SYSTEMIC INEQUALITY IN AMERICAN REPRESENTATION: MALAPPORTIONMENT, PARTISAN GERRYMANDERING, AND A CASE FOR AFFIRMATIVE ACTION FOR THE AMERICAN VOTER

A THESIS

Presented to

The Faculty of the History and Political Science Departments

The Colorado College

In Partial Fulfillment of the Requirements for the Degree

Bachelor of Arts

By

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May, 2016

Acknowledgements

It has taken a tremendous amount of time and energy to complete this senior thesis and I am indebted to those who gave me the ability to pursue and complete such a large task. This paper would not have come to fruition without the assistance of my political science advisor, Elizabeth Coggins. Thank you for taking a chance on me with this project and for your constant accessibility. Thank you for compelling me to pursue this topic with thoroughness and for continuously holding me to higher standards. To the rest of my political science professors—Tom Cronin, David Hendrickson, Dana Wittmer, Andrew Dunham, and Bob Lee—thank you for years of guidance, exposure to fascinating topics, and for inspiring me to pursue a career in public policy and public service. To my professors in the history department— Jane Murphy, Bryan Rommel-Ruiz, and Carol Neel—thank you for teaching me the art of historiography and for opening my eyes to the many different paradigms within my historical interests. To my history advisor on this topic, Doug Monroy, thank you for enabling me to pursue this endeavor and for your insightful feedback. Thanks are in order to my wonderful friends at Colorado College for always willing to listen to my political and historical rants, and for your incredible support throughout these years. Finally, to my parents and family—I cannot thank you enough for making my education at Colorado College possible and for your love and compassion that allowed me to find success here.

The purpose of this paper is to examine partisan gerrymandering and malapportionment, two political phenomena that have impacted the representational structure within the United States significantly. This work provides a history of the two issues across U.S. history within a framework examining original intent with regards to American electoral law, and representational values. This paper simultaneously utilizes both a macro and micro approach to engage with the history behind the text of American representational values and of partisan gerrymandering and malapportionment. It demonstrates how original intent with American electoral law and representational values has consistently been disregarded and exploited across U.S. history and then argues that the federal government has a compelling interest to implement affirmative action for the American voter under the authority of the First Amendment to ensure its legitimacy as a representative democracy within a republican framework.

Worthy of a Mention

In his 2016 State of the Union Address President Barack Obama implored the American people and its politicians to bring about a new era of American politics—a politics buoyed by widespread civic engagement and rational, constructive debates conducted amongst American politicians. In calling for a new type of politics the President outlined a series of reforms he believed could improve the health of American democracy. One reform within the President's proposals called for an end to the partisan gerrymandering[1] of congressional districts throughout the country—"I think we've got to end the practice of drawing our congressional districts so that politicians can pick their voters, and not the other way around. Let a bipartisan group do it."[2]

Partisan gerrymandering and malapportionment[3] are political phenomena within the United States that appear, on the surface, contrary to American representational values. The U.S., the normative argument goes, is a representative democracy within a republican framework

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[1] Gerrymandering in this paper is defined as the process of drawing U.S. House districts so as to protect incumbents, achieve party gains in Congress, guarantee minority representation, or ensure communities of interest are kept intact within contiguous districts. A common critique of modern gerrymandering practices mentioned by President Obama is that district drawers utilize voting data to choose the voters for the politicians in order to protect party control or incumbent Members of Congress.

[2] Obama, Barack. "Remarks of President Barack Obama: State of the Union Address as Delivered." The White House. Accessed March, 2016.

[3] Apportionment in this paper is defined as the process of reallocating U.S. House seats among the various states in accordance with population changes recorded after the decennial census is taken. Malapportionment is defined as stacking some congressional districts with larger populations than others within a state, a practice that was ended in the 1960's during what is known as the Reapportionment Revolution.

supported by free and frequent elections; and yet, the process of drawing congressional district lines and creating inequitably populated districts for the purpose of political retribution and preservation appear to undermine the very democratic tradition Americans take pride in. The consequences of modern gerrymandering practices almost exclusively impact the partisan composition of districts and thus, the competitiveness of U.S. House elections—of the 435[4] seats in the U.S. House only 18 are considered 'toss-ups' (significantly competitive) with regards to the anticipated outcome for the 2016 elections.[5] There is considerable evidence indicating that the polarization of American politics is currently at an all-time high, and yet elections for the U.S. House, the most democratic institution within the federal government, appear to be predetermined because of the partisan gerrymandering of congressional districts.[6]

Given the relevance of partisan gerrymandering in contemporary American politics, the primary historical question driving this paper is: what is the history of partisan gerrymandering, malapportionment, and founding American representational values? In other words, to what extent has a practice credited with the diminished competitiveness of contemporary U.S. House elections been utilized throughout American history, and how have acts of partisan gerrymandering and malapportionment aligned with the original intent of the framers with regards to American representation? It is the goal of this paper that a thorough inquiry into these historical questions will provide insight into the current political atmosphere of American representation and provide validity to the presented criteria that would remove partisan gerrymandering from American politics.

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[4] Non-voting members of the U.S. House, such as those Members from the Virgin Islands and Puerto Rico, are not addressed in the analysis of this paper.
[5] The Cook Political Report. "2016 House Race Ratings for April 8, 2016." 2016. http://cookpolitical.com/house/charts/race-ratings.
[6] Doherty, Carroll. "7 Things to Know about Polarization in America." Pew Research Center 2016. http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/

To answer this paper's primary historical question I have employed a method of historiography utilized by Fernand Braudel and recently revised by Jo Guldi and David Armitage, respectively. It is a method of historiography that, in Braudel's words, moves between "two poles of time, the instant and the *longue durée,"* a "history of the long" supported throughout with micro-historical events.[7] In investigating the history of partisan gerrymandering, malapportionment, and founding American representational values I have sought, as suggested by Guldi and Armitage, "a fusion between the big and the small, the 'micro' and the 'macro', that harnesses the best archival work on the one hand and big-picture work about issues of common concern on the other."[8] I have interwoven a diverse set of "data"[9], or sources, both quantitative and qualitative—primary documents, statistical tests, government documents, court opinions, census data, visual representations of electoral trends, and a number of secondary sources—so that my presentation of these issues is interdisciplinary in nature and in accordance with Guldi and Armitage's revision of *longue durée*. In short, I have assembled a number of micro-historical events examining founding American representational values, partisan gerrymandering, and malapportionment so as to provide a macro-historical narrative that informs contemporary American political thought on a controversial issue.

Guldi and Armitage's revision of *longue durée* seeks to put forth a method of historiography "with a public mission;" a theory for historians to use in order to "write good, honest history that would shake citizens, policymakers, and the powerful out of their complacency."[10] I have attempted to portray these political phenomena in a manner consistent with Guldi and Armitage's new *longue durée*. However, because this paper's purpose is to present not only a

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[7] Braudel, Fernand. *On History*. Chicago: The University of Chicago Press, 1980, 27
[8] Guldi, Jo and David Armitage. "Big Questions, Big Data." Chap. 4, In *The History Manifesto*, 88: Cambridge University Press, 2014, 118.
[9] Ibid.
[10] Ibid., 123, 116.

work of U.S. political history, but also remedial criteria for the partisan gerrymandering issue, there is interpretive analysis within the macro-historical framework of the micro-historical events throughout the paper. The interpretations and analysis of the interwoven micro-historical events put forth, however, were realized only after an inductive approach to my research and should not threaten the integrity of the research compiled and presented below.

Ultimately my research revealed that partisan gerrymandering and malapportionment of congressional districts in the U.S. are not new phenomena within American politics, but rather practices that have occurred since the founding of the American republic. Partisan gerrymandering and malapportionment are both processes of political retribution and preservation, processes that have long been protected and defended under the guise of the Times, Places, and Manner Clause of the U.S. Constitution which states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Choosing Senators

On the surface the text of the Clause is clear and open ended—Congress and the legislative bodies of the various states have the explicit authority to regulate elections for the U.S. Congress. By many accounts the Times, Places, and Manners Clause has been a success: the American people are privileged with reliable transfers of power between former and new Members of Congress and participate in what are widely regarded as free and frequent elections. In addition, the Clause has also been successful in compelling participation amongst the states in the Congress as intended by Alexander Hamilton.[11] However, the seemingly absolute power granted to Congress and state legislatures to regulate congressional elections has led to a number of egregious practices, among them poll taxes, literacy tests, property requirements for voting, the

[11] Hamilton, Alexander. Hamilton, Alexander, John Jay, and James Madison. "The Complete Federalist Papers." Primary Document, The Federalist Papers Project, 271.

disenfranchisement of both women and minority American citizens, and yes, the partisan gerrymandering and malapportionment of U.S. House districts.

An historical analysis of founding American representational principles also revealed that partisan gerrymandering and malapportionment practices are political phenomena contrary to the expectations of the American political experiment as envisioned by the framers—a system where citizens of the United States would practice representative democracy and self-governance through accountable democratic institutions. As Charles Bullock asserts in *Redistricting: The Most Political Activity in America*, "elections are essential to the legitimacy of any democracy."[12] The framers of the Constitution shared Bullock's sentiment: they were clear in their intent to devise a system where impartial elections, immune from corrupt partisan influences, would occur on a regular basis. Accountability was an essential component of representative democracy from the framer's perspective—the legitimacy of the U.S. Congress to govern depended on its unhindered accountability to the American people.

While malapportionment of congressional districts is now illegal because of the Reapportionment Revolution of the 1960s, gerrymandering techniques promoting partisan gains and incumbent protection still persist because of the inadequacy of the Equal Protection Clause in cases before the U.S. Supreme Court. Some legal scholars, however, such as David Shultz and Supreme Court Justices Kennedy and Stevens have argued a First Amendment approach is more appropriate for partisan gerrymandering cases. This paper agrees with David Shultz' premise that partisan gerrymandering is a clear violation of the free speech and association clauses of the First Amendment to the Constitution.[13] By manipulating the boundaries of congressional districts to

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[12] Bullock, S. Charles. *Redistricting: The most Political Activity in America*. United Kingdom: Rowman & Littlefield Publishers, Inc., 2010, 2.

[13] See Shultz, David. "The Party's Over: Partisan Gerrymandering and the First Amendment." *Capital Law Review* 36, (2007): 1.

make the votes of some more valuable than others in order to maintain and extend power, mapmakers throughout U.S. history have stifled the First Amendment rights of the American voter. For a number of reasons that will be illustrated later on in this paper, Shultz calls for neutrality in political affiliations when drawing congressional districts; I argue instead that political affiliations absolutely be taken into account when drawing congressional districts so as to maximize electoral competition. Many democratic theorists agree with the notion that competition is an essential component to a functioning democracy; electoral competition creates a marketplace of ideas necessary for the development of sound public policy, compels the engagement of a greater number of voters in the democratic process, and ensures the highest levels of accountability are in place.[14]

The pervasiveness of partisan gerrymandering and malapportionment throughout U.S. history compels the need for what will be termed affirmative action for the American voter. The state and federal governments of the United States have a compelling interest under the First Amendment to right the wrongs of the past and ensure its citizens have the greatest possibility to hold its elected officials accountable by maximizing electoral competition. The technicalities and logistics of maximizing electoral competition in U.S. House districts could not be addressed with a one-size-fits-all approach from the federal judiciary; however, it can put forth reasonable standards, all of which except are currently engrained in redistricting processes except criteria 3, that would achieve this goal:

1) Equitable Populations Across Congressional Districts—The one person, one vote doctrine is essential for adhering to original intent in representational values.
2) Contiguity in Districts—It would be unreasonable to create districts that are not contiguous from both a representative and constituent's perspective; representatives ought to have clarity in where their districts stretch and constituent's should not be

[14] See McDonald, Michael and John Samples, eds. *The Marketplace of Democracy: Electoral Competition and American Politics*. Baltimore, MD: Brookings Institution Press, 2006.

divided up across various areas of a state for that defies the ideals of maintaining communities of interests.

3) Compliance with the Voting Rights Act of 1965—Minority-majority districts ought to exist for the purpose of ensuring historically marginalized groups in the U.S. receive an equal chance at electing candidates of their choice. Because minority voters tend to vote overwhelmingly for the Democratic Party, it might be worth examining if these districts should be drawn with a plurality of minority Democratic voters, as opposed to a majority, so that Democratic votes across these states are not unconstitutionally, from a First Amendment perspective, diluted. In light of *Shelby County v. Holder (2013)*, mapmaker's adherence to the preservation of these districts is more important now than ever before.
4) Flexibility in Maintaining Communities of Interest and Compactness—Map drawers should avoid elaborate district shapes when possible so that constituents can easily know who their representatives are, and so that various localities with commonalities are not arbitrarily split without proper cause, such as adherence to any of these any other criteria.
5) Maximize Electoral Competition as Practically as Possible—Map drawers should consult relevant voting data in order to determine the partisan compilation of a given area and draw contiguous, equally populated districts that attempt to fall between a Cook Partisan Voting Index (PVI) Rating of R+3 and D+3 so as to ensure each party has an reasonable chance of winning an election through.[15] Maximizing electoral competition as practically as possible ensures that the American voter's First Amendment right of political association and speech is not infringed upon.

It might seem paradoxical and even egregious to some that a government would proactively attempt to instill competitiveness in elections for its own officials. However, in light of centuries old practices that have systematically imbedded inequality in American representation, it is a necessary step to ensure the legitimacy and longevity of the American republic. Much like many laws have been crafted to remedy the wrongs of the past towards historically marginalized populaces, American officials ought to implement affirmative action for American voters in order to alleviate systemic inequality in American representation and bring about legitimacy through accountability as envisioned by the framers and the intent of the law.

This paper begins with an examination of the framework of American electoral law through an originalist lens by investigating the historical context and meaning behind the text of Article 1

[15] District ratings throughout this paper are derived from the Cook Political Report. As indicated by the Report, a district's Partisan Voting Index (PVI) is determined how a district votes in a presidential election compared to the nation as a whole. A district with a PVI score of D+6 indicates that the district voted 6 percentage points higher for the Democratic presidential candidate than the nation as a whole.

of the Constitution at the time of the American founding. The first section of this paper analyze the founding principles of American representation through the historical context of the causes of the American War for Independence, the debates between the framers over American electoral law and representational values, and the defenses and critiques of the Constitution that ultimately determined the manner in which it was implemented and interpreted. It then continues with an historical investigation into the constitutional roots of partisan gerrymandering, chiefly the Times, Places, and Manners Clause, as well as the thoughts of James Madison concerning the ability of democratic institutions to determine the rules for the selection of its members. As will be illustrated, the sentiments held by Madison were contradictory and seem to undermine the manner in which the authority granted in the Times, Places, and Manners Clause of the Constitution has been utilized.

Having established an originalist lens with regards to founding American representational values and electoral law, this paper then begins an investigation into the prevalence of partisan gerrymandering and malapportionment throughout U.S. History. The investigation of these political phenomena is portrayed and analyzed through the originalist understanding of American representational values and electoral law established earlier in the paper. Thus, the second section of this paper analyzes the structural nature and results of early U.S. House elections and presents statistical data measuring partisan bias and electoral responsiveness of various congressional district maps.[16] It continues with an examination of the political climate surrounding the passage of the Reapportionment Act of 1842. While the Act represented an

[16] Electoral responsiveness, otherwise known as the swing-ratio, is defined as the percentage change of a party's seat share given a one percent change in an aggregate vote share; partisan bias is defined as the difference between a party's expected seat share with 50 percent of the aggregate vote and the party's fair share of seats at 50 percent of the aggregate vote, or "half the seats for half the vote." See Engstrom, J. Erik. *Partisan Gerrymandering and the Construction of American Democracy*. U.SA: University of Michigan, 2013, 29.

instance of reform by eliminating various policies that perpetuated inequality in representation, the motives behind its passage were chiefly partisan and did not alleviate the effects of partisan gerrymandering and malapportionment on elections for the U.S. House.

The third section of this paper examines U.S. House elections between 1840 and 1900; this era was characterized by high competition, high rates of gerrymandering, and the prominence of political parties across the U.S. The fourth section then demonstrates how a number of variables caused a substantial reduction in the rates of gerrymandering at the turn of the century up through the Reapportionment Revolution of the 1960s. The section next analyzes the first involvement of the U.S. Supreme Court into partisan gerrymandering and malapportionment issues in *Smiley v. Holm (1932)*, *Wood v. Broom (1932)*, and *Colegrove v. Green (1946)*. For a number of reasons that will be demonstrated, the Court refused to provide any legal remedy or relief to the inequalities perpetuated by partisan gerrymandering and malapportionment of congressional districts.

The section of this paper examines the legal foundations of the Reapportionment Revolution spearheaded by the Warren Court. It illustrates the consequences of the 'one-person, one-vote doctrine', which effectively eliminated malapportionment amongst congressional districts, as well as the Court's refusal to strike down partisan gerrymandered maps on the Equal Protection Clause in *Bandemer v. Davis (1986)* and *Vieth v. Jubelirer (2004)*. While both *Bandemer* and *Vieth* were defeats for advocates for redistricting reform, Justices Kennedy and Stevens both insinuated on separate occasions that partisan gerrymandering might be found unconstitutional under the First Amendment. The paper then examines conflicting political science literature surrounding gerrymandering, modern gerrymandering practices, and then expands upon the five redistricting criteria presented earlier, most notably the criteria mandating affirmative action for

American voters.

Founding Principles of American Representation

The Constitution of the United States is in many ways a reactionary document in response to the injustices imposed upon the American colonists by the British Crown and Parliament. Take for instance the Bill of Rights—the Second Amendment in response to the seizure of American gunpowder and arms by British forces; the Fourth Amendment in response to the impunity by which British officials could stop and search anyone at any time; the Fifth Amendment in an attempt to instill a more fair and equitable justice system for American citizens. Even beyond the Bill of Rights one can find within the Constitution numerous clauses of reactionary language that stem from an unjust British government, especially on the subject of American representation.

Under British rule the American colonists, from their perspective, were subject to inadequate representation and that inadequacy in representation compelled many Americans to rise up in arms against the Crown. In the years leading up to the American War for Independence the British crown sought to alleviate the anger of the American colonies by claiming that they were virtually represented in the British Parliament.[17] Yet, for many American colonists the notion that the House of Commons defended and promoted their interests through virtual representation was enraging—American colonists elected no official to parliament and the royal governors placed into power by the Crown seemed to promote the interests of the British Empire, not the American people. Soon the well-known mantra "no taxation without representation" became a rallying cry for the American colonists.[18] Furthermore, as Edmund Burke noted in 1770 the relation between the House of Commons and the People had deteriorated. Instead of employing

[17] McElroy, Robert McNutt. 1919. "The Representative Idea and the American Revolution". *Proceedings of the New York State Historical Association*17. New York State Historical Association: 44–55. http://www.jstor.org/stable/42890070, 51-54.
[18] Ibid, 54.

"a vigilant and jealous eye over executor and judicial magistracy; an anxious care of public money; an openness, approaching towards facility, to public complaint" the House of Commons had appeased the Crown in the face of discontent, condoned irresponsible fiscal matters, and punished the People without investigating wrongdoings against the People.[19] The foundations of American representation rest on the idea that their representatives ought to serve "as a control for the people" rather than "a control upon the people."[20]

The House of Commons held little legitimacy in the eyes of many American colonists and their independence from Great Britain called for the implementation of a reformed system of representation. John Locke's *Two Treatises of Government* outlined representation of the People in a legislative body as a form of contract between the Executive and the People. Locke asserted that it was "the interest, as well as intention of the People, to have a fair and equal Representative; whoever brings it nearest to that, is an undoubted Friend, to, and Establisher of the Government, and cannot miss the Consent and Approbation of the Community."[21] Locke believed that fairness and equality in representation leads to consent of the governed, a condition that John Adams, an American patriot, believed was lacking in the American colonies in 1776.

In his *Thoughts on Government* John Adams professed that the best form of government and end of any government ought to "communicate ease, comfort, security, or in one word happiness to the greatest number of persons."[22] To achieve stability and comfort amongst the people at large Adams utilized the philosophy of John Locke and other Enlightenment thinkers to advocate for a republican form of government; a government devised and centered on laws and not the

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[19] Burke, Edmund. "Thoughts on the Cause of the Present Discontents." Primary Document, The University of Chicago. 1770
[20] Ibid.
[21] Locke, John. "Second Treatise." Primary Document, The University of Chicago Press, Chicago. 1689
[22] Adams, John. "Thoughts on Governent." Primary Document, The University of Chicago Press, Chicago.

personality of one or a few.[23] Taking into account the immense size of both the American population and territories Adams believed it inconceivable for the people as a whole to make their laws and that it would be most wise "to depute power from the many, to a few of the most wise and good."[24] Thus, representative democracy in a republican form of government would foster the implementation of laws intended to serve the interests and needs of the country as a whole. The view that a new American government ought to ensure fair and equal representation was shared by Adams, Hamilton, Madison and other Federalists as well as the Anti-Federalists who noted in *Republicus* in 1788 that the Constitution ought to "provide for a fair and equal representation."[25]

Despite the difficulties in constructing a democratic institution for the purpose of providing fair and equal representation, as demonstrated by the debates at the 1787 Constitutional Convention and debates thereafter, there were commonalities between the two factions concerning the principles of American representation. Take for instance the Anti-Federalist who wrote under the pseudonym 'Federal Farmer'; in his seventh publication Federal Farmer declared "fair and equal representation is that in which the interests, feelings, opinions and views of the people are collected, in such manner as they would be were the people all assembled."[26] Federal Farmer's principles on representation seem to differ little with Madison's declaration that the representative body ought to "have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people.[27]"

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[23] See Massachusetts State Constitution Article XXX
[24] Adams, 1776
[25] "Republicus." Primary Document, The University of Chicago Press, Chicago. 1788
[26] Farmer, Federal. "No. 7." Primary Document, The University of Chicago Press, Chicago. 1787
[27] Hamilton, Alexander, John Jay, and James Madison. "The Complete Federalist Papers." Primary Document, The Federalist Papers Project, 243.

Representative democracy in the U.S. would, in effect, "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country."[28] The governing legitimacy of the future representatives, however, would only be achieved with the presence of frequent and fair elections that would hold them accountable to the people. Adams himself saw it of great importance "to prevent unfair, partial, and corrupt elections" because the legitimacy of the body depended on it.[29] Frequent elections were necessary because, as James Madison noted in the Federalists Papers, that where "no man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate."[30] In short, elections for representatives of the House would serve to propel leaders who could be trusted to pursue the common good of the nation, possess the most wisdom on policy matters, and behave so as to achieve the approval of their constituents and, consequentially, reelection.[31] When representatives should fall short of these ideals the next election cycle would serve as an opportunity for the people to hold them accountable and replace them with a candidate more in aligned with their interests.

In accordance with the views of the framers on the necessity of frequent and fair elections, the U.S. Constitution mandates in Article 1, Section 2 that the people of the several states choose representatives for the U.S. House every two years. Mandating biennial elections for the U.S. House is significant because absent a constitutional amendment, an arduous task, Congress alone cannot change the periods for its elections by the American people. The fallacies of the British Parliament again appear to have influenced the framers with the mandate of elections every two

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[28] Hamilton, Jay, Madison, 55.
[29] Adams 1776
[30] Hamilton, Jay, Madison, 247.
[31] See Thompson, F. Dennis. *Just Elections: Creating a Fair Electoral Process in the United States*. Chicago: University of Chicago Press, 2002.

years. As Madison noted in Federalist No. 53, Parliament "on several occasions, changed the period of election; and, on the last occasion, not only introduced septennial in place of triennial elections, but by the same act, continued themselves in place four years beyond the term for which they were elected by the people."[32] The intent of codifying election periods into national law is clear: to prevent those from power dictating who will stay in power or from conveniently passing a simple act to extend their terms and reducing their dependency on the people. As Adams noted, frequent elections will teach the representatives "the great political virtues of humility, patience, and moderation, without which every man in power becomes a ravenous beast of prey."[33]

The foundations of American representative democracy are in many ways a direct reaction to the fallacies of the representation they received under British rule. As indicated by the debates surrounding the ratification of the Constitution, the framers understood the desire of the American people to have their interests directly represented on the national level in the new federal government: generally speaking the American colonists leading up to the War "had all come to the same view of the meaning of representative government, and were determined never to relinquish the right to be taxed by their own representatives alone."[34] The U.S. House, with its biennial direct elections would adequately serve that purpose. Biennial elections codified into law would ensure accountability of the representatives to the people and the legitimacy of the body as a whole to govern the nation. It was of paramount importance to the framers, however, that the elections for the U.S. House be free of partiality and corruption, for that would diminish the legitimacy of the body. Thus, American representational values are founded in free and

[32] Hamilton, Jay, Madison, 247.
[33] Adams, 1776
[34] McElroy, 50.

frequent elections for if those two qualities were absent, the American republic would lose its legitimacy to govern for lack of accountability.

The legal framework for the regulation of American elections to Congress are found in Article 1, Section 4, Clause 1 of the U.S. Constitution which states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Choosing Senators

Taking into account the grievances put forth by the framers of the Constitution towards the British Parliament, such as Parliament's frequent change in the scheduling of its own elections, it would seem counterintuitive that the Constitution grants Congress supreme power to regulate congressional elections. Granted, the Constitution does mandate biennial elections earlier on in Article 1 Section 2. However, the many logistical issues arising from elections would also seem to compel state autonomy to regulate congressional elections. The Clause is also vague in its language and considering the innumerable conflicts over American election law that have arisen since the founding era, one would think that the framers would have addressed election law in a more deliberative manner. The Times, Places, and Manner Clause of the Constitution, it turns out, is a mechanism of self-preservation for the new Congress and a measure intended to promote equality in representation. In addition, it is also a gesture of respect for states' rights that arose from the framer's recognition of the infeasibility of a clause that would "have been always applicable to every probably change in the situation of the country."[35]

The power granted to Congress to regulate elections in the clause at hand was in part intended to ensure the states' commitment to providing representatives in the new Congress. According to Hamilton, without congressional authority to intervene in a states' election procedures the states "could at any moment annihilate it, by neglecting to provide for the choice

[35] Hamilton, Jay, Madison, 270.

of person to administer its affairs."[36] Taking into account the lackluster and dysfunctional nature of the Confederation Congress, as well as the ardent opposition to the new constitution put forth by the Anti-Federalists, Hamilton's concerns were not unfounded. Madison also rebutted critics of the Clause at the Federal Convention who accused the clause of unjustly empowering the federal government over the power of the states. His reasoning followed Hamilton's sentiments on preserving the new government: "the necessity of a general government supposes that the state legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices."[37]

Madison's defense of the Clause also invoked equality in representation and indicated a need for dividing states into districts so that representatives would have an intimate knowledge of their constituents. At the Virginia ratifying convention, Madison believed that the federal government ought to have the final power in regulating elections because "some states might regulate the elections on the principles of equality, and others might regulate them otherwise."[38] He believed that the regulation of elections in the United States ought to be "uniform throughout the continent" so that situations like that of South Carolina's at the time (where Charleston was disproportionality represented in the state legislator relative to the rest of the state owing to malapportionment practices) could be avoided across the nation.[39] On the issue of districts, he suggested dividing "the largest State [sic] into ten or twelve districts" so that representatives could legitimately tax their constituents.[40] Further indicating his intent for representatives to be elected through districts, Madison proclaimed in Federalist No. 57 that "each representative of

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[36] Hamilton, Jay, Madison, 271.
[37] Madison. "Records of the Federal Convention, August 9th." Primary Document, The Universty of Chicago Press, Chicago.
[38] Madison, James. "Debate in Virginia Ratifying Convention, 14 June." Primary Document, The University of Chicago Press, Chicago.
[39] Ibid.
[40] Hamilton, Jay, Madison, 258.

the United States will be elected by five or six thousand citizens."[41] Finally, Madison feared the various state legislatures would manipulate electoral law to propel candidates of their choice and infringe upon the suffrage rights of the people— "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould [sic] their regulations as to favor the candidates they wished to succeed."[42]

Whereas the Federalists believed granting sole power to the states to regulate congressional elections would inherently lead to inequitable representation, they believed the bicameral nature of Congress would prevent Congress from following suit. Responding to critics of the Clause at the Virginia ratifying convention who claimed Congress would hold elections at inconvenient times and places, Mr. Nicholas asserted: "This alteration, so much apprehended, must be made by law…with the concurrence of both branches of the legislature. Will the House of Representatives, the members of which are chosen only for two years, and who depend on the people for their reelection [sic], agree to such an alteration? It is unreasonable to suppose it."[43] Mandated biennial elections, in addition to the difficult task of gaining passage in both chambers, ensured that Congress could be held accountable if they unjustly altered states' electoral law.

While the Anti-Federalists were aghast with the powers enumerated in the federal government for regulating elections, Madison, Hamilton, and other Federalists believed the provision to be a gesture of respect towards the states' to manage their own affairs that also ensured the preservation of the federal government. As Madison noted at the Virginia ratifying convention:

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[41] Hamilton, Jay, Madison, 263.
[42] Madison. "Records of the Federal Convention, August 9th." Primary Document, The Universty of Chicago Press, Chicago.
[43] Nicholas. "Debate in Virginia Ratifying Convention, 14 June." Primary Document, The University of Chicago Press, Chicago.

> It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity and to prevent its own dissolution…considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter.[44]

The framers were indeed federalists: they believed in the potential for state governments to operate with autonomy effectively to guarantee equal representation of the American people at the national level. The task of regulating local election issues is not the task of a far off federal government and is contrary to federalist values. As Hamilton proclaimed in Federalist No. 59, "suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and, as a premeditated engine for the destruction of state governments?"[45]

The Times, Places, and Manner Clause of the Constitution was therefore an attempt at a compromise between the needs of the federal and state governments. Should the power to regulate elections be solely given to the state governments, the Union might very well have dissolved for lack of participation. If the power were solely given to the federal government, members of Congress might have exploited their authority to elect members of their choosing and to disenfranchise the American people on a massive scale. The Clause is yet another example of the framer's ability to compromise the seemingly competing needs of the federal and state governments, as well as recognition of the fragile nature by which the document was agreed to at the Federal Convention. Had regulatory authority been granted solely to the federal government the Southern states would have objected out of fear their peculiar institution

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[44] Madison, James. "Debate in Virginia Ratifying Convention, 14 June." Primary Document, The University of Chicago Press, Chicago.
[45] Hamilton, Jay, Madison P. 271

(slavery) would somehow be threatened. Ultimately, the faith placed in both the state and federal governments to ensure equal and fair representation in the U.S. House with a system of checks and balances was ill-conceived because, as Madison famously proclaimed in Federalist No. 10, "the latent causes of faction are thus sown in the nature of man," have "divided mankind into parties," and have historically served to perpetuate their own electoral interests at the expense of the people's representation.[46]

In defending the new federal constitution, Madison, Hamilton, and other Federalists were clearly optimists. They trusted their framework for representative democracy would succeed and be reformed when needed. On many occasions they have been correct—the United States Constitution has been amended twenty seven times with provisions widely considered to have bettered the political culture of the American Republic. Regardless, the Times, Places, and Manner Clause of the Constitution proved problematic for the legitimacy of American democracy immediately upon ratification.

Despite his ardent defense of the framework for regulating congressional elections, the potential repercussions stemming from the ambiguity and shared powers of the Clause were of concern to Madison. In discussing the general powers and privileges of representatives, Madison trusted their intent so long as the issue at hand is one in which they share a common entity with those they represent; a representative's behavior becomes problematic, however, when they "have a personal interest distinct from that of their constituents," such as preservation of office or power.[47] Legislative behavior of a representative that is distinct from the interests of her constituents is contrary to American representational values and is what Dennis Thompson defines as the Madison Proviso: "no democratic institution should have the final authority to

[46] Hamilton, Jay, Madison, 53.
[47] Thompson, 133.

determine the rules or settle the disputes about its own membership."[48] Thompson clarifies the Proviso: "when representatives decide questions that affect their own status or that of their party, they will tend to preserve the privileges and more generally perpetuate the practices of the institution" regardless of their constituent's interests.[49]

Madison's understanding of the tendency of those in power to perpetuate their own fate was paradoxical. On the one hand Madison entrusted the shared powers between the states and the federal government to prevent corrupt practices that diminish accountability, while on the other he condemned the practices of the British Parliament and feared the possibility of the American representatives to follow suit.

Others were not as compromising as Madison on the Times, Places, and Manner clause of the Constitution. Writing under the pseudonym Brutus in 1787, an Anti-Federalist decried the dangers of the clause in blistering fashion. The clause's enumerated powers would transfer the power of representation from the people to their rulers; the powers in control would fail to create equally sized districts; the federal government may dictate places for elections so as to disenfranchise many Americans; the cities would be better represented than the rural areas of the United States; and finally, the clause fails to direct a clear and deliberative procedure for U.S. House elections to ensure the representatives elected are the clear choice of the American people.[50]

Brutus' critiques of the clause stemmed predominately out of fear for the powers enumerated to the federal government, not the state governments. Regardless, his predictions proved correct on many accounts, though largely due to the actions of state governments. Some attempts were made to instill clarity into the Clause such as Mr. Smith's amendment at the New York ratifying

[48] Thompson, 134.
[49] Ibid.
[50] Brutus. "No. 4." Primary Document, The University of Chicago Press, Chicago.

convention which stated: “and that each state shall be divided into as many districts as the representatives it is entitled to, and that each representative shall be chosen by a majority of votes.”[51] Ultimately, Mr. Smith and other’s attempts at clarity were defeated because of the fragile compromises holding the Constitution together.

The refusal of the framers to devise a more deliberate and instructive manner for the development of American election law proved to imbed systemic inequality in elections for the U.S. House of Representatives. Voters were disenfranchised through elaborately drawn districts or general-ticket schemes, some areas or parties received more proportionate representation than others, and as a result, the seemingly most accountable democratic institution of the American Congress has been characterized by periods of corrupt electoral regulations and lack of accountability that run afoul of the framer’s original intent.

Inequality in Early U.S. House Elections

The current electoral structure that Americans currently enjoy, while marked with widespread gerrymandering practices, hardly resembles the electoral mechanisms of the infant American republic. The concepts of one person, one vote, minority and women voting rights, single-member districts, and the concern for communities of interest have taken centuries to develop, refine, and be implemented. As will be demonstrated, the impacts of partisanship on American representation were apparent and widespread from the onset of ratification. A common critique of modern gerrymandering practices is that the politicians choose their voters instead of the voters choosing their politicians; with regards to the early years of the American republic, it is revealed that many politicians did not choose their voters, or the voters their

[51] Smith, Mr. "Debate in New York Ratifying Convention, June 26." Primary Document, The University of Chicago Press, Chicago.

politicians, but rather that many politicians in power simply ensured their outright electoral security.

As has been noted, the Constitution granted the states power over American electoral law with the possibility for Congress to intervene if it should so choose; the Constitution did not mention districts, the explicit voting rights of the American people, or the rights of urban constituencies in contrast to rural constituencies. As a result, many states adopted the general ticket option for election to the U.S. House of Representatives. As Erik Engstrom illustrates in his *Partisan Gerrymandering and the Construction of American Democracy*, five states utilized a general ticket electoral scheme for the election of their representatives to the U.S. House for the First U.S. Congress.[52] Voters in those states are given a fixed number of votes to cast for the candidates of their choice; for example, voters in a state apportioned eight U.S. House seats would have eight votes to cast amongst a list of candidates on a single ballot.

The results of general ticket elections for representatives, from an original intent perspective, are inherently totalitarian. As Engstrom notes, the winners of candidates from states that utilized general ticket electoral schemes "were the top *M* voter-getters, where *M* was the number of seats to fill;" as a result, the party or faction who received 50 percent or more of the aggregate vote could expect to win all of the seats available.[53] A simple example of an election utilizing a general ticket scheme is depicted below in Table 1 in which a state has 100,000 voters and six seats in the U.S. House:

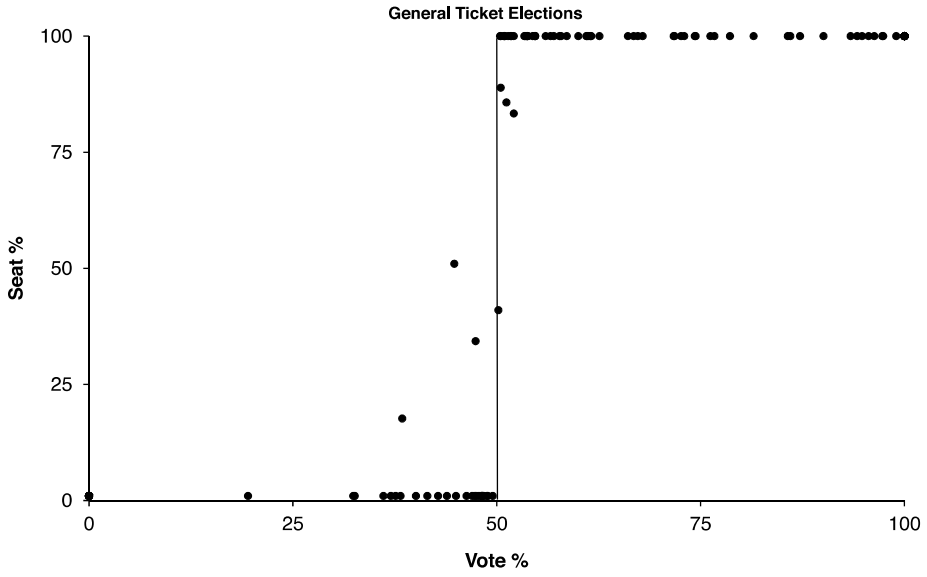
[52] Engstrom, 22.
[53] Ibid., 23.

Table 1: Hypothetical General Ticket Scheme with 100,000 Voters, 2 Parties, and 6 Potential Seats

Candidate 1 (Federalist): 53,000	**Candidate 7 (Federalist): 53,000**
Candidate 2 (Republican): 47,000	**Candidate 8 (Republican): 47,000**
Candidate 3: (Federalist): 53,000	**Candidate 9 (Federalist): 53,000**
Candidate 4 (Republican): 47,000	**Candidate 10 (Republican): 47,000**
Candidate 5 (Federalist): 53,000	**Candidate 11 (Federalist): 53,000**
Candidate 6 (Republican): 47,000	**Candidate 12 (Republican): 47,000**

The electoral scenario portrayed in Table 1 is simplistic in the sense that it only involves 100,000 voters and two parties, and it assumes that each voter votes a straight party ticket, but the implications are clear. If Table 1 were a real scenario, the Federalists would have won all six seats despite the fact that they garnered only 53 percent of the vote. Again, as depicted below in Figure 3 the hypothetical premise of general ticket elections was not far from reality as those parties garnering 50 percent or more of the votes in a given election between 1800-1840 won, with four exception, 100 percent of the states' seats to the U.S. House:

Figure 1: Vote-Seat Distributions under General Ticket Electoral Systems 1800-1840[54]



[54] Engstrom, 26.

As Figure 1 highlights, a state could be considerably divided on an aggregate level in terms of partisanship or policy opinion and yet receive near homogenous representation at the national level. In general ticket elections, communities of interest were given little to no regard. Rather, voters in those states that utilized general ticket schemes experienced considerable inequality in their states' U.S. House elections as their expression of political speech was frequently suppressed by a mechanism that prevented their ability to elect a candidate of their choice.

The effects of a general ticket electoral scheme on the legitimacy of national representation for the American people were two fold, the first being voter dilution. As Howard Scarrow notes, the underlying characteristic of the general ticket electoral scheme is "that a spatially concentrated group of voters—economic groups, party supporters, racial and ethnic groups—may not be able to elect candidates of their choice because their votes are 'swamped', 'absorbed', 'submerged', or 'diluted'…by votes cast outside their area for competing candidates."[55] General ticket schemes fell out of the intentions put forth by the framers because they diminished the ability of various interests, constituencies, and yes, factions, to have an equal chance at representation at the national level.

The second effect of general ticket schemes is to diminish the opportunities for voters to of choose their own candidates. Within the context of a representative democracy such as the United States, candidate choice and unhindered political speech is essential to the legitimacy of a representative as a trustee for their constituent's interests. As Scarrow further notes, "in at-large elections the many candidates whose names appear on the ballot, several of whom a voter must choose, have been recruited from a wide geographical area and have been required to campaign

[55] Scarrow, A. Howard. "The Impact of at-Large Elections: Vote Dilution Or Choice Dilution?" *Electoral Studies* 18, no. 4 (1999): 557, 558.

over a wide area, and consequently are often complete strangers to most of the electorate."[56] Scarrow's point highlights a serious fallacy of general ticket schemes within the context of the framer's original intent with regards to American representational democracy; the framers believed it important for representatives to have an intimate knowledge of the interests of their constituents—recall Madison—and placed faith in the electoral process to ensure representatives were accountable in that task.

A nation as diverse as the American republic should have its diversity reflected in its national representation. However, states that utilized a general ticket scheme, as empirically shown in Table 2, often put forth an unfounded image of ideological homogeneity as general ticket schemes produced single party house delegations 95 percent of the time, compared to 27 percent for those states utilizing districts:

Table 2: The Incidence of Unified House Delegations, 1800-1840[57]

	Districts	General Ticket
Unified Delegation	74 (27.7%)	116 (95.1%)
Nonunified Delegation	193 (72.3%)	6 (4.9%)
Total	267	122

Source: Rusk 2001.
Note: Column percentages in parentheses.
$\chi^2 = 152.1$; $p < .01$.

The data from Table 2 demonstrates the overtly partisan and unequal experience of those American voters residing in a state utilizing general ticket schemes. States utilizing districts in the early American republic elected much more diverse congressional delegations and, as a result, acted in more accordance with the framer's intentions for the representation of the American people.

[56] Scarrow, 560.
[57] Engstrom, 25.

The benefits of districts in comparison to general ticket schemes in the context of U.S. House elections are numerous. As Scarrow notes, where districts are utilized "the competing candidates have been recruited locally and have been able to wage a locally focused campaign, perhaps even waging a door-to-door campaign."[58] For the framer's representational vision for the United States to be achieved, candidates for the U.S. House must have an intimate knowledge with the values and interests of their constituents, as noted repeatedly in the Federalist Papers and other documents from the founding era. In contrast to general ticket schemes, a state utilizing districts enables various populations and communities of interest to have their voices heard within the context of the electoral process. For example, when Republican forces in New Jersey succeeded in carving the state into districts for the 1798 congressional elections they won three of the states' five U.S. House seats after having won none in the previous election as a result of the general ticket scheme.[59] Of course, and as such is the chief focus of this paper, the process of dividing a state into districts was viewed through the perspective of a partisan lens from the beginning of the American republic. From the onset, district drawers in the state legislatures, acting under the authority of the Constitution, made "some votes worth more than others."[60]

Erik Engstrom's work is one of the few works of political history that has statistically examined the repercussions of partisan gerrymandering in early U.S. House elections. For this reason, Engstrom's work, which was compiled with the assistance of a number of databases, will be presented below in order to demonstrate the statistical ramifications of partisan gerrymandered districts in the early American republic. As with other statistical examinations of gerrymandering, Engstrom seeks to examine if parties in the state legislatures were utilizing

[58] Scarrow, 560.
[59] Engstrom, 27.
[60] Bullock, 2.

redistricting schemes for partisan advantage in U.S. House elections by measuring the partisan bias as well as electoral responsiveness of various districting plans.[61]

The results, when taking into account the fact that party forces in the state legislatures drew the districts, are not surprising. From 1802 to 1820, Republican districting plans held a partisan bias of 8.66, meaning with 50 percent of an aggregate vote share, Republicans would on average win 58.66 percent of the available seats.[62] The Federalist's plans produced a bias of 5.72, but were not found to be statistically significant due to the low number of Federalist plans.[63] The electoral responsiveness of Republican plans valued at 1.7; therefore, Republican drawn plans typically included a large number of safe Republican districts.[64] From 1820 to 1840, as Engstrom statistically demonstrates, the distorted and unequal nature of U.S. House elections as a result of partisan gerrymandering only increased. The Democratic Party in particular experienced widespread partisan advantages in U.S. House elections with a partisan bias of 17.92 and an electoral responsiveness value of less than one; in other words, as Engstrom says, "Democratic plans during this period produced very low levels of competition and substantial levels of bias."[65] Partially contributing to these statistical levels of bias was the prevalence of malapportionment amongst congressional districts; as Rosemarie Zagarri notes in her *Politics of Size*, in early U.S. House elections "the largest districts in Massachusetts, New York, and South Carolina…had twice as many people as the smallest districts in those states."[66]

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[61] Recall that electoral responsiveness, also known as the swing-ratio, is defined as the percentage change of a party's seat share given a one percent change in an aggregate vote share; partisan bias is defined as the difference between a party's expected seat share with 50 percent of the aggregate vote and the party's fair share of seats at 50 percent of the aggregate vote, or "half the seats for half the vote."

[62] Engstrom, 31.

[63] Ibid.

[64] Ibid.

[65] Ibid., 32.

[66] Zagarri, Rosemarie. *The Politics of Size: Representation in the United States, 1776-1850*. Ithaca: Cornell University Press, 1987, 121.

Low competition inherently creates an atmosphere of apathy for the other side of the aisle, as well as a lack of accountability for those voters unable to have their political speech fairly registered. Furthermore, and as will be demonstrated in a later section of this paper, redistricting maps devised through a political process in order to achieve partisan gains or electoral security are inherently an infringement of voter's First Amendment right of association as well as political speech.[67]

Despite their unequal nature as a result of gerrymandering and malapportionment, districting schemes aligned more with the original intent of the framer's because they provided representation for communities and like-minded groups that were often excluded from representational privileges under a general ticket scheme. Elections by districts were also praised by many across the U.S. as a 1790 article from the *Carlisle Gazette*, a Pennsylvania newspaper, illustrates after the state adopted a congressional district map: "Pennsylvania will never again suffer eight representatives to be elected out of a mere corner of the state."[68] Unfortunately for the author of the article, and Pennsylvania voters, Pennsylvania was reverted back to a general ticket scheme in 1792 as the incentives for political viability trumped representational principles.[69] Pennsylvania was not alone as New Jersey in 1800 and Alabama in 1841 also reverted back to general ticket schemes after utilizing district maps.[70] As Engstrom observes, it is clear, both statistically and anecdotally, "that state politicians, early on, realized the potential gains from the manipulation of electoral law."[71]

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[67] It should be noted that the First Amendment had not been incorporated into state law at this point in American history; not until the ratification of the Fourteenth Amendment and incorporation of the Equal Protection Clause into state law did the First Amendment of the Constitution apply to state law.
[68] Zagarii,. 113 FN 38.
[69] Engstrom, 27-28.
[70] Ibid.
[71] Ibid.

Thus, while less authoritarian than general ticket schemes in regards to imposing restrictions on a voter's ability to fairly choose a representative of their choice, redistricting plans still inherently produced inequality in the representation Americans received. Political parties and factions systemically locked down guaranteed victories for years on end and effectively disenfranchised many American voters from the onset of the American political experiment.

State politicians are only partially to blame with the institutionalization of systemic inequality in U.S. House elections and American representation. That the federal Constitution provides an avenue by which state politicians can implement self-interested electoral law and procedures is the clear fault of the framers of the Constitution. Indeed, Article 1, Section 4, Clause 1 of the Constitution does grant Congress explicit authority to govern the elections of members of Congress when they should see fit. Yet, Congress at first showed an unwillingness to substantially act on the issue of inequality in electoral mechanisms. As the examples of New Jersey, Pennsylvania and other states has demonstrated, inaction by Congress is not surprising—many in Congress were propelled to Congress as a result of these statistically partisan and unequal redistricting or general ticket schemes. Self-interest, a key aspect of human nature the framer's sought to control, became imbedded within the institution itself as a means of self-preservation. Though Madison and others involved with the ratification of the Constitution presumed that districts would be uniformly utilized across the country, those in power from the onset of the republic quickly realized "that the method used to elect congressmen would play a large part in determining who was ultimately elected."[72]

The Madison Proviso, which expressed fear for the dangers arising from democratic institutions inherently choosing their own members and preserving unjust acts of an institution, was inherently violated from the birth of the republic. In this regard, political parties and

[72] Zagarri, 107.

factions, serving as platforms for democratic representation, served to act as the institutions Madison was referring to. While Madison was inherently referring to individual legislatures, the quick development and evolution of political parties served to defy the Madison Proviso. Thus, the mechanisms for indirectly choosing the composition of a U.S. House delegation through the medium of partisan gerrymandering undertaken by the political parties of the time clearly violated Madison's and the framer's vision for a democratic institution accountable to the people through fair and impartial elections.

The first major instance of reform in American electoral law with regards to U.S. House elections was the Reapportionment Act of 1842, signed into law by President Tyler following the 1840 census. The Act had two major repercussions for elections to the U.S. House: a reduction in the overall size of the U.S. House of Representatives and, which is the primary focus of this section, a congressional mandate requiring all states apportioned more than one representative to hold their elections for their U.S. House delegation in single-member districts. The text of Section 2 of the Reapportionment Act of 1842 is outlined below:

> That in every case where a state is entitled to more than one representative, the number to which each state shell be entitled under this appointment shall be elected by districts composed of contiguous territory in equal number to the number of representatives to which said state may be entitled, no one district electing more than one representative[73]

Section 2 of the Reapportionment Act of 1842 represented a key step towards the accountability and equality measures envisioned by the framers, chiefly Madison who claimed at the ratifying convention that election law throughout the U.S. ought to be uniform in nature to promote equality in representation. With the elimination of general ticket schemes in 1842, Congress effectively eliminated a massive component of inequality in its elections and demonstrated a willingness to improve its own institutional legitimacy. However, with the Reapportionment Act

[73] Section 2 of the Reapportionment Act of 1842 in Engstrom, 47.

of 1842 Congress inadvertently placed the nation's political culture on a trajectory of rampant partisan gerrymandering and malapportionment of U.S. House districts.

On May 3, 1842, the U.S. House voted 101 to 99 to approve Section 2 of the Reapportionment Act of 1842. The issues of federalism and congressional precedent dominated the debate surrounding the Act; but in all reality the Act and its debates concerned party control of Congress and survival in an era of increasing partisanship. As Erik Engstrom notes, the 1840 national census revealed that Whig states would see a reduction in apportioned seats whereas Democratic states would see a gain in apportioned seats; in short, "single-member districts gave Whigs a greater chance of winning some seats in Democrats' general-ticket bastions" and to "minimize the potential loss of seats that the new apportionment promised."[74]

For the Whig Party, issues of constitutional intent and partisan survival were intertwined. As Engstrom illustrated, the Whigs could have reasonably anticipated losses in states favorable to them in the next election due to reapportionment of members and the fact that five of the seven states utilizing general ticket schemes had Democratic majorities in the state legislatures.[75] A federal statute mandating districts across the country would "provide Whigs a chance, in the strong Democratic general-ticket states, to win seats more commensurate with their vote share."[76]

Whig members could not have openly attest partisan motives in the debate surrounding the mandate for obvious reasons. They instead invoked constitutional authority and American representational values. For instance, Rep. Thomas Arnold, a Tennessee Whig, defended the districting statute by claiming "the majority should govern but the minority be heard," a clear

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[74] Engstrom, 43.

[75] Quitt, Martin H.. 2008. "Congressional (partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844". *Journal of the Early Republic* 28 (4). [University of Pennsylvania Press, Society for Historians of the Early American Republic]: 627–51. http://www.jstor.org/stable/40208137, 637.

[76] Engstrom, 48.

nod to Madison's thoughts on the representational rights of non-majority political subdivisions.[77] With regards to constitutional authority, many Whigs believed the text of the Times, Places, and Manner clause of the Constitution to be clear enough—Congress had the power to regulate the manner of elections when necessary and original intent indicated that the framers envisioned broad and uniform regulations of congressional elections from Congress. For those Democrats who criticized the Whigs for tampering with the states' election laws after nearly fifty years of inaction, George Summers, a Whig from Virginia, evoked a reformist approach to interpreting the constitution and claimed that members of Congress ought to examine "vices in the system that had not been foreseen but which the new requirement would remedy."[78] That Section 2 of the Reapportionment Act of 1842 was guised as a means of reform notwithstanding, the political atmosphere of the time clearly compelled the Whigs to pursue a uniform districting mandate across the country so as to preserve their political viability.

Democrats in Congress were not blind to the intentions of the Whigs. As an opposition party is rightfully entitled to do, many Democratic members outwardly accused the Whigs of partisan manipulation of the nation's election laws. The *Congressional Globe* described the views of Senator Lewis Linn, a Democrat from Missouri, as viewing the districting requirement as a "political aspect—a party one….He believed—and he chose to speak plainly—that the Whig party would derive a positive advantage from this particular clause of the bill."[79] Those Democrats uncomfortable with speaking directly to the political ramifications instead approached the districting issue as a matter of respect for federalism. Aaron Brown, a Democratic representative from Tennessee, explained the Democratic Party's opposition to the provision as "not because they were opposed to the districting plan, but because they were

[77] Representative Thomas Arnold in Quitt,. 638.
[78] George Summers Quitt, 642.
[79] *Congressional Globe* recount of Senator Lewis Linn in Engstrom, 49.

unwilling to see it enforced on the states by the strong arm of federal domination."[80] Furthermore, Walter Colquit, a Democrat from Gerogia, stated: "Congress could act if it pleased, but could not direct a state how to act."[81] Colquit's statement is inherently a nod to the compact theory heralded by many conservatives in the nation at the time, but also, and more importantly for this paper's purposes, an attempt at preserving the Democratic Party's power.

The Reapportionment Act of 1842 marked a notable instance of reform in the cause of ensuring equality in U.S. House elections. The Act eliminated the legality of general ticket schemes and consequentially aligned elections for the U.S. House, if only partially, in a way that adhered to the framer's original intent. While the Act was indeed a moment of institutional reform, it cannot be ignored that the forces compelling its signage into law were partisan and self-interested in nature. Hiding under the guise of reform the Whigs sought to preserve their electoral viability when faced with defeat at the polls in the next election cycle. In addition, in an era of increasing sectionalist conflict, it cannot be ignored that the Southern[82] region was slated to lose a net 14 seats in the U.S. House as a result of the reapportionment after the 1840 census.[83] The Southern delegation during the 27th Congress had a considerable number of both Whigs and Democrats; however, beyond party domination it can be drawn that sectionalist interest and concerns also played into the razor thin vote on the Act.[84]

The Reapportionment Act of 1842 symbolized reform on the surface and yet still violated the Madison Proviso that condemned acts effectively determining the membership and composition of the membership of legislative bodies. Furthermore, the Act did nothing to alleviate the

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[80] Rep. Aaron Brown in Martin H. Quitt, 637.
[81] Rep. Walter Colquit in Quitt, 639.
[82] Defined here as the collection of states where slavery was legal before the Civil War.
[83] Dubin, J. Michael. *United States Congressional Elections 1788-1797*. Jefferson, North Carolina; London: McFarland & Company Inc., Publishers, 1998, 3.
[84] Ibid., 126-131.

antidemocratic three-fifths of the Constitution that granted the Southern states political power on the backs of African American slaves. Finally, and as will be illustrated, the Act coincided with the rise of power of political parties in the U.S. and did little to remove the ability of politicians manipulating electoral law concerning U.S. House elections.

The Rise of the Importance of Political Parties and Intense Competition

As Peter Argersinger notes in his *Representation and Inequality in Late Nineteenth Century America*, American voters in the mid-to-late nineteenth century "closely identified with, viewed the world through, and were represented by parties."[85] An examination of relevant primary sources from this era reveals Argersinger's claim. Take, for example, an 1846 article from North Carolina's *The Weekly Raleigh Registrar* concerning redistricting across the state. The article's author writes almost exclusively in partisan fashion, claiming "it is an unquestionable truth that the Whigs had a popular majority in North Carolina at the very time the Democratic Legislature deprived them of their influence and power in the Congress…by the manner in which they arranged her counties into districts."[86] The entirety of the article is framed as a conflict between the Democratic Party and Whig Party, making no reference to specific candidates but rather the legislative bodies and parties as a whole.

An additional examination of an 1868 article titled "The Proposed Redistricting of the State for Congressional Purposes" from the *Newark Advocate*, an Ohio publication, only reaffirms Argersinger's notion; again, the entire article is framed as a conflict between the two major parties, Republicans and Democrats, and is effectively an ardent endorsement of the Democratic Party's proposed redistricting plan as "legitimate" and justified for the purpose of ensuring a

[85] Argersinger, H. Peter. *Representation and Inequality in Late Nineteenth-Century America*. New York: Cambridge University Press, 2012, 18.
[86] Watchman, Salisbury. "Re-Districting the State." *The Weekly Raleigh Registrar,* 1846.

"fair proportion of representation in Congress."[87] Elections for the U.S. House had become a fixation of party ideology and the powers thereof as a result of the "elaboration of party machinery and by the emergence of impressively high levels of internal party cohesion and interparty disagreement."[88] Thus, elections for the U.S. House in this era were highly partisan in nature and, as will be demonstrated, highly competitive as a result of a particular method of gerrymandering.

Among the number gerrymandering techniques there is a method known as the efficient gerrymander. An efficient gerrymander entails, as it often did in the nineteenth century, spreading like minded voters amongst as many congressional districts as possible so as to maximize the number of seats won while simultaneously packing the opposition party's voters into as few districts as possible.[89] An efficient gerrymander has the potential to maximize a party's share in a states' congressional delegation so long as they maintain unity among their share of the electorate. One such instance occurred in 1886 in Ohio where the redistricting map "enabled Republicans to elect most congressmen, with their average margin of victory a modest 7.8 percent, while "wasting" Democratic voters in a few landslide victories with average margins inflated to 24.2 percent."[90] Other instances of the efficient gerrymander being utilized include Maine from 1884 to 1892 where Republicans in the state legislature carved out five Republican districts and "completely shut out Democrats" from the congressional delegation throughout that era despite receiving on average only 55 percent of the statewide vote.[91]

A critical consequence of the efficient gerrymander utilized nationwide in mid to late nineteenth century was the prevalence of intense competition in U.S. House elections indicated

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[87] Unknown. "The Proposed Redistricting of the State for Congressional Purposes." *Newark Advocate,*1868.
[88] Michael Holt in Engstrom, 44.
[89] Engstrom, 103.
[90] Argersinger, 23.
[91] Engstrom, 103.

by high swing-ratio values. In Ohio's congressional elections from 1876 to 1890, statistical testing reveals a low partisan bias value of 0.3 percent in favor of the Republican Party but a swing-ratio value of 9, indicating the high probability of widespread turnovers in membership given a small change in aggregate vote percentages and thus, competitive elections.[92] For example, in 1880 Republicans won 15 of the states' 20 congressional seats and then lost 15 of 21 in the 1882 election as a result of the effects of an efficient gerrymander.[93] Ohio was not alone, on an aggregate level between 1840 and 1900 redistricting plans controlled by both major parties demonstrated a reduction in overall margin of victories, larger swing-ratios, and relatively low partisan bias levels as a result of the rampant use of the efficient gerrymander. For example, under Democratic districting plans Democratic candidates saw their margins of victory reduced on average by 1.8 percent; under Republican and Whig plans during this era, Democratic candidates saw their margins of victory increased 3.09 percent on average as a result of the packing involved in an efficient gerrymander.[94] Thus, elections for the U.S. House throughout this era were turbulent in nature owing to the competitive nature of many redistricting schemes. Indeed, 40 percent of all U.S. House elections in the late nineteenth century were decided by 5 percent or less.[95]

The means by which electoral map manipulators created such high swing ratios, as well as the examples of Maine from 1884 to 1892 and Ohio in 1886 where closely divided aggregate vote totals and high margins of victory for the losing party prevailed, require an explanation. The principle of one person, one vote, the contemporary jurisprudence dictating redistricting procedures, was effectively absent from U.S. House elections in the 19th century. Granted, the

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[92] Argersinger, 25-26.
[93] Compiled from Dubin, 261.
[94] Engstrom, 107.
[95] Ibid., 105.

national 1872 reapportionment law mandated that congressional districts "should have as near practicable an equal number of inhabitants," but, as can be seen, the language was not only ambiguous in nature but also largely ignored.[96]

Though conventional wisdom would hold that districts ought to have equitable populations, partisan interests again trumped representational value and map drawers exploited the packing method of opposition voters with impunity: the congressional districts in Michigan and Iowa following the 1872 law, for example, ranged in population from 98,223 to 163,074 and 85,743 to 159,616, respectively.[97] While the swing-ratio across states throughout this era was large from a historical perspective, indicating a large responsiveness, many voters across the American republic experienced, to borrow from Robert Dixon, "virtual disenfranchisement" as a result of the population disparities resulting from the reapportionment battles.[98]

The rise of the organizational abilities of parties at this time is credited with the competitiveness of U.S. House elections in the mid to late nineteenth century; the institutional characterizations of the contemporary U.S. House in the context of seniority and career oriented politicians was nonexistent at the time.[99] In particular, the power hierarchy of American political parties at this time was decentralized in nature; state party leaders had little power over local activists who acted upon local county or municipal issues.[100] Consequentially, owing to the local nature of U.S. House elections, voter interest was high and party activists paid little attention to the notion of incumbency protection and instead sought to maximize their localities' influence as well as their own party's gains on a statewide level.[101] Maximization of party gains on a

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[96] Argersinger, 18.
[97] Ibid.
[98] Robert G. Dixon Jr. in Agersinger, 19.
[99] Engstrom, 103.
[100] Argersinger, 18.
[101] Engstrom, 103, and Argersinger, 29.

statewide level required the utilization of the efficient gerrymander that state parties utilized time and time again.

Viewing this hypercompetitive era through the lens of the representational values of the framers, one might be tempted to concede that the effects of the Reapportionment Act of 1842 were healthy for the state of American representative democracy. On the one hand, this is in part valid; voters experienced a period of intense competition that allowed them to effectively hold their representatives accountable through their usage of the franchise. The sophistication of party organization at this time also imbedded within American political culture a plethora of distinct policy ideas that proved consequential for the trajectory of the American republic, both good and bad.[102] Finally, American voters were relieved of the totalitarian general ticket methodologies that effectively disenfranchised large swaths of the American electorate with the requirement that all states utilize districts for election to the U.S. House.

The improved ability of the American voter to hold their representatives accountable notwithstanding, this era still experienced considerable inequality in its representation of the American people and a massive misguided use of time and energy on behalf of their representatives. The disregard for the equal population statute of 1872 resulted in widespread malapportionment across congressional districts and effectively provided more value of the voter of one party member than that of someone from another party. As then Congressmen James Garfield remarked, malapportionment practices made "a large portion of the voting people…permanently disenfranchised."[103] Ironically, Congressman Garfield benefited from these practices, indicating that there were objective sentiments believing malapportionment

[102] The election of 1876 is credited with the dismantling of Federal Reconstruction and, consequentially, the beginning of the Jim Crow era in the American South that rolled back the civil rights achieved by African-Americans after the Civil War.

[103] Congressman James Garfield (R-OH) in Argersinger, 19.

violated American representational values. Furthermore, with no mandates restricting spontaneous redistricting the American electorate's state legislatures sacrificed considerable policymaking opportunities for the purposes of redistricting so that, to describe a reapportionment battle in Indiana, "everything was prostituted to the work of redistricting the state…that the governor had to call a special session after the regular session expired in order for the legislature to finish its other work."[104]

Again, the Madison Proviso proved to be violated with the constant efforts dedicated for the purpose of redistricting and reapportionment. The sophistication of parties at this time only further exasperated the conflict of interest epidemic in U.S. House elections as they proved to develop into institutions with considerable control and influence in deciding who would be elected to the U.S. Congress and state legislatures across the nation. As will be demonstrated, the systemically perpetuated inequality in American U.S. House elections and representation would only continue into the twentieth century, especially in the South, though major judicial and legislative developments did come forth that further compelled the American republic to wrestle with its ideals of representation.

A New Era for Partisan Gerrymandering and the Entry and Exit of the Federal Judiciary

The political realities surrounding partisan gerrymandering processes changed drastically with the onset of the twentieth century. First, with the expansion of the powers of the federal government under various American presidents, the prestige of Congress and its powers expanded considerably making it a more desirable occupation. Secondly, following the end of Reconstruction in the South the region became, in effect, a one party region known as the Solid South where the Democratic Party consistently dominated congressional and presidential elections until 1968. The Democratic South maliciously and with impunity disenfranchised

[104] Argersinger, 38.

millions of African Americans who would have otherwise consistently voted for the Republican Party (the party of Lincoln). Furthermore, the disparities in population between rural and urban districts were only exasperated further as states redistricted far less in comparison to the mid to late nineteenth century. Finally, the federal judiciary of the U.S. on three occasions refused to resolve partisan gerrymandering cases beyond basic constitutional and logistical questions. As a result, Americans all across the republic continued to experience inequality in their representation in the U.S. House and, consequentially, experienced systemic infringements upon their First Amendment right of political speech and association.

The hypercompetitive and consistently manipulated atmosphere for U.S. House elections of the nineteenth century came to a seemingly abrupt end at the turn of the century. Contributing to this change in the nature of gerrymandering and U.S. House elections are a number of variables. First, the landslide elections of 1894 where Democrats lost 114 seats, and 1896 are often credited as realignment elections in American history and creating safer seats for Democrats in the South and for Republicans in the North.[105] Secondly, each reapportionment act passed by Congress up until 1929 included an intricate legal loophole—if a state was awarded additional seats to the U.S. House the state was permitted to hold at-large elections for those additional seats until the state was able to redistrict, and many did. [106] In addition, while these reapportionment acts included a statute mandating equal population amongst congressional districts, an 1899 ad-hoc congressional committee "dismissed the legal requirement for districts of equal population as merely an expression of congressional opinion and declared its belief that Congress had no authority whatsoever over districting by the states."[107] Finally, with the expansion of the powers

[105] Engstrom, 6, 132, 177.
[106] Martis, Kenneth C., Clifford L. Lord, Ruth Anderson Rowles, and Historical Records Survey. *The Historical Atlas of United States Congressional Districts, 1789-1983*. New York: Free Press, 7/
[107] Argersinger, 281.

of the federal government under the Roosevelt and subsequent administrations, the allure of power felt by all politicians, in addition to electoral security, began to professionalize the governing elite in Washington.[108]

One important variable contributing to the declining competition in U.S. House elections in the early twentieth century was a widespread reduction in the participation in the electoral process by the American voter. One factor involved the Progressive Era's evolvement on the meaning of American citizenship. Whereas in the mid to late nineteenth century American "citizenship was essentially a political status, involving active participation in the public sphere," early twentieth-century attitudes on American citizenship began to ignore "formal politics and government in favor of…cooperation and community." [109] A contributing variable to this transition in outlook on American citizenship was the "eastern and southern European, Asian, and Mexican immigrants and blacks" entering the nation's public schools and urban areas.[110] The Progressive Era is notorious for its prejudices towards these demographic groups: educators and politicians alike "believed that these groups lacked the 'Anglo-Teutonic' traits essential for democratic self-government," and excluded the franchise from the rights of citizens.[111]

Furthermore, party mobilization efforts to turn out the vote that fostered considerable competition in the nineteenth century had deteriorated with the turn of the century. As Mark Kornbluh demonstrates, "the number of elected officials dropped sharply as appointment or competitive examination filled more government jobs."[112] With the introduction of the

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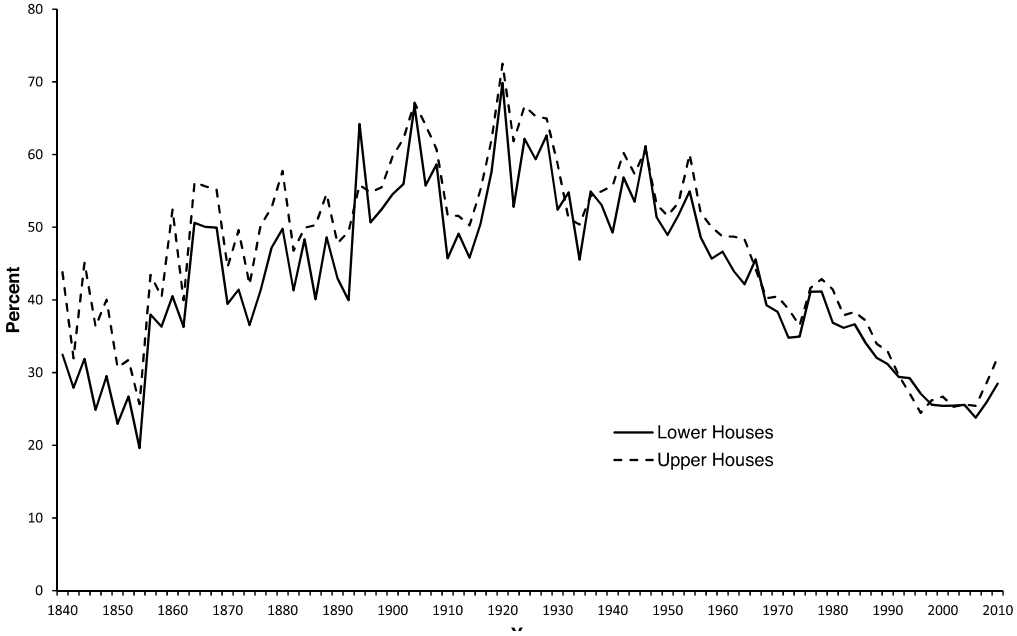
[108] See Fiorina, Morris P., David W. Rohde, and Richard F. Fenno. *Home Style and Washington Work : Studies of Congressional Politics*. Ann Arbor: University of Michigan Press.
[109] Reuben, Julie A.. 1997. "Beyond Politics: Community Civics and the Redefinition of Citizenship in the Progressive Era". *History of Education Quarterly* 37 (4). [History of Education Society, Wiley]: 399–420, 399.
[110] Ibid., 400.
[111] Ibid.
[112] Kornbluh, Mark Lawrence. *Why America Stopped Voting : The Decline of Participatory Democracy and the Emergence of Modern American Politics*. The American Social Experience Series. New York: New York University Press, 2000, 112.

Australian ballot voters could no longer turn in a straight-party ticket and were seemingly dissuaded from participating in the electoral process; elections became more candidate centered, in contrast to the elections of the nineteenth century which were dominated by party platforms, local issues, and a widespread appreciation for political culture in general.[113] Local elections became more infrequent, parties appropriated funds from voter mobilization efforts to advertising campaigns, voters chose to allocate time to the perks of American consumerism rather than civic society, and the American media focused its attention on "life style articles, comics" and other aspects of American life other than politics.[114]

The decline of voter mobilization efforts, Progressive Era attitudes towards citizenship, and the elections of 1894 and 1896 all coalesced to reduce competition in elections across the spectrum, especially state legislature and U.S. House elections. As illustrated by Figure 2, which measures competition in state legislatures across the U.S. by the absolute difference between the major parties in state legislature membership, the dominance of a single party in the state legislatures rose significantly following the turn of the twentieth-century:

[113] Kornbluh, 105.
[114] Ibid., 112-115.

Figure 2: 1840-2010 Competition in State Legislatures measured by the Absolute Difference between Democrats and Republicans/Whigs in State Legislature Membership[115]



As this paper has shown, a significant factor in a state's decision to redistrict at this time was a turnover of party power in state legislatures; should a new party come to power they were much more likely to redistrict so as to increase the odds of their party's victory in congressional elections in the next election cycle. Hypercompetition, arising from the mass mobilization of voters by political parties as well as the widespread use of the efficient gerrymander, was a significant variable contributing to the large number of redistricting battles in the nineteenth century. In the early twentieth century, however, with a lack of rampant competition in elections that ultimately decided redistricting authority, redistricting of congressional maps dropped significantly. Nowhere was this more prevalent than in the Southern region[116] of the U.S.

With the end of Military Reconstruction in 1877, the Southern region of the U.S. effectively shut out the Republican Party from all aspects of the region's political culture until 1968, especially in U.S. House elections. For example, in the 1918 U.S. House elections not a single

[115] Engstrom, 173.
[116] Now defined as the former Confederate States of America.

Republican candidate was on the ballot in any of Alabama's, Arkansas', Louisiana's, Mississippi's, South Carolina's, or Florida's U.S. House Elections, a trend that continued throughout the Solid South era.[117] Granted, the identity of a Southern Democrat in the Solid South era varied considerably on the ideology scale from state to state,[118] but the fact remains that running as a Democrat for the U.S. House during the Solid South era almost guaranteed victory. Even in the few states with a strong Republican Party presence, such as in North Carolina, Democrats were able to skillfully gerrymander "bacon strip" districts so as to prevent the likelihood of a Republican candidate winning election to the U.S. House.[119]

Furthermore, Democrats across the South managed to maintain near total power with the widespread disenfranchisement of African-American citizens who were loyal to Lincoln's Republican Party. One party rule, combined with laws that disenfranchised a significant portion of the electorate led to incredibly low turnout levels amongst Southern voters; for example, between 1898 and 1918, the average turnout of Southern voters for midterm congressional elections was a mere 20.2 percent.[120] Finally, one-party rule in the South significantly reduced the partisan incentives to gerrymander and as a result saw the age of their congressional district maps rise significantly. Louisiana, for example, used the same congressional district plan from 1912-1966.[121]

As mentioned previously, the reapportionment acts preceding the 1929 Act did not include a requirement of redistricting, but rather a provision allowing at-large elections until a state was able to redistrict. Ambiguous congressional lawmaking on apportionment issues, combined with decreasing competition for the state legislatures ultimately compelled many states to continue

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[117] Dubin, 421-427.
[118] Key, V. O. *Southern Politics in State and Nation*. Caravelle Edition. New York: Vintage Books,.
[119] Ibid.,226.
[120] Kornbluh, 99.
[121] Engstrom, 172.

using the same congressional district maps. Beginning in 1900, the average age of redistricting maps increased significantly up until 1960 where the average age of a map was 20 old.[122] Again, lack of competition amongst state legislative elections was a major contributing factor; between 1900 and 1962, there were only 16 transitional gerrymandering maps adopted—eight Democratic to Republican plans and eight Republican to Democratic plans, in stark contrast to 45 transitional gerrymandering maps adopted between 1840 and 1898.[123] The drastic reduction in redistricting plans should not be an indication that the partisanship of the process had been eradicated and equality established in American representation, quite the contrary; between 1900 and 1962 Democratic plans continued to foster a partisan bias average of 9.6 percent, Republican plans generated a partisan bias of 5.8 percent.[124]

In addition to the continued prevalence of partisan bias among district maps across the U.S., the era between 1900 and 1962 saw the continued growth of malapportionment across congressional districts as a result of the reduction in redistricting and the natural movement of populations. Because, as previously demonstrated, the congressional reapportionment acts that mandated equally populated districts were not enforced—and were even considered by Members of Congress themselves to be irrelevant—U.S. House districts across the American republic experienced widespread inequity in their populations and as a result, their weighted representation. As Robert Dixon notes, "in practice congressional districts exceeding by 40 percent or more the population of the smallest district in the state have not been uncommon."[125]

The persistence and growth of malapportionment in U.S. House districts throughout this period was a consequence of politician's attempts at maintaining power. In 1910 the U.S. census

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[122] Engstrom, 175.
[123] Ibid., 176.
[124] Ibid., 177-178.
[125] Dixon, Robert Galloway. *Democratic Representation; Reapportionment in Law and Politics*. New York: Oxford University Press, 9.

revealed that 46.3 percent of the nation's population lived in urban areas; by 1920, the census revealed that urban populations had outsized those of rural areas in the U.S.[126] Absent the enforcement of a federal statute requiring equally populated congressional districts, as well as a time frame for redistricting, redistricting often did not occur. Redistricting maps grew in age as a result of the reluctance of rural politicians to relinquish power, urban areas consistently experienced inequality in the power of representation they received. Table 3 puts forth the rates of inequality in district populations across much of the twentieth century and reveals that average population disparities between congressional districts between 1912 and 1962 ranged from 100,000 to nearly 300,000:

Table 3: Rates of Malapportionment in U.S. House Districts 1912-1982:[127]

Year	Average Difference between Largest and Smallest Districts	Ratio of Inequality	Population Deviation
1912	101,385	1.64	12.04
1922	132,875	1.78	17.53
1932	196,444	2.16	20.21
1942	200,532	2.23	20.27
1952	192,801	1.82	14.29
1962	270,748	2.06	16.67
1972	8,420	1.01	.51
1982	5,420	1.01	.37

As illustrated, the rates of population disparity up until the Reapportionment Revolution of the 1960s were significant. For example, on the eve of the Reapportionment Revolution Michigan's U.S. House districts had 14 of 19 districts with more than a 15 percent deviation from the states' average; Mississippi, three of five; Ohio, 14 of 24; Texas, 20 of 23 and Kentucky four of seven.[128]

[126] Engstrom, 174.
[127] Ibid., 180.
[128] Dixon, 630, Appendix B *Congressional Districting as of Baker v. Carr, 1962*

The rate of partisan gerrymandering might have dropped significantly with the turn of the century but its detriment to American democracy and original intent of the framers only continued. The Southern region of the U.S. disenfranchised large swaths of its electorate, both black and white, with the aim of maintaining white supremacy and eradicating the party of Lincoln from its political culture. States all across the republic continued to experience significant partisan bias in their congressional district maps as well as massive inequalities in their districts' populations. As a result, the votes of many Americans counted far less than other Americans and politicians, still acting through their political parties, showed an increased willingness to determine their own fate with simple acts of law, or lack thereof. Consequentially, the modern institutional characterizations of the U.S. House began to develop throughout the era between 1900 and 1960 as a result of the faltering competition of state legislatures and U.S. House elections. Seniority on committee assignments and careers in Congress, in particular amongst Southern members, would prove to alter the public policymaking landscape for the American republic as well as the political atmosphere of congressional elections in general.[129]

Malapportionment as a result of partisan gerrymandering proved one of the most contentious legal issues garnering attention up through the 1960's. As previously discussed, mandates for equally populated congressional districts in federal apportionment acts were consistently ignored and violated by electoral map drawers as well as the state courts. When the state courts did intervene, as was the case in Kentucky in the early 1900's, they often invalidated the apportionment law at stake and subsequently "revived the most recent preceding apportionment act that had not been invalidated," which was often worse from the perspective of the plaintiffs than the plan at hand.[130] Thus, many who might have challenged a states' reapportionment or

[129] Catledge, Turner. "New Deal Revives in North Carolina." *The New York Times,*1935, sec. General News
[130] Cortner, C. Richard. *The Apportionment Cases*. Knoxville: The University of Tennessee Press, 1970, 8.

redistricting plan concluded that, in the words of V.O. Key, "judicial review of legislative action on apportionment has proven an inadequate remedy against unfairness."[131] The Reapportionment Act of 1929, however, proved to be the catalyst for the federal judiciary's entry into the reapportionment and gerrymandering conflict. The 1929 Act rescinded previous requirements of equal populations, contiguity, and compactness of congressional districts and was the subject of considerable partisan conflict regarding numerous states' reapportionment and redistricting plans.[132]

The United States Supreme Court's entry into the partisan gerrymandering issue came in *Smiley v. Holm* (1932). In more ways than not, the Court in *Smiley* only addressed the constitutional questions regarding authority over gerrymandering and reapportionment. The plaintiffs in *Smiley* asserted that Minnesota's 1931 congressional district map violated the Reapportionment Act of 1911 because it failed to adhere to the contiguity, compactness, and equal population mandates of the statute. In its opinion, the Court in *Smiley* held that the Reapportionment Act of 1911's "substantive standard on congressional districting had expired, and that even if the Act still were in existence this aspect of the case would present a non-justiciable political question."[133] Significantly, the Court seemed to indicate that it had no role in the redistricting process because of the Constitution's granting to Congress "general supervisory power" over American election law.[134] Thus, the Court in Smiley reaffirmed the constitutional mandate that congressional election law was under the strict authority of a states' lawmaking process, absent congressional action, and that reapportionment and representational issues were inherently not an issue for the Court to decide.

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[131] V.O Key in Cortner, 8.
[132] Sweeting, Orville J.. 1956. "John Q. Tilson and the Reapportionment Act of 1929". *The Western Political Quarterly* 9 (2). University of Utah: 434–53, 437.
[133] Dixon, 108.
[134] *Smiley v. Holm,* 285 U.S. 355 (1932)

In *Wood v. Broom* (1932) the United States Supreme Court heard complaints that Mississippi's 1932 congressional district map violated the Reapportionment Act of 1911. Again, the Court refused to entertain this notion; Chief Justice Hughes, who authored the Court's opinion, found that the 1911 Act's mandates regarding district shape and populations had "expired by their own limitation," in accordance with *Smiley,* and that silence in the 1929 Act regarding compactness, contiguity, and equal population mattered little because the Act's "legislative history shows that the omission was deliberate."[135] Plaintiffs in *Wood* also asserted that the map violated the Times, Places, and Manners clause as well as their Fourteenth Amendment Rights, but Chief Justice Hughes the constitutional violations were "unnecessary to consider."[136]

In both *Smiley* and *Wood*, the Court refrained from examining the original intent of the Times, Places, and Manners clause of the Constitution. Indeed, the Court acknowledged the explicit textual authority granted to both the states and Congress to regulate U.S. House elections. However, the Court failed to acknowledge or mention the framer's original intent with the Times, Places, and Manners clause, including the Madison Proviso and their commitment to impartial elections. Had it inquired into original intent, the Court would have been faced with the fact that both Minnesota and Mississippi's district maps violated the framer's intentions, were contrary to American representational values, and perpetuated a culture of inequality for the republic's supposedly most democratic institution.

The third and final major case regarding gerrymandering and reapportionment the Court heard before the reapportionment revolution of the 1960's was *Colegrove v. Green* (1946). In *Colegrove,* plaintiffs once again challenged malapportionment amongst congressional districts,

[135] *Wood v. Broom*, 287 U.S. 1 (1932)
[136] Ibid.

this time in Illinois where the population disparity in congressional districts (914,053 to 112,116) was the most extreme in the nation, as a violation of the Fourteenth Amendment and the Reapportionment Act of 1911.[137][138] In a 4-3 split, the Court ruled to dismiss the case; however, the Court split 3-3-1 in its reasoning.[139] Justice Frankfurter, who delivered the judgment of the court, held firm on the issues regarding the Reapportionment Act of 1911, declaring that "the legal merits of this controversy" were settled in both *Wood* and *Smiley.*[140]

In addressing the potential Fourteenth Amendment violations suffered by the plaintiffs, Justice Frankfurter was again unmoved and declared that the "appellants ask of this Court what is beyond its competence to grant"—the plaintiffs' complaint was inherently a political question, and not suitable "for judicial determination."[141] Since the case at hand dealt with the electorate of Illinois as a whole, and not a private individual, there was no precedent for the court to intervene. Rather, "it is hostile to a democratic system to involve the judiciary in the politics of the people."[142] Congress has explicit oversight over elections to the U.S. House; when failures in the system occur it is the responsibility of the people (the U.S. House) to remedy the situation by "exercising their political rights."[143] Finally, Frankfurter asserted "no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system."[144]

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[137] Dixon, 110.
[138] *Colegrove* had incredible ramifications for the jurisprudence surrounding gerrymandering and apportionment issues up until the 1960's. From Robert Dixon's perspective, there were three possible outcomes the court could have pursued: 1) That the Court lacks any jurisdiction over the issue because of the explicit powers granted to Congress in the Constitution 2) That the Court had jurisdiction and could act accordingly and 3) That the Court has jurisdiction, but declines to act on the basis of its inability to provide a timely and legal remedy to the situation, 110-111.
[139] Ibid.
[140] *Colegrove v. Green* 328 U.S. 549 (1946)
[141] Ibid
[142] Ibid.
[143] *Colegrove v. Green* 328 U.S. 549 (1946)
[144] Ibid.

With its judgment in *Colegrove* the U.S. Supreme Court put to rest, temporarily, the notion that the ramifications of partisan gerrymandering and ambiguous lawmaking could be resolved through the American judicial process. Instead, the Court in *Colegrove* chastised the plaintiffs for attempting to supersede Congress' constitutional authority to regulate U.S. House elections, and, in ironic fashion, encouraged them to exercise their right of suffrage to make an impact on the political system they were inherently powerless over. The unwillingness of the Court to intervene proactively at this point in the twentieth century perpetuated the levels of inequality in American representation and, consequentially, fundamentally altered the institutional characterizations and policy trajectory of the U.S. House. The Madison Proviso continued to be violated on a substantial basis and the legitimacy of the U.S. Congress along with it. However, and as will be demonstrated, the Warren Court of the 1960's fundamentally altered the political landscape of U.S. House elections as well as American legal jurisprudence.

The Death of Malapportionment and Survival of Partisan Gerrymandering

The U.S. Supreme Court fundamentally altered the realities surrounding gerrymandering and apportionment throughout the U.S. After consistently refusing to intervene in partisan gerrymandering or malapportionment cases following *Colegrove* because it was not the federal judiciary's role to intervene in 'political questions,' the Court reversed precedent and ventured into the conflict in *Baker v. Carr* (1962). In *Baker* the Court once again entertained arguments that a states' legislative districts, this time in Tennessee where the "majority of the [state] house could be elected by less than a third of the population,"[145] violated the Equal Protection Clause of the Fourteenth Amendment because of the gross disparities in populations amongst legislative districts.

[145] Bullock, 33.

Writing for the majority in the landmark decision, Justice Brennan rebuked the lower court's claim that jurisdiction over reapportionment cases did not exist. In fact Brennan asserted there had been "an unbroken line of our precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature."[146] Going further, Brennan asserted that the plaintiffs had grounds to sue the state of Tennessee because "the right to vote, free of arbitrary impairment by the state, had been 'judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally…or by a refusal to count votes from arbitrarily selected precincts…or by a stuffing of the ballot bot."[147]

The next question then arose if whether or not *Baker's* plaintiffs brought forth a case that was justiciable and eligible for remedy by the courts. For years the federal courts hesitated to get involved in reapportionment and gerrymandering cases because of the implications that might arise from entering into the policy arena or encroaching upon the responsibilities of another branch of government. In order for the Court to deem Tennessee's legislative district maps a justiciable issue, Brennan noted, the Court must find that the discrimination endured by Tennessee's voters "reflects no policy, but simply arbitrary and capricious action."[148] The lower court's dismissal of *Baker v. Carr* rose from a misinterpretation of *Colegrove v. Green*—"the mere fact that the suit seeks protection of a political right does not mean it presents a political question."[149]

Going further, Brennan asserted, "if discrimination is sufficiently shown, the right to relief under the Equal Protection Clause is not diminished by the fact that the discrimination relates to

[146] *Baker v. Carr* 369 U.S. 186 (1962)
[147] Justice Frankfurter in Cortner, 136.
[148] *Baker v. Carr* 369 U.S. 186 (1962)
[149] Ibid.

political rights."[150] Brennan concluded that *Baker* brought forth justiciable questions under the Fourteen Amendment and "that the…appellants are entitled to a trial and a decision."[151] While the Court refrained from putting forth a specific judicial remedy in *Baker* it nevertheless established a powerful precedent that malapportionment cases were justiciable and subject to federal scrutiny. As will be demonstrated, the Court's decision in *Baker* would have immense consequences for the power dichotomy between rural and urban districts, incumbents, minority voting factions, and the Democratic and Republican Parties, respectively.

Two subsequent Court cases continued the progress made in *Baker*, *Reynolds v. Sims* (1964) and *Wesberry v. Sanders* (1964). *Reynolds* dealt with Alabama's egregious disparities in populations across its states legislative. As Robert Dixon notes, "one 13,462 population county had two house seats whereas Mobile (314,301) had only three and Jefferson County (634,864) had only seven."[152] Writing for the majority in *Reynolds,* Chief Justice Warren effectively established the "one man, one vote" doctrine that has shaped legislative districts all across the country ever since. Warren asserted, "legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests…the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."[153]

The Court's opinion in *Reynolds* rested exclusively upon the Equal Protection Clause of the Constitution in order to enforce population equity among a state's legislative districts. In *Wesberry,* which dealt exclusively with malapportionment issues arising from Alabama's congressional districts, the Court determined its opinion by citing Article 1, Section 2 of the U.S. Constitution that states Representatives for the U.S. House must be chosen "by the People of the

[150] *Baker v. Carr* 369 U.S. 186 (1962).
[151] Ibid.
[152] Dixon, 209.
[153] Chief Justice Warren in Cortner, 228.

several States" and inferred that constitutional provision to mean that "as nearly as practicable, one person's vote in a congressional election is to be worth as much as another's."[154] Justice Black, writing for the majority, continued by utilizing prose that evoked the intentions of the framers to justify the Court's ruling; the framer's believed that "equal numbers of people ought to have an equal number of representatives;" "the Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people;'" finally, Justice Black contended, "it would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others."[155]

Justice Black's lesson on American representational values marked an important development for advocates of redistricting reform. *Wesberry* effectively imposed an equitable standard for future districting maps that would partially abide by the original intent of the framers. Congress and the state legislatures ought to have ensured the "one person, one vote" principle from the onset simply because it was rooted in the original debates surrounding the American constitution, or, in Justice Black's own words—because "that is the high standard of justice and common sense which the Founder's set for us."[156]

The Warren Court fundamentally altered the manner in which gerrymandering was conducted throughout the U.S. Malapportionment was no longer an acceptable standard by which state legislatures could draw district lines, both their own and congressional. As Cox and Katz note, the Court's decisions "led to the (often substantial) redrawing of 301 of the 329

[154] *Wesberry v. Sanders* 376 U.S. 1 (1964)
[155] Ibid.
[156] Ibid.

nonsouthern congressional districts during the years 1964-1970."[157] The implementation of these opinions was difficult from the onset and proved to have profound partisan consequences for the shape, partisan composition, and location of U.S. House districts. The difficulties of implementing the one person, one vote, decisions notwithstanding, the Court's opinions in *Wesberry* and *Reynolds* effectively eliminated the inequitable effects of malapportionment from American representation and allowed redistricting reform advocates to focus almost exclusively on partisan gerrymandering practices.

In *Bandemer v. Davis* (1986) and *Vieth v. Jubelirer* (2004) the Court took up cases regarding the constitutionality of gerrymandered congressional districts for partisan advantage. *Bandemer* concerned the partisan gerrymandered district plans of the Indiana State legislature and *Vieth* concerned Pennsylvania's U.S. House districts following the 2000 census.

Bandemer was a near victory for proponents of eliminating partisan gerrymandering from the redistricting of U.S. House districts. Initially, a district court held the Indiana state legislature plan not only justiciable, but unconstitutional because of its findings that 'the district lines were drawn with the discriminatory intent to maximize the voting strength of the majority Republican Party and to minimize the strength of the Democratic Party."[158] On appeal to the Supreme Court, however, the District Court's opinion was reversed 7 to 2. The Court reasoned: "the mere fact that an apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme unconstitutional;" nor does the lack of proportional representation based on a votes to seats ratio constitute an equal

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[157] Cox, W. Gary and N. Jonathan Katz. *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution*. Political Economy of Institutions and Decisions., edited by Calvert, Randall, Thrainn Eggertsson. Cambridge: Cambridge University Press, 2002, 27.

[158] District Court opinion in *Bandemer v. Davis (1984)* in Grofman, Bernard, ed. *Political Gerrymandering and the Courts*. Agathon Series on Representation, edited by Grofman, Bernard. Algora Publishing: Agathon Press, 1990, 29.

protection violation.[159]

While the Court reversed the District Court's ruling on the constitutionality of Indiana's plan, it did lay out standards by which a redistricting map could be deemed unconstitutional; to begin, an "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole;"[160] furthermore, "that discrimination must have systematically frustrated and diluted the group's ability to influence the political process across several elections."[161] The case before the Court in *Bandemer* only concerned one election cycle and the Court did not find, to the surprise of many in light of Republican Party officials' omission to the contrary, that the Indiana plan systematically disadvantaged Democrats at the polls.[162] In short, the Court ignored the evidence presented to them that the redistricting procedures utilized by Indiana map drawers were indeed systematically frustrating to Democrats in the state, as well as the efforts of the framers to devise a representational system intended to prevent politicians from perpetuating their own political viability.

The Court's decision in *Vieth* in 2004 landed yet another defeat for proponents of redistricting reform. Writing for a plurality of the Court, the late Justice Scalia reminded the plaintiffs: "political gerrymanders are not new to the American scene."[163] Going further, Scalia recounts numerous early incidents of partisan gerrymandering in the American republic, as well as the apportionment acts that sought to remedy the inequalities in American representation. Yet, Scalia fails to mention the failure to of Congress to fully implement of the apportionment acts, nor the framer's fear of democratic institutions determining their own membership; he instead

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[159] *Davis v. Bandemer* 478 U.S. 109 (1986)
[160] Ibid.
[161] Shultz, 5.
[162] Ibid.
[163] *Vieth v. Jubelirer* 541 U.S. 267 (2004)

claims that the powers enumerated in Congress to regulate electoral law were intended to prevent egregious electoral laws.[164] Scalia continued by criticizing the Court's standards put forth in *Bandemer* for adjudicating partisan gerrymandering claims: "Eighteen years of judicial effort with virtually nothing to show for it… we must conclude that political gerrymandering claims are non-justiciable and that *Bandemer* was wrongly decided."[165] Finally, as if to settle the Equal Protection Clause question once and for all, Scalia lamented that the Equal Protection Clause ensures equality before the law to persons, not equality in representation to political groups.[166]

Luckily for proponents of redistricting reform, Justice Kennedy refused to form a majority in turning over the Court's precedent that treats partisan gerrymandering as a justiciable issue. Kennedy chided the plurality opinion's apparent admission that partisan gerrymandering might violate the law, but that it was not the Court's role to remedy those violations, as premature for a want of an unforeseen set of standards by which to approach the issue. Furthermore, both Kennedy in his concurring opinion and Justice Stevens in his dissenting opinion seemed to insinuate another avenue by which partisan gerrymandered maps could be ruled unconstitutional—the First Amendment.

In his concurring opinion Justice Kennedy explicitly suggested, "the First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional gerrymandering."[167] A First Amendment approach might be more suitable because, as Kennedy noted: "First Amendment analysis concentrates on whether the legislation [redistricting statutes] burdens the representational rights of the complaining party's voters for reasons of ideology,

[164] *Vieth v. Jubelirer* 541 U.S. 267 (2004)
[165] Ibid.
[166] Ibid.
[167] Justice Kennedy's concurring opinion in *Vieth v. Jubelirer* 541 U.S. 267 (2004)

beliefs, or political association."[168] In his dissenting opinion Justice Stevens further elaborated on the relevance of the First Amendment in partisan gerrymandering cases by citing Court precedence on federal patronage cases. Citing *Eldrod v. Burns (1976),* Stevens recalls the plurality opinion's statement that "political belief and association constitute the core of those activities protected by the First Amendment" and determines that "it follows that political affiliation is not an appropriate standard for excluding voters from a congressional district" and must be subject so strict scrutiny standards.[169]

Scalia's plurality opinion did not advert from criticizing Justice Steven's rational of utilizing First Amendment analysis in partisan gerrymandering claims: "To say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny;" furthermore, sustaining a First Amendment claim in *Vieth*, from Scalia's perspective, would disavow all considerations of political affiliation in redistricting processes.[170] Justice Stevens retorted that the plurality opinion was seemingly complacent in that they failed to acknowledge "the relevant lesson of the patronage cases…that partisanship is not always as benign a consideration as the plurality appears to assume."[171] Justice Kennedy further pushed back against the plurality opinions' unwillingness to assert the possibility of remedy by First Amendment analysis because it would render invalid all political interests in redistricting:

> That [Scalia's reasoning] misrepresents the First Amendment analysis. The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest[172]

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[168] Justice Kennedy's concurring opinion in *Vieth v. Jubelirer* 541 U.S. 267 (2004)
[169] Just Stevens' dissenting opinion in *Vieth v. Jubelirer* 541 U.S. 267 (2004)
[170] Scalia in *Vieth v. Jubelirer* 541 U.S. 267 (2004)
[171] Justice Stevens dissenting in *Vieth v Jubelirer* (2004) 541 U.S. 267 (2004)
[172] Justice Kennedy concurring in *Vieth v. Jubelirer* (2004) 541 U.S. 267 (2004)

Kennedy's concurring opinion and Steven's dissent seemed to prod future claimants into pursuing First Amendment violations with regards to partisan gerrymandering claims; each saw it as a more plausible way to ascertain the right of political association for individuals were not abridged by electoral map manipulators solely on the basis of political affiliation.

Ultimately, the Court's decisions in both *Bandemer* and *Vieth* were defeats for advocates of redistricting reform. While Justices Kennedy and Stevens insinuated an avenue by which partisan gerrymandering might be found unconstitutional, the fact remains that it has been 12 years since *Vieth* and, consequentially, the prevalence of partisan gerrymandering within American politics has continued. Indeed, the malapportionment of U.S. House districts, an egregious practice when viewed through the lens of original intent, was eliminated in the 1960s by the Warren Court and contemporary district drawers go to great efforts to maintain population equality when devising congressional districts in order to avoid legal challenges.[173] However, the removal of malapportionment from redistricting procedures did little to stymie the processes of gerrymandering for incumbent protection and partisan gain and a new set of criteria are needed throughout the U.S. so as to uphold the original intent of the framers and protect the First Amendment rights of the American voter.

Conflicting Scholarship, Modern Partisan Gerrymandering, and Five Reasonable Criteria for Modern Redistricting

Partisan gerrymandering is a widely studied and debated topic amongst American political scientists. Literature on the political phenomena has largely focused on the years following the Reapportionment Revolution and its effects on the composition of congressional districts and elections across the country. An examination the academic scholarship on partisan gerrymandering, however, reveals conflicting conclusions on the phenomenon's systemic effects on various aspects of American representative democracy. In their 2009 study, "Does

[173] Bullock, 39.

Gerrymandering Cause Polarization?", Nolan McCarty, Keith Poole, and Howard Rosenthal statistically demonstrated that "districting and…redistricting are not major factors in the increase of polarization."[174] Outliers Andrew Gelman and Gary King conclude from their 1994 study that while "individual state redistricting plans sometimes do produce very unfair electoral systems," in general "legislative redistricting has invigorated American representative democracy."[175]

Seth McKee in his "The Effects of Redistricting on Voting Behavior in Incumbent U.S. House Elections, 1992-1994" concludes that "under certain conditions redistricting can indeed affect the partisan balance in Congress."[176] In contrast to McKee, Bruce Cain and David Butler conclude, quoted in Engstrom, that "virtually all the political science evidence to date indicates that the electoral system has little or no systemic partisan bias, and that the net partisan gains nationally from redistricting are small."[177] Finally, Gary W. Cox and Jonathan N. Katz noted that there is no clear consensus on the ramifications of partisan gerrymandering following the Reapportionment Revolution; some claim that a party's gain in one state is offset by a party's gain in another seat and that claims of gerrymandering distorting true majorities in the U.S. House are widely overstated.[178]

The plethora of conflicting political science research on gerrymandering and it consequences on the health of American democracy notwithstanding, it is still a political phenomenon contrary to the original intent of the framers of the Constitution because it is a practice, if not an art in modern times, that allows those in power to dictate who will stay in power. Even when partisan

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[174] McCarty, Nolan, T. Keith Poole, and Howard Rosenthal. "Does Gerrymandering Cause Polarization?" *American Journal of Political Science* 53, no. 3 (2009): 666.

[175]Gelman, Andrew, and Gary King. 1994. "Enhancing Democracy Through Legislative Redistricting". *The American Political Science Review* 88 (3). [American Political Science Association, Cambridge University Press]: 541–59. doi:10.2307/2944794, 554.

[176] McKee, Seth C.. 2008. "The Effects of Redistricting on Voting Behavior in Incumbent U.S House Elections, 1992-1994". *Political Research Quarterly*61 (1). [University of Utah, Sage Publications, Inc.]: 122–33. http://www.jstor.org/stable/20299715, 130.

[177] Bruce Cain and David Butler in Engstrom, 12.

[178] Cox and Katz, 19-23.

gerrymandering plans have backfired, which they have, the intent of the map drawers to supersede the unhindered intent of the American voter violates the Madison Proviso, the founding principles of American representation, and the First Amendment of the Constitution.[179]

For example, while McCarty, Poole, and Rosenthal concluded in 2009 that gerrymandering has had little to no effect on the increasing polarization of modern American politics, they also conclude that "districting, abetted by the increased Republican hold on state legislatures, not only protected incumbents but also led to an increased Republican majority."[180] Take the case of former Representative Heath Schuler, a moderate Democrat who represented Western North Carolina; Schuler saw his district's PVI rating change from R+6 to R+12 following the 2010 census because Republican state-lawmakers cut the Democratic bastion of Asheville from Shuler's district and placed it in a safe Republican district—Schuler ultimately retired rather than face a considerable defeat.[181] Other moderate Democratic representatives from North Carolina at this time—Larry Kissell, Mike McIntyre, and Brad Miller— also saw their districts cracked of Democratic voters and then packed into the already safe Democratic districts of Reps. Mel Watt and David Price.[182]

There is also the famous partisan gerrymander of former Republican House Majority Leader Tom Delay of Texas. In the 2002 Texas U.S. House elections Republican candidates garnered 54.9 percent of the statewide vote and yet only won 46.9 percent of seats because of the gerrymandered map implemented by Texas Democrats.[183] DeLay, seeking to foster a more equitable portion of Republicans in the Texas U.S. House delegation instructed Republican state

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[179] See Bullock, 120, and his portrayal of Indiana Republican's 1980 'dummymander,' a partisan redistricting plan that ultimately failed to produce the intended partisan gains.
[180] McCarty, Poole, and Rosenthal, 677.
[181] Draper, Robert. "The League of Dangerous Mapmakers." *The Atlantic* (2012).
[182] Ibid.
[183] Bullock, 116.

legislators to pursue a controversial mid-decade redistricting plan. The DeLay redistricting plan that was implemented packed many African-American voters in a Houston area district and cracked or manipulated the districts of many other Democratic representatives so that their districts would no longer be safe Democratic seats, but instead competitive or safe districts for Republicans.[184] Indeed, an African-American from the Houston district was elected in 2004, but four of the Democratic representatives targeted by the Delay plan either lost reelection or retired.[185]

The plan from a Republican perspective was a success—Democratic incumbents had been defeated and Republicans won 66 percent of the seats with only 59 percent of the vote.[186] Inherently, however, DeLay's motives were those of political retribution and marked a successful attempt at manipulating electoral law for partisan gains. The parallels between DeLay's actions and the examples presented in this paper from the nineteenth century, where redistricting was conducted often and with the purpose of partisan gain, are striking.

Another modern gerrymandering practice is the bipartisan gerrymander, or the incumbent-protecting gerrymander. These plans are often devised in a divided state government and have been cited as a potential cause for the significant drop in competitive districts across the country.[187] A typical incumbent-protecting gerrymander involves a compromise where "incumbents happily swap out supporters of the opposition to a neighboring district in return for an increase in their own supporters coming from a district that elects a member of the opposite party."[188] As David Mayhew notes in his landmark work *Congress: The Electoral Connection,*

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[184] Bullock, 118-120.
[185] Ibid.
[186] Ibid., 120.
[187] Cain, E. Bruce, Mac Karin Donald, and Michael McDonald. "From Equality to Fairness: The PAth to Political Reform since Baker v. Carr." In *Party Lines: Competition, Partisanship, and Congressional Redistricting*, edited by Mann, E. Thomas and E. Bruce Cain, 125. Washington, D.C: Brookings Institution Press, 2005, 23.
[188] Bullock, 123.

there is significant evidence indicating that Members of Congress have a "single-minded" interest in reelection.[189] Thus, an incumbent-protecting gerrymander within the context of a divided state government is appealing to incumbent representatives because "none of the political actors involved in redistricting favor electoral competition. Incumbents want to get reelected."[190] Following the 2000 census 20 states utilized the incumbent-protecting gerrymander to draw 233 of the 435 U.S House districts.[191] Maureen Schweers, quoted in Bullock, observes that Iowa's independent redistricting commission, which draws districts without consideration to political affiliations, drew "more competitive seats…than in California, Texas, and Illinois combined."[192]

Finally, following the 2010 census, Republicans and Democrats had outright redistricting authority in 202 and 47 districts, respectively; bipartisan or citizen committees had authority in 92 districts and control amongst the parties was divided in 87 districts.[193] Compellingly, in the 2012 U.S. House elections 19 Members, 10 Democrats and 9 Republicans, won with 50 to 51.9 percent of the vote; 31 Members, 21 Democrats and 10 Republicans, won with 52 to 55 percent of the vote.[194] Incumbency advantages notwithstanding, the practices of partisan and incumbent-protecting gerrymandering in contemporary American politics have systemically perpetuated the electoral security of the American people's representatives.

The contemporary examples of gerrymandering practices presented thus far in this section not only parallel many of the historical examples presented earlier on in this paper, they are precisely practices the framers, especially Madison, sought to prevent in devising the framework

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[189] Mayhew, 17.
[190] Cain, Donald, and McDonald, 23.
[191] Ibid.
[192] Maureen Schweers in Bullock, 125.
[193] Cook Political Report
[194] Ibid.

for American representation. The very notion of an incumbent-protecting gerrymander, a swapping of like-minded voters in an apparent compromise for the purpose of maintaining political office, violates the Madison Proviso. Furthermore, to highlight once more an instance of American democratic institutions perpetuating an interest distinct from their constituents, map drawers using new computer technology to create congressional districts often operated behind closed doors—"that meant little transparency and minimal public participation. Secrecy allowed for more backroom negotiation and compromise," that perpetuated the practices of American democratic institutions. [195]

In light of these modern gerrymandering practices as well as the number of micro-historical examples provided in the macro-historical narrative, a First Amendment approach to the gerrymandering issue through the federal judiciary is necessary as well as affirmative action for the American voter in redistricting procedures so that accountability and legitimacy are imbedded within the American representational framework.

Edward Shultz, in his "The Party's Over: Partisan Gerrymandering and the First Amendment," argues that partisan gerrymandering, when viewed through a First Amendment lens, "is unconstitutional because it is inconsistent with the mandate that government should be impartial when it comes to how it governs, especially when it comes to defining the rules of representation and the allocation of legislative seats and political power."[196] Shultz rebuts the criticism of a First Amendment approach—which include the inappropriateness of the Court's involvement at all, a lack of clear First Amendment standards available for remedy, a lack of clear consensus on what entails representational rights, as well as a hesitation to intertwine individual rights and government structure—by positing that "the Court could use its traditional

[195] Cain, Donald, and McDonald, 9.
[196] Shultz, 2.

First Amendment jurisprudence that focuses on intent as an effort to uncover partisan gerrymandering. Under this form of analysis, the use of party membership or partisanship as a criterion in the drawing of redistricting lines would be ruled unconstitutional."[197] Shultz believed that "at the worst" a First Amendment appeal to the Court "would produce results no worse than presently yield with Equal Protection Clause."[198] Finally, Shultz justifies his First Amendment approach to adjudicating partisan gerrymandering through a theoretical discussion of classical Liberalism that, according to Shultz, demands absolute political neutrality when constructing institutions of government.[199]

In justifying his politically neutral approach to redistricting, Shultz cites Locke, Rawls, Hegel, Kant, and other political philosophers as espousing the idea that a government ought not to impose a specific view point with regards to a "natural law framework that respects the inherent rights of all individuals to make claims against the government and political society.[200]" Furthermore, Shultz evokes Rawls to determine that "the task for reaching political agreement is respect for…diversity, building upon it an overlapping consensus that must start with an understanding that the state may not favor the views of some at the expense of others."[201]

In order for the Court to utilize objective standards with regards to a First Amendment approach to partisan gerrymandering, Shultz recommends combining the Court's practice of identifying malicious intent, where "a form of viewpoint discrimination" has been identified, as well as utilizing the symmetry standard to examine the composition of U.S. House districts and

[197] Shultz, 20.
[198] Ibid., 11.
[199] Ibid.
[200] Shultz, 12.
[201] Ibid.

the results of their elections.[202] Identifying malicious intent in the sense of viewpoint discrimination would be relatively simple; it is analogous, Shultz claims, to being a Democrat in Texas or a Republican in New York where ones' votes are consistently wasted.[203] An adequate symmetry standard would require that each party in a state experiences the same swing-ratio from election to election; simply put, "the symmetry standard requires that if Democrats win 70% of the seats when they receive 55% of the vote, Republicans should receive the same number of seats when they receive the same percentage of the vote." Finally, he believes the only rational for a government utilizing partisan viewpoints for redistricting purposes would lie in adherence to the Voting Rights Act of 1965 so as to ensure minorities have equal opportunities to elect candidates of their choice.[204]

In closing, Shultz's call for a First Amendment approach to partisan gerrymandering cases offers a compelling avenue that appears to have the support of at least a few Supreme Court justices. Original intent in American electoral law indicates that a government has no right to discriminate political speech on the basis of political affiliations unless there is a compelling government interest. Furthermore, Shultz's appeal to the philosophical foundations of liberal democracy in calling for neutrality and complete ignorance of political affiliations in redistricting is convincing if one is to examine the issue from the original sentiment of the Madison Proviso. However, the benefits of Shultz's First Amendment approach to the partisan gerrymandering issue notwithstanding, the historical prevalence of partisan gerrymandering as well as contemporary norms make a politically neutral approach to redistricting procedures problematic. Plaintiffs in partisan gerrymandering cases ought to appeal to the Supreme Court on a First Amendment basis and contemporary map drawers

[202] Shultz, 20-21.
[203] Ibid.
[204] Ibid., 22.

should adhere to the following general criteria when redistricting and reapportioning a states' congressional map:

I: Equitable Populations across Congressional Districts:

The one-person, one-vote doctrine established by the Warren Court of the 1960s has been effective in eliminating the undemocratic practice of malapportionment amongst congressional districts. Currently, all 50 states abide by this principle and contemporary and future mapmakers should continue to do so because it is in accordance with the original intent of the framer's vision for American representation. The Constitution is clear on this issue—representatives are to be chosen by the people of the states not, to invoke Warren in *Reynolds*, geographical areas nor economic interests. In addition, recall Justice Black's lecture on the representational ideals of the founding era and the Great Compromise, the institutional framework of the U.S. House rests on the ideal of "equal representation in the House for equal numbers of people."[205] A departure from the one-person, one-vote standard in redistricting would only revert the condition of American representation back to one of malapportionment; American citizens and voters residing in districts within a less populated district would inherently enjoy a greater power in representation relative to districts with greater populations.

The Court recently rejected a challenge to the one-person, one-vote principle in *Evenwel v. Abbott* (2016). Appellants in *Evenwell* claimed that state legislative districts of equal populations served to dilute the power of voters within a district relative to voters within other districts because the deviation in the number of eligible voters and registered voters across the state of Texas exceeds 40 percent.[206] Therefore, appellants in *Evenwel* claimed that

[205] Justice Black in *Wesberry v. Sanders* (1964) 376 U.S. 1
[206] *Evenwel v. Abott (2016)* 578 U.S.

equally populated districts violated the one-person, one-vote principle inherent in the Equal Protection Clause. The Court unanimously rejected the appellants claim. The majority opinion asserted: "As the Framers [sic] of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote."[207] Non-voters, including minors, felons, immigrants, those who chose not to vote, in short, all inhabitants within a district, have just as much stake in the public policy outcomes determined by their representatives as eligible and registered voters.[208] The Court in *Evenwel* maintained a precedent that has been credited with moving the condition of American representation toward a more equitable condition. The Court was silent, however, on the legality of devising districting maps on the basis of eligible and registered voters and it remains to be foreseen if a state will attempt to utilize such a standard. Regardless, contemporary and future district map drawers ought to adhere to the one-person, one-vote doctrine currently utilized across all 50 U.S. States because it adheres to the equality standards of representation envisioned by the framers.

II: Contiguity in Districts:

It would be unreasonable to create districts that are not contiguous from both a representative and constituent's perspective. In general, this criteria is not widely regarded as controversial or difficult to fulfill.[209] Representatives ought to have clarity in where their constituents reside and be able to travel with relative ease across their districts so as to attend to their representational duties. Furthermore, it is important from both the constituent and representative's perspective that the congressional district be contiguous as well. Imagine the extreme hypothetical scenario in which a congressional district in North Carolina is split

[207] *Evenwel v. Abott (2016)* 578 U.S.
[208] Ibid.
[209] Bullock, 88.

evenly in population between two areas, the coastal and mountainous regions of the state. The representative would encounter numerous difficulties navigating her duties when conducting constituent services because the two regions would be many hours apart from each other. In addition, her constituents would be represented in Congress by someone who has to navigate the interests of two very distinct regions. The two regions' economies, cultures, local governments, agricultural needs, incomes, environmental hazards, demographics, and other numerous factors impacting a representative's behavior in Congress would be very distinct and yet still require equal representational attention. This hypothetical scenario would parallel the situation of a representative elected in a general-ticket scheme from a large state in the early days of the republic. Such is not a desirable situation for either the representative or the constituent as it would undoubtedly prompt contradicting legislative and voting behavior counterintuitive to the duties of a representative. Thus, contiguity in districts ought to be maintained because it is a criteria that assists with the maintaining of communities of interest within a common representational boundary.

III: Compliance with the Voting Rights Act of 1965:

The federal government has a compelling interest to ensure that historically marginalized groups within the U.S. have an equal chance at electing candidates of their choice, especially in regions that have historically demonstrated a tendency to discriminate on the basis of race. The U.S., and particularly the American South, has a troubling with regards to racial progress. Centuries of slavery and thereafter disenfranchisement through poll taxes, literacy tests, intimidation, violence, and other means have compelled the need to provide affirmative representational rights to minority groups across the U.S. to remedy the wrongs of the past. Thus, the Voting Rights Act (VRA) of 1965 and in particular Section 2 of the Act —which

allows existing electoral systems to be struck down if it provides "minorities less opportunity to participate in the political process and to elect their preferred candidates than whites"—ought to be adhered to when devising congressional districts.[210] This requires the preservation of minority-majority districts[211] across regions that have a history of racial discrimination and prevention of minority participation in American political culture.

One notable requirement of the VRA has recently been struck down in *Shelby County v. Holder (2013)*: the Voting Rights Act's preclearance requirements for changes to election law in regions that have historically discriminated against minority groups.[212] The nature and composition of future minority-majority districts is unclear at this point in time since *Shelby County* was decided after the 2010 redistricting processes. However, without preclearance requirements it is likely many redistricting maps created after the 2020 census will be challenged in court on the grounds that they violate the VRA's mandate that minority voters be given equal opportunity to participate in the political process. These challenges will likely claim that the minority-majority districts drawn after the 2020 census will have been drawn explicitly with the purpose of race because map drawers will likely pack within one district more minority voters than is legally acceptable, a standard the Supreme Court deemed unconstitutional in *Shaw v. Reno (1993)* and other subsequent cases.[213]

One common critique of minority-majority districts is that while they have fostered the election of African-Americans Congress, they have also contributed to the decline of the Democratic Party as a whole across the South. Specifically, after the 1990 census, the creation of minority-majority districts across the South saw not only the elections of

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[210] Bullock, 57.
[211] Minority-Majority districts are defined as U.S. House districts populated by a majority of either African-American or Latino peoples.
[212] See *Shelby County v. Holder (2013)*
[213] See *Shaw v. Reno (1993)*

Democratic minorities to Congress, but also more Republicans as well; in addition, white Democrats across the South experienced defeat as a result of the fewer minority voters within their new districts.[214] Indeed, it is estimated that minority-majority state legislative districts across the South contributed to 45 of the 105 seats lost by Democrats across the South between 1990 and 1994.[215] Recently, however, many prominent African-American elected officials have considered the validity of redistributing "excess black voters so as to bolster the political fortunes of white Democrats."[216]

The consideration on behalf of African-American and other minority officials to redistribute minority voters across other districts have not, and rightfully so, come to fruition simply because white politicians have suffered electoral losses. On the contrary, scholarly research indicating "districts could be less heavily minority without endangering the ability of the black voter to elect their preferences" has encouraged minority activists and politicians.[217] Supported by empirical data indicating the strong probability that minorities could still be elected to Congress with lower levels of minority voters in a district, it is worth examining electoral systems that preserve minority districts and the ability of minorities to elect candidates of their own choice alongside the competitive districts to be mandated in the final criteria.

Of course, as a 2006 House Judiciary Committee hearing indicated: "the clearest and strongest evidence of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process" is racially polarized voting, and "the only chance minority candidates have to be successful is in

[214] Bullock, 72-73.
[215] Lublin in Bullock, 77.
[216] Bullock, 80.
[217] Ibid.

districts in which minority voters control the election."[218] A thorough inquiry that is beyond the scope of this paper is required to examine the validity in reducing the numbers of minority voters from minority-majority districts when redistricting congressional maps. Ultimately, the VRA and its proven ability to facilitate descriptive representation[219] of minority groups in the U.S. must be proactively used within American redistricting procedures.

IV: Flexibility in Maintaining Communities of Interest and Compactness:

Much like contiguity provides clarity for both the representative and constituent regarding the scope and location of a congressional district, compactness in district shape is also desired when possible because it makes it easier for constituents to know which district they live in. There are numerous gerrymandered districts in the U.S. notorious for their bizarre shape and size: North Carolina's 12th Congressional District, a minority-majority district, is notorious for following Interstate 85 for 160 miles from Charlottes to Durham giving it a snakelike appearance.[220] Map drawers should also attempt, when possible, to maintain various communities of interest. Though a vague term, redistricting experts and state statutes often cite economic, ethnic, cultural, and demographic areas of significance.[221] Geographic centers with high rates of cohesion amongst the population (i.e traditional political boundaries), usually in rural areas, are also given preference though dividing these areas for the purpose of creating minority-majority districts and equally populated districts is acceptable.[222]

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[218] Light, Andre Steven. *"the Law is Good": The Voting Rights Act, Redistricting, and Black Regime Politics*. Durham, North Carolina: Carolina Academic Press, 2010, 155.

[219] Descriptive representation refers to a representative who "mirrors the needs and desires of her constituents based on the characteristics she shares with them." Skin color and shared values and experiences within a society are strong indicators of descriptive representation. From Light, 15.

[220] Light, 80.

[221] Cain, Donald, McDonald, 18.

[222] Bullock, 98.

V: Affirmative Action for the American Voter through the Maximization of Competition in U.S. House Elections:

This paper agrees with the premise that a First Amendment approach to the partisan gerrymandering issue is a much more suitable and plausible avenue by which to find the political phenomenon unconstitutional. However, whereas Shultz called for a complete disregard of political affiliation in redistricting procedures, this section argues that they should be taken into account so as to ensure as many competitive U.S. House elections as practically possible. This paper has demonstrated through a macro-historical narrative compiling a number of relevant historical events that the prevalence and impact of partisan gerrymandering has systematically pervaded the American political experiment from the onset. The intent of the framers, who consistently called for accountability through fair and frequent elections, as well as the inability of democratic institutions to decide their own fate or the composition of their memberships, have been ignored throughout American history and its contemporary political actors.

In effect, attempting to adhere to neutrality in political affiliations in redistricting is analogous to those who propose the U.S. legal system adhere to a color-blind approach to its laws. Much like a color-blind approach only leads to the continued presence of implicit racism in American culture, so too will a neutrality lens only continue the presence of systemic inequality in representation adverse to the spirit of the law as envisioned by the framers. Adherence to a symmetry standard, as proposed by Shultz and others advocating for a First Amendment approach to partisan gerrymandering, is also inadequate as it only calls for an equitable swing-ratio on an aggregate level across a state between the parties in election scenarios, not maximizing equitable opportunity for each voter to elect a candidate of their choice within their district. Again, elections ought to be structured, one could say, as practically as possible to

ensure competitiveness to right the wrongs of democratic institutions throughout American history. It is inherently impossible to guarantee equality, accountability, and the unabridged use of one's First Amendment right of political association and speech in U.S. House elections without paradoxically taking into account political affiliations.

Thus, map drawers should consult relevant voting and recent election data in order to determine the partisan compilation of a given area and draw contiguous, equally populated districts that respect the Voting Rights Act, traditional communities of interest, and fall between a Cook PVI Rating of R+3 and D+3. These standards will guarantee that each voter has, as practically as possible given the local political context, an equitable chance of electing a candidate of their choice. Much like the federal judiciary currently supervises and reviews redistricting maps for population deviations and overt racial redistricting, it ought to do the same under this new criteria to ensure map drawers, whether they be commissions or the state legislative bodies, have gone to the furthest extent to affirmatively promote competition in elections for the U.S. House. The courts should operate under a strict scrutiny standard when reviewing these redistricting plans because any deviation from the competitive standard, except for adherence to the other four criteria, constitutes a violation of the First Amendment on behalf of the redistricting authorities. In other words, the courts need to ensure that the redistricting authorities are not favoring the opinions of one group over another, except for compliance with the Voting Rights Act, by ensuring they are equalizing the two groups' opinions within an electoral competition framework.

The maps produced under this approach will still undoubtedly yield noncompetitive districts due to the natural sorting of voters, the partisan composition of a given state, and adherence to

the Voting Rights Act (VRA).[223] For example, the criteria calling for a flexible approach to maintaining communities of interest will significantly impact the PVI ratings of districts in and around New York City as they are strong Democratic areas. As Cain, Donald, and McDonald note, "in states that lean toward one party, it is theoretically impossible to draw every district to be completive."[224] Thus, the congressional districts drawn in Oklahoma under these criteria will also yield noncompetitive districts because of the states' strong Republican leanings with a statewide PVI rating of R+19; however, redistricting authorities in Oklahoma could produce at least one competitive district centered on Oklahoma City, an area with strong Democratic support relative to the rest of the state, one can do using an online redistricting program.[225] Furthermore, because minority populations tend to vote overwhelmingly for the Democratic Party, especially African Americans, adherence to the VRA will likely produce noncompetitive Democratic districts in areas where the VRA is applied.

There are a number of local and state specific issues involved with redistricting a state that are beyond the scope of this paper. However, the criteria presented in this section to remove intentional acts of partisan and incumbent-protecting gerrymandering are reasonable standards for redistricting authorities to follow. Each standard put forth—except for the criteria mandating affirmatively drawing competitive U.S. House districts—is already an engrained practice in modern redistricting practices. The mandate that U.S. House districts be drawn to affirmatively create competitive districts is merely a reversal of a practice that has occurred since the founding of the republic, a necessary standard so as to abide by the original representational values of the framers as well as the authority of the First Amendment to protect acts of political speech and association.

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[223] See McCarty, Poole and Rosenthal 2009
[224] Cain, Donald, McDonald, 26.
[225] Bradlee, Dave. *Dave's Redistricting*. Vol. 2.2.

The five reasonable redistricting standards put forth in this paper can serve as a basic framework for future legal challenges to partisan gerrymandering as well as redistricting authorities. Doing so would, in theory, eradicate an undesirable political phenomenon within American politics and affirmatively instill accountability and equality within the representational framework governing the American people. Because of the systemic inequality endowed on the ability of the American voter to choose their representatives free of institutional partisan forces, affirmative action is needed to redress the grievances and wrongs felt by the American electorate throughout their history. As illustrated this work, partisan gerrymandering and reapportionment battles have had significant impacts on the trajectory of American public policy, the development and viability of American political parties, on the basic representational rights that provided the fodder for the American War for Independence.

Letting Our Past Inform Our Worst Political Nature

It has been the goal of this paper to provide observers of American democratic institutions an avenue by which they can look into the past and become informed about contemporary characteristics of American democracy. In many ways, modern political institutions, phenomena, and actors are informed and characterized by the precedents and evolution of their historical peers. Thus, this paper utilized a methodology of historiography known as the *longue durée* that seeks to present a number of micro-historical events and sources in order to develop a simultaneous macro-historical narrative on issues of contemporary importance. A narrative illustrating the evolution of two political phenomena across American history—partisan gerrymandering and malapportionment— was assembled by engaging with a number of primary sources, court opinions, census data, statistical election data, secondary sources, political philosophers, and visualizations. Furthermore, an originalist understanding of founding

American representational values and electoral law was presented throughout this paper in order to develop "a *longue-durée* contextual background" by which the evolution of partisan gerrymandering and malapportionment could be interpreted.[226]

The micro-historical events assembled across American history on partisan gerrymandering and malapportionment have revealed that contemporary redistricting processes and those actors involved with their implementation have indeed been informed by their historical counterparts. With the simultaneous development of a macro-historical narrative on original intent in electoral law and founding representational values this paper has demonstrated that partisan gerrymandering and malapportionment have been an obstacle for the American voter to achieve the framer's intentions with regards to equal representation full accountable to the American voter.

Some might critique the *longue durée* method of historiography utilized in this paper in the as incomplete and failing to pay attention to certain aspects of American representational history. However, as Guldi and Armitage state, "it is not necessary to relate every link in the chain of a *longue durée* narrative in micro-historical detail: a serial history, of richly recovered moments cast within a larger framework, may be adequate to show continuities across time along with the specificities of particular instances." [227] This work has interwoven a diverse, yet relevant, set of historical illustrations throughout American history pertaining to the political issues of partisan gerrymandering and malapportionment within the larger framework of the original intent of American representational rights.

The influence of Enlightenment thinkers such as Locke, the unjust actions of Parliament, the debates surrounding the ratification of the U.S. Constitution, the ill-conceived language of the

[226] Guldi and Armitage, 117.
[227] Ibid.

Times, Places, and Manners Clause, and the mechanisms and results of early U.S. House elections all interconnect to provide a larger framework of from which to observe American representational values. Within the larger framework and underlying each of these historical illustrations are the issues of malapportionment and gerrymandering which have evolved throughout American history into self-perpetuating practices contrary to the values imbedded within the macro-historical framework. The evolution of these political phenomena continued throughout American history despite attempts at reform with the Reapportionment Act of 1842 and subsequent acts which sought to instill accountability in accordance with the original intent of the framers. Indeed, even those Reapportionment Acts were partisan in nature. As was illustrated, the self-interested nature of parties and sectional interests, such as the South, continuously undermined the representational principles agreed upon with the Constitution.

Partisan goals and self-interest blinded American representatives, democratic institutions, and even the federal judiciary to the notion that the people were ultimately meant to be the final arbitrators of power, at the very least within the context of the U.S. House. In a country as diverse and large as the U.S., competing visions for the nation as well as the desire to preserve regional clout are understandable—but when the foundations of the government rest upon moving towards a freer, fairer, and more accountable form of representative government, the prevalence and utilization of anti-democratic, if not corrupt, practices like partisan and gerrymandering diminish the legitimacy and accountability of those sent to represent the people. Madison and the framers devised a government meant to stymie practices that allowed for those in power to dictate who would stay in power. Thus, the interpretations of partisan gerrymandering and malapportionment events throughout the course of this work of political history have been largely negative because of the underlying macro-historical narrative that held

founding representational principles to their original sentiment as revealed by the plethora of primary documents explored. In many ways, the usage of "micro-history and macro-history—short-term analysis and the long-term overview" combined in this work "to produce a more intense, sensitive, and ethical synthesis" of the American representational and political issues being examined.[228]

This work is indeed a political history of political phenomena within the U.S. against a larger framework of the original meaning of American representation, but it was also intended to put forth remedial criteria for the political phenomena so as to contribute to the political science discipline. However, even if this work were solely a work of political history, interpretive analysis would almost be inevitable—as Charles Beard reminds us, historians, regardless of the methodologies they deploy, naturally present their research from the perspectives of "their biases, prejudices, beliefs, affections, general upbringing, and experience, particularly social and economic."[229]

Regardless, an avenue for remedial criteria for the partisan gerrymandering issue was found after a thorough investigation into U.S. Supreme Court cases surrounding these issues that further contextualized the inequality experienced by the American voter across U.S. history. An engagement with the work of Edward Shultz, who held similar sentiments, helped challenge and refine those remedial criteria and ultimately led this paper to implore redistricting authorities, whether government officials or commissions, to provide affirmative action for the American voter. As this research developed, it became clear that elections for the U.S. House ought to be as competitive as possible in order to right the wrongs of America's politicians and democratic institutions dating back to the founding.

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[228] Guldi and Armitage, 119.
[229] Beard, Charles. "Written History as an Act of Faith." *The American Historical Review* 39, no. 2 (1934): 219; 220.

Shultz's declaration that political affiliation be disregarded in redistricting procedures might appear to abide by American representational values and original intent; however, it is a sentiment contrary to those values because it ignores the self-interested manner in which American politicians and democratic institutions have behaved throughout American history. To begin, completely disregarding political affiliations in redistricting procedures could, in fact, have the opposite of intended consequences. As the Court noted in *Gaffney v. Cummings* (1973), which dealt with Connecticut's legislative reapportionment plan:

> It may be suggested that those who redistrict and reapportion should work with census, not political, data, and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.[230]

In addition, the Court further acknowledged the infeasibility of ignoring partisanship in redistricting plans by referring to Robert Dixon in *Davis v. Bandemer* when Dixon noted in 1982:

> Whether or not nonpopulation factors are expressly taken into account in shaping political districts, they are inevitably ever-present and operative. They influence all election outcomes in all sets of districts. The key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.[231]

Adherence to a blind approach with political affiliations in redistricting procedures, from the perspective of not only the court, but prominent reapportionment scholars as well, will only perpetuate partisan inequality in elections for the U.S. House, not stymie it.

Any government action that appears on the surface to attempt to control or censure forms of speech must, with respect to American legal jurisprudence, be accompanied by a compelling government interest. Both Justices Scalia and Stevens in their opinions appeared to hold the

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[230] *Gaffney v. Cummings* (1973)
[231] Robert Dixon cited in Footnote 10 of *Davis v. Bandemer*

belief, like Shultz, that a First Amendment approach to partisan gerrymandering entails eliminating all political affiliation considerations from the process. However, I contend that the government does have a compelling interest to take into account political affiliations when redistricting so as to maximize competition.

As the framers revealed in their debates the Times, Places, and Manners Clause is in many ways a mechanism of self-preservation for the federal government. One need only recall the fears of the framers that the states would refuse to send representatives to Congress. Original intent, then, seems to indicate that self-preservation on behalf of the government through legal and reasonable means is a compelling interest found in the Constitution and a plausible course of action for the government to pursue. This paper has discussed extensively the importance of accountability through elections as envisioned by the framers. Without proper accountability measures (i.e. fair, impartial, and frequent elections) the government, specifically the U.S. House, could conceivably lose its legitimacy to govern. An analogy is necessary to substantiate these claims—recall the British government's claim that the American people were represented virtually in Parliament, or the unilateral actions taken by Parliament to change the periods for their own elections; ultimately, these perceived injustices were grounds for rebellion from the American colonist's perspective.

A similar situation has evolved throughout American history with regards to the representation of its people. By continuously manipulating districting maps and electoral law for partisan advantage or incumbent protection, map drawers in the state legislatures have infringed upon the representational rights of the American voter to hold their elected officials accountable in elections. The nineteenth century era of partisan gerrymandering might appear as an exception to the gerrymandering narrative, yet that era was still inherently unconstitutional from a First

Amendment standpoint because the seemingly hypercompetitive nature of the era was still founded on the basis of partisan gain—states were gerrymandered often for partisan gain and the gerrymandered maps were often successful in their goals. The spirit of the law as articulated in Article 1, Section 4 of the Constitution has been consistently violated. Voters from political factions and parties have experienced harm on behalf of map drawers on the basis of their political affiliations; policy makers have spent considerable lawmaking time to redistrict for partisan advantage; accountability has diminished as electoral competition has been degraded over the last 50 years; and, finally, the tactics of perpetuating institutional practices, distinguished from the interests of constituents, has resulted in legislative bodies essentially choosing their own membership numerous occasions across U.S. history.

Thus, the American people are owed a complete reversal in policy concerning electoral map drawing and the government of the United States, acting out of self-preservation through legal means, has a compelling interest to ensure its citizens have the greatest possibility to hold its elected officials accountable. Radical as it might seem, affirmatively ensuring competitive elections on the grounds of a compelling government interest under the First Amendment offers a reasonable solution to the issues of partisan gerrymandering. Voters would be empowered to hold their representatives truly accountable for the first time in American history on a consistent basis and, as a consequence, the legitimacy and preservation of the American political experience would follow. Accountability and equality in representational rights, as the *longue-durée* history has shown, have consistently lacked throughout American history and ought to be guaranteed so that the vision of the framers for the republic and the Madison Proviso is fulfilled.

It is clear now why President Obama called for the end of partisan gerrymandering in his final State of the Union address in his plea for a new era of American politics—the two political

phenomena have no rightful place within the original framework of American representation and political culture and are, ironically, representative of what compelled the crafting of the Constitution and the American republic.

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