TO END GERRYMANDERING: THE CANADIAN MODEL FOR REFORMING THE CONGRESSIONAL REDISTRICTING PROCESS IN THE UNITED STATES

ANTHONY J. GAUGHAN*

I. INTRODUCTION ................................................................. 1000
II. THE HISTORICAL DEVELOPMENT AND CURRENT LAW OF CONGRESSIONAL REAPPORTIONMENT AND REDISTRICTING IN THE UNITED STATES ................................................................. 1001
   A. The Congressional Reapportionment System: From the Great Compromise to the Statutory Cap ................................................................. 1003
      1. The Great Compromise ................................................................. 1003
      2. The Challenge of Fair Apportionment ........................................... 1007
      3. The Statutory Cap on the Size of the House of Representatives ................................................................. 1010
   B. The Congressional Redistricting System: Deep in the Political Thicket ................................................................. 1015
      1. The Times, Places, and Manner of Holding Elections ................... 1015
      2. Into the Political Thicket ................................................................. 1020
III. A SYSTEM HIGHLY VULNERABLE TO POLITICAL MISCHIEF ................. 1025
   A. The Statutory Cap: Defying the Spirit and Intent of the Constitution ................................................................. 1026
   B. The Gerrymandered Republic: Placing Partisanship over Democratic Accountability ................................................................. 1029
   C. A Worsening Problem: The 2012 House Elections as a Disturbing case in Point ................................................................. 1033
IV. THE CANADIAN ALTERNATIVE: A SENSIBLE APPROACH TO A COMMON PROBLEM ................................................................. 1038
   A. Neighbors, Partners, and Allies ................................................................. 1038
   B. A House that Grows with the Country ..................................................... 1044
   C. A Fiercely Competitive Electoral System .................................................. 1049
V. APPLYING CANADIAN LESSONS TO THE AMERICAN POLITICAL SYSTEM ................................................................. 1056
   A. Reform by Statute, Not Constitutional Amendment ................................ 1056
   B. Independent Commissions ................................................................. 1057
   C. What Is the Right Number? ................................................................. 1059
VI. CONCLUSION ................................................................. 1063

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* Assistant Professor of Law, Drake University Law School; J.D., 2005, Harvard University; Ph.D. (history), 2002, University of Wisconsin-Madison; M.A., 1996, Louisiana State University; B.A., 1993, University of Minnesota. The author would like to thank Alexandra Frazier and James Gaughan for their research assistance on this project.
I. INTRODUCTION

In the 2012 congressional elections, Democratic candidates for the House of Representatives carried nearly 1.4 million more votes nationwide than Republican candidates.\(^1\) Nevertheless, Republicans captured control of the House by a margin of 234 seats to 201.\(^2\) The undemocratic outcome of the House elections resulted directly from America’s system of redistricting and reapportionment.\(^3\) Partisan politics, not principles of good government, dictate the congressional redistricting process in the vast majority of states.\(^4\)

Congressional apportionment law exacerbates the problem. In particular, the statutory limit on the size of the House of Representatives\(^5\) magnifies gerrymandering’s effects more than ever before. As the population gap between large and small states and urban and rural areas continues to widen,\(^6\) redistricting disparities will only worsen in the years ahead.

Accordingly, this Article proposes that Congress look to Canada as a model for making U.S. House elections more reflective of the electorate’s will. A nation strikingly similar to the United States in many important respects, Canada rejected partisan gerrymandering half a century ago.\(^7\) Adopting the Canadian approach would involve two significant reforms: first, the nationwide establishment of nonpartisan independent redistricting commissions; and second, the restoration of decennial increases in the total

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\(^1\) Dana Milbank, Republicans Stacked Deck in the House, WASH. POST., Jan. 6, 2013, at A15.
\(^4\) Robert Draper, The League of Dangerous Mapmakers, ATLANTIC, Oct. 2012, at 52 (“[R]edistricting today has become the most insidious practice in American politics—a way . . . for our elected leaders to entrench themselves in 435 impregnable garrisons from which they can maintain political power while avoiding demographic realities.”).
number of seats in the House of Representatives to reflect the growing population of the United States.

To be sure, there are aspects of the Canadian approach that would not work in the United States. However, embracing the Canadian system’s two key features—politically-neutral redistricting commissions and a legislature that keeps pace with the nation’s size—offers a solution to the problem of increasingly manipulated election outcomes in the House of Representatives.

This Article explains the current law of congressional redistricting and reapportionment, assesses the main critiques of the American system, analyzes the parliamentary redistribution process in Canada, and proposes methods through which the United States can embrace the best features of the Canadian system to reform the congressional redistricting process in America.

In light of the strong similarities between Canada and the United States, a comparative approach to the two nations’ redistricting systems offers a particularly useful perspective. As sociologist Seymour Martin Lipset once observed, “Looking intensively at Canada and the United States sheds light on both of them.”

II. THE HISTORICAL DEVELOPMENT AND CURRENT LAW OF CONGRESSIONAL REAPPORTIONMENT AND REDISTRICTING IN THE UNITED STATES

The issue of representation has long been a source of contention in American politics. The British Empire’s policy of taxing the American colonies without seating colonial representatives in Parliament sparked the American Revolution. When the American colonies declared their

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8 See id. at 5–6.
10 Bernard Bailyn, The Ideological Origins of the American Revolution 161 (enlarged ed. 1992) (“The question of representation was the first serious intellectual problem to come between England and the colonies . . . .”)
11 Pauline Maier, American Scripture 118 (Vintage Books 1998) (1997) (“[The American colonists] insisted they could be taxed only by representatives whom they had (continued)
independence from Great Britain in 1776, they asserted the fundamental point that a government’s legitimacy depended on accurately representing the people’s will. Indeed, as the historian Gordon Wood observed, “No political conception was more important to Americans in the entire Revolutionary era than representation.”

Establishing a fair system of representation at the federal level has proved easier said than done. The Constitution requires that Congress conduct a national census every ten years and redistribute seats in the House of Representatives accordingly. Consequently, Congress faces two perennial questions: (1) How many seats in the House of Representatives should each state receive, and (2) where should the district lines run? The first question concerns “reapportionment,” the process by which Congress reassigns House seats after each new census. The second question concerns “redistricting,” a term that refers to the redrawing of congressional district lines after the completion of the decennial reapportionment process.

From the beginning, politics has played a central role in both reapportionment and redistricting. As Thomas Jefferson warned, “No invasions of the Constitution are fundamentally so dangerous as the tricks played [by members of Congress] on their own numbers, apportionment, and other circumstances respecting themselves.” Unfortunately, today in

12 BAILYN, supra note 10, at 173 (“The view of representation developing in America implied . . . [that] the people were present through their representatives, and were themselves, step by step and point by point, acting in the conduct of public affairs.”); EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS 307 (1995) (“Consistently from 1765 to 1776 they denied the authority of Parliament to tax them . . . .”); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 176–77 (1969) (“The Americans, however, immediately and emphatically rejected the British claim that they . . . were ‘virtually represented’ in the House of Commons . . . .”).

13 WOOD, supra note 11, at 164.

14 U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

15 See ROYCE CROCKER, CONG. RESEARCH SERV., R42831, CONGRESSIONAL REDISTRICTING: AN OVERVIEW 1 & n.1 (2012).

16 Id. at 1 n.1.

17 Id.

18 Id. at 1.

America the tricks that Jefferson warned about two centuries ago have come to dominate the reapportionment and redistricting process.

A. The Congressional Reapportionment System: From the Great Compromise to the Statutory Cap

1. The Great Compromise

The Constitution establishes the House reapportionment process. Article I, Section 2 provides that seats in the House of Representatives “shall be apportioned among the several States . . . according to their respective [n]umbers,” thus expressly directing that state populations serve as the basis of congressional apportionment. Moreover, the Article I requirement that House seats be apportioned among the several States prohibits congressional districts from crossing state lines. Article I further guarantees each state representation in the House: “[E]ach State shall have at Least one Representative . . . .” To determine the proper apportionment of seats, the Constitution directs Congress to conduct an “actual Enumeration,” or census, every ten years “in such Manner as [Congress] shall by Law direct.” Congress has delegated to the Commerce Department the authority to administer the decennial census, which has taken place in the first year of every decade since 1790.

Article I, Section 2 resulted from a historic compromise at the Constitutional Convention in 1787. In the late 1780s and early 1790s, the

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20 U.S. CONST. art. I, § 2, cl. 3.
21 ROYCE CROCKER, CONG. RESEARCH SERV., R41382, THE HOUSE OF REPRESENTATIVES APPORTIONMENT FORMULA: AN ANALYSIS OF PROPOSALS FOR CHANGE AND THEIR IMPACT ON STATES 3 (2010) (“The constitutional mandate that Representatives would be apportioned according to population did not describe how Congress was to distribute fractional entitlements to Representatives. Clearly there would be fractions because districts could not cross state lines and the states’ populations were unlikely to be evenly divisible.”).
22 U.S. CONST. art. I, § 2, cl. 3.
23 Id.
American states ranged widely in population. Virginia, the largest state, had a population of 821,287, whereas Delaware, the smallest state, had only 59,096 people. The success of the Constitutional Convention depended on finding a way to apportion congressional seats such that the interests of large and small states alike would be protected.

Bicameralism provided the answer. A committee headed by Benjamin Franklin proposed a legislative branch composed of two chambers: the House of Representatives where states would be assigned seats based on their respective populations and the Senate where every state would receive equal representation. The Framers thus intended for the Senate to protect the influence of the small states and the House to represent the majority will of the nation as a whole. The delegates approved the compromise on July 16, 1787. The Constitution would never have been ratified but for the “Great Compromise” between the large and small states. However, the Framers left unresolved the question of precisely how to apportion seats in the House of Representatives. The Constitution mandates that every state receive at least one House seat and that the

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27 Id.
28 See Catherine Drinker Bowen, Miracle at Philadelphia 185–86 (1966) (“Yet without the Great Compromise it is hard to see how the Federal Convention could have proceeded further . . . .”).
31 See Andrew Hacker, Congressional Districting 14 (rev. ed. 1964) (“The House of Representatives was designed to be a popular chamber, giving the same electoral power to all who had the vote.”); McDonald, supra note 30, at 280.
32 See McDonald, supra note 30, at 285.
33 See Crocker, supra note 21, at 24 (“[H]istorians’ understanding [is] that the ‘great compromise’ was struck, in part, in order to balance the interests of the smaller states with those of the larger ones . . . .”); Max Farrand, The Fathers of the Constitution 121 (1921) (“[O]n the 16th of July, the great compromise of the Constitution was adopted. There was no other that compared with it in importance.”).
overall seat apportionment be based on population. The principle seems simple, but implementation raises the practical question of how many seats should be apportioned among the states. How large should the House be? A major concern during the ratification debates was that the House might be too small. The only time that George Washington expressed his opinion during the Constitutional Convention was when he objected to a proposal that congressional districts contain a minimum of forty thousand people. Washington advocated congressional districts of thirty thousand people each—smaller districts that he believed would enable members of Congress to better represent “the rights and interests of the people.” The delegates agreed to Washington’s proposal and adopted it in Article I, Section 2.

Crucially, the Constitution’s Framers assumed that the size of the House of Representatives would grow with the population. In sharp contrast to our modern system of congressional apportionment, the Framers approached the question not in terms of a fixed number of seats that would be divided between the states, but rather as a ratio of representation. The idea, as Michel Balinski and H. Peyton Young have explained, was to find the right ratio of citizens to representatives and then “allow the house size to fall where it may.” By making the number of House seats contingent upon population, the Framers of the Constitution


37 RON CHERNOW, WASHINGTON 538 (2010); Harden, supra note 36, at 75–76 (“Washington . . . interjected himself into only one issue at the Convention, arguing for greater representation in the House.”).

38 CHERNOW, supra note 37.

39 Id. See also U.S. CONST. art. I, § 2, cl. 3.


41 BALINSKI & YOUNG, supra note 30, at 10–11 (“The habit of thought in those days was not first to determine the total number of seats or house size and then to distribute them, but rather to fix upon some ‘ratio of representation,’ that is to declare that there shall be ‘one representative for every x persons’ . . . .”).

42 Id.
provided for a decennial increase in the size of the House of Representatives.\textsuperscript{43}

This was not by accident. Even before the Revolution, Americans understood how important it was for the Legislative Branch to grow with the country.\textsuperscript{44} During the colonial period, legislatures failed to keep pace with population growth.\textsuperscript{45} For example, the proportion of representation in the New York colonial assembly soared from one representative for every 320 voters in 1730 to one for every 1,065 by 1770.\textsuperscript{46} Historian Gordon Wood notes that “[a]lthough such disproportionate representation was common enough to Britain . . . the colonists were historically used to more direct and equal representation; and their small clublike assemblies became more and more of a grievance.”\textsuperscript{47}

Therefore, Americans insisted upon a large popular chamber in the new Congress.\textsuperscript{48} As Thomas Jefferson and his supporters warned, a Congress composed of few members risked domination by special interests.\textsuperscript{49} Critics also pointed out that a small House would lead to ever larger districts, which in turn would result in Representatives lacking “a proper knowledge of the local circumstances of their large constituencies.”\textsuperscript{50}

When the first Congress met in 1789, it consisted of sixty-five Representatives from thirteen states.\textsuperscript{51} In Federalist No. 55, James Madison defended the small size of the House of Representatives on the

\textsuperscript{43} See Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788, at 353 (2010) (“The proportion of one representative for thirty thousand people was ‘fixed as the standard of increase’ and would bring a steady increase in the size of the House of Representatives as the country’s population grew.”).


\textsuperscript{45} Id. at 128.

\textsuperscript{46} Id.

\textsuperscript{47} Id. at 128–29.

\textsuperscript{48} Balinski & Young, supra note 30, at 13.

\textsuperscript{49} See id. (“The Jeffersonians argued that [a small House of Representatives] would be an unsafe depository of the public trust. A larger House would not be ‘so easily corrupted as a small body’ . . . .”).

\textsuperscript{50} Id.

\textsuperscript{51} Crocker, supra note 21.
grounds that its ranks would grow each decade. This steady expansion, he insisted, should:

\[
\text{[P]ut an end to all fears arising from the smallness of the body. I take for granted here... that the number of representatives will be augmented from time to time in the manner provided by the [C]onstitution. On a contrary supposition, I should admit the objection to have very great weight indeed.}
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Madison predicted that in a few decades’ time, the House would reach four hundred members.

The Constitution’s ratification did not resolve the question of how large the House should be. The Constitution only establishes four requirements for congressional apportionment: each state must receive at least one House seat; the proportion of representation in the House must be determined by the census; congressional districts must contain at least thirty thousand people; and districts may not cross state lines. The Constitution’s silence on other vital questions has given rise to more than two hundred years of apportionment disputes.

2. The Challenge of Fair Apportionment

The first apportionment battle began with the inaugural national census of 1790. The controversy concerned states that were entitled to a fraction of a seat. For example, if a state’s share of the House came out to 2.5 seats, a question arose as to whether the state should receive three seats or...
only two. After receiving the 1790 census returns, Congress passed an apportionment method proposed by Alexander Hamilton.\textsuperscript{59} Hamilton’s method was to “rank the fractional remainders of the states’ quotas and award seats in rank order from highest to lowest until the House size is reached.”\textsuperscript{60} In contrast, Thomas Jefferson proposed awarding each state its whole number and rounding down all fractional remainders, no matter how large.\textsuperscript{61} In the spring of 1792, Congress adopted Hamilton’s method, but President Washington objected and issued the first veto in American history.\textsuperscript{62} A few days later, Congress passed an apportionment method based on Jefferson’s approach, and Washington signed it into law.\textsuperscript{63}

For the next 150 years, Congress tried a variety of apportionment methods.\textsuperscript{64} In 1941, it adopted the current apportionment formula, known as the Hill or “equal proportions” method.\textsuperscript{65} After each state is awarded one seat, as required by the Constitution, the Hill method distributes the remaining 385 seats on a proportional basis, with fractional remainders awarded based on the results of rounding at the geometric mean.\textsuperscript{66} Advocates of the Hill method have claimed it treats both small and large states fairly, but critics have long challenged that assertion, arguing that the Hill method “systematically favors the small states by 3–4 percent.”\textsuperscript{67} In any case, the fact remains that there is no perfectly fair way to divide 435

\textsuperscript{59} CROCKER, supra note 21, at 4–5.

\textsuperscript{60} Id. at 5.

\textsuperscript{61} Id. at 11; BALINSKI & YOUNG, supra note 30, at 18.

\textsuperscript{62} CROCKER, supra note 21, at 5; BALINSKI & YOUNG, supra note 30, at 16–17, 20–21.

\textsuperscript{63} BALINSKI & YOUNG, supra note 30, at 21.

\textsuperscript{64} CROCKER, supra note 21 (“From its beginning 1789, Congress was faced with questions about how to apportion the House of Representatives. The controversy continued until 1941 . . . .”); BALINSKY & YOUNG, supra note 30, at 23 (“Those regions fearing a loss of power searched for any new device to halt the erosion in their representation. New methods were proposed. Some were tried.”).

\textsuperscript{65} CROCKER, supra note 21, at 10; BALINSKI & YOUNG, supra note 30, at 58. The Hill method takes its name from Joseph Hill, the assistant director of the Census in the early 1900s, who proposed the equal proportions method. Kromkowski & Kromkowski, supra note 54, at 138.

\textsuperscript{66} CROCKER, supra note 21, at 10.

\textsuperscript{67} H. Peyton Young, Dividing the House, BROOKINGS POL’Y BRIEF SERIES, Aug. 2001, at 1, 8, http://www.brookings.edu/~/media/research/files/papers/2001/8/politics%20young/ph88.pdf. See also BALINSKI & YOUNG, supra note 30, at 54, 85. “The claim was made that it alone of the methods known was balanced in its treatment of small and large. That claim, we know, is false.” BALINSKI & YOUNG, supra note 30, at 85.
seats among fifty states and nearly 310 million people when no district
cross state lines. 68

Not surprisingly, therefore, apportionment disputes have often reached
the Supreme Court of the United States. 69 For example, in 1991, Montana
brought a constitutional challenge when the state lost one of its two
congressional seats following the 1990 census. 70 The resulting district,
with a population of 803,655, was the largest in Congress; 71 the average
district size under the 1991 apportionment was 572,466. 72 Citing the wide
population disparity, Montana asserted that the Hill method violated the
constitutional requirement of apportionment by population. 73 The Supreme
Court of the United States disagreed, noting that “although ‘common
sense’ supports a test requiring ‘a good-faith effort to achieve precise
mathematical equality’ within each State . . . the constraints imposed by
Article I, § 2, itself make that goal illusory for the Nation as a whole.” 74

The Supreme Court has also rejected efforts to challenge the
Commerce Department’s methods for conducting the census. 75 As the
Court observed in Wisconsin v. City of New York:

The text of the Constitution vests Congress with virtually
unlimited discretion in conducting the decennial ‘actual
Enumeration,’ . . . and notwithstanding the plethora of
lawsuits that inevitably accompany each decennial census,
there is no basis for thinking that Congress’ discretion is
more limited than the text of the Constitution provides. 76

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68 CROCKER, supra note 21, at 19 (“[T]here is no single established criterion by which
to determine the equality or fairness of a method of apportionment.”).
69 See, e.g., Franklin v. Massachusetts, 505 U.S. 788, 790–91 (1992); U.S. Dep’t of
(1962).
71 Id. at 1362 n.1.
73 Id. at 446.
74 Id. at 463.
75 See, e.g., Utah v. Evans, 536 U.S. 452, 457 (2002); Wisconsin v. City of New York,
76 517 U.S. at 19. See also CROCKER, supra note 21, at 2 (“The Supreme Court appears
to have settled the issue about Congress’s discretion to choose a method to apportion the
(continued)
The Supreme Court’s deference to the Commerce Department’s apportionment decisions makes sense. As the Justices stressed, the Constitution gives Congress broad discretion over the apportionment process, and in turn, Congress has properly delegated that authority to the Commerce Department and the Census Bureau.77

The problem, however, lies in the sweeping discretion Congress exercises over the size of the House of Representatives. In the early twentieth century, Congress used that authority to place a permanent ceiling on the total number of House seats.78 The undemocratic repercussions are still felt today.79

3. The Statutory Cap on the Size of the House of Representatives

Today, the House of Representatives contains 435 members representing each of the fifty states.80 The number is fixed under federal statutory law.81 A cap of 435 seats was established in the Apportionment Act of 1911, now codified as 2 U.S.C. § 2a(a).82 The cap represented a significant departure from both constitutional intent and long-standing congressional practice.83 For more than one hundred years after the Constitution’s ratification, the number of Representatives steadily increased with the population of the United States.84 The House grew from sixty-five seats in 1790 to 435 in 1910.85 The growth often came in large

House, and has granted broad discretion to the President in determining who should be included in the population used to allocate seats.”). 77 Wisconsin v. City of New York, 517 U.S. at 19. The apportionment formula is established by statute. See 2 U.S.C. § 2a (2006). In addition, the United States Code authorizes the Secretary of Commerce to conduct the decennial census “in such form and content as he may determine” and then apportion seats accordingly. 13 U.S.C. § 141(a) (2006).

78 CROCKER, supra note 5.

79 See YOUNG, supra note 67 (declaring Congress’s current method biased and as favoring small states).

80 CROCKER, supra note 5, at 2.

81 Id.

82 Apportionment Act of 1911, 2 U.S.C. § 2a(a) (2006); CROCKER, supra note 5, at 4 n.1; Harden, supra note 36, at 80–81 & n.66. See also CHARLES A. KROMKOWSKI, RECREATING THE AMERICAN REPUBLIC 3–4 (2002).

83 See BALINSKI & YOUNG, supra note 30, at 23, 36 (noting the growth in the House of Representatives as the population increased from 1790 through 1902).

84 Id.; CHARLES S. BULLOCK III, REDISTRICTING 3 (2010) (“After each census, from 1790 through 1910 with one exception, the House expanded.”).

85 Kromkowski & Kromkowski, supra note 54, at 132–33.
increments. For example, in the 1870s, Congress raised the number of seats in the House from 242 to 292—an increase of fifty seats or over 20%. Likewise, during the final expansion in 1910, the House grew by forty-nine seats.

The practice of expanding the lower chamber’s size suddenly ended in the 1920s. The reason was bare-knuckled politics. The 1920 census revealed that, for the first time in American history, more people lived in cities, towns, and villages than in the countryside. The change resulted from a massive population movement; in the decade before the 1920 census, approximately six million people moved from rural to urban areas. As the historian John Hicks has observed, “Rural areas were gaining only slowly in population when they gained at all; urban areas were growing by leaps and bounds.” Consequently, by 1920, urban congressional districts had become much more populous than rural districts.

The rise of urbanization undermined the political power of rural America. In his classic study of the time period, the historian William

[86] See id. at 133 tbl.I.
[87] Id.
[88] Id.
[91] KROMKOWSKI, supra note 82, at 3 (“[The 1920] Census revealed that for the first time in the nation’s existence more Americans resided within urban areas than within rural areas.”).
[94] See BULLOCK, supra note 84, at 26 (“Consequently, shifts in population that produced districts having unequal numbers of residents resulted in urban districts having far more people than rural districts.”).
[95] Straw, supra note 34, at 339–40.

[R]ural representatives from urban states had a vested interest in preventing reapportionment, as the anti-gerrymandering laws passed over the previous decades required the states to adhere to the principle of one person, one vote. Under such a system, any state whose population had shifted internally from rural to urban areas would have to reallocate its representatives accordingly, potentially redistricting out many rural representatives.

Id. at 340.
Leuchtenburg explained, “The United States in the 1920s neared the end of a painful transition from a country reared in the rural village to a nation dominated by the great metropolis.”\footnote{Leuchtenburg, supra note 92.} In light of the population shifts produced by urbanization, it became clear that the 1921–22 reapportionment process would substantially reduce the political power of rural areas.\footnote{See id. at 6 (“In the years from 1914 to 1932, . . . the city contested the supremacy of rural, small-town America.”). Cf. Bullock, supra note 84, at 26 (“Rural legislators saw no reason to cede influence to their urban rivals, especially if giving cities and suburbs more seats would strengthen the opposition party.”).} The historian Charles Eagles notes that rural interests immediately recognized that “[a]ny reapportionment based on the 1920 census would give more congressional power to urban areas at the expense of rural areas.”\footnote{Charles W. Eagles, Democracy Delayed 118 (1990).}

Consequently, for the first and only time in history, Congress refused to reapportion the House of Representatives.\footnote{Bullock, supra note 84, at 26 (“Following the 1920 Census, Congress declined to increase the number of seats as it had done after every census except for 1840 . . . .”); Kromkowski, supra note 82, at 3.} Even more importantly, it permanently fixed the House size at 435 seats.\footnote{See Straw, supra note 34, at 349–51.} Rural congressional representatives constituted the core of opposition to reapportionment.\footnote{Eagles, supra note 98, at 120 (“Nearly all the opposition to reapportionment came from rural congressmen . . . . The rural representatives were the ones most likely to fear reapportionment and its effects and, therefore, the ones who most consistently resisted any changes in the distribution of seats in the House.”).} Their motive was clear.\footnote{See Balinski & Young, supra note 30, at 51 (“[T]he agricultural states still had the votes—particularly in the Senate—and grasped at any means to prevent or delay the inevitable erosion in their power.”).} “With the size of the House fixed, Congress ignored the census rather than reduce the representation of rural states located primarily in the Midwest and South,” political scientist Charles Bullock has explained.\footnote{Bullock, supra note 84, at 26.}

The failure to reapportion the House in the 1920s flagrantly violated the Constitution, which requires Congress to reapportion House seats on a decennial basis “among the several [s]tates . . . according to their
respective [n]umbers . . . .”

By ignoring the results of the 1920 census, Congress kept in place the 1911 apportionment, which no longer accurately reflected the nation’s population. In the process, Congress defied both the constitutional mandate to reapportion seats to the states “according to their respective [n]umbers,” and the Framers’ intention for the number of House seats to increase with overall population growth.

In 1929, Congress belatedly enacted legislation to resume the apportionment process following the 1930 census. The 1929 Act empowered the Census Bureau to make all future reapportionment determinations, effectively ending the legislative role in specific apportionment decisions.

Congress left in place the statutory limit on the size of the House nonetheless. Advocates of the cap cited overcrowding and a lack of office space. Yet, as Christopher Straw points out, the strongest support

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104 U.S. CONST. art. I, § 2, cl. 3; Balinski & Young, supra note 30, at 51 (“In the end the 1911 apportionment stood for the entire decade and there was to be no apportionment based on the 1920 census—in direct violation of the Constitution.”).

105 See Bullock, supra note 84, at 26 (“For the first and only time in history, the size of a state’s congressional delegation was divorced from the state’s share of the national population.”).

106 U.S. CONST. art. I, § 2, cl. 3.

107 Kromkowski & Kromkowski, supra note 54, at 133–34 (noting that Congress’s refusal to reapportion in the 1920s broke “what Madison had called the ‘natural and universal connection’ between the federal Census and the House’s reapportionment.”).

108 Bullock, supra note 84, at 27 (“Members of Congress ultimately felt guilty about the failure to carry out reapportionment in 1920 and the willful violation of the constitutional directive that ‘Representatives . . . shall be apportioned among the several states . . . according to their respective numbers.’”; Kromkowski & Kromkowski, supra note 54, at 134–35.


110 Bullock, supra note 84, at 27 (“Congress gave up the power to determine the number of seats for each state and transferred the responsibility to the Census Bureau.”); Kromkowski & Kromkowski, supra note 54, at 135 (“No longer, according to the Act’s mandate, were the procedural requirements of two-house majorities followed by Presidential review necessary for completing new apportionments of the House.”).

111 See Harden, supra note 36, at 81 (“Since the 1929 Act, House membership has remained static at the 1910 level.”).

112 Eagles, supra note 98, at 33 (“[T]he House floor was already crowded because since the 1911 increase to 435 the members no longer had individual desks in the chamber but instead sat at long tables. Enlarging the House, therefore, presented serious physical problems . . . .”).
for the cap came from “the political party bosses and the Representatives themselves, who stood to lose from continued augmentation” of the chamber.113 Thus, political self-interest, not good government, motivated the limit on the total number of House seats.114 As Straw observes, the cap’s strongest supporters recognized that “[i]ncreasing the House would weaken the party bosses by simultaneously increasing the number of representatives that would have to be bribed and the geographic area from which general election ‘votes’ would have to be delivered.”115 To preserve the status quo, therefore, Congress froze the size of the House.116

The cap raises obvious constitutional concerns. Among other things, it undermines the plain directive of Article I that House reapportionment accurately reflect changes in the states’ population.117 When combined with the constitutional requirements that each state receive at least one seat and that no district cross state lines,118 the statutory cap of 435 seats makes it impossible to apportion seats fairly and accurately.119 The political scientists Charles and John Kromkowski note that in freezing the House size, Congress achieved “through a statute what arguably only a constitutional amendment can accomplish.”120

Nevertheless, the Supreme Court has deemed the issue an unjusticiable political question.121 The most recent challenge came in July of 2010.122 In Clemons, voters from Delaware, Mississippi, Montana, South Dakota, and Utah asserted that the statutory cap violated the constitutional requirement that House seats be apportioned to the states “according to their respective numbers.”123 The plaintiffs pointed out that the

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113 Straw, supra note 34, at 343.
114 See id. at 341–43.
115 Id. at 349.
116 Cf. id. at 349–50 (noting that the size of the House was fixed at 435 members but indicating that there is a “cloud of suspicion” on the underlying motive for doing so).
117 See Kromkowski & Kromkowski, supra note 54, at 130–31.
118 U.S. CONST. art. I, § 2, cl. 3; BALINSKI & YOUNG, supra note 30, at 8.
119 See, e.g., Clemons, 710 F. Supp. 2d at 572; Kromkowski & Kromkowski, supra note 54, at 135 (noting the increases in population while the number of Representatives has remained 435).
120 Kromkowski & Kromkowski, supra note 54, at 135.
121 See, e.g., Clemons v. Dep’t of Commerce, 131 S. Ct. 821, 821 (2010) (vacating and remanding the case to the lower court with instructions to dismiss the case for lack of jurisdiction).
122 Clemons, 710 F. Supp. 2d at 570–71.
123 Id. at 572–73 (quoting U.S. CONST. Art. I, § 2, cl. 3).
A combination of the statutory limit and the constitutional mandate that every seat receive a congressional district resulted in districts of widely varying sizes, from a low of 495,304 constituents in Wyoming’s single district to a high of 905,316 people in Montana’s single district. As a result, voters in Wyoming would have nearly twice the influence in House elections as voters in Montana.

A federal court in Mississippi disagreed. The court noted that “[t]here is evidence that the disparities are exacerbated by the statutory cap of 435 on the number of House seats.” However, it concluded that “[p]laintiffs here seek judicial entry into the exact area of decision-making that was reserved for Congress. The Constitution allows Congress to set the number of House members. Mathematics do not control.” On appeal to the Supreme Court of the United States, the Justices vacated the district court’s holding, but solely to remand the case with the directive to dismiss the complaint for lack of jurisdiction as a nonjusticiable political question.

The outcome of the Clemons case demonstrated that the Supreme Court does not intend to intervene in this inherently political question. Accordingly, the size of the House of Representatives is completely and solely in the hands of Congress.

B. The Congressional Redistricting System: Deep in the Political Thicket

1. The Times, Places, and Manner of Holding Elections

The Constitution says remarkably little about redistricting. Article I, Section 2 states that “Representatives . . . shall be apportioned among the several States . . . according to their respective [n]umbers . . . .” When combined with the requirement of a decennial census, Section 2 effectively requires congressional redistricting every ten years.

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124 Id. at 572.
125 See id.
126 See id. at 590 (“Congress’s decision to limit the number of Representatives to 435 is valid.”).
127 Id. at 573.
128 Id. at 589.
130 U.S. Const. art. I, § 2, cl. 3.
131 Id.
132 See CROCKER, supra note 15, at 1–2.
Moreover, by defining apportionment as occurring “among” the states, the Constitution prohibits multi-state districts.\(^\text{133}\)

Although the Constitution establishes federal requirements, the states play the leading role in congressional redistricting.\(^\text{134}\) Article I, Section 4 of the Constitution 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 . . . .\(^\text{135}\)

The Constitution thus gives state legislatures responsibility for drawing congressional district lines, but simultaneously entrusts Congress with unlimited authority to oversee the redistricting process, if it so chooses.

For more than two hundred years, the states have used their influence over the redistricting process to advance partisan and incumbent interests.\(^\text{136}\) Politically-motivated redistricting—commonly known as gerrymandering—refers to the manipulative redrawing of congressional district lines to benefit one party or candidate at the expense of others.\(^\text{137}\)

Gerrymandering takes several forms. The party in power may draw district lines such that incumbents from the minority party are forced to run for reelection in hostile or unfamiliar districts.\(^\text{138}\) Alternatively, district lines

\(^{133}\) Id. at 1.

\(^{134}\) Id. at 2 (“Congressional redistricting traditionally has been a state function . . . .”); C. Bryan Wilson, Note, What’s a Federalist to Do? The Impending Clash Between Textualism and Federalism in State Congressional Redistricting Suits Under Article I, Section 4, 53 DUKE L.J. 1367, 1368 (2004) (“On its face, Article I, Section 4 grants state legislatures authority to redistrict their states’ respective congressional districts.”).

\(^{135}\) U.S. CONST. art. I, § 4, cl. 1.

\(^{136}\) Vieth v. Jubelirer, 541 U.S. 267, 274–75 (2004) (observing that gerrymandering dates back to the 1700s); BULLOCK, supra note 84, at 107 (“Partisan considerations date back at least as far as the term gerrymander, since the origin of the term was the effort of Massachusetts Governor Elbridge Gerry to promote the fortunes of his party at the expense of the Federalists.”).

\(^{137}\) CROCKER, supra note 15, at 6 (“Partisan gerrymandering, as the name implies, is the process of manipulating the drawing of district boundaries to enhance the electoral chances of one political party above and beyond what would be expected based on statewide (or nationwide) partisan distribution of support.”).

\(^{138}\) Samuel Issacharoff, Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 TEX. L. REV. 1643, 1661–62 (1993) (“[P]arties in power can enhance their electoral opportunities by displacing incumbents of the other party from their established constituents, thus denying the displaced incumbents the benefits obtained from (continued)
may be drawn to concentrate voters of the minority party in a smaller number of districts, thus minimizing the number of seats the minority wins. Irrespective of tactics, the central goal of gerrymandering is to maximize the impact of the majority party’s votes while minimizing the influence of the minority party’s votes.

The term “gerrymandering” originated with one of the early practitioners of the art, Governor Elbridge Gerry, a Massachusetts politician and delegate to the Constitutional Convention. When Gerry drew a legislative district for the 1812 elections that was so contorted it resembled a salamander, the Boston Globe derided it as “Gerry’s salamander,” or a “gerrymander.” As Gerry’s enthusiasm for partisan redistricting indicated, he held the electorate in low regard, bluntly declaring that “[t]he evils we experience... flow from the excess of democracy.” The principal result of democratic elections, he warned, was that “the worst men get into the Legislature...” Hence, gerrymandering offered a means to subvert the popular will for partisan purposes.

Gerry did not invent the practice. Politically-motivated redistricting dates back to colonial Pennsylvania. Even James Madison, the Father of the Constitution, was not immune. Prior to the first congressional

name recognition, past delivery of constituent services, and prior social investment in the district.

139 CROCKER, supra note 15, at 5 (“By concentrating more like-minded voters into fewer districts with super-majorities, ... the group of like-minded voters will be able to elect fewer of their preferred candidates.”).
140 See Issacharoff, supra note 138, at 1662.
141 KROMKOWSKI, supra note 82, at 298; MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? 2 (1993) (“The term gerrymander was first used in 1812 when the Democrat-Republican (i.e., Jeffersonian) majority of the Massachusetts legislature split Essex County in order to dilute the strength of the Federalists.”).
142 CROCKER, supra note 15, at 5 & n.15; RUSH, supra note 141.
143 KROMKOWSKI, supra note 82, at 268.
144 Id.
146 Id. (“One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives.”).
147 RICHARD BROOKHISER, GENTLEMAN REVOLUTIONARY, at xiv (2003) (“James Madison... is commonly called the Father of the Constitution, because he kept the most complete set of notes of the debates, and made cogent arguments for ratification...”).
elections in 1788, Patrick Henry and his allies tried unsuccessfully to gerrymander Madison out of office. 149 Politicians across the country soon mastered the art of gerrymandering. 150 A quantitative study of nineteenth century congressional elections by political scientist Erik Engstrom concluded that “19th century politicians were clearly adept at achieving the two necessary conditions for a successful partisan gerrymander: they systematically drew state electoral maps to bias elections in their favor, and these efforts were largely realized at election time.”151

Gerrymandering has often involved the most malignant of motives. 152 For example, in the post-Civil War South, ex-Confederates used gerrymandering to undermine the political influence of African-American voters. 153

Congress gradually took steps to place nominal limits on the more extreme forms of partisan redistricting. 154 An 1842 act required that

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149 Id. at 275, 277. “In an attempt to exclude Madison from the House of Representatives as well, Henry, a master of the ‘gerrymander’ long before that term had been invented, placed Orange County in a Congressional district otherwise composed of counties considered heavily antifederal.” Id. at 275. However, Orange County went for Madison, 216 to 9. Id. at 277.
151 Erik J. Engstrom, Stacking the States, Stacking the House: The Partisan Consequences of Congressional Redistricting in the 19th Century, 100 AM. POL. SCI. REV. 419, 424–25 (2006). In the nineteenth century, “the partisanship of districting plans systematically affected the translation of congressional votes into legislative seats. . . . [G]errymandering served as a potent tool in the pursuit of state and national power.” Id. at 426.
152 See id. at 424–25.
153 J. Morgan Kousser, The Voting Rights Act and Two Reconstructions, in Controversies in Minority Voting 135, 144 (Bernard Grofman & Chandler Davidson eds., 1992) (“[G]errymanders reduced the chances of electing black congressional candidates or sympathetic white candidates in other states.”).
154 See Colegrove v. Green, 328 U.S. 549, 555 (1946) (“Until 1842 there was the greatest diversity among the States in the manner of choosing Representatives because Congress had made no requirement for districting.”); Crocker, supra note 15, at 4; Harold M. Bowman, Congressional Redistricting and the Constitution, 31 Mich. L. REV. 149, 161–62 (1932) (“Not until 1842 did Congress exercise the power conferred by [Article I, Section 4] to regulate elections to the House; for about fifty years after the adoption of the (continued)
districts be geographically contiguous. 155 In 1872, Congress added population equality as a requirement, directing that districts contain “as nearly as practicable an equal number of inhabitants.”156 In 1901, Congress added “contiguous and compact territory” as a redistricting requirement.157

However, Congress never enforced the federal redistricting standards.158 Moreover, when Congress adopted the 1929 Permanent Reapportionment Act, it dropped the requirement that congressional districts contain “as nearly as practicable an equal number of inhabitants.”159 Even today, Congress imposes very few restrictions on the states.160 One notable exception concerns racial gerrymandering.161

Section 2 of the 1965 Voting Rights Act (VRA) bars the states from crafting congressional districts that dilute the votes of racial minorities.162 The Act also protects members of linguistic minority groups.163 In addition, Section 5 of the VRA requires nine entire states and parts of seven other states with a history of racial discrimination to obtain preclearance from the Justice Department or the federal courts before

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155 CROCKER, supra note 15, at 4 (“Congress first passed federal districting standards in 1842, when it added a requirement to the Apportionment Act of that year that Representatives ‘should be elected by districts composed of contiguous territory . . . .’”); Bowman, supra note 154, at 162.


157 Apportionment Act of 1901, ch. 116, 26 Stat. 736; CROCKER, supra note 15, at 4 (“A further requirement of ‘compact territory’ was added when the Apportionment Act of 1901 was adopted, stating that districts must be made up of ‘contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.’”).

158 CROCKER, supra note 15, at 4 (“[T]hese standards were never enforced if the states failed to meet them . . . .”).

159 Id.; HACKER, supra note 31, at 18–19.

160 See CROCKER, supra note 15, at 1–2, 4.


162 42 U.S.C. § 1973; HERBERT ET AL., supra note 161, at 33 (“Section 2 prohibits what is referred to as ‘minority vote dilution’—the minimization or canceling out of minority voting strength.”).

163 42 U.S.C. § 1973(b)(2) (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.”).
implementing changes to a “standard, practice, or procedure with respect to voting,” including congressional redistricting plans. Consequently, redistricting plans in those states are subject to prior federal review to ensure that they do not discriminate against minority voters. Finally, in 1967, Congress barred the states from creating at-large districts or any other form of proportional representation.

Beyond the prohibitions on racial or linguistic discrimination in gerrymandering and the requirement that all states establish single member districts, Congress has largely permitted the states to develop their own approaches to redistricting. State legislatures have used that leeway to maximum partisan effect.

2. Into the Political Thicket

As one might expect, state approaches to redistricting differ. Only thirteen states require that districts reflect “communities of interest” and only twenty-two states require the bare minimum of geographic contiguity of districts. Most importantly, state legislatures draw the congressional district lines in forty-three of the fifty states. Partisan redistricting is the rule, not the exception, in the United States.

With modest exceptions, the Supreme Court has largely adopted a passive approach to redistricting disputes. The first major battle over political representation reached the Supreme Court in 1849. The case *Luther v. Borden* arose from a dispute over the Rhode Island constitution.

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167 *See* Vieth v. Jubelirer, 541 U.S. 267, 276 (2004) (“The requirements of contiguity, compactness, and equality of population were repeated in the 1911 apportionment legislation, . . . but were not thereafter continued. Today, only the single-member-district-requirement remains.”); *Crocker*, *supra* note 15, at 3–4.


169 *Crocker*, *supra* note 15, at 3.

170 *Id.* at 16.

171 *See id.* at 7; *Williams*, *supra* note 150.

which critics contended violated the United States Constitution’s republican form of government clause by extending the franchise of voting exclusively to property owners.\textsuperscript{173} The Supreme Court declined to exercise jurisdiction over the matter, deeming it a nonjusticiable political question.\textsuperscript{174}

The Supreme Court stayed out of redistricting disputes deep into the twentieth century.\textsuperscript{175} In 1932, the Supreme Court upheld a congressional redistricting plan crafted by the Mississippi legislature that consisted of noncontiguous and noncompact districts of unequal populations.\textsuperscript{176} Likewise, in 1946, the Justices refused to invalidate a similarly inequitable redistricting plan in Illinois.\textsuperscript{177} In \textit{Colegrove v. Green}, Illinois voters challenged the state legislature’s practice of awarding sparsely populated rural areas far more representation in Congress than densely populated urban areas.\textsuperscript{178} The plaintiffs contended that the plan’s wide population variations between congressional districts violated the Fourteenth Amendment.\textsuperscript{179} Nevertheless, the Supreme Court denied the plaintiffs’ claim, holding that only Congress could provide a remedy, not the courts.\textsuperscript{180} Writing for the majority, Justice Frankfurter warned, “Courts ought not to enter into this political thicket.”\textsuperscript{181}

Two decades later, the Court reversed its course. Its change of heart began with a dispute over a Tennessee state legislative districting plan.\textsuperscript{182} In the landmark 1962 case \textit{Baker v. Carr}, voters in Tennessee’s largest cities challenged a redistricting plan that gave rural voters a disproportionately large say in the make-up of the state legislature.\textsuperscript{183} The

\begin{thebibliography}{9}
\bibitem{173} Id. at 19–21.
\bibitem{174} Id. at 46.
\bibitem{175} CROCKER, supra note 15, at 7.
\bibitem{176} Wood v. Broom, 287 U.S. 1, 4, 8 (1932) (holding that 1929 Permanent Reapportionment Act established no requirements “as to the compactness, contiguity and equality in population of districts . . . .”).
\bibitem{177} Colegrove v. Green, 328 U.S. 549, 550–51, 556 (1946).
\bibitem{178} Colegrove v. Green, 64 F. Supp. 632, 633 (N.D. Ill. 1946).
\bibitem{179} Id.
\bibitem{180} Colegrove, 328 U.S. at 550, 556 (“The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”).
\bibitem{181} Id.
\bibitem{183} Id. at 192–95, 207–08. The appellants asserted that the state’s apportionment plan “disfavor[ed] the voters in the counties in which they reside[d], placing them in a position (continued)
district court dismissed on jurisdictional grounds, but the Supreme Court reversed, holding that the plaintiffs’ “claim that they are being denied equal protection is justiciable, and if ‘discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.’”184

Two years later, the Supreme Court extended its holding in Baker to congressional redistricting.185 In Wesberry v. Sanders, the Court struck down the Georgia legislature’s 1961 redistricting plan, which created wide population variations among the state’s congressional districts.186 Under Georgia’s plan, one urban district had three times the population of neighboring rural districts.187 The Supreme Court invalidated the plan, holding that it “contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.”188 The Court asserted that the Constitution requires state legislatures to observe the principle of “one person, one vote” when drawing congressional district lines.189 Although the Justices acknowledged, “it may not be possible to draw congressional districts with mathematical precision,” they insisted that there was “no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.”190

In subsequent cases, the Supreme Court stood steadfastly by the “one person, one vote” concept.191 In Karcher v. Daggett, the Court struck

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184 Id. at 209–10 (quoting Snowden v. Hughes, 321 U.S. 1, 11 (1944)). But cf. Reynolds v. Sims, 377 U.S. 533, 586 (1964) (holding that state “legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so”).


186 Id. at 2–3, 7.

187 Id. at 2, 7.

188 Id. at 7.

189 Id. at 18.

190 Id.

191 See, e.g., Karcher v. Daggett, 462 U.S. 725, 742–44 (1983) (invalidating a New Jersey congressional redistricting plan on grounds that population deviations were not **(continued)**
down a redistricting plan in New Jersey because “the plan was not a good-faith effort to achieve population equality using the best available census data.”\footnote{462 U.S. at 744.} The Court has even invalidated plans where population disparities were modest but avoidable.\footnote{Weiser, 412 U.S. at 790.} In the 1973 case \textit{White v. Weiser}, the Supreme Court rejected Texas’s congressional plan on grounds that population deviations between districts—although only slightly more than 4\% between largest and smallest—“were not ‘unavoidable,’ and the districts were not as mathematically equal as reasonably possible.”\footnote{Id. at 784–85, 790.} The Court in \textit{White v. Weiser} held that state legislatures must “demonstrate a good-faith effort to achieve absolute equality” in congressional redistricting.\footnote{Id. at 790.} In \textit{Davis v. Bandemer},\footnote{478 U.S. 109 (1986).} the Supreme Court held that political gerrymandering may give rise to a cause of action under the Equal Protection Clause of the Constitution.\footnote{Id. at 143 (“[W]e hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause.”).} In \textit{Shaw v. Reno},\footnote{509 U.S. 630 (1993).} the Court held that the creation of “district boundary lines of dramatically irregular shape” could constitute “an unconstitutional racial gerrymander,” even if drawn to create a majority-minority congressional district.\footnote{Id. at 633–34, 657–58.}

However, the general trend of the Supreme Court’s redistricting jurisprudence in recent years is one of caution and restraint.\footnote{See D. Theodore Rave, \textit{Politicians as Fiduciaries}, 126 Harv. L. Rev. 671, 673 (2013).} For
example, the Supreme Court has only applied the principle of “one person, one vote” to population inequality within states, not between states. In contrast, it has deemed wide disparities between congressional districts of different states a nonjusticiable political question. It has also expressed uncertainty about its holding in Bandemer. In 1989, the Supreme Court affirmed the dismissal of a political gerrymandering claim brought by the California Republican Party, despite the undisputed fact that Republican candidates carried over 50% of the vote in the 1984 congressional elections in California but won only 40% of the seats. Likewise, in Vieth v. Jubelirer, four Justices held that “political gerrymandering claims are nonjusticiable and that Bandemer was wrongly decided.” Two years later, the Supreme Court declined to bar states from adopting mid-decade congressional redistricting plans. In League of United Latin American Citizens v. Perry, the Supreme Court declared that it was impossible to develop judicially manageable standards to control partisan gerrymandering.

In short, the Supreme Court today takes a hands-off approach to partisan redistricting. As the Justices explained in a 1997 redistricting battle, “The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the

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201 CROCKER, supra note 21 (“Thus far, the ‘one person, one vote’ concept has only been applied within states.”).
205 541 U.S. at 270.
206 Id. at 281.
208 See id. at 447 (noting the lack of a solution to “the problem of determining a reliable measure of impermissible partisan effect.”).
myriad factors and traditions in legitimate districting policies." At present, the Supreme Court seems no more likely to strike down partisan gerrymanders than it is Commerce Department apportionment plans. Consequently, the current state of federal law gives state legislatures sweeping powers to redistrict as they see fit, so long as they do not dilute the influence of minority voters and they preserve population equality among congressional districts in the same state. In practical application, the leeway granted to the states has made a mockery of the Court’s “one person, one vote” jurisprudence.

III. A System Highly Vulnerable to Political Mischief

In light of the Supreme Court’s refusal to intervene in disputes over partisan redistricting and the statutory cap on House size, any change must come from Congress itself. Policy arguments, not legal arguments, will ultimately determine the course the United States pursues in the twenty-first century.

The policy arguments for reforming the system are compelling. The rise of computer-assisted redistricting has made gerrymandering more precise—and its effects more pernicious and undemocratic—than ever before. As Professor Sam Wang recently warned, “Through artful drawing of district boundaries, it is possible to put large groups of voters on the losing side of every election.”

Moreover, as the population of the United States continues to grow, the century-old statutory cap on the size of the House of Representatives generates increasingly perverse results. By freezing the House at 435 seats, federal apportionment law aids and abets partisan gerrymandering. The 2012 House elections provided a disquieting case in point.

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211 See Crocker, supra note 15, at 8, 16.
212 See Milbank, supra note 1 (“But computer-aided gerrymandering is helping to make such undemocratic results the norm . . . .”).
215 See id.
216 See Milbank, supra note 1.
A. The Statutory Cap: Defying the Spirit and Intent of the Constitution

In Federalist No. 55, James Madison stated that he took it “for granted” that “the number of representatives will be augmented from time to time in the manner provided by the Constitution.”

However, as discussed in Part II, the House membership has been frozen in place for more than a century.

The size of congressional districts has soared as a result. In 1911, the year the House reached 435 seats, the nation’s population was 92 million, and the average House district comprised 211,000 people. Today, the United States population exceeds 308 million, and the average congressional district includes 710,000 people, by far the most in the country’s history. Consequently, an American voter today has less say in House elections than at any previous time in the nation’s history.

Political scientist Jacqueline Stevens and sociologist Dalton Conley emphasized that fact when they noted that “Americans today are numerically the worst-represented group of citizens in the country’s history.”

When it comes to the size of our national legislature, the United States is increasingly an outlier among peer nations. The American ratio of citizens to elected representatives is now one of the highest in the western world. Great Britain provides an illuminating contrast. The British

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217 THE FEDERALIST NO. 55, supra note 53.
218 See Kromkowski & Kromkowski, supra note 54, at 135.
219 Id.
220 KRISTIN D. BURNETT, U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT 1 (Nov. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf (“The average size of a congressional district based on the 2010 Census apportionment population will be 710,767, more than triple the average district size of 210,328 based on the 1910 Census apportionment, and 63,815 more than the average size based on Census 2000 (646,952).”). See also Kromkowski & Kromkowski, supra note 54, at 136 tbl.II (showing a continual increase in the national average of persons per representative).
222 Id.
224 See Kromkowski & Kromkowski, supra note 54, at 136–37, 142.
The House of Commons has 650 members,\textsuperscript{225} making it larger than the U.S. Senate and House of Representatives combined.\textsuperscript{226} The contrast is even more striking when the population of the two nations is taken into account. With 63 million people, Britain has only 20\% the population of the United States,\textsuperscript{227} yet there are 215 more members in the House of Commons than in the United States House of Representatives.\textsuperscript{228} Hence, the British people effectively have seven times the amount of representation in the House of Commons that the American people have in the House of Representatives. This is an ironic development indeed given the fact that Americans rebelled in 1776 to increase their level of political representation in the national legislature.\textsuperscript{229}

Even more troubling, the statutory cap on the House directly violates the historic agreement reached at the Constitutional Convention in 1787. The large states agreed to the Great Compromise on the assumption that House apportionment would accurately reflect state populations.\textsuperscript{230} The Supreme Court made precisely this point in \textit{Wesberry v. Sanders}:\textsuperscript{231} “The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent ‘people’ they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of the state’s inhabitants.”\textsuperscript{232} By failing to increase the size of the House, Congress defies the Framers’ intent. As Christopher Straw notes: “This situation, a

\begin{itemize}
\item \textsuperscript{226} See U.S. CONST. art. 1, § 3, cl. 1 (establishing that the United States Senate must be composed of two Senators from each state); CROCKER, supra note 15, at 1 (noting the current size of the United States House of Representatives is 435).
\item \textsuperscript{227} Compare 2011 Census, Population and Household Estimates for the United Kingdom, OFF. FOR NAT’L STAT. (Dec. 17, 2012), http://www.ons.gov.uk/ons/rel/census/2011-census/population-and-household-estimates-for-the-united-kingdom/index.html (noting that the population of Britain was estimated to be just over 63 million after the 2011 Census), with BURNETT, supra note 220 (noting that, according to the 2010 Census, the population of the United States was 309 million).
\item \textsuperscript{228} Compare \textit{Frequently Asked Questions: MPs}, supra note 225 (noting that there were 650 MPs elected in the 2010 election), with Flynn, supra note 214 (noting that the House of Representatives is capped at 435 members).
\item \textsuperscript{229} See WOOD, supra note 11, at 162.
\item \textsuperscript{230} See CROCKER, supra note 21.
\item \textsuperscript{231} 376 U.S. 1 (1964).
\item \textsuperscript{232} Id. at 13.
\end{itemize}
House of Representatives which fails to augment its numbers as the country’s population grows, represents a major fear of the founding generation. An adequate ratio of representation was presumed to be an essential precondition for effective government.  

Today, representational inequities between states are increasingly severe. In a recent law review article, political scientist Jeffrey Ladewig found that “[s]ome states have vastly more representational power per individual in the House than other states.” Other studies have reached the same conclusion regarding previous apportionments. For example, Professor Jurij Toplak points out that after the 2000 census, “[t]here is one representative for every 524,831 Rhode Islanders while one representative represents 905,316 Montanans—a seventy-two percent disparity in the voting weights enjoyed by the voters of these states.” Consequently, Toplak concludes that “[r]epresentatives of 48.77% of the total U.S. population can hold a clear majority in the House of Representatives and can block passage of any decision supported by representatives of the popular majority.”

The source of the problem resides in the interplay between the statutory cap and two constitutional requirements. As discussed in Part II, Article I mandates that each state receive at least one seat in Congress and prohibits districts from crossing state lines. The result is the nation’s population cannot simply be divided into 435 seats of equal population. Each district must be confined within the borders of a single state, and each state must receive a seat, no matter how small the state’s population. The intersection of the statutory cap and the Constitution’s requirements means that population disparity “is built into the system.”

The Supreme Court itself has identified the cap as a driving force behind population disparities in Congress. In U.S. Department of

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233 Straw, supra note 34, at 362.


235 Id. at 134.


237 Id.

238 U.S. CONST. art. 1, § 2, cl. 3.

239 Id.; CROCKER, supra note 21, at 19.

240 Baker, supra note 223.
Commerce v. Montana,\textsuperscript{241} the Supreme Court concluded that “the need to allocate a fixed number of indivisible Representatives among 50 states of varying populations makes it virtually impossible to have the same size district in any pair of states, let alone in all 50.”\textsuperscript{242}

As the population of the United States grows, population disparities between state congressional delegations will become ever more extreme if the size of the House remains constant.\textsuperscript{243} Professor Ladewig’s analysis of the 2010 reapportionment found that it resulted in a far more severe interstate malapportionment than the intrastate malapportionment struck down by the Supreme Court in the “one person, one vote” cases.\textsuperscript{244} The statutory cap is the culprit. Ladewig explains that the 435-seat ceiling “considerably limits the chamber from minimizing interstate malapportionment . . . .”\textsuperscript{245} Ladewig concludes that “[o]nly by enlarging the size of the House” can Congress reduce the malapportionment problem.\textsuperscript{246}

By capping the House at 435, Congress has enabled intractable and growing population disparities between states—\textsuperscript{247} and that is not the end of the problems. The population disparities resulting from the statutory cap give rise to conditions that make politically-motivated redistricting possible.\textsuperscript{248}

B. The Gerrymandered Republic: Placing Partisanship over Democratic Accountability

The notion of incumbent officeholders manipulating district lines to promote partisan interests offends the most basic principles of democratic accountability. The central idea of republican government is that the people choose legislators to represent them, not the contrary.\textsuperscript{249} Politically-

\textsuperscript{241} 503 U.S. 442 (1992).
\textsuperscript{242} Id. at 463 (emphasis added).
\textsuperscript{243} See Ladewig, supra note 234, at 1153.
\textsuperscript{244} Id. at 1154.
\textsuperscript{245} Id. at 1153.
\textsuperscript{246} Id.
\textsuperscript{247} See id.
\textsuperscript{248} Adam Raviv, Unsafe Harbors: One Person, One Vote and Partisan Redistricting, 7 U. PA. J. CONST. L. 1001, 1003 (2005).
\textsuperscript{249} See 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. As long as ours is a representative form of government, . . . the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”).
motivated redistricting undermines that fundamental principle. Through gerrymandering, the politicians select the voters—a selection process that by its very nature mutes the popular will and channels it in ways that benefit incumbents and their political allies.

To be sure, not everyone considers gerrymandering a serious problem. Professor Peter Schuck has questioned gerrymandering’s effectiveness, observing that “a party’s motive to gerrymander is considerably stronger than its ability to execute and sustain one.” Professor Nathaniel Persily has challenged the notion that partisan redistricting undermines democratic values. He asserts that “the creation of safe seats . . . is neither inherently undesirable nor easily avoidable,” and further contends that “states have legitimate interests in sending a congressional delegation to Washington that has the greatest possible seniority . . . .” Similarly, Professor Franita Tolson defends partisan redistricting on federalism grounds. She notes that “nothing in the text” of the Constitution “suggests that partisan gerrymandering is per se illegal.” She concludes that “the ability of states to influence their representatives through redistricting can actually help states to protect their regulatory authority in the era of big government.”

However, gerrymandering is not the way democracy is intended to work. Professor Samuel Issacharoff, a leading academic critic of gerrymandering, emphasizes the crucial point that “[a]llowing partisan actors to control redistricting so as to diminish competition runs solidly counter to the core concern of democratic accountability.” Likewise, Professor Sam Wang contends that “gerrymandering is a major form of disenfranchisement” because it maximizes the influence of certain voters at the expense of all other voters.

251 Id. at 1345.
253 Id.
255 Id. at 878.
256 Id. at 902.
258 Wang, supra note 213.
The Supreme Court struck down intrastate malapportionment plans in *Wesberry v. Sanders* and *Baker v. Carr* because they subverted the will of the majority. As former Tenth Circuit Judge Michael McConnell observed, “A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government.” The same reasoning applies to partisan gerrymandering. As Professor Issacharoff warns, “So long as the process [of redistricting] is left in the hands of incumbent political officials whose self-interest runs strongly to what they can get away with, and so long as judicial oversight remains cumbersome and unpredictable, the private interest will likely continue to subsume the public interest.”

The undeniable reality is that when redistricting is left to politically-minded legislatures, the party in power inevitably manipulates the process for partisan interests, which come at the cost of both the public good and a fair system. Things can only get worse from here. Computerized redistricting gives partisans unprecedented power to manipulate election outcomes. Professor Richard Pildes notes that “technological advance[s] in data collection and computer technology” have made it possible for gerrymandering to occur with “astonishing precision.” As gerrymandering techniques have become more sophisticated, House elections have become increasingly uncompetitive. For example, during the closely fought presidential campaign of 2004—the outcome of which

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259 376 U.S. 1, 7 (1964).
262 Issacharoff, supra note 257, at 647.
263 See Steven F. Huefner, Don’t Just Make Redistricters More Accountable to the People, Make Them the People, 5 DUKE J. CONST. L. & PUB. POL’Y 37, 46 (2010) (“When political partisans control redistricting, it can be, and generally is, manipulated to self-interested ends.”).
264 Issacharoff, supra note 257, at 624.
266 Issacharoff, supra note 257, at 626 (“There is no question that district lines are manipulated for the purpose of protecting incumbents from effective challenge, that incumbents assiduously police the redistricting process to protect themselves from challenge, and that a diminishing number of legislative seats are electorally competitive.”); Pildes, supra note 265, at 2553–54.
was determined by a margin of 39%—only five out of 401 House incumbents were defeated.\(^{267}\) Gerrymandering has even helped determine control of the House of Representatives.\(^{269}\) Professor Gene Nichol Jr. thus states an incontrovertible fact when he observes, “Democrats and Republicans agree on one thing: everyone in office has the inherent right to try to bend the rules to make his or her own reelection inevitable.”\(^{270}\)

The United States is one of the few remaining democracies in the world that still engages in partisan redistricting.\(^{271}\) Most major democracies do not permit incumbent politicians to rig election boundaries to their own favor.\(^{272}\) America’s outlier status is an accident of history. Professor Steven F. Huefner points out that the Constitution’s Framers failed to anticipate the rise of a dominant two-party system in American politics.\(^{273}\) He speculates that had the Framers anticipated the pervasive influence of partisanship in American government, “an alternative redistricting process might have been implemented from the outset, as has been done in most other democracies around the globe.”\(^{274}\)


\(^{269}\) See Steven Hill, Behind Closed Doors: The Recurring Plague of Redistricting and the Politics of Geography, 91 NAT’L CIVIC REV. 317, 325 (2002) (“In fact, numerous observers have stated that the outcome of the 1994 elections, when Republicans took control of Congress for the first time in forty years, was due in no small part to Republican gains made during the 1991–92 redistricting.”).


\(^{272}\) See Mann, supra note 271 (“The United States is clearly an outlier in the democratic world when it comes to the role that politicians play in shaping the rules that affect their electoral future.”); The United States of America: Reapportionment and Redistricting, supra note 271 (“The redistricting process in the United States can be distinguished from redistricting elsewhere in the world . . . [by] the extent to which the process is overtly and acceptably political—legislators still have the responsibility for drawing electoral districts in most states . . . .”).

\(^{273}\) Huefner, supra note 263, at 65.

\(^{274}\) Id.
Sam Hirsch, a leading election law expert, notes that the Framers intended for the House of Representatives “to stand apart from the Senate, the Presidency, and the Supreme Court as our one truly majoritarian national institution, as the body most responsive to popular sentiment, with no intermediary between it and the people.” However, he concludes that “today, a handful of congressional and state-legislative leaders pursuing a narrow partisan and ideological agenda are threatening to transform what should be our most dynamically democratic institution into something sclerotic and skewed.” The 2012 congressional elections demonstrated that fact in stark and troubling fashion.

C. A Worsening Problem: The 2012 House Elections as a Disturbing Case in Point

In 2010, the Commerce Department conducted the twenty-third Census. The Census Bureau counted a total United States population of 308.7 million people, an increase of 27 million from 2000. The reapportionment plan that followed the 2010 Census gave rise to huge population disparities. For example, under the current apportionment, Montana’s single congressional district contains almost one million people; Rhode Island’s two congressional districts, in contrast, average approximately 527,600 people. This problem recurs after every census. As the New York Times observed of the apportionment following the 2000 census, the 435-seat cap means that a vote cast in Montana “carries a little more than half as much weight in the House of Representatives as that of someone living in Rhode Island.”

276 Id.
279 See BURNETT, supra note 220, at 2 tbl.1.
280 Id. at 1–2.
281 Baker, supra note 223.
Forty-two state legislatures have the responsibility of drawing the new congressional district lines. Only seven states entrust redistricting to independent commissions: Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington. In addition, Iowa delegates the task to a nonpartisan legislative bureau, subject to legislative and gubernatorial approval.

The fact that forty-two states engaged in partisan gerrymandering made the results of the November 2010 state elections very important. That fall, Republicans won complete control of twenty-one state legislatures, whereas Democrats won only eleven; the parties split control of the remaining legislatures. The Republican victories represented the largest number of state legislatures held by the party since 1928. More important still, the legislatures in which Republicans controlled the redistricting process contained an unusually large number of congressional seats. As a result, Republican-controlled legislatures drew the district lines for 40% of House seats, whereas Democratic legislatures drew the lines for only 10% of House seats. In the aftermath of the 2010 election, Tim Storey, an elections specialist with the bipartisan National Conference of State Legislatures, observed that “2010 will go down as a defining political election that will shape the national political landscape for at least the next 10 years,” because the results placed the Republican Party “in the best position for both congressional and state legislative line drawing that it has enjoyed in the modern era of redistricting.”

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282 Crocker, supra note 15, at 16 (“[T]he authority for drawing the new boundaries for congressional districts resides with the states. For the bulk of the states (43), this authority primarily lies with the state legislature . . . .”).


284 Crocker, supra note 15, at 16 n.92.

285 See Milbank, supra note 1.


287 See Palmer & Cooper, supra note 3.

288 Id.

Storey’s prediction came to fruition in November 2012, when all 435 seats in the House of Representatives were up for election.\footnote{290} The Republicans won 234 races and the Democrats won 201.\footnote{291} The most striking fact about the election was not the number of seats carried, but rather the total number of votes won nationwide. Democratic candidates received nearly 1.4 million more votes than Republican candidates, yet they carried thirty-three fewer seats.\footnote{292} In all, Republican candidates received only 48% of the vote nationally,\footnote{293} but they won more than 53% of the House seats.\footnote{294}

The paradoxical outcome was not a statistical aberration. A study by the Center for American Progress found that even if Democratic House candidates had won the popular vote by a margin of 7%, Republicans would still have maintained control of the House.\footnote{295} Likewise, a study by the Brennan Center for Justice found that redistricting may have changed election outcomes in at least twenty-six districts in the 2012 House elections.\footnote{296} As Dana Milbank of the \textit{Washington Post} concluded, “In a very real sense, the Republican House majority is impervious to the will of the electorate. Thanks in part to deft redistricting based on the 2010 census, House Republicans may be protected from the vicissitudes of the voters for the next decade.”\footnote{297}


\footnote{291} Id.

\footnote{292} Ian Millhiser, \textit{Thanks to Gerrymandering, Democrats Would Need to Win the Popular Vote by over 7 Percent to Take Back the House}, \textit{THINK PROGRESS} (Jan. 2, 2013, 9:00 AM), http://thinkprogress.org/justice/2013/01/02/1382471/thanks-to-gerrymandering-democrats-would-need-to-win-the-popular-vote-by-over-7-percent-to-take-back-the-house/?mobile=nc.

\footnote{293} See Wang, \textit{supra} note 213 (Republicans won 234 seats, which is 53.7% of the total 435 seats in the House).

\footnote{294} Milbank, \textit{supra} note 1.


\footnote{296} Milbank, \textit{supra} note 1.
It must be stressed that both parties—not just Republicans—actively engage in gerrymandering. In the 2012 election, Republican candidates won 53% of the vote and 72% of the House seats in states where Republican legislatures drew the maps. Similarly, Democratic candidates won 56% of the vote and 71% of the seats in states where Democratic legislatures drew the maps. However, because the states held by Democrats contained far fewer congressional seats, the election impact was much greater in the Republican-controlled states.

The only good news came from states with independent redistricting commissions. An analysis of the 2012 House elections by the New York Times indicated that in “states where courts, commissions or divided governments drew the maps[,] . . . Democrats won slightly more than half the vote and 56 percent of the seats, while Republicans won 46 percent of the vote and 44 percent of the seats.” Hence, in the seven states with independent redistricting commissions, the popular vote and the number of seats carried were closely aligned.

The statutory cap also played an important role in the striking disconnect between votes won and seats carried in gerrymandered states. As the population of the United States increases, the cap results in ever larger House districts. In 2012, the average House district size was the largest in American history. Highly populous districts magnify the impact of gerrymandering. The larger the district, the more votes that may be “packed” into it—and thereby “wasted”—during the redistricting process. Thus, the relentless growth in district size caused by the statutory cap provides a target-rich environment for gerrymandering.

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298 Id. (“To be sure, Democrats tend to be just as flagrant as Republicans when they have the chance to gerrymander.”); Palmer & Cooper, supra note 3 (observing that “both parties fight so hard for the power to draw the maps” to draw lines in a partisan fashion).

299 Id.

300 Id.

301 See id. (“Democrats also drew gerrymandered lines in states where they controlled the process, but had less of an impact over all because they had control in fewer states . . . .”).

302 Id.

303 See id.

304 See BURNETT, supra note 220.

305 See id.

306 See CROCKER, supra note 15, at 5.

307 See id.
American population patterns add fuel to the fire. Today, large numbers of Democratic voters reside in densely populated cities, whereas Republican voters tend to be widely dispersed in rural areas and peripheral suburbs.\footnote{Palmer & Cooper, supra note 3 (discussing “unintentional gerrymandering” or “natural geographic patterns that lead many Democrats to choose to live in dense, urban areas with very high concentrations of Democrats, effectively packing themselves into fewer districts.”); Jonathan Rodden & Jowei Chen, Railroad Blues, BOSTON REV., Sept./Oct. 2011, http://www.bostonreview.net/BR36.5/jonathan_rodden_jowei_chen_congressional_redistricting.php (“Democrats have tended to live in dense urban centers as well as smaller agglomerations (including college towns) . . . . Republicans tend to live in lower-density suburbs and exurbs surrounding these agglomerations as well as in the rural periphery.”).} In recent elections, Democrats have won huge popular majorities in urban areas, whereas Republicans have won in rural and suburban areas by small but consistent margins.\footnote{Rob Richie & Devin McCarthy, The House GOP Can’t Be Beat: It’s Worse Than Gerrymandering, SALON (Jan. 13, 2013, 5:00 PM), http://www.salon.com/2013/01/13/the_house_gop_cant_be_beat_its_worse_than_gerrymandering/ (“[I]n congressional races, Democrats win by huge margins in many urban areas, while Republicans win by smaller but still safe margins in more districts.”).} The distinction is vitally important. A candidate who wins a district with 80% of the vote and a candidate who wins a district with 51% of the vote both receive a seat in the House of Representatives.\footnote{Rob Richie & Devin McCarthy, It’s Not Just Gerrymandering: Fixing House Elections Demands End of Winner-Take-All Rules, FAIR VOTE (Dec. 16, 2012), http://www.fairvote.org/it-s-not-just-gerrymandering-fixing-house-elections-demands-end-of-winner-take-all-rules.} By stringing together a large number of narrow victories outside the cities, Republicans have overcome the Democrats’ landslide victories in urban districts.\footnote{Greg Giroux, Republicans Can’t Claim Mandate as Democrats Top House Vote, BLOOMBERG BUSINESSWEEK (Nov. 16, 2012), http://www.businessweek.com/news/2012-11-15/republicans-can-t-declare-mandate-with-more-democrat-house-votes (“Beyond a redistricting disadvantage, House Democrats are hindered by a heavy concentration of their voters in populous metropolitan areas, which inflates the party’s national vote total as Republican candidates win by more modest margins.”); Richie & McCarthy, supra note 309.}

That would not be the case in a larger House. If the number of House seats increased with population growth, the size of congressional districts would shrink accordingly. With more districts, like-minded voters would not be confined to a single, supersized district. However, because of the
statutory cap, supersized districts are the norm. Every decade the average size of congressional districts grows relentlessly higher. In short, gerrymandering and the statutory cap work together to subvert majority rule in House elections.

This is unacceptable for a nation that extols democracy’s virtues to the rest of the world. It also defies our republican heritage. As journalist Robert Draper observed:

This ritual carving and paring of the United States into 435 sovereign units, known as redistricting, was intended by the Framers solely to keep democracy’s electoral scales balanced. Instead, redistricting today has become the most insidious practice in American politics—a way . . . for our elected leaders to entrench themselves in 435 impregnable garrisons from which they can maintain political power while avoiding demographic realities.

Consequently, as Ian Millhiser notes, in 2013, “the incoming House bears no resemblance to the one America actually voted for.” The time has come to reform the American system of reapportionment and redistricting. Our neighbors to the north provide an example of how this can be done in a fair, effective, and sensible fashion. The Canadian model offers an approach that both restores the principles of the Great Compromise of 1787 and complements the redistricting reforms that eight American states have already successfully implemented.

IV. THE CANADIAN ALTERNATIVE: A SENSIBLE APPROACH TO A COMMON PROBLEM

A. Neighbors, Partners, and Allies

Canada shares a long political and legal heritage with the United States. Sociologist Seymour Martin Lipset noted that Canada and the

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313 See id.
314 Draper, supra note 4, at 51–52.
315 Millhiser, supra note 293.
United States “resemble each other more than either resembles any other nation.”

Like the United States, Canada is a common law nation with a written constitution, a charter of rights, and a colonial history in the British Empire. Canada’s ten provinces operate on terms similar to those of American states. Each Canadian province has its own legislature and premier, who exercises powers comparable to an American governor.

Canada and the United States also have long-standing military and economic ties. Canadian troops fought alongside American troops in both World Wars, and Canada is a charter member of the North Atlantic Treaty Organization. Canada is a signatory to the North American Free Trade Agreement and is America’s largest trading partner.

Like the United States, Canada is a multicultural nation of immigrants. Although English and French are the official languages, Chinese is now the third most common first language in Canada. A recent World Bank study found that 20% of Canadians were born abroad.

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317 Lipset, supra note 9, at 212.
322 Canada and the United States, supra note 316.
327 See Wiseman, supra note 320, at 30.
328 Peter H. Russell, Constitutional Odyssey 83 (3d ed. 2004).
329 Wiseman, supra note 320, at 100.
as compared to 12.5% of Americans.\textsuperscript{330} In global surveys of government quality, Canada consistently ranks alongside the United States as one of the least corrupt governments and freest societies on earth.\textsuperscript{331} Besides their extensive political, cultural, and economic ties, Canada and the United States are also neighbors, sharing an approximately 5,500 mile long border.\textsuperscript{332}

Despite these similarities, there are significant historical and political differences between the two nations. Canada never rebelled against the British monarchy.\textsuperscript{333} It became a federal union and an independent nation by an act of the British Parliament in 1867.\textsuperscript{334} Even today, the Queen of England remains Canada’s official head of state.\textsuperscript{335} Canada’s French heritage also plays a prominent role in Canadian society.\textsuperscript{336} The Constitution of Canada formally recognizes both French and English as the nation’s official languages.\textsuperscript{337} Moreover, the Francophone province of Quebec has a special political and cultural status within the Canadian


\textsuperscript{333} LIPSET, supra note 9, at 42.


\textsuperscript{335} See ELECTIONS CAN., THE ELECTORAL SYSTEM OF CANADA 7 (2d ed. 2007), http://www.elections.ca/res/canelecsys_e.pdf.


\textsuperscript{337} Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) (“English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.”).
federation, and exercises a considerable degree of autonomy from the rest of Canada. 338 Political scientist David E. Smith thus observes: “Canada’s is a double federation—of provinces and of English and French-speaking cultures.” 339

Although somewhat larger than the United States in total landmass, Canada is much smaller in terms of population. 340 According to 2012 estimates, Canada has 34.8 million people, which constitutes slightly more than 10% of the population of the United States. 341 Much like the American states, population is not evenly distributed among Canadian provinces. 342 Over 88% of Canadians live in one of the four largest provinces: Ontario, Quebec, British Columbia, and Alberta. 343 Ontario, the largest province, had a population of 13.5 million in 2012, whereas Prince Edward Island, the smallest province, had a population of 146,100. 344

The Canadian Parliament has three branches. 345 It is composed of the Senate, the House of Commons, and the Queen of England, who is represented in Ottawa by the Governor General. 346 A bill must pass in both the Senate and the House of Commons to become a law, 347 and all legislation is passed in the name of the Queen. 348 The Canadian Parliament is nearly as large as the United States Congress: the House of Commons and the Senate presently consist of 308 members and 105 members respectively. 349 Partisanship plays as important a role in Parliament as in

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338 Will Kymlicka, Citizenship, Communities, and Identity in Canada, in CANADIAN POLITICS 23, 29 (James Bickerton & Alain-G. Gagnon eds., 5th ed. 2009) (“[T]he special status of Quebec is undeniable.”).


341 Compare Population by Year, by Province and Territory, GOV’T CANADA, http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm (last visited Apr. 24, 2013) (indicating that Canada had a total population of 34,880,500 in 2012), with BURNETT, supra note 220 (indicating that the 2010 Census apportionment population in the United States was 309,183,463).

342 See Compare Population by Year, by Province and Territory, supra note 341.

343 See id.

344 Id.


346 Id.

347 See id. at 11.

348 Id. at 3.

349 Id. at 3–4; ELECTIONS CANADA, supra note 335.
Congress. Canada has three major national parties—the Conservative Party, the New Democratic Party, and the Liberal Party—along with a host of smaller parties. A fourth major party—the Bloc Québécois—competes only in Quebec.350

The House of Commons is the most important law-making branch of the Canadian government.351 The Canadian government is formed by the party—or coalition of parties—that holds a majority of seats in the House of Commons.352 The Prime Minister of Canada serves as the head of government as well as leader of his or her party in the House of Commons.353 More than any other institution, the House of Commons directly represents the will of the Canadian electorate.354 In the words of political scientist Norman Ward, “The fundamental importance of the House of Commons is its essential representative character, the fact that it can speak, as no other body in the democracy can pretend to speak, for the people.”355

Members of the House of Commons, known as Members of Parliament or “MPs,” are elected by popular vote in districts, called “ridings,” across


351 DAWSON & DAWSON, supra note 321, at 27; Legislative Branch, GOV’T CANADA, http://www.canada.gc.ca/abouutgov-ausujetgouv/structure/legislative-legislatif-eng.html (last visited Apr. 24, 2013) (“The House of Commons is the major law-making body.”). The Canadian Senate is the weaker institution of the two. See DAVID E. SMITH, THE CANADIAN SENATE IN BICAMERAL PERSPECTIVE 17 (2003) (“Canadians are not alone in desiring an improvement in the structure and operation of their [Senate].”); David E. Smith, Canada: A Double Federation, in THE OXFORD HANDBOOK OF CANADIAN POLITICS 75, 81 (John C. Courtney & David E. Smith eds., 2010) [hereinafter Smith, Canada: A Double Federation] (“[T]he Canadian Senate is unelected, unequal, and, say its critics, ineffective.”). Unlike the House of Commons, the Senate is an appointed, not an elected, body. See About the Senate, PARLIAMENT CANADA, http://sen.parl.gc.ca/portal/about-senate-e.htm (last visited Apr. 24, 2013). The result is the Senate plays a much smaller role in setting public policy than the House of Commons. Jennifer Smith, Canada’s Minority Parliament, in CANADIAN POLITICS, supra note 338, at 133, 150 [hereinafter Smith, Canada’s Minority Parliament] (“[T]he Senate has worn its outdated mode of selection modestly, attending to its work of legislative review and rarely confronting the public policy objectives of the government of the day.”).

352 See JACKSON & JACKSON, supra note 318, at 425.

353 Id. at 265.

354 DAWSON & DAWSON, supra note 321, at 27.

Canada. Like congressional districts in the United States, Canada has a first-past-the-post system in which each riding elects a single member to represent it in Parliament. One consequence of the first-past-the-post system is that a candidate does not need to win a majority of the vote; a plurality will suffice for election to the House of Commons. Since the 1980s, the party that has won the most votes nationwide has always won the most seats in the House of Commons. However, because Canada has three major national parties and several smaller parties, winning candidates frequently receive less than 50% of the vote. For example, in the May 2011 federal election in Canada, the Conservative Party received approximately 40% of the popular vote, yet captured 54% of the seats in the House of Commons because the party received more votes than any other party.

As the term “riding” indicates, Canadians use a different terminology for apportionment and redistricting than Americans do. Canadians describe the entire process as “redistribution”—a term that refers both to the apportionment of parliamentary seats to the Canadian provinces and to the redistricting of riding lines.

But the differences between the Canadian and American approaches extend far beyond terminology. The House of Commons grows with Canada’s population and all riding lines are drawn by independent

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358 Jackson & Jackson, supra note 318, at 426–27.
359 See id. at 431–32; Electoral Results by Party, supra note 350.
360 See David C. Docherty, Mr. Smith Goes to Ottawa 76 (1997) (“[A]n unusual split of the vote in a four-candidate race meant that someone with just over one-third of the vote could conceivably emerge victorious.”).
362 Courtney, supra note 334; Ward, supra note 355, at 92.
commissions, not politicians. The result is a system that every American interested in reforming the congressional redistricting process should take very seriously.

B. A House that Grows with the Country

The basic structure of the Canadian apportionment process closely parallels that of the United States. Seats in the Canadian House of Commons are assigned to the provinces according to the results of a decennial census. The Canadian census has taken place every ten years since 1871, the most recent Canadian census was conducted in 2011. Federal ridings do not cross provincial lines. Seat allocation is determined by dividing the population of the province by the “electoral quotient,” which is determined by the results of the Canadian census. In 2011, the electoral quotient was 111,166. The electoral quotient is adjusted following each census to accurately reflect population growth in Canada.

Neither the Canadian constitution nor federal statutes require strict population equality between provinces. For example, when Canada


365 COURTNEY, supra note 334; WARD, supra note 355, at 89.


368 DAVID C. DOCHERTY, LEGISLATURES 75 (2005).


370 Id.

371 Id.

372 See COURTNEY, supra note 334, at 50 (“The number of seats awarded a province has never conformed strictly to a province’s share of the Canadian population.”); Michael Pal & Sujit Choudhry, Is Every Ballot Equal? Visible-Minority Vote Dilution in Canada, 13 IRPP CHOICES, Jan. 2007, at 3, 4, http://www.irpp.org/choices/archive/vol13no1.pdf (“[C]onstitutional guarantees of a minimum number of seats to provinces with populations declining in proportion to the whole, coupled with limits on the growth of the House of Commons, mean that representation from provinces whose populations are growing significantly . . . has not kept pace with new demographic realities.”).
achieved nation status in 1867, Quebec secured a guarantee that it would always maintain at least sixty-five members in the Canadian House of Commons, regardless of the province’s future population.\footnote{WARD, supra note 355, at 89.} In the early 1900s, the Canadian Parliament established a representational floor for all provinces, not just Quebec.\footnote{See id. at 89–90; Pal & Choudhry, supra note 372, at 21.} A 1915 federal statute—known today as the “Senatorial floor clause”—provided that each province would receive at least as many MPs as it had senators in Parliament.\footnote{COURTNEY, supra note 334, at 50–51; JACKSON & JACKSON, supra note 318, at 437; WARD, supra note 355, at 89–90. Of the 105 senators, twenty-four come from Ontario; twenty-four from Quebec; twenty-four from the three maritime provinces; twenty-four from the four western provinces; six from New Foundland and Labrador; and three from the territories of Nunavut, Yukon, and the Northwest Territories. Smith, \textit{Canada: A Double Federation}, supra note 351, at 81; Smith, \textit{Canada’s Minority Parliament}, supra note 351, at 149.} In 1985, Parliament added the “grandfather clause,” a further guarantee that each province would always have at least as many MPs in the House of Commons as the province had in 1976 or the mid-to-late 1980s.\footnote{COURTNEY, supra note 334, at 50–51 (“The ‘grandfather clause’ law of 1985 ensures that no province will be granted fewer Commons seats than it had in 1976 or in the 33rd Parliament (1984-8), whichever is fewer.”); JACKSON & JACKSON, supra note 318, at 437.} Thus, as political scientist John Courtney notes, the grandfather and senatorial floor clauses “mean that seven of the ten provinces are, as it were, frozen in time.”\footnote{COURTNEY, supra note 334, at 51.}

It is worth noting, therefore, that the senatorial floor and grandfather clauses provide more representation for small Canadian provinces than the United States Constitution provides for the smallest American states.\footnote{See id. (“For the past three decades the populations of Ontario, Alberta, and British Columbia have grown faster than the national average rate. Therefore the remaining seven provinces now have more Commons seats than their populations warrant.”); JACKSON & JACKSON, supra note 318, at 437.} Article I, Section 2 of the United States Constitution guarantees each state only one seat in the House of Representatives,\footnote{U.S. Const. art. I, § 2, cl. 3.} whereas Canadian law guarantees each province several seats in the House of Commons.\footnote{COURTNEY, supra note 334, at 50–51; JACKSON & JACKSON, supra note 318, at 437; WARD, supra note 355, at 89–90.} For example, Prince Edward Island, the smallest province in Canada,\footnote{\textit{About Prince Edward Island}, GOV’T PRINCE EDWARD ISLAND, http://www.gov.pe.ca/infope/index.php3?number=13033&lang=E (last visited Apr. 24, 2013).}
receives four of the 308 seats in the House of Commons even though its population warrants only one seat. In contrast, Wyoming, the smallest American state, has only one seat out of 435 in the House of Representatives.

Despite this structural bias in favor of small provinces, the Canadian House of Commons does a much better job of keeping pace with and accounting for overall population changes than is the case in the United States House of Representatives. The reason is simple: the size of the House of Commons is not fixed. Canada’s earliest leaders intended for the House of Commons to grow in size, and Parliament continues to adhere to that intent. In the last century and a half, the House of Commons has grown from 206 members in 1878 to 308 members in 2001.

A notable criticism of the Canadian reapportionment system is that it has not increased the size of the House of Commons fast enough. In the twenty-first century, population growth in Ontario, British Columbia, and Alberta has far exceeded that of the other provinces. This uneven growth, combined with the senatorial and grandfather clauses, has resulted in rising population disparities in the House of Commons. By the early 2000s, the population distortions equaled or exceeded those in the United States House of Representatives. For example, in the first decade of the

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382 COURTNEY, supra note 334, at 51.
384 WARD, supra note 355, at 89 (Canada “experimented with a fixed ceiling” on the House when the chamber became full but ultimately “has . . . accepted the idea of steadily increasing the number of MPs . . . .”); James Fryman, Apportionment and Reapportionment in the United States, 10 CANADIAN PARLIAMENTARY REV. 6, 6 (1987) (“[T]he Canadian House of Commons has not maintained a fixed number of seats for a sustained period of time.”).
385 WARD, supra note 355, at 89.
387 See, e.g., Pal & Choudhry, supra note 372, at 4 (noting that the Canadian system “has not kept pace with new demographic realities.”).
388 John Courtney, Elections, in AUDITING CANADIAN DEMOCRACY, supra note 331, at 118, 129.
389 Id.
390 Compare COURTNEY, supra note 334, at 52 tbl.3.1 (showing the redistribution of parliamentary seats by province or territory), with Apportionment Population and Number of Representatives, by State: 2010 Census, U.S. CENSUS BUREAU, http://www.census.gov/ (continued)
twenty-first century, the average riding in Prince Edward Island had only 33,824 people, while the average riding in British Columbia had over 108,500 people. With much justification, therefore, legal scholars Michael Pal and Sujit Choudhry observed that “the average ballot cast in Ontario, British Columbia and Alberta is worth much less than one cast in any of the other provinces.”

However, unlike the United States, Canada has a system in place to account for—and correct—such imbalances. In September 2012, the Canadian Parliament voted to increase the House of Commons by thirty seats, the largest augmentation in Canadian history. Under the new redistribution, Ontario will receive fifteen additional seats, British Columbia and Alberta will receive six seats each, and Quebec will receive three seats. The new seats will be ready for the 2015 federal election.

The augmentation raises Ontario’s total number of seats to 121, Quebec’s total to seventy-eight, British Columbia’s to forty-two and Alberta’s to thirty-four. The augmentation increases the total number of seats in the House of Commons to 338—nearly a 10% increase.

The growth in the size of the House of Commons improves the accuracy of provincial representation. For example, the population of the province of Ontario makes up 38.7% of Canada’s total population. With fifteen new seats, Ontario MPs will constitute 35.8% of the House of Commons, a 1.4% improvement from Ontario’s previous apportionment of 35.4%.

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391 COURTNEY, supra note 334, at 51–52.
394 Carlson, supra note 393; House of Commons Passes Bill to Add Seats, supra note 393.
395 Carlson, supra note 393.
396 See LIBRARY OF PARLIAMENT, supra note 345, at 4.
397 See id.
398 See Population by Year, by Province and Territory, supra note 341 (noting that Ontario has just over 13.5 million people and that Canada has a total population of over 34.8 million according to the official 2012 estimate).
34.4% of House seats.\textsuperscript{399} The same is true for the other augmented provinces. The population of Alberta comprises 11.1% of Canada’s national population.\textsuperscript{400} With six additional seats, Alberta MPs will constitute 10% of the House membership, a 1% improvement from Alberta’s previous apportionment of 9% of House seats.\textsuperscript{401} Although the percentage differences in apportionment are small, they can be quite significant when national elections are close, as the 2012 House elections in the United States powerfully demonstrated.\textsuperscript{402}

In addition, parliamentary augmentation has the corresponding result of shrinking the average size of House ridings.\textsuperscript{403} For example, under the previous apportionment plan, the average riding in British Columbia was 128,405.\textsuperscript{404} Under the new apportionment, the average riding in British Columbia will fall to 110,061.\textsuperscript{405} That means every voter in British Columbia will have a larger say in future elections than they had under the pre-2012 apportionment.

Equally important, augmentation does not come at the expense of the six non-augmented provinces.\textsuperscript{406} None of the slow-growing provinces will

\textsuperscript{399} See Library of Parliament, supra note 345, at 4.

\textsuperscript{400} See Population by Year, by Province and Territory, supra note 341 (indicating that Alberta has over 3.8 million people of Canada’s total population of over 34.8 million).

\textsuperscript{401} See Library of Parliament, supra note 345, at 4.

\textsuperscript{402} See Milbank, supra note 1; Palmer & Cooper, supra note 3.

\textsuperscript{403} See Carlson, supra note 393.

\textsuperscript{404} See Library of Parliament, supra note 345, at 4 (noting that British Columbia had thirty-six seats in the House of Commons under the old apportionment); Population by Year, by Province and Territory, supra note 341 (indicating that the population of British Columbia is over 4.6 million). Thus, to calculate the average: 4,622,600 people residing in British Columbia divided by 36 seats in the House of Commons equals an average of 128,405 persons per seat.

\textsuperscript{405} See Population by Year, by Province and Territory, supra note 341 (indicating that the population of British Columbia is over 4.6 million). Compare Library of Parliament, supra note 345, at 4 (noting that British Columbia had thirty-six seats in the House of Commons under the old apportionment), with Carlson, supra note 393 (reporting that under the new apportionment, British Columbia will gain six additional seats). Thus, the calculation changes as follows under the new apportionment: 4,622,600 people residing in British Columbia divided by 42 seats in the House of Commons (36 seats under the old apportionment plus 6 additional seats under the new apportionment) equals an average of 110,061 persons per seat.

\textsuperscript{406} See House of Commons Passes Bill to Add Seats, supra note 393 (noting that the thirty new seats that will go to the fastest growing provinces that have been under-represented for years will be additional seats).
lose seats in Parliament. That in turn means that the average riding size in the non-augmented provinces will remain essentially unchanged. Canadian augmentation is thus a win-win scenario, with no province unfairly burdened by improved representation for the fastest growing provinces. This stands in sharp contrast to the apportionment process in the United States House of Representatives, where one state’s gain is another state’s loss. For example, in the 2011–2012 reapportionment, eight states gained seats in the House of Representatives and ten states lost seats. In each of the ten states that lost seats, the size of the states’ remaining districts increased, thus reducing the value of every voter’s ballot in those states.

Thus, unlike the American Congress, the Canadian Parliament grows with the population. As David Smith notes, “It is the absence of a rigid adherence to numbers that helps to explain the greater absorptive capacity of Parliament, compared to the United States Congress . . . .” Parliamentary augmentation permits Canada to ensure that uneven population growth does not lead to unrepresentative and undemocratic results. Indeed, as Professor David Docherty explains, augmentation means “more accountability, more representation, and more responsiveness” in the Canadian government.

C. A Fiercely Competitive Electoral System

Canada also has far more accountability on election day. This is because provincial legislatures do not draw the boundary lines for the thirty new ridings or the 308 preexisting ridings in the House of Commons. Instead, independent commissions will draw the boundaries...

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407 See id. (noting that no province will lose seats in Parliament as a result of augmentation).
408 See CROCKER, supra note 283, at 2–4.
409 See id. at 1.
410 See id. at 2–4 tbl.1.
411 SMITH, supra note 339, at 72.
412 DOCHERTY, supra note 368, at 183–84.
413 See ELECTIONS CANADA, supra note 335, at 8 (noting that independent commissions have been adjusting the riding boundaries in Canada since 1964).
of all 338 ridings in time for the next federal election, which is scheduled for October 2015. Independent commissions did not always draw riding lines in Canada. Politically-motivated boundary drawing dominated the first century of Canadian national history. Sir John A. Macdonald, the first Prime Minister of Canada, viewed gerrymandering as necessary to advance the Conservative Party’s political prospects. He encouraged his party to use gerrymandering to “hive the Grits” and shape the electoral map in his party’s favor. From 1872 to 1952, the Canadian Parliament drew the boundary lines for all federal ridings, employing gerrymandering tactics with zeal.

In 1903, Prime Minister Sir Wilfrid Laurier modified the redistribution system by emphasizing incumbent protection. However, partisan motivations still influenced boundary drawing deep into the twentieth century. In 1939, one MP complained that the Canadian electoral boundary process was “an unseemly, undignified and utterly confusing scramble for personal and political advantage.”

Outrageous population disparities were the norm in Canadian elections until the 1960s. For example, in Quebec, 25% of the population could

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414 See id.
416 See Courtney, supra note 388, at 127 (“Electoral districting by independent commissions charged with redrawing constituency boundaries is participatory and stands in marked contrast to the partisan, self-interested dealings of the past.”).
419 See COURTNEY, supra note 417; DONALD D. CREIGHTON, JOHN A. MACDONALD 335 (1998) (“Liberal voters were to be concentrated in as few ridings as possible, thus increasing the Conservatives’ chances of success”).
420 GWYN, supra note 418, at 355.
421 See COURTNEY, supra note 334, at 47.
422 WARD, supra note 355, at 93.
423 See id. (“It is improbable that coincidence alone in 1947 was responsible for the fact that ‘the three seats most adversely affected in the entire country had . . . been held by three leading members of the Progressive Conservative Party.’”).
424 COURTNEY, supra note 334, at 47–48.
425 See, e.g., COURTNEY, supra note 334, at 49.
elect a majority of the MPs. The three smallest ridings in rural Quebec had sixteen times the voting power of the three largest ridings in Montreal and Quebec City. As John Courtney points out, by the early 1960s, Quebec’s malapportionment exceeded that of the Tennessee legislative plan struck down in 1962 by Supreme Court of the United States in *Baker v. Carr*.

Quebec was not the only malapportioned province. In the early 1960s, Ontario’s largest riding had almost ten times the population of its smallest riding. Interprovincial comparisons reveal even greater disparities. In the 1965 parliamentary elections, a riding in rural Quebec had only 12,479 people, whereas an urban riding in Toronto, Ontario had 267,252 people. Thus, much like congressional districts in the United States, rural ridings exercised vastly greater voting power than ridings in metropolitan areas.

Ironically, a sparsely-populated rural province led the reform effort. During the first half of the twentieth century, rural ridings in Manitoba enjoyed double the representation of ridings in Winnipeg and the province’s other cities and towns. In 1955, Manitoba ended the disparities by adopting an Australian innovation: nonpartisan independent commissions for boundary drawing. Manitoba’s reforms spurred change

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426 *Id.*
427 *Id.*
428 *Id.*
429 See, e.g., *Courtney, supra* note 334, at 50; *Ward, supra* note 355, at 94.
430 See *Ward, supra* note 355, at 94 (noting that Ontario ridings had populations ranging from 29,000 to 267,000, where each had one MP).
431 *Courtney, supra* note 334, at 50 (“The extremes in the 1965 federal election were York-Scarborough in Ontario with 267,252 residents and Iles-de-la-Madeleine in Quebec with 12,479 residents.”); Terrence H. Qualter, *Representation by Population: A Study*, CAN. J. ECON. & POL. SCI. 246, 257 (1967) (noting that the York-Scarborough is an urban riding).
432 Compare Giroux, *supra* note 311 (noting the disadvantage to House Democrats of having their voters heavily concentrated in metropolitan areas), and Richie & McCarthy, *House GOP, supra* note 309 (noting that Democrats win by big margins in urban areas whereas Republicans win by smaller margins in more districts), with *Courtney, supra* note 334, at 49 (“With few exceptions, voters in urban and suburban districts had far less electoral clout than voters in rural districts.”).
433 See *Courtney, supra* note 334, at 55.
434 See *id.* at 55–56.
435 *Id.* at 55, 57.
in the rest of Canada. In the late 1950s and early 1960s, Ontario MP Douglas Fisher of the New Democratic Party repeatedly proposed the adoption of independent electoral boundaries commissions for all federal elections. In 1964, the Canadian Parliament finally responded by enacting the Electoral Boundaries Readjustment Act (EBRA), which was expressly modeled on Manitoba’s plan.

The EBRA has several key features. First, it mandates that every province establish a three-person independent boundary commission. The commissioners redraw riding boundaries every ten years, following the decennial census. Population variations between ridings may not exceed 25% absent “extraordinary” circumstances, and each riding’s population must be as close as possible to the province’s electoral quotient. In drawing riding lines, the commissions may consider communities of interest, local history, and geographical features. Before implementation, the public and members of Parliament are given an opportunity to review and comment on the new ridings. If ten or more MPs in Ottawa object to a proposed riding map, the full Parliament debates the issue. In all cases, however, the commissions have final decision-making authority.

The independent commissions have been a phenomenal success. John Courtney describes the independent electoral boundary commissions as “one of the democratic advances of the last half-century in Canadian political institutions” and notes that they are “widely seen as fair, nonpartisan, and independent bodies.” One reason for the

436 See id. at 58 (“Manitoba’s success in establishing a process whereby district boundaries would be regularly redesigned by a nonpartisan body was adopted within a decade by Parliament for federal ridings.”).
438 Electoral Boundaries Readjustment Act, R.S.C. 1985, c. E-3 (Can.).
440 R.S.C. 1985, c. E-3, ss. 3–4 (Can.).
441 Id. at s. 3.
442 Id. at s. 15.
443 Id.
444 Id. at ss. 19, 21.
445 Id. at s. 22.
446 Id. at ss. 23–25.
447 See COURTNEY, supra note 334, at 59, 71.
448 Id. at 71.
commissions’ success is the membership, which consists of academics and respected local attorneys, not partisan officeholders. Moreover, the commission chair must be a judge from the provincial high court. Moreover, Canadian judges are not elected, and thus their involvement underscores the nonpolitical nature of the commissions.

To be sure, the independent commissions have not eliminated all population disparities between ridings. As Norman Ward observed:

The commissions are instructed to make each constituency in the province as near the average as possible in population, which can still mean that constituencies within one province can vary greatly as geographic entities: all the provinces west of New Brunswick have huge northern seats whose populations are smaller than those that can be encompassed in a few city blocks.

Moreover, the Supreme Court of Canada has held that the American model of “one person, one vote” is not required by the Canadian Charter of Rights and Freedoms, Canada’s constitution. In 1991, urban voters challenged Saskatchewan’s riding plan, which permitted the province’s northernmost, heavily rural riding to hold 25% fewer voters than the provincial average. The Supreme Court of Canada rejected the challenge, holding that “it would be wrong to infer that . . . the intention was to adopt the American model.” Instead, the court declared that “[r]elative parity of voting power is a prime condition of effective representation” and permitted deviations from absolute voter parity “on the grounds of practical impossibility or the provision of more effective representation.”

Nevertheless, by any measure, the commissions have significantly reduced population disparities within provinces. Interprovincial population distortions now result from the senatorial floor and grandfather

449 Id. at 54 (“The provincial composition of the ten federal commissions has given credibility to the electoral boundaries process.”).
450 Id.; WARD, supra note 355, at 94.
451 COURTNEY, supra note 334, at 55.
452 WARD, supra note 355, at 94.
455 Carter, 2 S.C.R. at 185–86.
456 Id. at 160.
457 COURTNEY, supra note 334, at 69.
clauses, not from gerrymandering. Moreover, although EBRA permits variances of up to 25%, the average variation is only 10%, which represents a significant improvement on the pre-EBRA status quo. John Courtney concludes that “the great majority of Canadians live in ridings in which their vote is on more of a par with their fellow citizens in their province than was ever the case prior to the introduction of independent boundary commissions.”

The best evidence of the success of independent commissions resides in the extraordinarily competitive nature of Canadian elections. The last twenty-five years of parliamentary elections demonstrate the point. In the 1988 federal elections, the Conservative Party won a majority with 169 seats in the House of Commons, followed by the Liberal Party with eighty-three seats, and the New Democratic Party with forty-three seats. Five years later, in the 1993 federal elections, the Conservative Party suffered a devastating reversal of fortune. The Liberal Party seized the majority with 177 seats, the Bloc Québécois (a new party) carried fifty-four seats, the Reform Party (also a new party) carried fifty-two seats, the New Democratic Party (NDP) fell to nine seats, and most amazing of all, the Conservative Party won a mere two seats. Thus, in a single election, the majority party in the Canadian House of Commons plummeted from 169 seats to two seats, a 98.8% turnover rate. The 1993 results illustrated the vibrancy and dynamism of House of Commons elections in Canada.

High turnover rates have continued in the three most recent Canadian elections. The Conservative Party rebounded from its crushing defeats in the 1990s to capture 124 seats in the 2006 federal elections, versus 103 for the Liberal Party, fifty-one for the Bloc Québécois, and twenty-nine for the NDP. Two years later, in the 2008 federal elections, the Conservative Party’s total increased to 143 seats, the Liberal Party fell to seventy-seven

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458 See JACKSON & JACKSON, supra note 318, at 435–36, 439; WARD, supra note 355, at 95.
459 See id. note 388.
460 COURTNEY, supra note 334, at 70.
461 See id. at 75, 125.
462 JACKSON & JACKSON, supra note 318, at 454 tbl.12.6.
463 See id.
464 Id.
465 See id.
seats, Bloc Québécois dropped to forty-nine seats, and the NDP rebounded to capture thirty-seven seats.\footnote{Official Voting Results: Fortieth General Election 2008, Elections Can., http://www.elections.ca/scripts/OVR2008/default.html (last visited Apr. 24, 2013) (follow “Tables” hyperlink; then select “Table 7”).}  Finally, in the most recent federal election in 2011, the Conservative Party expanded its majority to 166 seats, the NDP surged to an all-time high of 103 seats, the Liberal Party fell to an all-time low of thirty-four seats, and Bloc Québécois virtually imploded, mustering only four seats.\footnote{Official Voting Results: Forty-First General Election 2011, Elections Can., http://www.elections.ca/scripts/ovr2011/default.html (last visited Apr. 24, 2013) (follow “Tables” hyperlink; then select “Table 7”). See also Josh Visser, Is the Liberal Party Dead and Buried?, CTV News (Dec. 28, 2011, 7:25 AM), http://www.ctvnews.ca/is-the-liberal-party-dead-and-buried-1.743492 (noting that the Liberal Party suffered its worst defeat in history).}  Thus, in the span of five years, nearly 75\% of the seats in the House of Commons changed parties.\footnote{Compare Official Voting Results: Thirty-Ninth General Election 2006, supra note 466 (listing the distribution of seats for each party in the 2006 general election), with Official Voting Results: Forty-First General Election 2011, supra note 468 (listing the distribution of seats for each party in the 2011 general election).}

The contrast with the United States House of Representatives could hardly be starker. In America’s heavily gerrymandered system, Canadian-style turnover is inconceivable. In recent elections, 95\% reelection rates are routine in the House of Representatives.\footnote{Michael L. Mezey, Representative Democracy 171 (2008) (“Members of the House of Representatives who seek reelection generally succeed at rates in excess of 95 percent.”).} The overwhelming bias in favor of incumbents is not a new development. From 1964 to 2010, the reelection rate of U.S. House incumbents was 93\%.\footnote{James Q. Wilson et al., American Government 338 (13th ed. 2013).} Equally troubling, the majority of House elections are not even close.\footnote{See id.} Since 1964, most incumbents in the House of Representatives win reelection with more than 60\% of the vote.\footnote{Id.}

Canadian elections illustrate that the United States can do far better. The extraordinary turnover in the House of Commons is powerful evidence that it is possible to establish a vibrant, competitive, and most important of all, fair election system. Professor Courtney put it well, therefore, in stating, “Should Congress choose to pursue the possibility of mandating every state to redistrict congressional districts via nonpartisan
commissions, it is conceivable that the Canadian model of redistribution commissions would have some utility in the ensuing debate.\footnote{474}

V. APPLYING CANADIAN LESSONS TO THE AMERICAN POLITICAL SYSTEM

A. Reform By Statute, Not Constitutional Amendment

There is no doubt that the Constitution empowers Congress both to increase the size of the House of Representatives and to require the states to adopt independent commissions for federal redistricting.\footnote{475} Article I, Section 4 provides that “Congress may at any time by law” regulate “[t]he times, places and manner of holding elections for Senators and Representatives.”\footnote{476}

The Supreme Court has repeatedly interpreted Section 4 as providing Congress with complete control and authority over the conduct of House elections.\footnote{477} As Justice Frankfurter famously observed in \textit{Colegrove v. Green}:

\begin{quote}
[T]he Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility . . . . Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress.\footnote{478}
\end{quote}

Frankfurter’s conclusion reflects generations of Supreme Court jurisprudence on the subject. In the landmark 1879 case \textit{Ex parte Siebold}, the Supreme Court observed that “the power of Congress over the subject [of House elections] is paramount. It may be exercised as and when

Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.479 Similarly, in a 2006 case, the Supreme Court reiterated that “Congress is the federal body explicitly given constitutional power over elections . . . .”480

Congress thus has all the constitutional power it needs to restore integrity and fairness to congressional elections: it may order the states to establish independent redistricting commissions481 and it may unilaterally increase its own size.482 Despite this power, practical considerations raise the question of how such commissions should operate. Moreover, to what extent should the House grow?

B. Independent Commissions

A congressional mandate that the states adopt independent redistricting commissions need not force all states to adopt the same approach. The genius of America’s federal system is the fact that it gives states freedom to innovate. Congress can and should require that the states establish independent commissions and expressly prohibit those bodies from advancing partisan or incumbent interests. However, beyond those general guidelines, Congress would be wise to permit the states to pursue diverse approaches to their independent commissions. As long as the result is

479 100 U.S. at 384. The Court has also said:

Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress or in adopting regulations which States have prescribed for that purpose has been settled by repeated decisions of this court . . . .

Gradwell, 243 U.S at 482.


481 See Ryan P. Bates, Note, Congressional Authority to Require State Adoption of Independent Redistricting Commissions, 55 DUKE L.J. 333, 358 (2005) (If Congress, as the Vieth plurality suggests, has sufficient constitutional authority to impose its own redistricting map on the states, then surely a procedural requirement, such as the use of an independent redistricting commission to control partisan gerrymandering, is not an ultra vires intrusion into states’ prerogatives over redistricting.”).

482 See Prigg v. Pennsylvania, 41 U.S. 539, 619 (1842) (discussing that the Constitution declared that seats in the House of Representatives should be apportioned among the states but that Congress has the implied authority to alter the size).
districts that give rise to fair and competitive elections, the states should be encouraged to experiment with different ideas.

Eight states already provide models of how diverse approaches to redistricting can work. Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington use independent commissions for congressional redistricting, and Iowa entrusts redistricting to a nonpartisan government agency. The state plans vary widely in their details. In Arizona, the commission is comprised of two Republicans, two Democrats, and a nonpartisan chairperson, all of whom act independent of the legislature. In California, government auditors select five Republicans, five Democrats, and four independents to draw the state’s congressional district lines. The common theme across the eight states is an effort to eliminate partisan and incumbent considerations in drawing district lines. A commitment to fair and competitive elections should be the standard for the whole nation.

Iowa employs a particularly sensible and effective approach to redistricting. In the 1980s, the Iowa legislature empowered the nonpartisan Legislative Services Agency to draw congressional district lines, subject to a subsequent approval vote by the state legislature and the governor. The state constitution expressly prohibits partisan or incumbent gerrymandering, requiring instead that congressional lines be drawn solely on the basis of population: “No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group.” In addition, the Iowa constitution prohibits the use of any demographic data—such as the addresses of elected officials, the political affiliations of registered voters, or previous election results—other than raw population numbers.

In the end, whatever particular approach states take, line drawing by a politically-neutral, independent commission or agency is essential. Indeed,

483 Crocker, supra note 15, at 1–2 & n.5, 8, 16 & n.92; Crocker, supra note 283.
486 Crocker, supra note 285.
489 Id.
the 2012 election provides the most compelling argument for independent, nonpartisan redistricting. In the forty-two states with partisan redistricting, the state legislatures drew congressional district lines with the implicit goal of subverting the electorate’s will. The House election results in those states displayed the undemocratic and unrepresentative consequences of that approach. In contrast, the states with independent commissions did a vastly better job of matching votes cast with seats won. In the handful of states with redistricting plans created in an independent and nonpartisan fashion, democracy succeeded in 2012. The same should be true of all states and all districts in every congressional election. The American people deserve no less.

C. What Is the Right Number?

As discussed in Parts III and IV, increasing the number of seats in the House of Representatives will give rise to immediate, tangible, and lasting benefits. A House that grows with the nation’s population means smaller congressional districts, fewer wasted votes, and fairer seat allocation between and among the states. But how big should the House become?

One of the most promising proposals is known as the Wyoming Rule. With a population of only 568,300 people, Wyoming is the smallest state in the country. The Wyoming Rule proposes the use of the smallest district as a baseline for all congressional districts nationwide, which is currently Wyoming’s lone district. To that end, the Wyoming Rule calls for increasing the number of seats in the House of Representatives so that the average district size matches Wyoming’s population. Using the 2010 apportionment as an example, the Wyoming Rule would result in the House growing to 543 seats, an increase of 108

491 See Wang, supra note 213 (stating that districts are redrawn to reflect partisan advantages).
492 See Milbank, supra note 1.
493 Palmer & Cooper, supra note 3.
494 Conley & Stevens, supra note 221 (“More districts would likewise mean more precision in distributing them equitably, especially in low-population states.”). See also Balinski & Young, supra note 30, at 67 (“[T]he larger the House the closer a method should come to the ideal of allocating seats in proportion to numbers.”).
495 Harden, supra note 36, at 102.
496 See Crocker, supra note 283, 2–4 tbl.1.
497 Harden, supra note 36, at 102 & n.248.
498 See id.
from its present size.\textsuperscript{499} The benefits of the rule’s adoption would be significant. Today, the average district size in Congress is over 710,000, the highest in American history.\textsuperscript{500} Adoption of the Wyoming Rule would reduce average district size by 20% and dramatically slow the future growth of congressional district size. As a result, far fewer votes would be wasted by the phenomenon of super-sized districts.

Some have advocated for an even larger increase in House size.\textsuperscript{501} In \textit{Clemons}, the plaintiffs contended that if the House grew to 658 members—a number comparable to that of the British House of Commons—interstate population disparities would be reduced by over 50%.\textsuperscript{502} In support of their position, the plaintiffs pointed out that many other democracies besides Great Britain—including Germany, Mexico, France, and Turkey—have larger legislative chambers than the United States, even though they all have smaller populations.\textsuperscript{503}

Whether the right number is 550 or 650, any increase in the total number of House seats should aim to reduce the average district size and minimize interstate population disparities. Furthermore, restoring decennial increases—a practice that prevailed for the first 120 years of America’s constitutional history\textsuperscript{504}—is crucial. The undemocratic consequences of a House frozen in time have been felt since the 1910s. That mistake must be rectified.

From a functional and operational standpoint, Congress could easily accommodate an additional 100 to 200 seats.\textsuperscript{505} The House chamber is large enough to comfortably seat several hundred people.\textsuperscript{506} For example,

\textsuperscript{499} The figure is reached by dividing the population of the United States according to the 2010 census, 308.7 million, by the population of Wyoming, 568,300.

\textsuperscript{500} \textit{Burnett}, supra note 220. \textit{See also} Kromkowski & Kromkowski, \textit{supra} note 54, at 136 tbl.II (showing a continual increase in the national average of persons per representative).


\textsuperscript{502} \textit{Id.} (“Based on the 2000 census, a House of 658 members would cut the maximum disparity from 410,012 to 190,359 persons—a reduction of 53.5%.”).

\textsuperscript{503} \textit{Id.} at 29 & n.4.

\textsuperscript{504} \textit{See} \textit{Crocker}, \textit{supra} note 21 (noting that House apportionments were proportional to population until the permanent House size was set at 435 after the 1910 Census).

\textsuperscript{505} Kromkowski & Kromkowski, \textit{supra} note 54, at 144 (“A larger House . . . would not require unreasonable modification of the House’s chamber.”).

\textsuperscript{506} \textit{Id.} (“As it now stands, the chamber often accommodates many more than 435 persons during State of the Union Addresses and special sessions.”).
during the President’s State of the Union address, which the House of Representatives annually hosts, the chamber seats 435 House members, 100 senators, as well as former members of Congress, the Joint Chiefs of Staff, the Justices of the Supreme Court, and members of the Cabinet.\textsuperscript{507} In addition, the House galleries provide additional seating.\textsuperscript{508}

In reality, the seating issue has always been a red herring. The actual work of the Congress is not done on the House floor.\textsuperscript{509} The desks are purely ceremonial; Congress conducts its day-to-day business in committee rooms and in the members’ offices located in four House buildings adjacent to the Capitol building.\textsuperscript{510} As President Woodrow Wilson once observed, “[I]t is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work.”\textsuperscript{511} Congress would have no trouble acquiring additional office space. Indeed, over the course of the last century, the House and Senate have added office buildings, annexes, and tunnels to accommodate growing congressional staffs.\textsuperscript{512} In short, space is not a serious impediment to expanding the House.

Modern technology also makes a larger House quite feasible. Telecommunications and videoconferencing have never been easier than they are today.\textsuperscript{513} To its credit, the House has not been shy to embrace technological change.\textsuperscript{514} As political scientists Charles and John Kromkowski note, “[M]icrophones, electronic voting, and C-SPAN television coverage are but a few of the technological advances that have revolutionized the legislative process in the House.”\textsuperscript{515}

Great Britain again provides an illuminating example. During World War II, German bombers destroyed the debating chamber of the British

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508 See id. at 5.


510 Id. at 89, 154.

511 Woodrow Wilson, Congressional Government 79 (1885).


513 See Conley & Stevens, supra note 221.

514 Kromkowski & Kromkowski, supra note 54, at 144.

515 Id.
House of Commons. Before its destruction, the chamber was too small to seat all members of the House of Commons. In October 1943, the British Parliament debated the question of whether to expand the size of the chamber as part of the rebuilding process.

Prime Minister Winston Churchill argued vigorously against increasing the chamber’s dimensions. The new chamber of the House of Commons, he contended, “should not be big enough to contain all its Members at once without overcrowding . . . .” Churchill reasoned that an overcrowded chamber made for a more productive and attentive Parliament. “If the House is big enough to contain all its Members,” he observed, “nine-tenths of its [d]ebates will be conducted in the depressing atmosphere of an almost empty or half-empty [c]hamber.” Accordingly, he advised keeping the chamber smaller than the membership so that “there should be on great occasions a sense of crowd and urgency. There should be a sense of the importance of much that is said, and a sense that great matters are being decided, there and then, by the House.” As Churchill explained to Parliament, “We shape our buildings, and afterwards our buildings shape us.”

Parliament ultimately heeded Churchill’s advice and rebuilt the House of Commons along similar lines as the old chamber, with dimensions of 103 feet by 48 feet. In contrast, the dimensions of the United States House chamber are considerably larger: 139 feet by 93 feet. It seems

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518 See id. at 6869.
519 See id. (arguing that the House should be “restored in all essentials to its old form, convenience, and dignity.”).
520 Id. at 6870.
521 See id.
522 Id.
523 Id.
524 CHURCHILL, supra note 517, at 6869.
fair to conclude, therefore, that if the cramped British chamber can serve as home to 650 members of the House of Commons, surely the more spacious American chamber can do the same for a similar number of Representatives.

VI. CONCLUSION

In the Gettysburg Address, President Abraham Lincoln pledged that “government of the people, by the people, for the people, shall not perish from the earth.” One hundred fifty years later, political machinations in Congress have undermined the basic principles of self-government that Lincoln so eloquently articulated.

Partisan redistricting vitiates the constitutional principles on which the United States was founded. The Constitution’s Framers intended for the House of Representatives to reflect the popular will more than any other branch of government. Gerrymandering and the statutory cap thwart the Framers’ goals. Therefore, with each election cycle, the House of Representatives becomes less and less representative of the American people.

The United States can, and must, do better. Change comes slowly to American politics, but change does come. Independent commissions and sensible decennial increases in the size of the House will help restore to Congress basic principles of democratic accountability and representative government.

Our northern neighbors provide an example of how it can be done. Using Canada as a model, Americans can reclaim the House of Representatives as the branch of government that most immediately represents the people’s will. We should demand no less for our country and our Congress.

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