

# The Nature of Consent in the American Republic: Substance or Procedure? The Elections Clause and Single-Member Congressional Districts

By ROBERT ALEXANDER SCHWARTZ\*

FOR MOST OF the last 162 years, Congress has regulated the “manner” of congressional elections by imposing a requirement that its members be elected from single-member districts.<sup>1</sup> In doing so, it has presumed to exercise its authority under Article I, Section 4, the “Elections Clause,” of the Constitution, which provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.<sup>2</sup>

Throughout much of that time, commentators and courts have tended to take for granted the assumption that requiring single-mem-

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\* Law Clerk to the Honorable Amalya L. Kears, U.S. Court of Appeals for the Second Circuit, 2003–04. J.D., New York University School of Law, 2003; B.A., Tufts University, 1998. Thank you very much to Professors Burt Neuborne and Nancy Northup and the participants in the Fall 2002 Brennan Seminar on Democracy at New York University School of Law.

1. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1156–58 (2d ed. 2001). A “single-member district” is the basic unit comprised by “the traditional Anglo-American electoral structure of territorially-based election districts,” represented in a legislative body by one individual representative. See *id.* at 1089.

2. U.S. CONST. art. I, § 4, cl. 1. It might also be argued that Congress has the authority to do this under Section 5 of the Fourteenth Amendment, as a prophylactic measure to prevent unlawful race discrimination. Although a full discussion of Section 5 is beyond the scope of this Article, it is suggested, for the purpose of focusing on Article I, Section 4, that the imposition of single-member districts for this purpose might fail in two respects. First, this measure might fail the “congruence” and “proportionality” requirements for such prophylactic legislation announced in *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). A requirement of “alternative voting systems” such as “cumulative voting,” “limited voting,” or at-large elections with a “bullet-voting” option may be more congruent and proportional. For an overview of alternative voting structures, see generally ISSACHAROFF, *supra* note 1, at 1089–1172. Second, and more importantly, this measure applies “uniformly throughout the Nation,” a feature that helped to doom the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598, 627 (2000).

ber districts has been a valid regulation of the "manner" of election under Article I, Section 4.<sup>3</sup> In fact, none other than James Madison, who was not one to speak without prior contemplation, once included district elections in a list of items that might come under the heading of "Times, Places and Manner." He noted that it covered "[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district."<sup>4</sup>

This Article recognizes the incredulity with which many readers might react to the suggestion that we reexamine Madison's inclusion of district elections on that list, and further recognizes that many courts would likely find his comments to be dispositive of the issue. During our republic's early years, however, there was not unanimity on the question of whether the Elections Clause did actually authorize a requirement of single-member districts by Congress. In 1800, the House of Representatives spent two months considering a constitutional amendment that would have required districting in congressional elections.<sup>5</sup> That measure was rejected, as were similar efforts to amend the Constitution repeatedly between 1800 and 1842, when Congress finally enacted a single-member district requirement by ordinary legislation.<sup>6</sup> The consideration of such amendments suggests that its proponents did not believe single-member districts could be required by statute. The Supreme Court has noted that congressional authority to enact this requirement was doubted by some throughout the nineteenth century, and as late as 1901 by committees of Con-

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3. See, e.g., *McPherson v. Blacker*, 146 U.S. 1, 26 (1892) (assuming, without analysis, constitutionality of single-member district requirement as evidence of constitutionality of district-based election of presidential electors). James Thomas Tucker argues that since many Framers likely assumed that elections would be by district, Congress must be endowed with the authority to mandate them. James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 374 & n.78 (2002) ("Although Congress has the authority to mandate districting . . ."); see also Terry Smith, *Rediscovering the Sovereignty of the People: the Case for Senate Districts*, 75 N.C. L. REV. 1, 9-10 (1996) (relying on *McPherson* dicta to assume constitutionality of district-based House elections). But see generally Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519 (2001) (arguing that single-member district statute is unconstitutional commandeering of state legislatures).

4. *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 833 (1995) (citation omitted) (striking down the Arkansas congressional term-limits provision).

5. ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850* 128 (1987).

6. *Id.*

gress.<sup>7</sup> Strangely, although the Supreme Court has never considered the subject directly, little debate remains today. This Article suggests that with over two hundred years of republican experience upon which to reflect, it is sensible to reexamine the propriety of including the question of districting in a category of otherwise ministerial matters.

Part I will examine the relatively scant body of Supreme Court precedent concerning the Elections Clause. It reaches the conclusion that although Congress's power to legislate on congressional elections is broad within the "procedural" realm, this power does not reach questions with non-neutral, substantive political ramifications. Part II applies the Supreme Court precedent to the question of single-member districts and concludes that there is a colorable argument that the question of districting falls outside the scope of Congress's Elections Clause powers. This argument, in turn, comes in two parts. Part II.A. argues that this decision is not properly characterized as "procedural" because electing congressmen by district is outcome determinative, restricts voters' choice of candidates, and more broadly effects a significant shift in the balance of power among represented states in Congress. Part II.B. suggests alternative grounds for concluding that the choice between single-member districts and at-large elections is not procedural. Summarily stated, not only does the selection of single-member districts effect a palatable change in the potential outcome of elections, but the decision to use them at all goes right to the heart of the meaning of "consent" and "representation" in our democracy.

It should be noted at the outset that this Article does not argue that a system other than single-member district elections would be preferable. It simply suggests that the federal legislative requirement sits on shaky constitutional grounds. For better or for worse, the selection of congressmen through elections in single-member districts affects not only how we vote, but for whom we vote. It codifies into law one of many sets of assumptions about fairness, proper consent of the governed, and the meaning of republicanism. Lumping that decision together with matters like the proper format of ballots is a serious mischaracterization.

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7. See *Colegrove v. Green*, 328 U.S. 549, 555 (1946).

## I. The Supreme Court's Notion of "Times, Places and Manner"

The history of Elections Clause jurisprudence at the Supreme Court level reveals an early expansion of congressional and state power in this arena, followed by, if not quite a contraction of its subject matter, the assertion of new limitations.<sup>8</sup> While the Court has held that Article I, Section 4 permits Congress and the states to enact a "complete code for congressional elections,"<sup>9</sup> it has asserted more recently that this power to enact a complete code is limited to "incidents"<sup>10</sup> of the election process, which can properly be characterized as "procedural."<sup>11</sup>

### A. Early Expansion of "Times, Places and Manner"

Early Supreme Court cases examining congressional and state power under the Elections Clause embraced an expansive view of the Clause's subject matter. These cases were generally confined, however, to instances in which Congress had enacted legislation aimed at its own preservation as an institution and its freedom from corrupt practices rather than broader measures with specific political ramifications. Furthermore, the cases often focused on enactment requirements alleged to affect the validity of laws enacted under this power.

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8. The concurrent nature of Elections Clause power may inspire some confusion in examination of the case law. Some of the cases discussed explore the bounds of state power under the Elections Clause, while others discuss limits on Congress. Because powers are nearly coextensive, subject to the limitation that Congress is proscribed from making law "as to the Places of ch[oo]sing Senators," the reasoning in each type of case and the limits each imposes ought to be interchangeable. U.S. CONST. art. I, § 4, cl. 1. Obviously, the decision between single-member districts and some other method of election must be vested in some level of government. The conclusion reached here, however, is that this power does not vest by way of the Elections Clause. One alternative may be the Tenth Amendment's Reservation Clause, which would reserve this power to the states. This argument would face the obstacle of directly adverse Supreme Court precedent. *U.S. Term Limits* held that "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." 514 U.S. at 802 (citation omitted). The Justices were not, however, unanimous in that view. "The majority is . . . quite wrong to conclude that the people of the States cannot authorize their state governments to exercise any powers that were unknown to the States when the Federal Constitution was drafted." *Id.* at 852 (Thomas, J., dissenting).

9. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

10. *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

11. *See U.S. Term Limits*, 514 U.S. at 832.

*Ex parte Siebold*<sup>12</sup> is an example of this early type of “Times, Places and Manner” case. *Siebold* involved a group of criminal defendants charged with unlawfully obstructing and interfering with a congressional election by abusing their authority as elections officers to oversee the collection and counting of ballots.<sup>13</sup> They were accused of interfering with the federal election officials’ duty to oversee the handling of ballots by refusing the officials access to the site while they “stuff[ed] the ballot box” with twenty illegal ballots.<sup>14</sup> Counsel for the accused conceded that Congress might “assume the entire regulation of the elections of representatives.”<sup>15</sup> He argued, however, that the Clause bestowed no power on Congress to regulate the elections only partially and in cooperation with state law—Congress could either occupy the field, or else it must abstain altogether.<sup>16</sup> The *Siebold* Court rejected this contention, mostly by reference to the plain meaning of Article I, Section 4: “It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments . . . .”<sup>17</sup>

*Ex parte Yarbrough*<sup>18</sup> presented a more direct challenge to Congress’s authority under the Elections Clause. *Yarbrough* considered criminal charges of conspiracy to intimidate and assault, resulting from the brutal beating of an African-American citizen while he attempted to exercise his right to vote for Congress.<sup>19</sup> Counsel for the alleged assailants and conspirators argued that such criminal charges were beyond Congress’s powers due to the absence of direct textual authorization in the Constitution for Congress to “provide for preventing violence exercised on the voter as a means of controlling his vote . . . .”<sup>20</sup> The Court dismissed this argument, holding that the criminal prohibitions in question were “necessary and proper” to Congress’s power to regulate the “times, places and manner” of holding elections for Congress.<sup>21</sup> It focused on Congress’s need to ensure its own survival against “enemies of all republics”:<sup>22</sup>

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12. 100 U.S. 371 (1879).

13. *See id.* at 378–79.

14. *Id.* at 379.

15. *Id.* at 382.

16. *See id.* at 382–83.

17. *Id.* at 383.

18. 110 U.S. 651 (1884).

19. *Id.* at 656–57.

20. *Id.* at 658.

21. *See id.* at 657–60.

22. *Id.* at 658.

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

. . . .

If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.<sup>23</sup>

The Court elaborated on this rationale in *In re Coy*,<sup>24</sup> which considered an indictment for conspiracy to interfere with election officers and willful neglect by election officers of their duty "in regard to the custody and safekeeping of the election returns" and persuading others to do the same.<sup>25</sup> In essence, the defendants were charged with persuading elections inspectors, "unlawfully and by false and deceitful speeches, statements, assertions, and promises" to fail in the officials' duty to deliver certified voting lists and "tally-papers" to the appropriate authorities in connection with a congressional election.<sup>26</sup> Upholding the statutes, which "made for the security and protection of the elections held for Representatives and Delegates to Congress" and "confer[red] authority to punish a conspiracy to prevent or interfere with that security, by proceedings in the federal courts," the Court concluded that the law was "necessary to secure the . . . preservation, proper return, and counting of the votes cast . . ." <sup>27</sup> Furthermore, Congress would have the authority to enact any law "necessary to an honest and fair certification of [congressional elections] . . ." <sup>28</sup>

*Smiley v. Holm*<sup>29</sup> represents the high-water mark in the Court's expansive rhetoric concerning the scope of government activity embraced by the Elections Clause. The Clause once again became the central focus when a Minnesota citizen challenged that state's 1931 reapportionment plan, which was passed by the state legislature, but not signed into law by the Governor.<sup>30</sup> Despite the Governor's veto,

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23. *Id.* at 657-58.

24. 127 U.S. 731 (1888).

25. *Id.* at 750.

26. *See id.* at 745-48.

27. *Id.* at 751-52.

28. *Id.* at 752.

29. 285 U.S. 355 (1932).

30. *Id.* at 361. Note, once again, that the powers vested in Congress and with the States under Article I, Section 4 are nearly coextensive. Arguments limiting the powers of either level of government should apply with equal force to both of them. *See supra* note 8.

the measure was deposited for enactment with the Secretary of State of Minnesota.<sup>31</sup> The Secretary argued that the Elections Clause conferred power to regulate the “Times, Places and Manner” of congressional election directly on the legislature, and was therefore immune from gubernatorial veto.<sup>32</sup> The Court framed the question in the following manner: does the Elections Clause concern the ordinary lawmaking function of the states’ legislatures or is it a special function outside of the normal legislative process?<sup>33</sup> If it is the former, the legislature would be bound to act only within whatever state constitutional limitations restricted its power to make law.<sup>34</sup> The Court concluded that the Clause did, indeed, address the ordinary, lawmaking function of state legislatures, and did not supervene otherwise applicable state constitutional limitations.<sup>35</sup> As to the Elections Clause’s subject matter, the Court asserted that it “embrace[s] authority to provide a complete code for congressional elections . . . .”<sup>36</sup>

At least one Supreme Court decision from the early twentieth century purported to limit the scope of the Elections Clause. In *Newberry v. United States*,<sup>37</sup> the Court held that a federal statute limiting the campaign expenditures of candidates for Congress in primary elections did not fit within Article I, Section 4’s grant of power by law to regulate the “manner of holding elections.”<sup>38</sup> The Court reasoned that if the Elections Clause were construed to cover every “prerequisite” to an election for Congress or all of those matters that might affect their outcome, then the federal government could reach such matters as “education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate . . . .”<sup>39</sup> This, in the Court’s view, would impermissibly interfere with states’ exclusively domestic affairs.<sup>40</sup> The *Newberry* limitation

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31. *Id.*

32. *See id.* at 362. *See* U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state *by the Legislature thereof* . . . .”) (emphasis added).

33. *See Smiley*, 285 U.S. at 365–66.

34. *Id.* at 366.

35. *Id.* at 366–68.

36. *Id.* at 366.

37. 256 U.S. 232 (1921).

38. *Id.* at 258 (“We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections.”).

39. *Id.* at 257.

40. *Id.* at 258.

was short-lived, however, as the Court expressly repudiated it twenty years later in *United States v. Classic*.<sup>41</sup>

## B. Limiting “Times, Places and Manner”

More recently, the Supreme Court has embraced a narrower construction of the Elections Clause—never approaching a repudiation of *Smiley* and the others, but setting other limitations consistent with the “complete code” view of Article I, Section 4. First, in *U.S. Term Limits, Inc., v. Thornton*,<sup>42</sup> the Supreme Court struck down an amendment to the Arkansas State Constitution, which imposed a three-term limit on that state’s candidates for the United States House of Representatives.<sup>43</sup> The Court considered, inter alia, the argument that this amendment regulated the “manner” of elections, consistent with state authority under Article I, Section 4.<sup>44</sup>

The Court rejected such a broad construction of the Elections Clause as “fundamentally inconsistent with the Framers’ view . . . .”<sup>45</sup> Justice Stevens, writing for the majority, explained that such a grant of power to the state governments would have necessarily implied a corollary power on the part of Congress to override the state’s regulations by federal legislation. The Framers, concerned about grants of power to the new Congress that would invite institutional self-aggrandizement, would have never approved of such a result.<sup>46</sup> As the Framers understood it, the Elections Clause was not “a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”<sup>47</sup> Rather, the Clause was intended as a grant of authority to create “procedural regulations.”<sup>48</sup> The Court discussed a class of limited needs that can legitimately give rise to such procedural regulations. In general, such regulation of the manner of congressional elections is called for to protect the “integrity and reliability” of the electoral process,<sup>49</sup> and to ensure that elections are “orderly, fair, and honest . . . ‘rather than chaos.’”<sup>50</sup>

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41. See 313 U.S. 299, 320 (1941) (holding primary elections are elections within the meaning of the Constitution and are subject to congressional regulation).

42. 514 U.S. 779 (1995).

43. *Id.* at 783.

44. *Id.* at 832.

45. *Id.*

46. *Id.*

47. *Id.* at 833–34.

48. *Id.* at 833.

49. *Id.* at 834 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

50. *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).



The Court distinguished *Storer v. Brown*,<sup>51</sup> which upheld California's requirements for independent candidates for elective public office. Among those requirements were one year of non-registration with any political party and a minimum signature threshold for nomination papers.<sup>52</sup> Writing for the majority in *U.S. Term Limits*, Justice Stevens characterized *Storer* and other cases upholding actions taken under the Elections Clause as involving procedures that "did not even arguably impose any substantive qualifications rendering a class of potential candidates ineligible for ballot position."<sup>53</sup>

Distinguishing term limits from regulations that simply dictate "procedure," the Court pointed out that the Arkansas law "unquestionably restrict[s] the ability of voters to vote for whom they wish."<sup>54</sup> Furthermore, term limits "would effect a fundamental change in the constitutional framework" and as such cannot be adopted either by Congress or any individual state acting alone.<sup>55</sup> Instead, the Court held that imposing term limits for members of Congress would require an amendment to the Constitution, via the Article V process.<sup>56</sup>

The Court further clarified this narrow reading of Article I, Section 4 in *Cook v. Gralike*.<sup>57</sup> Following *U.S. Term Limits*, Missouri voters adopted an amendment to their state constitution, "Article VIII," which instructed each member of that state's "congressional delegation 'to use all of his or her delegated powers to pass'" an amendment to the United States Constitution limiting members of the House to three terms and Senators to two terms.<sup>58</sup> Article VIII prescribed that the statement "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on ballots next to the name of any congressional candidate who failed to support the federal amendment.<sup>59</sup> Also, the statement "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" was to label those candidates who refused to make such a pledge.<sup>60</sup> In another opinion by Justice Stevens, the Court struck down the Missouri amendment.<sup>61</sup>

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51. 415 U.S. 724 (1974).

52. *Id.* at 726.

53. *U.S. Term Limits*, 514 U.S. at 835.

54. *Id.* at 837.

55. *Id.*

56. *See id.*

57. 531 U.S. 510 (2001).

58. *Id.* at 514.

59. *Id.*

60. *Id.* at 514-15.

61. *See id.* at 525-26.

Again, the Court emphasized the procedural nature of the grant of authority in the Elections Clause. States may regulate the "incidents" of congressional elections.<sup>62</sup> "Manner" encompasses matters like "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."<sup>63</sup> By contrast, the Court observed that Article VIII was "plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal."<sup>64</sup> The Court also assigned great importance to the probability that Article VIII would "handicap" certain candidates at "the most crucial stage in the election process—the instant before the vote is cast."<sup>65</sup> It held that because Article VIII sought to "dictate electoral outcomes," rather than to simply enact procedures for conducting the elections, it was not within the scope of regulation authorized by the Elections Clause.<sup>66</sup>

## II. Substance Versus Procedure?

As with other areas of law struggling to distinguish between matters that are "procedural" and those that are "substantive," a bright-line test would be difficult or impossible to establish. But we may still ask: is the decision to establish single-member districts more like the adoption of term limits or more like prescribing the duties of inspectors or the method of publishing returns? The law of *Cook* and *U.S. Term Limits* can be summarized as follows: a regulation concerning elections to Congress is not procedural, and is therefore outside the scope of the Elections Clause, where it intentionally dictates or handicaps electoral outcomes by exerting pressure at a "crucial stage" of the election process or "restrict[s] the ability of voters to vote for whom they wish."<sup>67</sup> Further, a law is not procedural, and therefore outside the scope of Article I, Section 4, if it "would effect a fundamental change in the constitutional framework."<sup>68</sup> These limitations should

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62. *See id.* at 523.

63. *Id.* at 523–24 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

64. *Id.* at 524.

65. *Id.* at 525 (internal quotation omitted).

66. *Id.* at 526 (citation omitted).

67. *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 837 (1995).

68. *Id.*

apply with equal force to laws enacted either by the states or by Congress.

The drawing of district lines, or the decision to draw them at all is every bit as “crucial” a stage in the election process as the moment the vote is cast, precisely because of the obvious impact it has on outcomes. From the very first Congress, states have recognized the crucial, outcome-determinative nature of this decision and have behaved in an accordingly pragmatic manner.<sup>69</sup> Furthermore, the decision to elect members from geographic districts plainly restricts the ability of citizens to vote for whom they wish.<sup>70</sup> Under some variant of an at-large election system, a given voter would have the ability to vote for any statewide congressional candidate of the voter’s choosing, regardless of where that citizen lived in the state. By contrast, a voter’s choice of congressional candidates in a single-member district is limited to individuals running for that specific congressional seat. Therefore, under the *U.S. Term Limits* and *Cook* formulation of “manner” regulation,<sup>71</sup> Congress’s mandate of single-member district elections would be outside the scope of Article I, Section 4.

There is, however, another reason why it does not make sense to treat this decision as merely procedural. Congress, by its periodic actions to require single-member districts nationwide, has locked in a single philosophy of representation. We are so accustomed to electing members of Congress and members of other legislative bodies from single-member, geographic districts that we may easily overlook the fact that other sensible and practical notions of representation might shape our institutions, including Congress. The present system favors geographic commonality over issue commonality, independent deliberation over mandatory instruction, and the representation of specific individuals over the representation of issues or interests.<sup>72</sup> All of these

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69. See *infra* notes 92–112 and accompanying text for a discussion of early state gamesmanship regarding the choice between district and at-large elections.

70. The idea is simply that, for example, in a state with two candidates apiece for ten districted seats, any given voter can, at most, cast a ballot for one of them, and would have to make that choice from between two candidates. If the ten seats were open statewide, the voter would likely—except perhaps under a very restrictive version of limited-voting—have the ability to vote for more, and would be choosing from among twenty candidates.

71. Justice Stevens quotes *Anderson v. Martin*, 375 U.S. 399, 402 (1964) for the “most crucial stage” language to describe the instant before the vote is cast. *Cook v. Gralike*, 531 U.S. 510, 525 (2001). Without devoting an unwarranted amount of space to semantics, this Article takes the position that criticality is not a matter of degree. Components of a system are either critical, like links in a chain, or not critical, like any given “E” tile in Scrabble—unless you’re trying to spell “election.”

72. For a more detailed analysis of these divides, see *infra*, notes 114–83 and accompanying text.

choices are plausibly sensible, but none is a necessary condition of representative democracy. To call them "procedural" reflects an impoverished view of representation, and grossly underestimates their significance.

## A. Outcome Determination

The decision to elect members of the House from single-member districts is outcome determinative in two constitutionally significant ways. First, the decision to employ district elections necessarily requires the drawing of district lines, which arguably cannot be done without some impact on the outcome of an election. Second, since a majority voting block will predictably win all of the congressional seats in an at-large election state, but substantially fewer seats in any other system of election, the aggregate impact of a national decision to use single-member districts has the potential to sway the balance of power among the states in the House. In fact, as explained *infra*, that was probably the intended result.

### 1. Individual Outcome Determination

It has been argued that drawing district lines necessarily involves gerrymandering.<sup>73</sup> Professor Dixon points out that a computer can churn out literally hundreds of equal-population districting plans and "each plan, because of its somewhat different grouping of partisans and interests, will have a different—and of course non-neutral—impact on the electoral outcomes."<sup>74</sup> Justice White pointed out as much in *Gaffney v. Cummings*:<sup>75</sup>

[A] politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, *in which event the results would be both known and, if not changed, intended.*<sup>76</sup>

"Gerrymandering . . ." writes Professor Zagari, "is as old as the district system and a direct consequence of its use."<sup>77</sup> She recounts what may be the earliest example of gerrymandering in the new Amer-

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73. See Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES 7, 8 (Bernard Grofman et al. eds., 1982).

74. *Id.* at 8.

75. 412 U.S. 735 (1973).

76. Dixon, *supra* note 73, at 16 (quoting *Gaffney*, 412 U.S. at 753).

77. ZAGARRI, *supra* note 5, at 122-23.

ican republic—Virginian Antifederalists' efforts to block James Madison's election to the House of Representatives in 1788.<sup>78</sup> At the time, Antifederalists controlled Virginia's legislature and tried to use that position to maximize the influence of Antifederalists in congressional elections. Most importantly, they sought to ensure that James Monroe would prevail over "arch-Federalist" James Madison in their congressional race.<sup>79</sup> Predictably, they created a congressional district described as "'distorted'. . . into 'a thousand excentrick [sic] angles' in order to ensure his defeat."<sup>80</sup> The ploy was immediately recognized, and Madison's supporters entertained serious doubts that their candidate could ever prevail in such a gerrymandered district. In the end, however, Madison squeaked by Monroe with a 336-vote margin of victory.<sup>81</sup> Gerrymandering was, however, a young art form. Its practitioners would improve over time.

The principle mentioned by Professor Dixon—that drawing district lines necessarily involves choices—has been pushed to the limits of its considerable utility by those with the power to draw lines. We need look no further than the long line of Supreme Court decisions concerning the art of gerrymandering to understand the outcome-determinative effect of drawing district lines. The results of these constitutional challenges are not important for the purposes of this discussion—the focus is on the practical result of a line-drawing process in the zero-sum game of districting, where every choice of district boundaries carries non-neutral implications. By this process, individual races can be decided *ex ante*.

*Gaffney* reversed a lower court's decision invalidating, on Equal Protection grounds, a Connecticut redistricting plan—a gerrymandering scheme designed to effect "political fairness" between the parties.<sup>82</sup> The process in question involved a three-member panel, appointed by the state's House Speaker and Minority Leader, reviewing the voting results of three previous elections and creating "what was thought to be a proportionate number of Republican and Democratic legislative seats."<sup>83</sup> Later, in *Davis v. Bandemer*,<sup>84</sup> the Court sustained an Indiana redistricting plan which, by "familiar techniques"

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78. See *id.* at 122.

79. See *id.*

80. *Id.* (quoting Virginia Independent Chronicle (Richmond), Mar. 11, 1789, in First Federal Elections, II: 393 n.i).

81. See *id.*

82. *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973).

83. *Id.* at 738.

such as “stack[ing]” and “wast[ing]” of votes,<sup>85</sup> prearranged the retention of a fifty-seven to forty-three majority in the state’s House of Representatives by the Republican Party, despite the fact that Democratic candidates received 53.1% of the vote.<sup>86</sup>

Race has been the most controversial factor in gerrymandering.<sup>87</sup> In *Shaw v. Reno*,<sup>88</sup> the Court examined North Carolina’s attempts to create “majority-minority” districts.<sup>89</sup> Two minority-controlled legislative seats were prearranged by creating a district shaped like a “Rorschach ink-blot test” or a “bug splattered on a windshield” and another that stretched for 160 miles, but was often no wider than a highway corridor, and “[wound] in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobble[d] in enough enclaves of black neighborhoods.”<sup>90</sup> The court held that the plaintiffs had stated a claim that the redistricting plan lacked “sufficient justification” under the Equal Protection Clause.<sup>91</sup>

Thus, it is evident that governing bodies can influence, *ex ante*, or even conclusively predetermine the outcome of a given legislative election in a geographically-defined district, by gerrymandering to include and exclude voters necessary to effect the desired outcome. The important thing to recognize, for the purpose of this analysis, is that because any district is on some level “gerrymandered” because of the zero-sum nature of geographic districting, the decision to require districts carries with it a similar outcome-determinative quality at a crucial stage in the democratic process in individual races just as term limits or unflattering labels affixed to the ballot. Although the precise

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84. 478 U.S. 109 (1986). As of this writing, the Supreme Court is revisiting *Bandemer* in *Vieth v. Jubelirer*. See *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478 (M.D. Pa. 2003), *prob. juris. noted*, *Vieth v. Jubelirer*, 156 L. Ed. 2d 654 (2003).

85. *Bandemer*, 478 U.S. at 117 n.6. “Stacking” and “wasting” in this context involved the creation of districts where Democrats carried the seat with far greater than the required 50% majority, while Republican seats were distributed to ensure safe, but relatively small, majorities. *Id.*

86. See *id.* at 115.

87. See generally Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1216–28 (2003) (explaining premises underlying judicial intervention in race-based districting); Richard H. Pildes, *Principled Limitations on Racial and Partisan Districting*, 106 YALE L.J. 2505, 2514–18 (1997) (describing “highly bizarre” districts resulting from race-based gerrymandering); Theane Evangelis, Note: *The Constitutionality of Compensating for Low Minority Voter Turnout in Districting*, 77 N.Y.U. L. REV. 796, 808–14 (2002) (explaining constitutional limitations on race-based districting).

88. 509 U.S. 630 (1993).

89. See *id.* at 633–34.

90. *Id.* at 635–36 (internal quotations omitted).

91. See *id.* at 649.

results will sometimes be impossible to predict at the point of deciding on single-member districts as opposed to some other system of representation, it is certain to impact the outcome of individual races.

## 2. Aggregate Outcome Determination

The outcome-determinative nature of this decision is even more striking when viewing the aggregate impact of district-based elections on a legislature as a whole. Contrary to the general inability to effect specific political results in individual contests by the simple act of choosing district elections, but prior to drawing the lines, the decision to adopt districting was made with an eye toward decisively influencing a specific political rivalry—that between large states and small states in Congress. A brief retelling of the history of single-member districts in the United States House of Representatives will shed some light on the significance of single-member House districts in determining aggregate electoral outcomes. In order to give that history proper context, however, this section will first consider the earliest American apportionment controversy—the 1787 debate that led to the “Great Compromise.”

Nationalist delegates to the Philadelphia Convention from large and small states arrived with very different visions of the structure of a new, American republic. The large-state, or “Virginia Plan,” usually associated with Edmund Randolph, included the blueprints for a “National Executive,” a “National Judiciary,” and a bicameral “National Legislature,” apportioned in both houses by population.<sup>92</sup> A highly-centralized proposal, with strong emphasis on population in its distribution of power, depending ultimately, on the national government’s ability to enforce its mandates by the coercive pressure of military force, the Virginia Plan was cause for concern among delegates from small states who feared their representatives would be consistently outvoted on issues of national importance.<sup>93</sup> The main counter-proposal, the “New Jersey Plan,” called for a looser association, with individual states the most important actors, maintaining the small states’ primacy. The New Jersey Plan was criticized as not improving the “weakness and uncertainty” inherent in the Articles of Confederation.<sup>94</sup>

The large states were able to use the strength of their numbers at the Convention to vote down the New Jersey Plan, but the small states

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92. SAMUEL ELIOT MORISON ET AL., *A CONCISE HISTORY OF THE AMERICAN REPUBLIC* 115 (1977) (internal quotations omitted).

93. *See id.* at 115–16.

94. *Id.*

were numerous enough to prevent any workable consensus behind the Virginia Plan.<sup>95</sup> Despite the flaring tempers of that hot July, the well-known Great Compromise gathered enough support from each camp. It provided for an equal vote afforded to each state in the Senate, and a House of Representatives apportioned according to a “‘federal ratio’”—the sum of the state’s free population and three-fifths of the slave population.<sup>96</sup>

The Great Compromise was extremely conciliatory to the small states—they enjoy power in the Senate disproportionate to their population.<sup>97</sup> Quite plausibly the federal Constitution could not have been enacted without this concession to the small states. The delicate balance of power in the two houses of Congress, between small and large states, is a defining feature of the original Constitution. Could it possibly be altered by simple legislation?

As Congress began to function, the full implications of the Great Compromise gradually came into focus. Early on, states experimented and alternated systems of selecting congressmen. The Constitution does not require any particular method of selection, and Congress did not act to institute the requirement until 1842.<sup>98</sup> Prior to that time, states broke down into two main categories—those with some form of district election, and those with at-large elections.<sup>99</sup>

States quickly realized the outcome-determinative significance of the choice between at-large and districted elections—the only two choices in the days before theoretical alternative voting structures. Following one election in which Pennsylvania elected all eight of its representatives from the Federalist party and the Eastern part of the state, one critic declared, “I am sure that Pennsylvania will never again suffer eight representatives to be elected out of a mere corner of the state.”<sup>100</sup> The state legislature was thereafter pressured to institute a system of eight single-member districts.<sup>101</sup>

A pattern became apparent in the early republic: large states preferred to employ single-member district elections, while smaller states elected their representatives at large.<sup>102</sup> But this was just part of a larger pattern—gamesmanship had broken out in state legislatures

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95. *See id.*

96. *Id.*

97. *See id.*

98. ISSACHAROFF, *supra* note 1, at 1156.

99. *Id.* (quoting ZAGARRI, *supra* note 5, at 105).

100. *Id.* at 1157 (internal quotation omitted).

101. *Id.*

102. *See id.*



across the young country in an effort to maximize the political power of each state's delegation. As was the case in the above Pennsylvania election, which prompted that large state to implement district elections, small states that elected at large would tend to send a single-party delegation of representatives to Congress; by contrast, large states electing from single-member districts would produce more fractured delegations.<sup>103</sup> This allowed delegations from smaller, at-large states to become more influential in the House of Representatives<sup>104</sup>—a state selecting all of its representatives from one party, and of like mind on important issues, may exert more influence than a state sending a relatively balanced delegation.<sup>105</sup> Larger states eventually became cognizant of this consequence of districting, and some began to consider a shift back to at-large elections.<sup>106</sup> Each group of states was beginning to realize the full well of power allotted by the Great Compromise of 1787.

Small states then had reason to fear that if large states switched to at-large elections, small states would lose all influence in the House as unified, large-state delegations began to vote in concert.<sup>107</sup> At a critical moment in 1842, where nine of the then twenty-six states were using at-large elections, Congress stepped in, mandating that all members be elected from single-member districts.<sup>108</sup> The Reapportionment Act was reenacted several times, but lapsed in 1929.<sup>109</sup> Once again, between 1929 and 1967, several states of varying sizes elected their members at large. In 1967, however, a Congress motivated by a fear that Southern states had the ability to dilute, or even eliminate, minority voting power through the use of at-large elections, once again enacted a requirement of single-member districts.<sup>110</sup>

The small states' fears of 1842 seem justifiable when viewed in isolation, but when seen in the context of the Great Compromise, the small states' position is not quite faithful to the founder's critical bargain. Is this disadvantage anything other than small states' end of that bargain? It was a *compromise* after all. It must have been understood at the Philadelphia Convention that smaller states would have less influ-

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103. *See id.*

104. *See id.*

105. *E.g.*, a state sending four Democrats and four Republicans to the House has no impact on giving either party a majority.

106. ISSACHAROFF, *supra* note 1, at 1157–58.

107. *Id.* at 1158.

108. *Id.*

109. *See id.*

110. *Id.*

ence in the House and relatively greater influence in the Senate. Without designing the House to mirror the Senate, the disparity is the simple consequence of small states' smallness.

The appropriate balance between large and small states has always been a matter of constitutional significance—to alter it “would effect a fundamental change in the constitutional framework.”<sup>111</sup> If the Great Compromise is to be revisited, it should be done by virtue of the process outlined by Article V. The Elections Clause is not a means by which Congress may “evade important constitutional restraints.”<sup>112</sup>

## B. Defining Consent and Representation: Merely Procedural?

In another important sense, the decision on the part of Congress to mandate the election of its members through single-member district elections cannot be belittled as “procedural.” Representation in a democracy is not a unitary concept, nor has it historically been a subject of consensus. Professor Lijphart has identified sixteen competing goals of representation, which cannot be fully reconciled under any given system of representative government.<sup>113</sup> This section describes three important divides in the philosophical debate on the meaning of representation: geographic/spatial vs. demographic representation, mandate-based vs. independent or deliberative representation, and representation of people vs. representation of interests or issues.<sup>114</sup> The congressional decision to require district-based elections selects a system of spatial representation with some demographic features. This favors a deliberative and independent system, and also generally favors representation of individuals, grouped by geographic commonality, but requires some voters to accept representation of interests.

Any of these choices may be viewed as desirable or undesirable. Without debating the merits of any of the above approaches to representation, this Part argues that it belittles the significance of the act of choosing when it is labeled “procedural” and grouped with details such as proper notice format or the duties of canvassers. The question of how the citizens of a democracy signal their consent, how they aggregate to legitimate a given representation scheme, goes directly to

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111. *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 837 (1995).

112. *Id.* at 833–34.

113. See Arend Lijphart, *Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements*, in REPRESENTATION AND REDISTRICTING ISSUES 145–47 (Bernard Grofman, et al. eds., 1982).

114. See *infra* notes 116–183 and accompanying text.

the character of our republic. Questions concerning appropriate representation lie “at the heart of power, obligation, and obedience.”<sup>115</sup>

### 1. Spatial Versus Demographic Representation

Professor Zagarrri defines “spatial representation” as referring to political communities which view relevant units of represented people according to preexisting counties, towns, parishes, and other political subdivisions.<sup>116</sup> During the founding era, states embracing this view typically supported a national legislature giving equal representation to each state “as [a] territorial unit[ ].”<sup>117</sup> Later, viewing the state as the territorial unit of primary importance, these states, typically smaller states, tended to elect members of Congress by at-large elections rather than, for example, equal-population districts.<sup>118</sup> This system was a holdover from the English, “corporate” system, which based representation in Parliament on “counties, boroughs, and universities.”<sup>119</sup> The English system was, in turn, a relic of that country’s feudal past—lords were represented in their capacity as landowners, while servants of the land were deemed to be represented through the lords.<sup>120</sup> In England, the legacy of spatial representation was the creation of so-called “rotten boroughs” which, despite having little or no population, received representation in Parliament on the same order of magnitude as highly populated areas.<sup>121</sup>

Many in the revolutionary culture of eighteenth century America viewed corporate representation as decidedly “unrepublican.”<sup>122</sup> Individual equality, a recurring theme in the developing American republic, led some revolutionaries to question the basic fairness of a system that gave certain individuals proportionately more influence over the election of a representative than others were afforded, based simply on an ancient—or, in America, new, but relatively arbitrary—municipal delineation.<sup>123</sup> The wisdom and fairness of English-style, corporate or spatial representation was most open to question in larger states, which tended to have larger, more mobile populations than smaller

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115. JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 31 (1989).

116. See ZAGARRRI, *supra* note 5, at 5.

117. *Id.*

118. See *id.*

119. *Id.* at 37.

120. See Tucker, *supra* note 3, at 367.

121. See ZAGARRRI, *supra* note 5, at 37.

122. See *id.* at 36.

123. See *id.* at 33.

states.<sup>124</sup> State governments in large states began to place more emphasis on population equality in representation. For example, they adopted numerical apportionment in their legislatures, preferred a national legislature based on proportional representation, and tended to hold elections for Congress from within districts divided, as nearly as practicable, by population.<sup>125</sup> In contrast to citizens of smaller states, who thought of the state as a "territorial community," citizens of larger states "regarded the state as an amalgam of diverse interests that an accident of history had united into a single unit."<sup>126</sup>

Zagarri argues that "demographic representation [has] acquired a virtual hegemony throughout the United States."<sup>127</sup> This Article takes a nearly opposite position, arguing that by requiring elections based on geographically defined districts, rather than at large or via some alternative voting structure, our system of congressional election retains many of the spatial features of the British system of representation from which the founding was to have been a relatively clean break. It is true that the equalization of the population of each respective geographic district represents an advance in the theory that legislators ought to represent people rather than "trees or acres,"<sup>128</sup> but it does not quite break the trees and acres' stranglehold on our representative institutions. Zagarri points out that the "corporate method of representation presumed that physical proximity generated communal sentiment," and that "each community [spoke] with a single voice . . ."<sup>129</sup> This Article argues, however, that geographic districts, despite equal population and a potential to ignore preexisting municipal boundaries, share this presumption with the English system.

The view that the creation of equally populous legislative districts provides adequate demographic representation requires the assumption of a homogeneous population—if no other demographic variables exist or have any relevance besides raw population, then all one needs to do to ensure a fair and accurately "representative" legislature

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124. *See id.* at 5.

125. *See id.* at 6. Georgia, Massachusetts, New Hampshire, New York, Pennsylvania, and South Carolina all experimented with proportional representation in the lower houses of their respective legislatures in the late eighteenth and early nineteenth centuries. *Id.* at 33.

126. *Id.* at 123.

127. *Id.* at 148.

128. *See id.* at 149 (quoting STANLEY L. KUTLER, *THE SUPREME COURT AND THE CONSTITUTION: READINGS IN AMERICAN CONSTITUTIONAL HISTORY* 596 (2d ed. 1977)). The original quote comes, of course, from Chief Justice Warren's majority opinion in *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.").

129. ZAGARRI, *supra* note 5, at 37–38.

is to carve the republic into districts of equal population. In a given election, however, any number of demographic considerations are likely to be important, but undermined by the existence of geographic boundaries to stifle potential voting blocs (e.g. race, income, age, gender, religion, ethnicity, and education immediately come to mind). The American system, which features geographically-circumscribed districts, but with borders gerrymandered to advantage chosen groups or individual politicians, is actually somewhat schizophrenic in attempting to produce particular demographic and political results, while refusing to completely abandon geography as a basis for grouping voters.

Other systems may be better able to transmit demographic variations among the electorate without producing the controversy that inevitably seems to result from using otherwise-arbitrary land formations to serve as the basic representative unit. Pure proportional representation is the system best able to create a legislature that most closely mirrors these demographic features in the represented population.<sup>130</sup> In a statewide election for ten congressional seats, for example, any minor party able to secure a minimal threshold number of votes—say ten percent—will be guaranteed at least one seat. Thus, any demographic grouping of sufficient number, but still constituting a minority—even a small minority—statewide, or within imaginable district divisions, would be able to secure representation. By contrast, a minority interest may constitute a popular minority in every district statewide and so, in a congressional election based on such districts, be unable to secure any representation at all. Note that a pure at-large, majoritarian election scheme also creates strong potential for a majority group to shut all minority groups out of a representative institution. Proportional representation has, however, never captured the American imagination.<sup>131</sup> Variants on a pure at-large system, such as cumulative<sup>132</sup> or limited voting,<sup>133</sup> would, like proportional representation, provide the potential for representative bodies to mirror rele-

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130. See ISSACHAROFF, *supra* note 1, at 1160.

131. See *id.*

132. "Cumulative voting" describes a process by which "each voter is given as many votes to cast as there are seats to be filled. Voters are free to distribute their votes among candidates in any way they choose." *Id.* at 1099. (quoting Richard H. Pildes, *Gimme Five: Non-gerrymandering Racial Justice*, NEW REPUBLIC, Mar. 1, 1993). Under this system, "minority groups with common interests and strong preferences for a particular candidate can ensure her election, even in the face of a hostile majority." *Id.* at 1100.

133. "Limited voting" describes a system in which voters are given "fewer votes to cast than the total number of seats at issue." ISSACHAROFF, *supra* note 1, at 1141. The effect is "to prevent the same majority from dominating each and every seat." *Id.*

vant demographic features. Under such a system, "each voter would create her own election district by the way she distributed her votes."<sup>134</sup>

Often, it has been possible to shape districts based on some of these other considerations.<sup>135</sup> Some of the most contentious issues in the law of American democracy have involved creative attempts on the part of those tasked with drawing congressional and other legislative districts so as to better reflect the existence of minority interests.<sup>136</sup> Clearly when many Americans think of the concept of "representation," it implies more than one-person, one-vote—it implies actual representation of racial, political, and other demographic minorities. Our struggles with stretching the single-member district into shapes that better serve our demographic and political ideals in representation indicate that there is strong tension between these demographic goals and the conviction expressed by Professor Zagarrri that, "[r]epresentation systems . . . inherently possess a spatial component. Some geographic unit is always going to be considered in establishing the basis of representation."<sup>137</sup> James Thomas Tucker disagrees, arguing that our districting practices unnecessarily privilege geographic factors over demographic and "relational" factors, thus undercutting the *Reynolds* court's "admonition that representation must be based upon the choices of individual voters"<sup>138</sup> and not "trees or acres."<sup>139</sup>

Given the current intellectual curiosity surrounding alternative voting structures<sup>140</sup> that might do a better job of transmitting relevant demographic features into legislatures, it seems reasonable to speculate that more experimentation might take place if Congress had not made the decision to lock the republic into this form of spatial system. Whether, however, one finds this Article's take on American district-based elections and spatial representation to be persuasive, or prefers Professor Zagarrri's numbers-based view of demographic representation, it must be acknowledged that the district-based system represents a choice to place Congress somewhere along the spectrum of possible

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134. Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1136 (1993).

135. See *supra* notes 73–91 and accompanying text for a discussion of cases of gerrymandering to accommodate political and racial groups.

136. Recall the "Rorschach"-shaped district at issue in *Shaw v. Reno*, 509 U.S. 630, 635 (1993).

137. ZAGARRRI, *supra* note 5, at 147.

138. See Tucker, *supra* note 3, at 385.

139. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

140. See generally Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241 (1995); see also Guinier, *supra* note 134.

notions of spatial and demographic representation. Given the age and fundamental nature of this question, to affix the “procedural” label to the decision to select this system nationally, is a terrific oversimplification.

## 2. “The Mandate-Independence Controversy”<sup>141</sup>

Another important question concerning the nature of representation is: what is the responsibility of a chosen representative whose good-faith personal views about the welfare of his constituents are at odds with the known wishes of the constituents themselves? Two extreme views can be identified. On one extreme are the “mandate theorists” who maintain that where the chosen representative deviates from the known wishes of the represented people, his or her actions do not constitute “representation” at all.<sup>142</sup> The opposite end of the spectrum theorizes that not only must the representative be endowed with complete discretion to exercise personal judgment, but he must be so completely independent that “constituents have no right even to exact campaign promises . . . .”<sup>143</sup>

In between these extremes, Professor Pitkin identifies three, more moderate, views of representation. One moderate position would suggest that a representative has some freedom to act on his best judgment, but has a responsibility to seek instructions from the represented before entering into any controversial decision.<sup>144</sup> A second moderate position would allow the representative to act independently, but only in the absence of explicit instructions from his constituents.<sup>145</sup> Finally, and closest to the strict independence model, the third moderate position permits independence of action, but only to the extent that independent action will not contravene an explicit campaign promise.<sup>146</sup>

The mandate/independence debate played out between the Federalists and Antifederalists during the formative years of American democracy. At the risk of severe oversimplification, the Antifederalists supported the most intimate relationship between a republican representative and his constituents.<sup>147</sup> This required that the representative have close, personal knowledge of the issues affecting the repre-

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141. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 144 (1967).

142. *See id.* at 146.

143. *Id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *See ZAGARRI, supra* note 5, at 90.

sented, that the electorate be able to closely monitor the actions of the representative, and even, perhaps, a requirement that a representative be subject to a right of instruction on the part of his constituents—an extreme version of the mandate theorists' view of the nature of representation. Federalists, by contrast, preferred a deliberative republic, with representatives who are "superior, dispassionate men, calmly debating in the light of reason, and so will refuse to give way to the factious desires of their constituents."<sup>148</sup>

Setting aside, for the moment, the set of plausible intermediate positions, it is also recognized that mandate theorists and independence theorists have different notions concerning the representative's responsibility for the national interest. Independence theorists, on the one hand, would urge that a national legislator has an important responsibility to pursue nationally desirable goals, even in the likely event that the national interest conflicts with the interests of those he represents.<sup>149</sup> Mandate theorists, by contrast, argue that the representative must act in the interests of his local constituency because the national interest amounts to little more than the sum of the various local interests.<sup>150</sup>

This leads to another question, related closely to the mandate/independence debate—to whom does the representative owe his primary loyalty, his constituents, or to the legislative institution of which he is a member?<sup>151</sup> Professor Reid points out that Colonial and early American citizens expected the loyalty of their representatives to run directly to the people who elected them.<sup>152</sup> British subjects of the same era—roughly the period of the American Revolution—would have the more mixed expectation that while a member of the House of Commons owed his primary responsibility to his constituents, this was not taken to imply service to their material needs. Rather, the representative was expected to maintain their liberty, but by upholding the independence of the House of Commons, which meant independence vis à vis the crown.<sup>153</sup>

Where does our representative democracy, and specifically the House of Representatives, lie along this spectrum of mandate/independence models? One of the most striking features of the develop-

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148. PITKIN, *supra* note 141, at 193.

149. *See id.* at 147.

150. *See id.*

151. *See* REID, *supra* note 115, at 64–65.

152. *Id.* at 64.

153. *Id.*



ment of representation at the national level in America is the degree of insularity achieved by members of the House from the adverse political consequences of their actions. During the forty-year period between 1960 and 2000, fewer than 20 percent of elections for House representatives were decided by margins of less than 10 percent.<sup>154</sup> In 2002, 64 percent of Democrats who were reelected to their House seats captured at least two-thirds of the vote or ran unopposed.<sup>155</sup> 91 percent scooped up at least 55 percent at the polls.<sup>156</sup> Unless this reflects extreme satisfaction on the part of voters with their representatives, it reveals a defect in the system, the blame for which lies squarely on the shoulders of mandated single-member districts, and the inevitable gerrymandering that results from that system of representation. Each state's majority party has the ability to "carve out safe seats,"<sup>157</sup> which it may use as a tool to protect incumbents or to install a member of a particular party by analyzing past voting behavior, and running the data through specialized software designed to construct ideal district configurations, yielding highly predictable election results.<sup>158</sup> The consequence is that incumbent representatives are virtually invulnerable to defeat, provided they maintain the requisite level of support at the state capital. As one Republican official described it, "[i]n the politics of redistricting, politicians get to choose the voters."<sup>159</sup> Disturbing as this trend may be, the Supreme Court has held that protection of incumbency is a valid criterion in creating legislative districts.<sup>160</sup>

Such a system is utterly incompatible with a mandate-driven model of representation. Not only can voters exercise no right of instruction, as the most extreme mandate theorists would prefer, the voter has virtually no recourse against a representative who is sent to Congress and behaves contrarily to the wishes of even significant aggregations of the electorate. The citizen may vote, but it is a mere formality if either that voter is lumped together with like-minded individuals in a safe district for another incumbent, or used as filler in a

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154. Joann Dann, *Safe but Sorry: The Way We Redistrict Destroys the Middle Ground*, WASH. POST, Dec. 2, 2001, at B1.

155. Dick Morris, *The House of Extremes*, JEWISH WORLD REVIEW, INSIGHT, Nov. 12, 2002, available at <http://newsandopinion.com/1102/morris111302.asp> (last accessed April 18, 2004).

156. *Id.*

157. Dann, *supra* note 154, at B3.

158. See *How to Rig an Election*, ECONOMIST, Apr. 27–May 3, 2002, at 29, 30.

159. Dann, *supra* note 154, at B3.

160. See *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966).

district served by a representative with whom he disagrees. The result must be a Congress that is utterly non-responsive to the wishes of the voters. It also seems likely to produce a body whose membership feels more loyalty to the institution of Congress, or at least to his party leadership within Congress, than they would to any particular constituency with virtually no recourse against the representative.

Is this an acceptable price to pay for the nurturing of experienced legislators who might be capable of the type of dispassionate deliberation that Madison and the Federalists had hoped for? Setting aside the fairly obvious conclusion that Madison would have preferred shorter tenures and greater accountability in the House of Representatives, the problem is that there is no guarantee of that type of deliberation. No empirical data presents itself, but citizens have reason for skepticism. The present system may offer the worst of both worlds— independence with no guarantee of enlightened deliberation.

Some hope may come from the existence of party primaries. A given candidate for the House may be relatively invulnerable to a challenge from a member of the opposing party, but perhaps vulnerable to a primary challenge from a member of his own party. This opportunity for a voice in the selection of representatives does more, however, to facilitate the selection of capable deliberators than it does to give voters an opportunity to aggregate so as to provide a candidate with a mandate on specific issues. In a district carved out by Party A for the purpose of predetermining that a member of Party A be elected to Congress, it is unlikely that a candidate in the primary election held by Party A would be nominated while vocally espousing views on issues that deviated very far from those of Party A's usual platform. Voters may be able to aggregate and nominate a slightly more moderate candidate than would otherwise be available, but no unusual departure from that Party's positions is likely. Indeed, it has been observed that the existence of "safe seats" in Congress has encouraged the emergence of more extreme views from those politicians who are shielded from the electoral pressures of those who might be sympathetic to many of the opposing party's positions.<sup>161</sup> Instead, the best a voter may be able to hope for is to select the most intelligent, articulate, or otherwise capable primary candidate from among a slate of candidates with similar views.

Even if we disregard the issue of gerrymandering, the existence of geographically defined congressional districts may thwart voters from

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161. See Dann, *supra* note 154, at B3.

aggregating with others to provide a mandate to a candidate on a given issue or set of issues. Assume the following hypothetical. Citizen X of District Y is passionate about protecting endangered species, and has no other interests in government of any kind. Candidate Z agrees with Citizen X on all such issues, and is similarly one-dimensional. Unless Candidate Z is running in District Y, Citizen X obviously cannot vote for him. At-large elections, or one of the alternative voting structures, would permit Citizen X to vote for Candidate Z as long as they were operating in the same state. The best Citizen X may be able to do, when he casts his ballot in a district-based election, is to vote for a candidate, in whose politics X has no interest, but who X believes is the brightest, most articulate, or has the potential to be the most talented legislator. Interposing geographic constraints between voters and candidates for Congress, at least in states allotted numerous representatives in the House, cuts down on the voter's ability to prospectively instruct a candidate whose positions he supports and to remonstrate those candidates whose actions in Congress meet with his disapproval.

### 3. Representing Issues and Interests Versus Representing Individuals

"I represent working families . . . ."<sup>162</sup>

"I represent . . . family values . . . ."<sup>163</sup>

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162. Sara Kugler, *Colorado Lawmakers Declared 'Conservative' by Magazine New American*, DENVER POST, Aug. 6, 1999, at A-20 (quoting Congressman James McGovern of Massachusetts ("Fortunately, I represent working families in Massachusetts, not rabidly partisan magazine editors.")); see also Jonathan Riskind, *NRA Runs Radio Ads Supporting Tiberi*, COLUMBUS DISPATCH, Oct. 24, 2000, at 2C (quoting Ohio congressional candidate Marc Guthrie spokesperson Randy Borntrager ("Jerry [Springer] knows Marc will represent the working families in Congress and Bob Ney will continue to represent the special interests.")); *Speaking of . . .*, DALLAS MORNING NEWS, June 12, 2000, Opinion, at 7A (quoting Texas Democratic Party Chair Molly Beth Malcolm ("They are going to see that the Democratic candidates we have running are the people that represent working families and Texas values.")); David Kocieniewski, *In TV Debate, Republicans Turn Their Fire on Corzine*, N. Y. TIMES, May 27, 2000, at B2 (quoting U.S. Senate candidate James W. Treffinger ("We Republicans represent the working families . . . .")); Bob McCarthy, *Never a Dull Moment in this Town*, BUFFALO NEWS, Oct. 19, 1997, at 3H (quoting New York Congressman Jack Quinn ("I still think I'm the one who represents working families . . . .")).

163. Jerry Fallstrom, *Bronson's Character Under Fire; Pam Bronson's "Family-Values" Campaign Has Come Under Attack By Her Political Opponent - And Her Estranged Husband*, ORLANDO SENTINEL TRIBUNE, Sept. 25, 1994, at 1 (quoting Florida House of Representatives candidate David Knolwes ("I've been married for 15 years to the same woman. I think I represent the family values that most people want in this community.")); see also BALT. SUN, Sept. 6, 1995, at 14A (Kathie Krieger, Letter to the Editor ("Cal Ripken . . . represents family values . . . ."))).

We hear statements like these from our representatives and those who aspire to representative capacity all the time without stopping to think about what they mean in the context of our democracy. Pitkin devotes a great deal of space to contrasting the difference between the representation of "unattached abstractions"<sup>164</sup> and the representation of people who have interests.<sup>165</sup> This section will summarize the distinction and attempt to apply it to the decision to elect members of Congress from single-member districts rather than some other, less-restrictive system.

Edmund Burke is credited with developing the concept that representatives may not be the direct representatives of those who elect them, but rather the representative of the nation as a whole<sup>166</sup> and "unattached abstractions."<sup>167</sup> Burke's philosophy assumes that "government should rest on wisdom and not on will . . ." <sup>168</sup> Indeed, he may have preferred methods other than elections as a means to select society's elite for the task of wise representation.<sup>169</sup> Because the consent of any individual or group of voters was unimportant to his model of representation, Burke was comfortable with "virtual" rather than "actual" representation:

What Burke, in fact, says is that some parts of the nation are represented "actually" or "literally," that is, they elect one or more members to Parliament; but a town or region that is not actually represented may nevertheless be represented "virtually"—virtual representation being a relationship in which "there is a communion of interest and sympathy in feelings and desires between those who act in the name of any description of people and the people in whose name they act, though the trustees are not actually chosen by them."<sup>170</sup>

This was the political theory that permitted the British "eighteenth-century legal mind" to make constitutional sense of what the modern legal mind would view as the obviously subservient position of the American Colonies to those geographic regions in Britain that actually sent representatives to Parliament—i.e., taxation without representation.<sup>171</sup> Americans were said to have a "community of interests"

164. PITKIN, *supra* note 141, at 168.

165. *See id.* at 190–93.

166. *See id.* at 168–69.

167. *Id.* at 168.

168. *Id.* at 169.

169. *See id.* at 171. "Burke actually says that decreasing the number of voters would increase representation because it would add to the voter's 'weight and independency.'" *Id.*

170. *Id.* at 173.

171. *See* REID, *supra* note 115, at 57–58.

with members of Parliament “‘arising from their trade, by which a great number of people in Britain, both electors of members of parliament and others, are deeply interested in preventing them from being oppressed.’”<sup>172</sup> Particularly landowners in America would be “virtually” and effectively represented in Parliament because Parliament had “‘shewn [sic] them always Attention . . . .’”<sup>173</sup> The American Revolution was the public and spectacular failure of this, most extreme, view of representation of interests.

The Federalists and, indeed, all American Revolutionaries, vehemently rejected the Burke model of representation. “Taxation without representation is tyranny . . . .”<sup>174</sup> But the rejection of virtual representation does not necessarily lead to the complete substitution of persons for interests in representation philosophy. Madison, after all, conceived of important interest groups—“factions”—battling one another into a stalemate and stable republic.<sup>175</sup> The main difference between interests as Burke saw them and as Madison saw them was that Burke’s “interests” were “clearly defined, broad, objective groupings . . . .”<sup>176</sup> while Madison saw “multiple, shifting alignments, largely subjective . . . .”<sup>177</sup> Burke perceived that “Birmingham is virtually represented in the English Parliament because both it and Bristol are of the trading interest. Bristol sees to it that a representative of the trading interest is sent to Parliament, and Birmingham thus has its spokesman.”<sup>178</sup> Madison would regard that view as overly simplistic:

While there is still a “landed interest” and a “manufacturing interest,” “These classes may again be subdivided according to the different production of different situations and soils, and according to different branches of commerce and manufactures.” These economic groupings are supplemented and crosscut by others “founded on accidental differences in political, religious, or other opinions, or an attachment to the persons of leading individuals.”<sup>179</sup>

Madison’s stable republic would, however, contain the tendencies of such “irregular passion” from subverting the long-term good by utilizing representation as a means of “stalemating” action based on

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172. *Id.* at 59.

173. *Id.*

174. PITKIN, *supra* note 141, at 191.

175. *Id.*

176. *Id.*

177. *Id.* at 192.

178. *Id.* at 178.

179. *Id.* at 192 (internal citations omitted).

interested passion.<sup>180</sup> "Only if each representative pursues the factious interests of his constituency can the various factious interests in the nation balance each other off in the government . . . ."<sup>181</sup> Direct consent of the individual in pursuit of his factious interests is crucial, under this model, because an unrepresented individual, or group of individuals, with no direct outlet in the representative body would naturally tend to pursue his temporary, factious goals outside of the designated forum. This would unleash the potential for subversion of the common good through anti-social, or at least un-republican, means. The violence of the American Revolution Madison had just witnessed was a vivid demonstration of this weakness of Burke's model.

In most important respects, Madison's view of representation prevailed over Burke's. At least as a matter of abstract philosophical underpinning, Americans generally would not accept the complete disenfranchisement of any significant group simply on the basis of shared interests with represented persons.

We do not, however, currently utilize the most efficient republican instruments for achieving direct consent by interested individuals to representation in the national legislature. By interposing geographic constraints, which are at best arbitrary, and at worst calculated to negate consent between the voter and the representative of his choice, Congress has dealt a blow to the concept that individuals in pursuit of interests must be represented directly, and have some means to consent or refuse consent to representation, in order to give rise to the legitimate form of republican government envisioned by Madison. It is true that, within a given congressional district, absent the sort of gerrymandered subversion of consent discussed *infra*, factional interest groups have some ability to align and choose a representative to their liking.

At least in large states with many representatives in Congress, however, the mechanism would be much more efficient if those individuals sharing common interests could aggregate on a statewide basis to choose the congressman best able and most willing to pursue their common goals. Under an at-large system of cumulative voting, for example, "the relevant unit of participation is the 'interest group' or the interest constituency. Interests are those self-identified voluntary constituencies who choose to combine because of like minds . . . ."<sup>182</sup> Tucker argues that under such alternative schemes, "each voter is able

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180. *See id.* at 196.

181. *Id.*

182. *See* Guinier, *supra* note 134, at 1140.

to define the nature of the representative/constituent relationship . . . .”<sup>183</sup> Superior methods of obtaining the consent of the governed are foreclosed by Congress’s choice of geographically defined districts.

Single-member districts make it far more likely that sizeable minorities in any given congressional district will be unable to select a member to their liking. Deprived of this ability, the voter may be resigned to accepting the virtual representation of a member of Congress who claims to represent them, their interests, or their abstract values. As noted above, candidates for office often signal to the voters that they “represent” some broader or narrower alignment of interests, and they often claim representation of that group, or even an abstract concept, on a statewide basis.<sup>184</sup> “Working families” may be a poor example, mostly because nobody really knows who it is that falls outside of that group. If it is taken to mean labor, the middle class, “soccer moms,” Democrats, or some similar swath of the state’s population, and “family values” is read as a code word for “conservative,” probably white, and affluent two-parent households with 2.3 children, the situation begins to resemble that which Burke describes as the “virtual” representation of Birmingham by the members of Parliament elected from Bristol. These “working families” or “family values” voters may have no real opportunity to vote for a candidate in their district who claims to represent them. More likely, they have an opportunity to cast a formal vote in an election whose outcome has been predetermined by gerrymandered district lines. The best that these subgroups may be able to hope for is that a candidate from some other district claiming to “represent” them will be elected and will pursue an agenda consistent with their interests. They will have had no opportunity to affirmatively signal their consent to his election.

We are comfortable with the result, however, because the district system is usually able to achieve a rough balance between at least the broadest interest groups—Democrats and Republicans. Despite this comfort, which prevailed for hundreds of years in Imperial England, but became unacceptable in Colonial America—largely because it was harming the material needs of the virtually represented colonists—we should recognize that it is not the pure system of actual representation envisioned by Madison. To be sure, the single-member district system does not approach the egregious tyranny that characterized Parliament’s domination of the Colonies. Gradually shifting political

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183. Tucker, *supra* note 3, at 397.

184. See *supra* notes 162, 163.

alignments make it at least theoretically possible that at any given time, an individual may be able to consent to the representative of his choosing. It must be pointed out, however, that fictional district boundaries interfere with the most efficient system of consent, and their very existence is a key feature of the prevailing model of American republicanism.

## Conclusion

The choice between single-member districts and other voting systems is clearly of a different character from choices related to "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."<sup>185</sup> Single-member districts affect the outcome of our elections, the composition of our representative institutions, and ultimately the character of our republican system. Unlike the size and shape of a ballot, or a prohibition against interfering with election officials, this is not a question of *how* we signal our consent, but rather *whose* consent is relevant and necessary to legitimate representative democracy in America. This article does not go so far as to suggest that Congress chose poorly. It may well be that single-member districts are the "least bad" method of aggregating consent, and they are certainly superior to other systems that might be imagined. But to characterize it as a "procedural" choice undermines its significance, and may have a chilling effect on public discourse. The American republican experiment should be based on perfecting the mechanism by which the government seeks the consent of the governed. At the very least, the propriety and legality of the status quo should not be assumed.

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185. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).