redistricting under the state constitution and a court challenge is pending in Texas. It is too early to tell whether these redistrictings are merely aberrations or presage a new tolerance for more frequent reapportionment.

Authority to Apportion

State constitutions generally allocate the authority to conduct legislative apportionment either to the legislature itself, or to an independent board or commission. The main problem with permitting a legislature to reapportion itself is, of course, that incumbent officials may assure their own continuance in office, and the continuance in office of other members of their party, through gerrymandering.

It is not clear, however, that allocating redistricting authority to commissions will solve the problem of partisan gerrymandering. The political forces organizing legislatures may well reappear in redistricting commissions, particularly when its members are appointed by partisan officials, as is the case in most commission states. Perhaps more importantly, thanks to computerization, the precise impact of any redistricting criterion that a commission might adopt, even for use in a mechanically applied redistricting algorithm, can be known in advance. This requires redistricting commissions to evaluate any proposed plans, algorithms, or redistricting criteria, and it is unclear how they would do so other than through the exercise of subjective judgment. This, in turn, suggests countervailing dangers of redistricting by commission: unlike legislatures, commissions tend to be anonymous, temporary, and democratically unaccountable. Finally, there is at present no systematic evidence to suggest that incumbency is less of an advantage when commissions rather than legislatures control the redistricting process.

In practice, thirty-six state constitutions opt for legislative apportionment, either through express delegation or omission to provide otherwise, although a substantial minority of fourteen provide for an independent redistricting commission. Such commissions are most commonly bipartisan, composed either of legislative leaders from each party or their designees. Some states combine the two apportionment models by using different methods to redistrict different bodies. For example, Colorado and Missouri designate a commission to redistrict the state legislature, but require the state legislature to conduct congressional redistricting. The picture is further complicated by the fact that the constitutional allocation of redistricting authority to the legislature does not necessarily preclude the legislature from redelegating that authority by statute to an independent commission, as in Iowa.

Another important variable concerns procedures where the primary apportionment authority fails to adopt a plan. In Connecticut, Illinois, Mississippi, Oklahoma, and Texas, the failure of the legislature to adopt a plan triggers appointment of a redistricting commission. In Florida, Iowa, Louisiana, Maine, South Dakota, Vermont, and Washington, and in Mississippi in the case of

judicial redistricting, if the legislature fails to adopt a redistricting plan, apportionment authority devolves on the state supreme court. In commission states, failure of the commission to adopt a plan most commonly results in redistricting authority vesting in the supreme court (Michigan, New Jersey, and Oregon).

For nonlegislative offices, the legislature is nearly always chosen to perform the apportionment. For example, nearly half the state constitutions specifically appoint the legislature to divide the state into judicial districts, although North Dakota assigns this responsibility to the supreme court. Methods for county and municipal apportionment are not typically specified, presumably leaving the choice to the legislature. The constitutions of a few states, such as Florida, New Mexico, Tennessee, and Texas, specifically delegate the authority to conduct local apportionment to the relevant local legislature.

Required Qualities of Apportioned Districts

The single most important quality that apportioned districts must possess is demanded by the federally mandated rule of one-person, one-vote: they must be equipopulous. This rule, which overrides all others, is applied strictly to congressional districts: essentially no deviation from exact population equality is permitted.[54] When drawing state legislative districts, redistricters are allowed somewhat greater latitude: the Fourteenth Amendment requires only that such districts be "as nearly of equal population as practicable."[55] In practice, federal courts have applied this requirement so as give states freedom to draw legislative districts that deviate from exact equality by up to 10 percent; greater deviations generally will be sustained only if the state produces a convincing justification. Twenty-nine state constitutions impose their own requirement of population equality in districting for at least some kinds of districts. For example, the Washington Constitution provides: "Each district shall contain a population . . . as nearly equal as practicable to the population of any other district."[56] Colorado and Ohio impose more rigorous requirements than federal law by limiting population deviations between districts in most circumstances to 5 percent. New York provides that population discrepancies between districts may not exceed the population of any town or city block in an immediately adjoining district.

The great majority of state constitutions provide additional criteria to guide the redistricting process, most dealing primarily with the shape and boundaries of election districts. Establishment of these criteria serves two distinct purposes. First, such criteria impose additional constraints on the discretion of redistricting authorities, a tactic meant to further reduce opportunities for successful gerrymandering. However, now that computers can predict the partisan impact of minute changes in district contours with great accuracy, it is unclear how successful such constraints can be. A second purpose of regulating the shape of election districts lies in the belief that such districts demarcate dis-

tinct political communities whose citizens share interests, beliefs, and a way of life that ought to be preserved.

Following these principles, thirty-six state constitutions provide expressly that election districts for at least some legislative chambers be "contiguous." State courts have tended to interpret this requirement deferentially, particularly where districts contain or detour around bodies of water.[57] The Ohio Constitution further defines contiguity by providing: "the boundary of each [house] district shall be a single nonintersecting continuous line."[58] Twenty-four states require election districts to be "compact." Colorado is more specific: it requires that "the aggregate linear distance of all district boundaries shall be as short as possible."[59] Michigan, Minnesota, Missouri, New York, Washington, and Wisconsin also require districts to be "convenient," a now archaic term that is sometimes taken to refer to the ability of citizens or candidates to travel easily about the district.[60] Michigan additionally requires certain senatorial districts to be "as rectangular" and "as nearly uniform in shape as possible."[61] It is not clear, however, that provisions restricting allowable district shape have had any appreciable constraining effect on redistricting practices.[62]

Many constitutions require that certain kinds of local government boundaries be respected to varying degrees in drawing legislative districts. A relatively weak provision is Alaska's, which requires only that "[c]onsideration may be given to local government boundaries."[63] At the other extreme, many states expressly prohibit the division of counties, towns, or municipalities. A rule banning entirely the division of a unit as large as a county is extremely difficult to observe without violating the equipopulation requirement, and is likely a relic from an era when representation was allocated explicitly among counties. Between these extremes lie rules such as Nebraska's, which provides that "county lines shall be followed whenever practicable,"[64] or Maine's, which provides that districts "shall cross political subdivision lines the least number of times necessary to establish as nearly as practicable equally populated districts."[65]

Three state constitutions cut more directly to the idea that election districts should be coherent political communities. The Alaska Constitution provides that legislative districts should contain "as nearly as practicable a relatively integrated socio-economic area."[66] The Hawaii Constitution similarly provides: "submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided."[67] More comprehensively, the Colorado Constitution provides: "communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible."[68] Delaware, Hawaii, and Washington try to achieve fairness in redistricting even more directly by requiring that districts not unduly favor or discriminate against any person, group, or political party.

Far fewer state constitutions regulate the qualities of districts drawn for nonlegislative state offices and local offices. The one-person, one-vote requirement does not apply to judicial elections,[69] so states are generally free to draw judicial districts, and to assign judges to them, for reasons other than equalization of population. The constitutions of Mississippi, New York, and Ohio, for example, direct the legislature to allocate judges to judicial districts based not only on population, but also on factors such as the district's caseload. A few states require judicial districts to conform to county lines. Nevertheless, nine states independently impose conditions on the drawing of judicial districts that resemble the constraints imposed by the federal equipopulation requirement.[70]

Even fewer state constitutions establish requirements for local government districts. The constitutions of Florida, New Mexico, and Virginia contain an equipopulation requirement for local government districting, and all three require local legislative districts to be contiguous. New Mexico and Virginia also require such districts to be compact.

THE REFORM AGENDA

Reformers have most often been motivated by a desire to address a relatively small number of issues that they have repeatedly identified as problems of American democracy. These include the following:

- insufficient citizen participation in politics, including low voter turnout;
- insufficient voter competence caused by a lack of information, interest, or both;
- insufficient citizen control over elected officials;
- a lack of adequate political virtue in voters, elected officials, or both;
- insufficient representativeness of legislatures;
- political inequality with respect to race, gender, class, geographical region, or other factors.

A wide variety of reformers, from Jacksonians in the early eighteenth century, to Progressives and women suffragists in the early twentieth century, to civil rights activists in the 1950s and 1960s, maintained not only that politics could be reformed through law, but that change at the constitutional level was the most reliable way to achieve it. Although some of these political reform movements were astonishingly successful at achieving constitutional change, none fully accomplished all its goals. In contemplating state constitutional reform of the electoral process, then, a good place to start is with the unfinished business of the major political reform movements of the past. The immediately following section reviews some of the most significant unfulfilled or only partially fulfilled reform proposals of the past, while the final section briefly examines some of the most pressing contemporary reform issues.

Unfulfilled and Partially Fulfilled Agenda Items of Past Reform Movements

Easier and More Convenient Voting

The Progressives were the first to raise systematic complaints about the difficulty of voting, primarily in response to concerns about declining voter turnout during the 1920s. They attributed this problem to the excessive length and complexity of ballots, and largely succeeded in reducing ballot length by lowering the number of elective offices.[71] Today, low voter turnout still is often deemed a problem, and efforts continue to increase turnout by making voting easier and more convenient. The process of voter registration in the United States is among the most onerous in the world, and some reform efforts, such as the federal National Voter Registration Act ("Motor Voter"), aim to lessen the burden. Turnout figures since passage of this law suggest that it has not had the anticipated impact.

Other efforts to make voting easier include improving polling place access for the disabled, and expanding the period during which votes may be cast beyond Election Day itself by providing an "early voting" procedure under which voters who would not otherwise qualify for absentee ballots may mail in ballots in advance of Election Day. It is also possible that the ballot is still too long for many voters, and shortening it by further reducing the number of elective offices might make voting easier.

Pursuit of many of these reforms need not require constitutionalization so long as the legislature possesses authority to enact them on its own, although care should be taken to avoid inadvertently prohibiting legislative experimentation through excessive constitutional specificity. Even the number of local elective offices may be and frequently is left to legislative discretion. Under the Wyoming Constitution, for example, "[t]he legislature shall provide by law for the election of such county officers as may be necessary";[72] the Nevada Constitution grants the legislature "power to increase, diminish, consolidate or abolish" certain county offices.[73]

Alternative Voting Systems

Reformers have long criticized the standard American voting system in which contested offices are awarded after a single round of voting to the candidate winning a plurality of the vote within a single-member district. This system is said to overrepresent the winning majority or plurality coalition, and thus to produce a legislature that is both unrepresentative of, and therefore insufficiently responsive to, public opinion in its full complexity. Also, by allowing voters to vote for only one candidate, the system has been said to be unnecessarily blunt by depriving voters of the opportunity to register either their relative preferences among candidates or the intensity of their preferences.

The Progressive reform agenda frequently included efforts to replace this voting system with a more sensitive one, most commonly proportional representation (PR).[74] In proportional representation, candidates are elected at large from multimember districts, and voters are permitted to vote for multiple candidates and to rank-order their preferences. Votes are then tabulated so as to produce a legislature in which candidates' chances of gaining a seat are proportional to their support in the electorate. This allows for representatives with a greater variety of views that correspond more closely to the distribution of views within the electorate, and greatly increases the possibility that the voice of sizable political minorities will be heard within the legislature.

By 1950, PR had been adopted in about two dozen American cities, most notably in the major cities of Ohio.[75] Although proportional and semiproportional systems are used increasingly around the world (e.g., Ireland, Israel, Germany, and New Zealand), PR eventually fell out of favor in the United States, and is rarely used today. The constitutions of only two states, Oregon and West Virginia, mention PR at all, and then only to authorize the legislature to employ it.[76]

A completely different alternative voting system that reformers have sometimes proposed is instant runoff voting (IRV). IRV is intended to assure that offices are filled only by candidates who have the backing of a majority of voters, but without the need for additional rounds of voting, and the attendant expense and additional campaigning, when no candidate wins a majority on the first ballot. In IRV, voters rank candidates in order of preference. When the first-choice votes are tallied and no candidate earns a majority, a paper runoff is held by dropping the candidate with the lowest number of first-place votes, and substituting the second-choice candidates of voters who had ranked the dropped candidate in first place. This process is continued until one candidate has a majority. Despite its simplicity and uncontested advantages, IRV is used only in San Francisco, Oakland, and a few other municipalities. In 2002, Alaska voters rejected an initiative that would have implemented IRV in most statewide races.

Devolution of Political Authority

Numerous and varied reform movements have contended that political authority should be exercised at the most local level possible. According to these reformers, devolution of political power not only increases the ability of citizens to exercise close control over the most significant decisions made by government, but also improves the quality of political life by giving more people a chance to become meaningfully involved in politics. To some extent, this position has been institutionalized in state constitutions through a largely successful movement for local home rule authority. However, home rule authority varies considerably from state to state, and a great many highly significant decisions are still made at the state level even in strong home rule states. Many

problems, moreover, such as environmental and resource management issues, may be best handled at a regional rather than local level. Very few state constitutions provide for the exercise of regional authority. One of the few is Virginia's, which provides: "The General Assembly shall provide . . . for the organization, government, powers, change of boundaries, consolidation, and dissolution of . . . regional governments."[77]

Direct Democracy

A significant article in the Progressive reform agenda, direct democracy through initiative and referendum has been implemented with considerable success by past generations of reformers. Although provisions for direct democracy have typically been justified as a way of making government more responsive to the popular will, direct democratic lawmaking has rarely been understood to be intrinsically superior to lawmaking through traditional forms of representation. Reformers have generally claimed only that representative democracy periodically becomes perverted by legislative incompetence or corruption, and that direct democracy provides a needed corrective.[78]

About half the state constitutions, mostly of western states, provide procedures for direct democracy at the state level through a process of voter-initiated lawmaking or constitutional amendment. Attempts to introduce similar procedures in older, eastern states have long been successfully resisted. Direct democracy is somewhat more common at the local level. For example, Georgia and South Carolina, which do not provide for statewide direct democracy, nevertheless require local voter approval for the consolidation of counties and municipal governments. Several states that lack statewide direct democracy require local voter approval for certain fiscal measures, such as incurring debt or exceeding local tax rates.

Reform Areas of Recent Interest

While interest persists in many of the reforms supported by political movements of the past, several new kinds of reform have recently pushed their way into public consciousness.

Term Limits

A presidential term limit was added to the U.S. Constitution by amendment in 1951.[79] There has been no serious federal attempt to impose term limits on members of Congress, although numerous states attempted to do so until the Supreme Court ruled in 1995 that congressional term limits could be imposed only by amending the federal Constitution.[80] Since 1990, initiative amendments to state constitutions in more than a dozen states have imposed term

limits on executive and legislative branch officials. Recently, however, efforts to repeal term limits have begun to appear.

Voting Technology

Improving voting technology has gained interest as computers become cheaper and more widely available. Reformers have begun to explore electronic voting as a way to make voting easier by allowing people to vote from locations other than an official polling place, and at times that they prefer. Electronic voting may also allow voters easier access to information that will help them make informed decisions. Some political theorists argue that electronic voting and communication can provide opportunities for participation and meaningful political community that have been lost in modern political life. Interest in electronic voting as a means of improving the accuracy of vote tabulation also grew after the 2000 presidential election, where faulty ballot design may have induced some voters to mark their ballots incorrectly, and where recounting ballots by hand required election officials to make a large number of seemingly contestable judgments about the intent of voters. The federal Help America Vote Act, enacted in 2002, responds in some degree to these concerns, although it has yet to be fully implemented. Moreover, concerns emerged after the 2002 elections about the capacity of electronic voting systems to generate accurate paper trails as a check on voting fraud and error.

By its nature, however, technology changes so fast that constitutional drafters might want to avoid constitutionalizing any particular voting methods or standards. Attention might instead be given to the approach mentioned earlier, in which only the ultimate normative goals of election administration are constitutionally specified (e.g., speed, accuracy, convenience, fairness), and the actual methods of voting are left to legislative discretion.

Party Primaries

States have long regulated the process by which political parties nominate candidates. Interest in the topic has revived recently due to apparently growing dissatisfaction with the candidates routinely put forward by the parties, and attention has focused on tinkering with the nomination process to produce more broadly appealing candidates who would better engage the electorate. The most prominent recent innovation was California's 1996 initiative mandating the use of a "blanket" primary, in which any eligible voter could vote for candidates of any party for any office, regardless of the voter's formal party affiliation. The Supreme Court struck down this measure in 2000,[81] but hinted that an "open" primary might survive constitutional scrutiny. In an open primary, voters are essentially free to vote in any party's primary, but they must choose only one party's primary in which to vote and may not switch party allegiance from office to office, as they may in a blanket primary.

Whether to constitutionalize such reforms presents a difficult question. State constitutions generally contain few provisions regulating political parties. Most such provisions merely direct the legislature to provide for and regulate primary elections. The North Dakota Constitution is typical, providing only that "[t]he legislative assembly shall provide by law for . . . the nomination of candidates."[82] Only a handful of state constitutions address the specific format of a primary election. Arizona, for example, provides for a semi-open primary in which registered independents may vote in party primaries.[83] Florida specifies an open primary when only one party fields candidates and the winner will run unopposed in the general election.[84] For the most part, however, regulation of political parties is left to the legislature.

On the other hand, there are good reasons to be suspicious of legislative regulation of political parties. There is an obvious risk that the party in power will use its regulatory authority to its own advantage, or that the major parties will strike undemocratic agreements of mutual advantage. This is probably why recent innovations in party regulation have been accomplished more often by initiative than by legislative action. In either case, however, care must be taken to comply with extensive federal constitutional restrictions on the kinds of regulations that may be imposed on parties.

Campaign Finance

Perhaps the most controversial and legally difficult area of state constitutional reform of the political process concerns campaign finance. Public support for reform apparently is high, yet the federal Constitution greatly restricts the ability of government to regulate the use and transfer of money in the political process. Moreover, legislatures seem to have great difficulty enacting campaign finance reform measures, as illustrated by the long struggle in Congress to enact the Bipartisan Campaign Reform Act (BCRA).

The constitutions of nine states—Arizona, Colorado, Florida, Hawaii, Minnesota, Nevada, Oklahoma, Oregon, and Rhode Island—contain provisions regulating campaign finance. About half of these were enacted by initiative amendment. The least controversial, and legally the least vulnerable to challenge, are provisions requiring disclosure of campaign contributions or spending. The Florida Constitution, for example, provides: "all elected public officers and candidates for such offices shall file full and public disclosure of their campaign finances."[85] Oregon's is more specific, requiring disclosure of all contributions exceeding $500, and all subsequent contributions of any amount from the same donor.[86]

Systems of public financing for elections also raise manageable issues under the U.S. Constitution, so long as participation in the system, and any restrictions on contributions and spending associated with participation, are genuinely voluntary. Florida, Hawaii, and Rhode Island require the legislature to establish

some system of public financing. In Florida, the system must cover statewide offices; in Hawaii, state and local elections; and in Rhode Island, gubernatorial elections and any other "general officers" the legislature may specify.[87]

Restrictions on campaign contributions enter trickier constitutional territory. The U.S. Supreme Court has ruled that regulatory restrictions on contributions to candidates raise severe constitutional issues, although is has upheld state-imposed contribution limits of as low as $250 for certain offices. The constitutionalization of a specific figure seems of dubious desirability, however, since the cost of campaigning will fluctuate over time. The Supreme Court's 2003 decision upholding most aspects of BCRA may give states additional latitude to regulate contributions to state political parties.

Limitations on campaign spending by candidates and their supporters are flatly prohibited under the federal Constitution, yet the Hawaii and Minnesota Constitutions require the legislature to enact limits on campaign expenditures. An initiative amendment to the Oregon Constitution prohibiting the expenditure of funds donated by nonresidents of the relevant election district was invalidated.[88] Such defects are more common among proposals in this area that have been generated through the initiative process.

State constitutional provisions regulating campaign finance clearly deal with an important problem, and frequently seem to do so in novel ways, raising possible questions about both their efficacy and their constitutionality under federal law. They also seem to respond to a suspicion that the legislature cannot be counted on to address the problem adequately. Resort to the initiative process, however, is not always the most reliable way to make sound constitutional policy, particular in areas of great legal delicacy.

NOTES

1. Not all of these reforms have been successful. The Supreme Court has invalidated some regulations of parties. Term limits have been held illegal for Congress, but legal for states. Subsequent state attempts to achieve term limits indirectly, through ballot notations with slanted wording, were also invalidated.

2. U.S. Const., amends. XV, XIX, XXIV, XXVI.

3. Conn. Const., art. VI, § 3.

4. For example, Tex. Const., art. 1, § 2; Wyo. Const., art. 1, § 1.

5. U.S. Const., amend. XIV, § 1.

6. See Gerald M. Rosberg, "Aliens and the Right to Vote," 75 *Mich. L. Rev.* 1092 (1977), and Jamin B. Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," 141 *U. Pa. L. Rev.* 1391 (1993).

7. *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Marston v. Lewis,* 410 U.S. 679 (1973) (per curiam); *Burns v. Fortson,* 410 U.S. 686 (1973) (per curiam).

8. Fla. Const., art. VI, § 2.

9. Conn. Const., art. VI, § 1.

10. For example, Haw. Const., art. II, § 3; Maine Const., art. II, § 1; N.D. Const., art. II, § 1.

11. Colo. Const., art. II, § 30 (1) (emphasis added).

12. *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). See also *Hill v. Stone,* 421 U.S. 289 (1975) (invalidating Texas property qualification in municipal bond election).

13. Robert J. Steinfeld, "Property and Suffrage in the Early American Republic," 41 *Stan. L. Rev.* 335 (1989).

14. *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969).

15. *Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973); *Ball v. James,* 451 U.S. 355 (1981).

16. N.C. Const., art. I, § 11.

17. Ore. Const., art. II, § 3.

18. For example, Tenn. Const., art. I, § 5; Wash. Const., art. VI, § 3.

19. For example, Ala. Const., amend. 579; Ga. Const., art. II, § 1 ¶ 3.

20. For example, Kan. Const., art. 5, § 2; Mont. Const., art. IV, § 2.

21. Miss. Const., art. 12, § 253.

22. *Hunter v. Underwood,* 471 U.S. 222 (1985).

23. *Richardson v. Ramirez,* 418 U.S. 24 (1974). This result stands in interesting contrast with a recent decision of the Supreme Court of Canada, in which it invalidated under the Canadian Charter of Human Rights a federal law providing disfranchisement as a punishment for certain crimes. *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. (4th) 519.

24. *See,* for example, *Cotton v. Fordice,* 157 F.3d 388 (5th Cir.), cert. denied, 525 U.S. 893 (1998).

25. For example, Idaho Const., art. I, § 2; Utah Const., art. I, § 2.

26. For example, Ky. Const., § 4; S.D. Const., art. VII, § 26.

27. For example, Cal. Const., art. I, § 3; N.C. Const., art. I, § 12.

28. For example, Neb. Const., art. 1, § 22; Va. Const., art. I, § 6.

29. For example, Del. Const., art. I, § 3; Ill. Const., art. III, § 3.

30. For example, Colo. Const., art. II, § 5; S.C. Const., art. I, § 5.

31. *See,* for example, Matthew C. Jones, "Fraud and the Franchise: The Pennsylvania Constitution's 'Free and Equal Election' Clause as an Independent Basis for State and Local Election Challenges," 68 *Temple L. Rev.* 1473 (1995).

32. Haw. Const., art. I, § 8; N.Y. Const., art. I, § 1.

33. Mont. Const., art. II, § 13.