GERRYMANDERING
–
A THREAT TO THE REPUBLIC

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A thesis submitted to Johns Hopkins University in conformity with the requirements for the degree of Master of Government

Baltimore, Maryland
May 2020

Abstract

This thesis explores the relationship between the concept of gerrymandering and the destruction of social trust. The first chapter discusses the history of gerrymandering in the United States. The second chapter examines the foundations of the current status of the issue by focusing on the foundation of the Political Question Doctrine and its offspring, the Judicially Manageable Standard, as described in *Baker v. Carr*. The final chapter explores the link between the concept of corruption and gerrymandering. The thesis concludes with discussion of the effects of corruption on social trust.

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Acknowledgments & Preface

First and foremost, I must acknowledge the assistance and guidance of my professors; I would not have achieved this without your help. There were several that stood out in their contributions on this journey. Dr. Sarah O'Byrne was responsible for the course that helped me form the basic concept for this thesis. Dr. Ken Masugi led me through a fraught path in the study of Constitutional Law. Dr. Kathyrn Wagner Hill was vital to forging the final chapter and the completed document into something worthy of submission. I must also recognize the comprehensive assessment of this thesis by Dr. Jacob Straus; his observations were constructive. All along the way, I had the support of friends and family. Most notably among the former, Lt Col. Robert Stevens of the United States Air Force, who provided a valuable sounding board. My family was instrumental to my well-being. Thanks to my daughter Savannah Lee McDonough for her unconditional cheerleading. Finally, my wife Yachiyo Furugen McDonough, who helped in so very many ways.

This thesis is a representation of a long journey into understanding the American political system. It is representative of my patriotism and my never-ending desire to help, in whatever way I can, our union learn from its past and be better in its future.

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*Unless otherwise noted, all cases are those of the Supreme Court of the United States.

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Introduction

Gerrymanders have been part of our political system from the beginning of the nation. They were not consistently effective and were not permanent, but they were and are a form of corruption. Corruption, in this sense, is not bribery or nepotism, but rather a violation of the ideas of fundamental fairness. This is a form of institutional corruption, a fundamental corruption that undermines essential functions of governance. For example, one is not likely to accept an opponent cheating by stacking the deck in their favor in a game of cards. Cheating in a contest is a form of corruption.

Similarly, allowing political parties to stack the deck, via gerrymanders, in elections is cheating, it is corrupt. This thesis explores the connections between corruption and gerrymandering and how they effectively undermine our democratic institutions. In this way, it identifies gerrymandering as a threat to our nation and concludes that it must be treated as the danger it is to the very foundation of our democracy.

Partisan gerrymanders are an attempt to stack the deck by the parties about which George Washington so rightly warned us. This form of corruption mostly persists due to the Supreme Court's reluctance to act.

While Chapter one focuses on the history of gerrymandering, the second chapter discusses this reluctance on the part of the court in depth. The idea that

gerrymanders are harmless has long been articulated both in academia and the popular press.[1] In chapter three though, this analysis finds that they contribute to a vicious spiral that steadily undermines social trust while fueling increasing corruption.[2] It is hard to overstate the importance of recognizing this form of corruption, wherever it arises. This thesis confines itself to normative connections between gerrymandering and corruption and later to a discussion of governmental corruption's impact on the polity.

An empirical connection might be more satisfying to some; however, due to the nature of corruption data tracking, it is quite challenging to come by. Many researchers use the prosecution and or the conviction rate for corruption. These data have a fragile relationship in comparison to other factors in recent research. Others point to the various survey indexes, and while these are interesting, they do not satisfy the needed connection between corruption rates and gerrymanders. Thus, this paper seeks to add to the body of work exploring gerrymandering, corruption, and their relationship. Additionally, it aims to illustrate that gerrymandering undermines our democratic institutions by

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[1] Jowei Chen and David Cottrell, "Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House," *Electoral Studies* 44 (2016), 329. doi:10.1016/j.electstud.2016.06.014. http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=119847991&site=ehost-live&scope=site.; DAN McLAUGHLIN, "The Gerrymander Myth," *National Review* 69, no. 3 (2017), 16. http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=121342245&site=ehost-live&scope=site.

[2] Rose-Ackerman, Susan., Palifka,Bonnie J., *Corruption and Government: Causes, Consequences, and Reform*, Second ed. (Cambridge, U.K.: Cambridge University Press, 2016).

creating distrust in the voters. With an initial overview of this thesis complete, a more detailed examination is in order.

The first two chapters were developed using the American Political Development view by focusing on periods bounded by significant change. American Political Development is a way of looking at political science in the United States by using historical data, and rather than focusing on a strict chronological view; it focuses on durable changes in policy.

The first chapter covers three eras, *The Era of Silence, The Equal Rights Era, The Era of the Manageable Standard*. The purpose of this chapter is to establish gerrymandering as a firm fixture of American politics from the very beginning. This purpose is vital to address the idea that gerrymandering is 'just a symptom' of political division.

This thesis finds the exact opposite; gerrymandering is at the root of American political dysfunction. The *Era of Silence* starts before the founding of the nation as early politicians found themselves freed of old feudal boundaries sought to control access to the reins of power. There are accusations of attempts at gerrymandering before the Boston Globe published its namesake map. Those accusations have not stood up to more recent scrutiny. In this era, the thesis looks at two cases, one because of its importance later and one as an example of the Supreme Court avoiding action on the subject of partisan gerrymandering.

The first case is significant as it brings two important ideas into American legal consideration.[3] The first is 'Judicial Review,' and that second is a limit on judicial review, the Political Question Doctrine. The second chapter explores these concepts in depth. This era also discusses the open levels of, if observers choose to engage in 'presentism,' political corruption. These behaviors served to reinforce Americans' suspicion of government.

The courts may have been shy about venturing into areas of Congressional power, but they were not shy about attempting to reign in corruption. The earliest Supreme court case found was from 1798. The thesis returns to the discussion of districting and covers the apportionment acts of 1842, 1911, and 1929. These acts are the foundation of the current House of Representatives. This discussion brings the second case of this era, *Colegrove v. Green*, into consideration. This case is an example of the Supreme Court's view of partisan gerrymandering and the Court's lack of role in regulating it.[4]

The Equal Rights Era gets its name from the motivating factor for a change in Supreme Court views on gerrymandering. The focus here is not to establish an arbitrary date, but rather to explore the changes in court opinions from this time. This change in the Court's view was forced by continued

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[3] "Marbury v. Madison." Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/5/137/#tab-opinion-1958607

[4] "Colegrove v. Green." Oyez. Accessed July 1, 2019. https://www.oyez.org/cases/1940-1955/328us549

corruption in the South after World War Two. African Americans refused to tolerate Jim Crow laws, and maltreatment. Their contributions in World War Two served to change opinions across the nation. More importantly, it changed African Americans' views of themselves. The Civil Rights movement forced the national government to take a stand against the perversions of the Constitution practiced in the Jim Crow South. This era considers five cases, continuing the use of SCOTUS litigation as the defining vehicle.

All five contribute to the change in the treatment of gerrymandering in a general sense.[5] The first established the use of the 15th Amendment's Equal Protection clause in gerrymandering cases. The second established the six criteria needed for the Court to *withhold* judgment in a case and brought the need for equality of district population firmly into the gerrymandering arena. The six criteria are listed below.[6] For the gerrymandering issue, the second is of primary concern.

1. A textual constitutional commitment of the matter to another branch of government, such as the power of the President in foreign affairs (note that later cases did not strictly adhere to this view);
2. A lack of judicially discoverable and manageable standards for resolving the issue;

[5] Gomillion v. Lightfoot – 1958, Baker v. Carr – 1962, Gray v. Sanders – 1963, Wesberry v. Sanders – 1963, & Reynolds v. Simms – 1964
[6] "Baker v. Carr." Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/369/186/

3. A need for an initial policy determination before addressing the matter that courts would not be able to reach;
4. A situation in which independent court action would violate the separation of powers framework;
5. An unusual need to strictly adhere to a previous political decision; or
6. A possibility that clashing statements on an issue by multiple branches of government would cause embarrassment

The third defined the 'one person, one vote' doctrine. The fourth uses the criteria from an earlier case and defines gerrymandering as a justiciable issue. With this background, the final case pulls the rest of the electoral system into the realm of judicial review. Though there were cases after it, they did not add to the foundation established across the five cases from 1958 – 1964.

The *Era of the 'Manageable Standard'* starts with the SCOTUS taking up the consideration of partisan gerrymandering in 1986. The 'Manageable Standard' question is not the only question in the apportionment arena in this time frame, but the rest are not germane to the subject of this thesis. In this era, the Court refuses to engage on the subject of partisan gerrymandering. The central question for the thesis in this era is, can the courts rule on partisan gerrymandering?

To examine the court's responsibility in addressing partisan gerrymandering, the paper again considers five cases.[7] The last two were combined by the SCOTUS and are discussed jointly. The cases paint an evolution in the Court's view of its role concerning partisan gerrymandering.

In the previous era, the Court was clear that it had a role in adjudicating these issues. At the start of this era, there is the beginning of a tidal change. The Court reaffirms the justiciability of gerrymandering, stumbling on the second of the six criteria listed above, the requirement for a discoverable and manageable standard by which to evaluate a partisan gerrymander. The Court chooses to exclude other questions that might have led them to a different conclusion. The Court mentions that this will invite further questions and challenges but does nothing to change that expectation. There were discussions of proportional representation and vote dilution, but in the end, they found no way to attack partisan gerrymanders.

In the next case, the SCOTUS again fails to discover a manageable standard, and this time comes to a split decision on if it will forever be a controversy beyond the courts' reach. Four justices claim this, and four reject their claim. Justice Kennedy chose a middle path and, in a concurring opinion,

[7] Davis v. Bandemer, Vieth v. Jubelirer, Gill v. Whitford, Rucho v. Common Cause & Lamone v. Benisek

left the door open to one day finding a standard. There are two other cases of some interest, and one is especially important for our consideration.

A decision from 2006 is crucial as it allows states to redistrict as often as they wish. Combine this with computer-drawn apportionment maps and stacking the deck becomes an almost casual exercise.[8] Additionally, in 2015 the Court ruled that states could use redistricting commissions and that voters could take the redistricting process away from state legislatures and give it to such commissions.[9] At the close of the era, three cases came before the Court, and the majority found no standard. These will be discussed more fully in the second chapter.

Chapter 2 delves into the manageable standard that the majority of the SCOTUS justices seem unable to find. This standard is rooted in the political question doctrine from the *Marbury v. Madison* decision authored by Justice Marshall. The idea that the judicial branch should not tread on the prerogatives of the political branches (those who are elected) stems from judicial review.

Judicial review has a long history stretching back to the Justinian Code in Rome circa 530 B.C. It has changed, and the support for it in a democracy must be different than it would be under a monarchy. The sovereign in the United

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[8] "League of United Latin American Citizens v. Perry." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2005/05-204
[9] "Arizona State Legislature v. Arizona Independent Redistricting Commission." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2014/13-1314.

States is the People, not a King or Queen. The type of sovereign does present problems though; the elected branches are the selected agents of the sovereign will, and the Court is unelected. Does an unelected group have the authority to impede the actions of the sovereign's agents?

In Federalist numbers 51, 78, & 80, there is a discussion of the branches and their relationships that is relevant here. The branches serve to check each other while maintaining their independence. This independence is further discussed in Federalist 80, reinforcing the need for an independent judiciary. The purpose of these checks and this independence is to keep the Constitution supreme, not any particular branch or office. To ensure the supremacy of the Constitution, the power of Judicial Review is necessary. It allows the Court to intercede when the other branches have exceeded their Constitutional bounds.

The political question doctrine stems from judicial review via the 'Doubtful Question Doctrine' that was well established in Colonial judicial practice. The doubtful question doctrine was the idea that the judiciary should only declare actions of the political branches void if there were no reasonable doubt of its unconstitutionality. In modern jurisprudence, we have the Doctrine of Clear Mistake. This concept is related to the Doubtful Question Doctrine but focuses on the attitude of the Court as it enters its consideration of a case. This doctrine states that the Court should assume the action of the legislature is Constitutional from the beginning of their deliberations. All of these, and other, 'doctrines' are

guideposts for the justices and like precedent can be ignored if the justice believes they are in error or should not apply in a particular case.

The second chapter also conducts a short literature review highlighting the continuing controversy over judicial review in the United States. In essence, the arguments, as they relate to gerrymanders, have not changed since the early days of the Republic. Alexander Hamilton argued that the courts are a vital check on the other branches, the state governments, the Legislative, and the Executive. Patrick Henry though, argued that the other branches would be irrelevant with such a powerful court.

Expanding on the reader's understanding of the current controversy, the chapter turns to several of the significant cases where the political question doctrine was either employed or actively rejected. Each of these cases explores a different aspect of the political question doctrine and its application.[10]

In the first case, there is concern for the requirement for a Republican Form of Government. The political question doctrine is employed here and, according to some, set the stage for *Dred Scott v. Sandford.* One of the worst decisions in the history of the Court. Next, the thesis considers a case from 1946. This case has two areas for consideration, 'one man, one vote' & jurisdiction over state governments' powers.

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[10] Luther v. Borden – 1849, Colegrove v. Green – 1946, & Baker v. Carr – 1962

The thesis moves to a 1962 decision concerning reapportionment. There is a similarity with an earlier case in that the state failed to reapportion districts based on population changes. The six criteria defined in it give future courts some guidance in the application of the doctrine. With an examination of the political question doctrine in different arenas complete, the thesis moves to a discussion of the current controversy surrounding partisan gerrymanders.

In the most recent cases, the majority has held that there was no discoverable manageable standard available to the Court.[11] They did, however, bemoan the perversion of the Constitution that partisan gerrymanders represent. The minority discerned that the Court could use the 'intent' of the redistricting parties as a standard, especially given the evidence in these cases. Discussion of this occurs as the thesis turns to chapter three.

The first concern of chapter three is corruption. Americans have an intense fear of corruption in government. The Constitution gives voice to this fear in its first Article. Corruption has, by no means disappeared. An examination of the history of the nation, using corruption as a lens, would present an interesting viewpoint. Currently, there is plenty of corruption to observe both 'legal' and illegal. The thesis here introduces a concept that might well be the source of another research effort. the idea of free and equal elections. The first Constitution of Pennsylvania, written in 1776, documents the desire for free and equal

[11] Rucho v. Common Cause & League of Women Voters of Michigan v. Benson

elections. Though this document was not long-lived, it showed the desire of average citizens to take control of their governments. When considering the demise of this Constitution and the development of the 1789 United States Constitution, a more balanced picture of the U.S. Constitution's framers comes into focus. It is fashionable today to hold these gentlemen up as if they are saints when in reality, they are just as flawed as any citizen of today. After bringing the reality of our forefathers into focus, the thesis turns to a discussion of corruption.

Next, there is a consideration of two indexes: Transparency International's (T.I.) Corruption Perception Index (CPI) & the Economist Intelligence Unit's Democracy Index (EIU DI). Both of these indexes examine perceptions of countries and rank them according to various factors. In both indexes, the United States is on the decline, that is, the perception is that the United States is more corrupt and less democratic than at any time since the start of these indexes. Though these are mere 'perceptions,' perceptions are important. Especially in the arenas of public confidence and, as is discussed later, social trust. Public confidence in the United States has also been declining. The sources indicate several reasons behind this going back to Watergate. With an understanding of the American fear of corruption and declining confidence in government of its citizens, the paper turns to the 'acid' that is gerrymandering and how it eats at the foundations of democratic institutions.

This thesis explores gerrymandering, corruption, and their impact on democratic institutions. The consideration now is how does corruption,

gerrymandering, affect democratic institutions? There is a solid base of research that explores these effects and the vicious spiral that results as citizens lose confidence in their government. Social Trust and political trust are concepts that explore the volume of trust citizens have generally, in their governments specifically, and how these factors affect communities. Putnam initiated the study of 'Social Trust,' and this study has continued today. This field of research has led to the understanding that generalized trust is based on perceived fairness and undermines other views that it is based centrally on some sort of homogeneity in a population. Additionally, chapter three provides an examination of Political Trust, related to Social Trust but more focused. The discussion in this area shares an operationalized or individualized definition of Political Trust. It also highlights some of the empirical research in the 'Trust' arena.

In the end, we come to this; gerrymandering is 'legal' corruption. Corruption destroys social trust. Social trust is the bedrock of democratic governance. Ergo, gerrymandering is a threat to democratic institutions.

With a firm idea of where this thesis leads, the journey begins on the following pages…

Definitions

For the purposes of this thesis, some standard definitions for terms need to be established.

Districting

Districting is the process for drawing the geographical lines that will define legislative districts.

Apportionment

Apportionment refers to the distribution of legislative seats among established geographical units, i.e., counties, towns. For the United States House of Representatives, we generally use first past the post elections for single-member districts, defined by their population size determined in the decennial census.

Malapportionment

If apportionment refers to the 'correct' distribution of seats; therefore, malapportionment refers to the distribution of seats in an abnormal manner. A manner not in keeping with the conventional method of distribution. Malapportionment may carry a negative context for some. However, it is not always used for ill intent. Sometimes, as in the case of racial apportionment, it is used to accomplish goals of more equal representation. It is sometimes used interchangeably with 'gerrymandering.'

Gerrymandering

To define gerrymandering simply is to say it is a synonym for redistricting or redefining congressional districts. The term 'gerrymandering' more specifically

implies a redistricting effort that is outside the norm or, in some way, creates a bias in the political process. This type of redistricting has two uses. The more acceptable one is when it is used to address past inequity in the electoral process. In the past, it has been used to create 'majority-minority' districts ensure the election of representatives from previously suppressed groups. African American communities have specifically been the targets of these past efforts. These gerrymanders are typically referred to as 'racial gerrymandering.' The less acceptable (to some) use, is to create a bias that helps a specific political party — referred to as 'partisan gerrymandering,' or more recently 'extreme partisan gerrymandering.'

In accomplishing a gerrymander there are two basic techniques, packing and cracking:[12]

Packing is used to combine a population that tends to vote in a certain way, or that has a shared demographic factor into a single district. This allows them representation, but it also removes their influence from surrounding districts. Packing is often used to turn these districts into 'safer' seats for the politicians. If done 'correctly,' packing can have the effect of both ensuring

[12] Friedman, John N. and Richard T. Holden. 2008. "Optimal Gerrymandering: Sometimes Pack, but Never Crack." *American Economic Review* 98 (1): 113-144. doi://www.aeaweb.org/aer/. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=0954665&site=ehost-live&scope=site http://dx.doi.org/10.1257/aer.98.1.113 http://www.aeaweb.org/aer/.

representation for a group and limiting the political power of their representative when they start working.

Cracking is the reverse of packing; populations are broken into separate districts, thus diluting their ability to elect a preferred representative. Using the cracking method can create districts that appear more competitive but are actually very safe seats. If the percentage by which a seat is won is narrowed, it can give this appearance without actually endangering the position from a partisan perspective. Other techniques that have been developed recently, especially through the use of computers, are still versions of the two methods above with additional techniques applied.

Corruption

What is 'corruption'? In the political arena, corruption is the use of political power or access for partisan gain. The type of corruption that is the focus of this paper is cheating in elections. Gerrymandering is cheating in elections. It is institutional or legalized corruption. Corruption does not have to be illegal per se to harm the polity. It need only present the appearance of impropriety.[13] There are many 'legal' practices that citizens will find distasteful; however, corruption (gerrymandering here) is a particular case in that it undermines the primary political institutions necessary in our republic.

[13] Hellman, Deborah. 2012. "Defining Corruption and Constitutionalizing Democracy." *Michigan Law Review* 111 (2012) (/03/13). https://papers.ssrn.com/abstract=2021188.

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Chapter One: A History of Gerrymandering

Introduction

In late July 1787, the Constitutional Convention delegated the responsibility for drafting their determinations on the structure of the new government to the Committee of Detail.[14] This committee's work was integral in determining the shape of the country and its political structure. One of the many vital determinations of policy agency established was that given to the Congress to "…determine the voter qualifications, districts, and times of elections to the U.S. House of Representatives."[15] Giving the House the power to govern elections for its members was one of the most consequential decisions made. Its effects echo through the years and recently have occupied a significant amount of attention as the nation grapples with gerrymandering. This decision represents a particularly 'sticky' bit of policy agency. Before examining the history of gerrymandering, the thesis reviews the current ideas in the literature.

A Review of the Literature

The first concept in the review is corruption. The paper looks at this because of the centrality of corruption and its impact on this thesis. After corruption, the review considers three recurring general issues found in both the litigation and the literature that impact both the judicial and legislative

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[14] Robertson, David Brian. *The Constitution and America's Destiny*. Cambridge, UK: New York, 2005. http://www.loc.gov/catdir/toc/ecip055/2004029683.html.
[15] Ibid.

involvement in districting.[16] The first is Federalism, or ensuring the national government is not intruding on state prerogatives. Second, Separation of Powers, how should the courts be involved, or not? And, finally, partisan gerrymandering: 'is it constitutional?', 'is it legal?', and 'is it fair?'. In closing, the review looks at literature on gerrymandering. The literature is grouped into three areas of consideration: 'gerrymandering is a threat?', 'it is not a threat?', & work that seeks to measure gerrymandering, asking 'if it has an effect at all?', or 'what is its effect?'.

Corruption

Corruption is a dangerous phenomenon. Gerrymandering is a form of corruption, and thus a review of it is pertinent. In looking at corruption in American government, the research finds that there is a cornucopia of literature. Most of it uses a variation the three definitions provided by Welch & Perry: A) "A political act becomes "corrupt" if it violates some system of civic or public order.", B) "…commission of an illegal act, an act that violates the formal standards of a public role for private gain.", C) "a political act is corrupt when the weight of public opinion determines it so…".[17] Corruption has been part of politics for as

[16] Clarke, Bruce, Robert Timothy Reagan, and Federal Judicial Center. 2002. *Redistricting Litigation*. Washington, D.C.: Federal Judicial Center. Pp. 6

[17] Welch, Susan and John G. Peters. 1977. "Attitudes of Us State Legislators Toward Political Corruption: Some Preliminary Findings." *Legislative Studies Quarterly* 2 (4): 445. http://search.ebscohost.com/login.aspx?direct=true&db=ijh&AN=28.2313&site=ehost-live&scope=site.

long as there have been. Fraud was noted in the California State census of 1852.[18] Summers presents a striking portrait of Gilded Age political corruption run amok.[19] Our concept of corruption has changed, however. What was once acceptable, for example helping one's family, is now the subject of laws to prevent it. Nor is the question settled; the *Citizens United v. FEC* decision "…substantially cut back on the power Congress has to regulate in campaign finance…" a traditional suspect in the discussion of political corruption.[20] Others go further still, asserting that the focus on illegal activities "…fails to account for much of what the public *thinks* is corrupt."[21] Which is where the focus of this thesis is on gerrymandering. An activity that, while legal, is perceived as corrupt.

Corruption is not limited to the government; unions are rife with it; corporations are often caught acting in a corrupt manner.[22] Even sitting

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[18] Wood, Warren C. 2018. "Fraud and the California State Census of 1852: Power and Demographic Distortion in Gold Rush California." *Southern California Quarterly* 100 (1): 5. doi:10.1525/scq.2018.100.1.5. http://search.ebscohost.com/login.aspx?direct=true&db=ahl&AN=128021737&site=ehost-live&scope=site.

[19] Summers, Mark W. 2004. *Party Games: Getting, Keeping, and using Power in Gilded Age Politics*. Chapel Hill: University of North Carolina Press.

[20] Gerken, Heather K. 2015. "The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties." *Proceedings of the American Philosophical Society* 159 (1): 5. http://search.ebscohost.com/login.aspx?direct=true&db=i3h&AN=112957508&site=ehost-live&scope=site.

[21] McCann, James A. and David P. Redlawsk. 2006. "As Voters Head to the Polls, Will they Perceive a "Culture of Corruption?"." *PS: Political Science & Politics* 39 (4) (Oct): 797-802. doi:10.1017/S1049096506060963.

[22] Thieblot, A. J. 2006. "Perspectives on Union Corruption: Lessons from the Databases." *Journal of Labor Research* 27 (4): 513-536. http://search.ebscohost.com/login.aspx?direct=true&db=s3h&AN=23107802&site=ehost-live&scope=site.

legislators have written about corruptions' prevalence within their workplaces.[23] Teachout asserts that the Framers were "obsessed" with corruption.[24] Because of this obsession, the Framers made the 'fight against corruption a central part of the United States Constitution.'[25] Other scholars add to this argument asserting the fiduciary nature of governments, relying extensively on Locke for justification.[26] Still, others broaden this view proclaiming a norm of impartiality and against partisanship, taking very expansive views on governmental duty and its impact on corruption.[27] Some are wary of these extended arguments, though, reminding that constituent service is an essential and legitimate function of political office.[28] Some counter the assertion of obsession, arguing that it goes too far and is just wrong in some instances.[29] In defining the reach of an anti-corruption principle (if it exists), these scholars posit that 'its scope is modest: it

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[23] "Crooks in the Legislature, by a State Senator." *American Mercury* 41 (1937), 269. http://search.ebscohost.com/login.aspx?direct=true&db=rgr&AN=522381178&site=ehost-live&scope=site.

[24] Teachout, Zephyr. 2009. "The Anti-Corruption Principle." *Cornell Law Review* 94 (341) (/03/04): 341-413. https://papers.ssrn.com/abstract=1353203. Pp. 348 & 352

[25] Ibid Pp. 347

[26] Bauries, Scott R. 1. 2012. "The Education Duty." *Wake Forest Law Review* 47 (4): 705-768. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=84577009&site=ehost-live&scope=site.

[27] Kang, Michael S. 2017. "Gerrymandering and the Constitutional Norm Against Government Partisanship." *Michigan Law Review* 116 (3): 351. http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=126540649&site=ehost-live&scope=site. Pp. 353

[28] Bone, Joshua. 2014. "Stop Ignoring Pork and Potholes: Election Law and Constituent Service." *Yale Law Journal* 123 (5): 1406. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1437745&site=ehost-live&scope=site.

[29] Tillman, Seth Barrett. 2012. "Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle." *Northwestern University Law Review* 107 (1): 399-421. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=88272439&site=ehost-live&scope=site. Pp. 399

does not reach the whole gamut of federal and state government positions; instead, it is limited to federal appointed offices.'[30] Other critics of "The Anti-Corruption Principle," go further, construing the argument to say "…under the anti-corruption principle a private citizen may not petition the government for redress of grievances…"[31] This argument is a bit hyperbolic but is in line with the idea that such an overriding concept requires thorough dissection. Interestingly critics of the "The Anti-Corruption Principle" fail to address the underlying supports for it.

Corruption is a thorny issue for all; the SCOTUS has also struggled with it.[32] It takes more than a mere exchange of money for a favor to qualify as 'corruption.'[33] Corruption is also a concern outside the United States with "…the frustration shared by practitioners and scholars alike at the apparent lack of success in controlling corruption worldwide."[34] Often we see attempts to deal

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[30] Ibid.
[31] Redish, Martin H. and Elana Nightingale Dawson. 2012. "Worse than the Disease: The Anti-Corruption Principle, Free Expression, and the Democratic Process." William & Mary Bill of Rights Journal 20 (4): 1053. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=76315435&site=ehost-live&scope=site.
[32] Capita, Katherine and Michael Crites. 2018. ""Tawdry Tales of Ferraris, Rolexes, and Ball Gowns:" How Mcdonnell V. U.S. Redefined "Official Acts" in Public Corruption Prosecution." *Widener Law Journal* 27 (1): 125-153. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=128076290&site=ehost-live&scope=site.
[33] Ibid. Pp 150.
[34] Claudia Baez-Camargo and Alena Ledeneva. 2017. "Where does Informality Stop and Corruption Begin? Informal Governance and the Public/Private Crossover in Mexico, Russia and Tanzania." *The Slavonic and East European Review* 95 (1): 49. doi:10.5699/slaveasteurorev2.95.1.0049.

with *perceived* corruption in the passage of laws to criminalize lack of compliance with established norms.[35]

Political scientists are working hard in the effort to measure corruption empirically and its impact. The work showing the difference between anti-corruption law and implementation of said law is noteworthy as a measure of tolerance of corruption. Often work on an international scale mirrors the efforts to study corruption in the United States.[36] A widely accepted measure is using the prosecution of corruption as an indicator of the level of corruption, generally. This measure was first asserted in 1992 and has been updated since then.[37] The scholars use prosecution of public officials for corruption to measure government corruption at the state and, by extension, the national level.[38] The use of prosecutions as a measure for corruption has found wide application. One scholar used it to examine the relationship between corruption and state-level environmental programs.[39] Others combine it with wage data to consider the

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[35] Dance, Scott. "Maryland Senate Passes Bill Requiring Presidential Candidates to Release Tax Returns." *baltimoresun.com*., last modified March 5, accessed Apr 22, 2018, http://www.baltimoresun.com/news/maryland/politics/bs-md-president-tax-returns-20180305-story.html.
[36] *Supra* note 34. Pp. 51
[37] Meier, Kenneth J. and Thomas M. Holbrook. ""I seen My Opportunities and I Took 'Em:" Political Corruption in the American States." The Journal of Politics 54, no. 1 (1992): 135-155. doi:10.2307/2131647. http://www.jstor.org/stable/2131647.; Schlesinger, Thomas and Kenneth J. Meier. 2002. "Ch 33 - Variations in Corruption among the American States." In *Political Corruption: Concepts and Contexts*, edited by Michael Johnston and Arnold Heidenheimer, 627-644. New Brunswick, N.J.: Transaction Publishers
[38] Ibid.
[39] Woods, Neal D. 2008. "The Policy Consequences of Political Corruption: Evidence from State Environmental Programs." *Social Science Quarterly* 89 (1): 258-271. doi://onlinelibrary.wiley.com/journal/10.1111/%28ISSN%291540-6237/issues.

impact of resources on the prosecution of corruption cases.[40] Still, others use the prosecutions measure to investigate many different areas: alcohol taxation rates and traffic fatalities, campaign contributions in light of prosecutions, corruption's impact on state spending and resource allocation, expansion of government debt, and its correlation to corruption.[41] Mickael & Pickering use prosecutions and prosecutorial resources to find that polarization increases accountability.[42] Their findings are interesting in light of the work Meir et al., showing a lack of targeting or strategic prosecutions.[43] Escresa expands it to international usage and refines it to focus on bribery prosecutions as the current ways of measuring corruption

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http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=0964907&site=ehost-live&scope=site http://onlinelibrary.wiley.com/journal/10.1111/%28ISSN%291540-6237/issues.

[40] Alt, James E. and David Dreyer Lassen. 2014. "Enforcement and Public Corruption: Evidence from the American States." *Journal of Law, Economics & Organization* 30 (2): 306. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1448076&site=ehost-live&scope=site.

[41] Fredriksson, Per G., Stephan Gohmann, and Khawaja Mamun. 2009. "Taxing Under the Influence? Corruption and U.S. State Beer Taxes." *Public Finance Review* 37 (3): 339. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1059312&site=ehost-live&scope=site.; Gokcekus, Omer and Sertac Sonan. 2017. "Political Contributions and Corruption in the United States." *Journal of Economic Policy Reform* 20 (4): 360-372. doi://www.tandfonline.com/loi/gpre20. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1691619&site=ehost-live&scope=site http://www.tandfonline.com/loi/gpre20.; Liu, Cheol and John L. Mikesell. 2014. "The Impact of Public Officials' Corruption on the Size and Allocation of U.S. State Spending." *Public Administration Review* 74 (3): 346. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1448651&site=ehost-live&scope=site.; Liu, Cheol, Tima T. Moldogaziev, and John L. Mikesell. 2017. "Corruption and State and Local Government Debt Expansion." *Public Administration Review* 77 (5): 681. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1686757&site=ehost-live&scope=site.

[42] Melki, Mickael and Andrew Pickering. 2018. *NICEP Working Paper: 2018-02 Polarization and Corruption in America*. School of Politics, The University of Nottingham, Law & Social Sciences Building, University Park, Nottingham, NG7 2RD: Nottingham Interdisciplinary Centre for Economic and Political Research.

[43] Schlesinger, Thomas and Kenneth J. Meier. 2002. "Ch 33 - Variations in Corruption among the American States." In *Political Corruption: Concepts and Contexts*, edited by Michael Johnston and Arnold Heidenheimer, 627-644. New Brunswick, N.J.: Transaction Publishers.

have well-known weaknesses.[44] Those weaknesses, reliance on surveys of those experiencing corruption and peoples' perception of it, give cause to question their validity.[45] Others go further and disaggregate those accused and those convicted of corruption.[46]

As popular as using the prosecution numbers for measuring corruption has become, some have been unable to fully replicate the work using other data sets. For example, Maxwell & Winters tried to replicate the results using data from a later period and were not able to find the same results.[47] They offered an alternative method, discussed in a note at the end of the paper.[48]

Federalism

Federalism is a tricky issue in addressing gerrymandering. "States' rights proponents have called for a "new federalism" for at least the past 30 years in

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[44] Escresa, Laarni and Lucio Picci. 2017. "A New Cross-National Measure of Corruption." *World Bank Economic Review* 31 (1) (Feb): 196-219. doi:10.1093/wber/lhv031. http://elibrary.worldbank.org/doi/10.1093/wber/lhv031.

[45] Ibid Pp 196-197.

[46] Goel, Rajeev K. 2014. "PACking a Punch: Political Action Committees and Corruption." *Applied Economics* 46 (10-12): 1161. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1433584&site=ehost-live&scope=site.

[47] Winters, Richard F. and Amanda E. Maxwell. 2004. "A Quarter-Century of (Data on) Corruption in the American States." *Conference Papers -- Midwestern Political Science Association*: 1. doi: mpsa_proceeding_24374.pdf. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=16055277&site=ehost-live&scope=site.

[48] In an email conversation with Dr. Winters he did not recall the FOIA request they mention in note 20 on page 16, stating 'I don't even remember the FOIA request that you reference. Something about it, I guess, may have appeared in an early draft of the paper…" Additionally, he provided an updated paper with no reference to the FOIA request. This updated paper is available upon request. He concurred with my assessment as to the popularity of using prosecution data as a case of possibly, in his words, "an available hammer."

their effort to reverse what they see as an unhealthy shift of policy-making authority from the states to the federal government."[49] The assertion of Congressional power in this area via Article 1, Section 4 of the Constitution, would create significant opposition from voters. Several scholars note that precedent from *Chapman v. Meir* establishes districting is the responsibility of the States, and the courts should only act when the States violate the Constitution.[50] One scholar asserts that the SCOTUS (Supreme Court of the United States) has overstepped its bounds in specific areas …

> …the ninth and tenth amendments to the United States Constitution, wherein the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others, retained by the people, and the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.[51]

In so doing, they have damaged Federalism. There is some merit to this argument. However, one must also consider that Congress and States have failed to act in addressing gerrymandering. Thus, there could be a role for the Court acting to protect the polity. Federalism is connected to the concept of separation

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[49] Shaw, Greg M. and Stephanie L. Reinhart. 2001. "The Polls-Trends Devolution and Confidence in Government." *Public Opinion Quarterly* 65 (3): 369-388. http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=5517047&site=ehost-live&scope=site.

[50] Clarke, Bruce, Robert Timothy Reagan, and Federal Judicial Center. 2002. *Redistricting Litigation*. Washington, D.C.: Federal Judicial Center.

[51] Caruso, Lawrence R. 1969. "The Rocky Road from Colegrove to Wesberry; Or, You can'T Get there from Here." *Tennessee Law Review* 36 (4) (1968-): 621-705. https://heinonline.org/HOL/P?h=hein.journals/tenn36&i=635. Pp. 705

of powers in that they federalism, as the United States practices it, requires that each branch of government respect the prerogatives of the others to maintain the balance between them.

Separation of Powers

The issue of Separation of Powers in gerrymandering is no less fraught than federalism. How much should the courts intervene? Should they even be allowed to intercede? The SCOTUS has more consistently avoided ruling on gerrymandering issues than it has produced judgments. As one scholar asks in 1962, "Do the constitutional grants of power to Congress over congressional elections support an inference that the judiciary is excluded from dealing with inequitable districting for the same elections?"[52] The question of inference seems to have been settled in *Baker* and later SCOTUS cases in favor of the court having a role. There are still concerns in the SCOTUS over the judiciary's involvement. Another later argues, "…legislative powers and the judicial power, respectively, are separately and distinctly defined, with no hint that the courts may act in an area exclusively reserved for Congress if the Court thinks Congress has acted unwisely or if it has chosen not to act."[53] Another area of contention noted is that

[52] Black, Charles L. 1963. "Inequities in Districting for Congress: Baker V. Carr and Colegrove V. Green Symposium: Baker V. Carr." *Yale Law Journal* 72 (1) (1962-): 13-22. https://heinonline.org/HOL/P?h=hein.journals/ylr72&i=45. Pp. 21

[53] Caruso, Lawrence R. 1969. "The Rocky Road from Colegrove to Wesberry; Or, You can'T Get there from Here." *Tennessee Law Review* 36 (4) (1968-): 621-705. https://heinonline.org/HOL/P?h=hein.journals/tenn36&i=635. Pp. 705

"…a broad legislative privilege protects the legislative process from harmful intrusions by the other branches of government."[54] Concluding…

> Federal Speech or Debate Clause precedent grasps the importance of the separation of powers and legislative efficiency to the legislative process by applying an absolute legislative privilege in nearly all cases.[55]

There are several who would note that 'districts that are commission and court-drawn experience more competition on average than those drawn by legislatures.'[56] Is more competition desirable? Do districts drawn with partisanship as the first consideration create better representation? These are just some of the questions raised; they are beyond the scope of this inquiry.

Threat and Measurement

Referring to other categorizations of the literature, it is time to consider the authors in the threat-effect/no threat-effect categories. Among those that view gerrymandering as a threat, gerrymandering as an undermining influence on the American system, they often refer to times of strife and extreme polarization in their work. For example, there are those that argue that the SCOTUS must act to address it in these "cynical times."[57] They are not alone;

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[54] Lamberson, J. P. 2017. "Drawing the Line on Legislative Privilege: Interpreting State Speech Or Debate Clauses in Redistricting Litigation." *Washington University Law Review* 95 (1): 203-225. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=124674180&site=ehost-live&scope=site. Pp. 206

[55] Ibid Pp. 224

[56] Carson, Jamie L., Michael H. Crespin, and Ryan D. Williamson. 2014. "Reevaluating the Effects of Redistricting on Electoral Competition, 1972–2012." *State Politics & Policy Quarterly* 14 (2): 165-177. http://www.jstor.org/stable/24711102. Pp. 165

[57] Ibid Pp. 351

others assert that the courts focus on adjudicating personal/individual rights cases serves to harm these areas by failing to rule in questions that focus on government structure and harm to the polity.[58] Of note is evidence that one of the effects of racial gerrymandering could be *less* substantive representation.[59] That is to say that the communities, the gerrymander was intended to help may suffer because of it. Racial gerrymandering is mentioned here because many have indicated it is hard to differentiate the two. After all, many groups, from immigrants to other minorities, have been shown to vote primarily for Democratic candidates. On the other side of the argument, we find those that say gerrymandering does not matter. Engstrom notes in the conclusion to his definitive work on gerrymandering in American history:

> But political science and history have underestimated the importance of gerrymandering in shaping the dynamics of American party history. Districting determined who held political power in the Congress and fundamentally altered the course of public policy.[60]

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[58] Issacharoff, Samuel and Pamela S. Karlan. 2004. "Where to Draw the Line?: Judicial Review of Political Gerrymanders." *University of Pennsylvania Law Review* 153 (1): 541. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=502560426&site=ehost-live&scope=site.

[59] Epstein, David, Michael C. Herron, Sharyn O'Halloran, and David Park. 2007. "Estimating the Effect of Redistricting on Minority Substantive Representation." Journal of Law, Economics, and Organization 23 (2): 499-518. doi://academic.oup.com/jleo/issue. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=0924008&site=ehost-live&scope=site https://academic.oup.com/jleo/issue.

[60] Engstrom, Erik J. 2013. *Partisan Gerrymandering and the Construction of American Democracy*. Legislative Politics & Policy Making. Ann Arbor: The University of Michigan Press. Pp 206.

In concluding the review of scholarship on gerrymandering, we come to work that attempts to measure gerrymandering, its effect, and how to correct it. Scholarship in this area serves to encourage efforts to address gerrymandering; it is pernicious and difficult to engage. Compactness has been a consistent measure for evaluating gerrymanders.[61] An additional option proposed is using a computer simulation to establish a baseline for assessing a gerrymanders' effect on the composition of the House.[62] This baseline is useful, generally, but along with others, the focus is on measuring impacts at the national level where corruption is more difficult to discover.[63] Scholars take different positions on the subject but still do not address the central concern of the subject of this thesis, the impact of the effects of gerrymandering on public trust. McGhee proposes an

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[61] Fan, Chao, Wenwen Li, Levi J. Wolf, and Soe W. Myint. 2015. "A Spatiotemporal Compactness Pattern Analysis of Congressional Districts to Assess Partisan Gerrymandering: A Case Study with California and North Carolina." *Annals of the Association of American Geographers* 105 (4): 736. doi:10.1080/00045608.2015.1039109. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=108443288&site=ehost-live&scope=site.

[62] Jowei Chen and David Cottrell, "Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House," *Electoral Studies* 44 (2016), 329. doi:10.1016/j.electstud.2016.06.014. http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=119847991&site=ehost-live&scope=site. http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=121342245&site=ehost-live&scope=site.

[63] Best, Robin E., Shawn J. Donahue, Jonathan Krasno, Daniel B. Magleby, and Michael D. McDonald. 2018a. "Authors' Response– Values and Validations: Proper Criteria for Comparing Standards for Packing Gerrymanders." *Election Law Journal: Rules, Politics, and Policy* 17 (1): 82-84. doi:10.1089/elj.2017.0471. https://doi.org/10.1089/elj.2017.0471.; Best, Robin E., Shawn J. Donahue, Jonathan Krasno, Daniel B. Magleby, and Michael D. McDonald. 2018b. "Considering the Prospects for Establishing a Packing Gerrymandering Standard." *Election Law Journal* 17 (1): 1. doi:10.1089/elj.2016.0392.; http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=128694788&site=ehost-live&scope=site.; McGhee, Eric. 2018. "Rejoinder to "Considering the Prospects for Establishing a Packing Gerrymandering Standard"." *Election Law Journal: Rules, Politics, and Policy* 17 (1): 73-82. doi:10.1089/elj.2017.0461. https://doi.org/10.1089/elj.2017.0461.

alternative to symmetry and responsiveness.[64] Others vigorously defend Symmetry as a better measure.[65] 'Symmetry' is where parties receive the same number of seats as each other, given they also have equal vote share.[66] 'Responsiveness' measures how many seats incumbents lose elections when measured against changes in the total vote.[67] Later, McGhee and Stephanopoulos further develop the 'Efficiency Gap' method of measuring gerrymanders.[68] This measure briefly found some success, being accepted by the SCOTUS in *Whitford v. Gill*.[69] Ostrow presents us with several approaches addressing apportionment by changing the way we conduct elections.[70] There are attempts to employ weighted voting, proportional representation, and others, and there is significant interest in them. However, they are not within the scope of this paper.

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[64] McGhee, Eric. 2014. "Measuring Partisan Bias in Single-Member District Electoral Systems." *Legislative Studies Quarterly* 39 (1): 55-85. doi:10.1111/lsq.12033. https://doi-org.proxy1.library.jhu.edu/10.1111/lsq.12033. Pp. 55

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Stephanopoulos, Nicholas O. and Eric M. McGhee. 2015. "Partisan Gerrymandering and the Efficiency Gap." *The University of Chicago Law Review* 82 (2): 831-900. http://www.jstor.org/stable/43410706.

[69] "The Politics of Gerrymandering: Overview of Supreme Court Precedent." 2017. *Supreme Court Debates* 20 (8): 5. http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=126538266&site=ehost-live&scope=site.; *Whitford v. Gill* was rejected for lack of standing, but the Court acknowledged the possible value of the 'Efficiency Gap' measure in the opinion. As discussed in Ch. 2, the measure was dismissed in later cases.

[70] Ostrow, Ashira Pelman. 2018. "The Next Reapportionment Revolution." *Indiana Law Journal* 93 (4): 1033-1072. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=135737756&site=ehost-live&scope=site.

Partisan Gerrymandering

Finally, the recurring issue of partisan gerrymandering is at the heart of this paper. Debates range across the moral and legal spectrum. In *Vieth v. Jubelirer,* the SCOTUS declares that 'excessive' partisanship is not permissible, and must explain what that means so that others might develop a reasonable test to expose it.[71] Some object to partisan gerrymandering but find that the reasons for addressing it must be grounded more firmly in Constitutional ideals rather than addressing competition concerns or reducing polarization.[72] At the same time, partisan gerrymandering "…implicates First Amendment rights because 'political belief and association constitute the core of those activities protected by the First Amendment."[73] Proponents of this view note Justice Kennedy's mention of it when concurring in *Vieth v. Jubelirer*.[74] Kang is especially assertive on this point,

> First Amendment case law about government speech and patronage most clearly announces the principle against government partisanship, but the norm permeates constitutional law under many different rubrics, including

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[71] Berman, Mitchell N. 2005. "Managing Gerrymandering." *Texas Law Review* 83 (3): 781. http://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=16191181&site=ehost-live&scope=site. Pp. 854

[72] Kennedy, Sheila Suess. 2017. "Electoral Integrity: How Gerrymandering Matters." *Public Integrity* 19 (3): 265-273. doi:10.1080/10999922.2016.1225480. https://doi.org/10.1080/10999922.2016.1225480.

[73] Bondurant II, Emmet J. and Ben W. Thorpe. 2018. "The First Amendment Case Against Partisan Gerrymandering." *Georgia Law Review* 52 (4): 1039. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=133873875&site=ehost-live&scope=site.

[74] Colton, Robert. 2017. "Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering." *Fordham Law Review* 86 (3): 1303. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=126603098&site=ehost-live&scope=site. Pp. 1355

> equal protection case law addressing other elements of redistricting and election administration.[75]

He goes further in the application, citing Justice Stevens, of First Amendment protections as noted above, arguing for a principle against partisanship. This view is based on Locke's view of government as a 'fiduciary.'[76] This view of fiduciary duty was noted and expanded dramatically by Zephyr Teachout in the paper "The Anti-Corruption Principle."[77] Others support this view in the issue of gerrymandering, saying, "…lack of any consensus as to when a normal or acceptable level of political motivation, *assuming there is such a thing*, shades into an extreme or objectionable level." (emphasis added)[78] Conversely, some argue that gerrymandering produces a 'preferred' legislature, from the viewpoint of voters.[79]

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[75] Kang, Michael S. 2017. "Gerrymandering and the Constitutional Norm Against Government Partisanship." *Michigan Law Review* 116 (3): 351. http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=126540649&site=ehost-live&scope=site. Pp. 353

[76] Locke, John. *Concerning Civil Government, Second Essay*. Raleigh, N.C.: Alex Catalogue. http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&AN=1085945. Pp. 68 & 70

[77] Teachout, Zephyr. 2009. "The Anti-Corruption Principle." *Cornell Law Review* 94 (341) (/03/04): 341-413. https://papers.ssrn.com/abstract=1353203.

[78] Olson, Walter. 2017. "The Ghost Ship of Gerrymandering Law." *Cato Supreme Court Review*: 59. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=132376899&site=ehost-live&scope=site.

[79] Chill, C. D. 2017. "Political Gerrymandering: Was Elbridge Gerry Right?" *Touro Law Review* 33 (3): 795. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=132554481&site=ehost-live&scope=site. Pp. 796

With an understanding of the concepts represented in the literature, the next step is to examine the three eras of judicial thought on gerrymandering.

The Era of Silence[80]

Cases Considered:

Case	Impact	Year
Marbury v. Madison	Established the precedent regarding 'political questions'	1803
Colegrove v. Green	Reinforces the political question doctrine	1946

In 1812 Elbridge Gerry found himself criticized by the Boston Globe for his 'Gerrymandered' set of congressional districts. Mr. Gerry had drawn districts in, particularly strange shapes to achieve partisan advantage in the legislature. This was not the first time such a strange creature had visited the new nation, but it was the first time the public took real notice.[81] Mr. Gerry's map was the first

[80] At the start of this portion of my thesis, I must acknowledge the work of Dr. Erik J. Engstrom more prominently. His book "*Partisan Gerrymandering and the Construction of American Democracy"* was central to my understanding of the role gerrymandering has played in American history. For a definitive treatment of the subject, I cannot recommend this book highly enough. Additionally, the analysis of apportionment litigation through 1964 by Pierson & Capp in 'Wesberry v. Sanders: Deep in the Thicket Notes' is masterful and worthy of your attention.

[81] Hunter, Thomas Rogers. 2011. "The First Gerrymander?" *Early American Studies*, an Interdisciplinary Journal 9 (3): 781. http://search.ebscohost.com/login.aspx?direct=true&db=ofm&AN=63800144&site=ehost-live&scope=site.; Engstrom, Erik J. 2013. *Partisan Gerrymandering and the Construction of American Democracy*. Legislative Politics & Policy Making. Ann Arbor: The University of Michigan Press; It is of note that in modern usage we have forgotten that a 'salamander' in the

partisan malapportionment that had generated significant editorial interest, and thus the name of the practice comes from Mr. Gerry.

This Era runs from the founding of our nation until approximately 1960. The issue at hand for this era is the high degree of deference given to the Marshall precedents and the prevailing interpretations of them. This era also considers *Colgrove v. Green* to illustrate how the deference to Justice Marshall and the precedents set in *Marbury* endured.

Fig. 1 – Original Gerrymandering Illustration

[82]

The Boston Globe article with its, now famous, illustration of the monster, is the first documented protest directed at a partisan redistricting scheme found.

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context of 1812 was a fire-breathing elemental animal or what we would refer to as a 'dragon'. Thus, references to an amphibian creature that are used today are in error and do not communicate the intent in the original criticism of gerrymanders.

[82] By Staff of Boston Gazette - Boston Gazette, 26 March 1812, Public Domain, https://commons.wikimedia.org/w/index.php?curid=2242335

However, it was not the first time politicians had availed themselves of this tool. There were accusations of similar efforts by other politicians, but none that attracted the same level of attention. Some wished to attribute the first to Patrick Henry, but though there might have been examples of partisan gerrymandering as far back as 1788, the studies were not conclusive.[83] Corruption was much in evidence in redistricting; the gerrymander as just one tool used by politicians to ensure their continued partisan dominance.[84] When looked at in the context of the times, this kind of activity blends in with the norms of the age. Contemporaries may have accepted gerrymandering, but that does not mean they approved of it, as illustrated by the criticisms of Patrick Henry and the article in the Boston Globe. The spoils or patronage system made for material motivations in maintaining partisan loyalty and dominance. Gerrymandering was an effective tool to accomplish this and was not uncommon. Likewise, redistricting was also quite common. Figure 2, below, from Dr. Engstrom's *Partisan Gerrymandering and the Construction of American Democracy,* illustrates this point rather well. The pace of redistricting slows after 1900, down to the current era, where we usually see it happen after the decennial census.[85] One should also note that the percentage of states redistricting after a census surges even as the pace slows.

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[83] *Supra* note 81.
[84] Summers, Mark W. *Party Games : Getting, Keeping, and using Power in Gilded Age Politics*, 352. Ch 8.
[85] Engstrom, Erik J. *Partisan Gerrymandering and the Construction of American Democracy*. *Legislative Politics & Policy Making*. Ann Arbor: The University of Michigan Press, 2013.; Some might be curious as to why the rate of redistricting changed? The motivations outlined by Dr.

Fig. 2 Yearly percentage of stats redistricting 1790 – 2010

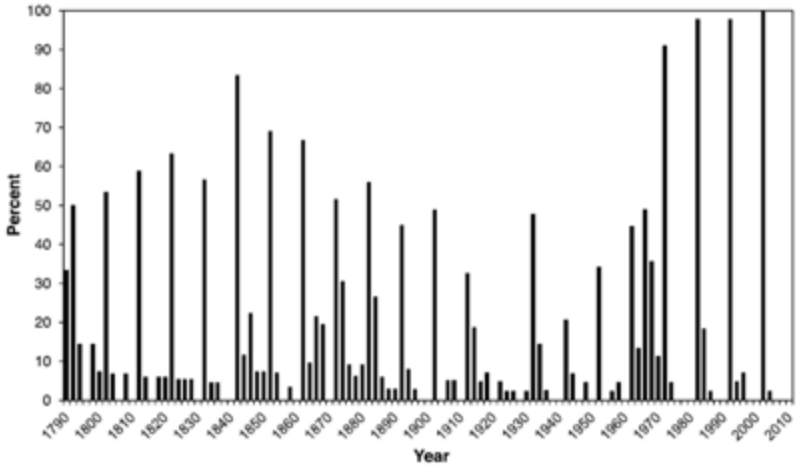

Fig. 4.1. The percentage of states redistricting, 1790–2010. States with only one congressional seat were excluded. (Data compiled by the author from information in Martis 1982.)

The voters and newspapers of the time were often vocal in their displeasure about the corruption they saw but were unable to translate that into policy until the Pendleton Act of 1883. This act was passed to dismantle the patronage and spoils system in the civil service due to public pressure and disgust with the corruption they saw in their government.[86] This legislation was the most significant action of the time to reign in corruption. Though the change was slow in arriving, the professionalization of the government had begun. Partisans took pains to avoid the courts' involvement, even though the courts declined to act

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Engstrom indicate that the motivator was party competition. Thus, decreases in redistricting was party competition indicate lower levels of competitiveness at the state level.

[86] Theriault, S. M. "Patronage, the Pendleton Act, and the Power of the People." *Journal of Politics* 65, no. 1 (2003): 50-68. doi:10.1111/1468-2508.t01-1-00003. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=8954801&site=ehost-live&scope=site.

until the 1890s (they desired to dodge protracted fights), where the court might invalidate their carefully laid plans.[87] Even when a case went before them, the courts were unlikely to take action except for in the most extreme circumstances.[88] The courts based their inaction on the idea that redistricting is a 'political' question.

The 'Political Question Doctrine' was established by Chief Justice Marshall in *Marbury v. Madison*. Marshall wrote that "Questions, in their nature ***political*** or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court."[89] (emphasis added). Apportionment seemed a natural extension to the power granted to Congress in Article 1 of the Constitution. Congress is a political body; therefore, many of the questions associated with it might fall under this heading. This idea, though, seems to have been in error, and we are still trying to resolve it today.

The 'hands-off' stance of the courts may have contributed to the view of the government of the time as inept and corrupt. The spoils or patronage system was corruption writ large across the nation, and ineptitude was ignored in favor of political considerations.[90] The courts' refusal to act (expecting Congress to self-

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[87] Summers, Mark W. *Party Games : Getting, Keeping, and using Power in Gilded Age Politics*, 352. Though in the example case, the redistricting was found to be Constitutional, this type of fight was one they did not relish e.g. New York Supreme Court - "Kinney v. The City of Syracuse" Caselaw Access Project. Accessed July 27, 2019. https://cite.case.law/barb/30/349/
[88] Ibid, 352.
[89] "Marbury v. Madison." Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/5/137/#tab-opinion-1958607
[90] *Supra* note 84.

regulate?) was at best naïve. Given the greed shown before the drafting of the Articles of Confederation, one must question if there were not more cynical purposes at work during the Constitutional Convention or even in the courts. One glaring example was the scam orchestrated by Alexander Hamilton to buy 'Continentals' at below face value, trading on people's fears.[91] The view of ineptitude and corruption still reverberates through our nation today.[92] If added to the inborn suspicion of government that is part of our national character and one has a recipe for a government that must always prove its competence and integrity. Further discussion of this idea will occur in later portions of this paper, but the topic is worth an essay of its own.

As for corruption on its own, there is no hesitation on the part of the courts in addressing this issue. One of the earliest SCOTUS corruption cases was delivered in 1798. That case, though, is not focused on elections.[93]

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[91] Scaramella, Mark. "The Founding Scam." . Accessed Aug 18, 2019. https://www.counterpunch.org/2004/03/30/the-founding-scam/.

[92] These are just two of the plethora of reports opinion polls available discussing the declining opinion of Congress and the government in general: Rainie, Lee and Andrew Perrin. *Key Findings about Americans' Declining Trust in Government and each Other*, 2019. https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/.McCarthy, Justin. "Snapshot: U.S. Congressional Job Approval at 18%." *Gallup News Service* (2018): http://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=129473802&site=ehost-live&scope=site.

[93] "THE UNITED STATES V. WORRALL, 2 U.S. 384 (1798)." . Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/2/384/.

From 1790 through 1920, there were fourteen decennial (every ten years) censuses.[94] During that time, there were a host of apportionment acts and legislation passed that brought us to the 435 member House of Representatives that we have today. Incidentally, Congress only reapportioned seats in the House after thirteen of the censuses.[95] After the fourteenth census, the members of the House, it seems, were concerned for their jobs and knew the reapportionment would change and delayed action until 1927.[96]

Of the Apportionment Acts, there are three of note, the Acts of 1842, 1911, and 1929. The Apportionment Act of 1842 was notable in that it is the only time Congress has voted to reduce its membership.[97] More importantly, it created the 'single-member district' method of representation. While single-member districts have become the norm for the United States, there are other methods that we could employ. In recent years there have been several initiatives to consider alternatives. Proportional Representation and one of its engines, the Single Transferable Vote, are currently popular alternatives. Ranked Choice Voting and Approval Voting have also gained attention. Pursuing these methods will require local and state efforts, as Congress is unlikely to change the system that elected

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[94] "A Brief Chronology of Congressional Reapportionment." *Congressional Digest* 8, no. 2 (1929), 34. http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=12292333&site=ehost-live&scope=site.
[95] Ibid.
[96] Ibid.
[97] Robert E. Ross, "Recreating the House: The 1842 Apportionment Act and the Whig Party's Reconstruction of Representation," *Polity* 49, no. 3 (2017), 408-433. doi:10.1086/692123. https://doi.org/10.1086/692123.

them. The Apportionment Act of 1911 continued the requirements for districts to be geographically contiguous(this was the last Apportionment Act to require this), reintroduced the equal population requirement, and increased the membership of the house to 435.[98] The 1929 Apportionment Act was significant; it was named the 'Permanent Apportionment Act of 1929'. It permanently fixed the size of the House of Representatives at 435, with allowances for inter census periods when new states were recognized.[99]

While federal courts were reluctant to act on redistricting cases, state courts were more likely to take these cases.[100] In the SCOTUS, there was no notable action until *Colgrove v. Green* (1946). What of *Wood v. Broom* (1932)? Though this case was concerned with gerrymandering, it did not explore the full range of issues found in *Colgrove*. *Wood* reaffirmed the status of the districting in the state according to the Apportionment Act of 1911, but the Court did not accomplish the deep dive we see in the latter case.[101]

Colgrove v. Green reinforces judicial silence on gerrymandering, "Prior to the 1960s, court challenges to redistricting plans were considered non-justiciable

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[98] Eckman, Sarah J. *Apportionment and Redistricting Process for the U.S. House of Representatives* US Congressional Research Service, 2019. http://search.ebscohost.com/login.aspx?direct=true&db=tsh&AN=139928351&site=ehost-live&scope=site.
[99] Ibid.
[100] Johnny H. Killian and Library of Congress. Legislative Reference Service, *Apportionment Issue* (S.l: S.N., 1966), 15.
[101] "Wood v. Broom" Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/287/1/

political questions".[102] The 1960s is separated from the Era of Silence because of the dramatic change in the nation's political structure.

In 1946, the acceptance of corruption was waning; the bureaucracy had been professionalized; the average Americans' opinion of the government was at one of the highest points in history.[103] In *Colgrove v. Green*, the court '…felt bound by the earlier decision in *Wood v. Broom…*', however, it chose to discuss the stance of the court concerning apportionment and districting more generally. The Court reaffirmed equal population of districts, but also disposed of the consideration of compactness as a test of district validity. The court goes quite far, indeed here describing the limits of judicial action:

> To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts, because they clearly fall outside the conditions and purposes that circumscribe judicial action.[104]

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[102] L. P. Whitaker, "Congressional Redistricting Law: Background and Recent Court Rulings," *Congressional Research Service: Report* (2017), 1-20. http://search.ebscohost.com/login.aspx?direct=true&db=tsh&AN=122413500&site=ehost-live&scope=site.

[103] "BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT Trust in Government: 1958-2015." Pew Research Center. Accessed Aug 10, 2019. https://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/.; Vavreck, Lynn. "The Long Decline of Trust in Government, and Why that can be Patriotic." *The New York Times,* July 3, 2015. https://www.nytimes.com/2015/07/04/upshot/the-long-decline-of-trust-in-government-and-why-that-can-be-patriotic.htm

[104] "Colgrove v. Green" Justia. Accessed July 8, 2019. https://supreme.justia.com/cases/federal/us/328/549/#tab-opinion-1938775

This limiting view of the courts' power is quite influential throughout legislation and litigation. Bickel noted, though, that "*Colegrove* did not hold that the Court may never interfere with the election process, or that there are no judicially enforceable constitutional principles that apply to elections."[105] Contrary to the many who were excited to interpret the case as shutting down the courts' interference. However, this view ignores interpretations of the fiduciary nature of government, as asserted by Locke and others. In reference to government, the idea of fiduciary responsibility is that elected members and the staff must act in the best interests of the people. They hold in trust the assets of the nation; their motivations must not be self-serving. Here again, we see an inheritance from English Common Law.[106] If we accept their assertion of the fiduciary function of government, then would it not fall to the courts to check the wandering of the legislature from that purpose? The court also says that there are adequate remedies in the Constitution to address these issues.[107] It feels that the voters should act to corral the wandering legislative herd.[108] As mentioned previously, this ignores the danger to the polity scholars assert. We will see this issue's echo before we are done. Bickel notes the grounds on which challenges to districting plans might be brought, stating that the Fifteenth Amendment is a powerful tool

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[105] Alexander M. Bickel, "The Durability of Colegrove V. Green Symposium: Baker V. Carr," *Yale Law Journal* 72, no. 1 (1962-, 1963), 39-45. https://heinonline.org/HOL/P?h=hein.journals/ylr72&i=71.
[106] *Fiduciary* 2019. https://en.wikipedia.org/w/index.php?title=Fiduciary&oldid=905845323.
[107] "Colgrove v. Green" Justia. Accessed July 8, 2019. https://supreme.justia.com/cases/federal/us/328/549/#tab-opinion-1938775
[108] Ibid.

that could be deployed here.[109] Fourteen years of confusion resulted from the C*olgrove* decision.[110] The SCOTUS refused to hear cases on apportionment, and the states wandered in the wilderness.[111]

The Equal Rights Era

After the long period of silence on apportionment issues, the courts were finally forced to engage as the nation began to deal with one of its greatest sins, racial injustice. As mentioned, the exact year or date of the start of this era is up for debate. Does it start with the beginning of the Equal Rights movement? The passage of the Voting Rights Act? Perhaps it begins with the first case brought to the District Courts? Or it might start when the first case reaches the SCOTUS? Regardless of the exact date, this era is centrally concerned with malapportionment associated with racial injustice.

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[109] *Supra* note 105.
[110] Pierson, W. T. and Alvin Capp. "Wesberry V. Sanders: Deep in the Thicket Notes." *George Washington Law Review* no. 5 (1964): 1076-1123. https://heinonline.org/HOL/P?h=hein.journals/gwlr32&i=1087 https://heinonline.org/HOL/PrintRequest?handle=hein.journals/gwlr32&collection=0&div=59&id=1087&print=section&sction=59. Pp 1081
[111] Ibid.

Cases Considered:

Case	Impact	Year
Gomillion v. Lightfoot	Equal Protection under the 15th Amendment.	1958
Baker v. Carr	Established six criteria needed for the court to *withhold* judgment in a case. It also established that districts must be of equal population.	1962
Gray v. Sanders	The 'one person, one vote' doctrine	1963
Wesberry v. Sanders	Establishes judicial review of districting	1963
Reynolds v. Simms	Opens the rest of the electoral system to judicial review	1964

When considering the apportionment questions in this era, we must keep in mind the changes occurring in the nation. Burnham gives us a useful periodization scheme referring to this era as "The New Deal System."[112] According to Burnham, this system had its start in 1932.[113] It meets its end with the Civil Rights movement. This party system was doomed from the start, as are all such systems.[114] It called for change even as it was born. The deals made to help the country recover from the Great Depression exposed a long-simmering

[112]Burnham, Walter Dean. "Party Systems and the Political Process." In *The Current Crisis in American Politics*, 92-117. New York: Oxford University Press, 1982. Pp 110.
[113] Ibid.
[114] Ibid.

change in how northern Democrats viewed the nation. They were uncomfortable allowing Southern elites to manage the programs meant to help all citizens, knowing that in the South, they would be perverted into only helping whites.[115] African Americans' attitudes had shifted, as well.

African Americans served in both World Wars with high distinction.[116] Their improved self-image and confidence would no longer allow second class citizenship and arbitrary 'justice.'[117] Discovering the reasons for the change in the world view of the Democrats is challenging and worthy of exploration at a later time.[118] Suffice it to say, that after two world wars and decades under Jim Crowe laws, the Democrats could no longer ignore what they were seeing. In contrast, the Republicans saw an opportunity to add to their elite/business base by appealing to the southern elites who were increasingly uncomfortable with the direction of the Democrats.[119]

In 1958 a group of citizens of Alabama filed suit in the United States District Court in Alabama (*Gomillion v. Lightfoot*). They alleged that the

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[115] Katznelson, Ira. *When Affirmative Action was White : An Untold History of Racial Inequality in Twentieth-Century America*. New York: W.W. Norton, 2005. http://www.loc.gov/catdir/toc/ecip052/2004024359.html.

[116] BENDER, BRYAN. "Medal of Honor Review Sought for Minority World War I Heroes." . Accessed 07/21/, 2019. https:www.politico.com/story/2019/04/18/world-war-i-medal-of-honor-1360220.

[117] Budanovic, Nikola. *The Battle of Athens - when WWII Veterans Stood Up to the Corrupt Local Government in Tennessee*. War History Online. 2017. https://www.warhistoryonline.com/instant-articles/battle-athens-group.html.

[118] Reading the Democratic portion of John Gerring's Party Ideologies in America, 1828-1996. Pp 187-253. & Katznelson's When Affirmative Action was White: An Untold History of Racial Inequality in Twentieth-Century America would be an excellent start on examining this topic.

[119] This and the preceding sentence are a summation of the three sources in notes 115-117.

Legislature of Alabama had passed a law that was "…in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and also in violation of the Fifteenth Amendment of the Constitution of the United States."[120] The respondents sought to have the complaint dismissed based on were 'separation of powers' and 'federalism' arguments. The District Court found for the State of Alabama mainly on the separation of powers argument with some reference to the federalism argument as well.[121] Not surprisingly, the citizens were not satisfied with this judgment and, in 1960, argued before the SCOTUS on the same grounds. The SCOTUS held explicitly that the District Court erred in its decision based on the Fifteenth Amendment.[122] Stating, "Even the broad power of a State to fix the boundaries of its municipalities is limited by the Fifteenth Amendment, which forbids a State to deprive any citizen of the right to vote because of his race."[123] The Court also noted that the use of the 'political question' to hide discriminatory racial motivations was not acceptable.[124]

This case is an excellent example of how laws are perverted to corrupt results. The Court noted that the respondents had not addressed the racial

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[120] U.S. District Court – Middle District of Alabama "Gomillion v. Lightfoot" Justia. Accessed July 29, 2019. https://law.justia.com/cases/federal/district-courts/FSupp/167/405/1632713/
[121] Ibid.
[122] "Gomillion v. Lightfoot" Justia. Accessed July 29, 2019. https://supreme.justia.com/cases/federal/us/364/339/
[123] Ibid.
[124] Ibid.

questions, relying instead on their interpretation of the broad power of the State.[125] This tactic of hiding corrupt intent behind the legitimate use of state power is a standard tool used to deprive citizens of their rights. This kind of perversion of the law also undermines the assertions of scholars who assert a fiduciary role for government. How can a government act as a fiduciary when it is intent on depriving some of its citizens of their rights? Tracking this kind of corruption, finding case law detailing the decision of the overturn of decisions based on this argument would be a stimulating exercise but beyond the scope of this paper. Additionally, the practice of hiding corrupt intent behind legitimate actions in redistricting efforts, though closer to the focus of this thesis, would also be beyond it. In the end, we find that the SCOTUS has ruled that despite its reluctance to rule on other areas of the redistricting question, it has no hesitation when the issue involves racially motivated redistricting.[126] In *Gomillion v. Lightfoot,* we have a firmly grounded precedent for the consideration of districting cases based on racial discrimination.

In Tennessee, a year after the initial filing of the *Gomillion* case, we see another case, *Baker v. Carr* in 1962, brought under the Fourteenth Amendment, Equal Protection Clause. The plaintiffs asked that the state be required to

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[125] Ibid.
[126] As an interesting side note, David T. Canon in *Race, Redistricting, and Representation*, found that racially motivated redistricting with the intent of providing a voice to minorities was one area of race policy that seemed to work. He noted this policy's success in breaking down racial barriers as opposed to the seeming failure of busing and affirmative action in achieving the same goal.

reapportion the state legislature under the census of 1950.[127] The state had not been reapportioned since 1901, and thus changes in the population of the various districts had created massive disparities in representation.[128] The respondents sought dismissal on a separation of powers argument that the court had no jurisdiction in the case.[129]

Similar to *Gomillion*, the District Court in *Baker* dismissed the case. However, in *Baker*, the dismissal was based on a lack of justiciability, using the *Colgrove* opinion as support. Once again, the plaintiffs did not take 'no' for an answer and sought help in the SCOTUS. In this case, the SCOTUS also held that the District Court had erred.[130] Differently, the court reversed the case and remanded it back to the District for resolution.[131] "For the first time made it clear that federal courts had jurisdiction to consider constitutional challenges to state legislative redistricting plans."[132] As noted by Cole, the current view of the

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[127] United States District Court Middle District – Tennessee "Baker v. Carr" Justia. Accessed July 29, 2019. https://law.justia.com/cases/federal/district-courts/FSupp/179/824/1522687/
[128] Ibid.
[129] Ibid.
[130] "Baker v. Carr" Justia. Accessed July 29, 2019. https://supreme.justia.com/cases/federal/us/369/186/
[131] Ibid.
[132] "Redistricting and the Supreme Court: The most Significant Cases," , accessed July 11, 2019, http://www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx.

political question doctrine was established in *Baker v. Carr*.[133] In *Baker,* we see a six criteria test that must be satisfied for a court to ***withhold*** an opinion:[134]

1. A textual constitutional commitment of the matter to another branch of government, such as the power of the President in foreign affairs (note that later cases did not strictly adhere to this view);
2. 2) A lack of judicially discoverable and manageable standards for resolving the issue;
3. 3) A need for an initial policy determination before addressing the matter that courts would not be able to reach;
4. 4) A situation in which independent court action would violate the separation of powers framework;
5. 5) An unusual need to strictly adhere to a previous political decision; or
6. 6) A possibility that clashing statements on an issue by multiple branches of government would cause embarrassment

The Baker test is a rigorous test. In gerrymandering cases after *Baker* that demur from passing judgment, the court seems exclusively focused on the second factor. The dissent also regularly points out that the missing this factor is not sufficient justification for withholding an opinion, but that does not seem to matter to the plurality of justices. The reasoning for this, though laid out in the

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[133] Cole, Jared P. and Library of Congress. Congressional Research Service. American Law Division. *The Political Question Doctrine*. S.l: S.N., 2014. In this report Cole also explains the broader applications of this doctrine beyond electoral considerations.
[134] "Baker v. Carr." Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/369/186/

various cases as deferring to precedent and the intent of the Framers, lack comprehensiveness. They fail to discuss Locke and the fiduciary nature of government. The problem of a '…judicially discoverable and manageable standard' is a difficult one but as will be discussed in *Rucho* even when one is present the Court demurs. Additionally, this case considers the question of population of districts, the vote dilution the plaintiffs faced was judged unconstitutional.[135] Generally speaking, before, districts were rarely of equal population with their boundaries following normal lines of political division such as towns & counties.[136] This case dragged on at the District level until 1965 when it finally concluded with more equitable representation.[137]

The 'One person, One Vote' has been a view of political equality whose history stretches to 1891 and quite possibly further.[138] In 1963 the SCOTUS reaffirmed this concept as a central idea in our system of government with an 8-1 vote in the *Gray v. Sanders* opinion.[139] The State of Georgia used a novel 'county unit' system to allocate votes in both the primary election for United States

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[135] "Gomillion v. Lightfoot" Justia. Accessed July 29, 2019. https://supreme.justia.com/cases/federal/us/364/339/

[136] Stephen Ansolabehere and Maxwell Palmer, "A Two Hundred-Year Statistical History of the Gerrymander," *Ohio State Law Journal* 77, no. 4 (2016), 741. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=120539867&site=ehost-live&scope=site.

[137] United States District Court Middle District – Tennessee "Baker v. Carr" Justia. Accessed July 29, 2019. https://law.justia.com/cases/federal/district-courts/FSupp/247/629/1956404/

[138] ""One Man, One Vote"." *The Spectator* 66, no. 3268 (1891): 233. https://search-proquest-com.proxy1.library.jhu.edu/docview/1295420691?accountid=11752.

[139] "Gray v. Sanders" Justia. Accessed July 29, 2019 https://supreme.justia.com/cases/federal/us/372/368/; "Gray v. Sanders" Oyez. Accessed July 30, 2019. https://www.oyez.org/cases/1962/112

Senator and statewide offices (such as the Governor).[140] Assigning less and fewer units as the population of the county increased. Thus, residents of counties with large populations found their votes diluted. This dilution had the practical effect of keeping the power in the state in the rural areas. The court's view was best summarized in the last phrase of the opinion "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote."[141]

Our next visit to the SCOTUS brings us to one of the most referenced cases on apportionment litigation, *Wesberry v. Sanders* (1963). This case also finds us in Georgia as the traditional power structure finds itself under attack by the Civil Rights movement and attempts to maintain its control over the state. The District Court had (as others before it) referenced Justice Frankfurter's minority opinion in *Colgrove* to dismiss the case as not justiciable as apportionment was a political question.[142]

The Warren court, however, was not so inclined. The opinion in *Wesberry* was critical of the dismissal of the case by the lower court, finding its majority opinion specious at best. Another similarity with *Gray* is that we have a question

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[140] Ibid.
[141] Ibid.
[142] Wesberry v. Sanders" Justia. Accessed Aug 1, 2019. https://supreme.justia.com/cases/federal/us/376/1/

of apportionment due to unequal populations. The difference here is that the offices in question are in the United States House of Representatives. The plaintiff argued that their district population was approximately forty percent larger than the next largest district.[143] Thus their level of representation and votes were diluted.

The Constitutional matters at hand were under Article one, Section two, and the Fourteenth Amendment Equal Protection Clause and Section two of the same, where it discusses apportionment.[144] The basic issue at hand is well summarized by Weiss, "The notion of effective participation in *Wesberry* deals only with quantitative dilution of the vote rather than distortion of voting power by gerrymandering or ethnic districting."[145] While the issue at hand was not gerrymandering, the case is pertinent in that it does deal with apportionment and separating apportionment cases from those whose narrow focus is gerrymandering runs the risk that we will miss important details as our discussion continues.

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[143] Ibid.
[144] Ibid.; As Pierson & Capp note there are even concerns raised about the continued validity of the Electoral College *Supra* 110. Pp 1088 note 80
[145] Jonathan Weiss, "An Analysis of Wesberry V. Sanders Summary Judgment," *Southern California Law Review*, no. 1 (1965), 67-71. https://heinonline.org/HOL/P?h=hein.journals/scal38&i=77 https://heinonline.org/HOL/PrintRequest?handle=hein.journals/scal38&collection=0&div=8&id=77&print=section&sction=8. Pp 71, note 3.

After the conclusion of *Wesberry,* the House Judiciary Committee began the legislative work to address the question of apportionment.[146] If nothing else of note were accomplished, prodding the Congress to engage one of its specific duties is justification enough for the action of the SCOTUS. Regardless of the eventual legislative result or lack thereof. The result of this effort was a bill that said in part that the SCOTUS "shall not have the right to review the action of a Federal court or a State court of last resort concerning… complaints…seeking to apportion or reapportion any legislature of any State of the Union or any branch there of…"[147] This bill made it out of the House but died in the Senate.[148] In the end, we see that *Wesberry* was highly influential in many areas, especially in concluding that the Constitutionality of districts was an area of judicial concern.[149]

Once again, we see the court addressing an idea of basic fairness, as many would define it, the idea that one person's vote should be equal to another's. The legalistic arguments against such, while having merit on an intellectual level, fail when one applies this basic idea. Similarly, we find repugnant 'legal' corruption; indeed, this is a case of that. The legalism we continue to see applied by the

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[146] Richard V. Carpenter, "Wesberry V. Sanders: A Case of Oversimplification," *Villanova Law Review*, no. 3 (1964), 415-421. https://heinonline.org/HOL/P?h=hein.journals/vllalr9&i=427 https://heinonline.org/HOL/PrintRequest?handle=hein.journals/vllalr9&collection=0&div=47&id=427&print=section&sction=47.
[147] "Evolution of the Present Controversy." *Congressional Digest* 61, no. 5 (1982), 134. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=10576821&site=ehost-live&scope=site.
[148] Ibid.
[149] *Supra* note 132.

dissenting opinions, in this case, continues to ignore the fiduciary role of government. Indeed, the focus of the dissenters seems to be concern about the fine points (however important they might be) rather than the larger issues these cases represent, and the danger to the polity seems to be of no concern. Pierson highlights a comment by Justice Harlan that is worth noting here in referring to the decision in *Wesberry* "cannot but encourage popular inertia in efforts for political reform through the political process...".[150] This passage seems to say that Justice Harlan was hostile to popular efforts at political reform. If this is the case, then one must wonder where reform should originate if not from the popular will? Such an attitude smacks of elitism that our nation has rejected repeatedly from its founding.

If *Wesberry* is considered influential, *Reynolds v. Simms* (1964) should be considered in the same league.[151] The plaintiffs, who were residents of counties that had grown much faster than most since the apportionment in 1901, argued that they were subject to serious discrimination in representation due to the State of Alabama's apportionment scheme that relied on county lines and population as determinants.[152] This scheme might seem reasonable until one finds that the populations used were from 1900. None of the parties involved argued to keep the original apportionment. Reapportionment plans had been considered at the

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[150] *Supra* note 110. Pp 1093 note 121.
[151] *Supra* note 132.
[152] "Reynolds v. Simms" Justia. Accessed August 3, 2019. https://supreme.justia.com/cases/federal/us/377/533/

state level, and a three-judge panel found none of them acceptable. State officials appealed to the SCOTUS arguing the District Court had erred in finding the reapportionment plans unconstitutional and that a Federal Court lacks jurisdiction.[153] Two groups of plaintiffs appealed the ruling, one based on the District Court not reapportioning the State Senate based on population and the other complaining that it did not reapportion both houses on that basis.[154]

In 1965 Congress passed the Voting Rights Act.[155] Arguably one of the most significant pieces of legislation in American history. It codifies racial equality in aggressive and even coercive ways. There have been several amendments and judicial clarifications since its passage, but we will confine ourselves to 1965 for the moment. The two most contested sections of the Act are sections two and five.[156] Section Two "… protects racial minorities against denial, abridgment, and dilution of the right to vote."[157] The broad language of Section Two enabled a host of suits to be brought and resulted in changes across the nation.

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[153] Ibid
[154] Ibid
[155] "Voting Rights Act of 1965." . Accessed Apr 22, 2020. https://www.justice.gov/crt/voting-rights-act-1965.
[156] Forgette, Richard, Andrew Garner, and John Winkle. "The Voting Rights Act, Legislative Elections, and Southern Partisan Change: Conversion Or Competition." *Social Science Quarterly* 93, no. 2 (2012): 291-308. doi://onlinelibrary.wiley.com/journal/10.1111/%28ISSN%291540-6237/issues. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1318337&site=ehost-live&scope=sitehttp://onlinelibrary.wiley.com/journal/10.1111/%28ISSN%291540-6237/issues. Pp. 294.
[157] Ibid.

Section Five of the Voting Rights Act was even more contentious for its coercive nature. Except for Arkansas and Tennessee, the entirety of the South fell under Section Five's rules, which requires states to get federal approval in advance (preclearance) for any changes affecting voting systems.[158] The contemporaries of the times found that "…the Voting Rights Act to have brought "amazing progress" in registering Blacks to vote in comparison with the eight years of extensive Justice Department litigation…"[159] There was broad support in the government before the passage of the Act as well, "The U.S. Solicitor General finds the proposed act necessary because of widespread violation of the Fifteenth Amendment," despite the "possibility of major changes in present distribution of state and federal responsibility for elections."[160] Admittedly there was no shortage of opposition, "…the act erodes the basic concepts of constitutional government in which individual states are acknowledged to be sovereign. Assesses the act to be both unconstitutional and discriminatory."[161] This controversy is not surprising considering the questions of federalism that the Act raises. Can the Federal government impose such measures on 'sovereign' states? Does the Fifteenth Amendment grant such power? Etc. This Act initiates a long list of legislation and litigation, on the subject of apportionment and others, that

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[158] Ibid.
[159] H., B. E. and Jr J.J.K. "Federal Protection of Negro Voting Rights." *Virginia Law Review* 51, no. 6 (1965): 1051-1213. doi:10.2307/1071533. http://www.jstor.org/stable/1071533.; Sutterlin, Edith and Library of Congress. Congressional Research Service. *Voting Rights Act*. S.l: S.N., 1982. Pp 25.
[160] Ibid.
[161] Ibid.

continues into the next century. In the end, as Engstrom notes, the result was "In the mid-1960s, the U.S. Supreme Court outlawed malapportioned electoral districts for both state legislatures and the U.S. House of Representatives."[162]

Political scientists had also begun taking note of the incumbency effect and began to examine the factors surrounding increased reelection of politicians.[163] The incumbency effect is the rising reelection of candidates first discussed in the 1960s.[164] With racial gerrymandering being addressed, other considerations of apportionment come to the fore.

The Era of the 'Manageable Standard'

After much consideration on issues of race, population, and other issues, the Court, in 1986, begins to at long last consider partisan gerrymandering. In the past, this question was tabled in favor of more pressing malapportionment issues.

The seed for the manageable standard problem is planted in *Baker v. Carr* though its era does not flower for over twenty years after the decision. The reason for this is before 1986; the SCOTUS was involved in other areas of apportionment litigation that did require reference to the political question doctrine in the way that partisan gerrymandering does. Other cases were brought that go into other

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[162] Engstrom, Erik J. 2013. *Partisan Gerrymandering and the Construction of American Democracy*. Legislative Politics & Policy Making. Ann Arbor: The University of Michigan Press. Pp 1.
[163] John N. Friedman and Richard T. Holden, "The Rising Incumbent Reelection Rate: What's Gerrymandering Got to do with it?" *Journal of Politics* 71, no. 2 (2009), 593. http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=37925827&site=ehost-live&scope=site.
[164] Ibid.

areas of apportionment during this era as well. Cases concerned the population of districts and the allowable variations in populations, the use of districting commissions, and further refinements on racial considerations. This thesis forgoes the exploration of these as they do not apply to what it asserts is the most central question. Can the courts rule on partisan gerrymandering?

Cases Considered:

Case	Impact	Year
Davis v. Bandemer	Reinforces the justiciability of these cases but can find no reasonable measurable standard by which to judge	1986
Vieth v. Jubelirer	The majority finds that the lack of a measurable standard renders these questions non-justiciable, but the Dissent is not ready to close the door.	2002
Gill v. Whitford	Opened the door to the 'Efficiency Gap' measure	2018
Rucho v. Common Cause & Lamone v. Benisek	The majority still holds that the questions are not justiciable. Minority continues to exhort the majority to accept measures that have been found	2018-2019

Davis v. Bandemer – 1986, is the first case that the SCOTUS considers political gerrymandering. Other cries declaring their entry into the mire were premature in that those cases considered population-based or racial apportionment. Here, we find the Justices thinking about overtly *partisan* schemes.[165] The apportionment scheme found in Indiana at the time provided for a mix of single and multimember districts.[166] The electoral results of the

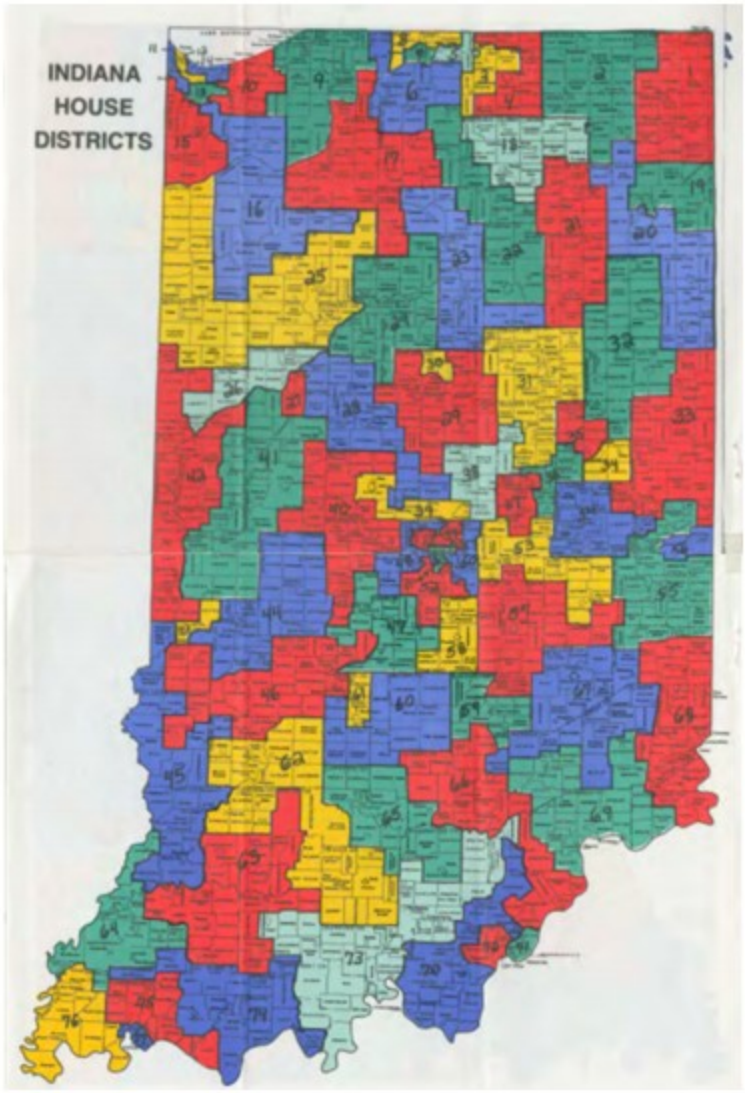
[165] "Davis v. Bandemer." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/1985/84-1244
[166] Ibid.

apportionment are shown in Figure 3. Though the Democrats received the majority or a near parity of votes in many cases, their representation at the Indiana state legislature was not in line with the results:

> In November 1982, before the case went to trial, elections were held under the new plan. Democratic candidates for the House received 51.9% of votes cast statewide, but only 43 out of the 100 seats to be filled. Democratic candidates for the Senate received 53.1% of the votes cast statewide, and 13 out of the 25 Democratic candidates were elected. In Marion and Allen Counties, both divided into multimember House districts, Democratic candidates drew 46.6% of the vote, but only 3 of the 21 Democratic candidates were elected.[167]

[167] "Davis v. Bandemer." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/1985/84-1244.

Fig. 3 1981 GOP redistricting plan for Indiana



"This picture is from 1981 Republican redistricting plan for Indiana House. Source: Case files of Justice Lewis Powell, Washington and Lee University School of Law."[168]

[168] Jochmann, Lilian. "Davis V. Bandemer." . Accessed Aug 10, 2019. http://88691976.weebly.com/davis-v-bandemer.html

The District Court found for the Democrats based on the Fourteenth Amendment's Equal Protection Clause. The GOP was not satisfied and sought relief in the SCOTUS.[169] In *Davis,* we see a significant difference from previous apportionment cases. The court states plainly that such claims are justiciable under the Equal Protection Clause.[170] Simultaneously, they found that this case was only based on the idea of a fair contest, 'does one group have the same chance to elect representatives as others?' Other questions were excluded from consideration. Apportionment that makes a successful election more 'difficult' for one political party does not make the distribution unconstitutional.[171] Thus, the court continues the idea that political considerations in apportionment are acceptable motivations. The court refused to speculate about the quality of representation that Democratic voters might receive in this case. Finding that the case lacked evidence of a continuing, systematic dilution of votes or degraded representation, it reversed the lower court's decision.[172]

Additionally, the court said that an absence of proportional results from an election was not sufficient evidence of vote dilution.[173] We find that the court was very concerned with finding a reasonable and applicable judicial standard, fully aware that the judgment would invite questions and challenges. However, despite

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[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.

this concern, they were unable to find a manageable standard. The 6-3 decision found us with political gerrymanders justiciable but gave them no sword to attack the beast. As Whitaker notes, "Even after the verdict that partisan gerrymandering questions were justiciable in *Davis v. Bandemer*, the court continued to search for a measure that does not drag them deeper into the mud."[174]

In 2002 plaintiffs in Pennsylvania filed to stop implementation of a districting plan passed by the legislature that they alleged was an unconstitutional political gerrymander.[175] The plan required several Democrat incumbents to run against each other and no Republicans to do the same.[176] After several visits to the court by the parties, the district court held that the final facts did not support the plaintiffs' claim. In keeping with tradition, the plaintiffs sought relief in the SCOTUS. In 2003 arguments were heard, and in 2004 the court issued its opinion regarding *Vieth et al. v. Jubelirer*. The court rejected the plaintiffs' claim. The finding was also crucial in that the majority noted that in the eighteen years since *Davis,* no court had found a standard to use in judging

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[174] Whitaker, L. P. "Congressional Redistricting: Legal and Constitutional Issues." *Congressional Research Service: Report* (2016): 1-14. http://search.ebscohost.com/login.aspx?direct=true&db=tsh&AN=114562673&site=ehost-live&scope=site.

[175] U.S. District Court – Middle District of Pennsylvania 241 F. Supp. 2d 478 (M.D. Pa. 2003) "Vieth v. Pennsylvania" Justia. Accessed August 5, 2019. https://law.justia.com/cases/federal/district-courts/FSupp2/241/478/2578206/

[176] Ibid.

partisan gerrymanders.[177] The lack of a reasonable standard led four of the majority to assert that it was time to close the books on partisan gerrymandering and that it would remain forever a 'political question.'[178] The remaining five justices did not agree with this and stated so in their dissent, or in Justice Kennedy's, case in a concurring opinion.[179] The five to four opinion has not been viewed as 'settled law' by the nation.

In the years since *Vieth,* there have been several cases refining our view of apportionment and how it can be accomplished. There have been refinements in the areas of racial considerations and the use of population as a district determinant. Two are of great consequence, *LULAC v. Perry* – 2006 & *Arizona Legislature v. Arizona Redistricting* – 2015. *LULAC* is important because it allows states to redistrict as often as the like as long as they do so after the decennial census as well. In *Arizona Legislature,* the court determined that states could use redistricting commissions and that voters have the power to choose to take redistricting power from the legislature.[180]

In 2018 and 2019, three cases come before the SCOTUS concerned with partisan gerrymanders: *Gil v. Whitford* – 2018, *Lamone v. Benisek* – 2018, *Rucho v. Common Cause* – 2019. *Gill v. Whitford* was rejected due to a lack of

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[177] "Vieth v. Jubelirer" Justia. Accessed August 3, 2019. https://supreme.justia.com/cases/federal/us/541/267/
[178] Ibid.
[179] Ibid.
[180] "Arizona State Legislature v. Arizona Independent Redistricting Commission." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2014/13-1314.

standing in a unanimous decision. However, in the ruling, there was some hope placed in the 'efficiency gap' measure developed by Stephanopoulos & McGhee.[181] *Rucho v. Common Cause* and *Lamone v. Benisek* were combined for the final decision.[182]

Rucho v. Common Cause was a North Carolina case that asserted the redistricting map presented by the Republican-controlled state legislature was an impermissible partisan gerrymander.[183] *Lamone v. Benisek* was a Maryland case in which the Democrat-controlled legislature was accused of attempting an impermissible partisan gerrymander.[184]

With the latter two contests, we see the court again retreating from the question. The majority states plainly, "Partisan gerrymandering claims present political questions beyond the reach of the federal courts."[185] The majority makes no mention of the Efficiency Gap measure, merely stating that "None of the proposed "tests" for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable."[186] The majority continues saying it "neither condones excessive

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[181] "Gil v. Whitford." Justia. Accessed July 11, 2019. https://supreme.justia.com/cases/federal/us/585/16-1161/; Stephanopoulos, Nicholas O. and Eric M. McGhee. "Partisan Gerrymandering and the Efficiency Gap." *The University of Chicago Law Review* 82, no. 2 (2015): 831-900. http://www.jstor.org/stable/43410706.
[182] "Rucho v. Common Cause." Justia. Accessed July 11, 2019. https://supreme.justia.com/cases/federal/us/588/18-422/
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.

partisan gerrymandering nor condemns complaints about districting to echo into a void."[187] The opinion concludes holding out hope for an answer to the problem from states or Congress.[188] In the dissent, Justice Kagan (with Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor) criticized the majority opinion for not addressing "the most fundamental of . . . constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." [189] Arguing that by not stopping political gerrymandering, the Court "encourage[s] a politics of polarization and dysfunction" and "may irreparably damage our system of government."[190] Further arguing that "limited and precise standard" adopted in lower courts do meet the requirements the majority demands, but cannot seem to find."[191] As this was a five to four decision, partisan gerrymandering will continue to plague the United States…[192]

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[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] For a more complete discussion on the use of the majority decision method in courts I suggest the following references one discussion how common 5-4 decisions are and the other questioning the wisdom of using bare majorities to make decisions in the SCOTUS: "Those 5-4 Decisions on the Supreme Court? 9-0 is Far More Common." . Accessed Aug 10, 2019. https://www.rstreet.org/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/.; Waldron, Jeremy. "Five to Four: Why do Bare Majorities Rule on Courts?" *Yale Law Journal* 123, no. 6 (2014): 1692-1730. doi://www.yalelawjournal.org/issue. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1437752&site=ehost-live&scope=site http://www.yalelawjournal.org/issue.; Riggs, Robert E. "When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90." *Hofstra Law Review* 21, (1993): 667. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=502302414&site=ehost-live&scope=site.

Discussion

The purpose here is to bring together some of the normative items in each era. In the Era of Silence, we find the court ignoring foundational thoughts of the American polity (Locke) in favor of deference to Marshall. In reading the opinion in *Marbury,* this is a reasonable conclusion. However, it is also reasonable to conclude that perhaps it was not Marshall's intent that the 'political question' doctrine become one or that it be applied so very broadly, as we have seen the SCOTUS do in the intervening years. Moving to the Equal Rights Era, we find three cases of institutional tension or intercurrence are created in *Reynolds*.[193] The first is between the ideas of institutional exceptionalism and a strong expectation of judicial abstention, second is the contest between the use of standards and rules, and the third is between discussions of race and politics.[194] As noted previously, due to the opinion in the *Marbury v. Madison* case and the long history of judicial abstinence concerning 'political questions,' there is a strong impulse in this direction. Additionally, the idea that the court had the freedom or indeed the responsibility to act in these cases to "…regulate the Law of Democracy" was firmly settled in the mind of the court.[195] This tension is still with us today. The second intercurrence depends on who will bear the cost of

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[193] Guy-Uriel E. Charles and Luis Fuentes-Rohwer, "Reynolds Reconsidered," *Alabama Law Review* 67, no. 2 (2016), 485-535. http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=113247762&site=ehost-live&scope=site. Pp 529-530.
[194] Ibid.
[195] Ibid. Pp 529.

enactment, the judiciary, or the enforcement authorities.[196] The former because of the effort to determine in advance the law's content, and the latter because of the later efforts to determine content.[197] The final intercurrence, that of determining the line between race and politics causes tension because the decision if an issue is one or the other can be the deciding factor in the outcome.[198] In the end, *Reynolds* opened the entirety of our political system to judicial intervention.[199] Finally, we find ourselves in an Era foundering on the rocks of terminology, or perhaps even on partisanship. The conservative majority is loath to intervein in partisan gerrymandering. It seems to have accepted that the subject is justiciable if only a reasonable and impartial measure can be found. The liberal minority asserts that such a measure has been found. Has the court succumbed to partisan pressure? Will it be able to address seriously the significant threat that partisan gerrymandering represents? The importance of this answer cannot be overstated. Americans of this century hold different views on corruption than those held at the founding of our country. Their tolerance is quite limited. The advent of social media and the ever-shortening news cycle limit the ability of politicians to pull the curtain on corruption. The court must act lest our ingrained distaste for government lead us to political destinations the nation is not interested in visiting.

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[196] Ibid, note 133. Pp 530.
[197] Ibid.
[198] Ibid.
[199] Ibid, 133. Pp 529.

Conclusions

Our history is rife with examples of attempts to gain power, for its own sake or corrupt motives. It also shows us that partisan gerrymanders are nothing new and were not even new when Elbridge Gerry found himself in the crosshairs of the Boston Globe. Using gerrymanders to accomplish these ends is seen by politicians as a legitimate approach. Research on corruption in government does not seem to support their view.

Chapter Two: The Manageable Standard and the Political Question Doctrine

Introduction

In consideration of gerrymandering as a form of corruption, it is important to understand the background of the current controversy. This chapter does this by examining the pedigree of the 'Manageable Standard' and its sire the Political Question Doctrine (PQD). This chapter also examines two categories of cases that fall under the PQD. When considering the PQD, there was no real guidance from the court until *Baker v. Carr*. In *Baker*, Justice Brennan provided six criteria for a legal claim to be rendered nonjusticiable.[200] They are:

1. A textual constitutional commitment of the matter to another branch of government, such as the power of the

[200] "Baker v. Carr." Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/369/186/

President in foreign affairs "(note that later cases did not strictly adhere to this view)"[201];

2. A lack of judicially discoverable and manageable standards for resolving the issue;
3. A need for an initial policy determination before addressing the matter that courts would not be able to reach;
4. A situation in which independent court action would violate the separation of powers framework;
5. An unusual need to strictly adhere to a previous political decision; or
6. A possibility that clashing statements on an issue by multiple branches of government would cause embarrassment.

These six standards require some clarification. The first of the criteria is an extension of the Constitution's explicit powers wielded by a single branch of government. For example, Article I, section 8, enumerates many powers reserved for Congress, including its power to levy taxes, borrow and coin money, and regulate foreign and interstate commerce.

The second criterion is the one that is most in the headlines today. This criterion refers to the need for standards or rules to resolve an issue. There are two types of these, a 'bright line' standard and "balancing tests."

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[201] Repeated here for ease of reference, the original found at Pp. 369 U. S. 218 was not broken out numerically. The parenthetical note here was from – Cole, Jared P. and Library of Congress. Congressional Research Service. American Law Division. *The Political Question Doctrine*. S.l: S.N., 2014.

Bright-line rules are saying to the judiciary and litigants, “you can go this far and no further.” We find an excellent example in the exclusionary rule established in *Weeks v. United States(1914)*. The rule prevents the use of evidence seized without a warrant in the prosecution of an accused person. [202]

Balancing tests are more subtle, for example, the discussion of the contest between freedom of religion and states compelling interests in *Sherbert v. Verner(1963)* “We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right.”[203] The Court seeks to balance these two considerations to arrive at a decision.

The third criterion requires that either the legislative or executive branch to make a policy decision before the court can rule on its merit. In other words, it is not the Courts’ role to establish policy, and thus the court cannot rule in a case that has yet to be defined in law.

Similarly, the fourth criterion prevents the court from straying into the violation of the separation of powers. The court cannot rule in such a way as to intrude or allow another branch to encroach on the authorities as assigned in law or the Constitution. For example, the court could not rule that determining the

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[202] “Weeks v. United States(1914).” Accessed Dec 7, 2019. https://supreme.justia.com/cases/federal/us/232/383/
[203] " Sherbert v. Verner(1963)." Accessed Dec 7, 2019. https://supreme.justia.com/cases/federal/us/374/398/

times and places of elections for the House of Representatives falls to the Executive branch as this power is exclusively assigned to that body.

The fifth criterion allows for unusual circumstances where adherence to a previous decision is necessary. For example, Justice Brennan remarks that there is a need for certainty in enactments and that the court should not be a vehicle for promoting disorder.[204] Finally, the last criterion seeks to avoid conflict among the branches of government — for instance, the Court questioning a diplomatic policy that is not covered by law or policy.[205] Before we dig further into the PQD, we should discuss from whence it came. We will start with Judicial Review.

Judicial Review

The PQD has its beginning in Marbury v. Madison's judicial review. Judicial review is "…the idea, fundamental to the US system of government, that the actions of the executive, legislative branches of government and the state governments are subject to review and possible invalidation by the judiciary."[206]

In discussions of Judicial Review, those that question its validity neglect to mention that judicial review was a concept established between 527C.E. - 533C.E

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[204] Baker v. Carr." Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/369/186/. Pp 368-369

[205] See Zivotofsky V. Clinton, 566 U.S. 189 (2012) for an example where a law and executive action were potentially in conflict. A more complete discussion of this type of conflict will be found under this case and in the final sections of this chapter.

[206] "Judicial Review." Accessed Nov 10, 2019. https://www.law.cornell.edu/wex/judicial_review

in the Justinian Code.[207] Its pedigree in English Common Law, Clinton notes, well established through Blackstone.[208] Further, it was well established in Colonial America. For example, in Federalist 78, Alexander Hamilton discusses judicial review, and it was further discussed in *Calder v. Bull* (1798).[209] The first time we see legislation set aside for unconstitutionality is in 1787 in *Bayard v. Singleton*.[210] In the United States, a nation whose sovereign is 'The People', the support for Judicial Review must be different, and this cannot be emphasized enough, than the justification in a nation whose sovereign is a single person. In Federalist No. 78, Hamilton explains the Federalist view of the role of the courts; they are to stand "…as an intermediate body between the people and the Legislature…"[211] The court is present to defend the individual from the state. The court is to provide a check on the other two branches ensuring they do not act in ways that are not allowed in the Constitution.[212] Historian Jon Meacham summed up our need for checks and balances quite well, 'A guiding idea of the framers is that we are imperfect, that we would give in to desires and

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[207] Clinton, Robert Lowry. Marbury V. Madison and Judicial Review. Lawrence, Kan.: University Press of Kansas, 1989. Pp 32.
[208] Ibid. Pp 22.
[209] Ibid Pp 21 & 34. & Parker, Junius. "The Supreme Court and its Constitutional Duty and Power." American Law Review no. 3 (1896): Pp 360. In researching Parker, I was unable to determine which Junius Parker this is, there are two that came up in this time period. One who is known as Amasa J. Parker and is well known but had passed away by 1896. Another, who it seems only wrote in reference to French law.
[210] Ibid Pp 34.
[211] Hamilton, Alexander *Federalist No. 78*
[212] "Judicial Enforcement." . Accessed Nov 24, 2019. https://law.justia.com/constitution/us/article-1/01-separation-of-powers.html.

ambition.'[213] Another point he made, even though he is talking about impeachment, applies here as well '…George Mason of Virginia asked, "Shall any man be above, Justice?"[214] This is as true for the Legislative as for the Executive branch. *The check provided by the courts on the other branches, entirely human failures, is* ***essential*** *in a republican nation, even though the Court is not a democratic institution.* Some discussion of this point is prudent.

In Federalist 51 we find discussion of the need each branch to be independent "…members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal."[215] Moreover, again, in Federalist 78, focusing here on the judiciary, "The complete independence of the courts of justice is peculiarly essential…"[216] This independence is further discussed in Federalist 80, reinforcing the need for an independent judiciary. The idea of a limited government is essential. Thus, we are told: "in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the

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[213] *Author's Panel: On Patriotism in a Divided Washington.* CBS News, 2019. Approximately 6:30 – 8 minutes. https://www.cbsnews.com/video/authors-panel-on-patriotism-in-a-divided-washington/
[214] Ibid
[215] Madison, James *Federalist No. 51*
[216] Hamilton, Alexander *Federalist No. 78*

Constitution void."[217] The central idea is that it is the *Constitution* that is supreme. *Not* the Legislature, the Executive, or the Judiciary. To ensure the supremacy of the Constitution, the power of Judicial Review is necessary. It allows the Court to intercede (when requested) when the other branches have exceeded their *Constitutional* bounds.[218]

By the time we reach the Marshall Court, we can see that the idea is not a new concept at all. One might even say that it is a settled question in the minds of the people of the early Republic. Indeed, John P. Frank said that Marshall was '…so faithful to the Framers and Constitution that it is no longer a fruitful subject to discuss'.[219] Of course, there is the question of which framers?[220] We are certain he aligned with Hamilton and the rest of the Federalists. His continuing enmity with Jefferson shows the two gentlemen did not share the same view of the correct path for the nation.[221]

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[217] Hamilton, Alexander *Federalist No. 78*

[218] The Court only has final say when it is asked to intervene and even then, it will often deny certiorari (choose not to hear a case). Critiques of various decisions the court has made can be entirely valid and still not damage Judicial Review or the nation generally. Later in the paper there is discussion of precedent. Accepting and overturning precedent is the court (and the nation) trying to get the law right. We cannot expect an imperfect system, staffed by imperfect beings to get all issues right the first time, every time.

[219] Clinton, Robert Lowry. Marbury V. Madison and Judicial Review. Lawrence, Kan.: University Press of Kansas, 1989.Pp 219. Frank's comments are quoted here.

[220] Madison questioned the validity of Judicial Review saying that the chance of the government standing against 'Sovereign' power (the People) in the United States or anywhere was minimal. Where he supported it by looking to the examples in Europe, we can look right here at home – the treatment of African slaves and their descendants, the treatment of Japanese Americans in WWII. *infra* note 18 – Pp. 102-103. Also, the circumstances and aftermath of *Cherokee Nation v. Georgia* and treatment of Native Americans generally.

[221] Clinton, Robert Lowry. Marbury V. Madison and Judicial Review. Lawrence, Kan.: University Press of Kansas, 1989. Pp 105.

The concern about the limits of Judicial Review with regard to the prerogatives of the political branches of government, most notably the legislature, was of great interest to our early leaders. The judiciary of the time repeatedly comments that it should only declare an act of the legislative branch unconstitutional when there was no reasonable doubt[222] of its unconstitutionality.[223] Thus, the PQD stems from this 'Doubtful Case' doctrine.[224] The PQD seeks to help the court limit its involvement in the business of the other 'political' branches. Here the term 'political' refers to those branches who are elected and held accountable at the ballot box.

Today, we have developed other limits on the concept of Judicial Review. These limits are of similar nature, either falling into '…general rules of prudence or self-restraint.'[225] The PQD is an expression of both. In the criteria for the PQD from *Baker v. Carr*, we can see these concepts. Essentially, the limits above ask, "…is it prudent for the court to act in this way?" or "…should the judiciary

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[222] Functionally this would rarely be the case, both Snowiss and Clinton discuss this at length. This concept presents a high bar to court intervention. While the court should not overreach, at the same time this level of deference is too much. In discussions of the idea of relying on precedent it is said that we should view the law as something we are working to get right through trial and error. This idea should also be applied here. The court and the nation will work to get to the 'right' answer, it is unreasonable to expect we will get it right the first time, every time.
[223] Snowiss, Sylvia. *Judicial Review and the Law of the Constitution*. New Haven: Yale University Press, 1990. Pp. 60-62. Also - Ibid, Note 14 Pp. 49 & 52.
[224] Ibid Snowiss, Ibid Clinton, Pp 72 & Thayer, James B. "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review* 7, no. 3 (1893): 129-156. doi:10.2307/1322284. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=15308684&site=ehost-live&scope=site.
[225] "Limitations on the Exercise of Judicial Review." . Accessed Nov 3, 2019. https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/limitations-on-the-exercise-of-judicial-review

exercise self-restraint due to some other factor?" The answers to these questions depend on the case at hand. These broad categories outlined by the questions above deserve some more detailed discussion.

Justices starting with Marshall and continuing to the present day adhere to the idea that the court *must* take those cases which fall in its jurisdiction and *must not* involve itself outside that jurisdiction.[226] The 'Doctrine of Strict Necessity' requires that the court avoid ruling on constitutional cases except in the most precise application of the facts and when no other means of resolving the question are available.[227] Alternatively, to say it another way, the court must only involve itself in a constitutional question when no other means of resolution is possible.[228]

Next, we have the Doctrine of Clear Mistake.[229] This doctrine is a modern interpretation of the Doubtful Question Doctrine mentioned previously.[230] It is

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[226] Ibid see notes 764-770
[227] "Limitations on the Exercise of Judicial Review." . Accessed Nov 3, 2019. https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/limitations-on-the-exercise-of-judicial-review
[228] It is reasonable to ask, "How long should we wait for the normal course of action to remedy the situation?" The amount of time we must wait varies according to the urgency of the issue. Some issues will want immediate resolution and others can wait for an election cycle. The choice to wait or act though really depends on the litigants bringing the case to court. There are often times that they choose not to do so for reasons of their own or because their interpretation of the laws in question lead them to believe they have other remedies that will resolve the situation more quickly.
[229] Ibid
[230] Thayer, James B. "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review* 7, no. 3 (1893): 129-156. doi:10.2307/1322284. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=15308684&site=ehost-live&scope=site.

related to the PQD but is not so specific as it.[231] Like the PQD, there are limitations to it. First, the court can decide to ignore it.[232] Second, the structure of the court limits the PQD. Justices can and do disagree on the nature of questions. Thus, the majority can apply this doctrine over the opinions of the rest of the court.[233]

Related to the Doctrine of Clear Mistake is the Presumption of Constitutionality.[234] The court should enter its deliberations with the assumption that the action taken by other branches is within the bounds of the Constitution. Another sibling of the Doctrine of Clear Mistake is the Disallowance by Statutory Interpretation.[235] The court should construe the interpretation of legislation with the intent of sustaining its constitutionality.[236] To say it in another way, if there is a way to read legislation that makes it constitutionally allowable, read it in that way.[237] It should also separate the portions that it finds unconstitutional from

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[231] See note 22
[232] The court is not bound by these doctrines as we are bound by for instance, laws on speed limits. The doctrines are guideposts for the court and can, if the court chooses, be ignored or even struck down.
[233] "Limitations on the Exercise of Judicial Review." . Accessed Nov 3, 2019. https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/limitations-on-the-exercise-of-judicial-review
[234] Ibid
[235] Ibid
[236] Ibid
[237] As mentioned previously, there are concerns that the application of this doctrine would make Judicial Review nothing more than ink on a page. See note 22 for more on this.

those that are constitutional.[238] This is the notion that the court should enter its deliberations with the presupposing that legislation is Constitutional.

Another 'constraint' on Judicial Review is the Exclusion of Extra-Constitutional Texts. The concept that the SCOTUS must only focus on the Constitution in its deliberations. It should not consider other factors such as "motives, policy, or wisdom or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitution."[239] This is another restraint that does not seem to be very stringent or indeed employed very often. The reference to decisions from other nations, and to documents other than the Constitution of the United States is quite common. Concerns about the intent of actors across the spectrum of consideration are the norm rather than the exception.[240]

Finally, we have the concept of Stare Decisis.[241] The common term for this is 'precedent,' the court is expected to adhere to previously considered cases "…because in most matters it is more important that the applicable rule of law be settled than that it be settled right…"[242] Stare Decisis is not a hard and fast rule, however. If the court thinks a decision is in error, it will set that decision aside.[243]

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[238] "Limitations on the Exercise of Judicial Review." . Accessed Nov 3, 2019. https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/limitations-on-the-exercise-of-judicial-review
[239] Ibid
[240] Ibid (As an example see the dissent in Rucho v. Common Cause)
[241] Ibid - "Limitations on the Exercise of Judicial Review."
[242] Ibid
[243] Ibid Notes 790 & 791 are very useful here

The adherence to precedent seems to be waning. Justice Thomas has been critical of the concept for quite some time, and his recent opinion in *Gamble v. the United States* (2019) provides us with this clarifying passage:

> I write separately to address the proper role of the doctrine of stare decisis. In my view, the Court's typical formulation of the stare decisis standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. [244]

Additionally, in *Janus v. American Federation of State, County, and Municipal Employees* (2018), Justice Alito gives us a litany of reasons for not applying Stare Decisis. They range from decisions in error concerning First Amendment freedoms to lack of jurisdiction in Article 3 of the Constitution to poor reasoning.[245] With our understanding of Judicial Review broadened, we can now consider its offspring, the Political Question Doctrine.

The Political Question Doctrine

The lineage of the PQD is quite long, illustrated in Fig 4. for convenience. The pedigree ends with the 'Manageable Standard' because, at this point, the court has ruled that it cannot find such a standard, and the controversy is non-

[244] "Gamble v. United States (2019)" Accessed 7 Dec, 2019 https://supreme.justia.com/cases/federal/us/587/17-646/case.pdf
[245] "Janus v. American Federation of State, County, and Municipal Employees (2018)" Alito Opinion. Accessed 7 Dec 2019. https://supreme.justia.com/cases/federal/us/585/16-1466/

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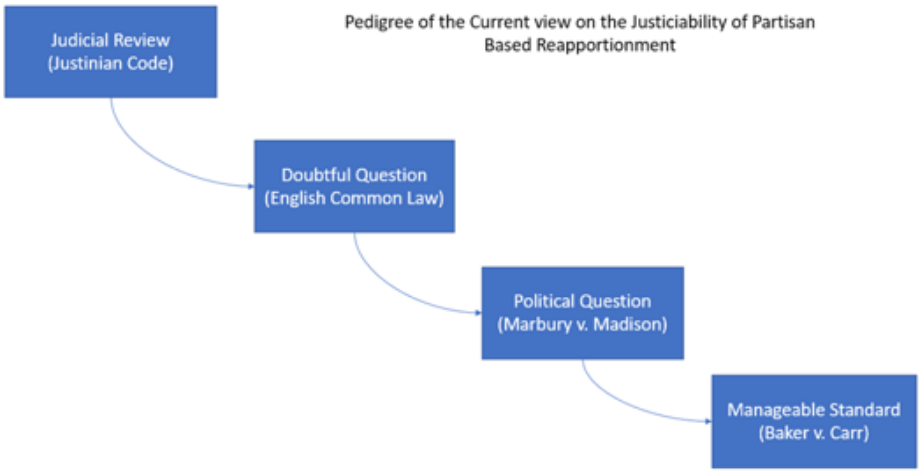
justiciable. It might also end, at some future date, when such a standard is perceived and accepted. We should also note that Judicial Review is different across the different government types. It serves to limit some aspect of government in each case. The difference is what part of government is limited and how. There are other concerns about Judicial Review in a Constitutional Republic, and we will discuss them later.

Fig. 4 - Pedigree of the Current view on the Justiciability of Partisan Based Reapportionment



As mentioned previously (repeated here for ease of reference), the PQD comes to us from Chief Justice Marshall via *Marbury v. Madison* (1803):

> Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.[246]

[246] "*Marbury v. Madison*." Oyez. Accessed October 21, 2019. https://www.oyez.org/cases/1789-1850/5us137.

Marshall us to consider the fundamental questions in a case, and this serves to limit the use of the PQD. Here Marshall is telling us if the Executive violates the law (either the Constitution or other laws), the Court has jurisdiction. Later in the case, we find this, "The subjects are political. They respect the nation, not individual rights, and, being entrusted to the Executive, the decision of the Executive is conclusive."[247] However, another explanation is, the decisions that do not affect an individual but instead are the business of the nation are beyond the reach of the court. There are hints of the view of the scope of the PQD in contemporaneous decisions, as examples – *Ware v. Hylton* (1796) & *Martin v. Mott*(1827).[248] In *Ware,* the court refused to pass judgment on a case involving payment of debts. To do so would have required them to declare if a treaty had been broken. This was something the Court did not feel was within their ability to decide.[249] In *Martin*, the court said that when the President was acting under the authority of the Congress, it was not for them to determine when or if he could call up the militia.[250] Other than the noninterference views of the PQD illustrated above, there is another interpretation that we can consider.

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[247] Ibid

[248] "Political Questions." Accessed Nov 9, 2019. https://law.justia.com/constitution/us/article-3/22-political-questions.html.

[249] "*Ware V. Hylton*, 3 U.S. 199 (1796)." . Accessed Nov 9, 2019. https://supreme.justia.com/cases/federal/us/3/199/.

[250] "*Martin V. Mott*, 25 U.S. 19 (1827)." . Accessed Nov 9, 2019. https://supreme.justia.com/cases/federal/us/25/19/.; both Ware and Martin were found via "Political Questions." . Accessed Nov 9, 2019. https://law.justia.com/constitution/us/article-3/22-political-questions.html. There are other cases at the time as mentioned in "The Doctrine of Political Questions." . Accessed Nov 9, 2019. https://www.law.cornell.edu/constitution-conan/article-2/section-3/the-doctrine-of-political-questions.

To add to the discussion of the PQD and its import, considering the place of the Judiciary in the American system is important. The elected or political branches of government are agents of the Sovereign (the People); therefore, the powers entrusted to them are primary. They act in the name of the people. The court must not interfere with their duties unless their actions are contrary to the Constitution. The court must ask itself, "Does this question revolve around a power given to another branch of government in the Constitution, or does it in some way damage an individual's Constitutionally guaranteed rights?"

Marbury, famously, first articulates, in the annals of the Supreme Court of the United States (SCOTUS), the concept of Judicial Review.[251] The PDQ is of the same pedigree and acts as a limiting factor on Judicial Review. The PQD was established in *Marbury* even though it was not applied there, and the court decided the case on other grounds. There are other cases where the Marshall Court applied the PQD, particularly *Foster v. Neilson* & *United States v. Palmer*, both foreign relations cases.[252] The paper discusses the various limiters on

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[251] Clinton, Robert Lowry. *Marbury V. Madison and Judicial Review*. Lawrence, Kan.: University Press of Kansas, 1989. See Pp. 76-77 discussing the view of Judicial Review at the time. An ally of Jefferson and Anti-Federalist views is quoted as first asserting the view we find in *Marbury*. Though the question in *Marbury* was not of great significance, this is where many will mark American Judicial Review's start.

[252] "The Doctrine of Political Questions." . Accessed Nov 9, 2019. https://www.law.cornell.edu/constitution-conan/article-2/section-3/the-doctrine-of-political-questions.

Judicial Review below. Initially, it covers some background on the matter at hand in *Marbury* and the concept of Judicial Review.[253]

This paper has been referring to *Marbury V. Madison* for a number of pages now, and the intent was to maintain focus on the impact of the decision. Some discussion of the details of the case is pertinent to frame the consideration of the case. Mr. William Marbury asked the court to force the Secretary of State, Madison, to deliver documents relating to Mr. Marbury's commission as a Justice of the Peace.[254] The appointment took place under what, some, consider dubious circumstances. The appointments were made and signed at the last moments of the outgoing administration's term and intercepted at the first moments of the incoming administration's time. The certifier would become the next Chief Justice of the Supreme Court. In other words, John Marshall was the Secretary of State and was in the process of setting his signature and seal to the new judge's commissions. The incoming Secretary of State stopped him from completing this task at the stroke of midnight.[255] The decision in *Marbury* is twofold, first that the mandamus (an order to perform an action that the person should as part of

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[253] For a more complete treatment of Judicial Review and *Marbury* I recommend - Robert Lowry Clinton's *Marbury v. Madison* and Judicial Review. Lawrence, Kan.: University Press of Kansas, 1989.
[254] "*Marbury v. Madison*." Oyez. Accessed October 21, 2019. https://www.oyez.org/cases/1789-1850/5us137.
[255] Pennoyer, Sylvester. "The Case of Marbury V. Madison." *American Law Review* no. 2 (1896): 188-202. https://heinonline.org/HOL/P?h=hein.journals/amlr30&i=196 https://heinonline.org/HOL/PrintRequest?handle=hein.journals/amlr30&collection=0&div=15&id=196&print=section&section=15.

the usual duties) requested would be an appropriate remedy, second that the SCOTUS could not issue it because it lacked jurisdiction.[256] The very fact that Justice Marshall did not recuse himself from the case in question leads one to wonder at his motivations.[257] The details of *Marbury* aside, Judicial Review was not a new concept at the time. As the PQD has developed over the years, a review of the litigation related to it or applying it is in order.

Literature Review

The debate over the breadth and scope of the power of Judicial Review in the United States has continued since the framing of the Constitution.[258] Alexander Hamilton argued that without a check on the Executive and Legislative branches along with the state governments, there would be no point in having a Constitution.[259] While Patrick Henry countered, saying such a court would render the other two branches irrelevant.[260] Today, some are still concerned about judicial overreach and activism enabled by judicial review and barely constrained

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[256] The latter portion of the decision is the most controversial since the court's decision required it to invalidate part of the Judiciary Act of 1789 (Section 13) that extended its jurisdiction into these and other cases. The conflict is with the U.S. Constitution's, Article III, Section 2.
[257] Both Pennoyer (note 13 above) and Parker describe the events surrounding the events that led to *Marbury* as being rather undignified and do not paint either Jefferson or Marshall in a positive light during this time. See especially Pp 194-195 from Pennoyer. Junius Parker refers to him at this moment as the "matchless judge" Parker, Junius. "The Supreme Court and its Constitutional Duty and Power." American Law Review no. 3 (1896): Pp 361. The circumstances here, do not support this view. He plainly had a personal interest in the case. This could be considered a bit of presentism as there seem to be no calls for recusal in the literature reviewed that considered the contemporary documents.
[258] *Supra* note 251, Clinton
[259] Parker, Junius. "The Supreme Court and its Constitutional Duty and Power." American Law Review no. 3 (1896). Pp 359
[260] Ibid Pp 360

by the PQD.[261] Others decry the PQD as having an "obsequious" level of deference to Congress and the President.[262] The Court can also go wrong. In those cases, justices can be encouraged to retire from the bench or be impeached and removed. There are other aspects to Judicial Review still being debated, but they are not central to our discussion about the Manageable Standard Doctrine and its sire the PQD.

PQD Litigation

As in the last chapter, an analysis of litigation will broaden our grasp of the current situation. Here we will look at the major cases where the PQD was employed or considered and rejected. To examine litigation, there are two categories the thesis focuses on 'Republican Form of Government' and 'Enactment or Ratification of Laws.'[263] The first is used solely to highlight the place the Judiciary has in ensuring the government is aligned with the Constitution. The second, 'Enactment or Ratification of Laws', is where most redistricting cases fall.

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[261] "Has the Supreme Court Gone Too Far?" . Accessed Apr 22, 2020. https://www.commentarymagazine.com/articles/james-wilson/has-the-supreme-court-gone-too-far/.

[262] This reference chosen mainly for the strength of the objection to current application of the PQD – Cohen, Harlan Grant. "A Politics-Reinforcing Political Question Doctrine." *Arizona State Law Journal* 49, no. 1 (2017): http://search.ebscohost.com/login.aspx?direct=true&db=lft&AN=124229882&site=ehost-live&scope=site.

[263] "Political Questions." Justia. Accessed Nov 9, 2019. https://law.justia.com/constitution/us/article-3/22-political-questions.html.

Republican Form of Government

Luther v. Borden (1849)

This case would fall under the first category Republican Form of Government.[264] In 1841 Rhode Island was still operating under the charter established by King Charles in 1663. It had not yet developed a new state constitution. By 1843 two different constitutions had been adopted, one by a voluntary convention of citizens and another by the state government that existed at the time.[265] The issue before the court (for our purposes) boiled down to the power of Congress[266] to determine if the State had established a Republican form of government. The court declined to judge on this idea because it was not (to use the modern term) justiciable, it was not within the jurisdiction of the courts' powers.

Further, the responsibility to protect the states from violence was given by Congress to the President.[267] Justice Taney and the court saw no role for the courts in this matter, either through legislation or the Constitution. Were these prudent applications of the PQD as the justices so clearly explain in their various

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[264] Ibid
[265] Adapted from "Luther v. Borden" Justia. Accessed Nov 7, 2019. https://supreme.justia.com/cases/federal/us/48/1/#tab-opinion-1956895
[266] United States Constitution – Article 4, Section 4, Clause 1
[267] "Luther v. Borden" Justia. Accessed Nov 7, 2019. https://supreme.justia.com/cases/federal/us/48/1/#tab-opinion-1956895

opinions? Justice Woodbury, in his dissent, highlighted the problems with the court deciding the issue:

> Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be that, in such an event, all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against, as well as for, them, and, under a prejudiced or arbitrary judiciary, the public liberties and popular privileges might thus be much perverted, if not entirely prostrated.[268]

Continuing his dissent, Justice Woodbury also quotes Hamilton in Federalist 77 - "Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both,"[269] Dr. Ken Masugi does not agree with the application in of the PQD in *Luther*.[270] He wrote that "By making legal positivism—the will of Congress—the test for what is 'republican,' Taney, I speculate, wished to denigrate the republican principles of the Declaration and then separate them from the Constitution."[271] His view is that it sets the stage for the woeful *Dred Scott v. Sandford* decision.

If Taney intended to attack the Declaration and disconnect it from the Constitution, then the *Luther* decision was in error.[272] We see in *Baker* that

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[268] Ibid
[269] Ibid
[270] Masugi, Ken. "Justice Thomas: Mr. Republican." . Accessed Oct 16, 2019. https://www.lawliberty.org/2016/04/14/justice-thomas-mr-republican/.
[271] Ibid
[272] Ibid

Justice Douglas does not agree with Justice Taney. Justice Douglas wrote, "Today we would not say with Chief Justice Taney that it is no part of the judicial function to protect the right to vote…"[273] This repudiation of the *Luther* decision has implications that we will discuss further in looking at *Baker*. Others have noted that Judicial Review, through Taney, is one of the reasons for the necessity of the Civil War.[274] While this is true, we also must accept that human institutions are imperfect and will occasionally make mistakes. Judicial Review has worked to protect the rights of the people more often than perverted to a bad result.[275]

Enactment or Ratification of Laws[276]

Colegrove v. Green (1946)

Colgrove is a reapportionment case wherein the complainants argued that an Illinois state law from 1901 that covered the apportionment of Congressional districts violated the United States Reapportionment Act of 1911.[277] There are two

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[273] The quote comes directly from Justice Douglas's opinion in "Baker v. Carr." Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/369/186/ & there is reference to it in Schuchman, John S. "The Political Background of the Political-Question Doctrine: The Judges and the Dorr War." *The American Journal of Legal History* 16, no. 2 (1972): 111-125. doi:10.2307/844569. http://www.jstor.org/stable/844569. Which was the source of my initial search for the opinion.

[274] It was observed by a reviewer that it is odd to use the term 'necessity' in referring to the Civil War. While this may be so, it does reflect my view of the situation. I am not a scholar of that era, but I do not see any other way for it to have been resolved. The personalities, faced with the realities of the times, would have found it nearly impossible to resolve the situation in any other way.

[275] Many would disagree with this assessment. Just as in any contentious issue, reasonable minds will come to different conclusions. In any case, that debate is one for another paper.

[276] "Political Questions." Justia. Accessed Nov 9, 2019. https://law.justia.com/constitution/us/article-3/22-political-questions.html.

[277] Colgrove v. Green" Justia. Accessed July 8, 2019. https://supreme.justia.com/cases/federal/us/328/549/#tab-opinion-1938775

questions here for us: from the court's perspective, is the idea of 'One Man – One Vote,' does the Constitution require that each person's vote count 'equally'? Concerning the PQD, though, do the courts have jurisdiction to rule on what is a 'state' matter? The complainants alleged that the districts lacked the requirements of equal population and compactness. As mentioned in Ch 1[278], the four to three[279] decision held that the court agreed with and would apply the same rationale as in *Wood v. Broom*; the question was a non-justiciable political question.[280] Justice Rutledge discusses at some length, in a simultaneously dissenting/concurring opinion, that the need to avoid conflict with the political branches of government. In this case, the legislature is the branch assigned the duties in question, those of managing elections.[281] However, as explained in *Baker,* he would have agreed with the dissent if there were sufficient time for Illinois to reconfigure their elections.[282] This slim majority and the fact that one of its members was ready to declare for the other side make this a poor choice for reference in supporting a ruling of nonjusticiability.

In the dissent, Justice Black states, "Here we have before us a state law which abridges the constitutional rights of citizens to cast votes in such way as to

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[278] See Pp 27 in the previous chapter
[279] Justice Jackson was not involved in the decision
[280] "Wood v. Broom" Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/287/1/
[281] Article I, Section 4 of the Constitution – "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.
[282] "Baker v. Carr." Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/369/186/

obtain the kind of congressional representation the Constitution guarantees to them." Additionally, he refers to the 'political question' claims in the majority and concurring opinions as a "…mere play on words."[283] The narrowness of the decision and the gulf of difference between the concurring and dissenting opinions illustrates the contentious nature of the question at hand and the lack of clarity when referencing PQD.

Baker v. Carr (1962)

The importance of *Baker v. Carr* to the discussion of the Political Question Doctrine is hard to overstate. The court, at long last, defines the boundaries of the doctrine. There is much discussion on if they do so effectively. The case itself is similar to *Colgrove*, in that a state (Tennessee here) was using outdated electoral district maps that failed to account for the change in population distribution, and the districts denied the plaintiffs equal protection as required in the Fourteenth Amendment.

The questions in *Baker* were very similar to those in *Colgrove*. The difference in *Baker* is that the court took action to define the parameters of the PQD using the six criteria we discussed earlier. Justice Clarks' concurring opinion was a veritable barrage of reasons for the court to take action. For example, he declared that "The truth is that -- although this case has been here for two years

[283] Ibid

and has had over six hours' argument (three times the ordinary case) and has been most carefully considered over and over again by us in conference and individually -- no one, not even the State nor the dissenters, has come up with any rational basis for Tennessee's apportionment statute."[284] The dissent spends much time referring to the "…substantial body…" of work while ignoring significant portions of that body. For instance, its reliance on *Colgrove* ignores that, '…but for lack of time…'[285], the decision could have been the opposite. Though the Constitution does not explicitly say that the concept of 'One Man – One Vote' is required, the Court has, fundamental fairness requires that each person's vote count equally. There are limitations to this idea within our system; for example, the Electoral College allows for an imbalance in power. However, even that has come into question recently as we elected two of the last three Presidents without a plurality of the electorate voting for them. However, this is a discussion for another day.

Additionally, Chief Justice Roberts noted in *Rucho v. Common Cause*, "The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had

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[284] "Baker v. Carr" Justia. Accessed November 10, 2019. https://supreme.justia.com/cases/federal/us/369/186/

[285] In his concurring opinion Justice Rutledge notes "The shortness of the time remaining makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek." "Colgrove v. Green" Justia. Accessed October 22, 2019 https://supreme.justia.com/cases/federal/us/328/549/

been in Great Britain."[286] Thus, equal representation has been part of the character of our nation from the start.[287]

2018/2019 & the 'Manageable Standard'

The cases here are considered together as the first, though a gerrymandering case, was rejected for want of standing. The latter cases were combined by the SCOTUS and decided together. All three of these cases fall under the Enactment or Ratification of Laws category as they are concerned with laws enacted in the various states: *Gil* – Wisconsin, *Rucho* – North Carolina, *Lamone* – Maryland.

In 2018 the Court considered *Gil v. Whitford,*[288] where it settled the concerns of standing for complainants in districting questions and opened the door for the Efficiency Gap measure of partisan gerrymanders; in the latter cases, they dismiss the use of this measure. During 2019, in both *Rucho v. Common Cause* and *Lamone v. Benisek,* the court stated the issue is not justiciable due to the lack of a 'manageable standard' as defined in *Baker*. They find that partisan based apportionment is allowed via a precedent provenance that reaches back to

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[286] Majority Opinion – "Rucho v. Common Cause" Justia. Accessed October 28, 2019. https://supreme.justia.com/cases/federal/us/588/18-422/

[287] It is true that the definition of equal representation has changed over the years but then so has our nation, for the better. The basic idea our founders had was equal representation as they counted who should be represented according to their times. Our times have a more inclusive definition, that still fits the basic concept.

[288] "Gill v. Whitford" Justia. Accessed July 25, 2019. https://supreme.justia.com/cases/federal/us/585/16-1161/

Davis v. Bandemer (1986).[289] "Specifically, even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, we do not believe that there has been an unconstitutional discrimination against members of that party unless the redistricting *does in fact* disadvantage it at the polls."[290] (emphasis added) Further in *Bandemer,* we find "…we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation."[291] In *Rucho,* the court states, "Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence."[292] While this is accurate for the claims made, from a normative standpoint, a better claim might be that they should have a fair chance at having some political power.

Despite the fact that the court finds "Excessive partisanship in districting leads to results that reasonably seem unjust." and "…such gerrymandering is "incompatible with democratic principles,"[293] Justice Kagan in the dissent notes, "The majority disputes none of what I have said (or will say) about how

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[289] "Rucho v. Common Cause - Dissent" Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/588/18-422/
[290] "Davis V. Bandemer, 478 U.S. 109 (1986)." . Accessed Nov 17, 2019. https://supreme.justia.com/cases/federal/us/478/109/.
[291] Ibid
[292] Ibid Rucho
[293] Majority Opinion – "Rucho v. Common Cause - Majority" Justia. Accessed October 28, 2019. https://supreme.justia.com/cases/federal/us/588/18-422/

gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles."[294](emphasis added) This decision was five to four along ideological lines. The current court has five justices that most would consider 'conservative' and four that most would consider being 'liberal.'[295] Thus, in this case, the five conservative justices comprised the majority. Due to the nature of SCOTUS precedent, we can expect that this will not be the end of the discussion.

The application of the PQD to redistricting has a long history. For most of our history, the court viewed redistricting as a political issue, and the courts had no place in it. The change in the view of redistricting occurred when the Civil Rights movement swept across the nation. There were other redistricting cases before the 1960s; however, none of them moved the court to act. When arguments demonstrated that reapportionment maps disenfranchised African Americans, the court struck them down.[296] Partisan gerrymandering is and has been allowed. It is of note, though, that throughout our history, we have also complained that partisan malapportionment was wrong.

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[294] Dissenting Opinion – "Rucho v. Common Cause - Dissent" Justia. Accessed October 28, 2019. https://supreme.justia.com/cases/federal/us/588/18-422/

[295] Conservative Justices – Samuel Alito, Neil Gorsuch, Brett Kavanaugh, John Roberts, Clarence Thomas Liberal Justices – Ruth Bader Ginsberg, Stephen Breyer, Elena Kagan, Sonia Sotomayor

[296] See the discussion of this in the Litigation section of the previous chapter. Other redistricting decisions have been promulgated using One Man – One Vote, Equal Protection, and other rationales. The real change for the PQD though was with *Baker*.

Was this type of complaint merely 'sour grapes,' losers complaining about losing and using something that a layperson can easily view as evidence? It could be the case; however, one would think that if so, it would cease to be a compelling argument. Today's concerns about this activity are sufficient to have pushed the House of Representatives to address it in legislation finally.[297] Perhaps, we failed to do anything about it because we lacked the political will or that it was not enough of a violation of our sense of 'fair play' to motivate us? The problem with our current situation is that the 'turnabout is fair play' maxim no longer works when there is ***no*** 'turnabout.' The ability to redistrict at will and to use computers to define the layout of those districts to enshrine a particular *continuing* result prevents any but the remotest chances of change. Thus, we cannot count on the traditional ebb and flow of the political system. The oral arguments in *Rucho* are illuminating in this consideration; we will discuss them further below. The discussion of the choosing of maps, especially.

Repeatedly the courts have said that partisan districting maps cannot be too extreme, but what is 'too extreme'? The five-member majority in *Rucho* held that that the examples under consideration were not too extreme, Justice Kagan in discussing the same cases though charged, "At its most extreme—as in North Carolina and Maryland—the practice amounts to rigging elections."[298] Not one

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[297] Sarbanes, John P. "H.R.1 - 116th Congress (2019-2020): For the People Act of 2019." . Accessed Dec 8, 2019. https://www.congress.gov/bill/116th-congress/house-bill/1.
[298] "Rucho v. Common Cause" Justia. Accessed July 28, 2019. https://supreme.justia.com/cases/federal/us/588/18-422/

example of partisan reapportionment maps has been struck down, not for being 'too extreme,' not for any reason. In the majority opinion in *Rucho*, Chief Justice Roberts notes, "This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims."[299] The opinion continues supporting this finding, citing precedents that say partisan apportionment is allowable under Constitution and that apportionment is an activity that is central to and inseparable from politics. When considering the search for a "politically neutral and manageable standard," the opinion cites the difficulty (impossibility?) in defining the basic idea of fairness due to the many and variable definitions of the term. Chief Justice Roberts focuses on the broader questions brought by this case rather than the specifics in this instance. In the process, it seems that there is evidence he is ignoring. In reviewing the opinions in this case, it is safe to say that both sides indulge in hyperbole to make their points. In this case, the evidence does not support the conclusion of the court. The evidence cited by the dissent leaves little doubt that, in this case, we have a partisan gerrymander that has gone too far. Thus, America is saddled with a SCOTUS that claims to be searching for or has failed to find a manageable standard by which to judge partisan districting maps.

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[299] Ibid

Conclusion

The search for a Manageable Standard, the Political Question Doctrine, and Judicial Review, are all about the rule of law. Are we a nation that is governed by laws, where no person, no branch of government, is above the law, or are we a nation of personalities, a nation of passion? This thesis asserts that the United States is 'A nation of laws, not men.'[300] In the arena of gerrymandering, the fundamental question about the PQD is, 'Is it still valid?' Setting aside the dismissal of blatant and excessive partisanship, ignoring the apparent evidence of reasonable, discernible standards, the court has affirmed again and again that it is not. The counterargument is that the current situation *is* the reasonable standard that the political solution is the answer. This reasoning ignores the problems the United States is faced with, though, as discussed in the conclusion of this thesis.

[300] Anonymous and John Adams. "The Constitution of Massachusetts." . Accessed April 16, 2020. https://www.consource.org/document/constitution-of-massachusetts-1780-10-25/20130122075650/. The actual phrase reads "…a government of laws, not of men." The paraphrase above is a common adaptation.

Chapter Three: Equal Elections & Trust?

Introduction

The first chapter discussed the background of gerrymandering, its history, and the litigation around it at the Supreme Court level. The chapter illustrated that though it has been part of our history, we have also found it to be unfair. Gerrymandering is institutional corruption. Legal, but still corrupt. The second chapter looked at the modern litigation in more detail and discussed the current impediment to a ruling from the Supreme Court, the political question doctrine. This chapter discusses corruption and its impact on democratic institutions. It also looks at elections and constitutions more generally. The reason for this change in focus is to bring into consideration why gerrymandering matters and why the Court's inaction on it matters.

A Threat to Democratic Institutions?

Previous chapters discussed the idea of fundamental fairness we inherited from the English system and culture. Those chapters also noted that from the beginning of the nation, gerrymandering was viewed as unfair. It was tolerated as a political practice by voters because the government generally left people alone to live their lives and seek their fortunes.

Yet as Norris et al. note, '...doubts about legitimacy may weaken confidence in elected institutions and generate disaffection with the overall

performance of democracy.'[301] In elections in the United States, participation hovers between approximately 40 to 55 percent, and a main cause of this low number is voter apathy, the feeling that their votes do not matter.[302] Various studies have found that voters in the United States express a relatively low level of satisfaction with democracy.[303] Norris's model (Fig. 6, next page) illustrates the feedback loop for the importance of electoral integrity. It is similar to the vicious cycle concept asserted by Rose-Ackerman & Palifka, discussed below.[304] Feelings that elections are or are not legitimate, weaken, or enhance voters' faith in their government. As those feelings, for good or ill, strengthen participation decreases or increases accordingly.[305] The cycle continues and can infect other segments of society, also discussed below.

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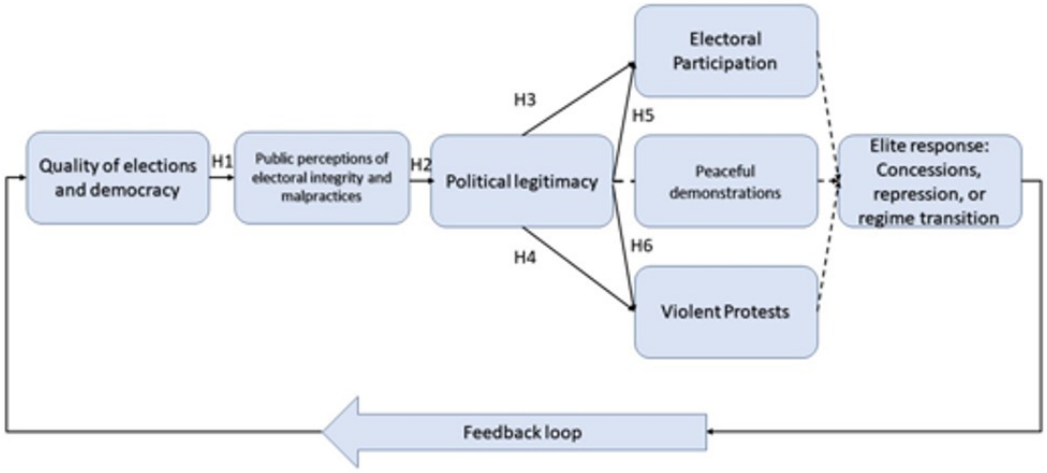
[301] Norris, Pippa., LeDuc, Lawrence., Niemi, Richard G.(Gene),. *Comparing Democracies : Elections and Voting in a Changing World* SAGE Publications, 2014. Pp 150.
[302] Sides, John. *Campaigns & Elections : Rules, Reality, Strategy, Choice*. New York: W.W. Norton & Co., 2012. & McDonald, Michael. "United States Elections Project." . Accessed Feb 8, 2020. http://www.electproject.org/home.
[303] Lijphart, Arend. Patterns of Democracy : Government Forms and Performance in Thirty-Six Countries. New Haven Conn.: Yale University Press, 2012. Pp 285-287.
[304] Rose-Ackerman, Susan., Palifka, Bonnie J.,. *Corruption and Government : Causes, Consequences, and Reform*. Second ed. Cambridge, U.K.: Cambridge University Press, 2016.
[305] Norris, Pippa., LeDuc, Lawrence., Niemi, Richard G.(Gene),. Comparing Democracies : Elections and Voting in a Changing World SAGE Publications, 2014. Pp 168.

Fig. 5



Agenda-setting model of electoral integrity [10]

The rule of law is central to our system. In Hayak's much-debated *Road to Serfdom,* there is this passage:

> Citizens can enjoy liberty only if the power of the state is circumscribed by law; that is, circumscribed by rules which specify limits on the scope of state action – limits based on the rights of individuals to develop their own views and tastes, to pursue their own ends and to fulfill their own talents and gifts.[306]

This places Hayak's views solidly in line with Locke.[307] There are many aspects of Hayak's work worth debating but debating the rule of law and its place in the American system is not. As shown in the chapter two, on the political

[306] Hayek, Friedrich A. von *The Road to Serfdom.* Chicago: University of Chicago press, 1944.
[307] Held, David. *Models of Democracy.* 3rd ed. Stanford, Calif.: Stanford University Press, 2006

question doctrine, few think that gerrymandering is compatible with democracy. The debate now is how to address it.

In discussions of government, it is common to look to the writings of the most influential founders, and rightly so. However, this tendency paints with an overly broad brush the larger body of the attendees of the Constitutional Convention. It helps us overlook the failures and flaws of that body. For example, slavery was accepted; this was a compromise that cost over one million lives. Was it worthwhile? The inability to form a government without the slave states might argue that it was. However, vanishingly few will agree that acceptance of slavery was…optimal. Greedy and corrupt intent was evident in the deliberations of the Constitutional Convention. Is it prudent then to accept that the document produced is without flaws? Instead, would it not be better to appeal to the better nature of those men and the document they created and seek to make a *more* perfect union indeed? There are other areas where the U.S. has failed to define corruption and these failures are not limited to the national government.

Recent cases have seen the SCOTUS take a very legalistic view of corruption overturning the conviction of a governor in one instance.[308] However, as shown by current efforts in the various states, inaction at the national level is

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[308] Barnes, Robert. "Supreme Court Overturns Corruption Conviction of Former Va. Governor McDonnell." *Washington Post,* -06-27T07:09-500,2016. https://www.washingtonpost.com/politics/supreme-court-rules-unanimously-in-favor-of-former-va-robert-f-mcdonnell-in-corruption-case/2016/06/27/38526a94-3c75-11e6-a66f-aa6c1883b6b1_story.html.

not indicative of voters' preferences. The American polity does not have to accept the corruption gifted to it by its forefathers. Among the Supreme Court justices, as noted in the last chapter, there is a movement to weaken the influence of and reliance on precedent. The framers expected those who came after to correct the framers' mistakes and gave them the means to do so without violence. Those tools have not always been sufficient, but that is no reason to fail to try. Gerrymandering may not violate the letter of the Constitution, but most assuredly violates its spirit. Like the abomination of slavery, the nation should also bury gerrymandering.

With the immediacy of the news cycle, the instantaneous ability to communicate with the entire nation, and the concurrent ability to manipulate perceptions, the legitimacy of elections is more important than ever. America must defend them vigorously and actively lest those of ill intent act first to the nations' detriment. By this point, identifying partisan gerrymanders as a form of corruption is stating the obvious. A discussion of corruption and its effects on democratic institutions should bring it all together.

The Economist Intelligence Unit's 2016 report was the first time the United States as a "Flawed Democracy" with its score coming in at a 7.98 (for a country to be considered a "Full Democracy," a rating of 8.01 and above is

required).[309] In 2019 the U.S. continued its slide, posting a score of 7.96.[310] The data for trust in government in the U.S. shows a steep slide starting in 1965, it began with a score in the high 70's by 1980 is was just below 30. The average rose and fell, never exceeding 60, coming to rest in 2015 at approximately 20.

There are many reasons for this low trust in government, but decisions in Korea, the Vietnam War, Watergate, and attacks on government in general from politicians' figure large in many minds. Actions by President Trump are significant in current perceptions of corruption. The litany of norms and even laws violated by the Trump administration, according to their accusers, would add several pages, at least, to this chapter. The seemingly constant criticisms from politicians take the government to task for inefficiency and corruption add to voters' apathy. The politicians, in this instance, are cynically giving voice to the frustrations of voters that are not satisfied with what they see occurring in government as a whole (in some cases, the criticisms are genuine). They are also deflecting criticism of their work by blaming others. By giving a larger stage to these frustrations, regardless of their factual basis, politicians serve to amplify voters' feelings of dissatisfaction. This is a vicious cycle as described by Rose-Ackerman & Palifka in *Corruption and Government: Causes, Consequences, and*

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[309] The Economist Intelligence Unit. *Democracy Index 2016: Revenge of the "Deplorables"*: The Economist, 2017.
[310] The Economist Intelligence Unit. Democracy Index 2019: A Year of Democratic Setbacks and Popular
Protest: The Economist, 2020.

Reform. This cycle is a self-reinforcing series of actions that undermine social or governmental trust, thus encouraging more corrupt behavior, and the cycle continues.[311] This cycle can create a spiral effect, undermining faith in both government and the polity as a whole.[312] The thesis finds further support for the impacts of corruption (and gerrymandering) in discussions of the concept of 'Social Trust.'

Social Trust

Social Trust is a concept that has a that has an extensive amount of research, especially since the theory of social capital was advanced by Robert D. Putnam initially in 1993 and more comprehensively in 2000 with the publication of "Bowling Alone: the collapse and revival of American community." In most research, social capital has two components, 'social trust' and 'reciprocity.'[313] Bjørnskov & Svendsen refer to social trust as a generalized trust which extends to others based solely on shared national origin.[314] Bjørnskov says that it is the "...degree to which people believe that strangers can be trusted...".[315] Reciprocity

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[311] Rose-Ackerman, Susan., Palifka, Bonnie J.,. *Corruption and Government : Causes, Consequences, and Reform*. Second ed. Cambridge, U.K.: Cambridge University Press, 2016.
[312] Ibid.
[313] Rothstein, Bo. "Corruption and Social Trust: Why the Fish Rots from the Head Down." Social Research 80, no. 4 (2013): 1009. http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=94074730&site=ehost-live&scope=site.
[314] Bjørnskov, Christian and Gert Svendsen. "Does Social Trust Determine the Size of the Welfare State? Evidence using Historical Identification." Public Choice 157, no. 1 (2013): 269-286. doi:10.1007/s11127-012-9944-x. http://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=90065460&site=ehost-live&scope=site.
[315] Bjørnskov, Christian. "How does Social Trust Lead to Better Governance? an Attempt to Separate Electoral and Bureaucratic Mechanisms." Public Choice 144, no. 1-2 (2010): 323-346.

is simply the idea of mutually beneficial cooperation.[316] This transactional view of human interactions or treating them as *"homo economicus,"*[317] as Rothstein puts it, does not explain the many and consistent acts of compassion we see.[318] However, the evidence is that reciprocity, using the transactional nature of this definition, is of minimal importance.[319] Thus, we come to the idea that social trust is *the* central component of social capital.

> One reason for the interest in social trust is that, as measured in surveys, it correlates with a number of other variables that are normatively highly desirable. At the individual level, people who believe that in general most other people in their society can be trusted are also more inclined to have a positive view of their democratic institutions, to participate more in politics, and to be more active in civic organizations. They also give more to charity and are more tolerant toward minorities and to people who are not like themselves. Trusting people also tend to be more optimistic about their own ability to influence their own life chances and, not least important, to be more happy with how their life is going.
>
> We see the same positive pattern at the societal level. Cities, regions, and countries with more trusting people are likely to have better working democratic institutions, economic growth, and less crime and corruption. At both the

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doi:http://dx.doi.org/10.1007/s11127-009-9522-z. http://search.ebscohost.com/login.aspx?direct=true&db=eoh&AN=1245240&site=ehost-live&scope=site.

[316] Rothstein, Bo. The Quality of Government : Corruption, Social Trust, and Inequality in International Perspective. Chicago ;London: University of Chicago Press, 2011.

[317] I cannot safely say that this term originated with Rothstein as I have also seen it in discussions of Behavioral Economics.

[318] *Supra* note 313.

[319] Ibid

> individual and societal levels, many things that are normatively desirable seem connected to social trust.[320]

The level of social trust is an essential indicator of where on the spectrum of development and democratization a society is due to the correlations and empirical evidence supporting those connections. Social capital thus, social trust, protects against vicious spirals and destruction of democratic institutions. The reverse is also true, the destruction of social capital or trust by institutional corruption (gerrymandering) damages the polity.

Levels of Social Trust

With the idea that social trust falls in a spectrum, some consideration of the idea that there are 'levels' of social trust, is in order. The gradations of trust from a particularized trust (trust in an individual built on past experiences) extending through what we call social trust, referring to trust for people in general with no set criteria. The range goes from a level of trust (or lack of it) that is generally not helpful (perhaps even harmful) to society, to a level of trust that is dangerous to the individual. In early Swedish society, there were levels of social trust that were, perhaps, uncommon for the times. Surely, granting tax collectors the power to set taxes according to the ability to pay was quite unusual in the

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[320] Rothstein, Bo and Eric M. Uslaner. "All for all: Equality, Corruption, and Social Trust." World Politics 58, no. 1 (Oct 1, 2005): 41-72. doi:10.1353/wp.2006.0022. http://journals.cambridge.org/abstract_S004388710001889X.

1500s?[321] In consideration of social & political concepts, the idea that there is a spectrum of behaviors in any field is useful and applicable to the relationship between gerrymandering and damage to the American polity. Further, it is crucial to understand that there are blended variations of ideas within and among these behaviors. Too often, the desire for simplicity of conversation or ease of computation leads researchers to forget the range of phenomena represented by a β or an α.

As is discussed throughout the literature, many think that social trust is dependent on some commonality of phenotype or culture. This idea, though, is refuted by more empirical studies. Recent research by several groups has shown that in developing and generating social trust, fairness, equity of treatment by the government, is the most critical factor "...perceptions of fairness are significantly correlated with social trust..."[322] There are many correlations to high levels of social trust; some were mentioned above. These correlations run from prosocial behaviors to economic benefits. Among the prosocial behaviors, we see higher levels of civic engagement, ranging from volunteerism to higher voter turnout. As You notes, "Social trust is likely to affect corruption and inequality, because non-

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[321] Retsö, Dag. "No Taxation without Negotiation." *Scandinavian Journal of History* 42, no. 4 (2017): 439-458. doi:10.1080/03468755.2017.1349577. https://doi-org.proxy1.library.jhu.edu/10.1080/03468755.2017.1349577. & Roberts, Michael. The Early Vasas: A History of Sweden 1523-1611. Cambridge, London: Cambridge U.P., 1968.
[322] You, Jong-sung. "Social Trust: Fairness Matters More than Homogeneity." *Political Psychology* 33, no. 5 (2012): 701-721. doi:10.1111/j.1467-9221.2012.00893.x. http://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=80125517&site=ehost-live&scope=site.

trusting people are less likely to stick to the rules of the game and societies with a higher social trust may find it easier to reach consensus on extensive redistribution and social insurance."[323] Indeed, this is precisely what many researchers have found. Countries with high levels of social trust do show lower levels of economic inequality and corruption.

The assertion here is that the levels of trust seen in homogenous societies are merely levels achieved with greater efficiency because of their homogeneity. As populations assimilate new members and ideas, leading to a blended culture, social trust is slower to develop. The fewer differences, the more quickly the groups achieve higher levels of social trust. Researchers in the field note that "Generalized trust enabling the provision of collective goods and governance can emerge even in dysfunctional states resulting from inclusive group identities in communities of overlapping memberships and people's experience with fair and impartial local institutions and governance."[324] This is where governments play a role in building social trust. This is also where institutional corruption, like gerrymandering, undermines social trust.

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[323] Ibid
[324] Börzel, Tanja A. and Thomas Risse. "Dysfunctional State Institutions, Trust, and Governance in Areas of Limited Statehood." *Regulation & Governance* 10, no. 2 (2016): 149. doi:10.1111/rego.12100. http://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=115897777&site=ehost-live&scope=site.

Political Trust

Political trust is a concept related to social trust, and similarly, it is crucial for consideration here. Political Trust is trust in government and confidence in political institutions.[325] This type of trust is differentiated from social trust because of its focus. Political trust focuses on an inanimate object. It is concerned with trust in something that is seen as faceless. One scholar observes, "The implication of this assurance is that parliaments (and states more generally) cannot meet their goals, cannot govern well, without a measure of public confidence."[326] Additionally, the same scholar posits that this trust is not unreserved or total, skepticism has an important place in a healthy democracy. Anecdotally one can observe this in the functioning of primary education. When parents interact with the teachers and administrators at their child's school, their trust in the school often increases. They have exchanged their weak trust in an institution for stronger particular trust in individual people. A possibly useful comparison is that it is hard to trust a building, less so to trust a person. Political trust is further removed because its focus often does not even have a persistent material object to serve as the focus of trust. It is related to other terms that

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[325] Ravel, Ann. "A New Kind of Voter Suppression in Modern Elections." *University of Memphis Law Review* 49, no. 4 (2019): 1019. http://search.ebscohost.com/login.aspx?direct=true&db=i3h&AN=137635962&site=ehost-live&scope=site.

[326] BRUNO, JONATHAN R. "Vigilance and Confidence: Jeremy Bentham, Publicity, and the Dialectic of Political Trust and Distrust." *American Political Science Review* 111, no. 2 (2017): 295-307. doi:10.1017/S0003055416000708. https://www.cambridge.org/core/article/vigilance-and-confidence-jeremy-bentham-publicity-and-the-dialectic-of-political-trust-and-distrust/B390A0B1F4AAD90CC1208E42BCC67314.

characterize citizens feelings about their governments.[327] On the positive side, it is related to confidence, system support, and legitimacy.[328] On the negative with cynicism, political disaffection, and alienation.[329] As mentioned previously, voting is the central democratic action, and trust in the integrity of elections is fundamental to trust in democratic governments.[330] An alternative definition has been proposed as well, "...the willingness to bear the immediate or expected material and ideological costs that arise from compliance with government action."[331] This definition better defines the reality of political trust at the individual level. It operationalizes trust. This is important in considering the importance of political trust and could easily be altered to encompass social trust as well. The willingness to sacrifice something for the good of another without expectation of direct compensation. The graph below (Fig. 7) illustrates the declining trust Americans express in their government starting in 1964.[332] The next chart (Fig. 8) documents Americans' trust by the branch of government.[333]

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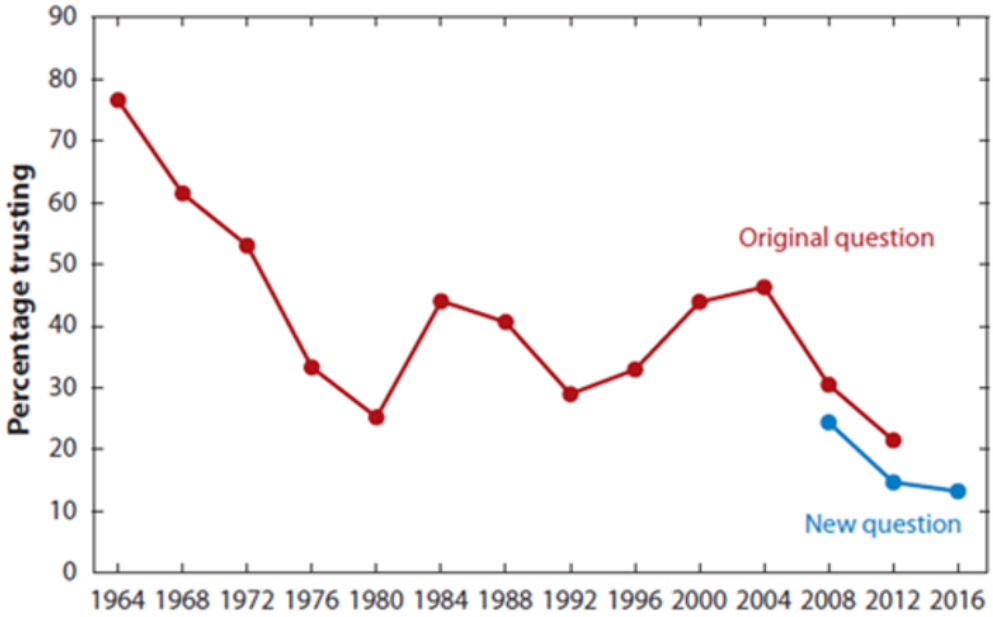
[327] Citrin, Jack and Laura Stoker. Political Trust in a Cynical Age. *Annual Review of Political Science* Vol. 21 2018. doi:10.1146/annurev-polisci-050316-092550. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=129548331&site=ehost-live&scope=site. Pp. 50
[328] Ibid
[329] Ibid
[330] Uslaner, Eric M. and Marc Hooghe. *Trust and Elections* Oxford University Press, 2017. doi:10.1093/oxfordhb/9780190274801.013.17. https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190274801.001.0001/oxfordhb-9780190274801-e-17.
[331] Tomankova, Ivana. An Empirically-Aligned Concept of Trust in Government. Vol. 12 *Sciendo*, 2019. doi:10.2478/nispa-2019-0007. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=137130038&site=ehost-live&scope=site.
[332] *Supra* note 327. Pp. 52
[333] Ibid Pp. 53

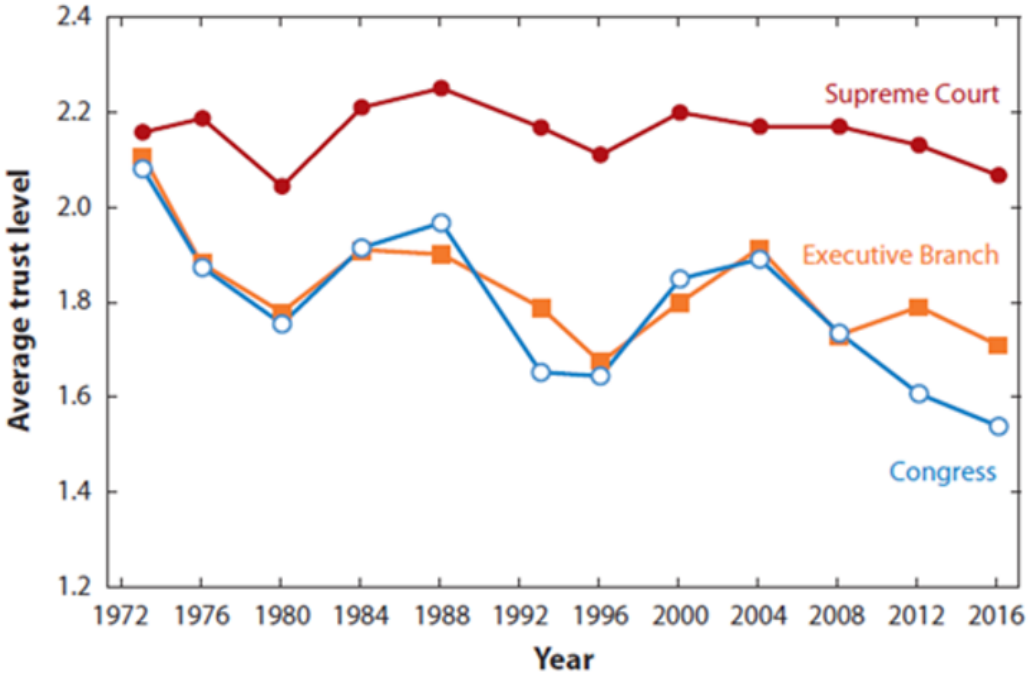
Fig. 6 Percentage of Americans who 'trust' the government



Percentage of U.S. citizens trusting the U.S. government over time. Entries are the weighted percentage of ANES face-to-face respondents saying that they trust the government most or all of the time. In 2008 and 2012, the ANES split sampled a new version of the question along with the original (red line), and in 2016, they carried the new question (blue line) only. The results show that the new question yields about 6–7% fewer trusting respondents than the old question. The original question is: How much of the time do you think you can trust the government in Washington to do what is right—just about always, most of the time, or only some of the time (with "never" coded if volunteered)? The new question is: How much of the time do you think you can trust the federal government in Washington to make decisions in a fair way—always, most of the time, about half of the time, some of the time (in 2012–2016; once in a while in 2008), or never?[334]

[334] *Supra* Note 327.

Fig. 7 Trust by branch of government



Confidence in U.S. institutions over time. Results are based on General Social Survey data collected during election years, when available, or during the following spring, when not. The confidence questions came in a battery introduced as follows: "I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?" Respondents were asked to indicate their confidence in the "U.S. Supreme Court" (red), "Congress" (blue), and the "Executive Branch of the Federal Government" (orange). Entries are weighted means for confidence variables scored to range from 1 (hardly any confidence) to 3 (a great deal of confidence).[335]

Kennedy found, "Popular opinion would seem to weigh in on the side of those who argue that partisan redistricting is unethical and has distorted the

[335] *Supra* note 327.

electoral process."[336] Further, Dr. Kennedy asserts that "gerrymandering is undermining democratic legitimacy by depriving voters of voice has political ramifications that may be difficult if not impossible to measure, but should not for that reason be dismissed as inconsequential. (As the Supreme Court noted in Shaw v. Reno (1993), reapportionment is one area in which appearances do matter.)"[337] The view is, politicians no longer work for the voters and are instead in league with special and or corporate interests. This view is supported by data documenting the lack of responsiveness shown by the government to voters' concerns.[338] Even a cursory search of the internet can find popular press supports for this idea as well. Another foray onto the internet can find widespread support for the assertion that the system is 'rigged.' There is empirical research that supports this concept, as well. The compounding of economic inequality with political inequality creates more of both; these both undermine political trust.[339] These findings correlate well with the concept that fairness is the most crucial

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[336] Kennedy, Sheila Suess. "Electoral Integrity: How Gerrymandering Matters." *Public Integrity* 19, no. 3 (2017a): 265-273. doi:10.1080/10999922.2016.1225480. https://doi.org/10.1080/10999922.2016.1225480.
[337] Ibid
[338] Waggoner, Philip D. "Do Constituents Influence Issue-Specific Bill Sponsorship?" *American Politics Research* 47, no. 4 (2019): 709. doi:10.1177/1532673X18759644. http://search.ebscohost.com/login.aspx?direct=true&db=ahl&AN=136904314&site=ehost-live&scope=site., Martin, Aaron, Raymond Orr, Kyle Peyton, and Nicholas Faulkner. Political Probity Increases Trust in Government: Evidence from Randomized Survey Experiments. Vol. 15 *Public Library of Science*, 2020. doi:10.1371/journal.pone.0225818. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=141899862&site=ehost-live&scope=site. & *Supra* note 326. Citrin & Stoker Pp. 57
[339] Stiglitz, Joseph E. "A Rigged Economy." *Scientific American* 319, no. 5 (2018): 56. doi:10.1038/scientificamerican1118-56. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=132271090&site=ehost-live&scope=site.

factor in growing social trust.[340] Rigged elections lead to a decline in trust in government and democratic institutions.[341] Gerrymandering or malapportionment should be included in the list of ways parties seek to suppress voters.[342] Next

1776, Pennsylvania

Corruption and gerrymandering have been part of American history since the earliest days of the Republic, as seen in the chapter on the history of gerrymandering. There are other constitutions from our past that predate the United States Constitution and can shed light on our discussion. One of these is the Constitution for the state of Pennsylvania. In the gerrymandering case *League of Women Voters, et al. v. the Commonwealth of Pennsylvania, et al.* – (2017), there is extensive discussion of Article 1, Section 5 of that Constitution, and the meaning of it.[343] The majority in the Pennsylvania Supreme Court's decision discusses that the common standard is that elections are to be 'free and equal' and that the map drawn by the defendants violates that standard. The importance of free and fair elections is common in American political discussion. Thus why, cheating through gerrymandering, is damaging to the polity.

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[340] *Supra* note 322.
[341] *Supra* note 325.
[342] Ibid
[343] "League of Women Voters, Et Al. V. the Commonwealth of Pennsylvania, Et Al. – 159 MM 2017 | Cases of Public Interest | News & Statistics | Unified Judicial System of Pennsylvania." . Accessed February 2, 2020. http://www.pacourts.us/news-and-statistics/cases-of-public-interest/league-of-women-voters-et-al-v-the-commonwealth-of-pennsylvania-et-al-159-mm-2017.

Pennsylvania sought to curb attempts to violate the ideal of free and fair elections as early as 1790, recognizing the need for strong institutions that would not be undermined by opportunism. The 1790 constitution also moderated some of the perceived excesses of the 1776 document by adding a second legislative body, bringing it in line with the United States Constitution.[344] One of the motivations of the authors of Pennsylvania's first Constitution was to eradicate all elements of the monarchy from the American system.[345] This motivation presented a clear threat to those accustomed to power.[346] When considered by the light of these competing interests, the debates during the Constitutional Convention take on a different tone.[347]

Further, in *League of Women Voters, et al. v. the Commonwealth of Pennsylvania, et al.* – (2017), there is a discussion of why it is important to use clear, unambiguous, plain language, and to remove qualifications on, the standard for the state to have free and fair elections. There may be variations on what the terms' free' and 'equal' mean, but those variations will not vary in any significant way. The difference for our consideration is that the authors of the

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[344] "Tracked Changes to the Pennsylvania Constitution." . Accessed Feb 8, 2020. https://www.paconstitution.org/historical-research/tracked-changes-to-the-pennsylvania-constitution/.; The excesses were perceived by those that felt it was too slanted toward the common people and took too much power from the established order. For more on this see the reference below.

[345] Williams, Robert F. "The Influences of Pennsylvania's 1776 Constitution on American Constitutionalism during the Founding Decade." *The Pennsylvania Magazine of History and Biography* 112, no. 1 (1988): 25-48. http://www.jstor.org/stable/20092180. Pp 26.

[346] Ibid

[347] Ibid. Pp 43-46

Constitution did not *plainly* define how elections were to be conducted. Why would the framers overlook this? Did they cover so many other considerations only to ignore a central standard for the most important civic duty? Apparently, the framers did not address gerrymandering because, for some, it was not an issue in their minds. Free and fair elections were the standard, and it was as evident to them as the rising sun. For others, the experience in other states (markedly the 1776 Pennsylvania Constitution) and the debate in Paine's *Common Sense* led them to seek to preserve their hold on power.[348] Is the average citizen strongly invested in who particularly holds power? Alternatively, are they just concerned with how they wield it? The previous chapter discussed a more arcane standard accepted during the framers' era, in the same way, that of judicial review. If this legal standard was readily accepted (and documented), why the need to state something else that is obvious to the framers? The only reason is that the parties that George Washington warned us about would seek to hold power and subvert the will of the people at every opportunity. Thus, the supports for gerrymandering and dismissal of concerns about it.

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[348] Ibid. Pp 44-45 & Paine, Thomas and Philadelphia Yearly Meeting of the Religious Society of Friends. *Common Sense*. New , with several additions in the body of the work ed. London: Re-printed for J. Almon, 1776. http://galenet.galegroup.com/servlet/Sabin?af=RN&ae=CY111234687&srchtp=a&ste=14&q=balt85423.

Corruption

In a 2016 survey, 60% of Americans reported their number one "Corrupt Government Officials."[349] Fear of corruption beat the fear of terrorism by 20 points.[350] When bribery, graft, nepotism, extortion, fraud, and other forms of corruption come to light, Americans mostly call for prosecution. Americans' sought to combat corruption from the birth of the nation by including a clause from the Article of Confederation to the Constitution almost word for word. The Emoluments Clause of Article I, Section 9, prohibits any "Person holding any Office of Profit or Trust under [the United States]" from accepting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Though Americans were well aware of the danger represented by corruption, that does not mean it was not a problem in the early days of the country.[351]

Unfortunately, though America was well aware of the dangers of corruption from the outset, it has never been eradicated. Views of what is corrupt have become more refined and, as mentioned previously, activity that was tolerated in the past is now prosecuted. Additionally, prosecution of individual corruption is still uneven across all levels of the judicial system. The Supreme

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[349] America's Top Fears 2016 - Chapman University Survey of American Fears. Wilkinson College of Arts, Humanities, and Social Sciences. Chapman University, 2016. https://blogs.chapman.edu/wilkinson/2016/10/11/americas-top-fears-2016/.
[350] Ibid
[351] Teachout, Zephyr Rain. *Corruption in America : From Benjamin Franklin's Snuff Box to Citizens United*. Cambridge, Massachusetts: Harvard University Press, 2016.

Court recently took a very legalistic view of it when it overturned the conviction of a former Governor from Virginia.[352] In Texas, about two years later, a former Congressman was found guilty of various forms of corruption.[353] Generally, low-level corruption (that found with average public servants) is not very common in the United States. That is not to say it is non-existent and institutional corruption can facilitate individual corruption. For example, Oklahoma had a system of County Commissioners that allowed these people to blatantly abuse their power to the point that the Federal government took over administration of the counties for an extended period. As of this writing Oklahoma represents an extreme outlier in prosecutions for corruption.[354] However, there are some issues with grand corruption that have only been made worse in recent years. Grand corruption is corruption of higher-level public officials and includes perceived corruption i.e. campaign contributions for access and special interest influence.[355] The United States has left things particularly murky concerning the

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[352] Barnes, Robert. "Supreme Court Overturns Corruption Conviction of Former Va. Governor McDonnell." *Washington Post,* -06-27T07:09-500, 2016. https://www.washingtonpost.com/politics/supreme-court-rules-unanimously-in-favor-of-former-va-robert-f-mcdonnell-in-corruption-case/2016/06/27/38526a94-3c75-11e6-a66f-aa6c1883b6b1_story.html.

[353] Bowden, John. "Former Texas Congressman found Guilty of 23 Felonies." Accessed Apr 22, 2018. http://thehill.com/homenews/house/382889-former-texas-congressman-found-guilty-of-23-felonies.

[354] Goble, Danney. "Government and Politics | the Encyclopedia of Oklahoma History and Culture." . Accessed 15 Feb 2020. https://www.okhistory.org/publications/enc/entry.php?entry=GO018. In the end, Oklahoma had 246 public 'servants' convicted on corruption charges between 1977 and 1987. This is an exception to the generally low level of corruption, but it most be noted that the system was facilitated by institutional corruption.

[355] Gerken, Heather K. "The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties." *Proceedings of the American Philosophical Society* 159, no. 1 (2015): 5. http://search.ebscohost.com/login.aspx?direct=true&db=i3h&AN=112957508&site=ehost-

norms associated with Presidents. For example, it is the norm for presidential candidates to submit their tax returns for review, but there is no *legal* requirement for them to do so.[356] Additionally, there is a long history of expecting Presidents to recuse or divest themselves of commercial enterprises during their time in office, yet again there is no *legal* requirement to do so.[357] Attempts to address institutional corruption have been mixed, as noted previously. The Pendleton Act was effective for some types of institutional corruption, but gerrymandering has continued.

The Supreme Court decisions in Citizens United et al. and others in 2010 have created a definite *perception* of corruption in the electoral system.[358] Zephyr Teachout paints a dramatic picture of a kind of corruption in her book, Corruption in America.[359] When discussing the *McCutcheon v. FEC* decision (one of the other cases mentioned in discussions of the *Citizens United* case), Teachout highlights the shakiness of the decision opining, 'it is hard to know if the Supreme Court believes democracy can withstand the attack of money or if they

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live&scope=site. & Hasen, Richard L. *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections*. New Haven; London: Yale University Press, 2016. & Sides, John. Campaigns & Elections: Rules, Reality, Strategy, Choice. New York: W.W. Norton & Co., 2012.

[356] Roos, David. "Can a U.S. President Remain in Business Once in Office?" . Accessed Mar 20, 2020. https://people.howstuffworks.com/can-a-us-president-remain-business-once-office.htm.

[357] Ibid & The 'Emoluments Clause' in the Constitution is cited as the source of this though it has yet to be made clear by further action from Congress or the SCOTUS.

[358] Hasen, Richard L. *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections*. New Haven; London: Yale University Press, 2016. & Sides, John. Campaigns & Elections: Rules, Reality, Strategy, Choice. New York: W.W. Norton & Co., 2012.

[359] Teachout, Zephyr Rain. *Corruption in America : From Benjamin Franklin's Snuff Box to Citizens United*. Cambridge, Massachusetts: Harvard University Press, 2016.

recognize the danger and think Congress is the more significant threat.'[360] Grand or high-level corruption is something that is of great concern in the United States and addressing it will be a crucial factor in returning the U.S. to a 'Full Democracy' rating in the Economist Intelligence Units Democracy Index, discussed below. As mentioned above, *Citizen's United et al*. have created some serious concerns about electoral integrity.[361] That said, when compared to other countries, these concerns are only developing. For example, Russia has rampant corruption down to the lowest levels of society.[362] For documentation of the growth in corruption, a review of recent corruption and democracy indexes is instructive.

Indexes and Reports from International Watchdog Organizations

The ratings in these indexes and reports are not important in and of themselves. Rather what they represent is what is important. These ratings represent how people view a country, their country. These perceptions, as discussed previously, matter because of their impact on the strength of democratic institutions in a country. Gerrymandering undermines voters'

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[360] Ibid, Pp 304
[361] *Supra* note 354, Hasen & Sides
[362] Larsson, Tomas. "Reform, Corruption, and Growth: Why Corruption is More Devastating in Russia than in China." *Communist & Post-Communist Studies* 39, no. 2 (2006): 265-281. doi:10.1016/j.postcomstud.2006.03.005. http://search.ebscohost.com/login.aspx?direct=true&db=hia&AN=21262803&site=ehost-live. & Starobin, Paul. "The Eternal Collapse of Russia." *The National Interest* no. 133 (Sep 1, 2014): 21. https://search.proquest.com/docview/1559826392.

feelings that elections are free and fair, thus creating concerns about electoral integrity.

The United States ranking by Transparency International's Corruption Perception Index dropped a place to 23 as its rating fell to 69 (incidentally, the U.S. now ranks below all of Scandinavia, most of Europe, Uruguay, and the United Arab Emirates).[363] The Economist Intelligence Unit's Democracy Index for 2016 is one of the motivators for this thesis, and it notes that for the first time, the United States dropped below the required score of '8' to be considered a 'Full Democracy.'[364] Since the index's inception in 2006, the U.S. has fallen from a high rating of 8.22 to 7.96.[365] The most significant two drops were in 2011 and 2016, though 2015 was near to the same magnitude (.07 drops for the former and .06 for 2015).[366] The decrease in 2016 was accounted for by a decline in the 'Functioning of Government' rating.[367] This criterion is the source of the continuing deterioration of the U.S.'s rating.[368] The report highlights hyper-partisanship and the numerous problems associated with the current administration as the main factors causing this decline.

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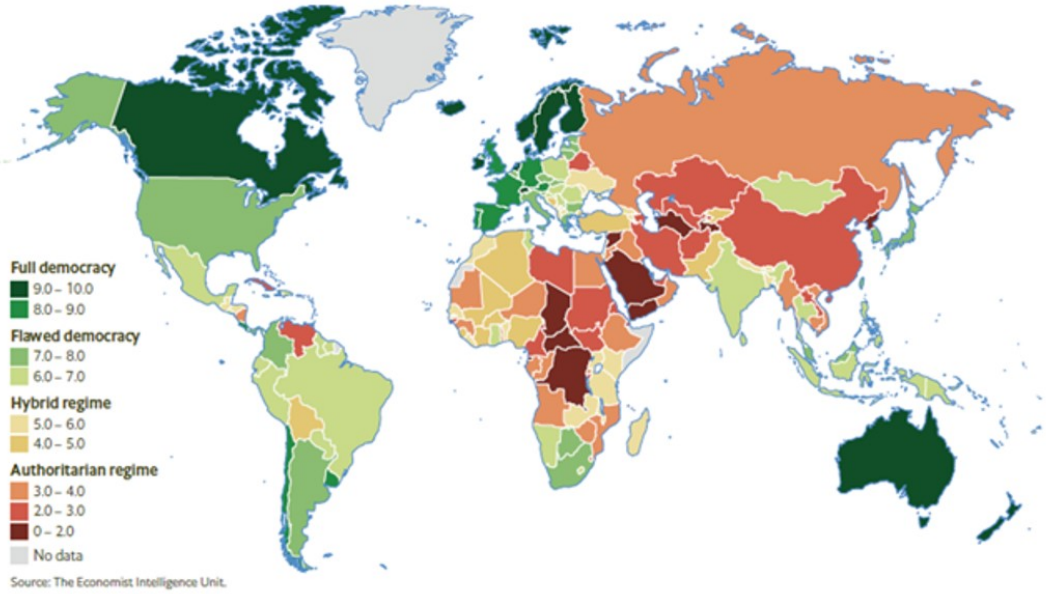
[363] Transparency International. "Corruption Perceptions Index." . https://www.transparency.org/research/cpi/cpi_early.
[364] The Economist Intelligence Unit. Democracy Index 2016: Revenge of the “Deplorables”: The Economist, 2017, The Economist Intelligence Unit. Democracy Index 2017: Free Speech Under Attack: The Economist, 2018, The Economist Intelligence Unit. Democracy Index 2019: A Year of Democratic Setbacks and Popular Protest: The Economist, 2020.
[365] Ibid
[366] Ibid
[367] Ibid
[368] Ibid

Fig. 8 Democracy Index 2019, global levels of democracy map by regime type [369]



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Public Confidence

"Democracies do not end when they become "too democratic"; they begin to founder when they exclude the demos."[370] 'Demos' is the people of a nation; for the United States, they are also sovereign.[371] Public confidence in the United States government has been on a decline since the 'end' of the Korean War.[372]

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[369] The Economist Intelligence Unit. Democracy Index 2019: A Year of Democratic Setbacks and Popular
Protest: The Economist, 2020.
[370] The Economist Intelligence Unit. Democracy Index 2017: Free Speech Under Attack: The Economist, 2018.
[371] *Collins English Dictionary – Complete and Unabridged*, 12th Edition 2014, HarperCollins Publishers
[372] Shaw, Greg M. and Stephanie L. Reinhart. "The Polls-Trends Devolution and Confidence in Government." Public Opinion Quarterly 65, no. 3 (2001): 369-388. http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=5517047&site=ehost-live&scope=site. & Shapiro, Robert Y. "Public Opinion and American Democracy." Public Opinion Quarterly 75, no. 5 (2011): 982-1017. http://www.jstor.org/stable/41345919.

After WWII, America and the 'West' saw nothing but global prosperity and eventual triumph of democracy and capitalism. While part of this dream came true, there were stumbles along the way that began to undermine faith in the system. The failure to 'win' in both Korea and Vietnam dealt blows American confidence. Watergate caused a dramatic fall in faith in the government. In the background, we have the continuing effect of gerrymandering undermining voters trust. After the Watergate drop, public opinion stayed at roughly the same level from the 1970s through to the early 1990s when it again dropped.[373] The Economist Intelligence Unit's Democracy Index does not track public confidence in individual nations per se, but it does follow support for democracy. The report for 2017 lists the following reasons for the decline [374] :

- declining popular participation in elections and politics
- weaknesses in the functioning of government
- declining trust in institutions
- dwindling appeal of mainstream representative parties
- growing influence of unelected, unaccountable institutions and expert bodies
- widening gap between political elites and electorates
- decline in media freedoms
- erosion of civil liberties, including curbs on free speech.

The EIU's Democracy Index discusses these reasons and notes that the United States also shows all of these symptoms. It highlights the election of Mr.

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[373] Ibid.
[374] *Supra* note 364, Economist Intelligence Unit's Democracy Index 2017

Trump as a symptom of this dissatisfaction.[375] The failure of the United States to address the reality of 'hegemony' and to properly handle sudden success has been at least part of the reason for the current situation.[376] With all of this to provide back ground, a discussion of the concepts of social trust and how institutional corruption via gerrymandering represents a threat to democratic institutions is in order.

Conclusion

There is resistance to the idea that gerrymandering is institutional corruption. Those that resist the connection should reflect on what they think corruption is. Does gerrymandering meet the criteria? This thesis demonstrates it does and support ranges from the bench of the Supreme Court to research in political and social science. To assist this consideration, one scholar gives us "…the practice described undermines, or has a tendency to undermine, some legitimate institutional purpose or process…" and "However, the central meaning of the term "corruption" carries strong moral connotations…"[377] The resistor must ask themselves, is it moral for gerrymanders to undermine the legitimacy of

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[375] Ibid.
[376] There is much debate as to the reality of an American hegemony – or if there is such a thing, what does it mean as it is not the same as previous hegemons?
[377] Miller, Seumas. Institutional Corruption : A Study in Applied Philosophy. Cambridge: Cambridge University Press, 2017. https://doi.org/10.1017/9781139025249. See the introduction and Ch. 3. Ch 14 also provides a focus on governmental corruption. The author's observations align with the findings of Rothstein et al. The findings of this resource point attention to those that are responsible for gerrymanders and their corrupt intent.

an election? In the American political system who is primary, the voter or party? This thesis finds that the voter is primary and thus gerrymandering is corrupt.

Does social trust matter to democratic governance? Compiled above is a compelling collection of sources that show that it does matter. Indeed, it matters a great deal. The impacts of the level of social trust are far-reaching and hard to overstate.

> Cities, regions, and countries with more trusting people are likely to have bettering democratic institutions, economic growth, and less crime and the societal levels...[378]

There is a direct correlation between social trust and trust in government. If one lacks the other suffers. As demonstrated in former totalitarian regimes, enforced 'trust,' if one can call it that, in the state damages interpersonal trust.[379] As with any correlation, a decline in one indicates a change in its correlate. A negative change in social trust indicates an adverse change in correlating prosocial phenomena. Social trust matters, not only to governance but really to all areas of social endeavor, nations often spend it without realizing it and competitors work to undermine it. The idea of growing social trust is one that

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[378] Rothstein, Bo and Eric M. Uslaner. *"All for all: Equality, Corruption, and Social Trust."* World Politics 58, no. 1 (Oct 1, 2005): 41-72. doi:10.1353/wp.2006.0022. http://journals.cambridge.org/abstract_S004388710001889X.

[379] Andrain, Charles F. and James T. Smith. Political Democracy, Trust, and Social Justice : A Comparative Overview. *Northeastern Series on Democratization and Political Development.* Boston: Northeastern University Press; Hanover N.H., 2006.; Marková, Ivana and British Academy. Trust and Democratic Transition in Post-Communist Europe. *Proceedings of the British Academy*. Vol. 123. Oxford ;New York: Oxford University Press, 2004.

governments should take seriously. Institutional corruption, here gerrymandering, represents an ongoing threat to social trust in America.

Additionally, protection and development of social trust should be treated and protected as much as any other national resource. For this issue, to put it succinctly: gerrymandering is corruption, corruption undermines social trust, decreasing social trust damages faith in democracy & undermines democratic institutions. Thus, gerrymandering is a threat to the American polity.

Final Words

This thesis assesses two factors, gerrymandering and corruption. It strives to bring attention to their relationship, as it has not been the subject of enough attention in the past. To do so, the thesis takes a *fairness* view of corruption. This serves to move the discussion from the purely criminal to a more general view on factors that can impact social cohesion. The thesis employs the American Political Development model to focus on durable changes in attitude in the nation, as reflected by the Court, toward malapportionment of electoral districts.

Chapter one provided a firm understanding of gerrymandering and a discussion of corruption in American history. It demonstrated that gerrymanders are not a symptom of division but rather a source of it. The three eras, *The Era of Silence, The Equal Rights Era, The Era of the Manageable Standard,* allow the paper to focus on specific changes without becoming lost in other data. By discussing in detail, the litigation surrounding the issue, the chapter also demonstrates that gerrymandering was identified as highly objectionable throughout American history. It was tolerated so long as it was not perceived as a persistent threat. The view was that though a gerrymander might be successful in the short term, in the long, it could not be. In the first era, the consideration of *Marbury*, outside the more common examination of Judicial Review, also serves to bring the reader's attention to a narrower focus. The move to the *Equal Rights Era* reveals another aspect of the change in American society that grew from that pivotal period. Understanding that districting could be used to disenfranchise

minority voters and that that was as unacceptable as other forms of voter suppression was essential to later developments that applied more generally. The final era sees the Court wringing its hands over a mess it has created concerning partisan gerrymanders. It compounded the error by failing to recognize the threat created by combining the effects of the *LULAC* and *Rucho* decisions.

Chapter two provided a solid understanding of the doctrinal source of the current controversy in districting. It followed the same litigation focus as the previous chapter. However, it abandoned the era focus and instead turned to conceptual evolution, starting with the foundation of the current controversy in the Justinian Code circa 530 B.C. From Rome, it fast-forwarded to another empire, England, and documentation of the Doubtful Question Doctrine via Blackstone. Marshall provides the next step by introducing the American version of judicial review and the political question doctrine. In 1962 Brennan delivered the next evolution via *Baker v. Carr* and the six criteria needed for the Court to use the political question doctrine to withhold judgment in a case. Chapter two also demonstrated that the Court is not perfect and is more than willing to correct errors of the past when needed—illustrated by the tragically flawed decision in *Luther*. It concluded with admissions from the majority in *Rucho* that gerrymandering is a perversion of the Constitution. The majority seems bound by an irrational attachment to the political question doctrine and fails to consider the entire list of criteria provided in *Baker*. Though the minority in *Rucho* might be safely accused of hyperbole, their basic assertion that the majority is ignoring

a manageable standard is accurate. The *intent* of the maps chosen was to create the most extreme partisan gerrymander they could. Thus, *intent* is an entirely reasonable and manageable standard. It is used in many cases across the breadth of judicial activity on a daily basis.

Chapter three linked the previous chapters together with a thorough discussion of corruption and social trust and their relationship to gerrymandering. Corruption, as considered here, can be both illegal and legal via institutionalized methods of electoral distortion. It started this discussion by focusing on free and equal elections and how concern for them was evident in the colonies before the Constitution was drafted. Consideration of the profound revulsion of official corruption is illustrated both at the birth of the nation and in recent studies. Additionally, it considered changes in perceptions of corruption levels and the strength of democracy in the United States via the Transparency International Corruption Perception Index & the Economist Intelligence Unit's Democracy Index. Chapter three provided evidence of the corrosive effects of corruption on social trust. It demonstrated the importance of social trust to democratic institutions. Finally, chapter three delved into the concept of political trust, a close cousin of social trust. The individualized definition provided brought the importance of political trust into sharp focus. This definition can be expanded to include social trust. Doing so encourages consideration of these types of trust as resources to be stockpiled or depleted. Their depletion feeds the destruction of democratic institutions. On top of the previous chapters'

indictment of the current legal situation, section three provided yet more evidence that not only is the electoral system being undermined by gerrymandering but that this also undermines the foundations of our nation.

Limits of the Analysis –

One of the significant limitations of this study is the lack of empirical rigor. As was mentioned at the outset and will be mentioned in the areas for further research, a reliable measure for corruption, regardless of the definition, has thus far eluded researchers. Additionally, there are limitations to the reliability of perception-based data.

Areas for Further Research

Corruption Studies

Measuring corruption empirically, statistically, is a hard problem. Due to the very nature of corruption, those who practice it are not willing to discuss it. Identifying and quantifying corrupt practices (i.e., legal corruption) versus illegal acts is especially challenging. For example, many would look at legislative earmarks as an indication of corruption, yet some of those earmarks serve many legitimate and vital functions. In another case, examinations of international finance rules and anti-corruption measures could easily make the examiner question the veritable "Swiss cheese" of regulations in the United States. It must be understood that *all* types of corruption are damaging to social trust, even if they are difficult to quantify or measure.

Electoral Studies

In the realm of elections, many have questioned the value of genuinely competitive elections, are they better than those where voters feel their voices were expressed successfully? Is more competition desirable? How often and to what extent are our laws perverted to corrupt ends? To what extent have apportionment or districting laws been used in this way? Do districts drawn with partisanship as the first consideration create better representation? How did the change in democratic views of equality occur? A search for empirical connections could also be of value. Finding valid measures of corruption though presents a hard problem. There are other areas of elections that serve to undermine social/political trust: voter suppression, election interference (both foreign and internal), & the impact of the various forms of media. All of these are currently being examined by academia and represent, to use another military term, 'target-rich environments.' Additionally, studies of the recent development of grassroots policy organizations via the various internet platforms, their impact on political concerns at all levels of government is an area many have started to examine and still provides a host of research opportunities. Finally, assessing the impact of gerrymandering at the state level would be a fruitful pursuit. The House of Representatives has seen several changes in party control in recent years. Still, many state legislatures have been under the control of one party or another for decades.

Social & Political Trust

These areas are similar to corruption, and Longitudinal studies would add to our understanding of how social and political trust develop.[380] Additional research to find empirical measures in both social and political, similar to Tomankova's work, arenas would help to add a more concrete dimension to the normative discussion. Citrin & Stoker highlight research into the effects of political trust, and adding to this type of study could increase interest in the subject from politicians and the public. The previously mentioned self-organizing election oriented and policy-focused groups that are pushing for reform in many areas could be encouraged by such research and thereby increase public involvement and decrease apathy.

Conclusion

This thesis has two conclusions, one directly related to its initial question and one that arose out of the analysis. The intent at that start and the plan for this study was to focus on connections between gerrymandering and damage to democratic institutions, however, in the course of the analysis the critical role of the Court became clear. In this analysis when the initial goal achieved, with the relationship between corruption and gerrymandering explored, and how gerrymandering represents a continuing threat to our polity was established a second conclusion was discovered. The results of this development will play

[380] Uslaner, Eric M. *The Oxford Handbook of Social and Political Trust*. Oxford Handbooks Online. New York: Oxford University Press, 2017.

themselves out in the coming wave of redistricting after the 2020 census because this conclusion is that the Court has given redistricting bodies the ability to stack the deck and choose the outcome of elections. Further, it has done so and seems to believe that it cannot do anything to correct its course. These two conclusions deserve some exploration, what are their implications, and how can the American polity eliminate the threat they represent? They are discussed in reverse order as the second conclusion, though relevant, is not the main focus of this paper.

Separately, *Lulac* and *Rucho* are reasonable conclusions. *Lulac* followed the trend of allowing partisan gerrymanders due to a lack of a manageable standard. It departed from the usual in its finding that states can redistrict at will so long as they do so after each census. These two factors, when considered separately, are areas of concern for the polity. However, until *Rucho,* there was some perceived limitation on what a district could look like, what electoral result it could achieve. After *Rucho,* there are no limitations. For much of America's history, the Court has seen the use of gerrymandering as inconsequential. From a national and purely electoral view, this is entirely reasonable, and the prudential concern to respect the separation of powers was in the best tradition of the judiciary. Due to the changeable nature of voters and the mobility of the population, partisan based apportionment maps were ineffective in the long run and corrected themselves, as Justice O'Connor asserts in *Bandemer*. Three recent developments have rendered that laissez-faire approach moot: 1) the ability to redistrict at will, as a result of the 2006 decision in *LULAC v. Perry*, 2) the

elimination of any limit on the partisan nature of new electoral district maps & 3) computer-drawn electoral district maps. *LULAC* & *Rucho,* give the function of legislative redistricting a power beyond anything we have seen to date. *Rucho* effectively ties the hands of the Court or, at the very least, demonstrates the Court will not act to protect the polity from rigged elections. The bodies that draw electoral districts only need to do so in such a way that they achieve a majority. They can do so as often as they wish, according to *Lulac*, and according to *Rucho,* there is no limit on how they can draw districts to achieve this. When combined, these two powers create a stunning opportunity to short circuit the entire voting process. If only the maps were more reliable…

Drawing effective partisan electoral maps were difficult and labor-intensive. The process took weeks and did not produce reliable results. Drawing hundreds or thousands of maps that could fine-tune the results was out of the question. The maps that were the focus in the *Rucho* decision demonstrated that the computer results were reliable. Those maps, selected from thousands that the program produced in a minute fraction of the time required to produce a single map before computers. With the addition of computer software that can draw and measure districts, one might reasonably ask if there was any point in casting a vote? The corrupt, no matter what party, are now free to engineer elections and ensure their continued hegemony. The threat to the polity is apparent. It is well documented that Americans already demonstrate apathy regarding voting. Allowing engineered elections to continue will exacerbate this apathy. "For

corruption – it is as old as the polity itself it seems, the key is how well a society and its government can curb or control it."[381]

Finally, the conclusion that is the focus of this paper. Gerrymandering is a threat to the democratic institutions the American polity holds dear. It has been a rot at the roots of the nation from the start. It is the result of reasonable people coming to different conclusions. However, they did so without perceiving the impact on the foundation of the nation, the people. The inescapable conclusion though, is that the voters must be in control; their voices must matter. Gerrymandering tells told them something different, though, because it is evidence that they are not in control of a key foundational piece of the electoral system, namely, who will represent who, that they do not matter. "Gerrymandering skews congressional districts and ultimately skews the entire electoral system."[382]

Earlier eras of the American experiment were more forgiving of mistakes, government was distant and rarely intruded on most people's lives. As communication speeds increased, the forgiveness of these mistakes decreased. Peoples frustrations grew, and as they felt ignored by their representatives, they became apathetic about their involvement. The Court awaits (is pushing for?) the work of Congress. Congress is the primary branch, according to the Constitution,

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[381] Wagner Hill, Kathryn, Ph.D. from an email discussion about this thesis
[382] Ibid

in this controversy. In the oral arguments in *Rucho*, Justice Kavanaugh states, "And -- and there is a fair amount of activity going on in the states, recognizing the same problem that you're recognizing." Justice Gorsuch commented that several states had acted to rein in partisanship in redistricting. As of this writing, at the national level, H.B. 1 (116th Congress) awaits action from the Senate. It contains a host of election reform measures, including ones that address redistricting. If the Senate fails to act or if the President vetoes the bill, continuing to pressure the SCOTUS to step in will be vital. Members of Congress members have recognized that gerrymandering is a problem. The bipartisan group (primarily comprised of former members of Congress) referred to as the 'Reformers Caucus' is working to address gerrymandering and other issues affecting legislative efficacy.[383]

There is also engagement at the state level. State courts are taking action, such as, in the Pennsylvania case mentioned in chapter three, where the Court redrew the districts. The Pennsylvania Supreme Court acted under the provisions of the *state* constitution. Thus, the SCOTUS refused to hear it. Additionally, the decision in *Arizona Legislature v. Arizona Redistricting Commission* (2015) is notable. The voters, via ballot referendum, took the redistricting power from the legislature and awarded it to a non-partisan redistricting commission selected by the electorate. Again this was supported by the SCOTUS. This decision showed

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[383] Clinger, William. Speech at Chautauqua Institution 2019.

the Court held the *people* to be more accountable for this important task than the legislature. This deference to the state and the people is, perhaps, the only redeeming factor of the inaction by the SCOTUS. It shines a ray of light into this arena.

Inaction by the SCOTUS seems to be signaling that while it does not feel it can take action to end gerrymandering, it will not interfere with the people doing so. This is a crucial window into their thinking if it is accurate. It indicates that the Court views the people as paramount. That "we the people" do retain some power in and are in charge of the nation. This message is one that the electorate needs to hear; they need to be reminded that they are in charge. A cursory foray onto the internet will reveal many state governments reacting to public pressure to address gerrymandering. The source of this pressure is, perhaps surprisingly, social discourse. Grassroots organizations, self-organized via various social media platforms, have started to exert pressure on state politicians.[384] These organizations come from both partisan and non-partisan ideological roots. For example, 'RepresentUs' is a non-partisan (though rather openly left-leaning) interest group that supports several initiatives. They are focused on removing what they see as legal corruption. Specifically, this involves reducing the

[384]All of these organizations are working on gerrymandering and other issues – Represent.us - https://represent.us, Reclaim the American Dream - http://reclaimtheamericandream.org, Common Cause - https://www.commoncause.org, & Indivisible - https://indivisible.org It should be noted that all of these organizations can be described as being on the 'left' despite most of them being self-described as 'non-partisan'. The author was unable to find similar organizations on the conservative side of the political spectrum.

influence of money and lobbying, more importantly, from the perspective of this paper, and fixing 'broken' elections; gerrymandering falls under this heading.[385] 'Reclaim the American Dream' focuses on a similar array of concerns adding in some economic concerns such as student debt and the minimum wage. Gerrymandering specifically and voter suppression generally are also listed in their top issues. Both 'Common Cause' and 'Indivisible' are concerned with gerrymandering but are more partisan than the previous two organizations.

Gerrymandering falls in with a broader category of malign political activity, voter suppression. Understandably, the concerns about gerrymandering and voter suppression are more concentrated on the left of the spectrum as the last two Republican Presidents were elected as the result of contentious votes without winning the popular vote.

There are other movements as well, recently a growing number of states (six as of this writing) have instituted non-partisan or balanced districting boards (e.g., *Arizona*.) Only one of these, California, has an independent commission made up of voters. Others have commissions selected by politicians or a combination of politicians and the State Courts. The California answer is the most voter inclusive as the selection of commission members is representative of the population and not tied to people serving in government. Commissions can

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[385] "Anti-Corruption is what we Do." . Accessed Mar 21, 2020. https://represent.us/anticorruption-act/.

employ the same computer programs used for ill intent elsewhere to achieve more balanced districts and achieve real competition in the marketplace of ideas. This move to redistricting commissions is, arguably, one of the better solutions to gerrymandering. That is, assuming voters wish to continue to use single-member districts elected in first past the post elections. There are other options.

Another possible response would be to adopt one of the various forms of proportional representation. To some, this is an attractive idea to refocus state and national legislatures on constituents and policy. Proportional representation addresses the concerns of political minorities over losing their voices and cures us of gerrymandering by eliminating our current system of using districts for representative selection. It could also allow for the rise of smaller parties and erase the two-party structure that has been a fixture of American politics from its earliest days. Changing to a proportional representation system is a controversial solution and would require careful study and execution. Many of the smaller states are worried their voices will be lost among the majority from larger states, for example, California & Texas, if this type of system were adopted.

The national judiciary and legislature have, thus far, failed to effectively address gerrymandering, the associated corrupting influence of it and the fundamental challenges to the electoral process that are eating away at the foundations of the Republic. Some state governments seem to understand that the contest of ideas must take place on a level playing field so that the *voters* can choose who will represent them. Even if other state governments do not

understand it, they do feel the heat from their constituents on this matter. The people and some statesmen are pushing congressional and state action on gerrymandering. This action, regardless of its motivation, can save the country from becoming nothing more than a paper democracy. Thus, at the close of this thesis, the author finds democracy the United States threatened, but has hope that it will correct and strengthen itself.

Appended Tables:

Redistricting/Gerrymandering Legislation

Table A		
Name	Effect on Districting	Year
Apportionment Act of 1842	'The Apportionment Act of 1842 increased the ratio of constituents to representatives & required that House members be elected in single-member districts. This change created the foundation for how we understand representation.'[386]	1842
Apportionment Act of 1911	Set the number of Representatives at 433. Additionally, added language regarding district shape "...compactness, contiguity and equal population requirements of the Apportionment Act of 1911..."[387]	1911
Apportionment Act of 1929	Set the number of Representatives at 435. Dropped compactness language.[388]	1929
Voting Rights Act of 1965	Under the 1970 and 1975 Amendments - "In 1973, the Supreme Court held certain legislative multi-member districts unconstitutional under the 14th Amendment on the ground that they systematically diluted the voting strength of minority citizens in Bexar County, Texas. This decision in White v. Regester, 412 U.S. 755 (1973), strongly shaped litigation through the 1970s against at-large systems and gerrymandered redistricting plans. In Mobile v. Bolden, 446 U.S. 55 (1980), however, the Supreme Court required that any constitutional claim of minority vote dilution must include proof of a racially discriminatory purpose, a requirement that was widely seen as making such claims far more difficult to prove.[389]	1965

[386] *Supra* note 97.
[387] Earl M. Maltz, *Power in Numbers: Reapportionment and the Constitution* (Philadelphia, PA: ,[2011]).
[388] Ibid.
[389] (Anonymous) "History of Federal Voting Rights Laws," last modified -08-06T09:30:07-04:00, accessed Jul 2, 2019, https://www.justice.gov/crt/history-federal-voting-rights-laws.

Selected Redistricting/Gerrymandering Litigation

Table B [390]		
Parties	Effect	Year
Colgrove v Green	"The Court held that the Illinois districts were constitutional, largely because existing laws imposed no requirements "as to the compactness, contiguity and equality in population of districts." In a plurality opinion, Frankfurter declined to involve the Court in the districting process, arguing that the political nature of apportionment precluded judicial intervention. "The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.""[391]	1946
Gomillion v Lightfoot	"A state violates the Fifteenth Amendment when it constructs boundary lines between electoral districts for the purpose of denying equal representation to African Americans."[392]	1960
Baker v Carr	"In an opinion which explored the nature of "political questions" and the appropriateness of Court action in them, the Court held that there were no such questions to be answered in this case and that legislative apportionment was a justiciable issue. In his majority opinion, Justice Brennan provided past examples in which the Court had intervened to correct constitutional violations in matters pertaining to state administration and the officers through whom state affairs are conducted. Brennan concluded that the Fourteenth Amendment equal protection issues which Baker and others raised in this case merited judicial evaluation."[393]	1962

[390] This table was compiled by searching cases found in the literature on the 'Oyez' website. A database of US Supreme Court cases. It is a collaboration among several institutions. Please check https://www.oyez.org/about for further information.
[391] "Colegrove v. Green." Oyez. Accessed July 1, 2019. https://www.oyez.org/cases/1940-1955/328us549.
[392] "Gomillion v. Lightfoot." Oyez. Accessed July 1, 2019. https://www.oyez.org/cases/1960/32.
[393] "Baker v. Carr." Oyez. Accessed July 1, 2019. https://www.oyez.org/cases/1960/6.

Reynolds v Simms	"...the Court upheld the challenge to the Alabama system, holding that Equal Protection Clause demanded "no less than substantially equal state legislative representation for all citizens...." Noting that the right to direct representation was "a bedrock of our political system," the Court held that both houses of bicameral state legislatures had to be apportioned on a population basis. States were required to "honest and good faith" efforts to construct districts as nearly of equal population as practicable."[394]	1964
Wesbury v Sanders	"Held: 1. As in Baker v. Carr, 369 U. S. 186, which involved alleged malapportionment of seats in a state legislature, the District Court had jurisdiction of the subject matter; appellants had standing to sue, and they had stated a justiciable cause of action on which relief could be granted. Pp. 376 U. S. 5-6. 2. A complaint alleging debasement of the right to vote as a result of a state congressional apportionment law is not subject to Page 376 U. S. 2 dismissal for "want of equity" as raising a wholly "political" question. Pp. 376 U. S. 6-7. 3. The constitutional requirement in Art. I, § 2, that Representatives be chosen "by the People of the several States" means that, as nearly as is practicable, one person's vote in a congressional election is to be worth as much as another's. Pp. 376 U. S. 7-8, 376 U. S. 18. 206 F.Supp. 276, reversed and remanded."[395]	1964
Gaffney v Cummings	"The Court today upholds statewide legislative apportionment plans for Connecticut and Texas, even though these plans admittedly entail substantial inequalities in the population of the representative districts, and even though the States have made virtually no attempt to justify their failure 'to construct districts . . . as nearly of equal population as is practicable.'"[396]	1973

[394] "Reynolds v. Sims." Oyez. Accessed July 1, 2019. https://www.oyez.org/cases/1963/23.
[395] "Wesberry v. Sanders." Oyez. Accessed July 1, 2019. https://www.oyez.org/cases/1963/22.
[396] "Gaffney v. Cummings." Oyez. Accessed July 1, 2019. https://www.oyez.org/cases/1972/71-1476.

Brown v Thomson	"The Court upheld the Wyoming apportionment scheme and found no Fourteenth Amendment violations. Justice Powell argued that using counties as legislative districts and assuring at least one representative per county supported ***"substantial and legitimate state concerns."*** (emphasis added) Since the population variations in the Wyoming plan were the result of the consistent application of a nondiscriminatory and legitimate state policy, the plan was consistent with the Constitution. Any dilution of voting strength which the constituents of the other sixty-three representatives may have experienced as a result of Niobrara's relatively small population was minimal and irrelevant given the advantages of the Wyoming scheme."[397]	1983
Karcher v. Daggett	"Congressional districts must be mathematically equal in population, unless necessary to achieve a legitimate state objective."[398] "Even though the population differences in the districts were slight, the Court held that they were unconstitutional because they "were not the result of a good-faith effort to achieve population equality." Justice Brennan upheld past Court decisions (Kirkpatrick v. Preisler, 1973, and Wesberry v. Sanders, 1964) and argued that relying on a strict numerical standard of populations to assess district equality would be misguided."[399]	1983
Davis v Bandemer	"The Court held that while the apportionment law may have had a discriminatory effect on the Democrats, that effect was not "sufficiently adverse" to violate the Equal Protection Clause. The mere lack of proportional representation did not unconstitutionally diminish the Democrats' electoral power. The Court **also ruled that political gerrymandering claims were properly justiciable under the Equal Protection Clause**, noting that judicially manageable standards could be discerned and applied in such cases."[400] (emphasis added)	1986

[397] "Brown v. Thomson." Oyez. Accessed July 1, 2019. https://www.oyez.org/cases/1982/82-65.
[398] (Anonymous). Accessed July 11, 2019. http://www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx.
[399] "Karcher v. Daggett." Oyez. Accessed July 11, 2019. https://www.oyez.org/cases/1982/81-2057.
[400] "Davis v. Bandemer." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/1985/84-1244.

Thornburg v. Gingles	The Court found that five of the six contested districts discriminated against blacks by diluting the power of their collective vote. Justice William J. Brennan Jr. delivered the opinion for a unanimous court. The District Court properly performed its function "to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate." The District Court correctly analyzed data from three election cycles in North Carolina to determine that the black voters strongly supported black candidates, whereas whites usually voted against black candidates. The redistricting plan apportioned "politically cohesive groups of black voters" into districts where blocs of white voters would consistently defeat the black candidates. In violation of the Voting Rights Act, this damaged the ability of black citizens "to participate equally in the political process and to elect candidates of their choice."[401] Established a tool for measuring if an apportionment plan violated the Voting Rights Act.	1986
Shaw v Reno	“The Court held that although North Carolina's reapportionment plan was racially neutral on its face, the resulting district shape was bizarre enough to suggest that it constituted an effort to separate voters into different districts based on race. The unusual district, while perhaps created by noble intentions, seemed to exceed what was reasonably necessary to avoid racial imbalances. After concluding that the residents' claim did give rise to an equal protection challenge, the Court remanded - adding that in the absence of contradictory evidence, the District Court would have to decide whether or not some compelling governmental interest justified North Carolina's plan.”[402]	1993
Miller v. Johnson	“Yes. In some instances, a reapportionment plan may be so highly irregular and bizarre in shape that it rationally cannot be understood as anything other than an effort to segregate voters based on race. Applying the rule laid down in Shaw v. Reno requires strict scrutiny whenever race is the "overriding, predominant force" in the redistricting process.”	1995

[401] "Thornburg v. Gingles." Oyez. Accessed July 11, 2019. https://www.oyez.org/cases/1985/83-1968.
[402] "Shaw v. Reno." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/1992/92-357.

Vieth v Jubelier	"In a split decision that had no majority opinion, the Court decided not to intervene in this case because no appropriate judicial solution could be found. Justice Antonin Scalia, for a four-member plurality, wrote that the Court should declare all claims related to political (but not racial) gerrymandering non-justiciable, meaning that courts could not hear them. Because no court had been able to find an appropriate remedy to political gerrymandering claims in the 18 years since the Court decided Davis v. Bandemer, 478 U.S. 109, which had held that such a remedy had not been found yet but might exist, Scalia wrote that it was time to recognize that the solution simply did not exist. Justice Anthony Kennedy, however, wrote in his concurring opinion (which provided the deciding fifth vote for the judgment) that the Court should rule narrowly in this case that no appropriate judicial solution could be found, but not give up on finding one eventually."[403]	2004
LULAC v Perry	"The Supreme Court held that the Texas Legislature's redistricting plan did not violate the Constitution, but that part of the plan violated the Voting Rights Act. Justice Anthony Kennedy, writing for a majority of the justices, stated that District 23 had been redrawn in such a way as to deny Latino voters as a group the opportunity to elect a candidate of their choosing, thereby violating the Voting Rights Act. Justice Kennedy also wrote, however, that nothing in the Constitution prevented the state from redrawing its electoral boundaries as many times as it wanted, so long as it did so at least once every ten years."[404]	2006
Tennant v Jefferson Co.	"The Court, in a per curiam opinion (unanimous decision), reversed the district court's decision. The Court held that the lower court failed to defer to West Virginia's reasonable exercise of political judgment. Even though the state could have chosen a re-districting plan with less of a population disparity, none of the other plans satisfied the **state's legitimate objectives**. Therefore, the minor disparity in	2012

[403] "Vieth v. Jubelirer." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2003/02-1580.
[404] "League of United Latin American Citizens v. Perry." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2005/05-204.

	population was justified to achieve those objectives."[405] (emphasis added, also see Brown v. Thompson)	
Alabama Legislative Black Caucus v. Alabama	"The Court held that the district court improperly considered evidence of statewide racial effects as a claim that the state used race as a factor when redrawing all of the boundary lines, when the actual allegations were that the racial gerrymandering took place in a few select electoral districts. Next, the Court held that the evidence suggested that the Caucus had standing to sue because it appeared to have members in every electoral district in the State of Alabama; the Court directed the Caucus to provide membership information sufficient to support this inference on remand. The district court also erred by considering Alabama's goal of obtaining a 1% population deviation among districts as a relevant factor to determine whether race was a "predominate" factor in redrawing the electoral districts rather than considering the traditional goals of the Voting Rights Act. Finally, the Court rejected the district court's holding that Alabama's gerrymandering satisfied strict scrutiny. In application, Alabama's interest in maintaining a particular population percentage of minority voters in each district did not equate to the Voting Rights Act's goal of preventing "retrogression in respect to racial minorities' 'ability . . . to elect their preferred candidates of choice'; therefore, using a race as a factor to meet Alabama's extraneous goals was not justified. The Court vacated and remanded the district court's decision for further consideration consistent with its holding and additional evidence."[406]	2015
Arizona Legislature v Arizona Redistricting	"Justice Ruth Bader Ginsburg delivered the opinion for the 5-4 majority. The Court held that the Elections Clause of the federal Constitution did not preclude an independent commission, created by initiative, from creating the map for congressional districts. Although the Elections Clause specifically mentions the state legislature, at the time the federal Constitution was ratified, direct lawmaking by the people did not occur. Since then, state Constitutions have	2015

[405] "Tennant v. Jefferson County Commission." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2011/11-1184.
[406] "Alabama Legislative Black Caucus v. Alabama." Oyez. Accessed July 11, 2019. https://www.oyez.org/cases/2014/13-895.

	been ratified that specifically place lawmaking power in the hands of the electorate in the form of an initiative, as the Arizona State Constitution did. Judicial precedent establishes that redistricting is a legislative function that must be performed in accordance with the state Constitution's structure of lawmaking; because the Arizona state Constitution allows lawmaking to occur by a referendum of the electorate, Proposition 106 was an acceptable use of that power. Additionally, because the use of such an initiative would not be questioned if it were employed to redistrict for local and state elections, it should also be allowed for federal elections."[407]	
Evenwel v Abbot	"The "one person, one vote" principle of the Equal Protection Clause allows a state to design its legislative districts based on total population. Justice Ruth Bader Ginsburg delivered the unanimous decision and the opinion for the six-justice majority. The Court held that constitutional history, judicial precedent, and consistent state practice all demonstrate that apportioning legislative districts based on total population is permissible under the Equal Protection Clause. Based on the wording of the Fourteenth Amendment and the legislative debates surrounding its adoption, the legislature at the time clearly intended for representation to be apportioned in the House based on total population, and it would be illogical to prohibit the states from doing the same within their own legislatures. In cases in which the Court has evaluated whether districting maps violate the Equal Protection Clause, the Court has consistently looked at total population figures to determine whether the maps impermissibly deviate from perfect population equality. Additionally, the total population approach has been used by all states and many local jurisdictions, and there is no reason to upset this accepted practice."[408]	2016
Cooper v. Harris	"The district court did not error in determining that North Carolina's new districting plan constituted an **unconstitutional racial gerrymander**, and neither claim nor issue preclusion based on the state court case dictate the	2017

[407] "Arizona State Legislature v. Arizona Independent Redistricting Commission." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2014/13-1314.
[408] "Evenwel v. Abbott." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2015/14-940.

	outcome of this case. (emphasis added) Justice Elena Kagan delivered the opinion for the 5-3 majority. The Court held that the district court was presented with sufficient evidence to find that race was the predominant rationale for the redistricting. Additionally, North Carolina did not meet its burden of proving that it had a compelling interest to sort voters based on race that it met with narrowly tailored means. Although complying with the Voting Rights Act (VRA) might serve as a compelling reason, the state must demonstrate that it had good cause to think that it would transgress the requirements of the VRA if it did not draw race-based district boundaries. Because there was no evidence of "white bloc voting" prior to the new districting plan, there was no sufficient reason for the state to think there was a potential VRA violation that required race-based districting. The Court also held that, although issue or claim preclusion may arise when plaintiffs in two cases have a special relationship, the state never proved that such a relationship existed between the plaintiffs in this case and those in the similar state court case."[409]	
Gil v Whitford	Rejected for consideration based on lack of standing. "The plaintiffs failed to demonstrate Article III standing, so there is no need to resolve any of the questions presented. In a unanimous decision authored by Chief Justice John Roberts, the Court sidestepped (for now) all of the key issues regarding partisan gerrymandering, resolving the case instead on the technical issue of judicial standing. For a plaintiff to bring a case in federal court, she must have Article III standing, which requires showing three elements, one of which is "injury in fact." To show injury in fact, a plaintiff must show that she has suffered "invasion of a legally protected interest" that is "concrete and particularized." In this case, the Court found that the plaintiffs alleged but did not prove individual harms, providing evidence instead only of statewide harms of alleged partisan gerrymandering. The Court thus vacated the judgment of the district court and remanded for further proceedings."[410]	2018

[409] "Cooper v. Harris." Oyez. Accessed July 11, 2019. https://www.oyez.org/cases/2016/15-1262.
[410] "Gill v. Whitford." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2017/16-1161.

Benisek v Lamone	***(See Rucho below)*** "Without resolving the substantive questions, the Court held, in an unsigned per curiam opinion (unanimous decision), that the district court did not abuse its discretion in denying the Republican voters' motion for a preliminary injunction. To succeed on a motion for preliminary injunction, the party seeking the injunction must show likelihood of success on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public's interest. Even assuming, contrary to the district court's findings, that the plaintiffs were likely to succeed on the merits, the Court found that they had unreasonably delayed seeking a preliminary injunction and that the public interest was not served in granting the injunction. Thus, it was not an abuse of discretion for the district court to deny the motion for preliminary injunction."[411]	2018
Rucho v. Common Cause & Lamone v. Benisek	"Partisan gerrymandering claims are not justiciable because they present a political question beyond the reach of the federal courts. Chief Justice John Roberts delivered the 5-4 majority opinion. Federal courts are charged with resolving cases and controversies of a judicial nature. In contrast, questions of a political nature are "nonjusticiable," and the courts cannot resolve such questions. Partisan gerrymandering has existed since prior to the independence of the United States, and, aware of this occurrence, the Framers chose to empower state legislatures, "expressly checked and balanced by the Federal Congress" to handle these matters. While federal courts can resolve "a variety of questions surrounding districting," including racial gerrymandering, it is beyond their power to decide the central question: when has political gerrymandering gone too far. In the absence of any "limited and precise standard" for evaluating partisan gerrymandering, federal courts cannot resolve such issues.	2019

[411] "Benisek v. Lamone." Oyez. Accessed July 2, 2019. https://www.oyez.org/cases/2017/17-333.

	Justice Elena Kagan filed a dissenting opinion, in which Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor joined. Justice Kagan criticized the Court for sidestepping a critical question involving the violation of "the most fundamental of . . . constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." Justice Kagan argued that by not intervening in the political gerrymanders, the Court effectively "encourage[s] a politics of polarization and dysfunction" that "may irreparably damage our system of government." She argued that the standards adopted in lower courts across the country do meet the contours of the "limited and precise standard" the majority demanded yet purported not to find. This case was consolidated with Lamone v. Benisek, No. 18-726, and the Court released a single opinion resolving both cases."[412]	

[412] "Rucho v. Common Cause." Oyez. Accessed July 11, 2019. https://www.oyez.org/cases/2018/18-422.

A note on Empirical Examinations:

At the start of this journey, the intent was to discover any empirical connection between corruption and gerrymandering. As the search continued, issues with data became apparent. Corruption is hard to measure accurately due to its very nature. Many researchers have chosen to use the number of convictions for corruption as a measure, primarily since that data is easily gathered.[413] This may present us with a case of 'an available hammer' and not a valid measure.[414] Below are two graphs of data used by Dr. Winter that he has graciously made available for this examination. [415] Neither of them shows patterns near times of redistricting. The first is a graph of those states that had the most convictions(A). The second graph is of states that are known to have districts that fail standards for compactness(B), itself a controversial measure of gerrymandering. Graph B shows a decrease in convictions for all states near the 2000 census and thus does not present a strong case for a relationship. Other combinations and groupings were tested and, once again, no patterns emerged.

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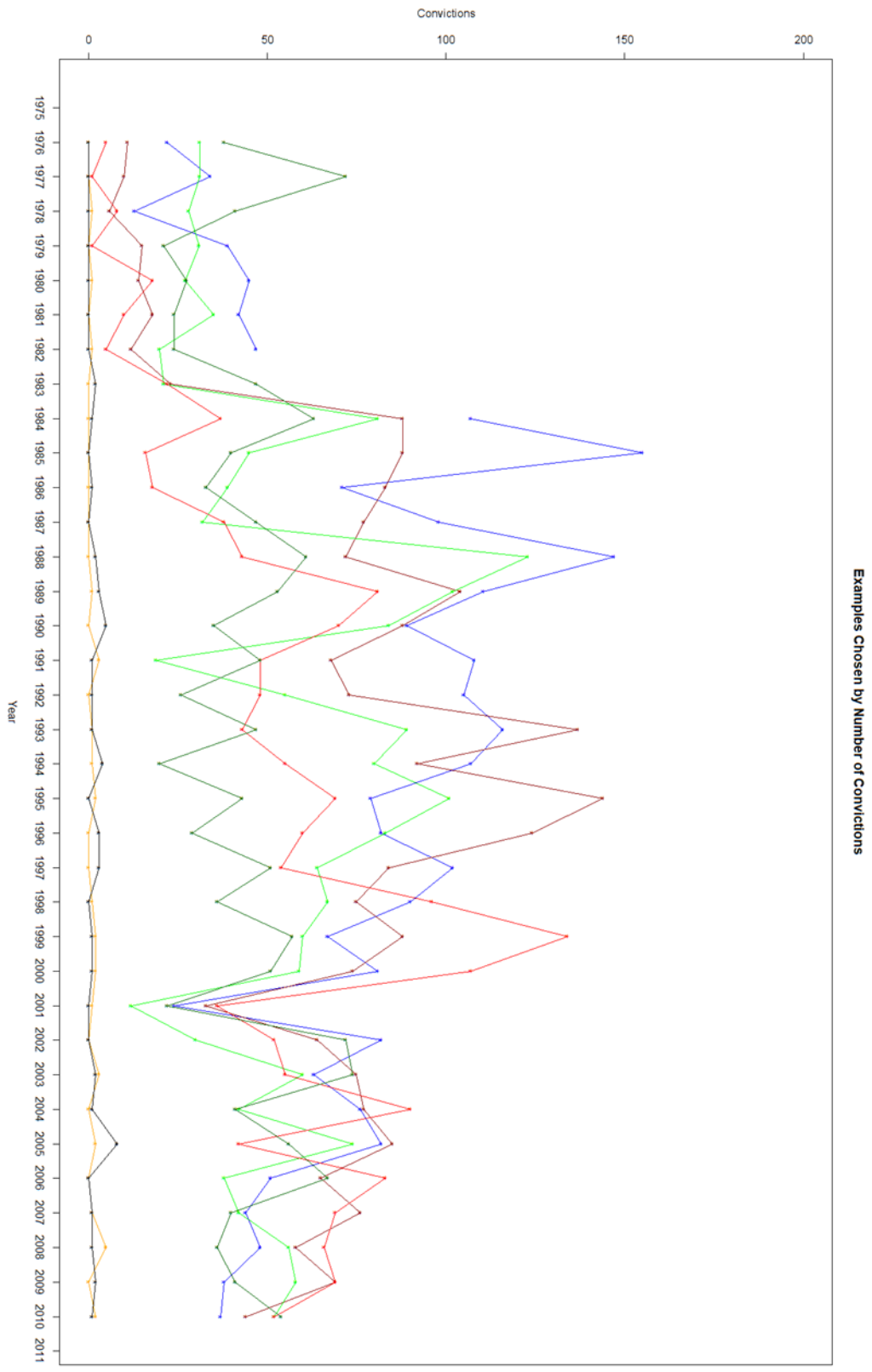
[413] Winters, Richard F. and Amanda E. Maxwell. 2004. "A Quarter-Century of (Data on) Corruption in the American States." *Conference Papers -- Midwestern Political Science Association*: 1. doi: mpsa_proceeding_24374.pdf. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=16055277&site=ehost-live&scope=site.

[414] *Supra* note 48

[415] Winters, Richard F. "Dartmouth Department of Government." . https://www.dartmouth.edu/~rwinters/Datasets.html.


Convictions
0
50
100
150
200
Year
1975
1976
1977
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1979
1980
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1984
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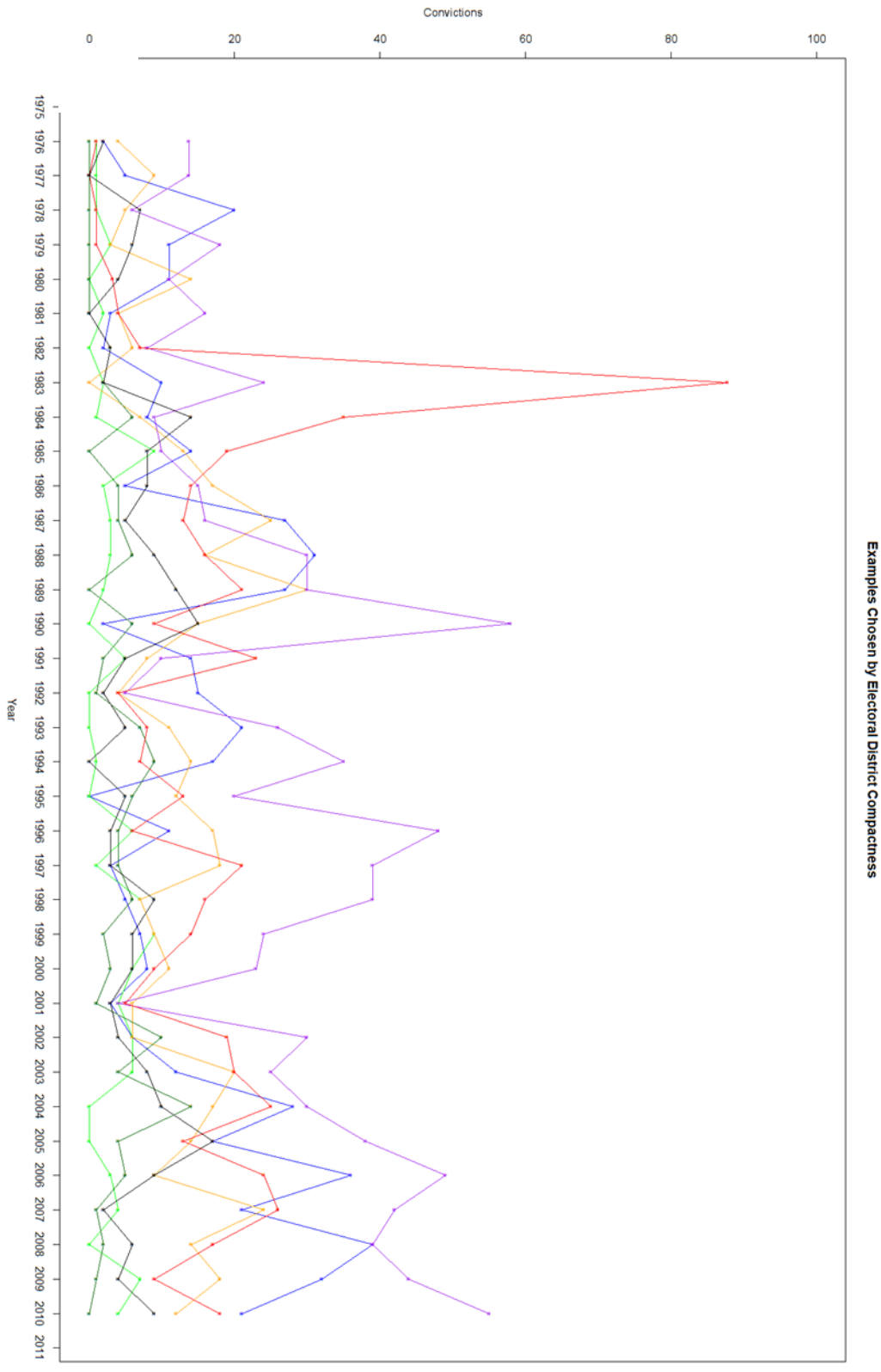
2011
Examples Chosen by Number of Convictions


Convictions
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Examples Chosen by Electoral District Compactness

Below is the code used in R to generate the graphs above:

A.

```
plot(xdata, ptsNY, xaxt="n", type="o", col="blue", pch="*", xlim = c(0,35), ylim=c(0,200), xlab = "Year", ylab = "Convictions", main = "Examples Chosen by Number of Convictions")
axis(1, at=0:36, labels=1975:2011)
points(xdata, ptsCal, col="darkred", pch="*")
lines(xdata, ptsCal, col="darkred")
ptsIll=CWintersxp$Illinois
points(xdata, ptsIll, col="Green", pch="*")
lines(xdata, ptsIll, col="Green")
ptsFL=CWintersxp$Florida
points(xdata, ptsFL, col="red", pch="*")
lines(xdata, ptsFL, col="red")
ptsPenn=CWintersxp$Pennsylvania
points(xdata, ptsPenn, col="darkgreen", pch="*")
lines(xdata, ptsPenn, col="darkgreen")
points(xdata, ptsVmt, col="orange", pch="*")
lines(xdata, ptsVmt, col="orange")
points(xdata, ptsWyo, col="black", pch="*")
lines(xdata, ptsWyo, col="black")
```

B.

```
plot(xdata, ptsMInd, xaxt="n", type="o", col="blue",
pch="*", xlim = c(0,35), ylim=c(0,100), xlab = "Year", ylab
= "Convictions", main = "Examples Chosen by Electoral
District Compactness")
points(xdata, ptsNV, col="green", pch="*")
lines(xdata, ptsNV, col="green")
points(xdata, ptsInd, col="orange", pch="*")
lines(xdata, ptsInd, col="orange")
points(xdata, ptsHaw, col="darkgreen", pch="*")
lines(xdata, ptsHaw, col="darkgreen")
points(xdata, ptsLou, col="purple", pch="*")
lines(xdata, ptsLou, col="purple")
points(xdata, ptsNC, col="red", pch="*")
lines(xdata, ptsNC, col="red")
points(xdata, ptsWV, col="black", pch="*")
lines(xdata, ptsWV, col="black")
axis(1, at=0:36, labels=1975:2011)
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