ONE PERSON, ONE VOTE: MISREPRESENTATION IN THE DEBATE OVER GERRYMANDERING AND CONGRESSIONAL DISTRICTS

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This article discusses the one-person, one-vote rule and the implications of gerrymandering on the Equal Protection clause. Partisan gerrymandering has consistently been discussed as an unfair action that infringes upon equal protection rights, and today focus upon the debate surrounding gerrymandering has been powerfully reinvigorated.[1] The practice of gerrymandering, defined as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power,"[2] is not a novel phenomenon in the United States, going back at least to the nineteenth-century when Elbridge Gerry, then Governor of Massachusetts, infamously signed a bill in 1812 allowing redistricting in the state to intentionally favor his own party in subsequent elections.[3]

In *Reynolds v. Sims*,[4] the Supreme Court held that states need to redistrict in order to have state legislative districts with roughly equal populations.[5] Under this interpretation, the Supreme Court upheld equal protection as being constituted through a framework of proportional representation under the one-person, one-vote principle.[6] If equal representation is determined to be "fair" under a proportional interpretation of "one person, one vote," however, districts would not represent the best system. If we are trying to achieve "fair" districts in the one-person, one-vote sense, a proportional state-wide representation system

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1. *See, e.g.*, Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness*, 67 CATH. U. L. REV. 229 (2018), for extensive discussion surrounding the current state of public debate and events surrounding partisan gerrymandering.

2. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015).

3 Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN MAG. (July 20, 2017), https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/.

4. 377 U.S. 533 (1964).

5. "Roughly equal populations" under *Reynolds v. Sims* referred to total population of the district, without consideration of eligible or registered voters.

6. *Reynolds*, 377 U.S. at 557–58 (quoting Gray v. Sanders, 372 U.S. 368 (1963)).

would in actuality be a better form of upholding the current interpretation of equal protections concerning congressional districts.

Presumably, districts are put in place so people at smaller levels, "communities," are able to have their own representatives in state and federal legislatures. What, then, truly defines these communities today? If districts are being redrawn every ten years, it would not only be required that these districts conform to a principle of fairness in relation to their representation compared to other districts, but additionally that there be some justification for why the distinct communities, such as towns and cities, within a given district should even be considered to be part of the same representative community at all. Simply put, what differentiates a town on one side of a congressional district from the town on the opposite side of the line in the other district? And what makes that town in one district part of the same representative community as another town within its own district? These are questions rarely, if ever, discussed in both public and scholarly discourse surrounding gerrymandering.

Congressional districts should be one-person, one-vote statewide if we are determining "fair" to be that every voter in the state is equally represented. If we are to keep congressional districts defined by drawn geographic areas, we must determine exactly why these geographic areas are the best solution, and why they should be deemed to be the best idea for representation. If we cannot determine why these geographic "representative communities" are in fact distinct communities at all, then there appears to be no purpose of drawn districts at all. If our goal is to make every district as competitive as possible, geographic districts do not even make sense in the first place, and a proportional system would be a better mechanism.

What I will show in this article is that districts drawn geographically are antithetical to the very principle of one-person, one-vote that was upheld by the Supreme Court and is widely utilized as the norm in public discourse. As a result, there is an inherent paradox. If we are to truly be seeking equal protection through fair representation in terms of legislative districts, we are advocating for a system of proportional statewide representation. What geographically-bounded congressional districts instead do is provide equal protection to specific geographic communities, or at the very least geographic borders, and determine fair representation in the form of representing communities of people as opposed to representing individuals at the state level, at which proportional statewide congressional representation would aim.

I display how misrepresentation in the debate surrounding redistricting and partisan gerrymandering has occurred as a result of increasing party polarization taking place in conjunction with legislation and court rulings. These occurrences have caused misrepresentation by shifting the focus of reform from considerations of regulating the number and proportion of elected representatives to crafting politically-neutral redistricting procedure. The reason that this has been such an issue for the democratic process and representation is that it has moved focus from who elected officials are chosen to serve and why they struggle between

political parties for a better image and greater power. As a result, party polarization and partisan gridlock has blocked progress towards democratic representation and efficient electoral processes. To remedy this, it is suggested that this problem is acknowledged and measures are taken to move considerations back upon how best to represent citizens.

Congressional Districts and Representation

Equal political representation is supposed to be the great equalizer in society. The basic concept of what democracy is designed to do is provide all citizens of a political community with the power to affect public decisions. The United States Constitution as originally drafted imposed few restrictions on eligibility for becoming a member of the House of Representatives.[7]

Representatives are required to be at least 25 years of age, have been a citizen of the United States of America for at least seven years, and live within the state in which they represent.[8]

The Constitution outlines that the House of Representatives is to be composed of elected members from each state, with the number of elected representatives not exceeding one for every 30,000 individuals,[9] and each state having at least one representative in the House.[10] Individual legislators at the state level are able to determine the times, places, and manner of holding elections for both senators and representatives, however, Congress holds the authority to make or alter state-level regulations by law, excluding the ability to choose the place for which senators are elected.[11] Interestingly, there is no stipulation provided in Article 1 of the Constitution requiring representatives in the House to reside in the *geographical district* which they represent, only that they reside within the state of which the geographic district exists. This has implications concerning not only the legality of representing a district in which a representative does not reside, but raises questions concerning the role and necessity of geographically-drawn districts aside from a method of compartmentalizing proportional state-level representation in the House.

The first notable legislative changes to constitutional precedent surrounding congressional districts occurred with the Apportionment Act of 1842. Congress had previously passed five apportionment acts every ten years as outlined in Section 2, Article III of the Constitution. These acts, however, had simply

7. Of course, many exclusions were indeed in place concerning women, African Americans, and Native Americans, who were not allowed to vote under the Constitution in 1787. *See, e.g.*, Morris D. Forkosch, *Who are the "People" in the Preamble to the Constitution*, 19 CASE W. RES. L. REV. 644 (1968).

8. U.S. CONST. art. I, § 2, cl. 2.

9. Prior to 1865, slaves counted as three-fifths of an individual, *see, e.g.*, U.S. CONST. art. I, § 2, cl. 3, "three fifths of all other Persons." Indentured servants, however, were counted as a full individual for representatives purposes. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3, "including those bound to Service for a Term of Years."

10. U.S. CONST. art. I, § 2.

11. U.S. CONST. art. I, § 4, cl. 1.

matched the proportional growth of the national population.[12] Prior to 1842, two forms of electoral systems existed as the general manner of carrying out congressional elections; general ticket elections and single-member district elections. General ticket elections allowed voters to cast an amount of votes equal to the total number of seats that needed to be filled in their state, and vote for each candidate on the voting ticket once.[13] The proponents in favor of this system contended that it bolstered the congressional power of smaller states in representing constituents, as a result of more uniform delegations from a single party being elected.[14] General ticket voting strengthened parties and their organizational power, as representatives were selected by the parties and allowed voters to cast their ballot simply along the party line.

The other electoral system, single-member district elections, are the current system of representative apportionment, in which eligible voters of a given geographically-bound district elect a single representative for this district in the House of Representatives. Single-member districts allow each voter to cast one vote for a candidate to represent their geographic district and the candidate that receives the most individual votes is selected to be the representative.[15] Residents of the district are then specifically represented legislatively by their single elected official.

In June 1842, a bill was passed to apportion congressional representatives who were to be "elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative."[16] The vote in the Senate passed by a 25-22 margin, with three senators not voting.[17] The measure was preferred by Whig representatives, but almost equally opposed by Democrats, however each party had a number of senators who split with the majority of their party, as well as at least one senator who did not vote. The reason behind this split was largely a result of the senators' general political positions on the distinction between state rights and federal power.[18]

After the dissolution of the Federalist and Anti-Federalist factions that developed in the late eighteenth-century in the United States, the Whigs and the Democrats rose to become the two major opposing parties in American politics between 1834 and 1856.[19] The Whigs filled the role of their Federalist predecessors and largely represented the interests of those who favored a stronger, more

12. *See* Emanuel Celler, *Congressional Apportionment: Past, Present, and Future*, L. & CONTEMP. PROBS. 268, 270 (1952).

13. *The Apportionment Act of 1842: "In All Cases, By District": U.S. House of Representatives: History, Art, & Archives*, U.S. House of Representatives, https://history.house.gov/Blog/2019/April/4-16-Apportionment-1/.

14. *Id.*

15. *Id.*

16. Act of May 25, 1842, 5 Stat. 491 (1842).

17. *Id.*

18. U.S. House of Representatives, *supra* note 13.

19. History.com Editors, *Whig Party*, HISTORY.COM (Nov. 20, 2019), https://www.history.com/topics/19th-century/whig-party.

robust federal government, while the Democrats primarily replaced the Anti-Federalists and supported a more decentralized national system of government which allowed individual states to command greater control and flexibility. In the shifting of the two-party system during the 1830's, the Whigs sought to establish themselves as a "dynamic, intelligent, and issue-based party emerged that was conservative without being reactionary."[20]

The new apportionment act passed in 1842 was seen as a win for the Whigs, as it reflected a shift towards standardized, national policy on electoral representation for congressional representatives. President John Tyler, a Whig, signed the apportionment bill into law in 1842, but did so with apprehension.[21] While it would appear that President Tyler should hold little misgivings for signing the apportionment act that established a single-member district policy, the circumstances of Tyler's rise to the presidency as a Whig followed a unique storyline. Tyler was initially a member of the Democratic-Republican party in the 1810's and early 1820's in his home state of Virginia before the Democratic-Republican party's split.[22]

He began a campaign for the presidency in 1828, which Andrew Jackson would overwhelmingly win against John Quincy Adams in both the popular vote and the electoral college.[23] Adams had been the incumbent in the 1828 presidential election, yet the 1824 election was marked by a contested four-way race between candidates who were all members of the Democratic Republican party.[24] Alongside Adams in the general election were Andrew Jackson, William H. Crawford, and Henry Clay. By this time, Jackson had served as a notable legal and political leader for years in Tennessee before making a greater public name for himself as a Major General in the military. Andrew Jackson was particularly well-regarded by many as a result of his leadership of the American army against British troops at the Battle of New Orleans in 1815, in which the Americans quickly shut down an attempt by British forces to overtake area in Louisiana around the Gulf of Mexico.[25]

Both William H. Crawford and Henry Clay had intriguingly similar political careers, which may have foreshadowed their similar outcomes in the 1824 presidential general election. Crawford had spent his early political career serving in the Georgia House of Representatives and then representing Georgia in

20. *See* Steven P. McGriffen, *Ideology and the Failure of the Whig Party in New Hampshire, 1834-1841*, THE NEW ENGLAND Q. 387, 388 (1986).

21. *See* Celler, *supra* note 12, at 272.

22. History.com Editors, *John Tyler*, History.com (July 9, 2019), https://www.history.com/topics/us-presidents/john-tyler#section_1.

23. *Presidential Election of 1828: A Resource Guide*, LIBRARY OF CONGRESS, https://www.loc.gov/rr/program/bib/elections/election1828.html.

24. *Presidential Election of 1824: A Resource Guide*, LIBRARY OF CONGRESS, https://www.loc.gov/rr/program/bib/elections/election1824.html.

25. *See, e.g.*, BENTON RAIN PATTERSON, THE GENERALS: ANDREW JACKSON, SIR EDWARD PAKENHAM, AND THE ROAD TO THE BATTLE OF NEW ORLEANS (2005) (providing a wider account of Jackson's actions, as well as the political and military considerations taking place in the months leading up to the battle).

the United States Senate.[26] Following this, he served under both the James Madison and James Monroe administrations, first as Minister to France and then as the Secretary of War.[27] Henry Clay, like Crawford, had been a Democratic-Republican since the beginning of his political career in the Commonwealth of Kentucky in 1803. Clay became known for his role in expanding the powers of the Speaker of the House, as well as his impact on U.S. foreign policy.[28] As Speaker of the House, Clay gained notoriety for leveraging his political will in the role and expanding the power of the position.[29]

Clay used his influence to lobby James Madison into declaring war with Britain in 1812, the year after he gained his title as Speaker of the House.[30] He resigned from the House for a brief period to negotiate a peace treaty with Britain in 1814, before returning to Congress for nearly a decade more.[31] Crawford had spent more time as a Cabinet member than as a member of Congress, in comparison to Clay, with similar experience in foreign affairs as a result of his time as Minister to France and Secretary of War during the presidency of James Madison. Clay and Crawford, however, ultimately failed to significantly differentiate themselves, and their politics, from one another at a time when the Democratic-Republican Party began to splinter. Andrew Jackson's victory in the 1828 presidential election solidified the fray of the Democratic-Republican party, which had largely been foreshadowed by dynamics of the presidential election in 1824.[32]

John Tyler, along with Daniel Webster and Henry Clay, created the Whig party in 1833 following special frustration with Andrew Jackson, then serving as the President, and his nullification proclamation.[33] The nullification proclamation arose when public officials in South Carolina sought to invalidate federal tariffs imposed under the Jackson administration.[34] The Compromise Tariff of 1833 resolved the feud between Jackson and state officials in South Carolina, however, the contentions between federal powers and states' rights interests during this time solidified the widening fissure within the Democratic-Republican

26. Editors of Encyclopedia Britannica, *William H. Crawford,* ENCYCLOPEDIA BRITANNICA (Sept. 11, 2019), https://www.britannica.com/biography/William-H-Crawford#accordion-article-history.

27. *Id.*

28. *Henry Clay (1825-1829),* UNIVERSITY OF VIRGINIA MILLER CENTER, https://millercenter.org/president/adams/essays/clay-1825-secretary-of-state (last visited Feb. 15, 2020).

29. *Id.*

30. *Id.*

31. *Id.*

32. *See, e.g.*, Donald Ratcliffe, *Popular Preferences in the Presidential Election of 1824*, J. EARLY REPUBLIC 45 (2014) (reviewing the tensions in the Democratic-Republican Party that occurred as a result of the 1824 election). This source also provides a clear analysis of the subsequent years that aided the election of Jackson as President in 1828.

33. *John Tyler: Life in Brief,* U. VA. MILLER CTR., https://millercenter.org/president/tyler/life-in-brief (last visited Feb. 15, 2020).

34. *Primary Documents in History: Nullification Proclamation*, LIBR. CONGRESS (Nov. 12, 2019), https://www.loc.gov/rr/program/bib/ourdocs/nullification.html.

party and led to the creation of the Whigs.[35] Tyler had gained his role in the executive after the death of William Henry Harrison in 1841 and despite his Whig moniker, he held a strong distrust in an expansive federal government.[36]

Tyler had difficulty holding party support during his time in executive office, and the political struggle surrounding the Apportionment Act in 1842 only continued to entrench the tensions. As President, John Tyler had failed to adequately appease either his own Whig party members and the opposing Democrats, leading to a massive gap in centralizing power on congressional apportionment. The Whigs sought to minimize a growth in the number of representatives, contending a smaller House would provide a manageable space for debate and decision-making, while the Democrats sought to increase this number, arguing that a larger House would be more representative of the will of constituents.[37] This debate, and its ultimate outcome in 1842, would fundamentally change the trajectory of political representation.

The Whigs supported an amendment to the bill introduced by William Halstead requiring the use of single-member districts, which would subsequently eliminate the ability for states to employ general-ticket voting in elections.[38] The coalescence of most Whig party members around this amendment to the Apportionment Act was integral in redirecting the trajectory of congressional representation at that point. Whigs were not unanimously in support of limiting the number of House representatives and the influence of states upon elections for federal office, however the Whig majority was able to pass the bill through the House by a margin of 113 votes to 87.[39] The Act also required congressional districts to be "composed of contiguous territory," implementing a significant provision which affected the role of gerrymandering in congressional district mapping.[40]

Martin Quitt provides further insight into the historical events which shaped the political debate between Whigs and Democrats concerning electoral representation in the House. Quitt posited that the elitism of Whig ideology underscored the limitation of House member expansion and the lack of public outcry was a result of acceptance that parties asserted power in Congress, as opposed to individuals.[41] In another piece on this topic, Robert Ross displays the historical importance of the Whig party's victory in the debates surrounding the Apportionment Act of 1842, which consequently required single-member voting in House elections and reduced representatives in the House of Representatives for

35. *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875,* LIBR. CONGRESS, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=004/llsl004.db&recNum=676 (last visited Feb. 15, 2020).

36. U. Va. Miller Ctr., *supra* note 33.

37. U.S. House of Representatives, *supra* note 13.

38. *Id.*

39. *Id.*

40. 5 Stat. 491 (1842).

41. *See, e.g.*, Martin Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, J. EARLY REPUBLIC 627 (2008).

the first time in the history of the United States.[42] The argument for legislative efficiency as a counterbalance with popular will proposed by the Whigs in support of the Apportionment Act of 1842 would serve as a platform for subsequent perception of electoral representation. Yet, notably, in neither piece is their prominent discussion surrounding the issue of contiguous geographical districts required by the act, or the influence this provision has on the current practice of and debate on gerrymandering. Additionally, following the enactment of the monumental Apportionment Act in 1842, later Constitutional amendments and acts of legislation have continued to shape our understanding of electoral representation as well. Following from Ross's presentation of the significance resulting from the Apportionment Act of 1842 are a list of particularly important questions left to answer.

How does this issue relate to the contemporary debate surrounding gerrymandering and representation? Were there similar issues that arose when general-ticket voting was in place? How have subsequent constitutional amendments and acts of legislation built upon the Apportionment Act of 1842? While this article does not provide exhaustive answers to each of these questions, the following sections will give deeper insight into how we reached the current state of affairs by developing more robust explanatory causal links surrounding gerrymandering and electoral representation as a result of legislative and judicial influence. This will help exhibit how these ad hoc historical shifts have led to a broken debate on how to address gerrymandering and appropriately represent constituents, which previous work has neglected to address, and allow for reevaluation of legislative representation and the consequences of prior failure to properly center the debate.

Reshaping Electoral Representation After the Apportionment Act of 1842

Amendments to the Constitution taking place in the latter half of the nineteenth century would further alter the path of determining electoral representation. The Fifteenth Amendment, ratified along with the Thirteenth and Fourteenth Amendments in the years following the Civil War, granted the right to protection against denial of voting on the basis of "race, color, or previous condition of servitude,"[43] in an attempt to expand voting rights to blacks and former slaves who had previously been denied significant civil rights under the Constitution. The Fourteenth Amendment also required representatives of congressional districts to "be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed,"[44] meaning that no district can cross from one state line into another. Together with the requirement under the Apportionment Act of

42. *See, e.g.*, Robert E. Ross, *Recreating the House: The 1842 Apportionment Act and the Whig Party's Reconstruction of Representation*, POLITY 408 (2017).

43. U.S. CONST. amend. XV, § 1.

44. U.S. CONST. amend. XIV, § 2.

1842 that congressional districts be composed of contiguous territory, the Fourteenth Amendment requirement for state-contained districts would heavily influence the geographically-bounded state-level congressional districts with which we are familiar today.

It is integral to note here the dynamics of two events which, when combined, significantly affected the trajectory of contemporary debate. This is central to understanding the causal links at the root of the broken debate surrounding electoral representation and gerrymandering. While certain acts of legislation, constitutional change, judicial decisions, and policy measures will have more influence than others, with some holding particularly prominent influence, we cannot point to a single moment in the political development of the United States that has resulted in the current state of partisan gerrymandering. Instead, analysis of wider spaces of time, with focus on moments on substantive and durable periods of change which do not occur in isolation but typically build upon or develop in reaction to one another, is a necessary component for capturing the underlying mechanisms of development which established the current state of affairs. This allows for the most substantive answer to the questions at hand concerning how the act of gerrymandering became nationally prevalent and why the debate around gerrymandering has failed to move towards consensus in terms of addressing the practice itself.

To further safeguard civil protections under the law for emancipated slaves following the end of the Civil War, the Enforcement Acts of 1870 and 1871 not only prohibited groups from organizing to deny others the opportunity to vote, aimed at eliminating the harassment of newly emancipated slaves attempting to vote, but expanded federal oversight of congressional elections.[45] The Second Force Act was particularly significant, as it established federal control of national elections and allowed for the supervision of local polling locations by federal officials.[46] The end of Reconstruction measures in the former Confederate states by 1877 would result in the failure to continue support for the civil rights of Black citizens in these states. This shift in federal policy would not only result in harmful consequences of social policy but would mark the expansion of federal power over the implementation of polling locations at the local level by national government presenting further change in national election law.[47]

By 1911, another piece of federal legislation would once again inexorably shape the boundaries of electoral representation in the House of Representatives. The Apportionment Act of 1911 replaced a previously held standard for House apportionment, which had continued to raise the total number of House representatives as population grew and new states were added to the Union. Two important actions outlined in the Act were first, that "after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed

45. *Landmark Legislation: The Enforcement Acts of 1870 and 1871,* U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm.

46. *Id.*

47. *Id*.

of four hundred and thirty-three Members"[48] and second, "if the Territories of Arizona and New Mexico shall become States in the Union before the apportionment of Representatives under the next decennial census they shall have one Representative each."[49] The first action we see set the number of House representatives at 433, and the second added one representative each for Arizona and New Mexico, which were admitted to the Union in 1912.[50] This would set the precedent of holding the total number of House representatives in congress at 435 members.

This ceiling on House members was at the center of a political debate during the beginning of the twentieth century, as members of the 63rd Congress were, on the one hand, concerned about an untamed growth of representatives, and on another, the ability to be duly responsive to constituents.[51] Yet, the contention that holding back the continued expansion in the number of House representatives won out, and indeed one of the most notable consequences of the ceiling placed on the number of House representatives is that since the enactment of the Apportionment Act of 1911, the number of individuals represented by each House member has risen from 212,000 to 710,000.[52] The number of House representatives would temporarily expand to 437 members from 1959 to 1963 with the addition of Alaska and Hawaii as the 49th and 50th states in the Union, however, the permanent cap of 435 House members set forth in the Reapportionment Act of 1929[53] would cause the temporary increase to once again return to the cap of 435, where it has since remained.

Today, we are seeing a shift towards the implementation of redistricting commissions designed to apply the principles of fair congressional district creation.

State redistricting commissions have become increasingly prevalent since 1964, in which the Supreme Court ruled in *Reynolds v. Sims*[54] that states must redraw districts in order to have legislative districts with populations that are relatively equal to one another. Redistricting commissions vary across states, with more diffuse, state-level systems constraining various aspects of redrawing congressional districts. There are many processes currently used by states to create new districts every ten years.

48. 10 Stat. 25 (1852).

49. *Id.*

50. *New Mexico and Arizona Statehood Anniversary (1912–2012)*, NAT'L ARCHIVES & RECORD ADMIN., https://www.archives.gov/legislative/features/nm-az-statehood.

51. *The 1911 House Reapportionment Act,* U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1901-1950/The-1911-House-reapportionment/.

52. *Proportional Representation,* U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Origins-Development/Proportional-Representation/.

53. *The Permanent Apportionment Act of 1929*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1901-1950/The-Permanent-Apportionment-Act-of-1929/.

54. 377 U.S. 533 (1964).

The most common system through which congressional district lines are redrawn is by state legislatures. In thirty-one states, the state legislature has control over redrawing congressional district lines and passing new districts through a similar process to other pieces of legislation.[55]

Thirty of these states redraw state legislative districts through the same process.[56] Political appointee systems are also in place in a number of states, which, in contrast to passing redistricting legislation through traditional legislative processes, delegate the duties of redistricting to an appointed group of individuals who are themselves elected legislators or selected officials of a given party.[57] Political appointee systems are not, on the whole, broadly distinct from using state legislatures to redevelop congressional or state legislative voting districts but use a small number of delegates as a measure to expedite the redistricting process.

A number of states have also moved towards the usage of independent redistricting commissions, designed with the hope of eliminating partisan efforts to gerrymander electoral districts at both the state legislative and federal congressional levels.[58] Independent redistricting commissions, as with other methods of redistricting, are heavily dependent on state-level guidelines and have little federal oversight for procedural guidelines. These independent commissions do, however, share the common structure of being composed of individuals who are neither elected legislators nor party officials and designed to have minimal partisan interaction in their final judgements for drawing and accepting redrawn district maps.[59]

Multiple studies have found that independent commissions have increased competitiveness in congressional elections when compared to legislature-driven redistricting.[60] Others, however, have contended that allowing state legislators to lead redistricting efforts is not the source of noncompetitive congressional races or political polarization.[61] While independent redistricting commissions

55. *Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUSTICE (Jan. 30, 2019), https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting.

56. *Id.*

57. *Id*.

58. *See* Royce Crocker, *Congressional Redistricting: An Overview*, CONGRESSIONAL RES. SERV. 23 (Nov. 21, 2012), https://fas.org/sgp/crs/misc/R42831.pdf.

59. *Id*. at 17, 23.

60. *See, e.g.*, Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, ST. POL. & POL'Y Q. 455 (2004); Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115 (2003); GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS (7th ed. 2009).

61. *See, e.g.*, Alan Abramowitz, Brad Alexander & Matthew Gunning, *Don't Blame Redistricting for Uncompetitive Elections*, PS: POL. SCI. & POL., 39, 87–90 (2006); Harry Basehart & John Comer, *Partisan and Incumbent Effects in State Legislative Redistricting*, LEGIS. STUD. Q. 65 (1991); Richard Forgette, Andrew Garner & John Winkle, *Do Redistricting Principles and Practices Affect U.S. State Legislative Electoral Competition?*, ST. POL. & POL'Y Q. 151 (2009); Seth E. Masket, Jonathan Winburn & Gerald C. Wright, *The Gerrymanderers Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It*, PS: POL. SCI. & POL. 39 (2012).

have been perceived as effectively addressing many partisan issues at the heart of unfair gerrymandering practices, it has been acknowledged that they do not wholly rid the redistricting process of its political tint.[62] Even as there has been a certain level of perceived reduction in unjust partisanship through the transfer of traditional legislative redistricting methods to commissions composed of non-partisan individuals, there remains little consensus on the effectiveness and necessity of independent commissions for redistricting purposes.[63]

Since the Apportionment Act of 1842, political debates centering around changes to seat apportionment and representative member limits have been replaced with a new shift. The move in contentious political disputes has instead become centered around procedural purity in recreating geographic districts, with a supposed end goal of fairly representative electoral districts.[64] Yet, what we see conspicuously left out of the contemporary debate is who congressional representatives *represent*, and *why they represent them*. It should seem integral, even primary, that at the heart of disagreement about the nature of political representatives should always remain the very people through which representatives are given their authority. Instead, what we have seen, as the result of legislative shifts in the beginning of the twentieth-century and procedural shifts beginning in the latter half of the twentieth-century that endure today, is a political debate that both misrepresents the principles of electoral competition and fails to address those who political representatives are in place to serve.

Court Cases

While members of Congress and political parties have been tantamount in shaping the current state of partisan gerrymandering and the discussion around redistricting, courts have been equally as influential in shaping the historical trajectory of gerrymandering and the path through which Congress has moved in relation to the issue. The influence of the courts on redistricting has become increasingly significant following the 1962 ruling in *Baker v. Carr*.[65] The case centered around a resident of Tennessee, Charles Baker, who contended that a Tennessee statute from 1901 had arbitrarily and capriciously apportioned General Assembly seats in the state and subsequently failed to reapportion these seats in proceeding years.[66] Baker argued that the statute was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, however, the district court dismissed Baker's case on the grounds that they did not hold jurisdiction over reapportionment activities.[67]

62. *See, e.g.*, Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer*, 121 YALE L.J. 1808 (2012).

63. *See* Cain, *supra* note 62, at 13.

64. *See* Brennan Center for Justice, *supra* note 55.

65. 369 U.S. 186 (1962).

66. *Id.* at 186.

67. *Id.*

The Supreme Court held that the district court maintained jurisdiction under federal judicial power defined in Article 3, Section 2 of the Constitution,[68] and that appellants in the case had standing resulting from the principle that a citizen's right to vote cannot be arbitrarily denied by the state and has been judicially recognized.[69] The Court ultimately reversed and remanded the case to the trial court on the grounds that Baker's complaint of violation under the Equal Protections Clause was justiciable, and the appellants were entitled to a trial and decision.[70] Central to understanding the impact of *Baker v. Carr* is the ruling setting precedent for courts to hold the power to take action in cases involving distribution of legislative seats, with Justice Brennan in the majority opinion firmly denying that the subject matter presents a political question.[71]

The Supreme Court ruling in *Baker v. Carr* would set the stage for another landmark case in 1964, *Reynolds v. Sims*.[72] *Reynolds v. Sims* is integral, as it set the standard for what would subsequently be known as the "one person, one vote" principle. This principle held that the rulings in *Baker v. Carr* and *Reynolds v. Sims* upheld Fourteenth Amendment interpretation that citizens were guaranteed equal protection of voting rights through proportional equality in legislative districts. The principle itself was built upon the ruling in *Reynolds* that states must redistrict to develop state legislative districts that have approximately equal populations, so as to satisfy the Equal Protections Clause, following the precedent from *Baker* that courts held the authority to hear cases on legislative redistricting.[73]

The rulings handed down by the Supreme Court in *Baker v. Carr* and *Reynolds v. Sims* coincided with the beginning of the shift towards the focus of procedure in distributing geographic legislative districts.[74] As a result, this shift following these rulings established an inevitable future in which court rulings and gerrymandering as a procedural issue met at the center of partisan contention. In *Davis v. Bandemer*,[75] this issue of partisan gerrymandering was brought to the forefront, over two decades after the *Baker v. Carr* and *Reynolds v. Sims* rulings in 1986.

In 1982, Indiana democrats filed a suit in district court alleging that a 1981 reapportionment plan put into place in the state violated the Equal Protection Clause of the Fourteenth Amendment by discriminatorily diluting Democratic Party constituent voting power.[76] The district court determined that the reapportionment plan established before the election was invalid, and a new plan was

68. *Id.* at 200.

69. *Id.* at 208. *See, e.g.*, *United States v. Saylor*, 322 U. S. 385 (1944); *United States v. Classic*, 313 U. S. 299 (1941); *United States v. Mosley*, 238 U. S. 383 (1915); for precedent of judicial intervention in relation to citizens right to cast a vote without state coercion or intervention.

70. *Baker*, 369 U.S. at 237.

71. *Id.* at 234.

72. 377 U.S. 533 (1964).

73. *Id.*

74. Crocker, *supra* note 58 at 4–7.

75. 478 U.S. 109 (1986).

76. *Id.* at 109.

required to be developed.[77] At the Supreme Court, there were two questions of the case which were significant in addressing. The first pertained to whether the 1981 apportionment plan in Indiana violated the Equal Protection Clause of the Fourteenth Amendment.[78] The plan, as determined by the Court, was not in violation of the Fourteenth Amendment, as the argument put forth by the Democrats that a lack of representative seats acquired in proportion to popular vote share did not constitute clear grounds for unconstitutional discrimination.[79]

Second, and even more important, was the question before the Court as to whether issues of partisan gerrymandering were justiciable before the Supreme Court under the Fourteenth Amendment.[80] Here, the Court ruled that partisan gerrymandering claims *were justiciable* under the Fourteenth Amendment, allowing subsequent cases of similar grievance to be heard.[81] While the previous rulings in *Baker v. Carr* and *Reynolds v. Sims* set the standard for issues of reapportionment to be justiciable in the courts and legislative representation to be legally conceived of through the lens of proportional equality, respectively, the Supreme Court's ruling in *Davis v. Bandemer* expanded the power of the courts' in assessing issues of proportional representation and partisan action. The ruling in *Davis v. Bandemer* was not only important for this expansion of the courts' role in determining the constitutionality of redistricting efforts across the state, but it also was also a point which saliently displayed the state of growing polarization that has undergirded party politics beginning in the latter stages of the twentieth-century and continuing into today.

The contention of redistricting as a political tool and the constitutionality of partisan control of redistricting efforts was once again reshaped in 2004 by the ruling in *Vieth v. Jubelirer*.[82] This case came before the Supreme Court as the result of a group of voters in Pennsylvania alleging that a congressional redistricting plan adopted by the state's General Assembly constituted a partisan gerrymander in violation of the Equal Protection Clause and Article I of the Constitution.[83] This marked the first time in which the primary task of the Supreme Court was to interpret the judiciary's place in determining bounds of constitutionality in relation to partisan gerrymandering. The claim was dismissed in the district court and, in a 5-4 decision, the Supreme Court upheld the lower court ruling, determining that there existed no provision within the Constitution that limited partisan consideration in the process of legislative redistricting.[84]

77. *Id.*
78. *Id.* at 127.
79. *Id.* at 129–30.
80. *Id.* at 118.
81. *Id.* at 127.
82. 541 U.S. 267 (2004).
83. *Id.* at 267.
84. *Id.* at 305.

The decision in *Vieth v. Jubelirer* did not ease contentions, and further displayed the frayed nature of partisan grasp of redistricting procedure.[85] As a result, legislators and citizens alike would become, to a greater extent, acutely aware of the motives and effects of the redistricting process as an issue of partisan power struggle. In response to the heightened awareness of legislators and citizens alike of redistricting's partisan nature, considerations of how to implement neutral or non-partisan procedures took hold of the imagination of the public and academics alike.[86] The constitutionality of independent redistricting commissions was ruled on by the Supreme Court in 2015 in the case of *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[87] Here, in another 5-4 decision with three dissenting opinions written, the Court held that a citizen initiative, called Proposition 106, that was passed in the state of Arizona to create an independent redistricting commission tasked with taking over redistricting responsibilities from the state legislature was constitutional.[88]

Upholding the constitutionality of independent redistricting commissions would mark a landmark moment of development for the procedural reform movement in addressing issues of fairness and justice in redistricting. This decision illuminated the acceptance of the process-focused debate as the remaining issue at the center of partisan gerrymandering. While procedural reform became accepted as the paradigm through which addressing partisan motive in legislative redistricting was to be conducted, shifting redistricting processes to independent commissions and away from legislative processes did not remain constant. In *Evenwel v. Abbott*,[89] following the year after the Supreme Court's ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court unanimously concluded that the precedent set by *Baker v. Carr* and *Reynolds v. Sims* establishing the one-person, one-vote principle under the Equal Protection Clause did not require legislative districts to be redrawn in proportion to registered voters, but could be designed in accordance with the total population of the district.[90] The implication of this ruling being that areas with larger number of registered voters in relation to total population would dictate more influence on electoral outcomes.

Then on June 27, 2019, with recently appointed Justices Gorsuch and Kavanaugh casting votes, the Supreme Court ruled in *Rucho v. Common Cause*[91]

85. *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring) in which Kennedy agrees with the majority in holding that an unconstitutional gerrymander must be found to be without any legislative merit to be found unconstitutional, not simply partisan, yet bemoans the state of partisanship in legislative processes and found no reason to believe that a future, more stringent, standard for determining the constitutionality of gerrymandering would not develop. *See also Vieth*, 541 U.S. at 355 (Breyer, J., dissenting); *Vieth*, 541 U.S. at 342 (Souter, J., dissenting); *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting). The three separate dissenting opinions from Justices Breyer, Souter and Stevens provide further perspective on the lack of unanimity on the Court's role in addressing partisan gerrymandering.

86. *See generally* Crocker, *supra* note 58, at 16–22.

87. 135 S.Ct. 2652 (2015).

88. *Id.* at 2671.

89. 136 S. Ct. 1120 (2016).

90. *Id.* at 1132.

91. 139 S. Ct. 2484 (2019).

that partisan gerrymandering claims are *not justiciable* because they present a political question that is not under the authority of the federal courts.[92] The decision in *Rucho v. Common Cause* presented another split 5-4 court, and set an interesting standard going forward in which the role of the courts in procedural reforms to issues of partisan gerrymandering became more uncertain. The ruling certainly marked an interesting point for the debate around partisan gerrymandering, in which neither side can appropriately gauge the next step in changing redistricting processes to reduce partisan influence. More importantly, however, is how it presents an image of gridlock not simply as a result of polarization and partisanship in both state and federal legislatures, but failure in the hopes that the courts could be a savior for procedural reform. Not only did the shift in debate surrounding redistricting falter as party polarization increased and procedural reform became the single center of discussion but attempts to rely on the courts as an effective arbiter for remedying the maladies of the broken debate fell short and arrived at an impasse of uncertainty.

Recentering the Gerrymandering Debate

To this point, I have discussed the early development of congressional districts and voting systems following the constitutional beginnings of legislative apportionment. This was followed by a more detailed appraisal of the Apportionment Act of 1842, and its role in standardizing single-member district elections. Assessment was then provided of how legislation and constitutional amendments pertaining to electoral representation following the Apportionment Act of 1842 resulted in a shift in focus from what constitutes the appropriate proportion and distribution of representatives to best serve citizens towards what constitutes the appropriate processes to best redraw legislative districts, which began to intensify in the latter half of the twentieth-century. This coincided with an increasing state of polarization between the two major political parties and the use of redistricting as a tool for political leverage.

Succeeding assessment of legislation and constitutional amendments, the paper turned its analysis to major decisions in the Supreme Court that shaped constitutional consideration of redistricting and gerrymandering. This culminated in displaying not only how the shift in the legislature's prevailing focus on redistricting as a political tool for party leverage resulted in a gridlocked debate and marred progress in effective electoral representation of constituents, but how the courts developed a principle of one-person, one-vote which misrepresented the debate surrounding partisan gerrymandering and failed to provide any durable solutions.

This has left us with the current state of seeking to address gerrymandering through procedural reform, which provides some assistance to tackling the issue, yet is largely ineffective at attending to the underlying disconnect with the problems at the root of the debate surrounding partisan gerrymandering. Procedural

92. *Id.* at 2506–07.

reform as it stands, both practically and academically, is intensely focused on developing statistical measures to draw fair congressional districts, as well as assess whether a partisan gerrymander is in place. The continual increase in technological and methodological sophistication has bolstered the quantitative growth of assessing the presence and intensity of partisan gerrymandering. What the state of this prevailing, and ever-increasing, focus upon statistical sophistication readily displays is how the search for perfected procedural neutrality, or close to such a target, in fair redistricting has become the overriding answer to partisan gerrymandering. Various statistical tests for discerning and addressing instances of partisan gerrymandering have been proposed to block political parties from retaining power by redrawing unrepresentative districts.[93]

Fairness, however, is not always as straightforward a concept as it may seem. Mathematical advances have indeed provided better assessment of partisanship in gerrymandering and addressed concerns with redistricting as a powerful political tool. Yet, these statistical systems designed to create fairness in electoral contests are fighting against the basis for geographically-bounded representative districts. What binds these residents together besides a formula that includes them with others to make an election purportedly "fair" as possible? While this does not diminish the aim of seeking to create a process for carrying out fair electoral selection of political representatives, it simultaneously serves as a bandage to a redistricting system that becomes less efficient as more solutions are thrown at the same broken debate.

There exists no single solution to fixing the broken debate. Like the circumstances that led to this point, legislation, constitutional amendment, court rulings, and political party transformation must progress together towards a more cohesive conception of electoral representation. As it stands, the principle of one-person, one-vote was always a misrepresentation of how legislative apportionment occurs and electoral representation takes place in practice. Presumptively, the institutional design of apportioning legislative representatives through geographically-bounded districts conceives equal representation to be one not of proportionality in relation to individuals, but as one of proportionality in relation to geographically-bounded communities made up of individuals who share some commonality that warrants a representative of their specific area. The principle of one-person, one-vote is instead more fit for a system of proportional representation devoid of these geographically-bounded districts and designed to treat all citizens as distinct individuals to be represented without consideration of their specific location within a given state.

As a result, the two most salient paths forward towards mending the fraught nature of contentious debate around partisan gerrymandering and electoral representation would be either moving the shared focus of legislators, judges, academics, and the greater public alike towards treating geographically-bounded congressional districts as distinct communities with shared interests that warrant

93. *See, e.g.*, Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1267–69 (2016); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 2, 4 (2015) for two particularly salient and influential examples.

an elected representative to voice their needs or aiming towards the implementation of a proportional system of representation that allocates representatives through a statewide process devoid of districts with geographic borders and focused instead upon apportionment based on popular vote. The current state of redistricting and partisan gerrymandering is broken, driven by a struggle to leverage party power and misrepresentation in the basic conception of how legislative districts are designed to represent the interests of citizens. While this undoubtedly warrants cause for concern, a coordinated effort towards a shared goal in reframing the debate and determining whether elected representatives serving geographic districts as shared communities or serving individuals through proportional representation of the popular vote is the most worthy democratic system among legislators, judges, academics, and the public can provide a path out of gridlock and towards democratic progress.