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**SUPREME COURT OF MISSOURI
en banc**

MERRIE SUZANNE LUTHER, et al.,)

Appellants,)

v.)

No. SC101412)

DENNY HOSKINS,)

Respondent,)

and,)

MISSOURI STATE REPUBLICAN
COMMITTEE,)

Respondent.)

DISSENTING OPINION

The question in this case is not whether, before article III, section 45 was added to the Missouri Constitution in 1945, the general assembly had authority to draw

congressional districts. Plainly, it did, and it exercised (or attempted to exercise) that

authority regularly for more than a century. Instead, the question in this case is whether

the addition of article III, section 45 was intended to limit the general assembly's

authority and whether this Court will enforce that limitation. The answer to both

questions should be “yes.” Accordingly, I respectfully dissent.

The plain language of article III, section 45 unmistakably states “when” and “how” the general assembly may – indeed, must – draw new congressional districts. When the constitution instructs the general assembly “when” and “how” a power is to be exercised, there is a “**strong presumption** that it was designed to be exercised in that time and mode **only.**” 16 Am. Jur. 2d *Constitutional Law* § 99 (emphasis added) (footnotes omitted). This should end the analysis. Nevertheless, further support for this conclusion is found in contemporaneous provisions of the 1945 Constitution, the historical context of reapportionment and redistricting leading up to the drafting of that constitution, as well as the proceedings of the 1943-44 Constitutional Convention themselves. Each of these indicators is sufficient to remove any doubt, and the combined weight of them – especially when added to the plain meaning of the language used in article III, section 45 – leads inescapably to the conclusion section 45 was intended to limit the authority of the general assembly.

Appellants bear the burden of demonstrating HB 1 clearly and undoubtedly violates article III, section 45. *Mo. Prosecuting Att’ys v. Barton Cty.*, 311 S.W.3d 737, 740-41 (Mo. 2010). But, Appellants having done so, this Court bears the corresponding burden to declare it unconstitutional.

There is no better settled law in our state than the rule that courts will not hold a statute to be unconstitutional unless it contravenes the organic law in such a manner as to leave no doubt of its unconstitutionality. ... On the other hand, if there is no doubt that a statute or part thereof is in conflict with the Constitution, then it is the duty of any court, whose duty it is to decide, to declare the conflict and declare void the statute or part thereof in conflict with the Constitution.

State ex rel. Hughes v. Sw. Bell Tel. Co., 179 S.W.2d 77, 80-81 (Mo. Div. 1 1944)
(quotations omitted).

The process for determining what section 45 requires and what – if anything – it prohibits, like any matter of constitutional construction, has remained unchanged for most of this Court’s history. First, and always, comes the text of the provision. “This Court will not adopt a convoluted meaning that renders words meaningless when the plain language of the provision is clear.” *Robust Mo. Dispensary 3, LLC v. St. Louis Cnty.*, 721 S.W.3d 135, 140 (Mo. 2025). Instead, “[w]ords used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning.” *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. 2012).

Generally, constitutional provisions are subject to the same rules of construction as other laws, except that constitutional provisions are given a broader construction due to their more permanent character. This broad reading does not permit this Court to ascribe to the provision a meaning that is contrary to that clearly intended by the drafters. Of particular importance is the principle that in determining meaning of a constitutional provision due regard will be given to its primary objects and all related provisions should be construed as a whole and where necessary to bring conflicts, if any, into harmony.

Brown v. Carnahan, 370 S.W.3d 637, 647-48 (Mo. 2012) (alterations, citations, and quotations omitted).

All of Appellants’ briefing and argument boils down to this: The plain language of article III, section 45 explicitly instructing the general assembly “when” and “how” to draw congressional districts necessarily prohibits the general assembly from drawing districts at any other time or in any other manner. All of Respondents’ briefing and argument, on the other hand, boils down to this: Nothing in article III, section 45

expressly forbids the general assembly from redrawing congressional districts as often as it pleases as long as the first such effort occurs when each decennial census and apportionment is certified to the governor.

The idea that the Missouri Constitution constrains the general assembly only when it uses language of explicit prohibition such as “may not,” “cannot,” or “shall not” is simply wrong. This Court has said, repeatedly, that the general assembly’s authority is limited as much by the constitution’s implied prohibitions as by its express ones. *State v. Shelby*, 64 S.W.2d 269, 271 (Mo. 1933) (providing restrictions on the power of the general assembly “must be expressed in the Constitution *or clearly implied* by its provisions” (emphasis added)); *see also Gordon v. Becker*, 49 S.W.2d 146, 147 (Mo. 1932) (explaining “the general grant of the legislative authority of the state ... is likewise subject to *all* the limitations, *express or implied*, contained in the Constitution” (emphasis added)).

It is a fundamental principle of constitutional law that a State Constitution is not a grant of power as is the Constitution of the United States but, as to legislative power, it is only a limitation; and, therefore, except for the limitations imposed thereby, the power of the State Legislature is unlimited and practically absolute. Those *limitations must be expressed in the Constitution or clearly implied by its provisions*.

Hickey v. Bd. of Educ. of City of St. Louis, 256 S.W.2d 775, 778 (Mo. Div. 1 1953)

(emphasis added) (quotations and citations omitted); *see also State ex rel. Heimberger v.*

Bd. of Curators of Univ. of Mo., 188 S.W. 128, 133 (Mo. 1916) (noting constitutional

limitations on the general assembly’s power can be found “either in terms *or by*

necessary implication” (quoting *Cooley’s Const. Limitations* 236 *et seq.* (7th Ed.) (emphasis added)).

One of the most obvious and long-recognized instances of an implied prohibition is when the constitution clearly and undoubtedly instructs the general assembly when and how to use its authority. Such a mandate contains an unmistakable – albeit implied – prohibition against the general assembly using that power at any other time or in any other manner.

We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. ***If directions are given respecting the times and modes of proceeding in which a power should be exercised there is at least a strong presumption that the people designed it should be exercised in that time and mode only***, and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end, especially when, as has been already said, it is but fair to presume that the people, in their constitution, have expressed themselves in careful, and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication.

Ex parte Arnold, 30 S.W. 768, 770-71 (Mo. 1895) (emphasis added) (quoting

Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the*

Legislative Power of the States of the American Union 78-79 (Little, Brown, &

Co. ed., 1868)); *see also State ex rel. City of St. Louis v. Seibert*, 27 S.W. 624, 625

(Mo. 1894) (Sherwood, J., dissenting) (quoting the same and noting the “rule of

construction is that, when the constitution defines the circumstances under which a

right may be exercised ... the specification is an ***implied prohibition*** against legislative interference to add to the condition” (emphasis added)).

Missouri has steadfastly adhered to this approach, both before and after the 1945 Constitution was drafted. *See State ex inf. Dalton v. Dearing*, 263 S.W.2d 381, 384 (Mo. 1954) (noting “directions given [in the constitution] respecting the time or modes of procedure for the exercise of a power create a presumption that the power should be exercised ***only in that time*** and manner” (citing 11 Am. Jur. *Constitutional Law* §§ 69-70; 1 *Cooley’s Constitutional Limitations* 159-60, 164 (8 ed.); *Harfst v. Hoegen*, 163 S.W.2d 609, 612 (Mo. Div. 1 1941); *State ex inf. McKittrick v. Wymore*, 119 S.W.2d 941, 944 (Mo. 1938), *overruled on other grounds by State ex. Inf. Att’y Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994).

Nor is there anything unique about this approach to Missouri. This Court repeatedly quoted this approach from Professor Cooley’s influential treatises, and it is (and always has been) black letter law:

Prohibitory language stated in a constitution is nearly always construed as mandatory. If directions are given respecting the time and mode of proceeding in which a power should be exercised, ***there is at least a strong presumption that it was designed to be exercised in that time and mode only.***

16 Am. Jur. 2d *Constitutional Law* § 99 (emphasis added) (footnotes omitted); *see also People ex rel. Mooney v. Hutchinson*, 50 N.E. 599, 601 (Ill. 1898) (“[W]here the constitution fixes the time and mode of exercising a particular power it contains a necessary implication against anything contrary to it, and by setting a particular time for its exercise it also sets a boundary to the legislative power.”).

Applying this time-honored approach, when the Missouri Constitution plainly and unmistakably tells the general assembly when and how to do something, there is a “strong presumption” the legislature is prohibited from doing so at any other time or in any other way. Accordingly, the inquiry proceeds in two steps: (1) whether article III, section 45 clearly and unmistakably instructs the general assembly “when” and “how” to draw congressional district; and (2) if so, whether the “strong presumption” thereby created against drawing such districts any other time or in any other manner has been rebutted. The plain language confirms the former. The surrounding provisions of article III, the context leading up to the 1943-44 Constitutional Convention, and the words and deeds of the delegates to that convention reject the latter.

A. The Plain Language

Prior to 1945, the Missouri Constitution contained no requirement that Missouri be divided into districts for the election of its delegates to the United States House of Representatives, let alone any direction as to when such congressional districts should be drawn, how they should be drawn, or who should draw them. In the absence of any limitation, the general assembly drew congressional districts as it pleased in accordance with article I, section 2 of the United States Constitution. With the adoption of the Missouri Constitution of 1945, however, the people added article III, section 45 to address these issues explicitly. It provides, in its entirety:

When the number of representatives to which the state is entitled in the House of the Congress of the United States under the census of 1950 and each census thereafter is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of

contiguous territory as compact and as nearly equal in population as may be.

Mo. Const. art. III, § 45.

The language is clear and unambiguous. It limits the general assembly's authority to draw congressional districts in several respects. The first phrase tells the general assembly "when" to redistrict, i.e., each time a new census is completed and Missouri's apportioned number of representatives is certified to the governor. The second phrase tells the general assembly "how" the districts should be drawn, i.e., there must be one district for each seat in the House, and these districts should be comprised of contiguous territory as compact and equal in population as may be.

The most important word in article III, section 45 – not just for present purposes but, as explained below, in the minds of those who drafted this provision – is the very first word, i.e., "when." The dictionary defines "when" to mean: "**1 a** : at or during the time that," "**b** : just after the moment that," "**c** : at any and every time that," and "**2 a** : in the event that." *When, Webster's Third New International Dictionary* (1966) (second definition).¹ Accordingly, there can be no argument as to what the introductory phrase of article III, section 45 says and what it means, i.e., "at or during the time that," or "just after the moment that," or "in the event that" Missouri's apportioned number of representatives in Congress under each new census is certified to the governor, the general assembly "shall" divide the state into that number of districts.

¹ The first definition defines "when" in other contexts but yields the same result for present purposes. *See When, Webster's Third New International Dictionary* (1966) ("**1 a** : at what time" or "**2** : at which time") (first definition).

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Respondents concede this is what the first word in article III, section 45 means and what it does. Nevertheless, Respondents argue the general assembly also has *inherent* authority to redistrict – separate and apart from article III, section 45 – and the general assembly may exercise this inherent authority any time (or any number of times) it pleases once it has complied with the affirmative command in section 45 to redistrict “when” each census and apportionment occurs. In other words, as set forth in the secretary of state’s brief: “It [section 45] says only that the General Assembly ‘shall’ redistrict *at least once* per decade – following the decennial census.” (Emphasis in original). The words the secretary of state chose to emphasize, however, are *not in* section 45. They were added to resurrect authority for the general assembly that section 45 takes away. Accordingly, this argument should be rejected. *Gray v. Taylor*, 368 S.W.3d 154, 156 (Mo. 2012) (“A court may not add words by implication when the plain language is clear and unambiguous.”).

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First, Respondents’ argument that article III, section 45 simply adds an obligation to the general assembly (i.e., to redistrict immediately after the apportionment under a new census is reported to the governor), but does not limit the general assembly’s inherent authority, cannot withstand even a cursory glance at the constitution drafted in 1943-44 and approved by the voters in 1945. Those framers put their intention in bold, uppercase letters so it would not be missed. When article III, section 45 was proposed and adopted, it was located in the part of article III titled “**LIMITATION OF LEGISLATIVE POWER.**” This proves beyond doubt section 45 was intended to limit the general assembly’s authority. *See Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98,

102 n.3 (Mo. 1994) (noting the “organizational headings of the constitution are strong evidence of what those who drafted and adopted the constitution meant” (quotation omitted)).²

Second, if the framers of the 1945 Constitution had intended for the general assembly to draw congressional districts “when” and “how” required by article III, section 45 only when each new census and apportionment was reported to the governor but also intended the general assembly would be free to redraw them at any other time (or times) before the next census, they would have said so. They certainly knew how.

Article III, section 10 provides, with respect to state representative and senatorial districts: “The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. *Such districts may be altered from time to time as public convenience may require.*” (Emphasis added).³ This language, allowing subsequent redistricting of the

² Respondents point to provisions added to this portion of article III in the decades since the constitution was proposed and adopted, but subsequent additions are irrelevant for present purposes. As *Hammerschmidt* explains, what matters is what “those who drafted and adopted the constitution meant[.]” *Hammerschmidt*, 877 S.W.2d at 102 n.3.

³ The framers of the 1945 Constitution not only knew how to put this language in article III, section 10 – and chose not to put it in article III, section 45 – they knew it appeared in article IV, section 9 of the 1875 Constitution. In *State ex rel. Major v. Patterson*, 129 S.W. 888, 894 (Mo. 1910), this Court held this language referred only to the *legislature’s* power to redraw state and house districts even though its authority to do so in the first instance each decade was limited. This language surely would have been added by the framers of article III, section 45 had they wanted the general assembly to have the power to redraw congressional districts whenever it deemed prudent even though it had no new census or apportionment from which to work.

Finally, if Respondents are right, i.e., if article III, section 45 limits only what must happen in the year following a census but imposes no limits on what may be done otherwise, surely the same logic would apply to state representative and senatorial districts. Article III, sections 3 and 7 set forth the manner of drawing state house and senate districts, and both say “when” this is to occur. Mo. Const. art. III, § 3(c) (providing the process must begin “[w]ithin sixty days after the population of this state is reported to the President for each decennial census”); Mo. Const. art. III, § 7(a) (same). But, as Respondents are quick to point out with respect to section 45, neither section 3 nor section 7 says this is the *only* time districts can be drawn. In fact, article III, section 10 suggests it is not.⁴ Under Respondents’ argument, therefore, the house and senate commissions would have inherent authority to reconvene and redraw these districts any time prior to the next census. Moreover, given the general assembly originally drew these districts, it would have inherent authority to redraw them as it sees fit. After all, nothing in section 3 or section 7 expressly prohibits either of these two absurd scenarios. The answer, of course, is that – despite the lack of express prohibitions – article III, sections 3 and 7 set out the *only* time the commissions are authorized to draw house and senate districts and displace entirely the general assembly’s authority to do so at *any*

⁴ It is worth noting that, despite this express authorization to redistrict the house and senate, this Court has held that no such mid-decade redistricting is permitted. *Preisler v. Doherty*, 284 S.W.2d 427, 436-37 (Mo. 1955) (“[I]n accordance with the reasoning of *State ex rel. Major v. Patterson, supra*, we think only one valid apportionment is intended for each decennial period. This must be true because the decennial census is made the basis of reapportionment.”). This decision focuses on what Respondents ignore, i.e., it is the result of the new census that triggers the power to redistrict and nothing else.

time. By the same token, article III, section 45 sets out the only time for the general assembly to draw new congressional districts.

Respondents contend the general assembly can draw congressional districts immediately after the apportionment and census are reported to the governor and then come back *one day later* and redistrict again, and that it may repeat this exercise – with no new census or apportionment – as often as it likes. This is not what the constitution says, and it was not what anyone – not the framers, the voters, or more than 70 years of legislators – has understood it to mean. *See Dep’t of Com. v. New York*, 588 U.S. 752, 770 (2019) (“That history matters. Here as in other areas, our interpretation of the Constitution is to be guided by a Government practice that has been open, widespread, and unchallenged” (quotation omitted)). Instead, the plain language of article III, section 45 limits the general assembly’s inherent authority to draw congressional districts both as to “how” those districts must be drawn and “when” the general assembly may draw them. This prohibition is not express because it does not need to be. It is clearly implied by the positive commands as to “how” and “when.” *See Arnold*, 30 S.W. at 770 (“If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode.”). This obvious conclusion flows from the plain language of article III, section 45, and it is confirmed by the context in which it was drafted and the words and actions of those who drafted it.

B. The History of Apportionment and Redistricting

The United States Constitution tasks Congress with determining the number of members in the House of Representatives and apportioning that number among the several states based on an enumeration (i.e., census). U.S. Const., art. III, § 2, cl. 3; and U.S. Const. amend. XIV, § 2.

As the number of states and the population of the country grew, the task of apportioning became increasingly difficult. For the first 120 years or so, Congress managed to avoid these difficulties simply by increasing the size of the House of Representatives. This approach kept any state from seeing a decrease in its number of representatives in Congress and, therefore, made the apportionment exercise reasonably achievable. Eventually, however, the size of the House reached the upper limits of practicality (if not constitutional authority),⁵ and Congress chose to cap the size of the House at 435. See Apportionment Act of 1911, ch. 5, 37 Stat. 13 (1911) (setting the size of the House at 433, with two additional representatives if the territories of Arizona and New Mexico became states). By capping the size of the House, apportionment became a zero-sum game, i.e., when one state gains a seat, another state must lose one.

The results of this zero-sum approach were immediately obvious. Following the 1920 census, the apportionment problem simply became too difficult to solve and, for the first time, Congress was unable to divide the seats in the House of Representatives among the several states. As a result, in 1929, Congress passed an act intended to automate the

⁵ Under article I, section 2 of the United States Constitution, the constitutional limit to the number of members in the House of Representatives today is approximately 11,400.

process and, therefore, ensure an apportionment even when Congress did not or could not act. Apportionment Act of 1929, ch. 28, § 22, 46 Stat. 26 (1929); see 2 U.S.C. § 2a.

Because the number of seats in the House was set at 435, apportionment became largely a matter of arithmetic once the results of each census were known. Accordingly, once each census is completed, the 1929 Act instructs the president to calculate the apportionment of the House of Representative among the states using the three formulas most often used in the past but instructed the president to apportion the House using the most recent formula (i.e., the one used following the 1910 census) until otherwise instructed by Congress. *Id.* The president then was to report the apportionment to the Clerk of House, *id.*, who, in turn, would report each state's number of representatives to that state's governor, 2 U.S.C. § 2a(b).

Prior to the 1929 Act, Congress had, from time to time, required states to elect their representatives from districts rather than “at large,” i.e., statewide.⁶ Congress occasionally also included requirements that such districts be comprised of contiguous territory, as compact and equal in population as may be. In the 1929 Act, however, all such requirements were removed, and Congress – to this day – has not reinstated them.

⁶ Congress did not require districts until the Apportionment Act of 1842, 5 Stat. 491 (1842). The apportionment act following the 1870 census provided the same, but added – for the first time – requirements that districts be as nearly equal in population as practicable. Apportionment Act of 1872, ch. 11, § 2, 17 Stat. 28. For states with an increased number of representatives, Congress instructed them – until the state legislature drew new districts under state law – to use existing districts for the election of the preexisting number of representatives and “at large” elections for electing the new or increased number of representatives.

The United States Supreme Court held the omission of this language in the 1929 Act meant states were free to draw districts however they wished with no federal requirements for contiguity, compactness, or equal populations. *Wood v. Broom*, 287 U.S. 1, 8 (1932) (“[T]he compactness, contiguity and equality in population of districts did not outlast the [1911] apportionment to which they related.”).⁷ The idea that the article I, section 2 of the United States Constitution – and not just (occasionally) federal statute – requires congressional districts be as nearly equal in population as practicable would not be established for several decades. See *Wesberry v. Sanders*, 376 U.S. 1, 4, 7-8 (1964) (holding, under article I, section 2 that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”).

Finally, in 1941, Congress amended the 1929 Act in two significant respects.

First, it settled on the “equal proportion” method of apportionment and instructed the president to use that method to apportion the House until Congress provides otherwise.

Apportionment Act of 1941, ch. 470, 55 Stat. 761-62 (1941); codified at 2 U.S.C. § 2a(a).

Second, it restored the reference to states’ redistricting and provided, following each apportionment and until a state is redistricted in compliance with that state’s law, the

following rules would apply: (1) if the state neither gained nor lost seats in the House of

⁷ The United States Supreme Court also addressed the 1911 Apportionment Act in *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (holding, if state law provides for referenda on acts passed by the legislature, such referenda extend to acts creating congressional districts), and *Smiley v. Holm*, 285 U.S. 355, 373 (1932) (holding, if state law provides for gubernatorial vetoes, such veto power extends to acts creating congressional districts). As discussed below, both the referendum and veto played an important role in Missouri’s redistricting efforts leading up to the 1943-44 Constitutional Convention.

Representatives, the districts previously in use would remain in use; (2) if a state gained seats in the House, the districts previously in use would remain in use and the new or additional seats would be elected at large; and (3) if the state's seats in the House decreased below the number of districts then in use, all representatives would be elected at large. 2 U.S.C. § 2a(c).⁸

This abbreviated overview of federal apportionment sets the stage for a review of redistricting in Missouri. From 1821 to 1833, Missouri had one seat in the House of Representatives, and this seat was filled (naturally) by voters statewide. In 1833 and 1843, Missouri's delegation to the House grew to two and five seats, respectively. All of these members were elected at large. Prior to the 1846 election, Missouri's general assembly divided the state into congressional districts for the first time, and the number of districts remained at five until after the 1850 census, when it increased to seven. The 1860 census saw the number of Missouri's seats (and, therefore, its number of districts)

⁸ Congress addressed two additional scenarios. First, if a state's number of seats in the House decreased, but that number still was *equal* to the number of existing districts, those districts would be used. 2 U.S.C. § 2a(c). Second, if a state's number of seats in the House decreased, but that number still was *greater* than the number of existing districts, those districts would be used and the remaining representatives would be elected "at large." *Id.* Congress found it necessary to include these scenarios because states often refused or failed to redistrict after apportionment became a zero-sum game under the 1929 Act. When this happened, a state's number of districts and its number of seats in Congress could get out of sync. Missouri was one of those states. The United States Supreme Court has noted none of these five scenarios likely would pass constitutional muster today. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 812 (2015) ("The one-person, one-vote principle announced in *Wesberry* ... would bar those procedures, except in the unlikely event that the decennial census makes no districting change constitutionally necessary." (quotations omitted)).

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increase to nine and to 13 following the 1870 census.⁹ The number increased to 14 following the 1880 census, to 15 following the 1890 census, and reached its highwater mark of 16 after the 1900 and 1910 censuses. As noted above, Congress failed to pass an apportionment following the 1920 census.

In 1920, a Republican landslide changed leadership in the both houses of Missouri's general assembly. In 1921, the general assembly sought to throw out the highly gerrymandered map drawn by a Democrat majority following the 1900 census (which was designed to yield 15 Democratic seats out of 16) in favor of a map that would reliably produce between eight and 13 Republican members of Congress. In 1922, however, this map was put before the voters in a referendum, and the voters rejected the new districts by a significant majority. As a result, no new districts were drawn in Missouri even though the disparities in population among the 16 districts that existed

⁹ Respondents point to the only mid-decade redistricting that has ever occurred in this state, i.e., the one that occurred in 1877, and it was as unfair as Respondents describe it. The problem with Respondents' efforts to use this example, however, is that this misuse of power occurred four generations *before* article III, section 45 was drafted and approved by the voters. In 1877, there was no restriction on the legislature's power to draw congressional districts as often as it liked. As a result, Respondents' example is a better argument that the purpose of section 45 was to prohibit such abuses than that it was intended to encourage them. See *McKittrick v. Wymore*, 119 S.W.2d at 947 ("A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on the legislative will." (quoting 12 C.J. *Constitutional Law* 729-30 (1917))). Respondents' efforts to make use of the multiple failed attempts at redistricting in the 1960s is even less availing. Then, the general assembly's attempts to draw congressional districts were rejected by the federal courts time and again. The focus of the general assembly was on drawing a single set of constitutional districts, not attempting to draw such maps more than once in that decade.

when they were drawn following the 1900 census worsened under the 1910 and 1920 censuses.

One of the first casualties of the zero-sum apportioning introduced by the 1911 Apportionment Act was Missouri. As noted above, there was no apportionment after the 1920 census, but Missouri saw its seats in the House shrink from 16 to 13 as a result of the 1930 census. In 1932, the general assembly drew 13 new districts, but the governor vetoed this map. No override was attempted, and, therefore, no new districts were drawn.

Because this left Missouri with more districts than seats, all 13 of its representatives were elected at large as required by the 1929 Apportionment Act. The sting of this redistricting failure was exacerbated by the fact it was the second such failure in a row.

Though the general assembly in 1934 managed to redistrict the state from the preexisting 16 seats down to the 13 apportioned to Missouri in 1931, the wounds of the redistricting failures following the 1920 and 1930 censuses – as well as the failure of

Congress to mandate the use of contiguous districts as compact and equal in population as may be – continued to fester in the minds of the delegates to the 1943-44

Constitutional Convention as they assembled to draft a new constitution.

C. The 1943-44 Constitutional Convention

The actions and debates of the framers of the 1945 Constitution are a key resource when interpreting the language of a provision “to arrive at the reason and purpose of the constitution.” *State ex rel. Aquamsi Land Co. v. Hostetter*, 79 S.W.2d 463, 469 (Mo.

1934). Respondents make passing references to the 1943-44 Constitutional Convention but fail to inquire into the debates or trace the development of the language that would be

Committee on Congressional, State and Senatorial and Representative Districts (“Committee CSSRD”), *Journal* 3 (Day 31, Nov. 10, 1943), where it was made part of File No. 21.

The Committee CSSRD sent its Report on File 21 to the floor of the Convention. *Journal* 2-11 (Day 168, June 28, 1944). This included a “Supplemental Report”

highlighting for the Convention’s consideration Section 55, which was based upon

Proposal 170 (though the Committee altered the language to track a provision in the

Virginia Constitution). *Id.* at 13-14. The Committee’s new version focused entirely on

“how” congressional districts should be drawn, not “when.” The Committee’s version,

with explanatory notes, stated in its entirety:

SECTION 55. The General Assembly shall by law apportion the state into districts corresponding with the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which districts shall be composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants.

[NOTES:] This section is the same as section 55 of the Virginia Constitution where it has been for over a hundred years. Under section 4 of Article I of the Constitution of the United States the places of holding elections for representatives are prescribed by state legislatures, but Congress may by law make or alter such regulations. In *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105, the supreme court of Virginia held that its above constitutional provision was binding on its legislature because not in conflict with any act of Congress, and annulled an act of its legislature for violation of the constitutional provisions as to equality in population.

In 1911 (U.S.C.A. Title 2, section 3) Congress passed an act reading:

“Sec. 3. Representatives shall be elected by districts composed of compact and contiguous territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal in number to the number of representatives to which the state may be entitled in Congress, no district electing more than one representative.”

But in *Smiley v. Holm*, 285 U.S. 355, 52 S.Ct. 397, and *Wood v. Brown*, 287 U.S. 1, 53 S. Ct. 77 it was held that the above 1911 Act expired by its own limitations on the passage of the Act of June 18, 1929. Taking advantage of this lack of an act of Congress the Illinois legislature passed a redistricting act in which one district contained a population twice that of any other district and in *Daily v. Madison County*, 378 Ill. 357, 38 N.E. 2d 160, this act was sustained on the ground that because the Act of 1911 had expired the state was free to form its districts in any way it saw fit.

As there is now no act of Congress on the subject and the above provision will be binding on our general assembly, our people will be protected by it until Congress passes an Act in conflict with it.

Chairman Searcy brought the Committee CSSRD's report (including the Supplemental Report) on File 21 to the floor for perfection. *Journal* 30 (Day 202, Sept. 5, 1944).

After section 7 (then referred to as section 7a), as amended, was adopted, Chair Searcy moved the adoption of Section 55. *Journal* 8 *et seq.* (Day 203, Sept. 6, 1944).

The transcript of the debate concerning Section 55 provides, in relevant part:

MR. SEARCY: now, Mr. President, I desire to ask the Secretary to read Section 55, which is found on Page 14 of File 21.

(The Secretary read as follows:)

SECTION 55. The General Assembly shall by law apportion the state into districts corresponding with the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which districts shall be composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants.

PRESIDENT: Do you move the approval of the Section?

MR. SEARCY: I move the section be adopted, but having made that motion I desire to yield to Mr. Alroy Phillips [who introduced Proposal 170].

PRESIDENT: Is there a second?

MR. PHILLIPS (of St. Louis City): Mr. President, I second the motion. Mr. President, this Section is also Section 55 of the Constitution of the State of Virginia. It has been in the Virginia Constitution for over one

hundred years and a great many of our redistricting statutes are exact copies of this language...

....

MR. SEARCY: Now Mr. President, insofar as this section is concerned, I made the motion to have it adopted but I don't expect to discuss my views about it. The section as it was written may come before the next General Assembly which may be Republican or Democrat. *It seems to me that we might set out sometime [sic] as to whether this redistricting might be done, ever[y] ten years or something like that, that the Legislature could do it.* I wish some of the rest of you would offer some amendments to this. Being the Chairman of this Committee I don't like to say too much pro or con for these measured [sic], but it occurs to me some serious thought ought to be given it before it is passed.

[colloquy omitted]

PRESIDENT: Is there further discussion?

MR. MAYER: Mr. President, I am writing an amendment if I can have some time.

MR. SEARCY: Mr. President, in spite of the fact that I made the motion to adopt this section, I hope that *unless it is clarified and fixed up so that everybody does understand it, that it will be defeated.*

PRESIDENT: Judge Mayer says he has an amendment. The Convention will stand at ease.

(The Convention was at ease for a short period of time.)

PRESIDENT: The Clerk will read Judge Mayer's amendment.

(The Clerk read as follows:)

AMENDMENT NO. 7. Amend File No. 21, Page 14, Section 55, by striking out the section and substituting the following:

"The General Assembly immediately following the decennial census of 1950 and the General Assembly *immediately following each succeeding decennial census* shall by law apportion the state into districts corresponding with the number of Representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which districts shall be composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants."

MR. PHILLIPS (of St. Louis City): Mr. President, I second the motion to adopt the amendment.

PRESIDENT: The question is on the substitute offered by Judge Mayer.

MR. FORD: Mr. President, the question has just arisen in my mind and I want a little information on it. I believe the habit is for the Congress to determine the number of Representatives they shall have after the general census is taken and that might be the year after. I don't know just how soon they do and it might be that the first Legislature couldn't redistrict because they wouldn't know the number of Representatives and if there is any question about that, whether or not it will be possible for the first Legislature, after the census is taken, to make this redistricting, I want to know about that, Judge Mayer?

MR. PHILLIPS (of St. Louis City): Can I answer him?

MR. FORD: Yes, anybody that can answer it.

MR. PHILLIPS (of St. Louis City): Under the census law of the United States, the census is not published for three years after it's taken, but there is a special provision requiring the Bureau of Census to certify the population to Congress for the purpose of determining how many Congressmen each state is entitled to immediately and they do that those figures are available and they give the population of the states by states and by counties and that's all you need.

MR. FORD: Thank you.

PRESIDENT: The question is on Judge Mayer's substitute for the section.

MR. SEARCY: Mr. President, I should like to inquire of Judge Mayer.

PRESIDENT: Judge Mayer, will you yield.

MR. MAYER: Yes, sir.

MR. SEARCY: Judge, don't you think that the result would be arrived at if you changed your substitute to read that the Legislature, immediately after the reapportionment of the Congressmen of the United States, can place it back in each decennial census.

MR. MAYER: Yes, I think there is a lot of nice ways it could be written if somebody would just do it. I wrote it very hurriedly with about seven people talking to me and I think that would be an improvement on it, Senator Searcy. I wish you would write it that way.

MR. PHILLIPS (of St. Louis City): Mr. President, may I say that Congress no longer apportions? There is an automatic apportionment in the Act of Congress and the Clerk of the House of Representatives certifies to the Governor of each state the number of representatives to which the state is entitled and it is no longer by Act of Congress.

MR. SEARCY: Then Mr. President, I suggest to Mr. Mayer that his amendment read that *redistricting be done immediately after the receipt of the report by the Governor.*

MR. PHILLIPS (of St. Louis City): What?

MR. SEARCY: In fact, Mr. President, I am prone to make a motion which I think is apropos that the *whole thing be stricken from the file.*

PRESIDENT: That motion will be in order at a later time, Senator. The question is on Judge Mayer's substitute.

MR. FORD: Mr. President, inasmuch as I am guilty of raising this question I want to say I did it for information only. I am in favor of the amendment offered by Judge Mayer. If it will cover the ground under Senator Phillip's explanation, why Judge Mayer's amendment is alright and I'm in favor of it. I want to say that I am most certainly in favor of it. I raised the question just for information and Senator Phillips has furnished the information and I am satisfied as far as I am concerned and I am going to support Judge Mayer's amendment as it is now written.

MR. MAYER: Mr. President, if I can have unanimous consent to write into this thing and then the Committee on Phraseology can straighten it out a little, also somebody ought to respell these words, "The General assembly, immediately following each succeeding decennial census, and the determination of the number of Representatives in which the state is entitled, shall by law apportion, if I can have unanimous consent to write that in it will at least let the

PRESIDENT: (Interrupting): Is there objection? The Chair hears none.

(Amendment by Mr. Mayer sent forward and read as follows:)

Amendment No. 7. Amend File No. 21, Page 14, Section 55 by striking the section out and substituting the following:

The General Assembly immediately following the decennial census of 1950 and the General Assembly *immediately following each succeeding decennial census and the determination of the number of Representatives in Congress to which the state is entitled* shall by law apportion the state into districts corresponding with the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which districts shall be composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants.

PRESIDENT: Question is on Judge Mayer's substitute. Are you ready for the question?

(Chorus of "Question").

PRESIDENT: As many as favor the substitute let it be known by saying "Aye" ... Opposed? The ayes have it. The substitute is chosen over the text.

PRESIDENT: The question now is, "Shall the substitute be made a part of the file?" Are you ready for the question? As many as favor the substitute as a part of the file, let it be known by saying "Aye" ... Opposed? The ayes have it....

Tr. at 7024-31 (emphasis added).

So far, it could not be more clear — at least in the minds of the delegates — why current article III, section 45 was added to the constitution and what it was supposed to achieve. Proposal 170, as it emerged from committee, focused on the "how" of redistricting, i.e., it imposed requirements that congressional districts be comprised of contiguous territory as compact and as equal in population as may be. The purpose was to ensure Missourians would not be reliant on Congress to impose (and maintain) these important limitations.

But, when this new section limiting the general assembly's authority concerning "how" districts could be drawn reached the floor, Chairman Searcy insisted language be added to limit the general assembly's authority as to "when" redistricting could occur.

Chairman Searcy was so adamant about this question of "when," he urged the new section be defeated if it did not address this issue. He suggested, without opposing arguments from anyone, that the provision be amended to require the general assembly to

redistrict "*ever[y] ten years* or something like that, that the Legislature *could* do it." *Tr.*

at 7027 (emphasis added). In real time, an amendment was drafted to address Chairman

Searcy's concerns. This new language provided the answer to "when," i.e., "*immediately* following the 1950 decennial census" and "immediately following each succeeding decennial census." (Emphasis added). The answer was *not* "immediately following each succeeding decennial census and whenever else the general assembly pleases." Nor did the framers add any language allowing for mid-decade redistricting as it did for state house and senate districts in article III, section 10.

When uncertainty around the mechanics of federal apportionment threatened the clarity Chairman Searcy was seeking as to "when" the general assembly "could" act, he again suggested the new section be defeated. Instead, the Convention quickly amended the new section so the question of "when" would be answered clearly and unambiguously: "immediately following each succeeding decennial census *and* the determination of the number of Representatives" apportioned to Missouri[.]" (Emphasis added).

The tale of article III, section 45's journey through the constitutional convention has one important chapter remaining. Chairman Searcy moved that File No. 21, as amended,¹¹ be adopted. The motion was seconded by Mr. Phillips, the motion prevailed, and File No. 21 was referred to the Committee on Phraseology, Arrangement and

¹¹ All of the sections other than section 7 and section 41 were deleted from File 21 because the Convention already had dealt with them in the report on File 17 from the Legislative Committee. *Journal* 10 (Day 203, Sept. 6, 1944). The result of these changes was that, by the time File 21 was perfected, it contained only Section 7 and Section 55 (which later was renumbered to Section 41 and, finally, to Section 45).

Engrossment (“Committee PAE”) for phraseology review.¹² *Journal* 11 (Day 203, Sept. 6, 1944).

The Committee PAE collated all the changes made by the Committee CSSRD, and on the floor of the Convention, and reported the perfected version of Section 55 as follows:

The General Assembly IMMEDIATELY FOLLOWING¹³ the decennial census of 1950 and THE GENERAL ASSEMBLY IMMEDIATELY FOLLOWING each SUCCEEDING decennial census AND THE DETERMINATION OF THE NUMBER OF REPRESENTATIVES IN CONGRESS TO WHICH THE STATE IS ENTITLED shall by law APPORTION the state into districts corresponding with the number of representatives to which it MAY BE entitled in the house OF REPRESENTATIVES of the Congress of the United States, which districts shall be composed of contiguous and compact territory CONTAINING as nearly as PRACTICABLE an equal NUMBER OF INHABITANTS.

The Committee PAE then suggested renumbering Section 55 to Section 41 and further suggested changing the phraseology so the provision would read:

Section 41. *When the number of representatives* to which the state is entitled in the house of the congress of the United States *under the census of 1950 and each census thereafter is certified to the governor*, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.

¹² It is important here to emphasize the authority of the Committee PAE and, more importantly, the limitations on its authority. Chapter III, Rule 6 (later renumbered to Rule 17) of the Rules of the Constitutional Convention provided the Committee PAE “*shall not have authority to change the sense or purpose of any proposal referred to it,*” and any change recommended by Committee PAE could be reviewed by a special committee if five delegates objected on the ground it had altered the sense or purpose of a proposal. *Journal* 9, 26 (Day 11, Oct. 13, 1943) (emphasis added).

¹³ The Committee PAE used capitalization to highlight changes to the original proposal made by the Committee CSSRD, as well as amendments made on the Convention floor during the perfection process.

(Emphasis added). The Committee PAE offered the following explanation:

(Changes. Whole section rewritten.)

Notes:

U.S. Code, Title 13, sections 201-02 require that within eight months of the first day of the year each census is started the population of each state for apportionment of representatives shall be reported to the President.

U.S. Code, title 2, sections 2(a)-(b) require that the President transmit to the clerk of the house a statement showing the population and number of representatives of each state within the first week of the first regular session of congress beginning January 3, 1951 and each ten years thereafter, and that within fifteen days thereafter the clerk of the house must send the governor of each state a certificate of the number of representatives to which the state is entitled. Under the rewriting of this section the first re-apportionment would be made in 1951 for the election in 1952.

Journal 22-24 (Day 210, Sept. 19, 1944).

The Committee PAE's report on File 21 was taken up on September 20. *Tr.* at 7464-65. Five members, headed by Chair Searcy, **objected** to the Committee PAE's changes to Section 7 of File 21 "for the reason that said report changes the meaning and purpose of said section and ask that a committee be appointed in conformity to Rule 17 of the Rules of this Convention." *Journal* 9-10 (Day 211, Sept. 20, 1944). There was **no objection** that the Committee PAE had changed the meaning or purpose of Section 41.

Having objected to the Committee PAE's revisions to Section 7 but not to its revisions to Section 41, the inference is inescapable that the convention understood changing "immediately after" (in the perfected version) to "when" (in the Committee PAE's version) did not alter meaning or purpose. It sets forth **the** time for redistricting and, by necessary implication, prohibits redistricting at any other time.

Once the objection to the Committee PAE's revisions to Section 7 was resolved, File No. 21 (comprised of Sections 7 and 41) was ordered engrossed. *Journal* 26 (Day 211, Sept. 20, 1944); *Tr.* at 7482-83. By a roll-call vote of 69-0 (four members not voting), File No. 21 was third read and finally passed. *Journal* 11-12 (Day 212, Sept. 21, 1944). When the Committee PAE assembled all the finished files into the proposed 1945 Constitution, Section 41 was added to article III and renumbered as Section 45. *Journal* 178-79 (Day 213, Sept. 27, 1944). Its wording did not change.

This lengthy review of the proceedings in the 1943-44 Constitutional Convention demonstrates there was no question in the minds of the delegates what article III, section 45 would do and why. This new section was added to the 1945 Constitution to ensure:

(1) the general assembly would redistrict; (2) that *the* time for doing so was immediately after a census; and (3) the districts it drew would be subject to contiguity, compactness, and equal population requirements unless and until Congress expressly said otherwise.

The delegates wanted fair districts and knew the time to draw them was when the census information was as accurate as it could be, i.e., districts were to be drawn immediately after the census data became available. *See Karcher v. Daggett*, 462 U.S. 725, 738

(1983) (noting, "because the census count represents the best population data available, it is the only basis for good-faith attempts to achieve population equality" (quotation and citation omitted)).

There is not one word in all the Convention's deliberations – spoken or written – that suggests to any degree the delegates intended or understood the general assembly would be bound by article III, section 45 only for the first redistricting following each

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new census but thereafter would be free to do whatever it wished, however it wished, and whenever it wished. In fact, every word and action suggests the opposite. The "strong presumption" that section 45 was added to the constitution to limit "the times or modes of proceeding" regarding the general assembly's authority to draw congressional districts has not been overcome. See *Arnold*, 30 S.W. at 770. Beyond any reasonable doubt, this limitation on the general assembly's power is as clear as it can be. Had Respondents' argument been made on the floor of the Convention, it is clear the delegates present would have rejected it. Accordingly, this Court should reject it now.

CONCLUSION

For the reasons set forth above, the circuit court's judgment should be reversed and judgment entered for Appellants declaring HB 1 unconstitutional under article III, section 45 of the Missouri Constitution. Accordingly, I respectfully dissent.


Paul C. Wilson, Judge