

# THE ROLE OF ELECTORAL ACCOUNTABILITY IN THE MADISONIAN MACHINE

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*In The Federalist Papers, Alexander Hamilton and James Madison laid out their argument for why the American people need not fear a tyrannical federal government. Chief amongst their arguments was the system of checks and balances, which would keep the proposed government loyal and responsive to the people. As some commentators have noted, their theory appears to have failed. In this Article, I argue that this failure was not a foregone conclusion and that, in fact, American history until the early 20th century presented a continual progression towards the political ideal put forth by Madison. The root cause underlying the present failure of the Madisonian system of checks and balances lies not, as some commentators have suggested, with the rise of political parties, but with the fixing of the House of Representatives at 435 members.*

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INTRODUCTION

On November 7, 2006, the United States once again witnessed a peaceful change of power.<sup>1</sup> This scene, which involved an unprecedented display of voter wrath, saw the reigns of government ripped away from the dominant party as a historic number of seats changed hands.<sup>2</sup> The bell of accountability tolled, and our constitutional system once again showcased the brilliance of the Madisonian system of checks and balances.<sup>3</sup>

The problem with this story is that it never happened. Of the 403 incumbent Representatives who ran in the general election, 95% were re-elected<sup>4</sup> despite polls indicating overwhelming voter desire to purge

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1. See Carl Hulse, *On Wave of Voter Unrest, Democrats Take Control of House*, N.Y. TIMES, Nov. 8, 2006, at 2 (describing the 2006 congressional election).

2. See Ronald Brownstein, *Election 2006: How They Voted: GOP Ceded the Center and Paid the Price*, L.A. TIMES, Nov. 8, 2006, at A1 (analogizing the Republican party’s “widespread losses” to the “historic Republican landslide in 1994”); Jill Zuckman, *Virginia Holds Key to Control of Senate*, CHI. TRIBUNE, Nov. 9, 2006, at C1. (describing the election as a “Democratic rout” and a “historic midterm election”).

3. In this paper, I credit Madison as the Constitution’s principle author, rather than using the phrase “Founding Fathers.” For the sake of brevity, I refer solely to Madison when a dual cite to Alexander Hamilton might be more appropriate.

4. See CNN.com, *Elections 2006, U.S. House of Representatives / Complete Results*, <http://www.cnn.com/ELECTION/2006/pages/results/house/full.list/> (last visited Jan. 30, 2008) (listing all House races and denoting incumbent status in each race). Of the thirty-one races where seats changed hands, nine involved races for an open seat. See CNN.com, *Elections 2006, Balance of Power*, <http://www.cnn.com/ELECTION/2006/pages/results/bop/index.html> (listing races where party control of seat changed and indicating incumbent status and party affiliations for each race) [hereinafter CNN Balance of Power]. Eight seats had previously been held by the GOP, and one was held by now Senator Bernie Sanders, an independent. See *id.*; James W. Pindell, *State Continues to Break from its Republican Past*, BOSTON GLOBE, Nov. 8, 2006, at A21. Along with the twenty-two Republican incumbents defeated during the

Congress of its current members.<sup>5</sup> As a general matter, congressional accountability appears to be dead.

Our current political universe, populated as it is by what I shall refer to as Durable Incumbents—elected representatives seemingly immune to deep voter discontent—represents a dramatic departure from how Madison had imagined the House would operate.<sup>6</sup> Indeed, these Durable Incumbents represent a crisis for American democracy that extends beyond day-to-day politics, reaching to the core of American constitutional theory—electoral accountability.

In structuring the Constitution, Madison held a realist's perspective of human nature. He recognized that there exists in man a "degree of depravity in mankind which requires a certain degree of circumspection and distrust."<sup>7</sup> This degree of circumspection expressed by Madison manifests itself in our system's dual principles of separation of powers and checks and balances. Power was to be separated into competing branches in order to protect against humankind's propensity to fall into factions adverse to the rights of others.<sup>8</sup> Each branch would check the others and, as is so often quoted, "[a]mbition must be made to counteract ambition."<sup>9</sup> As important as it was, this system of checks and balances was to take a backseat to the primary control on government—electoral accountability.<sup>10</sup>

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general election, three incumbents lost their party primaries: Cynthia McKinney (D-GA-4), Bob Barr (R-GA-7), and Joe Schwarz (R-MI-7). See CNN Balance of Power, *supra*; Barr, *McKinney Lose in Georgia Primaries*, CNN.COM, Aug. 21, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/08/21/elec02.ga.primary.results/index.html> (reporting on McKinney's loss to Denise Majette and Barr's loss to another incumbent House member, John Linder, after each of their districts were "dismembered" by the Georgia Legislature's district reapportionment); Ken Thomas, *Rep. Joe Schwarz Beaten in Mich. Primary*, FOXNEWS.COM, Aug. 9, 2006, <http://www.foxnews.com/wires/2006Aug09/0,4670,CongressSchwarz,00.html>. The 95% re-election rate for incumbents in the 2006 election represented a decrease in the re-election rate for incumbents in relation to the prior decade, which had witnessed an overall re-election rate of 98.6%, and 2006 was only the fourth time since 1954 that at least six incumbents lost. See George F. Will, Op-Ed., *Keeping Score on Tuesday*, WASH. POST, Nov. 5, 2006, at B7.

5. See New York Times/CBS News Poll, Oct. 27–31, 2006, at 15, *available at* [http://graphics8.nytimes.com/packages/pdf/politics/20061031\\_poll.pdf](http://graphics8.nytimes.com/packages/pdf/politics/20061031_poll.pdf) (showing only 16% of Americans believe most members of Congress deserve re-election).

6. See THE FEDERALIST NO. 61, at 374 (Alexander Hamilton) (Bantam Dell ed., 1982) (defending the uniform date of election because it presents the possibility of arguing the entire House); see also discussion *infra* Part II.B.

7. THE FEDERALIST NO. 55 (James Madison), *supra* note 6, at 342.

8. See THE FEDERALIST NO. 51 (James Madison), *supra* note 6, at 316.

9. *Id.*

10. *Id.* ("A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."); see discussion *infra* Part II.B.

In this Article,<sup>11</sup> I argue that in focusing on the perceived flaws of Madison's system of checks and balances, constitutional theorists have consistently neglected a key requirement for electoral accountability—a reasonable ratio of representation.<sup>12</sup> In fact, during the ratification debates, the primary objection to the proposed Constitution was its failure to guarantee a ratio adequate to ensure the very feature Madison deemed the “primary control” of government.<sup>13</sup> Part I briefly describes the Madisonian theory of checks and balances, the supporting role it was to play with regards to electoral accountability, and the concerns of the Anti-Federalists. It then describes how the historic progression towards the Madisonian ideal ended when the 71st Congress fixed the House of Representatives at 435 members with the adoption of the Apportionment Act of 1929.<sup>14</sup> After a sum-

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11. The focus of this paper is the House of Representatives. I implicitly assume that by correcting the House, the loyalty problems seen throughout the system would be ameliorated. I ignore the Senate, as it cannot be justified as anything more than a historic compromise. See THE FEDERALIST No. 62 (James Madison), *supra* note 6, at 375–76 (prefacing his defense of the Senate by admitting it to be the result of a political compromise). *But see* THE FEDERALIST No. 63 (James Madison), *supra* note 6, at 382–83 (attempting to justify the Senate as a stabilizing force for a frequently turning over House).

12. For example, the least represented state in the Union is currently Montana, with one representative for 905,316 residents. See U.S. Census Bureau, Apportionment Population and Number of Representatives, by States: Census 2000, available at <http://www.census.gov/population/cen2000/tab01.pdf> (last visited Dec. 20, 2007). This greatly exceeds the ratio of other western democracies and U.S. state governments. See, e.g., Central Intelligence Agency (CIA), The World Factbook, United Kingdom, <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> (last visited Dec. 3, 2007) (describing how in the U.K. there are 646 House of Commons seats for 60.8 million residents, a ratio of 1 to 94,000); MSN Encarta, New Hampshire Facts and Figures, [http://encarta.msn.com/fact\\_701505871/New\\_Hampshire\\_Facts\\_and\\_Figures.html](http://encarta.msn.com/fact_701505871/New_Hampshire_Facts_and_Figures.html) (last visited Dec. 20, 2007) (listing that in the New Hampshire House of Representatives, there are 400 representatives for 1.3 million residents, a ratio of 1 to 3,250).

13. See THE FEDERALIST No. 55 (James Madison), *supra* note 6, at 337 (stating no other clause of the Constitution was more denounced); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 645 (Boston, Hilliard, Gray & Co. 1833) (quoting Madison in stating that the clause was one of great interest and debate). See also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 9 (1998) (stating that the size of the House was “perhaps the single most important concern of the Anti-Federalists”).

14. See Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2000)) (setting out a formula for reapportionment based on then-existing number of representatives). This Act is often referred to as either the “Apportionment Act of 1929” or the “Reapportionment Act of 1929.” I will use the former name. This depiction of voting rights rests, of course, on a value judgment that increased political equality represents advancement towards a certain political ideal. Such a view is at odds with the utilitarian perspective that equality is simply a means to an end.

mary of the passage of this Act, Part II turns to a discussion of the effect this Act has had on our constitutional system. It then addresses a particular effect of the “super-sized” ratio of representation in our political system—the increased influence of the party apparatus. Using this lens, one gains a lucid understanding of why the United States constitutional system has evolved into a competition between two monolithic organizations which routinely place party loyalty before the good of the electorate. Finally, Part III addresses three possible solutions for addressing party control of political actors and concludes that only decreasing the ratio of representation presents an acceptable solution.

## I.

### CHECKS AND BALANCES

In structuring the Constitution, Madison sought to deal with two separate yet inextricably intertwined problems arising from the ego-centric nature of mankind—self-interested factions which placed their own interests before those of the community and faithless agents willing to betray the people. At the time, mainstream political thought counseled that factions must be excised from government in order for a political system to function properly.<sup>15</sup> In *The Federalist Papers*, however, Madison put forward a theory of democratic government that rejected this view, adopting instead a constitutional theory rooted in the weakness of human nature and the depravity of humankind.<sup>16</sup>

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15. See, e.g., 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, at bk. V, VIII (J.V. Prichard ed., Thomas Nugent, trans., G. Bell & Sons 1914) (1748) (arguing republics are built on the principle of “virtue,” with patriotic legislators driven by the public good and that, in an extensive republic, the general good will be “sacrificed to a thousand private views”).

16. See, e.g., THE FEDERALIST NO. 10 (James Madison), *supra* note 6, at 51 (commenting that there will always be men who will conspire to obtain office with the intent to betray the interests of the people); THE FEDERALIST NO. 51 (James Madison), *supra* note 6, at 316 (“If men were angels, no government would be necessary.”). See also *supra* note 7 and accompanying text. In so doing, Madison rejected the views of Rousseau and Montesquieu, for whom the common good served as a driving motivation of political actors, adopting instead a position more akin to Hobbes. Compare MONTESQUIEU, *supra* note 15, at bk. V (claiming that the love of equality in a democracy restricts ambition to the sole desire of doing a greater service to the country than others); and Jean-Jacques Rousseau, *On the Social Contract*, in THE BASIC POLITICAL WRITINGS 147–49, 155–56 (Donald Cress ed. & trans., Hackett Publishing Co. 1987) (1762) (describing his conception of the general will) with THOMAS HOBBS, *LEVIATHAN*, pt. I, ch. VI (Edwin Curley ed., Hackett Publishing Co. 1994) (1651) (arguing that although some human action is motivated by benevolent desires, self-interest serves as a primary motive for human action); *id.* pt. I, ch. XV, at 16 (“For no man giveth but with intention of good to himself . . .”).

### A. *The Problem of "Factions"*

Madison believed self-interested factions presented a problem for democratic government.<sup>17</sup> Madison's understanding of representative government grew from the colonial experiments with self-rule both prior to and after the Revolution. The pre-revolutionary period had been marked by the colonial struggle against claims of dominion by Parliament—a political body in which the colonists lacked representation.<sup>18</sup> After the Revolution, many of the colonies, anxious to avoid hoisting a new King upon themselves, infused their legislatures with unchecked powers.<sup>19</sup> Rather predictably, these bodies proceeded to engage in partisan excesses, with the majority violating the rights and liberties of the "minority party," thus substituting tyranny of the executive for tyranny of the legislature.<sup>20</sup>

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17. See generally THE FEDERALIST NO. 10 (James Madison), *supra* note 6, at 50–58 (describing the problem of factions and methods for ameliorating their effects).

18. Indeed, a major source of pre-Revolution conflict was Parliament's claim of the power to tax the colonies for revenue purposes while simultaneously rejecting colonial demands for Parliamentary representation. The colonists, on the other hand, believed themselves answerable only to the King. See Declaratory Act, 1765, 6 Geo. 3, c. 12 (Eng.) (declaring, contrary to colonial claims, that colonists were subordinate to Parliament); 1 JOURNALS OF THE CONTINENTAL CONGRESS 43–51 (Worthington Chauncery Ford ed., 1904) (Entry for Sept. 28, 1774) (inserting Joseph Galloway's Plan of Union proposing a separate American Parliament, equal to the British and answerable only to the King); *id.* at 63, 68–69 (Entry for Oct. 14, 1774) (declaring the colonists' rights to be free from taxation for revenue purposes by British Parliament).

19. See, e.g., N.H. CONST. of 1776, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 2451–55 (Francis Newton Thorpe, ed., 1909) (lacking an executive or an independent judiciary); PA. CONST. of 1776, §§ 2, 19, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3081–92 (Francis Newton Thorpe, ed., 1909) (replacing governor with a supreme executive council of twelve).

20. See THE FEDERALIST NO. 10 (James Madison), *supra* note 6, at 51 (lamenting the influence of parties in the colonial governments). The actions of the individual states presented Madison with numerous contemporary examples of factions acting in manners adverse to the rights of others. See, e.g., Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 505–27 (discussing examples of state retroactive laws passed to benefit factions at the expense of the few, especially in the area of debtor relief). Of course, the unanimity requirements of the Articles of Confederation presented numerous examples of minority tyranny as well, where the lack of a single vote would frustrate the will of the remaining twelve states. See THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 6, at 127 (stating the Continental Congress had "been frequently in the situation of a Polish diet, where a single veto has been sufficient to put a stop to all their movements."). This aspect of the Confederation's structure was one of the driving motivations behind the Philadelphia Convention. Rhode Island, accounting for less than 2% of the country's overall population, boycotted the Convention and threatened to prevent the remaining 98% from adopting desperately needed changes to the Articles of Confederation. See RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE

This disregard for the public good, rooted “in the conflicts of rival parties,” was the first of the two egocentric problems that Madison hoped to curtail.<sup>21</sup> Recognizing that factions could not be prevented,<sup>22</sup> he sought instead to prevent any one faction from rising to the level where it constituted a majority.<sup>23</sup> His goal was not to prevent parties, but rather to ensure that any congressional action would require the consent of multiple self-interested factions. This consensus building would hopefully result in increased deliberation—a process which would tend towards justice and the general public good.<sup>24</sup> By framing the problem of factions in this manner, the question became how to ensure that no party constituted a majority. Madison and Alexander Hamilton argued that Montesquieu and other political theorists were wrong in believing a successful democracy required a small geographic area.<sup>25</sup> Only by enlarging the republic,

UNITED STATES 3 (1790) (listing the population of each state in the year 1790); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 11–12 (1913) (discussing circumstances around Rhode Island’s boycott of the Convention); *THE FEDERALIST* NO. 40 (James Madison), *supra* note 6, at 239 (describing the “absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth”). This was not the only time Rhode Island played the antagonist to the other twelve. In 1781, it alone opposed granting Congress the power to tax imports. See Bruce Ackerman & Neil Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 489 (1995).

21. See *THE FEDERALIST* NO. 10 (James Madison), *supra* note 6, at 51.

22. Madison did not fail to foresee or try to prevent the rise of factions and parties. In fact, in *The Federalist No. 10*, Madison himself lamented the futility of attempting to excise parties from the political system. See *id.* at 54–55. Madison believed the most one could hope for, indeed the entire purpose of his system, was to keep parties in check. See, e.g., *THE FEDERALIST* NO. 50 (James Madison), *supra* note 6, at 314 (“[A]n extinction of parties necessarily implies either a universal alarm for the public safety, or an absolute extinction of liberty.”).

23. See *THE FEDERALIST* NO. 10 (James Madison), *supra* note 6, at 54.

24. See *THE FEDERALIST* NO. 51 (James Madison), *supra* note 6, at 318 (arguing that the coalition building necessary in an extended republic would result in just outcomes). Recent political theorists have argued for the value of public deliberation separate from the goal of coalition building. See generally JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* (Ciraran Cronin & Pablo De Greiff eds., MIT Press 1998) (1996) 239–52 (proposing a procedural model of democracy centered around deliberation); Thomas Christiano, *The Authority of Democracy*, 12 J. POL. PHIL. 266, 267 (2004) (describing defenders of deliberative democracy); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17 (Alan Hamlin & Philip Pettit eds., 1989) (proposing democratic deliberation as a fundamental political ideal).

25. See MONTESQUIEU, *supra* note 15, at 130–31 (arguing that the size of a state dictated its eventual form of government and that a republic required a small geographic area); see also John Bach McMaster & Frederick D. Stone, *Pennsylvania and the Federal Constitution*, PENN. PACKET & DAILY ADVERTISER (PHIL.), Dec. 18, 1787, reprinted in *THE ANTIFEDERALISTS* 39 (Cecilia M. Kenyon ed., 1966) (reporting “the most celebrated writers on government[’s]” fear of a government with centralized

Madison believed, could it be ensured that no faction would rise to the level where it would constitute a majority of the legislature.<sup>26</sup>

### B. Ensuring Agent Loyalty

Madison realized the constitutional structure needed to check more than just factions in society at large. His assumption that individuals would put their interests before the common good also informed his understanding of how a faction's political agents would act once in office. The system had to be structured to ensure these self-interested agents remained loyal to their constituents.<sup>27</sup> For Madison, the *only* policy that could ensure loyalty would be frequent elections through which the people could remove faithless representatives.<sup>28</sup>

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power over "a very extensive territory"); DEBATES IN THE LEGISLATURE AND IN CONVENTION OF THE STATE OF SOUTH CAROLINA, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1788), *reprinted in* THE ANTI-FEDERALISTS 184 (arguing that placing power in the hands of men one thousand miles away will lead to a tyrannical monarchy); Brutus I, N.Y. J., Oct. 18, 1787, *reprinted in* THE FEDERALIST WITH THE LETTERS OF "BRUTUS" 443 (Terrence Ball ed., 2003) ("History furnishes no example of a free republic, any thing like the extent of the United States"). For each of these writers, the Grecian and Roman republics served as warnings that as a republic expands its territories, it was doomed to fall into despotism. *Id.* Madison and Hamilton famously responded to these claims in *The Federalist No. 9* and *The Federalist No. 10*. See THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 6, at 46–49 (describing how the opponents of the proposed Constitution have, "with great assiduity," seized upon Montesquieu's theory that republican governments require a contracted territory); THE FEDERALIST NO. 10 (James Madison), *supra* note 6, at 50–53. Hamilton used the Anti-Federalists' zeal for Montesquieu's theory against them when he noted that the existing states already encompassed areas far greater than contemplated by Montesquieu. THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 6, at 46–47.

26. A smaller society will contain fewer distinct parties and interests, increasing the frequency with which oppressive factions can band together as a majority. By increasing the size of the republic, a greater variety of interests and opinions are encompassed, making it more difficult for any particular group to create an oppressive majority. See THE FEDERALIST NO. 10 (James Madison), *supra* note 6, at 50–53. Cf. DAVID HUME, *Idea of a Perfect Commonwealth*, in POLITICAL WRITINGS 240, 240–52 (Stuart D. Warner & Donald W. Livingston eds., 1994) (proposing a purported "perfect" commonwealth and concluding the essay with an observation quite similar to Madison's). With this fundamental insight, Madison laid the foundation of American political theory. See Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 *FORDHAM L. REV.* 1587, 1596 n.27 (1997) (referring to Federalist No. 10 as the "Ur-text"—meaning the original text—of American political theory); Larry D. Kremer, *Madison's Audience*, 112 *HARV. L. REV.* 611, 611–13 (1999) (cataloging the praise given to Madison's theory).

27. See THE FEDERALIST NO. 52 (James Madison), *supra* note 6, at 321 ("[I]t is particularly essential that [the House] should have an immediate dependence on [the people].").

28. *Id.* ("[F]requent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured."). Indeed, Madison and Hamilton believed the key to both the Constitution's legitimacy and effectiveness was a House of Representatives directly elected by the people as opposed to the individual States.



Not only must these elections be frequent, but they also must be held in unison for a key reason. If a corrupt spirit were to enter the House, the only way to effectively purge the system of its influence would be to remove the entire group from office in one fell swoop.<sup>29</sup> Thus, a specific date of election was imposed for the entire country in order to ensure all incumbents could be removed at once.<sup>30</sup> In short, Madison intended the primary check on government to be frequent elections with the possibility of significant incumbent turnover.

### C. *Madisonian Separation of Powers*

Although frequent elections capable of purging the entire House were to be the primary control on faithless agents, this check was to be augmented by the auxiliary mechanism of separation of powers and its complimentary system of checks and balances.<sup>31</sup> Power was to be separated into competing branches in order to protect against the danger of betrayal that would arise between elections. Each branch would watch the others and “[a]mbition [would] be made to counteract ambition.”<sup>32</sup>

Madison structured this system of separation of powers on a theory of vigilance and mobilization. The people could not be expected to watch the government all the time—they were busy “taming”<sup>33</sup> the continent.<sup>34</sup> By breaking legal authority into separate branches at both the federal and state level, numerous bodies would be made to compete for the affection of the citizenry. The result of this competition would be two-fold: (1) eternally vigilant sentinels always on the lookout for representatives willing to betray their constituents, and (2) a structure through which the people could act to counter the usurpation

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See THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 6, at 83 (describing equal representation of the states under the Articles of Confederation as its “great and radical vice”).

29. See THE FEDERALIST NO. 61 (Alexander Hamilton), *supra* note 6, at 374.

30. *Id.*

31. See THE FEDERALIST NO. 51 (James Madison), *supra* note 6, at 316.

32. See THE FEDERALIST NO. 51 (James Madison), *supra* note 6, at 316; THE FEDERALIST NO. 52 (James Madison), *supra* note 6, at 324–25 (noting that the people, the states, and the individual branches would each maintain a vigilant eye).

33. See THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 6, at 141, 143 (justifying the creation of a national military, in part, as a means to guard against our natural enemies, the “savage tribes on our Western frontier” and as a means to “facilitate future invasions” of the West).

34. Hamilton believed that such attentiveness could not reasonably be expected of the people at large. A select body of men, armed with means of communication, on the other hand, could be expected to detect plans of usurpation before they came to fruition. THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 6, at 160–63.

of their rights.<sup>35</sup> If the federal government fell under the sway of a corrupting influence, the states provided a pre-existing apparatus through which the people could mobilize.<sup>36</sup>

In sum, Madison structured the Constitution to ensure the loyalty of the government through two structural mechanisms. The first and primary guarantee of representative loyalty was frequent elections which would make representatives dependant on the people. The auxiliary mechanisms—separation of powers and checks and balances—would come into play only when either the representatives betrayed their constituents or a partisan spirit managed to take hold of one branch.

#### D. *The Anti-Federalist Critique*

For Madison's critics, this system for ensuring government loyalty suffered from a fatal flaw: separation of powers would only function so long as the first and primary check—electoral accountability—remained in operation. The proposed Constitution, though, lacked a key requirement for electoral accountability—a reasonable ratio of representation. Specifically, the Constitution provided no guarantee the House would augment its numbers as the nation grew. If the House failed to increase in size, the Representatives would quickly become disconnected from the people and the presumptions underlying Madison's theory would fail.

Article I, section 2 of the Constitution empowers Congress to set for itself the ratio of representatives to constituents.<sup>37</sup> Although modern political debate is almost devoid of discussion of this clause, at the time of the founding it was the subject of such interest and debate that some argued almost no other clause of the entire Constitution was deemed more important.<sup>38</sup>

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35. *Id.*

36. Alternative structures of organized resistance—namely state governments and local militias—play a pivotal role in Madison and Hamilton's thinking throughout *The Federalist Papers*. Their views were informed by the frequent uprisings witnessed in the years prior to ratifications, most notably Shay's Rebellion in Massachusetts. See THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 6, at 31; THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 6, at 147–48.

37. U.S. CONST. art. I, § 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made . . . every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives [in the House] shall not exceed one for every thirty Thousand . . .”).

38. See THE FEDERALIST NO. 55 (James Madison), *supra* note 6, at 337 (“Scarce any article, indeed, in the whole constitution seems to be rendered more worthy of attention, by the weight of character and the apparent force of argument, with which

### 1. *The Size of the House at the Philadelphia Convention*

During the Philadelphia Convention, the clause was of great concern to the delegates. The delegates, after agreeing on the general structure of the proposed government, left it to the Committee of Detail to work out the specifics.<sup>39</sup> The Committee, in their report to the general Convention, proposed setting the number of representatives at the fixed rate of one for every forty thousand.<sup>40</sup> Madison was unhappy with this proposal, as he believed a fixed ratio, combined with future increases in population, would eventually render the number of Representatives excessive.<sup>41</sup> Therefore, he proposed changing this to the more flexible “not exceeding one in every forty thousand,” which received unanimous concurrence.<sup>42</sup>

Madison’s objection holds the unique distinction of being the only objection during the Convention that the House would become too large. Although other delegates raised objections over the ratio proposed throughout the last weeks of the convention, each argued the proposed text presented too high a maximum ratio of representation. These delegates, who felt a small House posed a danger to the people, included Hugh Williamson of North Carolina, Alexander Hamilton of New York, Nathaniel Gorham,<sup>43</sup> and Rufus King<sup>44</sup> of Massachusetts,

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[the House ratio clause] has been assailed.”). *See also supra* note 13 and accompanying text.

39. *See* Library of Congress, Documents from the Continental Congress and the Constitutional Convention, 1774–1789: Creating a Constitution, <http://memory.loc.gov/ammem/collections/continental/constit.html> (last visited Dec. 20, 2007) (discussing the Committee’s role in drafting a written constitution after the Constitutional Convention).

40. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 386 (Ohio Univ. Press 1966) [hereinafter NOTES OF DEBATES] (describing the committee report).

41. *Id.* at 410.

42. *Id.* at 410. This phrase is the constitutional basis for our current rate of representation, which is close to one in every 650,000. *See* U.S. CONST. art. 1 § 2 (“The Number of Representatives shall not exceed one for every thirty Thousand . . . .”); Population & Housing Programs Branch, U.S. Census Bureau, Questions and Answers on Apportionment, <http://www.census.gov/population/www/censusdata/apportionment/faq.html> (last visited Dec. 20, 2007).

43. Gorham was the former president of the Continental Congress and chairman of the Committee of the Whole. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 29 (Max Farrand ed., 1966) (noting Gorham’s election to chair the Committee of the Whole).

44. King would eventually serve as the first Senator from New York before running for Vice-President of the United States on the Federalist ticket in 1804. Biographical Directory of the United States Congress, Rufus King, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=k000212> (last visited Dec. 20, 2007).

Daniel Carroll of Maryland, and even Madison himself.<sup>45</sup> Nevertheless, until the last day of the convention, their repeated attempts to alter the already-settled ratio failed.

On the very last day of the convention, after the Constitution had been finalized, Nathaniel Gorham proposed to change the wording of this clause once again.<sup>46</sup> At this moment, a remarkable event occurred. George Washington, whose role at the Convention had until this point been limited to merely providing legitimacy to the endeavor, rose to address the substance of the Constitution for the first time in the entire Convention.<sup>47</sup> According to Madison:

When the President rose . . . [he stated that t]he smallness of the proportion of Representatives had been considered by many members of the Convention an insufficient security for the rights & interests of the people. He acknowledged that it had always appeared to himself among the exceptionable parts of the plan, and late as the present moment was for admitting amendments, he thought this of so much consequence that it would give much satisfaction to see it adopted.<sup>48</sup>

The delegates unanimously agreed to strike out “forty Thousand” in the finalized copy of the Constitution, and the limit of “one for every thirty Thousand” was adopted.<sup>49</sup>

## 2. *The Size of the House in the Ratification Debates*

For the Anti-Federalists and a majority of the ratifying conventions that proposed amendments, though, the Constitution’s variable ratio of representation still raised the specter of a federal legislature

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45. See NOTES OF DEBATES, *supra* note 40, at 582 (Williamson moved to reconsider the number of Representatives, “which he thought was too small.”). On September 8, Williamson again moved to reconsider increasing the size of the House. *Id.* at 608. Madison seconded his motion, at which point Hamilton also spoke in favor of the motion. *Id.* Hamilton, who later would be accused of aristocratic aims and monarchical sympathies, was “of the opinion that the House of Representatives was on so narrow a scale as to be really dangerous . . . .” *Id.* The motion was defeated and the delegates adjourned. *Id.* On September 10, 1787, Randolph iterated his list of objections with the proposed Constitution, which included the insufficient size of the House. *Id.* at 614. Admittedly, it remains unclear whether, at the time, the objections were based on the ratio used to determine the number of representatives or the overall size of the House. Nathaniel Gorham’s speech on the last day of the convention, though, indicates the objections involved the proportion, rather than the overall size. See *id.* at 655 (proposing to change the proportion of representation).

46. NOTES OF DEBATES, *supra* note 40, at 655 (proposing to change the ratio of representation from one in forty thousand to one in thirty thousand).

47. *Id.* at 655.

48. NOTES OF DEBATES, *supra* note 40, at 655.

49. *Id.*

which would be unresponsive to the will of the electorate.<sup>50</sup> Self-serving House members would have little incentive to dilute their individual power through continued augmentation of their numbers as the country's population grew.<sup>51</sup> If the House failed to increase in size,

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50. For a background of the Anti-Federalists' position, see *Elbridge Gerry to the Massachusetts General Court*, MASS. CENTINEL, NOV. 3, 1787, reprinted in THE DEBATE ON THE CONSTITUTION, PART I, at 231 (Bernard Bailyn ed., 1993) [hereinafter DEBATES I]; *Brutus III*, N.Y. J., NOV. 15, 1787, reprinted in DEBATES I, supra, at 323 ("No free people on earth, who have elected persons to legislate for them, ever reposed that confidence in so small a number."); George Mason, *Objections to the Constitution*, VA. J., NOV. 22, 1787, reprinted in DEBATES I, supra, at 346 ("In the House of Representatives there is not the substance, but the shadow only of representation."); *Centinel I*, INDEPENDENT GAZETTEER, OCT. 5, 1787, reprinted in DEBATES I, supra, at 60 ("The number of representatives (being only one for every 30,000 inhabitants) appears to be too few, either to communicate the requisite information . . . or to prevent corruption and undue influence . . ."); *Cato V*, N.Y. J., NOV. 22, 1787, reprinted in DEBATES I, supra, at 402 ("It is a very important objection to this government, that the representation consists of so few; too few to resist the influence of corruption, and the temptation of treachery . . ."); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PENN. PACKET & DAILY ADVERTISER, DEC. 18, 1787, reprinted in THE ANTI-FEDERALIST 214 (Herbert J. Storing ed., 1985) [hereinafter THE ANTI-FEDERALIST] ("The representation is unsafe, because in the exercise of such great powers and trusts, it is so exposed to corruption and undue influence . . ."); *The Federal Farmer VII*, DEC. 31, 1787, reprinted in THE ANTI-FEDERALIST, supra, at 74 ("The representation is unsubstantial and ought to be increased. . .").

The extent to which the citizens shared this Anti-Federalist fear can be seen in the records of the state ratifying conventions. No fewer than six of the eight states that proposed amendments to the Constitution called for either an increased level of representation or a fixed rate until the House reached a size where prudence might caution for flexibility—the same number that called for protection of religious freedom. See *Dissent of the Minority of the Pennsylvania Convention*, PENN. PACKET (PHILA.), DEC. 18, 1787, reprinted in DEBATES I, supra, at 533; *Resolutions of Massachusetts*, Feb. 6, 1788, reprinted in THE DEBATE ON THE CONSTITUTION, PART II, at 548 (Bernard Bailyn ed., 1993) [hereinafter DEBATES II]; *In Convention of the Delegates of the People of the State of New-Hampshire*, June 21, 1788, reprinted in DEBATES II, supra, at 551; *Resolutions of New-York*, July 26, 1788, reprinted in DEBATES II, supra, at 541; *Resolutions of Virginia*, June 1788, reprinted in DEBATES II, supra, at 561; *Resolutions of North Carolina, Amendments to the Constitution*, Aug. 2, 1788, reprinted in DEBATES II, supra, at 568–69; see also EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 33 (1957) (reporting the number of states proposing amendments falling under religious freedom). The ensured growth of the House was perceived as more pressing an issue than either the right to bear arms or the freedom of speech. *Id.* Rhode Island also proposed amendments, but, given its tardiness in joining the Union, they had no effect on the Bill of Rights. See *id.* at 32. Professor Amar counts that five of the six states that endorsed amendments proposed a secure minimum size for the House, but does not include the unofficial lists of amendment proposed by the Pennsylvania and Maryland minorities. See AMAR, supra note 13, at 14 (1988).

51. George Mason, one of only three delegates present at the end of the Philadelphia Constitutional Convention that refused to sign the Constitution, presented the argument in a concise, forceful manner:

the ratio of representation would grow unchecked until eventually the representatives would become uncoupled from their constituents.<sup>52</sup> In other words, what is now commonly referred to as “retail” politics would fall to the wayside.<sup>53</sup> Although the theory that self-serving representatives would remain loyal to those to whom they owed their positions would remain valid, the objects of their loyalty would become the wealthy and powerful.<sup>54</sup> In effect, Madison’s egocentric theory was turned against him.

Madison admitted this objection—“that the number of members will not be augmented from time to time, as the progress of population may demand”—“if well supported, would have great weight.”<sup>55</sup> The man who created the flexible ratio by inserting the phrase “not exceed” into the Constitution,<sup>56</sup> though, believed such concerns vanished under a close inspection of the system.<sup>57</sup> Madison, in effect, shared

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There is a want of proportion that ought to be strictly guarded against . . . [T]hose gentlemen who shall be sent from those districts will lessen their own power and influence in their respective districts if they increase their number; for the greater the number of men among whom any given quantum of power is divided, the less the power of each individual. Thus they will have a local interest to prevent the increase of, and perhaps they will lessen their own number: This is evident on the face of the Constitution—so loose an expression ought to be guarded against; for Congress will be clearly within the requisition of the Constitution, although the number of Representatives should always continue what it is now, and the population of the country should increase to an immense number.

George Mason, *Remarks at Virginia Ratifying Convention*, June 4, 1788, reprinted in DEBATES II, *supra* note 50, at 608. See also NOTES OF DEBATES, *supra* note 40, at 659 (reporting Mason’s refusal to sign).

52. See generally Richard Wollheim, *A Paradox in the Theory of Democracy*, in 2 PHILOSOPHY, POLITICS AND SOCIETY 71, 71–74 (Blackwell, Laslett, & Runciman eds., 1962) (noting the inability of democratic theory to deal with a modern state that is “both numerous and diverse”). Wollheim argues, before tossing it out as infeasible, that one solution to this problem would be a return to the Greek city-state. *Id.* at 73. He concludes instead that the criteria for finding “effective rule” should be watered down. *Id.*

53. “Retail” politics involves politicians interacting with voters on a face-to-face basis through activities such as knocking on doors, handing out coffee, and engaging in town hall-style meetings. See Don Frederick & Andrew Malcolm, *Calling All Voters: Obama’s Phone Banks are at Work*, L.A. TIMES, Dec. 30, 2007, at A22.

54. See *The Federal Farmer VII*, Dec. 31, 1787, reprinted in THE ANTI-FEDERALIST, *supra* note 50, at 78 (arguing insufficient representation will result in only a handful of citizens wielding influence over Representatives).

55. THE FEDERALIST NO. 58 (James Madison), *supra* note 6, at 353.

56. NOTES OF DEBATES, *supra* note 40, at 43, and accompanying text.

57. To support his view, Madison presented two justifications—one comparative and one structural. First, claims that the ratio should be fixed suffered from the same error as the claims that the initial ratio was inadequate—with both issues the federal Constitution mimicked the existing practices of the states. *Id.* at 353–54. Just as the initial ratio roughly reflected the existing ratios at the state level, none of the State

the Anti-Federalist concerns of an unresponsive fixed-size House, but argued that their proposed solution of a fixed *rate* of growth brought serious issues of its own—primarily the risk of a political mob.<sup>58</sup> After assuring his audience that the House would continue to gradually increase its membership, Madison provided a warning:

The people can never err more than in supposing that by multiplying their representatives, beyond a certain limit, they strengthen the barrier against the government of a few. Experience will forever admonish them that, on the contrary, *after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with the whole society*, they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic; but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer and often, the more secret will be the springs by which its motions are directed.<sup>59</sup>

That Madison, the intellectual powerhouse behind the Constitution, would put forth such an argument is hardly surprising—where his critics focused on the system's flaws, Madison presented its strengths. While they focused on the initial census, he envisioned a nation one hundred years removed. The proper ratio of representation could not be founded on "arithmetical principles."<sup>60</sup> Instead, as Madison explicitly emphasized, the need for loyalty, information, and factional representation must in each case be *balanced* against the effects of passion on numerous assemblies.<sup>61</sup> Such a balancing required flexibility, which was exactly what the variable ratio of representation provided. As the nation grew, Congress would continuously strike the proper balance between the need for sufficient representation to guard

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constitutions contained more than an advisory limitation on their ratios of representation. *Id.* at 354. Furthermore, over the preceding years, each of these States had experienced a gradual increase in representatives and had not, as the Anti-Federalists supposed, halted their growth for the aggrandizement of the few. *Id.* Second, the structure of the Constitution itself provided an assurance of a gradual augmentation of the number of representatives. *Id.* The larger states, faced with inadequate representation in the Senate, would be strenuous advocates for increasing the number and strength of the House. *Id.* Their Representatives would set aside any rivalries and local prejudices in order to ensure what both equity and the principles of the Constitution demanded—continuous augmentation of the House. *See id.* at 354–59.

58. *See id.* at 358–59.

59. *Id.* at 358 (emphasis in original).

60. THE FEDERALIST NO. 55 (James Madison), *supra* note 6, at 338.

61. THE FEDERALIST NO. 58 (James Madison), *supra* note 6, at 358.

against disloyalty and the risk that a mob mentality would infect the House.<sup>62</sup>

In the end, Madison and the other Federalists conceded the point, promising to introduce an amendment ensuring an appropriate ratio of representation—a promise which found its form in the very first proposed Constitutional amendment.<sup>63</sup> This proposed amendment, which

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62. *Id.* Surprisingly, modern constitutional scholars have misinterpreted Madison's response to the Anti-Federalist critique by either ignoring it entirely or by assuming he believed a House over a certain fixed-size would degenerate into a mob. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1139 (stating Madison's theory "presupposes an absolute numerical limit on the size of the legislature: no matter how large the polity, the legislature could not expand beyond a certain number . . ."); *id.* at 1144 (same). Unless one supposes that after reaching a certain critical mass, a fixed number of representatives can adequately allay Madison's fears of an unresponsive, ignorant, unrepresentative body, such a reading runs counter to both Madison's argument and his republican theory laid out in Federalist 10. See THE FEDERALIST NO. 10 (James Madison), *supra* note 6, at 56 ("[T]he representatives must be raised to a certain number, in order to guard against the cabals of a few . . ."). See also THE FEDERALIST NO. 37 (James Madison), *supra* note 6, at 213 (arguing for placing power in numerous hands). The absolute maximum view would be more accurately attributed to David Hume. See HUME, *Idea of a Perfect Commonwealth*, *supra* note 26, at 248. At the other extreme, some writers have misinterpreted Madison as a proponent of a ratio of 1 to 30,000. See Christopher St. John Yates, *A House of Our Own or a House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157, 176 (1992).

63. See AMAR, *supra* note 13, at 15 n.45 (analyzing the votes of the different states and rejecting the tallies offered by some historical commentators). Professor Amar demonstrates that the amendment's failure can most likely be attributed to an internal mathematical inconsistency arguably introduced by Madison while harmonizing the different wordings found in the Senate and House versions. See *id.* at 14–17. Both of the initial versions would have imposed a mandatory perpetual increase. *Id.* at 15. The joint committee, though, replaced the word "less" with "more" in the last sentence. *Id.* Between 8,000,000 and 10,000,000, the amendment would become internally inconsistent, demanding at least 200 representatives while simultaneously requiring no more than 1 for every 50,000 individuals—a mathematically impossible event. *Id.* Without this substitution, the internal contradiction does not exist. Even with this mathematical error, the proposed amendment came within one vote of becoming part of the Constitution. See *id.* at 15 n.45. The final text of the proposed amendment read:

. . . After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

See DUMBAULD, *supra* note 50, at 220 (emphasis added). The other holdout of the original twelve proposed amendments, the Congressional Compensation Amendment of 1789, was ratified on May 7, 1992, as U.S. CONST. amend. XXVII. The Bill of Rights, although often deemed to include only the ratified amendments, is more cor-



came before the “First Amendment,”<sup>64</sup> remains the only unratified portion of the Bill of Rights, having fallen one vote short at the time it was proposed.<sup>65</sup>

### E. *The Apportionment Act of 1929*

For almost 150 years, the fears of the Anti-Federalists turned out to be unfounded—the House continued to grow with every census.<sup>66</sup> Although the problem of unresponsive representatives did arise, their unresponsiveness was rooted in such structural problems as at-large districts, gerrymandering, and restricted suffrage rather than in a static House size.<sup>67</sup> Yet over the century following ratification, each of these barriers was gradually removed. Religious qualifications were abolished shortly after the revolution, and property requirements, widespread after the founding, began to follow forty years later.<sup>68</sup>

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rectly understood to be the “bill” passed by Congress on September 25, 1789. *See* 1 Stat. 97 (1789) (recording version of bill passed in 1789 which includes proposed amendment regarding House size).

64. *See id.*; U.S. CONST. amend. I.

65. *See* AMAR, *supra* note 13, at 14–15.

66. After the first official census, the number of Representatives grew to 106. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 1990 CPH-2-1, 1990 CENSUS OF POPULATION AND HOUSING: POPULATION AND HOUSING UNIT COUNTS 3–4 tbl.3 (1992), available at <http://www.census.gov/prod/cen1990/cph2/cph-2-1-1.pdf> [hereinafter 1990 CENSUS OF POPULATION AND HOUSING]. By 1880, this number had risen to 332, and by 1910, the number reached 435. *Id.* Although the average number of inhabitants represented by each House member increased gradually from 33,000 in 1790 to 176,000 by 1890, the total number of Representatives continued to grow. *See* GEORGE B. GALLOWAY, HISTORY OF THE HOUSE OF REPRESENTATIVES 21 (1961); *Oppose a Bigger House*, N.Y. TIMES, July 26, 1920, at 7 (noting the continued growth each decade, with the exception of 1840).

67. Throughout the ratifying conventions, the Anti-Federalists fought to remove intrastate allocation of representatives from the hands of Congress out of fear that it would distribute representation in an inequitable manner. *See, e.g., Brutus IV*, N.Y. J., Nov. 29, 1787, reprinted in THE ANTI-FEDERALIST, *supra* note 50, at 132 (“Had the power of regulating elections been left under the direction of the state legislatures . . . it would have been secure . . .”), discussed in James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of “Representation”?*, 7 MICH. J. RACE & L. 357, 368–72 (2002) (describing the debate over the method of allocating representatives and the Anti-Federalist attempts to gerrymander James Madison himself out of Congress). Ironically, the first electoral abuses would originate in the states rather than the Congress. In fact, by the 1840s, geographic gerrymandering and multimember districts were rampant throughout the states. *See id.* at 371–80 (describing the history of geographical representation).

68. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2177–81 (2003) (describing religious restrictions on suffrage prior to Independence and the continued application of religious tests for officeholders after Independence); *id.* at 2179 n.492 (noting that most states granted Jews full rights of political participation by 1830); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*,

From the 1840s to the 1920s, multimember districts and the gerrymandering of district lines were also abolished,<sup>69</sup> and the right to vote was nominally extended to blacks and then, eventually, women.<sup>70</sup> In the 1920s, this period of federally-imposed improvements to our democratic system would come to an end with the Apportionment Act of 1929.

### *I. An Unlikely Coalition—the Opposition to Reapportionment*

The decade between 1910 and 1920 represented a period of upheaval, not only in world politics, but also in the population distribution of the United States.<sup>71</sup> With the United States' entry into World War I, many of the nation's young men were sent off to war.<sup>72</sup> A significant number of those who remained moved from the rural areas of the nation to the major cities in order to help with the war effort.<sup>73</sup>

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41 STAN. L. REV. 335, 353 (1989); JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 U.C.L.A. WOMEN'S L.J. 103, 126–27 (1994).

69. In 1842, Congress imposed a requirement of single-member districts, eliminating the use of general-ticket representation—a system in which all of the residents of a state would vote for the entire congressional delegation. Tucker, *supra* note 67, at 372–75. In 1872, the requirement that these districts contain approximately the same number of inhabitants was added, with the requirement that these districts be “compact territor[ies]” coming 30 years later. *Id.* at 376. All of these requirements would be eliminated by the Apportionment Act of 1929. *Id.* at 377. Single-member districts elect a single representative. Such districts can be contrasted with multi-member districts, where voters select multiple representatives, and general-ticket representation, when the state as a whole elects the entire delegation. See *Whitcomb v. Chavis*, 403 U.S. 124, 127–28 (1971) (defining multi-member districts); Tucker, *supra* note 67, at 372 (defining general-ticket representation). When properly drawn, single-member districts provide geographically distinct factions with a voice in government. General-ticket representation, on the other hand, presents the possibility that a single geographically compact faction comprising 51% of the voters will elect 100% of the representatives. *But see id.* at 376 (stating that Congressional regulations on redistricting may have actually increased gerrymandering by eliminating general-ticket representation).

70. See CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 33 n.7 (noting 1870 as the year of ratification for the Fifteenth Amendment to the Constitution, which prohibited race-based voting discrimination); *id.* at 36 n.11 (noting the 1920 ratification of the Nineteenth Amendment, which provided that the right to vote not be denied or abridged on the basis of sex).

71. See generally, CHARLES W. EAGLES, DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S 32–84 (1990) (discussing in great detail the reapportionment battles of the 1920s).

72. Mitchell Yockelson, *They Answered the Call: Military Service in the United States Army During World War I, 1917-1919*, 30 PROLOGUE 228–34 (1998) (quoting the Secretary of War for the statistic that “over 25 percent of the entire male population of the country between the ages of 18 and 31 were in military service”).

73. See EAGLES, *supra* note 71, at 49.

Furthermore, waves of immigrants continued to pour into the United States from areas other than Western Europe, where prior waves of immigration had come.<sup>74</sup>

When the war came to an end, the nation found its population distribution in a state of flux. Many of its soldiers were still stationed in Europe,<sup>75</sup> while still more of its formally rural workers remained in the urban centers.<sup>76</sup> The United States had in a matter of just ten years gone from having a mostly rural population to having a mostly urban one.<sup>77</sup>

Against this backdrop, the federal government completed the 1920 Census which showed a population that was more diverse, more urban, and younger than it had been just a decade prior.<sup>78</sup> If Congress were to reapportion and augment its numbers as arguably required by the Constitution,<sup>79</sup> many of the more rural states whose citizens had

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74. See OFFICE OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., 2006 YEARBOOK OF IMMIGRATION STATISTICS 6–13 tbl.2 (2006) available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS\\_2006\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf) (listing persons legally obtaining permanent resident status since 1820 by region and country of last residence and showing a change in the overall makeup of immigrant nationality starting in the late 1800s).

75. After World War I, several thousand American troops remained in Germany. See *Coblentz Opposed to Our Withdrawal*, N.Y. TIMES, Nov. 15, 1920, at 16 (reporting on rumors that President Harding might recall the 20,000 American troops stationed in Coblentz, Germany). The number of troops decreased over time, and on January 10, 1923, President Harding ordered all remaining troops sent home. *Britten Proposes Allies Quit Rhine*, N.Y. TIMES, Jan. 5, 1922, at 17 (quoting Representative Fred Britten's bill, which claimed 9,729 American troops remained in occupied Germany in early 1922); *Harding Withdraws Army*, N.Y. TIMES, Jan. 11, 1923, at 1 (reporting on President Harding's executive order withdrawing troops entirely from Germany).

76. Harry Schwartz, *Farm Labor Adjustments After World War I*, 25 J. FARM ECON. 269, 269–70 (1943).

77. In 1910, 45.6% of the country lived in urban areas; by 1920, this number had risen to 51.2%. 1990 CENSUS OF POPULATION AND HOUSING, *supra* note 66, at 5 tbl.4 (listing historical population distributions).

78. See *id.*; Charles A. Kromkowski & John A. Kromkowski, *Why 435? A Question of Political Arithmetic*, 24 POLITY 129, 134 (1991). See generally EAGLES, *supra* note 71, at 32–84. Eagles, in casting the battle in terms of urban-rural conflict, downplays the democratic theory-based opposition to fixing the size of the House and the evidence presented to rebut claims of inefficiency. For example, he only briefly touches on the fact that the March 1928 Census Committee's vote to fix the House at 435 passed only 10–8. *Id.* at 64–65. Likewise, he just briefly discusses the last minute removal of the anti-gerrymandering provisions that had existed for over fifty years. *Id.* at 73, 80–81.

79. See U.S. CONST. art. I, § 2, cl. 3 (“The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”); THE FEDERALIST No. 58 (James Madison), *supra* note 6, at 354 (“There is a peculiarity in the federal Constitution which insures a watchful attention in a majority both of

relocated to more urban states would lose representatives.<sup>80</sup> Furthermore, those states which had seen a recent influx of ethnically diverse immigrants—states which, incidentally, tended to be more urban—would receive a significant increase in political clout.<sup>81</sup> At the same time, rural representatives from urban states had a vested interest in preventing reapportionment, as the anti-gerrymandering laws passed over the previous decades required the states to adhere to the principle of one person, one vote.<sup>82</sup> Under such a system, any state whose population had shifted internally from rural to urban areas would have to reallocate its representatives accordingly, potentially redistricting out many rural representatives. Finally, the National Association for the Advancement of Colored People (NAACP) and other civil rights groups had begun to aggressively lobby Congress to enforce Section 2 of the 14th Amendment,<sup>83</sup> which requires Congress to decrease the basis of representation for any state which denied African American

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the people and of their representatives to a *constitutional* augmentation of the latter.”) (emphasis added). See also EAGLES, *supra* note 71, at 55–57, 64–79 (describing the battle in Congress over whether the Constitution mandates reapportionment after every census).

80. See, e.g., *Apportionment of Representatives: Hearings Before the Subcomm. of the Comm. on the Census, 67th Cong. 10–11 (1921)* (statement of Rep. Marion Edward Rhodes) (“At the time the census was taken last year an unusual industrial condition prevailed in Missouri. Thousands and tens of thousands of our working people at that time were absent from the State . . . hav[ing] gone to Cleveland and to Detroit and to other [out-of-state] industrial centers . . .”).

81. After the 1930 reapportionment, only California, Michigan, New Jersey, New York, Ohio, and Texas gained more than one representative, with only California and Michigan gaining more than three. See 1990 CENSUS OF POPULATION AND HOUSING, *supra* note 66, at 3–4 tbl.3; EAGLES, *supra* note 71, at 127–31. With the exception of Ohio and Texas, the percentage of citizens in each of these states that were foreign born was significantly higher than the United States average of 13.2%. See Campbell Gibson & Kay Jung, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 2000*, at 51–60 tbl.14 (U.S. Census Bureau, Working Paper No. 81, 2006), available at <http://www.census.gov/population/www/documentation/twps0081/twps0081.pdf> (listing the percentage of foreign born citizens by state after each census). Of the nine states with less than 2% of their populations foreign born—Alabama, Arkansas, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia—only Arkansas and North Carolina did not lose a Representative. See *id.*; 1990 CENSUS OF POPULATION AND HOUSING, *supra* note 66 at 3–4 tbl.3.

82. For a discussion of the anti-gerrymandering laws, see *supra* note 69.

83. See *Apportionment of Representatives: Hearings on H.R. 14498, H.R. 15021, H.R. 15158, and H.R. 15217 Before the H. Comm. on the Census, 67th Cong. 35–36 (1920)* (statement of William Pickens, Field Secretary of the NAACP) (describing rampant race-based voter discrimination throughout the South); *Would Cut South's Electoral Votes*, N.Y. TIMES, Aug. 15, 1920, at 3 (stating the Reapportionment Committee planned to consider the issue); EAGLES, *supra* note 71, at 35, 46–47.

males the right to vote.<sup>84</sup> These forces—the rural interests, representatives from areas guilty of racial discrimination, slow growing states, and the xenophobes—carried enough weight to block Congress from reapportioning the House for the first time in United States history.<sup>85</sup>

These groups, rather than setting aside their “rivalships and local prejudices” as predicted by Madison, formed instead a de facto coalition to block the augmentation that “equity and the principles of the Constitution” demanded.<sup>86</sup> Their resistance, sparking a ten-year battle over how the House would reapportion its membership, finally ended in 1929 when a coalition formed along lines far different than Madison predicted.

Throughout the 1920s, congressmen from states expected to gain seats overwhelmingly supported reapportionment while congressmen from states expected to lose seats generally opposed it.<sup>87</sup> That two such factions would arise had never been in doubt—indeed, their existence was a foregone conclusion. Madison, however, had assured the Constitution’s detractors that a third faction, the large states, would condition any reapportionment on continued augmentation of the

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84. See U.S. CONST. art. XIV, § 2. (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”).

85. See Kromkowski & Kromkowski, *supra* note 78, at 134 (implying rural and nativist interests were responsible, while ignoring the role played by racial discrimination). See also *Apportionment of Representatives in Congress Amongst the Several States: Hearing on H.R. 13471 Before the H. Comm. on the Census, 69th Cong.* 138 (Feb. 9, 1927) [hereinafter *House Census Hearings: 1927(III) (Feb. 9)*] (statement of Rep. Strong) (“It would be a great pity to transfer a representative of our form of Government from an American State like Iowa to one where so many do not speak the English language.”). If Congress were to reapportion and augment its numbers in 1920, as arguably required by the Constitution, many of the more rural states whose citizens had relocated to more urban states would lose representatives. See, e.g., *Apportionment of Representatives: Hearings Before the Subcomm. of the H. Comm. on the Census, 67th Cong.* 10–11 (1921) (statement of Rep. Marion Edward Rhodes) (stating his belief that Missouri’s population loss was only temporary); EAGLES, *supra* note 71, at 47–48 (reporting Rep. Rankin of Mississippi’s opposition to political equality for “an inferior race”); *id.* at 97 tbl.4.5 (showing lack of support for reapportionment among representatives from states expected to lose seats).

86. See THE FEDERALIST NO. 58 (James Madison), *supra* note 6, at 354–55.

87. See, e.g., EAGLES, *supra* note 71, at 97 tbl.4.5 (tallying support given reapportionment based on groups expecting change in seats).

House.<sup>88</sup> With the Apportionment Act of 1929,<sup>89</sup> no such faction arose.<sup>90</sup>

Instead of a coalition between large States and fast-growing ones, the Apportionment Act of 1929 represented a compromise between the drastically under-represented urban areas and the various groups that had opposed reapportionment and augmentation over the preceding decade. For representatives from fast growing states that had suffered through almost a decade of under-representation, the act was accepted out of pure desperation.<sup>91</sup> For the discriminatory southern states, the xenophobes, and the rural representatives of urban states, the Act allowed them to fight another day. Although Congress failed to exclude immigrants from the census tally as some demanded,<sup>92</sup>

88. See *supra* note 57.

89. Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2000)).

90. In fact, New York, the nation's largest state delegation, voted in favor of reapportionment with no further augmentation. See *House Passes Bill for Reapportioning*, N.Y. TIMES, Jan. 12, 1929, at 1; 1990 CENSUS OF POPULATION AND HOUSING, *supra* note 66 at 3–4 tbl.3 (tallying number of representatives for each state after reapportionments). See also *House Census Hearings: 1927(III)* (Feb. 9), *supra* note 85, at 136 (statement of Rep. Rankin) (stating that the 1921 reapportionment bill was recommitted to committee by a margin of only four votes, with support coming primarily from the large States).

91. See *Apportionment of Representatives in Congress Amongst the Several States: Hearings on H.R. 111, H.R. 398, H.R. 413, and H.R. 3808 Before the H. Comm. on the Census*, 69th Cong. 29 (Feb. 25, 1926) [hereinafter *House Census Hearings: 1926* (Feb. 25)] (statement of Rep. John B. Sosnowski) (when asked by Rep. Rankin whether he supported Rep. Fitzgerald's bill which fixed the House at 435 members, Rep. Sosnowski replied, "I am in favor of anything that will give my people a fair representation."); *id.* at 16–17 (statement of Rep. Fitzgerald) (indicating that what he really cared about was reapportionment); EAGLES, *supra* note 71, at 72 (noting that California's 10th district contained 1,250,000 people compared to 10 Missouri districts with less than 180,000); Rep. John Q. Tilson, *Wants No Increase of House Members*, Op-Ed., N.Y. TIMES, Feb. 3, 1929, at 51 (opinion piece by Republican Leader of the House of Representatives decrying the failure to reapportion as raising the specter of the "rotten borough" system); *House Passes Bill for Reapportioning*, N.Y. TIMES, Jan. 12, 1929, at 1 (claiming New York's delegation supported the bill, even though it stood to lose seats). The observation by the Times—a vocal advocate for reapportionment with no further augmentation—that New York would lose a Representative was completely unsubstantiated. See 1990 CENSUS OF POPULATION AND HOUSING, *supra* note 66 at 3–4 tbl.3 (showing New York actually gained representatives, moving from 43 to 45); *Oppose a Bigger House*, Editorial, N.Y. TIMES, July 26, 1920, at 7 (setting forth the Times' position on the apportionment debate). Indeed, a portion of the debate over apportionment in the House revolved around excluding aliens from the census in order to prevent New York and other states from gaining seats. EAGLES, *supra* note 71, at 50–51.

92. Rep. Homer Hoch of Kansas went so far as to introduce a joint resolution in the House to amend the Constitution to exclude aliens from apportionment. See *To Amend the Constitution: Hearing on H.J. Res. 102 & H.J. Res. 351 Before the Comm. On the Judiciary*, 70th Cong. 19 (1921); *Ku-Kluxing the Constitution*, N.Y. TIMES,

Congress removed the restrictions on gerrymandering and the requirements of one-person, one-vote which it had imposed in prior years.<sup>93</sup> As such, state legislatures could return to the old system of geographic redistricting. Without this compromise, rural and discriminatory representatives had little hope of ameliorating the effects of any reapportionment plan. With the restrictions on gerrymandering removed, though, rural representatives from states standing to gain from redistricting could take the urban-rural conflict to the state legislature while discriminatory states could water down the voting power of geographically concentrated racial minorities by splitting them into separate districts.<sup>94</sup>

## 2. *The Unchecked Faction—the Opponents of Augmentation*

Any increase in political equality will naturally have a class of political losers—namely those who had previously enjoyed an unfair level of influence in the system. Although this included slow growth states, rural interests, and states guilty of racial discrimination, for these factions the central issue presented by the Act was reapportionment, not augmentation. It was a fourth group, the political party bosses and the Representatives themselves, who stood to lose from continued augmentation.<sup>95</sup> This group saw in the Reapportionment crisis of the 1920s an opportunity to halt the continued expansion of the House.

The chairman of the House Census Committee, Rep. E. Hart Fenn of Connecticut,<sup>96</sup> used his position to push through two separate

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May 24, 1929 (reporting that Sen. Sackett of Kentucky proposed excluding aliens as well).

93. See *Wood v. Broom*, 287 U.S. 1, 6–7 (1932) (holding the anti-gerrymandering and equality of population provisions of the 1911 Act expired when Congress passed the Act of 1929); EAGLES, *supra* note 71, at 80–81 (describing Rep. Daniel Reed of New York's attempt to avoid invalidating these restrictions).

94. Arguably this was an acceptable compromise, from the Southern point of view, since some Northern representatives had recently sought to enforce the 14th Amendment's anti-discrimination seat-stripping provision against these states. See *supra* notes 83 & 84 and accompanying text; EAGLES, *supra* note 71, at 46–47 (discussion of Rep. Tinkham of Massachusetts pressing of the issue of enforcing the 14th Amendment). Although *de jure disenfranchisement* violated the Constitution, *de facto disenfranchisement* through the artful drawing of districts did not.

95. See *infra* notes 118–128 and accompanying text.

96. Chairman Fenn hailed from Connecticut during the peak of the J. Henry Roraback political machine. Roraback effectively controlled the entire state of Connecticut from the 1910s up until the Depression era. See generally John D. Bunker, *The Politics of Resistance: The Rural-Based Yankee Republican Machines of Connecticut and Rhode Island*, 47 NEW ENG. Q. 212 (1974) (providing a thorough discussion of the Roraback political machine); Lane W. Lancaster, *The Background of a State "Boss" System*, 35 AM. J. SOC. 783 (1930) (describing the functioning of the Rora-

anti-democratic “riders” to the Apportionment Act.<sup>97</sup> The first riders eliminated the restrictions on at-large congressional seats originally enacted in 1842,<sup>98</sup> abolished the one person, one vote requirement adopted in 1872,<sup>99</sup> and gutted the anti-gerrymandering provisions adopted in 1901.<sup>100</sup> The second rider, and the one of most concern for this Article, fixed the size of the House at 435 members.<sup>101</sup>

Proponents of this Act put forth five distinct arguments for ending 140 years of Congressional expansion.<sup>102</sup> The charges exhibited against an increased House were: (1) the House would become unmanageable;<sup>103</sup> (2) any increase in number would require smaller

back machine. *See also* Last “Party Boss”, WASH. POST, May 20, 1937, at 6 (“Few political bosses . . . ever held such complete control over a State-wide political machine as did Roraback.”). His control over the state was so complete that he was rumored to have directed the state legislature from his hotel room. Buenker, *supra*, at 213. Roraback’s political machine collapsed in 1937 after he committed suicide with a pistol while on a hunting retreat. *See J. Henry Roraback Kills Self by Shot*, N.Y. TIMES, May 20, 1937, at 1.

97. *See* EAGLES, *supra* note 71, at 72 (discussing how Fenn, without comment or discussion struck the anti-gerrymandering provisions from his own bill minutes before the final House vote); Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (1929) (failing to renew numerous federal guarantees on voter equality). *See also* Wood v. Broom, 287 U.S. 1, 6–7 (discussing the Act’s omission of previous restrictions on district composition); Tucker, *supra* note 67, at 377 (mentioning how the Act of 1929 allowed the states to return to unregulated elections). The final apportionment bill was fittingly referred to as the Fenn Bill. *See House Passes Bill for Reapportioning*, N.Y. TIMES, Jan. 12, 1929, at 1. Referring to these aspects of the bill as “riders” is somewhat inaccurate as the revocation of these federal regulations on congressional apportionment occurred through the *absence* of language that had existed in past apportionment amendments. A more accurate label would be akin to a “rider by omission.”

98. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491 (1842). *See generally* Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 605–41 (discussing the Act of 1842 and Congress’s failure to enforce its provisions when a handful of states refused to comply with its requirements).

99. Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28 (1872). *See* Tucker, *supra* note 67, at 376.

100. Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734 (1901). *See infra* tbl.1 (highlighting districts created by the elimination of these requirements).

101. *See* Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (1929).

102. *See* Yates, *supra* note 62, at 183–85 (briefly canvassing the arguments against expansion of the House).

103. *See, e.g., House Census Hearings: 1926 (Feb. 25)*, *supra* note 91, at 20–23 (statement of Rep. Barbour, author of one of the bills which would have fixed the size of the House). Of the objections against the expansion of the House, it is the claim of an unwieldy mob, *see* EAGLES, *supra* note 71, at 40, that rings the most true to our modern ears. The number of members in the House had increased five-fold over the preceding 140 years, from 65 members to 435. 1990 CENSUS OF POPULATION AND HOUSING, *supra* note 66, at 3–4 tbl.3. This increase, some contended, had created a legislative body that was inefficient and unwieldy. *See* EAGLES, *supra* note 71, at 40. With this increase in size came an increase in rules to control the body and a shift in



desks for the members and additional office space;<sup>104</sup> (3) additional Representatives were too costly;<sup>105</sup> (4) an increase in membership would result in only marginal gains in representation;<sup>106</sup> and (5) the current size of the House already served to undermine the deliberative nature of the assembly.<sup>107</sup>

Each of these arguments, when analyzed, fails to stand up to scrutiny. For example, when pressed, supporters of the scheme repeatedly admitted that the large House ran efficiently,<sup>108</sup> far smoother

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business from the floor to subcommittee, while the time allocated for speeches on the floor by individual members diminished. See *infra* note 107. Furthermore, as the size increased, the number necessary for a quorum increased as well. See *Apportionment of Representatives in Congress Amongst the Several States: Hearing on H.R. 13471 Before the Comm. on the Census*, 69th Cong. 49 (Jan. 19, 1927) [hereinafter *House Census Hearings: 1927(I)*] (statement of Rep. Rankin) (stating a belief that a lot of the opposition to augmentation lay in the tendency of Representatives to miss votes, which they would be able to do less frequently if the quorum number increased with a larger House). Finally, some Representatives claimed any further increase in numbers threatened “boss rule” and centralized control in the hands of the few. EAGLES, *supra* note 71, at 40. In short, proponents of a fixed-size House echoed Madison’s warning on the dangers posed by large assemblies. See *supra* note 41 and accompanying text.

104. See, e.g., *Oppose a Bigger House*, Editorial, N.Y. TIMES, July 26, 1920, at 7 (citing a lack of floor space and narrow seats as reasons to oppose an increase in size); *Congress Reapportionment*, WASH. POST, Mar. 7, 1926, at E51 (reporting the replacement of individual seats with benches akin to the House of Commons); Guy-Harold Smith, *Changed Political Map Awaits Census of 1930*, N.Y. TIMES, Feb. 17, 1930, at 153 (stating the physical limitations of current office space proved the House was of sufficient size). In prior years, each Representative had a personal desk on the floor of the House Chamber. As its membership grew, the House was forced to replace these desks with communal tables and “plain seats.” See *Apportionment of Representatives: Hearings Before the Subcomm. of the H. Comm. on the Census*, 67th Cong. 19 (June 28, 1921) (statement of Rep. Theodore E. Burton) (claiming that Representatives once would work at their desks until debate turned to an issue which caught their attention, at which point they would join in the debate).

105. See *Fight on Increase Begins in House*, N.Y. TIMES, Jan. 19, 1921, at 2 (stating that the chief argument against augmentation lay in its expense, estimated to be \$1,000,000 a year, plus a \$500,000 outlay to increase the size of the House Office Building); EAGLES, *supra* note 71, at 40 (stating that Rep. Samuel Brinson of North Carolina proposed Congress simply increase the clerical help while retaining the existing number of representatives).

106. See EAGLES, *supra* note 71, at 39 (noting Rep. Fairfield’s argument that if there was any justification to halting growth of the House at 500, there was no justification for increasing to 483, so therefore the House should remain at 435).

107. See *Apportionment of Representatives in Congress Amongst the Several States: Hearings on H.R. 13471 Before the Comm. on the Census*, 69th Cong. 140–43 (Feb. 16, 1927) [hereinafter *House Census Hearings: 1927(II) (Feb. 16)*] (statement of Rep. Beedy) (claiming the House had already reached the point where it was no longer a deliberative body, speech on the floor had been limited, and most business was now conducted in committee rooms).

108. See, e.g., *House Census Hearings: 1926 (Feb. 25)*, *supra* note 91, at 23 (statement of Rep. Barbour) (admitting when pressed by Rep. White that the House “functioned well” and had become more efficient over his four terms in office); *House*

than the Senate, which was the true impediment to legislation.<sup>109</sup> They also conceded that this view was held by the country in general.<sup>110</sup> As for the issue of adequate office space, Congress had faced the problem for almost as long as the post-1920 reapportionment impasse.<sup>111</sup> This justification became moot, though, when Congress authorized a second Office Building less than a month before passing the Apportionment Act of 1929.<sup>112</sup> The third charge leveled against a

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*Census Hearings: 1927(II) (Feb. 16)*, *supra* note 107, at 140–43 (statement of Rep. Beedy) (admitting that a larger House would not necessarily be inefficient after stating that he was “very much in favor” of limiting the size of the House). Although Rep. Blanton did present a situation he claimed indicated a mob mentality in the House (members yelling for a vote on a bill), Rep. Kahn pointed out that the vote in question was being taken late on a Saturday afternoon before the House adjourned. *See Apportionment of Representatives in Congress Amongst the Several States: Hearings Before the H. Comm. on the Census*, 69th Cong. 37 (Mar. 4, 1926) [hereinafter *House Census Hearings: 1926 (Mar. 4)*].

109. *See, e.g., Apportionment of Representatives in Congress Amongst the Several States: Hearings on H.R. 13471 Before the Comm. on the Census*, 69th Cong. 123 (Feb. 2, 1927) [hereinafter *House Census Hearings: 1927(II) (Feb. 2)*] (statement of Rep. Brigham) (stating that the country shared his belief that the House outperformed the Senate); *Apportionment of Representatives in Congress Amongst the Several States: Hearings on H.R. 13471 Before the Comm. on the Census*, 69th Cong. 135 (Feb. 9, 1927) [hereinafter *House Census Hearings: 1927(II) (Feb. 9)*] at 135 (statement of Rep. Strong) (stating the House considered legislation more quickly and carefully than the Senate). Opponents of augmentation were left with no option other than to concede the House’s place as the efficient branch of Congress. *See House Census Hearings: 1926 (Mar. 4)*, *supra* note 108, at 32–37 (statement of Rep. Blanton) (opposing augmentation but agreeing the House functioned better than the Senate).

110. *See House Census Hearings: 1926 (Feb. 25)*, *supra* note 91, at 16 (statement of Rep. White) (taking issue with Rep. Fitzgerald’s claim that the House was too large by observing that the general consensus of the country was that it outperformed the Senate, even though it was significantly larger); *id.* at 16 (statement of Rep. Fitzgerald) (conceding the point, while backpedaling by claiming he was just referring to what he believed to be the general opinion in the country and that he himself would not stand in the way of an increase); *House Census Hearings: 1926 (Mar. 4)*, *supra* note 108, at 41 (statement of Rep. White) (rebuking Chairman Fenn by calling his attention to the fact that no one believed the Senate to be more efficient than the House). Furthermore, if the House had indeed reached the point where, in Madison’s words, passion had wrestled the scepter from reason, their argument would have justified only a *pause* in augmentation until the number was no longer sufficient to ensure the safety, knowledge of local issues, and diffuse sympathy with the whole society. *See supra* notes 55–62 and accompanying text (showing that Madison himself recognized a need for a balancing test in determining the proper size of the House).

111. *See, e.g., Oppose a Bigger House*, N.Y. TIMES, July 26, 1920, at 7.

112. *See Coolidge Gets Bill for Annex of House*, WASH. POST, Jan. 8, 1929, at 20; *see also* WILLIAM C. ALLEN, HISTORY OF THE UNITED STATES CAPITOL: A CHRONICLE OF DESIGN, CONSTRUCTION, AND POLITICS 407 (2001) (identifying March 4, 1929, as the day when \$8.4 million was finally appropriated for the new building). This sum—although significant in 1929 dollars—amounted to just a fraction of the \$115,000,000 authorized by Congress that year for the public building program in the nation’s capitol. *See* Richard N. Elliot, *A New Policy Governs Our Public Building*, N.Y. TIMES,

larger House, the added expense of additional members, was equally transparent. Proponents of this position argued the money could instead be spent on additional clerks for the existing members—alleviating them from the need to handle routine work, such as directly addressing their constituents' needs.<sup>113</sup> This argument, although technically accurate, served only to legitimize their opponent's claim that the primary faction in favor of a fixed-size House was the self-serving Representatives.<sup>114</sup> As for the argument that the representation gains from augmentation would be only marginal, this charge focused only on the gains which the 1930 augmentation would bring. Although the addition of forty-eight members proposed in 1921 amounted to only a 10% increase,<sup>115</sup> such an argument could have been applied to any census in the nation's history—what may only have been a 10% increment after any given census had grown the House from 103 to 435. Finally, it was argued that the size of the House had undermined the deliberative nature of this branch of the legislature by taking work away from the main chamber floor and into committees.<sup>116</sup> The central problem with this argument was its complete disconnect from re-

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Aug. 11, 1929, at XX11 (reporting allocation of \$115,000,000 for public buildings in the national capitols). Today, three buildings, rather than one, are used by a House of Representatives which has not added a single member since 1929: the original Cannon House Office Building built in 1908, the Longworth House Office Building completed in 1933, and the Rayburn House Office Building which was finished in 1965, not to mention two additional buildings now designated for House staff. See Architect of the Capitol, The Congressional Office Buildings—Overview, <http://www.aoc.gov/cc/cobs/index.cfm> (last visited Jan. 7, 2008).

113. See *House Census Hearings: 1926 (Mar. 4)*, *supra* note 108, at 35 (statement of Rep. Thomas L. Blanton) (stating that a clerk could do half his work and that no Congressman should have to respond to requests from constituents, including veterans). *But see id.* (statement of Rep. White) (disagreeing with Blanton by stating that it was a Representative's conscientious duty to take up such matters personally).

114. See *House Census Hearings: 1927(II) (Feb. 2)*, *supra* note 109, at 124–25 (statements of Reps. Lozier & Brigham) (arguing that history showed that those who opposed popular government continuously sought to confine the size of legislatures). See also *House Census Hearings: 1927(II) (Feb. 16)*, *supra* note 107, at 144 (statement of Rep. Beedy) (stating that he favored a smaller House because it would allow Members to “more exactly” reflect the views of their constituents). This nonsensical statement misses entirely the effect of increasing a constituency—the picture of the people's opinions becomes more grainy and generalized. The only voices that grow clearer are those of the Representatives.

115. See *Fight Increase in Congressmen*, L.A. TIMES, Jan. 18, 1921, at I5.

116. See, e.g., *House Census Hearings: 1927(II) (Feb. 16)*, *supra* note 107, at 143 (statement of Rep. Beedy) (claiming each augmentation decreased the ability of individual representatives to speak on the floor of the House, turning them into “a smaller cog in the big wheel”).

ality. If the House had ever actually operated in such a manner, Representative Beedy argued it had long since ceased to do so.<sup>117</sup>

### 3. *Critics of the Apportionment Act*

Critics of the proposal offered their own explanation for why some opposed further augmentation of the House. They saw the attempt to fix the size of the House as a blatant power grab by the political machines which were slowly losing control over the increasingly numerous Representatives.<sup>118</sup>

In the decades prior to the Apportionment Act of 1929, the nation had slowly evolved its political systems in the direction of fairness and equality in a period commonly dubbed the Progressive Era.<sup>119</sup> By the 1920s, Progressive Era reforms had begun to take their toll on the political machines, with the fight making it all the way to the floor of Congress.<sup>120</sup> The Senate itself engaged in a bitter battle over charges that a significant number of its members were in the pockets of party

117. *See id.* at 140–43 (statement of Rep. Beedy) (“The House is already so large that it is no longer a representative body. Because of its size it is impossible to permit real consideration of legislative proposals. That is only possible in committee rooms.”). In fact, the system of committees and subcommittees continues to this very day. Some even argued that increasing the size of the House would increase its deliberative nature. *See id.* at 142–43 (Rep. Jacobstein) (arguing Rep. Beedy was confused as to the effect of increasing the House and that augmentation would actually increase a Representative’s voice on bills). By increasing the total number of Representatives, the workload of each individual member would diminish, allowing them additional time to sit in on and offer their view in other committees. Although the increased debate would not occur on the *floor*, it would occur. *Id.*

118. *See* EAGLES, *supra* note 71, at 38 (describing how one Representative warned that lobbyists and the machine politicians opposed enlarging the House because they feared losing control of it); *House Census Hearings: 1927(II) (Feb. 2)*, *supra* note 109, at 124–25 (statements of Reps. Lozier & Brigham) (stating that throughout history, those who opposed popular government had sought to confine legislatures to an easily controllable size).

119. *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process* 66 U. COLO. L. REV. 13, 14–17 (1995) (discussing the increase of democratic devices during the Progressive Era).

120. *See* Peter Swenson, *The Influence of Recruitment On the Structure of Power in the U.S. House, 1870–1940*, 7 LEGIS. STUD. Q. 7, 7, 16, 21–26 (describing the revolt against the political machines, which had placed “machine congressmen” into the House while turning the Senate into a federation of political bosses, between 1900–1940); George W. Norris, *Senator Norris Proposes a Remedy for the Condition Which Permits a Small Minority to Hold Up and Disrupt the Business of Legislation—He Would Eliminate the Short Session of Congress*, N.Y. TIMES, Mar. 13, 1927, at XX1 (describing the corruption in the Senate, the control the Pennsylvania political machines held over the primary process, and the filibuster by a minority of Senators which prevented the Senate from purging itself of this corruption).

bosses.<sup>121</sup> Into this mix was thrown the issue of augmenting the House of Representatives.

As Madison noted, the ease with which a legislature may be bribed is inversely proportional to its number—the more numerous the body, the less susceptible it will be to corruption and “combination for improper purposes.”<sup>122</sup> Indeed, Madison advocated a confederated republic specifically because such a system would more effectively guard against corruption and intrigue by the few.<sup>123</sup> Increasing the House would weaken the party bosses by simultaneously increasing the number of representatives that would have to be bribed and the geographic area from which general election “votes” would have to be delivered. Given that Chairman Fenn hailed from Connecticut during the reign of J. Henry Roraback—one of the most effective party bosses in United States history<sup>124</sup>—it is perhaps not surprising that he stubbornly insisted throughout the 1920s that the size of the House be fixed at 435 and that the bill which eventually passed even bore his name.<sup>125</sup>

Although there is little hard evidence to prove the role political machines played in pushing to end augmentation, circumstantial evidence points solidly in their direction. The arguments put forth against augmentation had little connection to the underlying facts.<sup>126</sup> The Chairman of the House Committee came from a state where every political office was doled out by one of the most powerful “party bosses” in U.S. history.<sup>127</sup> And finally, House members claimed in Congressional testimony that the political machines were behind the portion of the bill freezing the size of the House.<sup>128</sup> Together, this

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121. See, e.g., Norris, *supra* note 120; Magleby, *supra* note 119, at 16 (discussing the direct election of U.S. Senators in order to reduce the influence of state legislatures dominated by corrupt party system); Swenson, *supra* note 120, at 16.

122. THE FEDERALIST NO. 55 (James Madison), *supra* note 6, at 338. See also THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 6, at 128–29 (recognizing that one of the weaknesses of a republic is that those elected by the people “may find compensations for betraying their trust . . . exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty”).

123. See THE FEDERALIST NO. 10 (James Madison), *supra* note 6, at 57; see *supra* notes 16–26 and accompanying text.

124. See *supra* note 96.

125. See *House Passes Bill for Reapportioning*, N.Y. TIMES, Jan. 12, 1929 at 1.

126. See *supra* notes 102–17 and accompanying text.

127. See *supra* note 96 (noting influence of the Roraback machine); see also *supra* note 97 (noting that Rep. Fenn was also responsible for the removal of the anti-gerrymandering provisions which had existed for decades).

128. See *supra* note 118. In one notable exchange, Reps. Lozier and White presented a convincing argument against limiting the House to 435 which appeared to win over the majority of the committee. See *House Census Hearings: 1927(II)* (Feb. 2), *supra* note 109, at 126–27. Rep. Jacobstein then proposed amending the reappor-

evidence throws a cloud of suspicion on the underlying motivation for fixing the House at 435 members. Although we cannot determine with certainty the true motivation behind the Apportionment Act of 1929, as I explain below, its effects on our political system are clear.

## II. SUPER SIZE ME

By exploiting the flexible ratio of representation, the Apportionment Act of 1929 enervated the Constitution's primary guarantee of responsive government. Not surprisingly, the elimination of this precondition for effective government has had a significant effect on our political system. These effects range from procedural issues regarding the actual operation of our political system to more normative issues surrounding the validity of our democracy. I will address each of these in turn.

### *A. Party Power as a Symptom*

Although the idea of self-interested factions lies at the very core of Madison's political theory, Madison failed to anticipate the rise of the *national* political party and the resulting two-party landscape.<sup>129</sup> America's current political system, operating as it does outside the theoretical boundaries Madison laid down, has undermined his fundamental assumptions on how the machine would operate. Professors Daryl Levinson and Richard Pildes recently addressed this departure from the intended constitutional channels in their article, *Separation of Parties, Not Powers*.<sup>130</sup> They argue that, as a general matter, Madisonian political theory fails to conceptually describe our current two-party political system.<sup>131</sup> This failure, they believe, lies in the Constitution's inability to cope with unanticipated "[p]olitical competition and cooperation" challenged through two major political parties

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tionment bill to remove the 435 limit. *Id.* at 130. Chairman Fenn responded by stating he would be willing to address the issue in "executive session" and immediately moved to end the hearing. *Id.* Rep. White responded that he expected as much and wanted to go on the record as being strongly in favor of a larger House. *Id.* at 130–31.

129. See *supra* Part I.A (discussing Madison's belief that a structural barrier to single-faction majorities could be erected by expanding the republic over a greater geographic area).

130. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (arguing that a realist's perspective of the American political system demands a retooling of the Madisonian system of separation of powers based on separation between the two major parties instead).

131. *Id.* at 2313–14.

“along relatively stable ideological lines.”<sup>132</sup> Indeed, according to Professors Levinson and Pildes, the rise of party loyalty has created a significant extra-constitutional supplement to the separation of powers, such that “[f]ew aspects of the founding generation’s political theory are now more clearly anachronistic” than Madison’s conception of competition between the legislative and executive branches.<sup>133</sup>

Professors Levinson and Pildes premise their observations on the assumption that the failure of the Madisonian system lies in its system of separation of powers, describing this system as a “machine” that has “stopped running.”<sup>134</sup> Yet, as discussed *infra*, Madison intended the system of divided powers to serve only as an auxiliary control.<sup>135</sup> The primary means of political accountability would lie in frequent competitive elections—a system which would ensure that representatives remained responsive to the electorate. This mechanism of the “machine,” though, has broken down.

Since the Apportionment Act of 1929 fixed the size of the House at 435 members, the average member’s constituency has increased more than 200%.<sup>136</sup> Through accretion, the ratio of representation has reached the level where it is now impossible for the average voter to obtain first-hand knowledge of their representative’s character, let alone exert any meaningful level of control over their voting patterns. This barrier to communication is not one-way. Gone are the days when a representative could personally handle requests from military veterans.<sup>137</sup> Furthermore, a potential candidate has little hope of reaching voters through face-to-face communication and must instead turn to expensive mass-media advertising.<sup>138</sup> District-wide retail politics is no longer viable at the federal level.

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132. *Id.* at 2313–15.

133. *Id.* at 2313.

134. *See id.* at 2312–13 & 2313 n.3 (further describing the political origin and meaning of the word “machine”).

135. *See infra* Part II.B–C.

136. *See* BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, PHC-3-1, 2000 CENSUS OF POPULATION AND HOUSING II-5 tbl.B (1994), available at <http://www.census.gov/prod/cen2000/phc3-us-pt2.pdf> (reporting a ratio of apportionment population to representative of 280,675 in 1930 to 646,952 in 2000, an increase of roughly 230%).

137. *See supra* note 113.

138. In 2004, candidates for the New Hampshire House of Representatives, with a ratio of residents to legislators of 3,250:1, raised on average \$539, while candidates for the California Assembly, with the highest ratio of residents to legislators in the nation at 456,915:1, raised on average \$403,456. *See* INSTITUTE ON MONEY IN STATE POLITICS, STATE ELECTIONS OVERVIEW: 2004, at 4 (2005) available at <http://www.followthemoney.org/press/Reports/200601041.pdf> (reporting on average amounts raised by legislative candidates in each state); MSN Encarta, New Hampshire Facts and Figures, [http://encarta.msn.com/fact\\_701505871/New\\_Hampshire\\_Facts\\_and\\_](http://encarta.msn.com/fact_701505871/New_Hampshire_Facts_and_)

Aspiring politicians, cut off as they are from potential constituents, turn instead to alternative means of winning elections—the party apparatus.<sup>139</sup> The party system and wealthy campaign contributors have become the primary means through which a candidate wins election.<sup>140</sup> In fact, at least one study of House elections found that the margin of an incumbent's victory turns primarily on his challenger's level of funding.<sup>141</sup> Madison's central premise—that self-serving political actors will remain loyal to their base—still holds, but the base on which officeholders rely has become campaign contributors and influential party members as opposed to constituents. The influence political parties wield over their members is in effect a symptom of overlarge districts.

Once an incumbent is elected, political parties possess a variety of means for ensuring members remain loyal, as a politician's ability to operate depends a large part on their willingness to toe the party line.<sup>142</sup> The party leadership dictates which members will serve on what committees, the flow of campaign contributions from large national donors, and the quality of news coverage from the party's proxies in the media.<sup>143</sup> Yet each of these means of maintaining party

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Figures.html (last visited Dec. 20, 2007) (giving New Hampshire's population as 1.3 million residents and reporting number of representatives as 400—a ratio of 1 to 3,250); U.S. Census Bureau, *Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007*, <http://www.census.gov/popest/states/tables/NST-EST2007-01.xls> (last visited Jan. 27, 2007) (reporting current population estimates for California and other states); CAL. CONST. art. IV, § 2(a) (setting the size of the Assembly at 80 members).

139. See Levinson & Pildes, *supra* note 130, at 2336–38 (describing the influence party leaders wield through campaign funds and political consultants).

140. See *id.* (noting the role of political parties in campaigns); Alan I. Abramowitz, *Incumbency, Campaign Spending, and the Decline of Competition in U.S. House Elections*, 53 J. POL. 34, 35–38 (1991) (demonstrating that campaign spending is the single most important determinant of a challenger's success against an incumbent). Although this is hardly a new situation, having effectively existed since the time of the founding, I assume that the progress during the Reform era would have greatly weakened this party control. Of course, this is a two way street. Voters need not do their homework because they can rely on the party label attached to their candidate. Carl Schmitt used the reflexive tendency to vote along party lines—breaking politics into a friend-enemy distinction—as the basis for a critique of democracy. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 32 (George Schwab, trans., Rutgers Univ. Press, 1976) (1932).

141. See Abramowitz, *supra* note 140 at 35–38 (taking into account the partisanship of the district, seniority status, committee membership, party defection rate, campaign spending by both challenger and incumbent, political experience, and national party ties).

142. See Levinson & Pildes, *supra* note 130, at 2336–38 (discussing the influence the political parties wield over the political system).

143. See *id.* at 2336–37 (discussing increasing control by party leaders over legislators); Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81



control remains secondary to an incumbent's dependency on their party's financial backing for reelection.

As the upper party apparatus has consolidated control over the system, fewer incumbents have been willing to defect across party lines.<sup>144</sup> The result is an increasingly polarized two-party system<sup>145</sup> which places the interests of the parties before the interests of the people. In a world where the national party and the congressional campaign committees direct the expenditures of their supporters, representatives are in effect demonstrating agent loyalty to the ones that brought them—the party.<sup>146</sup> As Professors Pildes and Levinson note, separation of powers has been a high-profile victim of this development.<sup>147</sup> The breakdown of separation of powers, though, has not been the only unintended consequence of a fixed-size House.

### B. Super-Sized Districts and Increased Incumbency

By fixing their numbers, representatives also solidified their existing positions and contributed to the problem of the Durable Incumbent.<sup>148</sup> Larger districts eliminate the possibility of retail politics, creating barriers to entry for potential opponents.<sup>149</sup> They also arguably lead to an increase in gerrymandering, another major factor behind the Durable Incumbent.<sup>150</sup>

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CORNELL L. REV. 623, 662–69 (1996) (describing the methods for selecting committee positions, the rise of the seniority system, and instances of party leader deviation from this system); *id.* at 688 (describing the position political parties can play in doling out special interest donations); Mike Allen & Jim VandeHei, *Social Security Push to Tap the GOP Faithful*, WASH. POST, Jan. 14, 2005, at A6 (reporting the Republican National Committee's incoming chairman's plan to use, among other tools, television surrogates in order to build congressional support for the executive's plans).

144. *See, e.g.*, Levinson & Pildes, *supra* note 130, at 2333.

145. *Id.*

146. *See* CHRIS MATTHEWS, *HARDBALL* 74–80 (1988) (stating that his former boss, House Speaker Tip O'Neill, believed “[l]oyalty is everything in this business” and that party loyalty is the basic building block of politics).

147. Levinson & Pildes, *supra* note 130, at 2313.

148. This, of course, was precisely the concern the Anti-Federalists had expressed during the ratification debates. *See supra* notes 50–51 and accompanying text.

149. Because retail politics revolves around face-to-face interaction with individual voters, *see supra* note 53, as the number of voters increases, it becomes increasingly more difficult to interact with a significant number of the electorate on an individual basis, forcing candidates to rely instead on mass media to reach voters. *See, e.g.*, Michael Luo, *McCain's Victory Muddles G.O.P. Field as It Looks to Michigan*, N.Y. TIMES, Jan. 9, 2008, at A1 (noting that “[b]ecause of its size, Michigan is not a state conducive to retail politics, and campaigns are largely waged over the airwaves”).

150. *See* Levinson & Pildes, *supra* note 130, at 2379–81 (suggesting the elimination of safe districting as an alternative solution to the breakdown of separation of powers).

In order to avoid dilution of geographically concentrated voting minorities, courts have been willing to allow districts to be drawn along exceedingly creative lines.<sup>151</sup> Larger districts are akin to a low-resolution photo. As the total number of districts, and thus the granularity, increases, the picture of the electorate becomes more accurate. A decrease in district size combined with a requirement of compact, contiguous districts would arguably eliminate the need for racial gerrymandering in order to provide geographically concentrated minorities with a voice equivalent to their percentage of the population.

As a politician's assurance of reelection rises, one would expect their willingness to vote in a manner at odds with the interests of their constituents to increase.<sup>152</sup> The primary means of ensuring their loyalty—electoral accountability—has been effectively curtailed. As such, Durable Incumbency can be expected to result in growing insensitivity to the concerns of voters.

### C. *Durable Incumbents and Party Loyalty as a Normative Matter*

Although democratic theorists disagree on whether the value of democracy lies in its procedures or its outcomes, the Durable Incumbent calls both evaluative aspects into question.<sup>153</sup> For proceduralists, who believe the value of democracy is grounded in the representative nature of the government, evidence of a breakdown in effective democratic participation is a cause for concern.<sup>154</sup> When, in times of widespread voter discontent, 95% of all incumbents are re-elected to office,<sup>155</sup> proceduralists must seriously question how deliberative and

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151. See, e.g., *infra* tbl.1, Illinois Congressional District 4 (connected portions of Chicago and Cook County by a razor-thin strip of land); see also *King v. State Bd. of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997) (detailing the extended litigation regarding the Illinois redistricting plan of 1991, which centered on the irregular shape of this Hispanic super-majority district), *aff'd*, 522 U.S. 1087 (1998).

152. See John Ferejohn, *Incumbent Performance and Electoral Control*, 50 *PUB. CHOICE* 5, 8 (1986) (noting that the desire to remain in office and frequent elections causes politicians to act in the interest of their constituents); Editorial, *The Gerrymandered Democrats*, *WALL ST. J.*, Nov. 5, 2002, at A22 (noting that the House, with its gerrymandered districts, is less responsive to public opinion than the Senate, which cannot be gerrymandered).

153. See generally Christiano, *supra* note 24 (discussing the two competing justifications for democracy and whether either can stand on its own).

154. See *id.* at 266. For a critique of proceduralism, see Hans Kelsen, *On the Essence and Value of Democracy*, in *WEIMAR: A JURISPRUDENCE OF CRISIS* 84, 96–97, 100–02 (Arthur J. Jacobson & Bernhard Schlink eds., Univ. of Cal. Press 2002). (1929) (exposing the “fiction of representation” and noting the ability of a minority to rule a majority in parliamentary democracies).

155. See *supra* note 4 and accompanying text. The problem of unresponsive parliamentary governments plagues Latin America and has called into question the legitimacy of their political systems. See Mei-Ling Hopgood, *Protesters' Power Swells*,

democratic our system actually is. Instrumentalists, on the other hand, who value the outcome of the democratic process, recognize that if the citizens as a whole can recognize what is “good,” whether “good” legislation emerges from the democratic process depends largely on whether our agents remain loyal.<sup>156</sup> Durable Incumbents present a serious problem of agent loyalty—and thus the quality of outcomes—by calling into question the extent to which representatives are bound to their constituents. Durable Incumbents, then, present a serious problem for democratic legitimacy regardless of one’s theoretical leanings.

For example, one of the most noted modern democratic proceduralists, Jürgen Habermas,<sup>157</sup> believes democracy finds its value in its deliberative process.<sup>158</sup> Although direct deliberation cannot be achieved on a nationwide scale, he argues modern democracies are still justified based on the ability of the legislature to respond effectively to the will of the electorate by channeling public opinion through various sluices in society.<sup>159</sup> Habermas’s defense of democracy, though, rests on the premise that political agents remain responsive to the will of the electorate. When the ratio of representation rises to the level where the officeholder’s primary loyalty no longer lies with the electorate, this justification of democratic systems becomes less compelling. Thus, an adequate ratio of representation serves as more than just a check on the representatives—it also represents a key component of mainstream theories of democratic legitimacy.

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MIAMI HERALD, June 28, 2005, at 1A (noting the unhealthy situation in Latin America where government institutions had failed to effectively respond to demands from the populace, resulting in an extraconstitutional exercise of power through street protests). Populists vowing to restructure these systems through both constitutional and extra-constitutional channels achieved numerous victories in 2006. See Patrick Markey, *Venezuela’s Chavez Storms to Re-election Victory*, REUTERS, Dec. 4, 2006 (stating that Chavez was the fourth leftist to win election in Latin America in under two months).

156. See, e.g., Rousseau, *supra* note 16, at 147–49, 155–56 (conceiving of democratic legitimacy based on a general will capable of reaching the “right” conclusion only so long each member of the assemble votes as to what they believe is the public good and avoids “intrigues and partial associations”); Christiano, *supra* note 24 at 266 (describing instrumentalist focus on outcomes).

157. See generally THE OXFORD COMPANION TO PHILOSOPHY 356–57 (Ted Honderich, ed., 2d ed. 2005) (describing Habermas’s work and noting Habermas’s eminent, as well as controversial, position in German socio-cultural debate).

158. See HABERMAS, *supra* note 24, at 249–50.

159. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 307 (William Rehg, trans., MIT Press 1998) (1992).

## III.

## THREE POSSIBLE SOLUTIONS

As we have seen, fixing the House of Representatives has undermined our system's primary mode of ensuring government loyalty—electoral accountability. This has created both theoretical and procedural issues, including the breakdown of Madison's system of checks and balances. With this understanding in mind, let us turn to the question of how we should deal with the problem of political representatives that put their party before their branch.

Three potential solutions are: (1) create checks to ensure the minority party exerts influence,<sup>160</sup> (2) increase electoral accountability through campaign finance reform,<sup>161</sup> and (3) increase electoral accountability by decreasing the ratio of representation in the House.<sup>162</sup>

A. *Separation of Parties, not Powers*

Political actors increasingly place loyalty to party before loyalty to the constitutional system. Professors Levinson and Pildes confronted this problem by suggesting we rethink our basic constitutional theory—specifically by injecting a realist's understanding of the two-party system into the Madisonian theory of separation of powers.<sup>163</sup> Under this view, modern political parties are properly viewed as monolithic organizations filled with members whose primary loyalty is to the goals of the party, rather than to the political office they hold or the constituents they represent.<sup>164</sup> Constitutional theory should accept the reality of this situation, so the thinking goes, and new checks and balances should be established to account for these changes.<sup>165</sup>

Pildes and Levinson believe Madison's "will-based theory of separation of powers" rests on the unrealistic assumption of civic-minded politicians willing to place the interests of their constitutional office over the interests of the citizens they represent.<sup>166</sup> This view is based on reflexive acceptance of our system's fundamental deviation from the Madisonian theory of representative democracy—the fixed-size House of Representatives. As previously shown, the modern

160. See generally Levinson & Pildes, *supra* note 130.

161. See, e.g., Arnold Schwarzenegger, Editorial, *Reform Term Limits*, L.A. TIMES, Jan. 15, 2008, at A17 (advocating for redistricting of California and campaign finance reform to make state government more responsive to the electorate).

162. See generally Kromkowski & Kromkowski, *supra* note 78.

163. Levinson & Pildes, *supra* note 130, at 2314–15.

164. *Id.*

165. *Id.* at 2347–49.

166. *Id.* at 2317–19.

monolithic two-party system is not the source of the breakdown in the Madisonian system of checks and balances. Rather, it is a symptom arising from the uncoupling of representation from the requirement of constituent loyalty.<sup>167</sup>

Furthermore, providing the political parties with additional tools to check each other, such as altering the structure of party primaries or changing legislative rules,<sup>168</sup> serves only to address the periodic collapse of inter-branch competition. It leaves unaddressed the serious problems of legitimacy, incumbency, and officeholder unresponsiveness. Although an additional check on government abuse and corruption serves an admirable purpose, inter-party checks provide no guarantee that either party will become responsive to the people on issues where the interests of large donors conflict with the interests of the people as a whole.<sup>169</sup> Nor will such a check serve to deal with the problem of Durable Incumbents in the face of widespread voter dissatisfaction.

Such a solution is wholly unacceptable if one believes the value of democracy is rooted not only in the outcomes of the process, but also in the actual procedure itself. The democratic proceduralists<sup>170</sup> will see little difference between a broken system where parties can check each other and a broken system without such checks—either way, the system is still broken. There is no guarantee that government will respond to the desires of the electorate when they run counter to the desires of the party. Thus, loyalty to party over constituents will remain as much a problem as it does today.<sup>171</sup>

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167. See *supra* Part I.B. Levinson and Pildes focus on the loyalty of the agent to their office and conclude that Madison erred in believing an agent would ever place their office before either their party or the will of their constituents. Levinson & Pildes, *supra* note 130, at 2314. I believe this critique is misguided in that Madison assumed the people would always desire an invigorated separation of powers. As such, loyalty to the citizens would equate to loyalty to one's office.

168. *Id.* at 2381–83.

169. One of the most egregious examples of government influence buying can be seen when a single organization makes large donations to both parties. The National Association of Realtors, for example, has donated large sums of money to both the Republicans and Democrats for years. See [Opensecrets.org](http://www.opensecrets.org), Ctr. for Responsive Politics, Donor Profiles: National Ass'n of Realtors, <http://www.opensecrets.org/orgs/summary.asp?ID=D000000062> (last visited Jan 25, 2008). Such campaign contributions create a strong presumption of influence buying and providing inter-party checks will do nothing to rectify such situations.

170. See *supra* note 154 and accompanying text.

171. See, e.g., Ryan J. Donmoyer, *Reid's 'Dead-of-Night' Maneuvers on Measure Contradict Pledge*, BLOOMBERG, Dec. 15, 2006 (describing, after the Republican defeat, Senate Democratic Leader Harry Reid's 10:30 p.m. insertion of two questionable provisions into the last major bill of the year. One involved a highly controversial

Professors Levinson and Pildes acknowledge their proposal is vulnerable to such a critique and suggest another potential solution involving reformation of the electoral process—the fragmentation and moderation of political parties.<sup>172</sup> Two methods they present for accomplishing this task are the creation of more competitive districts and increased adoption of open primaries.<sup>173</sup> By creating more competitive districts and allowing moderates to cross party lines during primaries, more centrist candidates can succeed during the primary process, enhancing party diversity and thus moderating the tendency toward ideologically polarized parties.<sup>174</sup> Yet a significant barrier would remain—the capital necessary for mounting a successful political campaign.<sup>175</sup>

### B. Campaign Finance Reform and Electoral Accountability

The United States has grappled with the second potential solution to the problem of faithless representatives—campaign finance reform—for thirty years. Despite numerous attempts at reform,<sup>176</sup> congressional campaign spending has grown dramatically almost every election cycle.<sup>177</sup> The failure of campaign finance regulation to halt this growth has led some commentators to question its effectiveness.<sup>178</sup> Yet there is another reason to question campaign finance reform. Besides the First Amendment issues which continue to plague attempts to regulate political expenditures,<sup>179</sup> removing money from politics may have the perverse consequence of simply increasing the influence of political party leaders.<sup>180</sup>

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land deal in his home state, Nevada, opposed by the surrounding county because it lacked funds to study the effect of the diversion of water to Clark County).

172. Levinson & Pildes, *supra* note 130, at 2379.

173. *See id.* at 2379–83.

174. *See id.*

175. *See id.* at 2336.

176. *See, e.g.*, Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

177. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 524 & tbl.2 (rev. 2d ed. 2002).

178. *See* Richard H. Pildes, *The Supreme Court, 2003 Term—Foreward: Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 130–53 (2004); ISSACHAROFF, KARLAN & PILDES, *supra* note 177, at 526–27.

179. *See, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, Inc., No. 06-969, slip op. at 28 (U.S. June 25, 2007) (striking down Section 203 of the Bipartisan Campaign Reform Act of 2002 as a violation of the First Amendment).

180. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 642–47 (2000) (discussing the influence of political parties

The route to election in the United States broadly entails traveling down one of two roads. Either a candidate obtains endorsements from major players within the political party, or the candidate expends a massive amount of money—often either from their own pocket or from special interests.<sup>181</sup> According to Madison, a candidate's loyalty will naturally lie with the source of their power.<sup>182</sup> As recognized by Tip O'Neill—they will dance with the one that brought them.<sup>183</sup>

Madison's assumption carries with it a warning for proponents of campaign finance reform. Decreasing the role of money in the system will arguably increase the power of the party apparatus.<sup>184</sup> The resulting power configuration would simply perpetuate the problems identified by Pildes and Levinson, that is, increasingly polarized parties whose members allow party loyalty to frustrate the Madisonian system of checks and balances. By increasing the party apparatus's control over the election process, any gains that might be made by reforming campaign financing would be lost.

Thus, we find ourselves left with a conundrum. The restriction of partisan gerrymandering and allowance of open primaries may diminish the control exercised by party leaders, but financial barriers to entry will likely remain. If this problem is addressed through campaign finance restrictions, the party apparatus will be reinvigorated. Either solution leaves U.S. democracy open to the critique advanced by Max Weber who argued that liberal democracy amounts to nothing more than the control of political machinery by a handful of party leaders.<sup>185</sup>

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as financial conduits due to campaign finance reform efforts) (2000); Cf. David Estlund, *Political Quality*, in *DEMOCRACY* 188–89 (David Estlund ed., 2001) (arguing against strict campaign finance reform and noting that money is not the only route to political influence).

181. See Jim Rutenberg & Patrick D. Healy, *Bloomberg Spends \$50 Million on Race*, N.Y. TIMES, Oct. 8, 2005, at A1 (noting that Mayor Bloomberg, in using his personal wealth to fund his reelection campaign, was on track to break records for expenditures for an office other than the presidency); Kevin Sack, *For Limited Government? That's Me, Gore Says*, N.Y. TIMES, Oct. 25, 2000, at A23 (reporting allegations that special interests underwrote President Bush's initial presidential campaign).

182. See *supra* Part I.D.

183. See MATTHEWS, *supra* note 146, at 78 (noting O'Neill's view that loyalty is everything in politics).

184. Such an effect is something akin to the hydraulics of campaign finance reform described by Issacharoff and Karlan. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (describing how applying restrictions on money use in one area simply diverts money through an alternative channel). A more apt analogy might be to the game Whack-a-Mole. Whenever you whack one mole, another one always pops up elsewhere.

185. See MAX WEBER, *The Profession and Vocation of Politics*, in *POLITICAL WRITINGS* 338–39 (Peter Lassman & Ronald Speirs eds., Cambridge Univ. Press 1994)

One solution to this potential problem is increasing the level of campaign subsidies provided by the government.<sup>186</sup> Yet it is not clear whether such public financing would actually resolve the problem. Some commentators have argued that public financing of elections may serve only to subsidize and solidify the political parties.<sup>187</sup> Unless campaign subsidies were structured in a manner such that the voice of the parties could be drowned out,<sup>188</sup> they could potentially only perpetuate the problem. Furthermore, subsidies fail to address the problems of non-monetary influence, such as the role the media plays in shaping elections.<sup>189</sup>

This observation also offers another solution to the consolidation of political power by party leaders. Removing restrictions on campaign contributions by individuals would allow wealthy donors to directly influence party elections, disperse influence and control to a larger, yet still limited, group. Although hardly ideal, such a situation may be preferable to our current system and might result in a return to more overlapping parties with fringe members more willing to cross party lines. While the average representative would remain beholden to a self-interested faction, the faction's defining characteristic would be wealth, rather than political affiliation. Some commentators implicitly follow this reasoning.<sup>190</sup> Indeed, some commentators have pointed to well-meant campaign finance reform as a factor behind the

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(1919). Weber made this observation while articulating his theory of legitimacy. *Id.* at 311–12. Weber focused not on what was necessary for a state to actually be legitimate, but rather on what was necessary to provide the appearance of legitimacy such that the people will submit to the authority claimed. *Id.* at 311. Further, there are three models for creating the appearance of legitimacy: (1) tradition, (2) charisma, and (3) simple belief in the validity of a law. *Id.* at 311–12. Of course, it may be that any attempt to structure U.S. democracy in a manner which ensures its legitimacy is doomed to failure. See A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 155–57 (2000) (concluding that although all states are illegitimate, they may occasionally be justified).

186. See, e.g., ME. REV. STAT. ANN. tit. 21, §§ 1121–1128 (2007) (offering full public financing of state elections at a level equal to the average amount spent on similar contested elections during the previous two election cycles).

187. See ISSACHAROFF, KARLAN & PILDES, *supra* note 177, at 526–27.

188. See ME. REV. STAT. ANN. tit. 21, § 1125(3) (triggering full public financing after the collection of only fifty to 3,250 \$5 donations, depending on the office). Of course, the level of funding must still be sufficient to outweigh the intangible value of a pre-existing party apparatus.

189. See *McConnell v. FEC*, 540 U.S. 93, 355 (2003) (Rehnquist, J., dissenting) (noting that there is “little doubt” that endorsements by major newspapers affect elections).

190. See Annelise Anderson, *Political Money: The New Prohibition*, in POLITICAL MONEY: DEREGULATING AMERICAN POLITICS 171, 184 (Annelise Anderson, ed., 2000) (noting that abolition of campaign contribution limits would channel funds from the wealthy directly to candidates, making potential influence more obvious).



increased level of partisanship in Congress over the last thirty years.<sup>191</sup> Of course, such a situation represents no improvement over our current political system in terms of legitimacy or responsiveness to the people at large.<sup>192</sup>

### C. *Decreasing the Ratio of Representation*

There remains a final option for addressing the problem of decreased branch competition due to increased party influence—we can attempt to eliminate the root problem. Levinson and Pildes identify the central problem as the power of the political parties in the system.<sup>193</sup> They cite Madison to support their contention that the spirit of parties cannot be excised from the system; rather, its effects can only be ameliorated.<sup>194</sup> Therefore, they focus on preventing strong, unified party government from arising.<sup>195</sup>

Yet, as previously demonstrated, the influence political parties wield over their members is not the cause of the breakdown of the separation of powers. It is instead just another symptom of the breakdown of agent loyalty. The primary means of ensuring agent loyalty in a democracy is electoral accountability. When the election of a political actor is decoupled from loyalty to their constituents, representatives will naturally fall under the sway of the actor to whom they

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191. See, e.g., ISSACHAROFF, KARLAN & PILDES, *supra* note 177, at 485 (describing two studies which suggest campaign finance reform has resulted in a shift from a candidate-centered election system to a party-centered one); see also Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L. J.* 1049, 1071–84 (1996) (iterating a list of unintended consequences of campaign finance reform, including entrenchment of incumbents, increased influence peddling, decreased accountability, increased influence of select elites, benefits to wealthy candidates, and increased influence of special interests).

192. Durable Incumbency would arguably be affected, as wealthy candidates would be, on the margins, more willing to run if they know they can expect large contributions from similarly situated acquaintances. This would result in more wealthy, dark horse challengers, like Ned Lamont, who defeated incumbent Senator Joseph Lieberman in the 2006 primaries. See Deirdre Shesgreen, *Lieberman's Loss Signals Rebellion: Anti-War, Anti-Bush, Anti-Incumbent Lamont's Campaign Portrayed Senate Veteran as a Lackey for President Bush*, *ST. LOUIS POST-DISPATCH*, Aug. 10, 2006, at A1. It would also allow for wealthy benefactors to sponsor candidates, freeing the candidate from fundraising and allowing them to spend more time meeting with voters. See Josh Gerstein, *McCain Says Major Financiers Will Back His 2008 Bid*, *N.Y. SUN*, Dec. 15, 2006 (indicating John McCain, a candidate opposed by the political establishment, has secured wealthy individuals to serve on his finance committee in his bid for the 2008 presidential nomination); Jonathan Weisman, *McCain Faces Payback from Old GOP Foes*, *WASH. POST*, Jan. 14, 2008, at A1 (noting McCain's acrimonious relationship with the Republican establishment).

193. See Levinson & Pildes, *supra* note 130, at 2314–15.

194. See *id.* at 2379.

195. See *supra* notes 163–65 and accompanying text.

owe their position. In the current system, with its patchwork system of campaign finance reform, the primary means of election has become the party apparatus.

A straightforward solution to the breakdown of the system of separation of powers is to address the problem of faithless representatives. If, as Madison postulated, electoral accountability is the primary means to ensure representative loyalty,<sup>196</sup> barriers to competitive elections should be stripped away in a manner that increases the influence of the public at large. This requires weakening the party apparatus while simultaneously decreasing the cost of political campaigns. Decreasing the size of federal districts arguably achieves both of these goals. The cost of reaching voters is directly proportional to their total number. Likewise, dependency on party leadership endorsements is closely tied to the size of a district. The larger the population represented, the less chance a candidate has of meeting voters individually. These voters naturally base their decisions on the endorsement of people in positions to “know.”

Smaller federal districts carry a theoretical justification as well. Decreasing the ability of incumbents to remain unresponsive to the electorate provides a partial answer to the question of democratic legitimacy. When an incumbent knows that hundreds of individuals in their district can potentially bring a successful challenge, they may be far less likely to betray the interests of their constituents.

#### CONCLUSION

Over the last eighty years, the population of the United States increased dramatically. In 1920, the nation’s population stood at 105 million.<sup>197</sup> In 2006, it reached the 300 million mark.<sup>198</sup> Despite this massive increase, not a single additional member has been added to the House of Representatives.

This situation, a House of Representatives which fails to augment its numbers as the country’s population grows, represents a major fear of the founding generation. An adequate ratio of representation was presumed to be an essential precondition for effective government.

Our current super-sized ratio of representation greatly contributes to the nation’s agent loyalty problem. Lack of agent loyalty has in

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196. *See supra* note 10 and accompanying text.

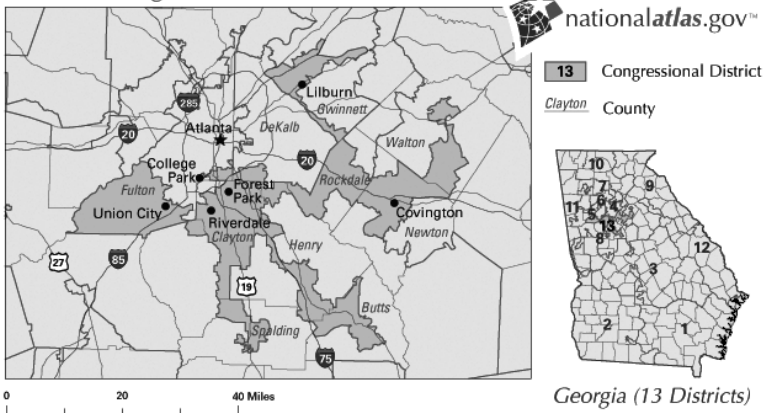
197. BUREAU OF THE CENSUS, DEP’T OF COMMERCE, FOURTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1920, at 13 (1920), available at <http://www2.census.gov/prod2/decennial/documents/41084484v1.pdf> (documenting the population of the continental United States as 105,710,620).

198. *U.S. Population Hits 300 Million*, CHARLESTON GAZETTE, Oct. 18, 2006, at 4.C.

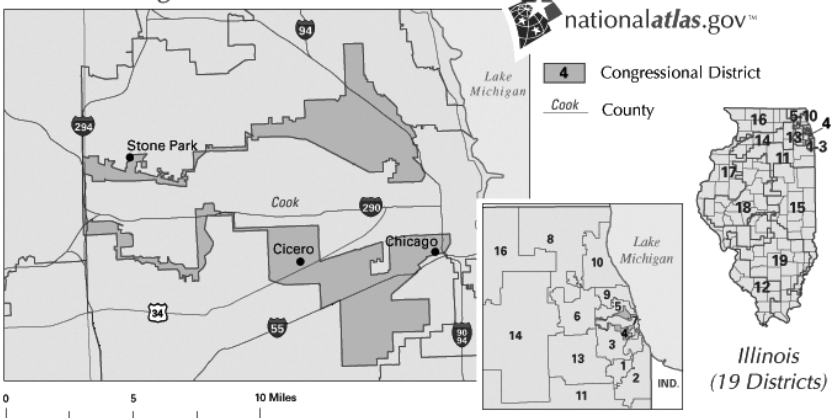
turn resulted in increased influence for the political parties and the breakdown of the system of separation of powers. Given the problems the fixed-size House has raised, constitutional theorists need to ask whether the gains achieved justify the corresponding decreased legitimacy, increased influence of campaign dollars, and increased alienation many feel towards the political system. Given the drawbacks of our current system, I would hazard to guess the burden of proof lies with defenders of the fixed-size House.

GERRYMANDERED DISTRICT MADE POSSIBLE BY THE APPOINTMENT ACT OF 1929<sup>199</sup>

Congressional District 13



Congressional District 4



199. Congressional District Maps, <http://nationalatlas.gov/> (last visited Nov. 30, 2006).

TABLE 2<sup>200</sup>

Year	Seats (R)	Seats (D)	Other	Change (R)	Change (D)	Swing > 2006
2006	202	233	0	-30	31	N/A
2004	232	202	1	3	-2	
2002	229	204	1	8	-8	
2000	221	212	2	-2	1	
1998	223	211	1	-5	5	
1996	228	206	1	-2	2	
1994	230	204	1	54	-54	*
1992	176	258	1	9	-9	
1990	167	267	1	-8	7	
1988	175	260	0	-2	2	
1986	177	258	0	-5	5	
1984	182	253	0	16	-16	
1982	166	269	0	-26	27	
1980	192	242	1	34	-35	*
1978	158	277	0	15	-15	
1976	143	292	0	-1	1	
1974	144	291	0	-48	49	*
1972	192	242	1	12	-13	
1970	180	255	0	-12	12	
1968	192	243	0	5	-4	
1966	187	247	0	47	-48	*
1964	140	295	0	-36	36	*
1962	176	259	0	2	-4	
1960	174	263	0	21	-20	
1958	153	283	1	-48	49	*
1956	201	234	0	-2	2	
1954	203	232	0	-18	19	
1952	221	213	1	22	-22	
1950	199	235	1	28	-28	
1948	171	263	1	-75	75	*
1946	246	188	1	55	-54	*
1944	191	242	2	-18	20	
1942	209	222	4	47	-45	*
1940	162	267	6	-7	5	
1938	169	262	4	81	-72	*
1936	88	334	13	-15	12	
1934	103	322	10	-14	9	
1932	117	313	5	-101	97	*
1930	218	216	1	-52	52	*
1928	270	164	1	32	-30	
1926	238	194	3	-9	11	
1924	247	183	5	22	-24	
1922	225	207	3	-77	76	*
1920	302	131	2	62	-61	*
1918	240	192	2	25	-22	
1916	215	214	6	19	-16	
1914	196	230	9	62	-61	*

200. See Office of the Clerk, Congressional History, [http://clerk.house.gov/art\\_history/house\\_history/partyDiv.html/](http://clerk.house.gov/art_history/house_history/partyDiv.html/) (last visited Nov. 21, 2007).