were in terms of the degree to which state constitutions factored into decisions to invalidate or uphold districting plans and in terms of addressing the problem of mid-decade reapportionment.

1. Traditional Districting Criteria

Several cases were filed under state constitutional provisions requiring that legislative districts be compact, contiguous, competitive, of equal population, or avoid breaking up local political subdivisions. For example, in *In re Legislative Districting*,²⁴² the Maryland Court of Appeals ruled that a state constitutional requirement, which required natural and local subdivision boundaries be respected, was violated in the drawing of the 2002 plan.²⁴³ Article III, section 4 of the Maryland Constitution mandates that “[e]ach legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population [and that d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions.”²⁴⁴

240. *In re* Reapportionment of Colo. Gen. Assembly, 828 P.2d 213, 216-17 (Colo. 1992) (en banc).

241. See discussion *supra* Parts III.B.1, III.B.7.

242. 805 A.2d 292 (Md. 2002).

243. *Id.* at 295.

244. MD. CONST. art. III, § 4.

Ordinarily a map that did not respect local units of government would entail, as in the 1990s in Nebraska, a straightforward examination of whether local counties or cities had been broken up where they need not be.²⁴⁵ But in the Maryland case, what was unusual was that while the court stated that the constitutional criteria for drawing lines had to be respected,²⁴⁶ the plaintiffs argued that other factors used in redrawing the districts included political or partisan ones.²⁴⁷ The Court rejected this claim that deviation from “[t]he requirement of ‘due regard’ for natural boundaries and boundaries of political subdivisions may be subordinated to achieve a ‘rational goal,’ such as avoiding the additional loss of senior legislators, [and] reducing the number of incumbent contests.”²⁴⁸ Instead, the constitutional requirements took precedent over these nonconstitutional factors.²⁴⁹

Similarly, in *Bingham County v. Idaho Commission for Reapportionment*,²⁵⁰ the Idaho Supreme Court used its state constitution to invalidate the 2001 legislative redistricting plan under article III, section 5, which prevents counties from being broken up except to comply with the U.S. Constitution.²⁵¹ But in addition to the Maryland and Idaho cases invalidating redistricting plans, challenges in other states were raised under their state constitutions contesting the validity of an apportionment plan.

In *In re 2001 Redistricting Cases*,²⁵² the Alaska Supreme Court issued an order invalidating portions of the 2001 redistricting plan developed by the redistricting commission for violating the state constitution.²⁵³ Article VI, section 6 of the Alaska Constitution requires that: “[e]ach house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area [and] shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty.”²⁵⁴ In challenging the state redistricting plan, plaintiffs alleged on state constitutional grounds that the inclusion of an oddly-shaped appendage to the southwest portion of house district 16 violated the compactness requirement of the state constitution; that districts

245. See discussion *supra* Part III.B.1.

246. *In re Legislative Districting*, 805 A.2d at 296-97.

247. See *id.* at 302-10.

248. *Id.* at 311 (second alteration added).

249. *Id.* at 326 (“But neither discretion nor political considerations and judgments may be utilized in violation of constitutional standards.”).

250. 55 P.3d 863 (Idaho 2002).

251. *Id.* at 866-67.

252. 44 P.3d 141 (Alaska), *appeal after remand*, 47 P.3d 1089 (Alaska 2002).

253. *Id.* at 143.

254. ALASKA CONST. art. VI, § 6 (amended 1999).

12 and 32 were improperly divided; that individuals in an unorganized area had a right to be placed in a single district (and not divided up); and that a deviation of 9.5% between the most and least populous districts was unconstitutional.²⁵⁵

In its order, the Alaska Supreme Court first examined house district 16.²⁵⁶ It then ruled that district 5 was less compact in shape and population than it needed to be.²⁵⁷ Even though the court cited only one case to support its decision, the ruling here did not involve as much legal analysis under the state constitution as it did a visual inspection of the map.²⁵⁸

The Court next stated that a reconsideration of districts 12 and 32 must be done on remand.²⁵⁹ It did so because the plan was developed on

a mistaken legal premise that constrained the board's view of the permissible range of constitutional options for these areas. The board interpreted this court's decision in *Kenai Peninsula Borough v. State* to preclude the board from pairing population from the Matanuska-Susitna Borough with the Municipality of Anchorage because both Anchorage and the borough had sufficient excess population to "control" an additional seat.²⁶⁰

The court stated that it was permissible to link the borough with Anchorage.²⁶¹ In reaching this claim, it did not invalidate their separation, but instead stated that the constitutional requirement of districts sharing a "relatively integrated socio-economic area" did not preclude their linkage.²⁶²

Third, the court ruled that absent discriminatory intent, dividing of unorganized²⁶³ areas is permissible and does not violate the constitutional requirement that districts must be relatively integrated socio-economic areas.²⁶⁴ Finally, the court ruled that the 9.5% deviation did violate article VI, section 6.²⁶⁵ In reaching that conclusion, it stated that the article VI, section 6 requirement that districts be as equal in population as practical, "will in many

255. See *In re 2001 Redistricting Cases*, 44 P.3d at 143-46.

256. *Id.* at 143.

257. *Id.*

258. See *id.*

259. *Id.*

260. *Id.* at 143-44 (footnotes omitted).

261. *Id.* at 144.

262. See *id.*

263. Although not expressly stated by the court, it is also likely meant that unorganized means unincorporated.

264. *In re 2001 Redistricting Cases*, 44 P.3d at 144-45.

265. *Id.* at 145-46.

cases be stricter than the federal threshold.”²⁶⁶ Here, because the deviation was 9.5% and because respondents conceded that they did not make an effort to reduce the deviation, the court ordered a redoing of the plan to lessen the deviations around the Anchorage area.²⁶⁷ Overall, while the Alaska Constitution was used to invalidate portions of the 2001 plan, some of the constitutional discussion was not detailed nor very well developed.

In *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*,²⁶⁸ plaintiffs challenged a redistricting plan created by the Arizona Redistricting Commission in 2001, and subsequently approved by the Secretary of State, and then pre-cleared by the U.S. Department of Justice for the 2002 elections.²⁶⁹ Among the challenges raised in both state and federal court were that the plan violated the VRA, the Equal Protection Clause, and several provisions of the Arizona Constitution.²⁷⁰ In terms of the state constitution, it was alleged that the Commission did not comply with the constitution in terms of the factors it must consider when drawing lines and that it failed to consider correctly the promotion of competitiveness in districts.²⁷¹ In drawing district lines, article IV, part 2, section 1(14) of the Arizona Constitution (“section 1(14)”) requires that they comply with the U.S. Constitution and the VRA; be “compact and contiguous”; “respect communities of interest as much as practical[]”; and “[t]o the extent practical[], competitive districts should be favored where to do so would create no significant detriment to the other goals.”²⁷² The suit by the Arizona Minority Coalition for Fair Redistricting (“Coalition”) claimed that the plan did not create as many competitive districts as it was possible to do and therefore it violated section 1(14).²⁷³

In rejecting this argument, the court of appeals undertook an extensive review of both the lower court decision²⁷⁴ and the section 1(14) criteria.²⁷⁵ It

266. *Id.* at 146.

267. *Id.*

268. 121 P.3d 843 (Ariz. Ct. App. 2005) (per curiam), *review denied*, 121 P.3d 843 (Ariz. Ct. App. 2006). Discussion here of the dispute over the districting plan in Arizona passes over the federal litigation on it, concentrating on the state constitutional litigation instead.

269. *Id.* at 848 & n.5 (discussing how the U.S. Department of Justice approved the congressional plan, but required some changes in the legislative plan to comply with the VRA).

270. *Id.* at 848-49, 851.

271. *Id.* at 849.

272. ARIZ. CONST. art. IV, pt. 2, § 1(14).

273. *Ariz. Minority Coal.*, 121 P.3d at 849.

274. *Id.* at 851.

discussed both how the lower court had applied strict scrutiny because a right to vote under the U.S. Constitution was implicated²⁷⁶ and how plaintiffs claimed that the plan was a racial gerrymander under both the federal and state equal protection clauses.²⁷⁷ The court of appeals dismissed both points.²⁷⁸ First, it found that strict scrutiny was not warranted because the plan did not severely affect the right to vote.²⁷⁹ Second, it rejected the racial gerrymander claim, indicating that the shape of the districts were not so “extremely irregular” that race was the only reasonable explanation for their appearance.²⁸⁰ Interestingly, while the racial gerrymander claim was raised under the state and federal constitutions, the court saw no difference between the two clauses and stated that it confined its discussion to the federal equal protection claims.²⁸¹

Second, the appellate court turned its attention to the claim that the plan violated the state constitution in that it did not create as many competitive districts as possible.²⁸² Here, the court undertook a close textual reading of section 1(14)²⁸³ and declared that the trial court had incorrectly applied the criteria.²⁸⁴ The appellate court explained that when the trial court ruled that the competitiveness criteria were as important as compactness, etc., it was misreading section 1(14), which clearly makes it a “subordinate goal.”²⁸⁵ Thus, the appellate court here used its interpretation of the state constitution to uphold the redistricting plan.²⁸⁶

2. Procedural Rules

In Michigan, the state constitutional rules regarding the procedures to enact legislation were unsuccessfully invoked to challenge a redistricting plan. In *LeRoux v. Secretary of State*,²⁸⁷ plaintiffs challenged the 2001 redistricting plan adopted by the Michigan legislature.²⁸⁸ They alleged,

275. *Id.* at 858-60.

276. *Id.* at 852.

277. *Id.* at 851.

278. *Id.* at 854-55.

279. *Id.* at 853.

280. *Id.* at 855.

281. *Id.* at 851 n.10.

282. *Id.* at 858.

283. *Id.* at 858-60.

284. *Id.* at 860.

285. *Id.*

286. *See id.* at 863.

287. 640 N.W.2d 849 (Mich. 2002) (per curiam).

288. *Id.* at 851.

among other things, that the plan was not properly enacted according to the procedures outlined in the Michigan Constitution.²⁸⁹ Specifically, after Senate Bill 546 was adopted by both houses of the legislature, it was discovered that a couple of census tracts had been omitted from its description of the districts.²⁹⁰ Drawing upon procedural rules in the legislature, the secretary of the senate corrected the bill by inserting the two tracts (totaling 4578 individuals) and the bill was sent to the Governor for his signature.²⁹¹

The state constitutional challenge to the corrected bill was that it had not been adopted by a majority of both houses before going to the Governor, in violation of article 4, sections 1, 26, and 33 of the Michigan Constitution.²⁹² The state supreme court upheld the law.²⁹³ In doing so, the court noted how in the past it had permitted corrections to errors in statutes when there was clear legislative intent.²⁹⁴ In the case of this bill, the intent to have included these tracts was clear in that the actual population of the district, where the excluded tracts were, included the numbers from these missing tracts.²⁹⁵ Plaintiffs also conceded that the legislature intended to include these missing tracts in the district.²⁹⁶ Given this clear intent, the court found that there was no violation of the state constitution.²⁹⁷

3. Mid-decade Redistricting

LULAC was perhaps the most high profile mid-decade reapportionment case, reaching the U.S. Supreme Court on Fourteenth Amendment political gerrymandering grounds.²⁹⁸ However, any potential state constitutional law claims were not explored. Yet several other state constitutional law cases also addressed a new phenomenon that was present in the Texas case, i.e., the constitutionality of mid-decade reapportionment.²⁹⁹ While in *LULAC* the

289. *Id.* at 857.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 860.

294. *Id.* at 859 (citing *People ex rel. Gale v. Supervisor of Onondaga*, 16 Mich. 254, 258 (1867)).

295. *See id.* at 859 & n.28.

296. *Id.* at 859.

297. *Id.* at 860.

298. *See supra* notes 103-25 and accompanying text.

299. *See generally* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004) (reviewing state efforts or threats to engage in mid-decade reapportionment).

Court seemed to reject mid-term redistricting as a per se violation of the Equal Protection Clause,³⁰⁰ state courts reached different conclusions under their own constitutions.

a. South Dakota

In *In re Certification of a Question of Law*,³⁰¹ the South Dakota Supreme Court was asked to address a question certified to it from a federal court: “Whether the South Dakota Legislature acted in violation of Article III, Section 5 of the South Dakota Constitution, by the enactment of Chapter 21, Session laws of 1996, now codified as SDCL 2-2-28.”³⁰² The underlying facts of the case are that in its 1991 redistricting plan, the South Dakota legislature mandated that every representative district shall have two representatives.³⁰³ While this at-large system was a general rule, it split district 28 into 28A and 28B, purportedly to comply with the VRA and to protect the representational rights of Native Americans.³⁰⁴ In 1996, the legislature amended the 1991 plan, eliminating 28A and 28B by collapsing them into one at-large district.³⁰⁵ The United States and members of the Cheyenne River Tribe sued the state in federal court, contending a VRA, section 2 violation.³⁰⁶ Among the questions in federal court was the one eventually certified to the state supreme court in *In re Certification of a Question of Law*.

Article III, section 5 of the South Dakota Constitution states in relevant part:

An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. 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.³⁰⁷

300. 126 S. Ct. 2594, 2632 (2006) (plurality opinion).

301. 615 N.W.2d 590 (S.D. 2000).

302. *Id.* at 592.

303. *Id.* at 593 (citing S.D. CODIFIED LAWS § 2-2-28 (1991) (repealed 2001)).

304. *Id.* at 592-93.

305. *Id.* at 593.

306. *See id.* at 592-93.

307. S.D. CONST. art. III, § 5 (amended 1982).

In other words, the question certified to the supreme court was whether the amendment to the 1991 plan was barred under this section of the state constitution.³⁰⁸ The court stated it was.³⁰⁹

To support its answer, the South Dakota Supreme Court first referenced an earlier opinion where it was asked about the authority of the legislature to enact the state's 1933 reapportionment plan.³¹⁰ The court there concluded, after a survey of other state constitutions that placed time parameters on legislatures to act, "It seems to be held by all the courts which have had occasion to pass upon the matter that an affirmative mandate for legislative action at a specified time *is an implied prohibition of action at any other time.*"³¹¹ Phrased otherwise, once the legislature has apportioned after a census it may not do so again until after the next census.³¹² The court further reinforced this point by citing to its 1985 opinion where it stated that "[w]hen there is an affirmative constitutional mandate for legislative action at a certain specified time, there is an implied prohibition of action at any other time."³¹³ The court also cited opinions from other states, which had reached the same conclusion on this matter.³¹⁴

In addition to citing past case law, the South Dakota Supreme Court undertook a detailed examination of article III, section 5 of the constitution.³¹⁵ It noted that the legislature had until December first of the apportionment year to act, after which time the duty fell to the court.³¹⁶ This language the court read as mandating a legislative duty within a certain time period, and if it failed to act by then, the duty fell to the courts, precluding the legislature from acting until the next decade.³¹⁷

Finally, the last issue the court addressed was whether the deletion of the phrase "at no other time" from a 1982 constitutional amendment that addressed redistricting permitted mid-decade redistricting.³¹⁸ Here again, the

308. *In re* Certification of a Question of Law, 615 N.W.2d at 593.

309. *Id.* at 597.

310. *Id.* at 594 (citing *In re* Opinion of the Judges, 246 N.W. 295, 295 (S.D. 1933)).

311. *Id.* (quoting *In re* Opinion of the Judges, 246 N.W. at 296).

312. *In re* Opinion of the Judges, 246 N.W. at 297.

313. *In re* Certification of a Question of Law, 615 N.W.2d at 594 (citing *Kane v. Kundert*, 371 N.W.2d 172, 174 (S.D. 1985)).

314. *See id.* at 595 (citations omitted) (citing cases for the proposition "that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period" (internal quotation marks omitted)).

315. *Id.* at 593-97.

316. *Id.* at 595-96.

317. *Id.* at 596.

318. *Id.*

court stated that even without the express language there was an implied bar on this type of action.³¹⁹ Overall, in distinction to the Supreme Court's *LULAC* opinion, the South Dakota Supreme Court drew upon case law and implied language to prohibit a mid-decade apportionment.

b. Colorado

A second case addressing mid-term redistricting was Colorado's *People ex rel. Salazar v. Davidson*.³²⁰ Following the 2000 census, Colorado was entitled to one additional member in Congress, increasing its number from six to seven.³²¹ In 2001, the general assembly began the process of drawing a new map, but it was unable to do so in part because the lower house was controlled by republicans and the senate by democrats.³²² As a result of this partisan divide, citizens of the state asked the courts to perform the redistricting.³²³ A state district court gave the assembly additional time to draw a map, but when it became clear that it would be unable to complete this task the district court drew a new one with seven congressional districts in place for the 2002 elections.³²⁴ The plan was approved by the Colorado Supreme Court.³²⁵ In November, 2002, the republicans took control of the senate and in May, 2003, passed a new congressional districting plan that supplanted the court-ordered one of 2002.³²⁶ The Colorado Attorney General sued to enjoin implementation of the 2003 plan, seeking also mandamus to order the secretary of state to revive the 2002 one.³²⁷ The secretary of state cross-filed, contending that the attorney general lacked authority to bring the case and that, because he represented the state, he could not also sue her in court.³²⁸ The Colorado Supreme Court ruled that the attorney general could bring the action,³²⁹ and then ruled on the merits of the mid-decade redistricting.³³⁰

319. *Id.*

320. 79 P.3d 1221 (Colo. 2003) (en banc).

321. *Id.* at 1226.

322. *See id.* at 1227.

323. *Id.*

324. *Id.*

325. *Id.* (citing *Beauprez v. Avalos*, 42 P.3d 642, 647 (Colo. 2002) (en banc)).

326. *See id.*

327. *Id.*

328. *Id.*

329. *Id.* at 1231 (upholding the authority of the Attorney General to bring this cause of action).

330. *Id.*

The core of the complaint brought by the attorney general involved article V, section 44 of the Colorado Constitution, which states:

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.³³¹

Given this language, the secretary of state contended that the general assembly, and not the courts, are entrusted to do redistricting³³² and that article V, section 44, imposed no temporal limitation upon when the legislature may engage in reapportionment.³³³

To begin its analysis, the Colorado Supreme Court turned to the U.S. Constitution, noting that Article I, Section 4, Clause 1, states, “The times, places and manner of holding elections for senators and representatives shall be prescribed in each state, by the *legislature* thereof”³³⁴ The court rejected the secretary of state’s contention that “legislature” referred only to the Colorado General Assembly.³³⁵ It argued that the U.S. Supreme Court has read “legislature” in this part of the U.S. Constitution broadly to include redistricting commissions, referenda, and court orders.³³⁶ Thus, the 2002 court-ordered plan was no less a valid redistricting plan than the subsequent 2003 general assembly one.

A second argument raised by the general assembly and the secretary of state was that Article I, Section 4, Clause 1 gives the former “unfettered” power to engage in redistricting.³³⁷ The Colorado Supreme Court quickly dispatched with this claim, noting how the one-person, one-vote standard and the VRA, for example, placed additional constraints upon the ability of the general assembly to act.³³⁸ Finally, since the U.S. Constitution only grants power to legislatures to redistrict, the court concluded that further restrictions at the state level, including through its constitution, could further constrain

331. COLO. CONST. art. V, § 44 (amended 1975).

332. *Salazar*, 79 P.3d at 1231.

333. *Id.* at 1237-38.

334. *Id.* at 1232 (quoting U.S. CONST. art. I, § 4, cl. 1).

335. *See id.*

336. *Id.*

337. *See id.*

338. *Id.* at 1233-35.

the ability of the general assembly to act.³³⁹ This is precisely what article V, section 44 does.³⁴⁰

In its interpretation of article V, section 44, the court stated that the clause addresses three issues: who does the redistricting, when it is to be done, and what is to be done.³⁴¹ After addressing the “who” and the “what” questions,³⁴² the court turned to the “when” issue:

The second sentence of Article V, Section 44, says *when* redistricting may take place: “[w]hen a new apportionment shall be made by congress.” [A] Colorado statute, enacted in 1999, defines “new apportionment.” It says that “a new apportionment occurs after each federal decennial census.” Moreover, the one-person, one-vote doctrine firmly requires redistricting after each national census. Thus, the second sentence requires that redistricting must take place “when” there is a census: *at least* once per decade.³⁴³

While redistricting must occur at least once per decade, the court saw the question as whether it can occur more often than that.³⁴⁴ To resolve this, the court turned to the intent of the framers of this constitutional clause by turning to its plain meaning and context, to other state constitutions, and then to history, tradition, and custom.³⁴⁵

In terms of plain meaning, the court noted how the second sentence of section 44 imposes a temporal restriction upon redistricting.³⁴⁶

In the sentence “[w]hen a new apportionment shall be made by Congress, the general assembly shall divide the state into congressional districts accordingly,” the word “when” is used as a subordinating conjunction. It indicates the relationship of redistricting and apportionment-redistricting “shall” take place “when” apportionment occurs. “When,” in this context,

339. *Id.* at 1235.

340. *See id.*

341. *Id.* at 1236.

342. *Id.*

343. *Id.* at 1237 (second alteration added) (footnote and citations omitted).

344. *Id.* at 1237-38.

345. *Id.* at 1238.

346. *Id.*

means “just after the moment that,” “at any and every time that,” or “on condition that.”³⁴⁷

For the court, “when” to redistrict means only after Congress has issued the new apportionment.³⁴⁸ More specifically, it is “just after,” and not spontaneously when, the legislature wants to act.³⁴⁹ Hence, the plain language seems to restrict when action may occur. Moreover, in referencing other states, the court noted how they had resolved this issue, indicating that courts in Illinois and Indiana had reached similar conclusions.³⁵⁰

Third, the court looked to the framers of section 44 back in 1876 when the state had only one seat in Congress.³⁵¹ At that point, section 44 was read to reference this only seat, and the general assembly could only create more seats when it received them.³⁵² For the court, it would have been logically absurd for the assembly to have created more seats before they received them; instead it would have to wait until the next apportionment by Congress.³⁵³ This textual limitation in the original 1876 version of section 44 thus pointed to a temporal limit upon when the general assembly may act.³⁵⁴ Additionally, the court compared the original section 44 language to the language of section 47, which controls redistricting for the legislature.³⁵⁵ Section 47 originally read, “[s]enatorial and representative districts may be altered *from time to time, as public convenience may require.*”³⁵⁶ The absence of this phrase from section 44, along with its inclusion in section 47, pointed to another clear sign that the framers sought to condition congressional redistricting on apportionment by Congress.³⁵⁷

347. *Id.* at 1238 (quoting COLO. CONST. art. V, § 44 (amended 1975); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY: UNABRIDGED 2602 (Philip Babcock Gove ed., 1993)).

348. *Id.*

349. *Id.*

350. *See id.* at 1238 (citing *People ex rel. Mooney v. Hutchinson*, 50 N.E. 599, 601 (Ill. 1898); *Denney v. State ex rel. Basler*, 42 N.E. 929, 931-32 (Ind. 1896)).

351. *Id.*

352. *Id.*

353. *Id.*

354. *See id.*

355. *Id.* at 1239.

356. *Id.* (alteration in original) (quoting COLO. CONST. art. V, § 47). Article V, section 47 of the Colorado Constitution was enacted in 1876 as a part of the first enactment of that constitution. Section 47 has since been repealed, reenacted in 1967, and then amended in 1974. *See* COLO. CONST. art. V, § 47 note.

357. *See Salazar*, 79 P.3d at 1239.

Finally, the court contended that history and custom argued in favor of once per decade redistricting.³⁵⁸ First, Colorado had never done it more than once per decade before, and, in fact, while it should have engaged in it a total of thirteen times, it did it only six times.³⁵⁹ Even more, when the general assembly had changed partisan hands in the past, it had not undertaken a second districting in a decade.³⁶⁰ The same was true with other states.³⁶¹ All told, these experiences pointed to history, custom, and tradition boding against a second mid-term redistricting.³⁶² Thus, the 2003 plan violated section 44 of the state constitution.³⁶³

c. New Hampshire

In contrast to the South Dakota and Colorado examples where state courts invalidated a mid-term redistricting,³⁶⁴ the New Hampshire Supreme Court upheld a 2004 plan adopted by the state legislature in *In re Below*.³⁶⁵

The New Hampshire Constitution grants to the state legislature the authority to undertake redistricting.³⁶⁶ Yet, when in 2002 they failed to do that because of their inability to override the governor's veto, the state supreme court created one to be used in the 2002 elections in order to preserve the citizens' right to vote.³⁶⁷ Thereafter, in 2004, the legislature passed two bills to redistrict both the senate and house.³⁶⁸ The issue for the court was whether the state constitution prohibited this 2004 redistricting.³⁶⁹

According to the court, three provisions of the state constitution address the power of the legislature to reapportion—part II, articles 9, 11, and 26.³⁷⁰ Article 9 calls for the creation of a state house of representatives to be selected

358. *Id.*

359. *Id.*

360. *Id.* at 1239-40.

361. *See id.* at 1240.

362. *Id.*

363. *Id.* at 1243.

364. *See* discussion *supra* Part III.C.3.a-b.

365. 855 A.2d 459, 462 (N.H. 2004) (per curiam).

366. *See id.* at 461.

367. *Id.* at 463.

368. *Id.* at 462.

369. *See id.* at 462-63.

370. *Id.* at 464.

[a]s soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state.³⁷¹

Article 11 calls for the legislature to create districts “at its next session after approval of this article by the voters of the state, and thereafter at the regular session following every decennial federal census,”³⁷² and article 26 states that “[t]he legislature shall form the single-member districts at its next session after approval of this article by the voters of the state and thereafter at the regular session following each decennial federal census.”³⁷³

In seeking to clarify what these three constitutional clauses mean, the court went to their original language, dating back to 1784 for articles 9 and 11.³⁷⁴ Here, a process referred to as “rateable polls” was used to determine the number and location of polling places, and therefore the number of representatives who would be elected.³⁷⁵ Over time this process for determining the number of representatives was abandoned and other processes were instituted, until gradually a variation of a one-person, one-vote system for determining the size of the house was arrived at in 1964, resulting in the current language for articles 9 and 11.³⁷⁶ In terms of article 26, the court noted that prior to the present language the senate was apportioned on the basis of taxes, not population.³⁷⁷ This was also changed in 1964 to the present population apportionment process.³⁷⁸

Out of this history of the two articles the court reached several conclusions. First, they concluded that the “amendments to the language governing when the legislature must reapportion were technical, not substantive” as to when the legislature must redistrict.³⁷⁹ Second, the language of the clauses “makes clear the intent that the legislature reapportion *once* in a ten-year period.”³⁸⁰ Third, the federal census

371. N.H. CONST. pt. II, art. 9 (amended 1964).

372. *Id.* art. 11 (amended 1964).

373. *Id.* art. 26 (amended 1964).

374. *In re Below*, 855 A.2d at 465-68.

375. *Id.* at 465-66.

376. *Id.* at 467.

377. *Id.* at 468.

378. *Id.* at 468-69.

379. *Id.* at 468.

380. *Id.* at 469.

establishes the basis for the time of the state's apportionment³⁸¹ and thus, "[a]s soon as the legislature has fulfilled its constitutional duty to reapportion once based upon the last federal census, it may not reapportion again until the *next* federal census."³⁸² Thus, for the court, it was settled that reapportionment could only occur once per decade, but the issue is whether it must be done in the session immediately following the federal census and, if having failed in that task, whether the legislature is prevented from acting later in 2004 because the court did the redistricting.³⁸³ The supreme court answered no to these questions.³⁸⁴

In terms of whether the legislature can only redistrict in the session following the federal census, the court said that a literal reading of the language misses the substantive purpose of the constitutional language, which is to ensure that the citizens have representation based upon equal population.³⁸⁵ This meant that even though the language of articles 11 and 26 use mandatory language in terms of when the legislature must reapportion, the supreme court stated that the duty imposed upon them is to keep trying to do the redistricting until they accomplish their task.³⁸⁶ The court noted that "when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration,"³⁸⁷ and that the legislature has a duty, even beyond the first session after the federal census, to redistrict until it accomplishes its constitutional duty.³⁸⁸

Finally, the court addressed the issue of the 2002 court plan.³⁸⁹ In explicit opposition to the Colorado *Salazar* opinion,³⁹⁰ the New Hampshire Supreme Court rejected the idea that the judiciary is part of the legislative process.³⁹¹ The principle of separation of powers in the New Hampshire Constitution precludes the courts from performing a legislative function such

381. *Id.*

382. *Id.*

383. *Id.* at 470.

384. *See id.* at 473.

385. *Id.* at 470.

386. *Id.* at 470-71.

387. *Id.* at 471 (emphasis omitted) (quoting *In re Certification of a Question of Law*, 615 N.W.2d 590, 594 (S.D. 2000)).

388. *See id.* (citing *In re Certification of a Question of Law*, 615 N.W.2d at 594).

389. *See id.* at 472-73.

390. *See In re Below*, 855 A.2d at 472 ("Courts do not enact or create laws; [they] declare what the law is and what it requires." (alteration in original) (quoting *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1243-44 (Colo. 2003) (Kourlis, J., dissenting))).

391. *Id.*

as redistricting,³⁹² and they (the court) only acted to protect the voting rights of citizens.³⁹³ Thus, once the legislature was able to act and perform their duties, their plan replaced the temporary one implemented by the court, and therefore, the 2004 districting done by the legislature did not violate the state constitution.³⁹⁴

4. Implementing One-Person, One-Vote

One last novel issue adjudicated at the state constitutional level was perhaps the reverse of that presented in the mid-decade redistricting—how many years beyond the decennial census can a state go without implementing its new reapportionment plan? This is the issue that was raised in *Kahn v. Griffin*.³⁹⁵ In November of 2001, the city of Minneapolis held city council elections utilizing the old ward boundaries based on the 1990 decennial census.³⁹⁶ The Minneapolis city charter provided that the term of office of city council members is four years.³⁹⁷ The city charter also permitted city council members to finish their terms “notwithstanding changes in ward boundaries.”³⁹⁸ Although the city of Minneapolis created new ward boundaries in 2002, it had not yet held any city elections utilizing the new ward boundaries through 2003.³⁹⁹ Elections using the new ward boundaries were not scheduled to take place until November, 2005,⁴⁰⁰ a full fifteen years after the 1990 census. The continued use of the old ward boundaries based on the 1990 census had resulted in some wards being underrepresented, while others were overrepresented.⁴⁰¹ Additionally, two wards did not have any representation on the Minneapolis city council.⁴⁰²

The plaintiffs, as it was originally adjudicated in federal district court, argued that the failure to hold prompt and timely elections following the 2000 decennial census using wards districted upon it violated the one-person,

392. *Id.* at 473.

393. *Id.*

394. *Id.*

395. 701 N.W.2d 815 (Minn. 2005) (en banc). In this case, the Supreme Court of Minnesota answered a certified a question from a U.S. district court. *See Kahn v. Griffin*, No. Civ. 03-5037, 2004 WL 1635846 (D. Minn. July 20, 2004) (mem.).

396. *Kahn*, 701 N.W.2d at 819.

397. *Id.*

398. *Id.*

399. *See id.*

400. *Id.*

401. *Id.*

402. *Id.*

one-vote requirement under *Reynolds v. Sims*.⁴⁰³ The U.S. district court rejected the argument, claiming that while adherence to the one-person, one-vote standard is mandatory, the interests of stability and letting incumbents complete their current terms do not require immediate elections based upon new population figures obtained in the most recent decennial census.⁴⁰⁴ But the case was certified to the Minnesota Supreme Court with the question, “Does the Minnesota Constitution provide greater protections to the right to vote than does the United States Constitution such that failure to hold prompt elections following decennial redistricting violates . . . the Minnesota Constitution . . . ?”⁴⁰⁵ Specifically, the question was whether the state’s equal protection and right to vote clauses in the constitution offered more protection for the right to vote than would be found under the Federal Constitution such that prompt and timely elections under the new census should have been required.⁴⁰⁶ The Minnesota Supreme Court answered no to this question.⁴⁰⁷

The court noted that unlike the federal constitution, Minnesota has an explicit clause—article VII, section 1—that explicitly grants the right to vote.⁴⁰⁸ It also noted that the state has historically used its equal protection and other clauses to grant more protection under its constitution than found under the federal one.⁴⁰⁹ Overall, the court stated, “Our precedent indicates that we are most inclined to look to the Minnesota Constitution when we determine that our state constitution’s language is different from the language used in the U.S. Constitution or that state constitutional language guarantees a fundamental right that is not enumerated in the U.S. Constitution.”⁴¹⁰

Despite the explicit textual language, the court said the right to vote could not be more protected under the Minnesota as opposed to the U.S. Constitution because “regardless of whether the right to vote is explicitly

403. See *Kahn*, 701 N.W.2d at 820 (discussing the U.S. district court’s memorandum opinion).

404. *Kahn v. Griffin*, No. Civ. 03-5037, 2004 WL 1635846, at *3-6 (D. Minn. July 20, 2004) (mem.) (discussing Political Action Conference of Ill. v. Daley, 976 F.2d 335 (7th Cir. 1992) and French v. Boner, 963 F.2d 890 (6th Cir. 1992)); see also *Kahn*, 701 N.W.2d at 820.

405. *Kahn*, 701 N.W.2d at 818.

406. See *id.* at 833-34.

407. *Id.* at 834.

408. MINN. CONST. art. VII, § 1 (amended 1974) (“Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct.”).

409. *Kahn*, 701 N.W.2d at 825-28.

410. *Id.* at 828.

stated or its existence is implied, the right to vote is considered fundamental under *both* the U.S. Constitution and the Minnesota Constitution.”⁴¹¹ Thus, while the Minnesota Supreme Court did not foreclose a future possibility that the Minnesota Constitution granted more protection for the right to vote than the federal one,⁴¹² it saw no reason why the Minneapolis city council members could not finish their terms, even if it meant that they would be serving in districts that were last reapportioned approximately sixteen years ago.⁴¹³

5. Explaining the Post-2000 Litigation

In contrast to state redistricting litigation in the 1990s, where of the eleven states examined, only four state courts undertook more than a perfunctory analysis of their constitutions and only two used it to invalidate all or part of a reapportionment plan, the pattern was very different following the 2000 census. Here, of the nine states identified where state courts had to address redistricting issues, seven undertook more than a perfunctory discussion of state constitutional law to resolve the underlying legal issues, with five of them invalidating all or part of a reapportionment plan under it. How might this difference be explained?

The first obvious answer is that the difference is simply random. By that, given the facts, issues, and controversies that surfaced following the 1990 and 2000 censuses, plaintiffs decided that the state court route made better litigation sense following the latter. But this randomness argument misses something—was it really the luck of the draw or coincidence that more cases were filed and decided under state constitutions post-2000 than post-1990, or were there other forces at work that made state adjudication more frequent? This Article contends the latter.

For starters, one could argue that the new judicial federalism movement, launched by Justice Brennan in 1977, was barely a decade old when the 1990 decennial census controversies were being litigated. At that point, while the philosophy of judicial federalism might have developed, state constitutional law and judicial experience with it had not. Perhaps the movement had not yet matured in time for the post-1990 census litigation to turn to state courts and constitutions, yet by the time of the 2000 census, it had. Following the 2000 census and the redistricting that took place, perhaps enough state courts had experience with their own constitutions (or perhaps enough plaintiffs’

411. *Id.* at 830.

412. *Id.* at 834.

413. *See id.* at 835.

attorneys had) to make it easier to address reapportionment issues. This might have been the case either because states had developed their own jurisprudence under their own constitutions, or they saw successful litigation and adjudication in other states and therefore could emulate or import it into their own state. Put simply, it may have taken a generation for the new judicial federalism movement to mature enough before redistricting became a matter of state constitutional litigation.

A second reason for the more aggressive turn toward state constitutions post-2000 may have been cues and signals the Supreme Court sent in *Grove v. Emison*. Prior to that decision it looked as if the federal courts would be the primary and dominate player in redistricting, and clearly they were from the days of *Gomillion* and *Baker*, especially given the forty or more years that states had refused to redistrict prior to those cases. But with *Emison*, the Supreme Court signaled that state courts should be given the first shot at redistricting. Such a decision seems perfectly consistent with the Rehnquist Court's other federalism jurisprudence⁴¹⁴ and with a host of abstention doctrines that already regulate the interaction between the state and federal courts.⁴¹⁵ Perhaps *Emison* was the judicial signal to state courts that they should address redistricting issues, and it took until after the 2000 census for litigators and state court judges to respond.

A third argument for the activism following the 2000 census again might grow out of *Emison* and the changes in the Supreme Court under Chief Justice Rehnquist. With the Supreme Court and lower federal courts less hospitable to rights claims than under the Warren, and even the Burger Court, perhaps litigants opted to go into state court, hoping for a better forum. Thus, if one of the reasons Justice Brennan gave for turning to state

414. See, e.g., Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339 (2004) (discussing the intersection of the Rehnquist Court federalism and state constitutional adjudication); see also John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913 (1995) (discussing how recent federalism decisions by the Supreme Court fit into the new judicial federalism movement).

415. See, e.g., *Younger v. Harris*, 401 U.S. 37, 53 (1971) (stating that federal courts cannot prevent state criminal proceedings except in extraordinary circumstances); see also *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987) (holding that the doctrine of *Younger* abstention should be applied in cases that raise issues of important state interest); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam) (noting that reapportionment is a state issue); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01 (1941) (ruling that a federal district court should defer to a state court proceeding where (1) there is substantial uncertainty regarding issues of state law, and (2) resolution of the state law issues will render it unnecessary to address the federal constitutional issues).

courts was to guarantee rights protection under state constitutions as the federal courts retrenched, then perhaps perceived retreat of the federal courts made state venues more attractive.

The most notable example of this is the contrast between the Supreme Court's approach to mid-term redistricting in *LULAC* and similar litigation in Colorado, South Dakota, and New Hampshire. While the Supreme Court found that this practice was not per se unconstitutional under the Fourteenth Amendment, state constitutions have more explicit language regarding this practice, making it a more attractive place to litigate. Given that mid-term redistricting did not become an issue until later in the decade, it made no sense to address it following the 1990 census. But as political parties in some states later sought to use mid-decade redistricting to entrench themselves, and given the language in state constitutions, litigants opted to go to state courts. Given the decision in *LULAC*, the persistent efforts to address or define partisan or political gerrymandering in light of the failure of the Supreme Court to clarify the issue, and the success of litigation in Colorado and South Dakota, for example, more litigation at the state level using state constitutions seems likely. In fact, should it occur, it would prove Justice Brandeis correct—states are laboratories of democracy for legal innovation⁴¹⁶—as well as those who argue that the Supreme Court is in the middle of an evolving process of adjudication where it learns from state experiences before fashioning a national rule.⁴¹⁷

A final reason for the more pronounced shift towards state constitutional adjudication of reapportionment issues might lie in other factors such as the legacy of *Bush v. Gore*⁴¹⁸ and the litigation around election disputes in the 2000 presidential race in Florida. While the Supreme Court ultimately resolved the controversies in that case, one should not forget the state litigation that preceded it.⁴¹⁹ While impossible to show or prove, maybe the

416. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

417. See, e.g., Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 359-61 (1984).

418. 531 U.S. 98 (per curiam), *remanded sub nom. to Gore v. Harris*, 773 So. 2d 524 (Fla. 2000) (per curiam).

419. See *Gore v. Harris*, 772 So. 2d 1243 (Fla.) (per curiam), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (per curiam), *remanded sub nom. to Gore v. Harris*, 773 So. 2d 524 (Fla. 2000) (per curiam); *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla.) (per curiam), *vacated sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (per curiam), *remanded sub nom. to Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000) (per curiam).

disputes in Florida mobilized concern for many election-related issues at the state level, including litigation of redistricting issues.

IV. CONCLUSION: STATE CONSTITUTIONS AND REDISTRICTING

The pattern of state constitutional litigation following the 2000 census demonstrates more vigor than it did post-1990. As the federal courts either retreat from redistricting issues, are unable to resolve political gerrymandering questions, or are throwing the issues of malapportionment back to states as a result of *Growe v. Emison*, state constitutions appear to be becoming more important tools for resolving legal disputes. But one still should not make too much of it in terms of calling new judicial federalism a success in redistricting. Only about one-fifth of the states turned to their constitutions to address reapportionment matters. Some states, such as Colorado, seem more willing to turn to their constitution than others, while the vast majority does not. Either litigants are not pursuing the state claims, as in Texas, or courts, as in Arizona, when given the chance to resolve a dispute under either a state or federal constitutional claim, prefer the latter. The lesson advocates should take from this pattern is that while state constitutions are being used more frequently than in the past, there is still a long way to go to really call this a revolution.