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# ENCLAVE DISTRICTING

Henry L. Chambers, Jr.\*

*Congressional districting has historically fostered single-member, geographically compact districts consisting of contiguous territory and has resulted in common representation for those who live near each other. Underlying compact districting is the assumption that people living relatively close together share political interests that can be adequately served by common representation. When the United States was a sparsely populated agrarian nation and only the propertied were the enfranchised, providing common representation based on residential proximity was sensible. Over time, however, the connection between residence and political interests has diminished.*

*In the wake of the Supreme Court's suggestion that representation should focus on people rather than land, some have suggested that states should attempt interest-based districting in which citizens with common political interests are provided common representation. Professor Chambers follows in that tradition by positing enclave districting. Enclave districting is an interest-based system that divides land into demographically similar enclaves that can be aggregated to create congressional districts with internally consistent demographic profiles. The resulting districts would be structured around the political interests the state perceives to be important and the political interests around which citizens vote. Consequently, enclave districting would allow states flexibility in districting while also potentially providing more effective representation for citizens.*

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## INTRODUCTION

Since the earliest days of the Union, states have constructed congressional districts.<sup>1</sup> That tradition has yielded single-member, compact districts consisting of

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<sup>1</sup> Congress first required congressional districting in 1842. See Reapportionment Act of 1842, ch. 47, 5 Stat. 491. By that time, only a handful of states elected members of Congress through at-large voting, although commentators are unclear on precisely how

contiguous territory. Such districting has been sensible, as land has been historically viewed as the foundation for representation.<sup>2</sup> Particular pieces of land, whether in the form of states, counties, cities, or towns, have been provided representation.<sup>3</sup> However, in the last thirty-five years, the Supreme Court has shifted the focus of representation away from land and toward voters and their political interests.<sup>4</sup> Rather than focusing on whether a piece of land should have representation, the question has become what representation is appropriate for the people who live on the piece of land.<sup>5</sup> Nonetheless, the stewards of the current land-centered system of districting have not changed our congressional districting system accordingly. Whether this stasis is problematic depends on how well voters' interests are represented under the current system. The land-centered approach, focusing on compactness and

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many states used districting and how many used at-large systems. See ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 59 n.2 (1968) (stating that by 1842 all but six states elected representatives by districts); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 253 n.46 ("By the time of [Reapportionment] Act [of 1842], nine states still used at-large elections.").

<sup>2</sup> Representation has many different meanings. See A.H. BIRCH, *REPRESENTATION* 15 (1971) (suggesting three non-political usages of term "representative": "(1) to denote an agent or spokesman who acts on behalf of his principal; (2) to indicate that a person shares some of the characteristics of a class of persons; [and] (3) to indicate that a person symbolizes the identity or qualities of a class of persons"); Daniel Walker Howe, *Anti-Federalist/Federalist Dialogue and its Implications for Constitutional Understanding*, 84 NW. U. L. REV. 1, 4 (1989) ("We employ the Federalist model of representation when we say that a lawyer 'represents' a client; but we are using the Anti-Federalist model when we say that a jury should be 'representative' of the community."); Hanna Fenichel Pitkin, *Introduction to REPRESENTATION* 6-17 (Hanna F. Pitkin ed., 1969) (suggesting that there are many different definitions of representation). Each different notion of representation denotes some relationship, abstract or concrete, between the representative and the represented. What that relationship is or how it is defined determines how and how well the representative represents the represented. See Pitkin, *supra*, at 17 (stating that a representative has been described variously as "an actor, an agent, an ambassador, an attorney, a commissioner, a delegate, a deputy, an emissary, an envoy, a factor, a guardian, a lieutenant, a proctor, a procurator, a proxy, a steward, a substitute, a trustee, a tutor, and a vicar").

<sup>3</sup> While the land was not literally represented, the importance of the representational interests of all of those living on the land was not always the primary concern in districting. Of course, in other electoral systems, the land is almost literally represented. See *infra* note 71.

<sup>4</sup> See *Reynolds v. Sims*, 377 U.S. 533, 561-68 (1964) (noting that representatives represent people rather than land).

<sup>5</sup> Indeed, in some cases, the question is how a districting plan can affect the rights of particular voters. See *Shaw v. Reno*, 509 U.S. 630 (1993) (ruling that the method of placing voters in a particular district can violate their equal protection rights).

contiguosness, protects the representational interests of voters to an extent, but not as well as possible. The system is not broken, but it can be improved.

Districting is the process of grouping things—be they pieces of land or collections of people—in order to provide the group with common representation.<sup>6</sup> Congressional districting is no different. Traditional single-member districting apportions tracts of land and provides inhabitants of those tracts with common representation. While districting has followed this pattern since the early days of the United States, the implications of districting have changed as the makeup of the electorate and society's notions of representation have changed. As the nature of representation changes, so should the nature and goals of apportionment.

In early America, congressional representatives were chosen by a relatively small portion of the citizenry.<sup>7</sup> The prevailing view of government was that only those people who owned some significant amount of property were possessed of sufficient interest in the government's workings to affect those workings through voting.<sup>8</sup> The right to vote was accordingly limited to those people.<sup>9</sup> Because the effective electorate was so small, the broader political interests of the populace did not factor into congressional representation or the districting structure. Quite simply, the will of the people was not the primary concern of the voting process. While a small group of electors voted on behalf of the populace, they were not required to vote with the interests of the populace in mind.<sup>10</sup> Even if such a requirement had existed, it is unclear how it would have been enforced.

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<sup>6</sup> See Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1204 (1996) (“The very purpose of apportionment is to aggregate voters into groups for the purpose of electing representatives.”).

<sup>7</sup> The Constitution does not require that members of Congress be chosen by a state's entire population. Rather, it requires only that those who could elect the most numerous branch of the state legislature also be allowed to elect members of Congress. See U.S. CONST. art. I, § 2. Today, those who can elect representatives to the most numerous branch of a state legislature constitute the entire voting age population, excluding those who have lost the right to vote for specific reasons. Such was not the case when the Constitution was ratified. See *infra* note 130.

<sup>8</sup> See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992) (positing that the federal government was formed in large part to protect private property).

<sup>9</sup> See *infra* notes 130-43 and accompanying text.

<sup>10</sup> While representative government produces representatives who can advance the public interest, it is unclear that individual voters vote in the public interest, rather than based on self-interest. See Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 1001 (1998) (contrasting public choice theory's focus on self-interest and republican theory's focus on the possibility of voting based on public interest). See generally Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328 (1994) (discussing Madison's views with respect to the tension between voting based on public interest and voting based on self-interest).

Given the small effective electorate and the meager attention given to the broader political interests of society at large, concern regarding whether districting led to the representation of land in the abstract or of the people living on the land could be regarded as misplaced. If the interests of the greater populace were not directly factored into voting, whether districting adequately protected their interests hardly mattered. However, even as the percentage of the population with the power to vote expanded, congressional districting explicitly continued to follow geography.<sup>11</sup> Land-centered compact districting continued to make sense because it focused broadly on land and property, insofar as it continued to provide common representation for those who lived near each other. In a predominantly agrarian and sparsely populated society, that style of districting was reasonable. Land continued to be the basic unit of representation because it still fit as the basic unit of apportionment.

During the middle third of this century, however, the Supreme Court's recognition of the one-person, one-vote doctrine clarified (and arguably altered) society's vision of representation.<sup>12</sup> At its core, the one-person, one-vote doctrine established that all citizens have an equal right to choose their political representatives, advance their political interests, and influence government.<sup>13</sup> Consequently, representation now focuses directly on the political interests of citizens. As a result, our voting system can be described as a people-based representation system that necessarily encompasses the land on which people live rather than as a land-based apportionment system that necessarily provides representation to the people who live on the land. While either vision can lead to a land-based districting system, the importance of particular elements of the system depends on how the system is viewed. The focus of the districting system now must be to provide effective representation to all citizens.

Although the nature of representation has changed to focus on providing representation to voters, the nature of districting has not. States continue to group parcels of land that happen to support population and provide that land and the people on it with common representation. While this may implicitly group people, rather than land, and provide them with common representation, the political system should do so more explicitly. Indeed, states should redefine their districting criteria to provide representation to groups of people with common political interests to have

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<sup>11</sup> The expansion of the right to vote occurred slowly. Although universal male suffrage was Jacksonian democracy's rallying cry, see 3 ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY* 139, 149 (1984), Jacksonian beliefs still allowed racial and gender restrictions on suffrage. See DIXON, *supra* note 1, at 44.

<sup>12</sup> See *Reynolds v. Sims*, 377 U.S. 533 (1964) (announcing the one-person, one-vote doctrine requiring districts of equal populations).

<sup>13</sup> Broadly, the one-person, one-vote doctrine encourages universal representation. See *id.* at 565-66 ("[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment . . .").

common representation in Congress.<sup>14</sup> Such a change would require an invigorated emphasis on the interests of voters in the districting process and a concomitant de-emphasis of traditional geography-based districting principles. While that could temporarily cause disruption to the districting system, ultimately it would provide better representation for voters. Common representation works best if the people who are grouped in districts share political interests with respect to the issues on which their representative will act. Because such a sharing of interests arguably no longer occurs along compact districting lines,<sup>15</sup> compact districting is no longer as beneficial a system as it once was.

However, society should not abandon districting. Single-member districting continues to supply important benefits by fostering a relationship between an identifiable representative and an identifiable constituency.<sup>16</sup> It is through that relationship that constituents influence their representative, who is specifically accountable to the constituents. This relationship provides a structure in which a representative and her constituency can communicate, and provides the link that makes representative democracy work.<sup>17</sup> Consequently, using districts, even land-

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<sup>14</sup> Districting fundamentals may change depending on the body being elected. Voters can have common political interests vis-a-vis local or state government while having very different political interests vis-a-vis Congress. The focus regarding the creation of congressional districts must revolve around issues about which Congress tends to legislate. See Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering under the Voting Rights Act*, 92 MICH. L. REV. 652, 654 (1993) (“[I]t is also true that no single, all-purpose normative theory of electoral mechanics will cover every case of democratic representation, from county commissions to mosquito control districts to sovereign legislatures. We do not claim that one can generalize our argument to every sort of election to which the [Voting Rights Act] might apply.”) [hereinafter Polsby & Popper, *Ugly*].

<sup>15</sup> See Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 475-76 (1997) (discussing failure of compact districting to reflect voters’ shared interests).

<sup>16</sup> See Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1140-41 (1998) (noting advantages of single-member districting) [hereinafter McKaskle, *Wasted Votes*].

<sup>17</sup> Voters choose who will speak for them by determining who will best represent their interests. Representative democracy may produce representatives who will reflect the will of the people as if it were a direct democracy. See generally Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 437 (1998) (suggesting representative democracy may be the best way for individual voters to be heard in the political system); Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 6-7 (1997) (describing direct and representative democracy). However, in some circumstances, voters may seek something other than the representation of their personal interests. Nonetheless, this Article will assume that voters are rational and that they will seek the representation of their personal interests. *But see* Hamilton, *supra*, at 12-13 (suggesting that voters may not “automatically vote out of relatively well-informed self-interest”). Voters may choose a representative because the representative appears to

based ones, in the process of providing representation is sensible, as long as the political interests of citizens are the paramount consideration in structuring the districting system.

The issue is how to create an apportionment system that preserves the benefits of single-member districting, yet explicitly recognizes voters' political interests. This Article proposes a new system of districting that would retain the core benefits of the current single-member, geography-based districts while adding benefits that can flow from an interest-based apportionment system. That system is enclave districting.<sup>18</sup> Enclave districting would allow states to divide jurisdictions into demographically similar enclaves that then would be aggregated to create congressional districts with internally consistent demographic profiles. Each state would determine the factors used to create its enclaves based on the features each state believes are important to electing its congressional delegation. The resulting districts might be compact and contiguous, or might be relatively homogenous, interest-based, and non-contiguous. The goal of enclave districting is to maintain the relationship between representatives and constituencies while providing the maximum latitude for states to apportion representation based on voters' common interests.<sup>19</sup>

Enclave districting loosens the structure of districting while maintaining districting's salient features. At root, enclave districting asks why two demographically similar areas that sensibly could be combined to create a single district benefitting from common representation should not be combined merely because they are in different parts of a state. As an illustration, consider two poor farming areas in separate regions of a state. If each area is too small to populate a single district, each may be combined with suburban or urban areas to create a

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share a common background, and presumably common political interests, with the voter or because the voter believes that the representative will be the most effective person to protect the voters' interests without regard to whether the representative herself actually shares the voter's political interests. A poor district may rationally select a very wealthy representative who does not have the same political interests of the poor as the representative may be an incumbent who can influence legislation, and thus, would be very influential in advancing legislation favorable to the poor. Similarly, the representative may tirelessly advance the interests of his constituents even if he does not share those interests, either because he wants to be reelected or because he believes that selflessness is the nature of representation. This suggestion is not meant to discount the possibility that a wealthy representative may share political interests with the poor; rather, it is to suggest that a representative need not share the interests of his constituents in order to champion those interests effectively. Such a representative could be likened to a lawyer who advocates legal positions with which she may not personally agree.

<sup>18</sup> This Article relates most directly to congressional districting, but could be applied in limited fashion to state or local legislative districts. However, this theory may lose some accuracy in its translation. As a cautionary note, see *supra* note 14.

<sup>19</sup> While enclave districting is interest-based, it is distinct from districting based solely on communities of interest. See *infra* pt. V.

district that may or may not serve the interests of the farming communities. Enclave districting suggests that it is sensible to place the two areas in the same district to provide common representation to their citizens, even though the areas are not in the same region of the state.

This Article reflects four key premises. First, the relationship between an identifiable representative and an identifiable constituency is important. Second, districting is about determining how people will be grouped for representation purposes. Third, providing common representation for voters with common political interests is important. Fourth, traditional districting principles are not sacred. The structure of this Article is simple. Part I details the genesis of congressional districting. Part II describes the benefits of single-member districting. Part III broadly outlines current districting practices and attempts to define the core values of the current districting process. Part IV contrasts interest-based and geography-based districting. Part V explains enclave districting.

## I. THE GENESIS OF CONGRESSIONAL DISTRICTING

Though congressional districting is deeply entrenched in American democracy, the Constitution is silent on its appropriateness or desirability.<sup>20</sup> Indeed, the Constitution places relatively few explicit restrictions on the structure of the House of Representatives (the "House")<sup>21</sup> and has few requirements for being a congressional representative.<sup>22</sup> The House consists of representatives from the several states, with the size of a state's congressional delegation being determined by the state's population.<sup>23</sup> A member of the House must be at least twenty-five years

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<sup>20</sup> The Constitution requires districting insofar as representatives represent particular states. However, the Constitution does not require intrastate districting. See Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 CUMB. L. REV. 515, 526 (1995-1996) ("Indeed, the Constitution does not explicitly say that the United States must have single-member congressional districts."); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483, 527 n.139 (1993) ("Nothing in the Constitution itself requires the states to create congressional districts."). See generally Pildes & Donoghue, *supra* note 1, at 251-52 n.43 (detailing the history of representative districting).

<sup>21</sup> For example, that the House consists of 435 members is not a constitutional requirement. Congress simply stopped adding members when it reached 435. See Christopher St. John Yates, *A House of Our Own, or A House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157 (1992).

<sup>22</sup> See U.S. CONST. art. I, § 2. While U. S. representatives and senators are members of Congress, in this Article, the term "congressional representative" and its variations will refer only to members of the House of Representatives.

<sup>23</sup> See U.S. CONST. art. I, § 2, cl. 3. The Constitution fixed the number of



old, must have been a citizen of the United States for at least seven years, and must be a resident of the state she is to represent.<sup>24</sup> The Constitution otherwise does not regulate how congressional representatives are to be selected.<sup>25</sup>

Although the Constitution does not require or restrict a state's particular method of electing congressional representatives, representatives have been elected almost exclusively through single-member districts<sup>26</sup> since Congress passed the Reapportionment Act of 1842 (the "1842 Act").<sup>27</sup> Before the 1842 Act, some states

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representatives each state was to have until the first Census was taken.

<sup>24</sup> See *id.* at cl. 2.

<sup>25</sup> However, if a vacancy occurs in a state's delegation to the House of Representatives, the governor of that state has the power to fill the vacancy. See *id.* at cl. 4.

<sup>26</sup> Under certain circumstances, states have held at-large congressional elections. In 1962, Alabama held at-large elections for U.S. representatives because it had not redistricted after population losses counted in the 1960 Census diminished its House delegation from nine to eight. See *Moore v. Moore*, 229 F. Supp. 435, 436-38 (S.D. Ala. 1964) (holding Alabama's continued use of election plan unconstitutional); *Alsup v. Mayhall*, 208 F. Supp. 713, 715-16 (S.D. Ala. 1962) (denying constitutional challenge to Act 154 which provided for at-large elections in response to redistricting); *White v. Frink*, 145 So. 2d 435 (Ala. 1962); *Jansen v. State ex rel. Downing*, 137 So. 2d 47 (Ala. 1962) (affirming validity of Act which regulated manner for nominating candidates for Congress). Each political party was allowed to select a candidate for each of the nine pre-1962 districts. See *Alsup*, 208 F. Supp. at 714. Those nine ran in a runoff primary election for the eight slots each party was allotted in Alabama's general election. See *id.* at 714-15. In *Alsup*, the court denied a challenge that one of the nine districts would not receive representation as a result of the winnowing feature of the plan. See *id.* at 715-17. Current law provides for the at-large election of congressional representatives in the event that a state loses representation and does not redistrict in time for the next election. See 2 U.S.C. § 2a (1994 & Supp. III 1997).

<sup>27</sup> Ch. 47, 5 Stat. 491. A proposed constitutional amendment in 1802 was the first attempt at imposing a districting structure on the states, albeit for the purpose of electing the President and Vice-President. See 7 ANNALS OF CONG. 263-64, 303 (1802). The proposed amendment offered:

That the State Legislatures shall, from time to time, divide each State into districts, equal to the whole number of Senators and Representatives from such State in the Congress of the United States; and shall direct the mode of choosing an Elector of President and Vice President in each of the said districts, who shall be chosen by citizens having the qualifications requisite for Electors of the most numerous branch of the State Legislature; and that the districts, so to be constituted shall consist, as nearly as may be, of contiguous territory, and of equal proportion of population, except where there may be any detached portion of territory, not of itself sufficient to form a district, which then shall be annexed to some other portion nearest thereto; which districts, when so divided, shall remain unalterable until a new census of the United States shall be taken.

*Id.* at 603. Ultimately, the districting issue vanished from the proposal, which focused on the selection and accountability of Presidential and Vice-Presidential Electors and

chose representatives through at-large voting and others chose representatives through districts.<sup>28</sup> The 1842 Act required that representatives be elected through single-member districts consisting of contiguous territory.<sup>29</sup> The Reapportionment Act of 1901 required that districts be compact and contiguous.<sup>30</sup> This stipulation was also

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eventually failed. *See id.* at 1296. Additionally, numerous constitutional amendments were proposed before 1842 to require districted congressional elections. *See Pildes & Donoghue, supra* note 1, at 253 n.46. All failed. *See id.*

<sup>28</sup> *See supra* note 1.

<sup>29</sup> In requiring districts, Congress formalized the common practice among the states. *See id.* Supporters of the 1842 Act argued that the Act would endorse what was already occurring in the majority of states while bringing uniformity to the manner in which representatives were sent to the House. Uniformity was desired not only to ensure that all states were selecting representatives in the same manner, but also to guarantee that individual states would not vary their method of selection from election to election. *See CONG. GLOBE* app., 27th Cong., 3d Sess. 493 (1842) (statement of Sen. Huntington). Only by implementing a uniform system of districting would political minorities have an opportunity to select a representative. *See id.* at 793 (statement of Sen. Bates).

The Act's opponents objected to it for several reasons. First, they claimed that the districting requirement was not a time, place, or manner restriction on elections and, as a result, the Act would impinge upon the rights guaranteed to the states by the Constitution. *See id.* at 585 (statement of Sen. Bagby). Second, they argued that this was a mandate to the states that Congress simply could not enforce. *See id.* Further, critics noted that in a democracy, whether the candidate of one's choice wins or loses, the voter's right to vote is left intact, and as such the voter has not been disfranchised. As for political minorities, they have no right to representation beyond the casting of the ballot. Senator Bagby of Alabama spoke against the Act:

To disenfranchise, means to deprive of the rights of a free citizen. While the right to vote according to the dictates of conscience and judgement remains unfettered and uncontrolled, no man is disfranchised. It is said, however, that it is destructive of the rights of minorities. Beyond the ballot-box, minorities have no rights. I have been nurtured in the school and rocked in the cradle of minorities. They have no right to be represented, either in a popular or political point of view, as is clearly demonstrated by the result of every election, from a constable up to the chief magistrate of the Union. . . . The only rational hope of minorities is founded in the ever-varying tide of public sentiment.

*Id.* at 584 (statement of Sen. Bagby).

The Reapportionment Act, after vigorous debate in both houses of Congress, was enacted into law on June 25, 1842. *See* ch. 47, 5 Stat. 491. The enactment of the Act did not quiet debate over the appropriateness of the districting requirement. Shortly after the passage of the Act, the Connecticut State Legislature passed a resolution denouncing the districting requirement. *See CONG. GLOBE*, 27th Cong., 3d Sess. 104 (stating that Connecticut was "denying the right of Congress to dictate to the States the mode in which they shall elect their Representatives in Congress; and protesting against the exercise of that right by the Congress of the United States, as a palpable and dangerous violation of rights of the legislature and people of the States. . .").

<sup>30</sup> Ch. 93, 31 Stat. 733. Congress had retained the contiguousness requirement in the Reapportionment Act of 1872, ch. 11, 17 Stat. 28, the Reapportionment Act of 1882, ch.

required in the Reapportionment Act of 1911.<sup>31</sup> The compactness and contiguousness requirements were both eliminated in the Reapportionment Act of 1929,<sup>32</sup> leaving only the requirement that single-member districts exist.<sup>33</sup> No federal statute has required either compactness or contiguousness since 1929.<sup>34</sup> Thus, while Congress set some of the parameters for congressional districting for four score and seven years of this nation's history, current federal law requires only that states create and maintain single-member congressional districts. Nonetheless, many states continue to create districts according to geography-based principles, including compactness, contiguousness, and respect for natural boundaries.<sup>35</sup>

## II. WHY SINGLE-MEMBER DISTRICTING?

Districting and at-large voting are the two major methods of electing congressional representatives.<sup>36</sup> Districting divides an electorate or jurisdiction into subsets which then elect individual or multiple representatives. Single-member districts elect single representatives. Multi-member districts elect multiple representatives.<sup>37</sup> Conversely, at-large voting schemes do not divide jurisdictions.

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20, 22 Stat. 6, and the Reapportionment Act of 1891, ch. 116, 26 Stat. 735.

<sup>31</sup> Ch. 5, 37 Stat. 13.

<sup>32</sup> Ch. 28, 46 Stat. 26.

<sup>33</sup> *See id.*; *Wood v. Broom*, 287 U.S. 1, 6 (1932) (examining the interplay between the Reapportionment Act of 1911, which required compact and contiguous districts, and the Reapportionment Act of 1929, which did not); *Karlan & Levinson*, *supra* note 6, at 1206 n.24 (noting that compactness and contiguousness were rejected in 1929 Reapportionment Act).

<sup>34</sup> *See* Reapportionment Act, § 201, 2 U.S.C. § 2a (1994 & Supp. III 1997); Reapportionment Act of 1941, ch. 470, 55 Stat. 761; Reapportionment Act of 1940, ch. 152, 54 Stat. 162. These are the most recent Reapportionment Acts.

<sup>35</sup> Many states require compactness and contiguity in congressional districting, in state legislative districting, or both. *See, e.g.*, MO. CONST. art. III, § 45 (“[D]istricts shall be composed of contiguous territory as compact and as nearly equal in population as may be.”); MINN. STAT. ANN. § 2.91(2) (West 1997) (“The legislature intends . . . that all districts consist of convenient contiguous territory substantially equal in population, and that political subdivisions not be divided more than necessary to meet constitutional requirements.”). Of course, the Supreme Court has specifically validated such an approach. *See also infra* pt. III. B.

<sup>36</sup> If a jurisdiction is not districted in some way, it selects representatives at-large. *See* Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. CHI. LEGAL. F. 193, 193-94 (suggesting that single-member and multi-member districting schemes are the two ways to choose a legislature). An at-large system can be viewed as the ultimate multi-member district in which all representatives run in the same district.

<sup>37</sup> For example, a city that is divided into three wards for its city council but allows each ward to select three councilors or councilmen would have a multi-member districting scheme. While such a system might seem odd, having multiple representatives for a single district might allow nearly every voter to feel as though one of their representatives

Under traditional at-large schemes, each voter can cast one vote for each representative to the legislature.<sup>38</sup> While multi-member districting and at-large voting are distinguishable, they can appear very similar and can serve some of the same purposes.<sup>39</sup> Districting and at-large voting are not exclusive; the same voting scheme can incorporate both systems.<sup>40</sup> Given the various options for electing political representatives, we must ask why congressional representatives are elected from single-member districts.

Single-member districting is historically familiar,<sup>41</sup> tracks many American views

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represented their interests. *See, e.g.,* *Davis v. Bandemer*, 478 U.S. 109, 109 (1986) (noting that the subject reapportionment plan called for 61 single-member districts, 9 double-member districts, and 7 triple-member districts); *White v. Regester*, 412 U.S. 755, 758 (1973) (indicating that the Texas House of Representatives used a combination of single-member and multi-member districts). Indeed some congressional representatives have proposed that states be allowed to have multi-member congressional districts. *See* H.R. 3068, 105th Cong. (1997) (calling for allowance of multi-member districts for states with a proportional voting system). H.R. 3068 was referred to the House Committee on the Judiciary on November 13, 1997, and to the Subcommittee on the Constitution on December 16, 1997. *See* 143 CONG. REC. H10953-02, H10954. Currently, federal law bans multi-member congressional districts. *See* 2 U.S.C. § 21(a) (1994 & Supp. III) (requiring that each district choose single representative).

<sup>38</sup> A city council for which each member is elected by the entire electorate uses an at-large voting scheme. *See* Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL'Y REV. 354, 358 (1991) (“[I]n the usual at-large election to fill five seats, each voter would have five votes to cast for five different candidates . . .”). In some situations, a jurisdiction may not want a particular individual representing any particular group of people. For example, school board members arguably should represent every citizen’s interests, rather than the interests of any particular group of citizens.

<sup>39</sup> *See* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 143 n.226 (1992) (noting similar effect of both, yet noting that at-large voting is technically a sub-set of multi-member districting). United States Senate elections can be viewed either as multi-member districting schemes with entire states being the districts or as at-large schemes with the population of the subject state being the entire electorate. The distinction is largely one of semantics. For an interesting article on districting the U.S. Senate, see Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1 (1996). State senates are districted and those districts are subject to the one-person, one-vote requirement. *See* *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”).

<sup>40</sup> Some city councils consist of councilors elected from districts and councilors elected at-large. *See, e.g.,* D.C. CODE ANN. § 1-1312(h)(1)(A) (1981).

<sup>41</sup> *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 178 (1989) (“The innate appeal of the geographic approach [to districting] lies in large part in its familiarity.”).

regarding congressional representation,<sup>42</sup> and is an orderly way to send representatives to Congress.<sup>43</sup> Additionally, by pairing a particular representative with a particular constituency, single-member districting can provide better individual and personal representation than other voting schemes. Such representation is considered by some to be a fundamental principle of American democracy.<sup>44</sup> That citizens can identify "their" congressman, who is ready and willing to hear their entreaties, is meaningful and comforting.<sup>45</sup>

Single-member districting reflects a belief that representative democracy works best when voters can closely identify with a representative, and a representative can closely identify with her constituency. This style of representation requires an easily identifiable constituency and a single representative selected by that constituency.<sup>46</sup> Such a vision of representative democracy is served most easily by single-member districting, where a member of Congress is a voter's only dedicated representative.

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<sup>42</sup> See McKaskle, *Wasted Votes*, *supra* note 16, at 1124 ("The tradition of single-member districts in the United States is strong and ancient—predating the adoption of the Constitution.").

<sup>43</sup> See *id.* at 1142 (stating the single-member district provides advantages of "simplicity" and "understandability").

<sup>44</sup> For a general description of the Federalist and Anti-Federalist visions of representation, see Wilson Carey McWilliams, *The Anti-Federalists, Representation, and Party*, 84 NW. U.L. REV. 12 (1989). While America is wedded to single-member districts, the national legislatures of many other democracies are not chosen solely through single-member districts. See DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES 1-2* (1993) (suggesting generally that the American districting system is a poor way to elect officials and noting that few world democracies use it).

<sup>45</sup> Indeed, knowing that one can turn to a congressman for constituent services is very important. See Steven G. Calabresi, *Some Structural Consequences of the Increased Use of Ethics Probes as Political Weapons*, 11 J.L. & POL. 521, 524 (1995) (noting the importance of constituent services); see also Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 307 (1997) (suggesting that constituent services are increasingly being handled without regard to the constituent's race). It is interesting to note that citizens in Washington, D.C., do not have their own voting member of Congress to hear their entreaties and petitions. The Constitution does not provide for representation for those citizens living in the federal district. See U.S. CONST. art. I, § 2 (providing representation only for the several states); Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1659 (1991) (explaining the District of Columbia's lack of congressional representation). The push for statehood for the District of Columbia, which would necessarily include congressional representation, has existed for many years. See, e.g., H.R. 51, 104th Cong. (1995) (proposing statehood for District of Columbia with concomitant congressional representation).

<sup>46</sup> Districting by territory also allows new arrivals to a state to know who their representative is. This capacity is necessary if the new arrival is to be provided with representation as soon as she becomes a state resident.

This relationship can create strong ties that yield good representation, because the tighter the bond between a representative and her constituency, the better the representation the voter will likely receive.<sup>47</sup>

Single-member districting creates a symbiotic relationship between a representative and her constituency.<sup>48</sup> The relationship encourages continued interaction between a representative and her constituency that may foster clearer and potentially more frequent communication between them.<sup>49</sup> That focused communication allows the representative to advance the interests of her constituency as she deems appropriate, providing the best opportunity for the constituency to receive good representation.<sup>50</sup> Additionally, the continuing relationship allows constituents to hold the representative accountable in future elections for any shortcomings made apparent during a representative's term.<sup>51</sup> Of course, through reelection, constituents can also reward a representative for good representation.

Single-member districting snugly fits a notion of representation in which a representative will champion her constituency's interests.<sup>52</sup> The desirability of

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<sup>47</sup> While ties between voters and representatives can be strong in multi-member districting and at-large voting plans, they likely will not be as strong as they could be in a single-member districting scheme. Of course, that may be a reason to choose a multi-member or at-large scheme. Weak ties may be preferable to strong ties if strong ties constrain a legislator's independent judgment on issues. Conversely, weak ties may lead to more difficult and less effective communication between a representative and her constituency. In multi-member and at-large plans, the voter has several representatives who may represent his interests, but none who is necessarily devoted to representing his interests. With constituencies that are much larger than they would be under single-member districting, representatives likely would have less of an opportunity to develop strong ties within their constituency. This debate echoes that between Federalists and Anti-Federalists regarding the preferability of small or large districts. See *infra* notes 65 & 67. Nonetheless, while voters might yet be well-represented under multi-member or at-large schemes, the opportunity to be well-represented with respect to a voter's individual interests appears greater under a single-member districting scheme.

<sup>48</sup> In an at-large system, a representative may have a vague notion of who voted for her. Similarly, voters may have only a vague notion of who should or will represent their interests.

<sup>49</sup> See McKaskle, *Wasted Votes*, *supra* note 16, at 1140 (indicating small size of single-member districts "allows constituents greater access to the representatives (and vice versa)").

<sup>50</sup> See *id.*

<sup>51</sup> Electoral accountability is a serious check on the actions of representatives. See John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1143-44 (1996) (citing THE FEDERALIST NO. 70, at 477-78 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961)).

<sup>52</sup> That a representative will advance his constituency's interest is largely an American notion. See BIRCH, *supra* note 2, at 48-49 (suggesting that "the radical notion that sovereignty rests with the people and political representatives are the people's agents . . . as a working concept of government . . . is exclusively American").

closeness tracks the agency theory of representation, which suggests that representatives are sent to legislatures as agents to advance their constituency's interests.<sup>53</sup> Under that theory, the effectiveness of the agent-representative follows directly from how well the representative's actions reflect the constituency's desires.<sup>54</sup> In a representative democracy, the representative is the voter's connection to the government and is the vehicle through which the populace makes its desires known. Consequently, single-member districting can encourage the twin beliefs that individuals can affect policy and that government will protect and champion personal interests.<sup>55</sup> The closer a voter is to her representative, the more easily she can influence the representative and policy.<sup>56</sup> That closeness is most easily achieved when

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<sup>53</sup> Whether a representative should work for constituents' interests or whether the representative should think independently of his constituency are the bases for the differing views of representation. *See id.* at 20 ("Innumerable writers and speakers have maintained that elected representatives have a duty to act as agents for their constituents. . . . On the other hand, the most influential theorists in the Western world have stressed the need for elected representatives to do whatever they think best for the nation as a whole . . . ."); Mark A. Graber, *Conflicting Representations: Lani Guinier and James Madison on Electoral Systems*, 13 CONST. COMMENTARY 291, 292 (1996) (differentiating the trustee model of representation that allows representatives to rely on their sense of the public good from the delegate model of representation which guides representatives to vote for their constituents' policy preferences); Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 567 (1996) (explaining the debate between the agent and trustee models and concluding that the question is whether representatives should be "autonomous or automatons"); Pitkin, *supra* note 2, at 19. For the purposes of this Article, the agency theory of representation will embody the representative who largely attempts to advance the interests of her constituents. *See* BIRCH, *supra* note 2, at 42-43 (arguing that many Founders subscribed to this agency theory of representation, though Birch names it the delegate theory). The theory that this Article refers to as the delegate theory of representation embodies the notion that the representative should consistently consider interests other than those of his constituents before voting. *See* Hamilton, *supra* note 17, at 9 ("The Constitution frees representatives from direct control by the people during the term of representation so that they may make the decisions that are in the country's best interest. During the term of representation, they are given decisionmaking power that is independent of the people.").

<sup>54</sup> The vision of a member of Congress as an agent of her constituency is certainly consistent with the one-person, one-vote doctrine, which stems from the notion that "[l]egislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>55</sup> At least one court has suggested that the protection of individual interests is at the heart of representation. *See Sokaogon Chippewa Community v. Babbitt*, 929 F. Supp. 1165, 1173 (W.D. Wis. 1996) ("In our federal system of representative democracy, congressional representatives are expected to represent the concerns of their constituents vigorously. This expectation of spirited congressional advocacy applies not only to legislation but to any governmental decision that affects constituent interests.").

<sup>56</sup> *See* LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 84 (1994) (suggesting that districting can help constituents

a legislator can be identified by an individual as her representative to the federal government. If the federal government protects individual rights and interests at all,<sup>57</sup> tying individual voters to a particular congressional representative as closely as possible is particularly sensible because it provides the best opportunity for the voter to protect those individual rights and interests.<sup>58</sup>

Additionally, a representative can better identify and advance her constituents' interests under such a system. A representative can most easily advance the interests of her constituency when those interests are clearly or narrowly defined.<sup>59</sup> Such clear definition is most likely to occur when the constituency is smaller and consists largely of people with similar interests and similar views of government.<sup>60</sup> Single-member districting creates the smallest—and affords the most homogeneous—constituencies possible.<sup>61</sup> A homogeneous constituency is more likely to share similar views and exhibit less dissent when its representative advances the constituency's interests.<sup>62</sup>

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feel connected to their representatives).

<sup>57</sup> Arguably the federal government should focus on protecting individual rights and interests. See Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531, 535 (1998) (noting that accountability is best seen "as a structural feature of the constitutional architecture, the goal of which is to protect liberty").

<sup>58</sup> Short terms and term limits can be seen as ways to loosen those ties. The two-year term for congressional representatives was a contested issue for the Framers of the Constitution. Indeed, some would have preferred a shorter term of office. See THE FEDERALIST NOS. 52, 53, at 327-30, 332-36 (James Madison) (Clinton Rossiter ed., 1961) (assessing the arguments for a two-year term limit and for shorter terms). Of course, the term limit issue is still argued. See, e.g., *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). Interestingly, lengthening congressional terms has been seriously debated as recently as 1966. See BIRCH, *supra* note 2, at 81 (noting President Johnson's suggestion of four-year congressional term in 1966).

<sup>59</sup> See Levmore, *supra* note 53, at 600-01 (indicating that bloc voting based on narrow common interests can yield benefits to the bloc).

<sup>60</sup> See Howe, *supra* note 2, at 2 (arguing that "[c]lassical republican thought" that "republicanism worked best in homogeneous communities").

<sup>61</sup> See Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1223 n.88 (1985) (describing single-member districts as "geographically smaller and more ethnically homogeneous"). Multi-member and at-large systems, by definition, create fewer, more populous districts than would a single-member system applied to the same jurisdiction.

<sup>62</sup> While homogeneous districts may be easy to represent, they can mask other problems. Indeed, there may not be a principled way to distinguish homogenous districts from districts intentionally packed with a disfavored group. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno*, 92 MICH. L. REV. 588, 630 (1993) (noting that homogeneous districts can be created from a desire to lessen a group's electoral influence).



The foregoing suggests that single-member districting facilitates the voters' choice of a representative who will represent their parochial interests.<sup>63</sup> Of course, the Congress that passed the Reapportionment Act of 1842 may have intended that future Houses of Representatives be filled with legislators poised to advance the personal interests of their constituents. Interestingly, if this was that Congress' motivation, mandatory single-member districting may be the lasting legacy of the Anti-Federalists.<sup>64</sup> Though conventional wisdom suggests that the Anti-Federalists lost the struggle surrounding the Constitution,<sup>65</sup> the notion that districts be as small as possible, with congressional representatives accountable largely to their constituency rather than their state or the nation, is consistent with strains of Anti-Federalist thought.<sup>66</sup>

However, that congressional representatives represent particular districts does not necessarily mean they will always advance the parochial interests of their constituents. Members of Congress can and do vote with the broader interests of all

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<sup>63</sup> See GUINIER, *supra* note 56, at 126 (suggesting that some may envision the nature of representation as being the ability to get whatever government or financial benefits one can through their representative).

<sup>64</sup> Indeed the Anti-Federalists preferred smaller districts that would bind representatives as closely to the people as possible. See generally THE ANTIFEDERALISTS, xxxix-lxi (Cecilia Kenyon ed., 1966). Conversely, Federalists tended to favor large districts. See THE FEDERALIST NO. 10, at 82-83 (James Madison) (Clinton Rossiter ed., 1961); Graber, *supra* note 53, at 300 ("Large voting districts were crucial to the Madisonian quest for public-spirited representatives. Publius defended vast geographic legislative districts because he thought that such electoral units increased the number of worthy candidates and forced voters to transcend parochial concerns when making electoral choices."). Interestingly, small districts could render the Congress a replication of the state legislatures, an idea that did not appeal to the Federalists. See THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) (noting that the federal and state governments are "constituted with different powers and designed for different purposes").

<sup>65</sup> The Anti-Federalists lost major issues regarding the breadth and structure of the Constitution. Nonetheless, they may have influenced how particular provisions of the Constitution are or should be read. For commentary on the impact that the Anti-Federalist thought has had on the Constitution and the American structure of government, see generally, Symposium, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. U. L. REV. 1 (1989).

<sup>66</sup> See THE ANTIFEDERALISTS, *supra* note 64, at liii (citing Anti-Federalist concern that republican government over large area would lead to impersonal relationships between representative and constituency); JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788, at 135 (1961) (mentioning Anti-Federalist desire for small constituencies "so that they would be intimately known by the electors and intimately acquainted with the popular will"); Graber, *supra* note 53, at 305 (suggesting that Anti-Federalists would support an electoral model that called for smaller districts and a greater ability to elect representatives who specifically and staunchly support their constituents' views).

of their state's citizens or the American people in mind.<sup>67</sup> However, even if legislators only voted in support of their constituencies' interests, Congress may yet represent the interests of the nation.<sup>68</sup> The votes of a state's House delegation may reflect the varied interests of the state's populace. By extension, the aggregate vote of the House of Representatives may reflect the collective interests of the people of the United States.<sup>69</sup> When Congress acts, it may act in accord with the varied interests of the American people or in the general national interest even when each member votes based on the personal interests of his constituents.<sup>70</sup> Thus, single-

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<sup>67</sup> The delegate theory of representation suggests that representatives are chosen to represent the general interest of the country in the best way they see fit. See BIRCH, *supra* note 2, at 40 (discussing the notion of delegated or elective representation as encouraging the representative to use his judgment in determining what is in the best interest of the nation). For some, the delegate theory of representation refers to ideas that this Article has referred to as the agency theory of representation. See *supra* notes 2 & 53-54. This is merely a difference in terminology, not in substance. The delegate theory is an historically British and European vision of representation that views the legislature as the body through which the country is governed rather than the body through which the people are directly given voice. See Graber, *supra* note 53, at 306 ("The central question of representative government is whether electoral systems should minimize or maximize the impact of public opinion on public policy . . . . The issue is the extent to which public officials should be harnessed by public opinion.") (citing HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION*, 145 (1967)). While that vision does not precisely fit the American notion of the Congress, the seeds of a delegate-style theory of representation were suggested by some of the Constitution's framers. See *THE FEDERALIST NO. 57*, at 350 (James Madison) (Clinton Rossiter ed., 1961) ("The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society . . .").

<sup>68</sup> Regardless of why members of Congress are chosen through single-member districting, a representative's effectiveness will depend on how the legislature conducts business. Even if single-member districting tends to favor the representation of local or parochial interests, it remains compatible with a delegate theory of representation if congressional representatives are generally persuaded only by appeals to the national interest. The fact that congressional representatives are chosen by local majorities may mean little if Congress systematically ignores arguments based on local interests or if the president vetoes legislation that is not in the national interest. See Thomas O. Sargentich, *The Future of the Line Item Veto*, 83 *IOWA L. REV.* 79, 123 (1997) (hypothesizing a president who represents the national interest when making policy).

<sup>69</sup> This may suggest that voting in favor of one's constituents' interests leads to no one getting precisely what they want. It also may be the best solution of all, giving a tolerably large number of people something close to what they want while not allowing any one individual to have everything he wants.

<sup>70</sup> Of course, the national interest may not exist apart from the collective interest of the people. See McWilliams, *supra* note 44, at 14 (describing contrasting visions of common interest as an "aggregate of private interest" and as "an objective collective interest"). Some Anti-Federalists believed the federal government would be unable to serve all of the interests of the people. See MAIN, *supra* note 66, at 129 (detailing Anti-Federalist concerns

member districting may allow citizens to be heard, while also allowing the collective will of the people to be advanced.

While the above arguments suggest that single-member districting provides some advantages that at-large districting cannot, they should not be taken to suggest that at-large voting schemes are necessarily inconsistent with American notions of representation. Representative democracy does not require districting to work well. Citizens do not need the focused representation that single-member districting provides in order to be reasonably well-represented in Congress.<sup>71</sup> While representatives must speak for those they represent, it is not necessary that a particular representative be the only speaker for any particular constituency or citizen. Because congressional representatives can and do represent interests broader than the individual interests of constituents, freeing representatives from their districts could make representing those broader interests easier.<sup>72</sup> If congressional representatives are to represent the collective interest of their state's citizens<sup>73</sup> or the collective interest of the American people, electing them in a manner that binds them to a particular district may not be the best way to foster that style of representation.

Congress is a national body that legislates national issues. Choosing congressional representatives through statewide elections could be a powerful statement suggesting that local majorities should not and will not matter in

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that a large nation controlled by a single government could not adequately protect the varied interests of all of the nation's people).

<sup>71</sup> See LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES AND JUSTICE* 770 n.4 (3d ed. 1998) ("During the first-half century of the nation's history, it was common for the states to select their delegates to the House of Representatives on an at-large basis rather than using the single-member constituency plan."); Gordon E. Baker, *Bases of Representation*, in *REAPPORTIONMENT* 25-26 (Glendon Schubert ed., 1965) (indicating that representation in colonial America was based on localities, regardless of size, reflecting the valuation of autonomous communities). Similarly, representation in the British Parliament has historically been based on land rather than people. See GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER AND THE SUPREME COURT* 15 (1966) (indicating that the size of the constituency in England was irrelevant because the delegates represented localities, not people). The notion of politicians representing people or acting for others did not arise until the Middle Ages. See Pitkin, *supra* note 2, at 2.

<sup>72</sup> Of course, freeing congressional representatives from territorial districts could lead them toward special interests. Those special interests have real reasons for attempting to keep their favored candidates in office. See generally John O. McGinnis, *The Original Constitution and its Decline: A Public Choice Perspective*, 21 *HARV. J.L. & PUB. POL'Y* 195 (1997) (examining constitutional constraints on expropriation by special interests).

<sup>73</sup> Note that the demand for states' rights protects the people's interest in configuring their state governments and interpreting their state laws as they see fit. See generally ALPHEUS THOMAS MASON, *THE STATES RIGHTS DEBATE, ANTIFEDERALISM AND THE CONSTITUTION* (1972). Ostensibly, the interests of individual citizens combine to become state interests that then are protected.

Congress.<sup>74</sup> A representative whose constituency is an entire state might feel freer to represent the interests of his state or the nation if he is not politically constrained to represent the specific interests of his constituency.<sup>75</sup> Therefore, at-large voting for congressional representatives could be appropriate if legislators should represent the interests of their state or the nation rather than the interests of their constituents. While such a notion would run counter to the idea that each representative should serve as small a constituency as possible in order to represent that constituency's interests, requiring small constituencies has no explicit constitutional support.<sup>76</sup>

Different voting structures imply different values. While single-member districting is not the only way to provide adequate representation to the populace, it is the only way to provide a certain style of representation to the people. The reasonableness and efficacy of single-member districting rest on a preferred vision of congressional representation that stems from certain views of government and representation. If, as many believe, congressional representatives primarily represent the political interests of their constituents, single-member districting provides a structured relationship that allows representatives the greatest ability to be responsive to their constituents and allows those constituents the greatest ability to hold representatives accountable for their actions. The value of accountability and responsiveness of representatives is assumed. If accountability is not a primary value and society prefers representatives to do what is right rather than to do right by their constituents, single-member districting arguably should be replaced by a system that does not so directly support accountability.

### III. CONSTRUCTING DISTRICTS

#### A. *Creating Constituencies Through Districting*

As districting is the process of grouping people and providing them with common

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<sup>74</sup> The Constitution does not prohibit a state with ten congressional seats from conducting an at-large election and sending the candidates who garnered the ten highest vote counts to Congress. As noted previously, federal law provides for at-large elections in certain limited situations. See 2 U.S.C. § 2a (c) (1994) (allowing at-large elections when a state loses representation and does not redistrict before the next election); *supra* note 34 and accompanying text.

<sup>75</sup> This does not mean that all members of the delegation will act or think alike. Each will still count on his background and vision of the state's interests to guide his determination of policy. *But see infra* note 84.

<sup>76</sup> However, one commentator has argued that the Constitution's command that the number of representatives not exceed more than one per 30,000 citizens, see U.S. CONST. art. I, § 2, cl. 3, suggests that the Constitution views this as an appropriate number to comprise a district. See generally Yates, *supra* note 21 (proposing that the Framers of the Constitution intended that the House of Representatives grow in proportion to the population).

representation, it confers the power to create and define constituencies. Apportionment is the inclusion and exclusion of people<sup>77</sup> and land in and from districts.<sup>78</sup> Through apportionment, legislatures structure the democratic process by building the constituencies<sup>79</sup> they deem appropriate.<sup>80</sup> For example, if a legislative majority wants to create districts encompassing politically homogenous voters because it believes that such districts are easily represented,<sup>81</sup> then courts likely will

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<sup>77</sup> For an example of drawing lines to exclude people, see *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (drawing lines to exclude black citizens of Tuskegee, Alabama, from municipal elections). For examples of drawing lines to include people, see *Miller v. Johnson*, 515 U.S. 900, 907-09 (1995) (drawing lines to include black citizens in a congressional district); *Shaw v. Reno*, 509 U.S. 630, 633-34 (1993) (same).

<sup>78</sup> The one-person, one-vote doctrine espoused in *Reynolds v. Sims*, 377 U.S. 533, 558-65 (1964), requires that each district have equal population. Creating equipopulous districts requires that citizens explicitly be included in or excluded from particular districts. However, since apportionment is ostensibly based on land (technically land on which people live), land is that which is included in or excluded from districts. Traditional districting relies on property and geography to divide and combine voters into districts. See Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 358-59 (1995-1996) (recognizing the traditional primacy of geographical interests in districting). The shift to a one-person, one-vote model worked a subtle change in emphasis from districting land to districting people. That change means that instead of looking at land, and necessarily including the people on that land in the district, states look at people and necessarily include the land on which they live in the district. It may also suggest that districting based on land is incompatible with politics based on the representation of personal interests. See generally GUINIER, *supra* note 56, at 127-37 (detailing the link among property, territory, and the representation of land rather than people).

<sup>79</sup> See Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998) (suggesting that reapportionment concerns groups, and treating individuals as members of groups).

<sup>80</sup> See Aleinikoff & Issacharoff, *supra* note 62, at 588 ("In a democratic society, the purpose of voting is to allow the electors to select their governors. Once a decade, however, that process is inverted, and the governors and their political agents are permitted to select their electors.").

<sup>81</sup> Districting can be used to create culturally homogeneous units that reflect the heritage of their inhabitants. Such constituencies could be easier to represent because of their homogeneity of outlook. See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1391-96 (1997) (discussing jurisdiction formation in which a main component is the desire to be racially separate or segregated). Indeed, allowing like-minded people to vote together in various elections simultaneously can yield continuity of views in all who represent the district, be they city councilors, state representatives, state senators, or congressional representatives. Cf. *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (noting the incorporation of a village of Satmar Hasidim Jews who wanted the village, and presumably its governance, to reflect their religion and heritage).

allow such districting.<sup>82</sup> Similarly, the same legislative majority could construct districts encompassing heterogeneous voters.<sup>83</sup> Whether districting power is used appropriately or inappropriately depends on how and for what purposes it is exercised, because the power to district or to model constituencies is also the power to gerrymander.<sup>84</sup>

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<sup>82</sup> See Ford, *supra* note 81, at 1383-86 (arguing that the Supreme Court has shown little inclination to scrutinize intentionally created racially homogeneous local governments).

<sup>83</sup> Heterogeneous constituencies may provide representatives who can compromise and must consider the wide range of interests in their constituency before making policy. Indeed, such representatives may turn policy away from extremes and toward the political center. Some have suggested that such a turn to the political center is sensible. See generally RICHARD DARMAN, WHO'S IN CONTROL? THE POLARIZATION OF AMERICAN POLITICS AND THE REVIVAL OF THE SENSIBLE CENTER (1996) (chronicling the resurgence of centrist national politics). Conversely, some commentators, if the title of their books are to be believed, have little respect for those who seek the political center. See JIM HIGHTOWER, THERE'S NOTHING IN THE MIDDLE OF THE ROAD BUT YELLOW STRIPES AND DEAD ARMADILLOS (1997).

<sup>84</sup> See GUINIER, *supra* note 56, at 121 ("Districting breeds gerrymandering as a means of allocating group benefits; the operative principle is deciding whose votes get wasted."); Karlan & Levinson, *supra* note 6, at 1209 n.37 (stating that "[all] districting is gerrymandering") (quoting ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968)); John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 173 (1984) ("The fundamental dilemma of geographical districting is that all districting is gerrymandering."). Because districting is line-drawing, political gerrymandering can occur whenever districts are created. See EPSTEIN & WALKER, *supra* note 71, at 769 ("Because district lines determine political representation, the authority to draw those boundaries carries with it a great deal of political power. Skillful construction of political subdivisions can be used to great advantage, and politicians have never been reluctant to use this power to advance their own interests."). When gerrymandering is particularly entrenched, slim majorities can leverage their numerical advantage to hegemonic superiority. See Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 302 (1991) (indicating that gerrymandering allows "a party that enjoys only a small majority in popular support over its principal competitor [to] . . . translate this popular edge into preemptive institutional dominance") [hereinafter Polsby & Popper, *Third Criterion*]; see also Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION 85 (Chandler Davidson ed., 1984) (labeling gerrymandering as "any redistricting practice which maximizes the political advantage or votes of one group, and minimizes the political advantage or votes of another"). Whether majorities should be allowed to leverage votes depends on the proportion of decisions a majority should be allowed to make. See GUINIER, *supra* note 56, at 12 (questioning whether those who win 51% of the vote should necessarily make 100% of the decisions). Of course, as long as significant political minorities who are eligible to vote do so, gerrymandering is a dangerous game. While officials can herd voters into particular districts, the representatives elected from districts that essentially are given away could cause real problems in the legislature, even if legislators from those districts and

Although districting is always subject to abuse, not all districting schemes are qualitatively similar. Some districting rules are more objective or process-oriented, while others are more subjective or result-oriented. Consider two rules. The first states that Counties A, B, and C are to comprise Congressional District 1. The second rule states that communities where farming is the predominant occupation shall be combined to create congressional districts wherever possible. Both rules appear to suit a purpose and appear to be fair. The first rule is more objective than the second and is less prone to manipulation. This does not necessarily mean that less legislative wrangling occurred before its adoption.<sup>85</sup> Rather, it suggests that once the first rule is in place, nothing can be done to avoid its intended effect.

The second rule is more flexible and more likely to yield gerrymandering because it states a general rule, rather than a specific command. However, the second rule may group voters with similar concerns better than the first rule. If retaining cohesion among farming communities is important, then the second rule may be necessary. However, defining what is a farming community may become a problem both for those communities that wish to be considered farming communities and those that do not. Allowing legislative majorities to decide which communities will be and will not be deemed farming communities can lead to explicit modeling of constituencies, that is, the conscious inclusion and exclusion of specific groups of voters in a district. While the second districting rule is not bad, it poses a greater threat of gerrymandering abuse than the first, precisely because it allows a more detailed modeling of constituencies. The more detailed the modeling of constituencies becomes, the more the process resembles gerrymandering.

Although gerrymandering is a concern in districting, subjectivity in constructing districts is not unlawful. While states are required to have congressional districts, they retain significant latitude in structuring them.<sup>86</sup> Aside from the constitutional requirement that congressional districts contain equal populations,<sup>87</sup> states are free to design districting plans based largely on political considerations.<sup>88</sup> While states

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their allies do not constitute a majority of the legislature.

<sup>85</sup> For example, Counties A, D, and E could be more suited to amalgamation than Counties A, B, and C, but other political factors could make the ABC combination more appropriate. For example, in the redistricting process that led to *Shaw v. Reno*, the North Carolina legislature created the oddly-shaped 12th Congressional District to avoid upsetting incumbent congressmen. See Aleinikoff & Issacharoff, *supra* note 62, at 591.

<sup>86</sup> See *Bush v. Vera*, 517 U.S. 952, 978 (1996) (recognizing flexibility retained by states with respect to districting).

<sup>87</sup> See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

<sup>88</sup> While political gerrymandering does have some limits, those limits likely do not heavily influence districting plans. See Karlan & Levinson, *supra* note 6, at 1208-09 (suggesting that blatant political gerrymandering is accepted); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2513 n.26 (1997) (“Thus *Davis v. Bandemer*, 478 U.S. 109 (1986), has never been applied by a lower court to strike down any districting plan for a legislative body at any level of governance.”).

retain latitude in structuring constituencies, they do not write on a blank slate. This country's history of state and congressional districting has provided a number of traditional districting principles that stand as historical bases for districting. States historically have used various criteria, such as compactness, contiguousness, incumbent protection, and respect for natural and political boundaries to create congressional, state legislative, and other districts.<sup>89</sup> The Supreme Court has validated these principles as the baseline for districting.<sup>90</sup> Consequently, the use of these principles indicates to the Supreme Court that states have engaged in historically appropriate apportionment.<sup>91</sup>

The Supreme Court does not tend to scrutinize apportionment plans that utilize traditional districting criteria. Although the use of these traditional criteria is not mandatory,<sup>92</sup> deviation from those criteria suggests that gerrymandering may have occurred.<sup>93</sup> Although the Supreme Court has not invalidated many, if any, districting plans because of political gerrymandering, it has made clear that it stands ready to do so.<sup>94</sup> This may explain why states have not been particularly bold in altering their districting systems.<sup>95</sup> A state's blueprint for districting is relatively clear—create the

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Conversely, limits on pro-minority racial gerrymandering seriously constrain districting plans.

<sup>89</sup> These criteria have been considered the traditional, appropriate criteria for districting. See *Miller v. Johnson*, 515 U.S. 900, 906 (1995) (allowing the state legislature to pass redistricting procedures endorsing "contiguous geography, fidelity to precinct lines where possible, . . . maintaining the integrity of political subdivisions, preserving the core of existing districts, and avoiding contests between incumbents").

<sup>90</sup> See *Bush*, 517 U.S. at 952, 964 ("[W]e have recognized incumbency protection . . . as a legitimate state goal."); *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[D]istrict lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." (citing *Reynolds*, 377 U.S. at 578)).

<sup>91</sup> However, some have suggested that fidelity to and the prevalence of traditional districting principles have not been as common as courts indicate. See Karlan & Levinson, *supra* note 6, at 1205-07 (noting that some traditional principles are not particularly traditional); see also Samuel Issacharoff, *The Redistricting Morass*, in AFFIRMATIVE ACTION AND REPRESENTATION: *SHAW V. RENO* AND THE FUTURE OF VOTING 201, 220 (Anthony A. Peacock ed., 1997) ("In the absence of any real content to the Court's repeated invocation of the 'traditional principles of districting,' there remains the gnawing impression that the rules of the game were changed only when minorities started to figure out how to play.").

<sup>92</sup> See *Shaw*, 509 U.S. at 647 (noting that the Constitution does not require the use of any particular districting criteria).

<sup>93</sup> See, e.g., *Bush*, 517 U.S. at 980 (noting that "deviations from traditional districting principles" are of constitutional concern).

<sup>94</sup> See *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986) (noting the justiciability of pure political gerrymandering claims).

<sup>95</sup> States could be much bolder with districting. See Pildes, *supra* note 88, at 2534-35 (hypothesizing various extremely nontraditional ways to district, including the random assignment of voters to districts); Polsby & Popper, *Ugly*, *supra* note 14, at 672 (suggesting



constituencies the legislature desires, but do so using traditional principles.

### B. *Compact Districting*

States commonly use geography-based principles, including compactness, contiguousness, respect for natural boundaries, and respect for political subdivisions, to create congressional districts.<sup>96</sup> The Supreme Court has validated this approach, viewing compact districts of contiguous land as the epitome of appropriate districting.<sup>97</sup> Therefore, this section of the Article focuses generally on geography-based principles and specifically on compactness and contiguousness as the prototypical geography-based districting principles.<sup>98</sup> Additionally, this section considers some of the justifications for and limitations of using compactness and contiguousness in districting.

Compactness is a relative concept that focuses on the shape of a district and considers whether districting lines could be made more uniform or whether a district could be of a more regular shape.<sup>99</sup> Consequently, one district can be said to be more

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endless ways to district on the basis of characteristics not related to land). For example, a state with 10 congressional districts could randomly assign its voters to districts. Such a districting scheme would produce 10 demographically similar districts that could produce 10 similar representatives. While such a delegation might not be diverse, it could forcefully position itself as a voting bloc. See James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right To Vote*, 145 U. PA. L. REV. 893, 923-25 (1997) (reviewing plaintiff's argument in *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971), that voters in multi-member districts are over-represented because representatives from those districts vote as a bloc). Since each representative would represent demographically similar districts, each representative might be expected to vote similarly on issues. That scheme could strongly protect a state's interests.

<sup>96</sup> See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (placing burden on plaintiff to show the legislature relied on racial considerations as opposed to principles such as contiguity and compactness).

<sup>97</sup> For example, the decision in *Shaw v. Reno* hinged almost entirely on whether North Carolina's 12th Congressional District was geographically compact. See *Shaw*, 509 U.S. at 647; see also Ford, *supra* note 81, at 1407 ("Many commentators believe that geography should function as an independent criterion for electoral districting, vindicating an ancient concern with territorial solidarity.").

<sup>98</sup> While the other geography-based districting principles mentioned are important, the Supreme Court has focused on compactness. See *Bush*, 517 U.S. at 979; *Miller*, 515 U.S. at 916; *Shaw*, 509 U.S. at 647. Additionally, much of what is said about compactness and contiguousness can apply to the other geography-based principles. Nonetheless, this Article will mention other geography-based principles by name when appropriate.

<sup>99</sup> While different definitions of compactness exist, the Supreme Court has settled on one based on a district's appearance. See *Miller*, 515 U.S. at 908-10 (describing the shape of the district); *Shaw*, 509 U.S. at 635-36 (same). But see *Bush*, 517 U.S. at 962 (suggesting that compactness is not solely about the regularity of district lines). Of course, regularity may depend upon context. Whether a circle or a square or a triangle is regular in the

compact than another.<sup>100</sup> Conversely, contiguousness is an absolute concept that focuses on whether one can travel to all parts of a district without ever leaving the district.<sup>101</sup> Thus, compactness and contiguousness are related,<sup>102</sup> but are not the same. Nonetheless, contiguousness and compactness are rarely analyzed separately,<sup>103</sup> and compactness tends to subsume contiguousness. Compact districts must be contiguous, but contiguous districts may not be compact.<sup>104</sup> The key issue, however, is identifying the benefits that compact, contiguous single-member districts provide that non-compact, non-contiguous single-member districts do not.

### 1. Justifying Compactness

While states must create congressional districts,<sup>105</sup> no federal statutory requirements remain in effect governing construction.<sup>106</sup> Consequently, the use of compactness and contiguousness as districting principles rests on their appropriateness. Compact, contiguous single-member districting schemes provide at least four benefits that other single-member districting schemes cannot. First, compact districting affords maximum geographic diversity in a state's congressional delegation. Second, compact districting can yield convenient campaigning. Third, compact districting can help protect local majorities from being splintered geographically by an unsympathetic or gerrymandering legislative majority. Fourth, compact districting best vindicates the principle that those who live in close proximity should have common representation.

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context of any particular state is debatable.

<sup>100</sup> See *infra* note 152 (indicating that degrees of compactness can be measured). The question is whether a specific number of voters can be corralled with more uniform lines. Often, the answer to this question is yes. This can cause problems since counties and other subdivisions, which have traditionally comprised districts, may not have boundaries that create regular district shapes.

<sup>101</sup> This Article does not suggest that whether a district is contiguous cannot be disputed; it is merely to say that a district is either contiguous or it is not. See Paul L. McKaskle, *The Voting Rights Act and The "Conscientious Redistricter,"* 30 U.S.F. L. REV. 1, 60 n.282 (1995) (providing examples of districts that could be deemed non-contiguous or contiguous depending upon definition of contiguousness); see also Aleinikoff & Issacharoff, *supra* note 62, at 660 (stretching the notion of contiguousness).

<sup>102</sup> See Pildes, *supra* note 88, at 2534.

<sup>103</sup> See Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 84 (1985); Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185, 187 (1985); Polsby & Popper, *Third Criterion*, *supra* note 84, at 330 n.139.

<sup>104</sup> See *Shaw*, 509 U.S. at 657-58 (invalidating a contiguous, but non-compact, district).

<sup>105</sup> See 2 U.S.C. § 2a (1997).

<sup>106</sup> See *supra* pt. I.

a. *Maximizing Geographical Diversity of Representation*

Compact districting helps maximize the geographical diversity of a state's representation by ensuring that constituencies in different parts of the state select representatives. Single-member districting creates districts with the smallest constituencies possible. Compact districting ensures that those districts are spread across different regions of a jurisdiction. Simply, a districting plan consisting of districts following irregular paths or encompassing strips of land extending into various areas of a state is not a compact one. This does not mean that non-compact, single-member districting schemes necessarily will not or can not yield diverse geographical representation. Rather, it suggests that one need not worry about diverse geographical representation when all districts are compact.<sup>107</sup>

Diverse geographical representation may not be important in some states, but may be very important in others. If a citizenry's political interests vary with geography, geographical diversity of representation may be necessary to ensure that each of a state's interests are represented by at least one member of the state's congressional delegation. For example, a state whose geography encompasses farmland, grazing land, and mountains may wish to ensure geographical diversity of representation with a reapportionment law requiring compactness so that farmers, ranchers, and mountain dwellers would be guaranteed the ability to select at least one representative. However, such a law may be unnecessary to provide most of the benefits of geographical representation. Any districting scheme providing representation for geography-based political interests would be sufficient. While compactness is helpful in guaranteeing that geography-based interests are protected, it is not the only method for doing so.

While diverse geographical representation may be important, maximum geographical representation may not be. If the interests of voters in all parts of a state are represented, it may not matter that a state's congressional delegation is not quite as geographically diverse as it might be under a compact apportionment scheme. If a non-compact districting plan can provide adequate representation for voters in all geographic sections of a state, requiring compactness may not provide any additional benefit. Of course, if maximizing the geographical diversity of representatives is very important to a state's citizenry, any deviation from compact districting could be problematic.

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<sup>107</sup> See Pildes & Donoghue, *supra* note 1, at 252-53 n.45 (relating Pennsylvania's abandonment of at-large elections after the first congressional delegation it elected consisted of eight Federalists from eastern Pennsylvania).

b. *Easing Campaign Costs*

The most practical benefit of compact districting is that it can make campaigning easier.<sup>108</sup> By definition, the more compact a district is, the less far-flung it is. At its extreme, non-compact districting could lead to districts comprised of territory located in every region of the state, effectively making some congressional races statewide races.<sup>109</sup> Given the cost of congressional elections and the complaints that candidates must raise money without pause in order to run campaigns, statewide races for congressional seats could make campaigning for those seats prohibitively costly for all but the most wealthy or well-supported citizens.<sup>110</sup> Additionally, the time commitment necessary to campaign across a state rather than just across a district might deter individuals from seeking office. Whether this would negatively impact representation, of course, is debatable.

c. *Stopping Gerrymanders*

Compactness can help prevent political gerrymanders,<sup>111</sup> but there likely are few

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<sup>108</sup> Judicious line drawing can create jurisdictions that are easy to govern and easy to canvass. For example, historically, county lines were often drawn in order to allow easy communication between county citizens and county government. County lines were drawn so that a citizen could reach the county seat within one day's ride from his home. See ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF REPRESENTATION 25 (1965). The desired result was better and more frequent communication from government to citizen and from citizen to government.

<sup>109</sup> Of course, states with only one U.S. Representative already have statewide districts. For a list of those states, see *infra* note 184. However, nothing short of giving all states at least two U.S. Representatives can remedy that situation.

<sup>110</sup> See Cornelius P. McCarthy, *Campaign Finance: A Challenger's Perspective on Funding and Reform*, 6 J.L. & POL'Y 69, 72 (1997) (discussing high cost of congressional campaigns). Congressional candidates might be limited to those with personal, expendable fortunes or those sufficiently well-known to receive contributions from a vast number of organized groups. Indeed, the Anti-Federalists complained of this possibility from the beginning of the Republic. See Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 90 (1989) (mentioning Anti-Federalist concerns that large districts would lead to the election of the wealthy). While such a limitation on candidates may already exist, it would likely get worse with statewide congressional elections. Of course, concerns arise surrounding special interests when candidates are well-supported by groups. Concerns regarding the effect of special interests have existed since the founding of the Republic. See THE FEDERALIST NO. 10, at 79-80 (James Madison) (Clinton Rossiter ed., 1961).

<sup>111</sup> See Parker, *supra* note 84, at 85 (suggesting that the 1842 Reapportionment Act's contiguous and compactness requirements were aimed at ending excessive gerrymandering); see also Polsby & Popper, *Third Criterion*, *supra* note 84, at 332-34 (discussing use of compactness requirement to limit gerrymandering).

situations in which a compactness requirement alone would stop a gerrymander. In order for a compactness requirement to stop a congressional gerrymander, a local majority would have to be sufficiently populous over such a wide territory that no compact district or districting plan could be drawn to divide that local majority.<sup>112</sup> Because compact districts can be drawn in numerous ways, many different plans could splinter a local majority, yet escape scrutiny. While a compactness requirement would dramatically narrow the number of acceptable plans a legislature could enact, it is unclear whether the choices would be so dramatically narrowed that compactness alone could prevent any particular gerrymander.<sup>113</sup>

A compactness requirement can, however, powerfully protect local majorities when used in conjunction with other geography-based districting principles.<sup>114</sup> A compactness requirement coupled with respect for political and natural boundaries could create a narrow range of acceptable districting plans. For example, if the county system and river system in a state created five regions of roughly equal population, and the state had five congressional representatives, districting plans that did not allocate one representative to each region would likely appear suspect. A rule requiring both compactness and respect for political and natural boundaries could protect any local or regional majority splintered by such a plan.<sup>115</sup> While this may appear to represent a narrow band of cases, in the situations where these conditions exist, compactness coupled with other factors might be the only chance for the local majority/statewide minority to be represented adequately.

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<sup>112</sup> Merely applying a compactness requirement would necessitate that the local majority be able to claim that only non-compact plans would splinter their constituency. Such a local majority would likely need to be extremely compact, such that it would always fit inside of any compact district, or it would have to be sufficiently widespread to be a majority in some district in any conceivably compact districting plan. Local majorities consisting of racial minorities are treated somewhat differently, as *Thornburgh v. Gingles*, 478 U.S. 30 (1986), requires only that such a local majority be geographically compact enough to dominate some district that could be drawn surrounding it. *See id.* at 49-51.

<sup>113</sup> A local majority may only be one because of how it is defined. Many different groupings of people may constitute local majorities. For example, Democrats, Black Americans, farmers, or families with annual incomes over \$250,000, could all be local majorities. Indeed, they can be local majorities even though they may be minorities if the locale were widened just a little.

<sup>114</sup> *See* Polsby & Popper, *Third Criterion*, *supra* note 84, at 330-31 (noting the importance of compactness and contiguity in eliminating a significant number of districting options and thus a significant number of gerrymandering options).

<sup>115</sup> Of course, such a rule would have to be a state law or regulation directed to the state legislature or redistricting committee. Note that state statutes generally provide guidance to legislatures and redistricting committees. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 906 (1995) (noting that the Georgia legislature adopted redistricting guidelines after the 1990 Census).

d. *Providing Common Representation for Neighbors*

The most important feature of compact districting is that it validates the notion that those who live close to each other should have common representation.<sup>116</sup> This Article refers to this notion as the “residence proximity principle.” The residence proximity principle rests on an assumption that people who live in close proximity share similar political interests or, at least, share more similar political interests than those who do not live in close proximity. As applied to congressional elections, the residence proximity principle suggests that citizens who live close to one another share political interests vis-a-vis Congress.<sup>117</sup> If the residence proximity principle is accurate, compact districting groups like-interested citizens.<sup>118</sup> For example, if the representative is being chosen for a body that only decides issues related to property, compactness reasonably may be a paramount consideration in districting.<sup>119</sup> However, if one is choosing a representative for a body that does not decide issues related to property, little reason, aside from convenience, may exist to retain compactness as a core districting principle.

Voters who live in the same geographic area will certainly have common interests on some legislative matters. Citizens who live close to each other may desire the passage of a particular piece of legislation because it will benefit all in close proximity. Likewise, they may desire the defeat of a piece of legislation that will

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<sup>116</sup> See Pildes & Niemi, *supra* note 20, at 483 (“As embodied in election districts, physical territory is the basis on which we ascribe linked identities to citizens and on which we forge ties between representatives and constituents.”).

<sup>117</sup> Many commentators do not believe this to be convincing support for compact districting schemes. See, e.g., GUINIER, *supra* note 56, at 127 (suggesting that the residence proximity principle is a long-standing, if misguided, justification for geographical districting); Ford, *supra* note 81, at 1416-17 (“If it seems reasonable . . . to assume that residence is equivalent to community, this is so largely because the present legal regime ties so many of the activities and the affiliations of political membership to residence. To tacitly rely on this legally constructed affiliation to justify further entrenching residence as the criterion for community is to engage in circular reasoning.”).

<sup>118</sup> This may lead such a constituency to elect a like-interested representative. Whether this is necessary or desirable is debatable. See THE FEDERALIST NO. 56, at 346-47 (James Madison) (Clinton Rossiter ed., 1961) (suggesting that a representative’s familiarity with his constituents’ interests is only crucial for those issues on which the representative will act).

<sup>119</sup> See Still, *supra* note 38, at 360 (“Districting plans are based on the implicit assumption that voters have an identity of interest with their geographical neighbors. While my neighbors and I may have a common interest in whether the city repaves the street in front of our houses or rezones the lot on the corner for use as a fraternity house, on other issues we probably have no commonality.”).

harm all in close proximity.<sup>120</sup> Consequently, the residence proximity principle holds most strongly when the interests that matter to citizens are interests that are linked to where they live.<sup>121</sup> If the federal government often legislates on issues that are closely related to where citizens live or that have similar impact on citizens living in close proximity, structuring congressional districting around the residence proximity principle may be sensible.<sup>122</sup>

Federal legislation can have distinctively local effects on citizens living in close proximity. For example, laws like the 1998 federal highway law,<sup>123</sup> can impact localities significantly. Areas that will have improved roads due to the law will uniquely benefit from that law. Even if the law benefits every congressional district in the country, each citizen benefits locally. Citizens benefit not because federal legislation has been passed to help all Americans, but because they live in a particular place in the United States. While anyone will be allowed to use federal highways built pursuant to the highway law, the primary beneficiaries will be the local citizens who will use those roads every day. Similarly, laws focusing either on urban problems or on rural problems can uniquely affect particular geographic areas.<sup>124</sup> Indeed, targeted local effects are the aim of such laws. The more that federal laws

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<sup>120</sup> Consider the similar interests of neighbors whose neighborhood may be condemned to make way for a state highway. Although some of the neighbors may favor the proposal and some oppose it, all neighbors will have an interest in how the issue is determined. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 875 n.207 (1998) (discussing neighbors' shared interests in defeating legislation). Similarly, a district completely comprised of farming communities might want a representative from that district who understood farming issues or was from a farming background, even if the representative did not always vote in the farmers' best personal interests. If compactness could result in the formation of such districts, compactness would be a sensible principle around which to build congressional districting.

<sup>121</sup> This can be the case if property, particularly real property, is the central organizing principle of the subject government or if that government deals with property or property-related rights. A sensitivity to property rights in general can provide neighbors with shared political interests, particularly if governmental decisions tend to affect tracts of real property encompassing several landowners.

<sup>122</sup> This idea is particularly powerful if a representative is to serve the individual interests of his constituency, rather than the general interests of the state he represents. See *supra* pt. II.

<sup>123</sup> See Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) (to be codified at 23 U.S.C. § 101 *et seq.*).

<sup>124</sup> See, e.g., Agricultural Market Transition Act of 1996, Pub. L. No. 104-27, 110 Stat. 896 (codified as amended at 7 U.S.C. §§ 7201-7333 (Supp. IV 1998)) (overhauling the federal government's system of agricultural subsidies and price support); Urban Asthma Reduction Act of 1998, H.R. 3897, 105th Cong. (seeking to reduce suffering due to asthma among inner city residents, especially children, through an urban cockroach management program).

and actions narrowly affect particular geographic areas, the more sensible basing districting on the residence proximity principle is. Conversely, the fewer such laws that Congress passes, the weaker the justification for districting based on the residence proximity principle. Interestingly, this analysis suggests that as Congress' attention to parochial interests increases, the stronger the case for geography-based districting becomes. Put another way, the more Congress focuses on the problems of localities, the more sense it makes to keep districts compact and contiguous.<sup>125</sup>

While theorizing that compactness is a tool that facilitates parochialism in Congress and that it provides Congress additional control over localities may be accurate, such theorizing may ignore a simpler, and possibly stronger, historical justification for compactness. Given the importance of property, the purpose of the federal government, and the voting restrictions of the time, the residence proximity principle may have been more clearly justified at the founding of the United States.<sup>126</sup> The emphasis that the United States historically placed on property, property rights, and property ownership in voting may have made compactness a reasonable organizing principle for districting.<sup>127</sup> Property's historical centrality to American life can hardly be overstated.<sup>128</sup> Land is power, and our connection to it powerful.<sup>129</sup> Many individual rights and states' rights historically have flowed from land and other property. For example, individual voting rights historically depended on property

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<sup>125</sup> Arguably, Congress should not handle local issues, unless they have national impact. While highway bills and general aid to cities can be viewed as issues with national impact, they can also be viewed as local issues.

<sup>126</sup> While compactness was only required for congressional districting beginning in 1901 and lasting for 28 years, its roots stretch further back into American history. *See supra* pt. I.

<sup>127</sup> *See* MILTON D. MORRIS, *THE POLITICS OF BLACK AMERICA* 57 (1975) (suggesting that the conception of property was more firmly fixed in the founders' minds than the concept of democracy).

<sup>128</sup> Indeed, in an agrarian society, land can appear to be life itself. *See* John Crowe Ransom, *Reconstructed but Unregenerate*, in *I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* 1, 19-20 (1930)

He identifies himself with a spot of ground, and this ground carries a good deal of meaning; it defines itself for him as nature. . . . A man can contemplate and explore, respect and love, an object as substantial as a farm or a native province. But he cannot contemplate nor explore, respect nor love, a mere turnover, such as an assemblage of 'natural resources,' a pile of money, a volume of produce, a market, or a credit system. It is into precisely these intangibles that industrialism would translate the farmer's farm. It means the dehumanization of his life.

*Id.*

<sup>129</sup> *See* Frank Lawrence Owsley, *The Irrepressible Conflict*, in *I'LL TAKE MY STAND*, *supra* note 128, at 61, 69-71 (noting the physical and emotional connection between landowner and land).



ownership.<sup>130</sup> Similarly, property played a role in determining the number of congressional representatives granted to slave states.<sup>131</sup> Because the Constitution can be regarded as a compromise between slave and non-slave states over the issue of human property,<sup>132</sup> it is not surprising that property and property-based interests have always been central to representation.<sup>133</sup> At its founding, the United States was an overwhelmingly agrarian nation. For many people, their residence was their property, their property was their livelihood, and their livelihood was dictated by their property.<sup>134</sup> At that time, the struggle between agrarianism and industrialism over

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<sup>130</sup> Historically, property was central to determining the right to suffrage. Indeed the 24th Amendment was passed to make sure that poll taxes were not used as a property-based method of discrimination. See Gerald L. Neuman, *Constitutional Equality: Equal Protection, "General Equality" and Economic Discrimination from a U.S. Perspective*, 5 COLUM. J. EUR. L. 281, 295 (1991). Arguably, poll taxes are a mild form of property requirement. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 683 (1966) (Harlan, J., dissenting) (linking property requirements for voting and the state poll tax). Although poll taxes were ostensibly meant to insure that the voter had some real interest in voting, they acted to require that the voter have sufficient personal property to be able to purchase the right to vote. Of course, the 24th Amendment to the Constitution ended poll taxes. See U.S. CONST. amend. XXIV.

<sup>131</sup> The three-fifths clause of the Constitution allowed states representation based, in part, on their population of human property, that is, slaves. See U.S. CONST. art. I, § 2, cl. 3 (effectively repealed by the 13th Amendment); THE FEDERALIST NO. 54, at 337-38 (James Madison) (Clinton Rossiter ed., 1961) (discussing generally the dual nature of slaves as humans and property).

<sup>132</sup> The debate regarding how to treat slaves for apportionment of representation and apportionment of taxes was detailed in the Federalist Papers. See THE FEDERALIST NO. 54, at 337-38 (James Madison) (Clinton Rossiter ed., 1961).

<sup>133</sup> See ELY *supra* note 8, at 3 ("Historically, property ownership was viewed as establishing the economic basis for freedom from governmental coercion and the enjoyment of liberty."). But see Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363, 369 (1996) (noting that the Framers' protection of property rights led to tension between individual liberty and equality).

<sup>134</sup> This was particularly so in the South, where the idiosyncracies of land dictated the social order. Note the difference in the interests of yeoman farmers and large planters. See James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1241 (1998) (noting differences between the planter and yeoman classes) [hereinafter Gardner, *Southern Character*]; Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1397 (1995) (suggesting that the social and economic interests of yeoman farmers and planters diverged, even if the yeoman farmers did not always act on that divergence). Territory that could support slavery also supported a social structure in which property rights and prerogatives had to be vigorously protected. The Civil War was fought primarily over property and property rights. The theory of states' rights rests in large part on the notion of a state's primary and autonomous rule over persons and property within the state's borders. See generally MASON, *supra* note 73 (discussing Anti-Federalism as the basis for

land and the uses to which land would be put was extraordinarily important.<sup>135</sup> Consequently, Congress and the federal government were heavily involved in national issues surrounding property, residence and livelihood.<sup>136</sup> Organizing voting based on property and land makes sense when a significant portion of voters cares about property-based or property-related rights.

Given that Congress was heavily invested in the protection of property and property rights, a congressional districting system based on residence and property made sense.<sup>137</sup> In the early days of the Union, the federal government was a limited government<sup>138</sup> whose officials were chosen by property owners largely to protect property interests.<sup>139</sup> The federal government's limited scope may have affected how citizens' interests coalesced. When a government's powers are limited, the citizenry's interests may rationally center around the powers that the government can exercise. In early America, when protecting property interests was one of the federal government's primary concerns, citizens' interests, vis-a-vis the government, may have coalesced around issues related to property interests.<sup>140</sup> The primacy of property interests in early America made a land and property-based districting system

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the theory of states' rights).

<sup>135</sup> See Gardner, *Southern Character*, *supra* note 134, at 1243-44 & nn.107-13 (discussing differences between agrarian South and industrial North).

<sup>136</sup> Physical property historically has aided in defining communities. This is so, in part, because life itself has been tied so closely to property and property rights. Both in the state and national legislatures many rifts can be traced to different ways of life (agrarian vs. industrial) and different uses for land (agrarian vs. industrial). See THE FEDERALIST NO. 60, at 368 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (mentioning the competing interests in agriculture and industry and opining on how their concerns will be represented in Congress); see also DONALD B. COLE, *THE PRESIDENCY OF ANDREW JACKSON* 62-67 (1993) (noting the internal improvements debates of the early 1800s). Nonetheless, Alexander Hamilton also stressed the interdependence of agriculture and commerce. See THE FEDERALIST NO. 12, at 91-92 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>137</sup> Congress had other functions, but this one was very important to the Framers. See ELY, *supra* note 8, at 26 (arguing generally that the protection of property was very important to the colonists in the Revolutionary War era); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMM. 271, 302 (1997) (noting that "the national government had been given extensive power to protect property").

<sup>138</sup> See ELY, *supra* note 8, at 26 ("[T]he protection of property ownership was an integral part of the American effort to fashion constitutional limits on governmental authority."). However, the federal government has the constitutional authority to control a vast amount of the nation's functions. See U.S. CONST. art. I, § 8.

<sup>139</sup> Historically, property has been important to American government. See ELY, *supra* note 8, at 160 ("The Constitution and Bill of Rights affirmed the central place of property ownership in American society.").

<sup>140</sup> Conversely, when government's powers are broad, there may not be a primary organizing principle around which to coalesce. Consequently, communities of political interest will coalesce around whatever interests are central to those in the community.

sensible. This Article does not necessarily suggest, however, that the centrality of property interests dictated that compactness should be the central organizing principle of congressional districting or that the primacy of property rights has continued to drive the congressional districting system. Rather, it suggests that districting systems based on property and compactness have been historically sensible, even if they did not perfectly reflect the political interests of the constituencies thereby created.<sup>141</sup> Of course, one could suggest that districting created a political system that supported property rights.

Not only was government for the propertied, but so was voting.<sup>142</sup> Property interests drove political interests; political theory drove voting restrictions. Consequently, voting restrictions in the late 1700s and early 1800s may have created the context in which voters' political interests were necessarily property-based. Most of the voters at the time were property owners.<sup>143</sup> Many of the interests of the propertied vis-a-vis the government were likely related to property, that is, either related to obtaining more property or protecting what property they had. Thus, the issues around which the enfranchised coalesced might have been related to property and geography. When non-propertied men, women, blacks, and immigrants were excluded from the electorate, those who voted may have had similar views of government as their neighbors—the surrounding land and property holders.<sup>144</sup> These

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<sup>141</sup> As the country has moved from agrarian to industrial to post-industrial, land has become less a source of wealth and livelihood and more the place where one lives. Now that real property and its location are less central to the interests of voters today than when the compact, land-based districting system was first imposed, the political benefits of that system must be reexamined. Even though the place where people live certainly correlates with some demographics, such as wealth, our coalescing interests likely have more to do with the demographic factor than with the fact that we live in a certain place. Put differently, the fact that someone lives in an upscale suburban neighborhood may suggest that she and her neighbors have common political concerns. However, those concerns are likely less related to the fact that her suburban neighborhood is located in the southeastern portion of the state than they would be if she and her neighbors farmed the land for their livelihood.

<sup>142</sup> See ELY, *supra* note 8, at 47.

[T]he Constitution allowed the states to determine the qualifications for voting. When the Constitution was written, virtually every state imposed a property or taxpaying qualification on suffrage and set higher property qualifications to hold public office. The Framers in effect accepted such state-imposed criteria for participation in national elections. They failed to foresee the rapid emergence of universal manhood suffrage in the early nineteenth century, a move that would upset their calculations.

*Id.*

<sup>143</sup> See *id.*

<sup>144</sup> See V. O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 489 (1949) (“[T]he

interests would make a system that provided common representation to land-holding neighbors quite sensible.<sup>145</sup> Given the actual electorate in early America, districting based on the residence proximity premise may have been quite reasonable.

Not surprisingly, compact, contiguous districting has solid historical roots. Those roots fit the society in which they were laid. Nonetheless, compact districting remains sensible in some contexts. Districting provides groups of voters with common representation. If compact districting actually yields constituencies with similar interests, it is reasonable. However, as the residence proximity principle becomes weaker, compactness may merely serve as a tool to aggregate voters artificially. If residence-based issues do not or should not drive federal legislation and the democratic process, geographic compactness may make effective congressional representation more difficult. If political interests no longer center around property, a voting system freed from compactness may provide better representation.<sup>146</sup> Such a system could provide constituents common representation based on their interests rather than the proximity of their residences.<sup>147</sup>

## 2. Redefining Compactness

While some justifications for geographical compactness are fairly strong, they are also open to criticism. However, much of that criticism could be blunted if the definition of compactness were broadened. While this Article has used a static definition of compactness thus far, other viable definitions of compactness can be theorized. At least two possible visions of compactness, an external one and an internal one, exist. In addition, each encompasses a number of variations. An external vision of compactness looks at the shape of the district to determine its

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makeup of the body of voting citizens and the way in which they use their franchise determine, within limits, the character of governing groups and the manner in which they exercise their power.”). Of course, candidates and elected officials can ignore the interests of those who do not vote or cannot vote them out of office. *See id.* at 509 (“What classes or groups do not vote and thereby may be ignored by candidates and perhaps given little recognition in the actions of government?”).

<sup>145</sup> Additionally, the issues that divided land-holding voters may have stemmed from geography. The protection of agrarian or industrial interests was a unifying and dividing theme among communities. This division remained strong at least until the 1940s. *See id.* at 513 (suggesting that rural dwellers have different concerns than city dwellers).

<sup>146</sup> For example, proportional representation allows for pure homogeneity of political culture by allowing those who care deeply about a particular issue to join with others having similar interests to get specific representation based on that issue in the subject legislature. *See Still, supra* note 38, at 358 & n.13.

<sup>147</sup> This might be considered a different style of districting or the elimination of districting altogether, depending on one’s definition of districting. *See Butler, supra* note 78, at 360 (suggesting that as a district deviates from traditional boundaries, it progressively ceases to be a real district).

compactness. This is the conventional view of compactness that the Supreme Court has taken,<sup>148</sup> and it is the version of compactness that informed the analysis above. Conversely, an internal vision of compactness focuses on the voters inside the district to determine if the constituency is physically close enough to make common representation sensible.<sup>149</sup> A districting plan based on an external view of compactness would certainly retain the benefits of compactness mentioned in the preceding section. Most plans based on an internal vision of compactness would also retain those benefits.

External visions of compactness validate districts that are as regular in shape as possible. Since round or square districts are not normally possible given geography, districts that fit smoothly with the natural boundaries and political subdivisions of a state would comply with an external vision of compactness.<sup>150</sup> However, an external vision of compactness can be much more stifling than flexible.<sup>151</sup> Because compactness can be defined with mathematical precision, an external vision of compactness might require the construction of districts in a certain manner so as to be as compact as possible.<sup>152</sup> That could lead to districts that are as compactly

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<sup>148</sup> See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (listing “compactness, contiguity, and respect for political subdivisions” as objective districting principles).

<sup>149</sup> See Pildes, *supra* note 88, at 2532 n.103.

<sup>150</sup> States with odd shapes could have a difficult time creating a set of aesthetically pleasing districts, even though they can create a set of districts that are as compact as possible. See Aleinikoff & Issacharoff, *supra* note 62, at 616 (noting the difficulty of creating compact districts in oddly shaped states such as Maryland (with its eastern shore and northwest panhandle), Michigan (with its upper peninsula), and West Virginia (with its double panhandle)).

<sup>151</sup> Consider a state that is square-shaped with enough voters for four congressional districts. If voters are relatively equally dispersed throughout the state, such that a checkerboard districting plan would make sense, an external vision of compactness might require that the state’s districting plan conform to the checkerboard. Likely, this is not a problem if the interests of the voters do not suggest a different structure. However, if the voters wanted to create four districts consisting of strips of land running east and west from border to border, a plan based on an external view of compactness might still require the checkerboard plan unless another traditional districting principle compelled a different result.

<sup>152</sup> Such compactness could be based on some set of mathematical criteria. See *Diaz v. Silver*, 978 F. Supp. 96, 114-15 (E.D.N.Y. 1997) (detailing mathematical measures of compactness); *Carstens v. Lamm*, 543 F. Supp. 68, 87 (D. Colo. 1982) (noting a mathematical test for compactness); DIXON, *supra* note 1, at 532-33 (noting mathematical measures of compactness); Aleinikoff & Issacharoff, *supra* note 62, at 621 (suggesting the use of objective standards of compactness that would “regiment the redistricting process by creating a presumption of unconstitutionality whenever there is a significant deviation from maximum compactness”); Pildes & Niemi, *supra* note 20, at 553-57 (defining different ways of measuring the compactness of districts).

shaped as possible, regardless of whether the districts fit natural or political subdivisions.

An extreme application of a mathematically bound definition of compactness might require the drawing of districts without reference to the political interests of the districts' constituencies or the cohesion that districting often affords.<sup>153</sup> Although a plan containing only such districts might meet any compactness requirement, it likely would not provide good representation to the resulting districts because compactness would be elevated to the exclusion of all other districting interests and principles. States generally have not used compactness as the sole criterion for districting, presumably because other interests are important in the districting process.<sup>154</sup>

Conversely, an internal vision of compactness bases a district's acceptability on whether voters inside of a district are physically close enough to one another for the constituency to be considered compact.<sup>155</sup> The question under such a vision of compactness is whether the voters inside a district could be appropriately represented given their physical proximity, regardless of where citizens from adjoining districts resided. If an affirmative answer yielded a compact district, compactness could be used to focus on good representation rather than appearances. If an internal vision of compactness can help construct constituencies that are well-represented, then it would seem a reasonable principle to use or at least consider when districting.<sup>156</sup>

The distinction between an internal and external view of compactness can be made clear by considering the districting of a hypothetical city that could support

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<sup>153</sup> Districts, rather than districting plans, are deemed compact or not compact. However, the result of having a district declared not compact is that the entire plan may be subjected to scrutiny. *See Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion).

<sup>154</sup> *See Shaw v. Reno*, 509 U.S. 630 (1993) (discussing compactness, contiguity, and respect for political subdivisions as traditional principles and as important factors to consider in determining if a district has been gerrymandered along racial lines). Though states do not appear to search for perfectly compact districts and districting schemes, whether maximally compact districts exist may be important because the constitutionality of districts is measured, in part, by how much the district deviates from a compact district. More precisely, the constitutionality of a district is measured by how far the principles on which it is constructed deviate from traditional districting principles. *See supra* notes 87-96 and accompanying text. While the Court would not likely require that a district meet any mathematical measure of compactness, the issue would be whether each district met some loose definition of compactness. If the prototypical compact district is a perfectly compact district, the constitutionally allowable deviations from that district would be narrower than if the prototypical compact district is not a maximally compact district.

<sup>155</sup> *See Pildes, supra* note 88, at 2532 n.103.

<sup>156</sup> Some have suggested that the ease of representation should dominate the compactness inquiry. *See Karlan, supra* note 41, at 211-12 (suggesting that compactness should hinge on whether those inside of the district can be effectively represented, rather than "whether the district has four regular, or twenty-eight uncouth, sides" (citing *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988))); *see also Sanchez v. Colorado*, 97 F.3d 1303, 1328-29 (10th Cir. 1996) (focusing on compactness and cohesion of those in district rather than the physical compactness of the district).

multiple districts. Assume that a city has sufficient inhabitants to fill two congressional districts. A proposed districting plan apportions the city so that one district contains the poorer neighborhoods in the city and one district contains the wealthier neighborhoods in the city. Under the plan, each district would contain neighborhoods from each quadrant of the city because of the dispersion of wealth in the city. Such a plan would be analyzed differently under an external vision of compactness than under an internal vision of compactness. An external view of compactness would deem each district non-compact because several districting plans could be drawn that would contain more compact districts. Conversely, an internal view would focus on the voters inside of the district and ask whether voters living inside of the same city live close enough to each other to be adequately represented.<sup>157</sup> While neither district would be as compact as possible, arguably all voters would be compact in relation to each other because they all live in the same city.<sup>158</sup> This Article does not suggest that either the external or internal view of compactness would necessarily validate or invalidate the hypothetical districting plan under prevailing law. Rather, it suggests that the questions that would be asked and the process of determining the districts' appropriateness would be different.

How compactness is defined can have serious effects on how a constituency is defined and ultimately on how well it is represented. An external vision of compactness can be suffocating. An internal vision allows compactness to serve the ultimate goal of good representation. While the internal vision of compactness provides most of the benefits of compactness that the external vision of compactness provides, it does not provide all of them. However, moving toward an internal vision of compactness can provide representational benefits that an external vision of compactness cannot. Indeed, as the hypothetical suggests, in densely populated areas the internal vision of compactness can provide all of the geography-based benefits of external compactness and some extra representational benefits. The next question is whether a departure from all visions of compactness toward a system that only considers the political interests of voters could provide even greater representational benefits.

#### IV. INTEREST-BASED DISTRICTING

The congressional voting system is based on providing common representation

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<sup>157</sup> See Pildes, *supra* note 88, at 2531-32 (discussing compactness as related to the interests of those inside of a district).

<sup>158</sup> This definition allows nearly any district that lies almost solely within a metropolitan area, such as the 18th Congressional District of Texas at issue in *Bush v. Vera*, to be deemed compact. See *Bush*, 517 U.S. at 952; see also Pildes & Niemi, *supra* note 20, at 548-51 (suggesting that a district's compactness depends on one's definition of compactness).

to people who have been grouped as constituencies. If that representation is to be as effective as possible, states should group voters in a way that allows them to advance their political interests through elections. Creating cohesive constituencies with the ability to elect legislators who most probably represent their interests would be the easiest way to realize that goal. Focusing explicitly on shared political interests as a basis for creating constituencies is one way to reach that goal. While the solution sounds simple, implementing it could result in a radical restructuring of the current voting system.

The historical focus on compactness and contiguousness has resulted in neighbors enjoying common representation.<sup>159</sup> While these principles can guide the construction of effectively represented districts, they may not serve the goal of effective representation as well as they have historically.<sup>160</sup> The conditions that made property and residence good indicators of shared interests are no longer as common as they used to be.<sup>161</sup> If geographical proximity is no longer a sufficient proxy for shared political interests, focusing exclusively on shared political interests to the exclusion of geography can provide a reasonable basis for districting. Indeed, districting based on shared political interests is an accepted, though rarely determinative, districting method.<sup>162</sup> Although courts have made shared political interests a secondary districting principle,<sup>163</sup> districting based primarily on shared political interests may

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<sup>159</sup> Outside of the congressional context, the residence proximity premise may hold in many situations, particularly as the issues addressed by the subject legislature or council become more local. Local decisions will tend to affect land and interests intimately tied to land more often than national decisions. *But see* Sargentich, *supra* note 68, at 135 n.245 (noting the wisdom former Speaker of the House Tip O'Neill received from his father, "All politics is local."). Of course, the residence proximity premise likely holds when Congress handles inherently local issues, such as appropriations for specific local purposes. The residence proximity premise grows stronger as the body involved becomes more local because localities are more likely to be neatly segregated by interests than congressional districts. Self-segregation creates a context in which the residence proximity premise is valid. However, with respect to the national issues that Congress manages, the residence proximity premise weakens.

<sup>160</sup> Some have suggested that geography-based districting is no longer compatible with the representation of group interests. *See* Pildes & Niemi, *supra* note 20, at 535 ("[C]ompactness is the conceptual point at which the tension between the traditional American commitment to territorial districting and the [Voting Rights Act] concern for fair representation of group interests must be resolved.").

<sup>161</sup> *See supra* notes 127-47 and accompanying text.

<sup>162</sup> *See Sanchez v. Colorado*, 97 F.3d 1303, 1306-07 (10th Cir. 1996) (using preservation of communities of interest as a districting principle).

<sup>163</sup> Courts appear reluctant to endorse the use of shared political interests as a primary districting criteria, possibly because of the potential for communities of interest to track racial identity too closely. *See Silver v. Diaz*, 978 F. Supp. 96, 99-101 (E.D.N.Y. 1997) (questioning Latino political cohesion in New York City); *Moon v. Meadows*, 952 F. Supp. 1141, 1145-46 (E.D.Va. 1997) (suggesting that the aggregation of areas populated by



effectuate optimal representation, because combining voters based on their common political interests facilitates the advancement of the constituency's agenda. Interest-based districting focuses on representation rather than geography and can lead to homogeneous, easily represented districts.<sup>164</sup> When geography was a proxy for political interest, geography-based and interest-based districting were the same.<sup>165</sup> They no longer are.<sup>166</sup>

A geography-based, interest-influenced system is very different from an interest-based, geography-influenced system. Depending on the hierarchy of principles, a district that could be acceptable under one hierarchy could be highly problematic under the other. The issue is the hierarchy of values. Geography-based districting and interest-based districting can reflect different values.<sup>167</sup> Those values can clash when states create congressional districts.<sup>168</sup>

Consider this hypothetical districting scenario. A state, which has six members of Congress, designates areas of the state as urban, suburban, and rural for districting

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African-Americans in southeastern Virginia into a district is racial gerrymandering).

<sup>164</sup> See *Sanchez* 97 F.3d at 1308 (recognizing the role of communities of interest in facilitating political representation in the districting process).

<sup>165</sup> See *supra* notes 144-45 and accompanying text.

<sup>166</sup> Interest-based districting can be viewed as a break from traditional principles if geography-based districting is viewed as a traditional principle. Conversely, geography-based districting can be viewed as a special form of interest-based districting that focuses on physical proximity. See GUINIER, *supra* note 56, at 127 (noting that geographical districts have been viewed as somewhat interest-based). *But see* Aleinikoff & Issacharoff, *supra* note 62, at 637 (disputing the notion that geography tracks interests). The current system can be viewed as merely derivative of the English districting system. The English system was based on land, rather than the political interests of the district's inhabitants. See GUINIER, *supra* note 56, at 127-28 (explaining the British antecedents to American districting). Conversely, the current congressional system is based on individual interests. The one-person, one-vote doctrine makes little sense unless an individual's vote is what matters. See *Reynolds v. Sims*, 377 U.S. 533, 559 (1964). Whether interest-based or geography-based districting is viewed as the appropriate template matters, because deviations from traditional districting principles can lead to a districting plan's invalidation. See *Bush v. Vera*, 517 U.S. 952, 980-81 (1996).

The foregoing should not be interpreted to suggest that interest-based districting is required by the Constitution, as the Constitution does not require any type of districting at all. See *supra* notes 21-25 and accompanying text. Rather, interest-based districting is consistent with a vision of representation that existed at the time of the nation's founding, and still exists.

<sup>167</sup> See Pildes, *supra* note 88, at 2536 ("By organizing elections around geographic districts, we seek to make representation turn on geographically defined concerns. With the Voting Rights Act, we seek to define representation in terms of the political interests of specific groups, such as protected minorities.").

<sup>168</sup> See *id.* ("We are currently trying to wedge the concerns of an interest-based approach into a geographically based system; at some point, the tension between the two reaches a breaking point.").

purposes. The state has two major cities, each capable of supporting a congressional district. Each city is surrounded by a suburban ring that also has a sufficient population to support a congressional district. A river running east to west bisects the state and the state's population is distributed such that each half of the state can support three districts.

The state decides that its first district will include every citizen who lives in the river's 100-year flood plain. Assume that district encompasses everyone living within five miles of the river which runs the length of the state. Because of the state's population dispersion, creating five other districts of equal population consisting of contiguous territory will be impossible. However, creating five districts with reasonably cohesive constituencies is possible. To do so, the state draws two urban districts with each city constituting a district, two suburban districts drawn in concentric circles surrounding the urban districts, and one district consisting of the remaining statewide rural populations. The characteristics of the districts are as follows: District 1 (the flood plain district), District 2 (urban district north of the river), District 3 (suburban district north of the river), District 4 (urban district south of the river), District 5 (suburban district south of the river), and District 6 (statewide, non-flood plain rural district).

From an interest-based perspective, there is little problem with the plan. The voters in District 1 (the flood plain district) have common interests in congressional legislation related to flood relief, levee flood control, wetlands regulation, environmental protection, and river-related commerce. Constructing a flood plain district is sensible if the shared political interests of the district's voters matter. Likewise, the urban, suburban, and rural districts make sense because Congress has legislated and likely will continue to legislate in ways that uniquely affect urban, suburban and rural areas.<sup>169</sup> Placing these populations in these six districts is sensible, even if the District 6 voters have a statewide district, while the urban voters have a citywide district. While the rural voters and the candidates who vie to represent them will be burdened geographically, voters' interests may be better served by a representative chosen from this district than by a representative chosen from any other compact district that might be created. Whether the rural voters would prefer to be in a statewide district or one that consisted of some urban, some suburban, and some rural territory is unclear, particularly if the urbanites and suburbanites could outvote them.

Conversely, this plan is highly problematic if compactness and contiguousness remain important districting principles.<sup>170</sup> Both principles have been ignored in this

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<sup>169</sup> See *supra* note 124 and accompanying text.

<sup>170</sup> This is not to suggest that the hypothetical plan would be invalidated under existing districting theories. Rather, it suggests that different questions must be asked and answered

plan.<sup>171</sup> As traditionally understood, compactness suggests that those who live closer to each other have more common interests than those who live farther away from each other. According to this theory, a District 6 voter who lives south of District 5 should be more readily grouped with voters south of the river in Districts 4 or 5 than with District 6 voters living north of the river. Of course, District 6 is as compact as it can be, given that rural voters not living in the flood plain are only sufficiently numerous to comprise one district. However, neither District 6 nor the overall districting plan is as compact as they could be. The river's positioning and the state's population dispersion combine to make a more compact apportionment relatively easy to achieve.

This districting scheme has more severe problems with respect to contiguousness. District 6 is not contiguous. Once District 1 is created, non-contiguousness is inescapable because population sufficient to create two and one-half districts exists both north and south of the river. Districts consisting of non-contiguous territory strike at the heart of what a geography-based system is. If such districts are allowed, the term "geography-based" may mean nothing more than that districts need to be tied to land. Of course, that is the essence of placing interest-based districting above geography-based districting. It is also the essence of enclave districting.

## V. ENCLAVE DISTRICTING

Enclave districting is an unabashed interest-based districting system. It defines geographical enclaves based on demographic criteria that are relevant to electing members of Congress, then aggregates them into districts. Each state legislature would use whatever set of demographic criteria it believed important to electing its congressional delegation when defining enclaves and constructing districts.<sup>172</sup> Enclave districting rests on the premise that defining enclaves with similar demographic characteristics and aggregating them into congressional districts can provide better representation than districting based solely on aggregating compact and contiguous areas of land.

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in different ways depending on the hierarchy of districting principles courts adopt.

<sup>171</sup> That a plan contains a non-contiguous district will not necessarily invalidate it. *See* Dillard v. Town of Louisville, 730 F. Supp. 1546, 1549-50 (M.D. Ala. 1990) (approving a districting plan that included non-contiguous district); Polsby & Popper, *Third Criterion*, *supra* note 84, 330 ("[T]he Supreme Court has never said that a district must be composed of contiguous areas.").

<sup>172</sup> Enclave districting provides states with options regarding how to district. While it may seem strange that a scheme that seeks to enhance representation for voters would still be controlled *a priori* by the state, if one is going to have districts, some entity must control how the district lines are drawn. Consequently, enclave districting allows state legislatures to create districts along whatever political interest lines the state deems appropriate. Of course, the process to determine what interests are important will include input from a state's citizens.

Enclave districting accepts that while the residence proximity principle may be accurate on a small scale, it becomes less so on a larger scale. Neighborhoods should have common representation for practical reasons and because neighbors often have similar political interests on issues about which Congress legislates. However, when the neighborhood is expanded to the size of a congressional district encompassing more than 500,000 people, there is little reason to provide the entire area with common representation based solely on geographical proximity.<sup>173</sup> As a result, enclave districting is most relevant to large legislative districts, such as congressional districts.

In its mildest form, enclave districting encourages departures from compactness and contiguousness when appropriate. The hypothetical flood plain district in Part IV evinces a relatively subdued form of enclave districting. At its most radical, enclave districting would be limited only by the imagination of state legislatures, the Constitution, and voting rights laws.<sup>174</sup> The set of demographic criteria a state uses to create enclaves could be based upon almost any factor that a state legislature deemed relevant to congressional representation. A state could create enclaves based primarily on income and secondarily on geography, resulting in a congressional district centered around middle class neighborhoods in the southwestern portion of a state. Similarly, a state could create enclaves based on the population of its cities, resulting in a congressional district consisting of cities of 50,000 to 75,000 people. The choices are almost limitless. However, the point of this Article is not to suggest what demographic criteria are appropriate or inappropriate bases for creating districts; rather, it is to suggest that states can and should group voters based on some vision of the demographic characteristics that are important to its citizens and to the

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<sup>173</sup> With 435 members of the House of Representatives and over 248 million people in the United States, the average congressional district encompasses more than 500,000 people. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 DECENNIAL CENSUS.

<sup>174</sup> See U.S. CONST. amends. XIV, §§ 1 & 2, XV, §§ 1 & 2; Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1994). Enclave districting may not be as radical as it sounds. Enclave districting can be likened to reverse virtual representation. Virtual representation suggests that a constituency not be given specific representation if voters in other areas of the subject jurisdiction have elected representatives who can adequately represent the interests of the unrepresented constituency. See BIRCH, *supra* note 2, at 51-52 (explaining virtual representation); GUINIER, *supra* note 56, at 130-31 (discussing virtual representation). Thus, industrial areas may not need a representative dedicated to their cause because other industrial areas have elected representatives who can protect the interests of those living in industrial areas. However, instead of suggesting that the industrial areas should be content without a representative, enclave districting suggests that the far-flung industrial areas should be combined so that voters in all industrial areas can have some input in choosing a legislator who may represent their interests.

state when electing members of Congress.<sup>175</sup> Enclave districting provides that flexibility.

This raises the question of why states should not adopt at-large voting schemes. Since any form of districting compels voters to join with other voters who may not share their political vision, some form of non-districted voting would seem to provide the greatest opportunity for voters to vote based on their political interests. Therefore, the most appropriate vehicle to provide voters the greatest autonomy would seem to be a modified at-large or proportional representation system that is completely free from geography. While there are numerous reasons to avoid at-large and proportional representation systems, the most salient, for the purposes of this Article, is that such a system would not allow the real or perceived relationship between a representative and her constituency to flourish.<sup>176</sup> That relationship, mentioned in Part II, facilitates the ability of the representative to represent her constituency and allows the constituency to hold the representative accountable for her actions.

Under non-districted systems, voters cannot be certain who champions their interests (i.e., who is their representative), and representatives cannot be certain whose interests to champion (i.e., who are their constituents). Functionally, every representative represents every voter, and every voter is represented by every representative in a non-districted system. That relationship can hardly be considered superior in all respects to one formed in a single-member district system. The loss of the representative-constituent relationship would render focused representation a matter of chance rather than a matter of principle. While voters generally may know how a representative stands on issues, there would be little opportunity to shape the representative's views precisely because there would be little targeted accountability for the representative's actions. That no obvious constituency would exist to punish a representative for poor representation suggests that an at-large representative might court any group of voters in order to remain in office, rather than focus on those voters who elected him. While a representative might attempt to represent his perceived constituency, whether the perceived constituency actually *was* his constituency would always be an uncertainty because no method would exist to identify members of an at-large constituency other than opportunistic self-reporting,

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<sup>175</sup> Of course, some may suggest that this proposal would allow race-based districting. Enclave districting would allow race-based districting to the extent that such districting would seek to combine relevantly similar enclaves that could not be aggregated into districts if districts were limited by compactness analysis, and to the extent that such districting is currently allowed by the Voting Rights Act. However, enclave districting is a reasonable method of districting whether the law allows race-based districting or not.

<sup>176</sup> See *supra* notes 45-62 and accompanying text (describing the importance of the constituent-representative relationship).

in the form of saying, "I voted for you."<sup>177</sup> Simply, the relationship between a representative and her constituency that is created by a districting system is too important to sacrifice, given that enclave districting creates an option that retains the relationship. Because that relationship is available only in a districted system, a non-districted system would not be an appropriate solution.<sup>178</sup> Rather, the appropriate solution is an interest-based districting system.

Enclave districting is a form of interest-based districting, that appears to be very similar to districting based on communities of interest. However, two important distinctions between enclaves and communities of interest exist. Communities of interest are self-identifying and, of necessity, large. Enclaves are defined by legislatures and can be relatively small. Communities of interests are defined by their members and based in large part on the political objectives that community members want to gain from the legislature.<sup>179</sup> While a community of interest is shaped by outside forces, those inside of the community and those wishing to be inside of the community ultimately define it subjectively.

Districting based on communities of interest can be considered the logical terminus of interest-based districting precisely because it allows those inside of the community to define the terms of their representation.<sup>180</sup> However, in the political context, this can provide an incentive for those inside of the community to define the community as broadly as necessary, to validate the claim that the community be allowed to choose a representative to champion the community's interests. Since

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<sup>177</sup> Of course, self-reporting has its own drawbacks. A legislator could find herself with many more putative supporters than she had votes.

<sup>178</sup> There are situations in which other structural problems in the voting system are so severe that using a non-districted scheme to fix them in the short-run might be more important than maintaining the relationship between a representative and her constituency. One case might be when a minority group is unable to elect anyone to represent their interests without a stylized voting scheme.

<sup>179</sup> See *Diaz v. Silver*, 978 F. Supp. 96, 124 (E.D.N.Y. 1997) ("Common employment, services, religion, economy, country of origin and culture are more relevant in determining whether a community of interest exists."); *Scott v. United States Dep't of Justice*, 920 F. Supp. 1248, 1254 (M.D. Fla. 1996), *aff'd* 521 U.S. 567 (1996) ("Viewed optimistically, a community is definable as individuals who sense among themselves a cohesiveness that they regard as prevailing over their cohesiveness with others. This cohesiveness may arise from numerous sources, both manifest and obscure, that include geography . . . , history, tradition, religion, race, ethnicity, economics, and every other conceivable combination of chance, circumstance, time, and place."); JOSEPH TUSSMAN, *GOVERNMENT AND THE MIND* 9 (1977) ("A community is constituted by—its very existence depends upon—a condition or state of mind. It is not a mere collection of physical entities or a herd of biological organisms. It is a continuing organization of persons related by shared understandings, commitments, agreements, attitudes.").

<sup>180</sup> See GUINIER, *supra* note 56, at 137 (suggesting that voters should have "the opportunity to make their own local choices about the nature and salience of their interests").

communities of interest are often constructed in the context of seeking representation, they necessarily need to be large enough to command a majority in a congressional district. That communities of interest need to be large may encourage community members to define the community based less on shared interests and more on a desire for representation.<sup>181</sup> While there is nothing inherently sinister about communities of interest, that they are the linchpin to claims of representation puts pressure on people to create them where they may not exist and define them in a way that ultimately may not advance the interests of the now large community of interest.

No similar pressure exists in enclave districting. Enclaves are rooted in neighborhoods and are not necessarily any larger than a broadly defined neighborhood.<sup>182</sup> An enclave is defined by a set of demographic criteria constructed by a body outside of the enclave. Additionally, since enclaves can be much smaller than congressional districts, they are unlikely to be defined merely to create a single-enclave district. While this does not necessarily make enclaves superior to communities of interest, it lessens the temptation to expand the demographic factors defining an enclave to increase its size. This is not to say that enclaves will never resemble communities of interest. In some situations, a community of interest may be an enclave. Indeed, groups might attempt to structure their communities of interest as enclaves hoping that the community would appear cohesive enough to become the core of a congressional district. Depending on the demographic criteria used by a state to define enclaves, this strategy might be successful. Nevertheless, enclaves and communities of interest are conceptually distinct and serve different purposes.

Enclave districting is subject to criticism. The most salient criticisms are that enclave districting invites gerrymandering, can yield unwieldy statewide districts, and invites balkanization. That enclave districting tolerates gerrymandering is true.<sup>183</sup> Enclave districting allows districts to be finely constructed based representation based on the political interests of voters. That is the trade-off, one that states have always made and likely will continue to make.

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<sup>181</sup> See *Diaz*, 978 F. Supp. at 99-101 (suggesting that an interest group incorrectly suggested a cohesion among Latinos in New York that did not exist). Of course, *Thornberg v. Gingles* requires that any group seeking representation be large enough to control a district before any harm to the community's voting rights exists. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) ("First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.").

<sup>182</sup> In referring to a neighborhood, this Article does not mean to suggest any particular definition of a neighborhood. Rather, it intends to suggest that a neighborhood is one where most residents are joined by common political concerns merely because of the proximity of their residences. In that vein, a neighborhood can be relatively small or quite large.

<sup>183</sup> See *Karlan & Levinson*, *supra* note 6, at 1209 n.37 (asserting all districting plans consider and tolerate racial classifications).

While not mandating statewide districts, enclave districting allows their creation. Statewide districts are not inherently undesirable.<sup>184</sup> Whether statewide districting is a problem depends on how important compactness is to the state. If widely dispersed districts are anathema to a state, geographic location likely would become a delimiter that the state would use in creating districts. States could require that all district enclaves be in a particular region of a state or that district enclaves be within a circle of prescribed radius. Conversely, states not troubled by statewide districts could create some number of them. Flexibility in apportionment is the key to and greatest strength of enclave districting.

Enclave districting creates districts populated by people with similar political concerns. For example, a district full of farmers will likely care about farming issues. Such a district likely will be more oriented to farm issues than a district populated by urban city dwellers. If combining people based on political interest is synonymous with balkanization, enclave districting leads to balkanization. However, the current political system is focused on combining people with similar political concerns, however imperfectly it completes the task. If this is so, any scheme that helps the current system achieve its goal of reasonably effective representation may move society toward balkanization. Thus, the criticism is undoubtedly a valid one, but one that must be directed at a political system that seeks to provide common representation to those with common interests, not at a scheme that seeks to help the system reach that goal.

Enclave districting allows similar areas to have common representation and affords different representation to dissimilar areas without regard to geographic proximity. Unsurprisingly, enclave districting has its greatest application in situations where neighborhoods are physically close but demographically distant. When the physical proximity of neighborhoods is uncorrelated with political closeness,<sup>185</sup> providing common representation to both neighborhoods may be traditional, but may not serve the representational interests of either neighborhood. If a state containing such physically close but politically distant neighborhoods believes that the neighborhoods should have common representation, providing common representation may make sense regardless of their lack of geographical proximity. Similarly, if the state finds that the two neighborhoods should not have common representation, separating them into different districts makes sense regardless of their proximity.

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<sup>184</sup> This Article certainly does not denigrate those states that have a lone member of the House of Representatives: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. See Robin H. Carle, Clerk of the House of Representatives, *Official Alphabetical List of the House of Representatives of the United States* (1998); Pildes & Donoghue, *supra* note 1, at 251-52 n.43.

<sup>185</sup> See Ford, *supra* note 81, at 1407 (stating geography is one factor for consideration, but is not wholly determinative of the political actions and affiliations of individuals).



Although they appear different, at their cores, enclave and compact districting are not so different. Compact districting assumes similarity of political interests along a geographical axis, then endorses it through compactness. Enclave districting assumes similarity of political interests along a axis, then endorses it. Enclave districting is a single-member, geography-influenced, interest-based districting system. It fosters the representation and accountability that single-member districting provides while encouraging interest-based representation that better protects the political interests of voters. While enclave districting may be subject to gerrymandering, such gerrymandering is structured along representational lines that still make sense. States should consider adopting enclave districting because it can provide better representation for voters, while allowing states to structure the districting process along lines they deem proper.

#### CONCLUSION

Enclave districting permits voters to elect representatives who will advance and protect their interests by grouping voters who live in similar neighborhoods under common representation, rather than aggregating voters who merely live in neighborhoods that are physically close. By disconnecting the voting system from compactness and contiguousness, enclave districting allows representatives to better represent their constituents through an interest-based system that focuses on voters' interests rather than parcels of land. However, by maintaining single-member districts, enclave districting also allows the possibility of a strong relationship between a representative and her constituents through which the representative will be accountable to her constituents. Consequently, enclave districting allows states the freedom to construct districts in a way that is most likely to provide good representation to their citizens.