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Mid-Decade Congressional Redistricting In a Red and Blue Nation

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I. INTRODUCTION

Following the 2002 elections, Republicans in Texas and Colorado achieved unified control of their state governments.[1] In both states, Republicans introduced congressional redistricting legislation and enacted a new redistricting map. Just a year earlier, following the release of the decennial census, each state had enacted a congressional redistricting map that had governed the 2002 elections. The second round of legislation marked the first time in United States history that a state reopened redistricting for partisan political purposes after

1. "Unified government" refers to control of both houses of the legislature as well as control of the governor's office.

a redistricting plan had been adopted following the release of the decennial census, had been upheld as constitutional, and had been used in an intervening election. Democrats in both states filed lawsuits, alleging not only that Article I of the Constitution forbids a state from engaging in redistricting after the state already has used a valid map in an election following release of the census but also that the mid-decade redistricting plans were unconstitutional partisan gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment.[2]

Part II of this Note will use Texas as a case study to provide insight into the redistricting process. Part III will examine the differing conclusions of the Colorado and Texas courts on the constitutionality of mid-decade redistricting. This Note will then address two challenges to this unprecedented use of mid-decade congressional redistricting. Part IV of this Note will address whether a state legislature has the authority under Article I of the Constitution to redraw a lawfully-enacted congressional redistricting plan after it has been used in one or more elections but before the next decennial census. Since this is a question of first impression,[3] this Note will analyze the issue according to the text of the Constitution, the intent of the Framers of the Constitution, and analogous redistricting precedents. Part V will address whether mid-decade redistricting qualifies as an intentional partisan gerrymander in

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2. Session v. Perry, 298 F. Supp. 2d 451, 456-57 (E.D. Tex. 2004) (alleging that "[p]lan 1374C is invalid because (1) Texas may not redistrict mid-decade; (2) the Plan unconstitutionally discriminates on the basis of race; (3) the Plan is an unconstitutional partisan gerrymander; and (4) various districts in Plan 1374C dilute the voting strength of minorities in violation of § 2 of the Voting Rights Act"); People *ex rel* Salazar v. Davidson, 79 P.3d 1221, 1225 (Colo. 2003) (challenging state legislature's redistricting plan on the basis that the state constitution "limits the timeframe and frequency within which the General Assembly may ... [redraw district lines]" and arguing that the legislature acted outside of this timeframe). The lawsuits also alleged that the redistricting plans violated Section 2 of the Voting Rights Act, but that point is beyond the scope of this Note.

On October 18, 2004, the U.S. Supreme Court remanded the Texas congressional redistricting case to the three-judge panel from the U.S. District Court for the Eastern District of Texas for further consideration in light of the 2004 Supreme Court ruling in Vieth v. Jubelirer, 541 U.S. 267 (2004) (partisan gerrymandering case from Pennsylvania). If the redistricting plan is declared unconstitutional, then the winners of the 2004 elections will find themselves running in different congressional districts in 2006, and the defeated incumbents from 2004 will have a decent chance at winning back their old seats. *See http://www.tlc.state.tx.us/redist/pdf/101804remand.pdf.*

3. *See* Edward Walsh, *Redrawing Districts Raises Questions*, WASH. POST, Oct. 26, 2003, at A4 (stating that "[a]ccording to experts in the field, there is no precedent in modern U.S. politics for what the Texas and Colorado Republicans did: voluntarily redraw congressional district lines a year after lawmakers were elected from districts that had already been redrawn once in this decade.").

violation of the Equal Protection Clause of the Fourteenth Amendment. This Note ultimately concludes that states have the plenary power to conduct mid-decade redistricting, subject only to the supervisory power of Congress. Finally, in Part VI, this Note proposes that, because of vital public policy considerations, Congress exercise its supervisory power to prohibit redistricting until the release of the next decennial census after a lawfully enacted map has already been used in an election.

II. TEXAS: A CASE STUDY IN REOPENING REDISTRICTING

The Texas Constitution provides that the legislature "shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts."[4] Although the Texas Constitution does not explicitly address federal congressional districts, the legislature's consistent practice has been to handle federal congressional redistricting as it does state redistricting.[5] In Texas' seventy-seventh legislature's regular session, which ran through May 2001, the legislature could not reach an agreement on a new congressional plan, and Governor Rick Perry opted not to call a special session to complete a redistricting map.[6] This failure to act required the courts to produce a redistricting map consistent with constitutional guidelines.

On November 14, 2001, the United States District Court for the Eastern District of Texas, based both on findings that the thirty existing congressional districts in Texas were unconstitutional and on the "continuing failure of the State to produce a congressional redistricting plan," imposed a new map of thirty-two congressional districts.[7] The court entered a final judgment declaring that the existing congressional districts were unconstitutionally malapportioned and adopted plan 1151C as the remedial congressional redistricting plan for the state.[8]

Neither the state nor any other defendant appealed the court's decision to impose its own redistricting map.[9] Instead, the state of Texas filed a motion asking the United States Supreme Court to enter

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4. TEX. CONST. art. III, § 28.

5. Motion to Prohibit Modification or Termination of Injunction at 3, Balderas v. Texas, 6:01-CV-158 (E.D. Tex. Oct. 14, 2003) [hereinafter Motion to Prohibit].

6. *Id.*

7. *Id.* at 3-4.

8. *Id.*

9. *Id.* at 4.

an order affirming the judicially created redistricting map.[10] On June 17, 2002, the Supreme Court summarily affirmed.[11] As a result, the district court's plan remained in place and governed the 2002 elections.

Although Plan 1151C created several potentially competitive congressional districts, recent statewide elections suggested that twenty districts leaned at least somewhat Republican and twelve districts leaned at least somewhat Democratic.[12] However, the 2002 elections resulted in a congressional delegation with fifteen Republicans and seventeen Democrats.[13] "The two new congressional districts that Texas gained from reapportionment elected Republicans, while the other thirty districts reelected twenty-eight incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party)."[14]

"Seven of the incumbents—six Democrats and one Republican—prevailed even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the *opposite* party."[15] These seven incumbent members of Congress won because they attracted split-ticket voters. Without that support, each would have lost to a challenger from the dominant political party in the district.[16] Not surprisingly, those seven incumbents had the closest contests of any incumbents in the State, and three of them won with less than fifty-two percent of the total vote.[17] "Because six of the seven incumbents who won these relatively tight contests were Democrats, Democrats won more of the State's thirty-two congressional seats, and Republicans won fewer seats than the current statewide balance of power alone would have suggested."[18]

The election resulted in a net gain of two seats for Republicans, with additional gains at the state-legislative level.[19] "As a result, Republicans won a majority of seats in the Texas House of

10. *Id.*

11. Balderas v. Texas, 536 U.S. 919, 919 (2002).

12. Motion to Prohibit at 4, *Balderas* (6:01-CV-158).

13. *Id.*

14. *Id.*

15. *Id.* (emphasis in original).

16. *Id.*

17. *Id.*

18. *Id.* at 4-5. The statewide balance of power is measured here by political party registration numbers. In this instance the statewide balance of power was not reflected in the congressional elections because Democrats won a majority of the seats, despite the fact that a majority of the state's population and many of the state's congressional districts were moderately to heavily Republican.

19. *Id.* at 5.

Representatives, and with it, unified control of the state government for the first time since reconstruction."[20]

The newly elected seventy-eighth legislature convened in regular session in 2003.[21] The entire state government was now controlled by Republicans, who could exercise complete control over the redistricting process. The Texas House of Representatives immediately began considering congressional redistricting, and its Redistricting Committee quickly passed a plan and sent it to the full House for consideration.[22] There was no precedent for the Texas legislature's push for mid-decade congressional redistricting, which was driven by Texas Congressman and Majority Leader Tom DeLay.[23] During a press conference in Austin, Texas, Congressman DeLay stated that the rationale for the mid-decade redistricting effort was: "I'm the Majority Leader, and we want more seats."[24] "During the 2003 regular session, as a critical deadline approached for passing legislation in the Texas House, a group of Democratic House members fled the state and broke a quorum for a week, setting off a frenzied reaction."[25]

Governor Perry and the Speaker of the Texas House of Representatives Tom Craddick asked state law-enforcement officials to physically compel the Democrats to return so that a quorum could be issued.[26] Republican efforts to locate the Democrats were expansive. For example, Texas Department of Public Safety troopers were sent to a neo-natal unit to try to nab one legislator who might be visiting his premature, newborn twins.[27] Congressman DeLay's office also attempted to enlist federal assistance from the Department of Homeland Security, the Department of Transportation, and the

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* While the United States House of Representatives in no way controls redistricting decisions in the state legislatures, Congressman DeLay's enormous influence in Texas politics, both federal and state, prompted members of the Texas House to support his plan.

24. *Id.* (citing Suzanne Gamboa, *DeLay, Texas Dems in Redistricting Fight*, ASSOCIATED PRESS ONLINE, May 7, 2003, *available at* 2003 WL 20007924).

25. *Id.* In order to take up a piece of legislation, the legislature must establish a quorum. A quorum occurs when two-thirds of the legislative body is present. By fleeing the state, Democratic lawmakers created a large enough absence to prevent two-thirds of the House from being present. As a result, Texas Republicans, despite being in the majority, could not begin work on the redistricting legislation until enough Democrats returned to surpass the two-thirds barrier. *Id.* at 5-6.

26. *Id.* at 5.

27. *Id.* at 5-6 (citing April Castro, *Troopers Sent to Find Lawmakers Who Skipped Session*, ASSOCIATED PRESS, May 13, 2003).

Department of Justice to locate and apprehend the Democrats.[28] None of these tactics succeeded in finding the legislators and regaining a quorum.[29] "Consequently, the legislative deadline passed without action by the Texas House, effectively killing the congressional redistricting measure for the regular session."[30]

During the 2003 regular session, Representative Joe Crabb, the Chair of the House Committee on Redistricting, asked Texas Attorney General Greg Abbott if the Texas Legislature had a mandated responsibility to perform congressional redistricting in 2003.[31] Attorney General Abbott issued his opinion on April 23, 2003, stating that the "Legislature was not mandated to act nor could it be compelled to do so."[32] Attorney General Abbott also stated that the plan drawn by the three-judge court in the *Balderas* litigation was a valid map that could govern congressional elections for the entire decade.[33]

Shortly after the 2003 regular session ended, Governor Perry announced that he was calling the Texas legislature into special session to take up congressional redistricting.[34] "This marked the first time in history that the Texas legislature would be convened for the purpose of enacting a new congressional plan to replace a legally valid map."[35]

During the first special session, the House quickly passed a new congressional map despite widespread public opposition.[36] "The

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28. *See* OFFICE OF INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, AN INVESTIGATION OF THE DEPARTMENT OF JUSTICE'S ACTIONS IN CONNECTION WITH THE SEARCH FOR ABSENT TEXAS LEGISLATORS 4-6 (2003) (discussing the Justice Department's role in attempting to locate the Texas legislators), *available at* http://www.usdoj.gov/oig/special/0308a/final.pdf; *Federal Aviation Administration Efforts to Locate Aircraft N711RD Before the House Committee on Transportation and Infrastructure*, 107th Cong. 2 (2003) (statement of Hon. Kenneth M. Mead, Inspector General, U.S. Dept. of Transportation) (discussing the Department's role in attempting to locate the Texas legislators), *available at* http://www.oig.dot.gov/show_pdf.php?id=1127; OFFICE OF INSPECTOR GENERAL, U.S. DEPT. OF HOMELAND SECURITY, REPORT OF INVESTIGATION IN03-OIG-LA-0662-S 1 (discussing the Department of Homeland Security's involvement in attempting to locate the Texas legislators), *available at* http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf.

29. Motion to Prohibit at 6, *Balderas* (6:01-CV-158).

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.* (stating that "[u]nless and until the Legislature adopts [a new] plan, the map drawn in 2002 [*sic*] by the three-judge court in *Balderas v. Texas* will continue to be the congressional redistricting plan for Texas.") (citing Op. Tex. Att'y Gen. No. GA-0063, at 5 (Apr. 23, 2003), *available at* http://www.oag.state.tx.us/opinopen/opinions/op50abbott/ga-0063.htm).

34. Motion To Prohibit at 6-7, *Balderas* (6:01-CV-158).

35. *Id.* at 7.

36. *Id.*

Senate Jurisprudence Committee also took up congressional redistricting in the first special session. On July 23, 2003, the Senate Committee voted along party lines to approve a new plan, with all three Democrats voting against the measure, and all four Republicans voting in favor."[37]

In the full Texas Senate, however, "the attempt to enact a new congressional map failed in the first special session when eleven state senators (more than a third of the Texas Senate) announced that they were opposed to taking up congressional redistricting legislation."[38] "It has been a long-standing tradition of the Texas Senate to require that a measure receive support of a two-thirds supermajority before the full Senate will consider it."[39] With only one exception, the Texas Senate has used this practice, known as the "two-thirds rule," each time it has convened in the last thirty years to enact a new congressional redistricting plan.[40] Because more than a third of the senators announced that they would not consider congressional redistricting legislation, the measure died in the first special session.[41]

Lieutenant Governor David Dewhurst then announced that he would abandon the two-thirds rule in any future special session on congressional redistricting.[42] Dewhurst noted that the decision to abandon the two-thirds rule would apply only to congressional redistricting legislation considered in any second special session.[43] "When information surfaced that the Texas Senate would adjourn *sine die* on June 29, 2003, and would convene a second special session five minutes later, eleven Texas senators left the State to deny the Senate of a quorum."[44] Relations between Democrats and Republicans became increasingly bitter, with Democrats refusing to return to the state until the special session had ended, and Republican Senators voting to fine their Democratic colleagues $5000 per day and to revoke privileges for their staff.[45] The eleven senators stayed out of the State for a month, but as the second special session ended, one of the absent

37. *Id.*

38. *Id.*

39. *Id.* at 7-8. This rule does not require that two-thirds of the Senate *support* the measure, only that two-thirds of the Senate are willing to *vote* on the issue. For discussion of the "two-thirds" rule, *see* Legislative Reference Library of Texas, *The two-thirds rule*, *available at* http://www.lrl.state.tx.us/citizenResources/twoThirds.html (last visited Nov. 15, 2004).

40. *Id.* at 8.

41. *Id.*

42. *Id.* (citing Ken Herman, *Dewhurst: Redistricting Dead This Session*, AUSTIN-AMERICAN STATESMAN, July 25, 2003).

43. *Id.*

44. *Id.*

45. *Id.*

senators announced that he would return.[46] "The remaining ten, unable to prevent a quorum, announced that they too would return."[47]

Governor Perry called a third special session on September 9, 2003.[48] This time, Democrats could not prevent a quorum, and on October 12, 2003, the Legislature enacted a new congressional map (Plan 1374C) on a near perfect party-line vote.[49] The sole purpose of the plan was to defeat as many Democratic incumbents as possible.[50]

When the 2004 election returns were in, it was clear that the mid-decade redistricting plan had been a huge success. Before the mid-decade redistricting map was enacted Democrats had held a 17 to 15 seat advantage in the state congressional delegation.[51] But the morning after the election, Republicans awoke to discover that they now commanded a 21-11 majority – a whopping 6 seat gain.[52]

III. THE MID-DECADE REDISTRICTING STATE SPLIT: TEXAS AND COLORADO

The only two courts that have dealt with the issue of mid-decade redistricting have reached seemingly irreconcilable conclusions. The United States District Court for the Eastern District of Texas held that the United States Constitution does not bar the use of mid-decade redistricting.[53] The Colorado Supreme Court, however, held that the state's constitution forbade the use of mid-decade redistricting.[54] While the Colorado Supreme Court's holding was based on state law, the reasoning and dicta of the opinion strongly

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46. *Id.*

47. *Id.*

48. *Id.* at 9.

49. *Id.*

50. Suzanne Gamboa, *DeLay, Texas Dems in Redistricting Fight*, ASSOCIATED PRESS ONLINE, May 7, 2003, *available at* 2003 WL 20007924).

51. *Republicans Take Four of Five Targeted Democratic Seats*, ASSOCIATED PRESS, Nov. 3, 2004, *available at* http://www.usatoday.com/news/politicselections/vote2004/2004-11-02-tx-ushouse-redistricting_x.htm.

52. *See id.* Prior to the election, in an act of self-preservation Democratic Representative Ralph Hall switched parties, evening the split to 16-16. Democratic Representative Jim Turner chose to retire, essentially giving Republicans a 17-15 advantage because his district had become so heavily Republican that it was considered unwinnable by any Democrat. Five Democratic incumbents fought until election day in their new, heavily Republican Districts. Democratic incumbents Martin Frost, Charlie Stenholm, Max Sandlin and Nick Lampson were all defeated, each by more than 10 percent. Only Representative Chet Edwards prevailed, with 51 percent of the vote. Ironically, Congressman Edwards represents President Bush's congressional district in Crawford. *Id.*

53. Session v. Perry, 298 F. Supp. 2d 451, 458-59 (E.D. Tex. 2004).

54. People *ex rel* Salazar v. Davidson, 79 P.3d 1221, 1226 (Colo. 2003)

suggest that even if there were not a redistricting provision in the Colorado Constitution, the court would find that the United States Constitution prohibits mid-decade redistricting.[55]

In addition, it is disputed that state law should even govern this situation.[56] Consequently, the Texas and Colorado opinions effectively create a split among states, even though they are based on different sources of law. The decision made by the Colorado Supreme Court is one that likely could be used by another court, even one that relies on federal law, to determine that the United States Constitution forbids mid-decade redistricting. A federal court also could adopt the reasoning employed by the Colorado Supreme Court to rule against the use of mid-decade redistricting, thus placing it in direct conflict with the decision of the district court in Texas. Despite the Colorado Supreme Court's emphasis on state law, therefore, its decision is squarely at odds with the result based on federal law in Texas. This section of the Note will detail the Texas and Colorado court opinions.

A. Texas

In *Session v. Perry*, the United States District Court for the Eastern District of Texas held that neither the United States Constitution nor the Texas Constitution bars the use of mid-decade redistricting.[57] While the case touched on racial discrimination, partisan gerrymandering, and vote dilution claims, this Note will only address whether Texas had the legislative authority to engage in mid-decade redistricting.

First, the court noted that the Elections Clause of the United States Constitution delegates to the states the power to determine the procedures governing congressional elections in each state. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chasing Senators."[58]

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55. *See id.* at 1245 (Kourlis, J., dissenting) (noting that the majority's acknowledgement of the importance of federal law "is a telltale indication of the premise that court authority does truly stem from federal law" and is not an independent creation of the state constitution).

56. *See id.* at 1249 (Kourlis, J., dissenting) (taking issue "with the majority's assignment of this issue to state law.").

57. *Session*, 298 F. Supp. 2d at 451.

58. U.S. CONST. art. I, § 4, cl.1.

The purpose of this provision is to give state legislatures the authority to redraw congressional districts.[59] The court noted that while states can enact the "time, places, and manner" of voting regulations, the text of the clause does not further define or otherwise limit the discretion of state legislatures.[60] Congress can override state election decisions by enacting regulations of its own, but "unless and until Congress chooses to act, the states' power to redistrict remains unlimited by constitutional text."[61] Consequently, the court refused to read the Elections Clause so as to allow the states to use their election power only a single time after each census.[62]

Second, the court relied on Supreme Court precedent suggesting that states may redistrict mid-decade following court action. The most direct Supreme Court assessment of redistricting came in *Wise v. Lipscomb*, in which the Court stated:

> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan *pending later legislative action*.[63]

The *Session* court concluded that this language "contemplates that any federal court plan must give way to later legislative redistricting efforts."[64] Consequently, given the text of the Elections Clause and Supreme Court precedent interpreting it, the Elections Clause "does not limit states to redistricting once per decade, particularly where, as here, the State's action follows a court-imposed map."[65]

Third, the court dismissed the Census Clause as a limitation on a legislature's ability to conduct mid-decade redistricting. The Census Clause provides:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers. . . . The actual

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59. *See* Smiley v. Holm, 285 U.S. 355, 366-67 (1932) ("The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It 'has a general supervisory power over the whole subject.' ") (citing *Ex parte* Siebold, 100 U.S. 371, 387 (U.S. 1880)).

60. *Session*, 298 F. Supp. 2d at 459.

61. *Id.*

62. *Id.* at 460.

63. 437 U.S. 535, 540 (1978) (emphasis added) (citing Connor v. Finch, 431 U.S. 407, 415 (1977)).

64. *Session*, 298 F. Supp. 2d at 461.

65. *Id.*

Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.[66]

The court did not accept the plaintiffs' argument that the requirement of enumeration every ten years imposed a limitation on the states' power to redistrict. The Court based this on the difference between apportionment *among* the states and apportionment *within* the states, saying that the Census Clause applies only to the apportionment of congressional seats *among the states.*[67] While Clause links each state's delegation to the state's population in order to ensure a state is not over- or under- represented in the United States House of Representatives, the Clause *says nothing about how congressional district lines within a state must be drawn.*[68] After the census is released, congressional seats are reapportioned and states are required to redistrict in order to bring their districts into conformity with the equal protection rule of one man, one vote.[69] However, the Clause does not expressly limit the ability of a state to redistrict more frequently. In fact, the Census Clause does not even mention the states or their power to redistrict.[70] As a result, the court concluded the Clause could not limit a power that was never referenced, and it refused to add an implicit limitation to the Elections Clause that states may determine the "times, places, and manner" of holding elections only after each decennial census.[71]

Fourth, the court dismissed the argument that Congress has already exercised its power under the Elections Clause to limit the authority of the states to conduct mid-decade redistricting.[72] There are two provisions in Title 2 of the United States Code that arguably represent an exercise of Congress's power to limit the authority of the states to redistrict.[73] Section 2a specifies that the President must

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66. U.S. CONST. art. I, § 2, cl. 3.

67. *Session*, F. Supp. 2d at 462. Apportionment of Representatives *among* the states is the process whereby congressional seats are allocated to the states based on population following the completion of the United States Census. U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT—HISTORICAL PERSPECTIVE: APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES (2000), *available at* http://www.census.gov/population/www/censusdata /apportionment/history.html. Apportionment of Representatives *within* the states occurs after the allocation of congressional seats to each state, when each state's legislature redraws the congressional district lines within its borders. *Id.*

68. *Session*, 298 F. Supp. 2d at 462.

69. *Id.*

70. *Id.*

71. *Id.* at 463.

72. *Id.* at 463-67.

73. *Id.* at 463.

inform Congress after each decennial census of the population of each state and the corresponding number of representatives apportioned to each state,[74] and Section 2c requires every state entitled to more than one representative under the census figures to create a number of districts equivalent to the number of representatives it sends to the House.[75] Plaintiffs argued that in Section 2c, Congress revoked the power granted to state legislatures by the Elections Clause and delegated a far more limited power and that Section 2c allows redistricting only once after the decennial census.[76] Consequently, when the *Balderas* Court imposed a redistricting plan, the redistricting power delegated to states through Section 2c was effectively depleted, thus invalidating the new redistricting map because the State had no authority to enact it.[77]

The court held that while Section 2c is a restriction on the states' ability to redistrict, it is not a revocation of the states' power.[78] First, the court noted that had Congress wished to revoke the states' redistricting authority, it should have done so clearly.[79] More importantly, the court stated that the structure of the Elections Clause suggests that the primary source for election regulation is state law, and that federal law can supplement or override state procedures only when necessary.[80] The court viewed Section 2c as a congressional regulation imposing a single election requirement on the states, thus preserving the role of Congress and the states under the Elections Clause.[81] The court proceeded to note that even if Section 2c did revoke redistricting authority, Section 2c would not limit

74. 2 U.S.C. § 2a (2003). The pertinent part of section 2a reads:

> On the first day, or within one week thereafter, of . . .each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under . . . each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one member.

75. 2 U.S.C. § 2c (2003). The pertinent part of section 2c reads:

> In each State entitled . . . to more than one Representative under an apportionment made pursuant to the provisions of [section 2a(a) of this title], there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.

76. *Session*, 298 F. Supp. 2d at 464.

77. *Id.* at 464-65.

78. *Id.* at 464.

79. *Id.*

80. *Id.* at 465.

81. *Id.*

redistricting to only after the census.[82] While Section 2c undoubtedly imposes upon states an obligation to redistrict after each census, there is nothing in the statute that limits the frequency with which a state may do so.[83]

Finally, the court held that redistricting custom and tradition in Texas do not prevent the Texas Legislature from redrawing district lines in the middle of the decade.[84] Plaintiffs pointed to *White v. Weiser*, in which the Supreme Court held that federal courts must abide by state redistricting traditions when they are responsible for map-drawing.[85] The *White* Court also stated that "legislatures, not courts, have 'primary jurisdiction' over reapportionment, and reinforced the notion that court intervention in the redistricting process is meant to be minor and remedial."[86] The court declined to extend this principle to the legislature, thus preserving its ability to take the unprecedented step of mid-decade redistricting after a valid map already had been used in an intervening election.

B. Colorado

Colorado's redistricting experience was similar to that of Texas. After the state gained an additional House seat following the 2000 census, its General Assembly convened to work out a new redistricting plan.[87] The Colorado Legislature could not agree on a plan during its regular session and two special sessions, so the matter went to the courts.[88] The district court settled on a map but gave the legislature one more chance to pass its own plan during the 2002 session before the court plan would be enacted.[89] After the General Assembly again

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82. *See id.* (stating that "even if § 2c did somehow revoke and redelegate redistricting authority, we disagree that § 2c would allow redistricting only on the decennium.")

83. *See id.* (concluding that "[w]hile it is true that states are under an obligation to redistrict after each census, we find nothing in § 2c that limits the frequency with which they may do so. It would have been remarkably easy for Congress to impose such a limitation in the text of § 2c, but it did not.").

84. *See id.* at 466-467 (noting that "the Court has never held that a state *legislature* is bound to follow its prior districting practices indefinitely," and declaring it "illogical to require a state legislature to adhere strictly to the state's districting principles whenever it undertook to redraw the state's map." (emphasis in original)).

85. 412 U.S. 783, 795 (1973).

86. *Id.*

87. People *ex rel* Salazar v. Davidson, 79 P.3d 1221, 1224 (Colo. 2003).

88. *Id.* at 1227.

89. *Id.*

was unable to act, the court's redistricting plan was enacted for the 2002 election.[90]

One year later, at the end of the 2003 regular session, the newly elected General Assembly enacted a new redistricting plan.[91] The Colorado Attorney General filed an action in state court seeking an injunction to prevent the Secretary of State from implementing the new plan and a writ of mandamus requiring the Secretary of State to return to the original 2002 redistricting plan.[92]

The Colorado Supreme Court held that while the General Assembly has the primary responsibility for drawing congressional districts, when it fails to create a constitutional redistricting plan in the face of an upcoming election and forces courts to create one, the judicially-created districts are just as binding and permanent as districts created by the General Assembly.[93] The court held that "regardless of the method by which the districts are created, the state constitution prohibits redrawing the districts until after the next decennial census."[94]

While the Colorado Supreme Court based its holding on the state constitution, federal law played a significant part in its decision. First, the court noted that the United States Constitution does not grant redistricting power to the state legislatures exclusively, but rather to the states generally.[95] Second, the court noted that far from being unfettered, the redistricting authority of the states is circumscribed by federal law, especially by the requirement that "each state must draw congressional districts immediately after each federal census and before the ensuing general election."[96] In addition, the court wrote that under federal law, the Colorado Constitution cannot relax the federal laws pertaining to redistricting; a state constitution can only impose more stringent restrictions.[97]

The court noted that while the United States Constitution granted the states the power to draw congressional districts, that power has often been restricted.[98] For example, the Supreme Court

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1231.

94. *Id.*

95. *Id.* The grant of power to the states generally allows for redistricting plans to be crafted constitutionally by the judiciary, which would not be permissible if the power were granted exclusively to the legislature.

96. *Id.*

97. *Id.*

98. *Id.* at 1232.

established the "one person, one vote" doctrine, which requires states to elect all of their representatives from districts of equal proportions.[99] As a consequence of this doctrine, states now have a "constitutional obligation to draw congressional districts with equal numbers of constituents, or else justify any differences, no matter how small, with a legitimate reason."[100] The census figures are used to comply with this doctrine, and new decennial census figures render the old districts unconstitutional, forcing states to redistrict prior to a subsequent election.[101] "In sum, under federal constitutional law, each state must draw new congressional districts after a decennial census or risk having its districts declared unconstitutional prior to the next congressional election."[102]

The court also pointed to federal statutory limitations on redistricting. First, the Court looked to Section 2c, which eliminated the option of at-large elections for states with more than one representative.[103] Because of this provision, states are required to draw same-sized, single-member districts.[104] Second, the court pointed to the Voting Rights Act.[105] The Voting Rights Act forbids diluting the voting strength of a minority group "sufficiently large and geographically compact to constitute a majority in a single-member district."[106] Furthermore, Section 5 of the Voting Rights Act requires preclearance, which mandates jurisdictions with a history of discrimination to obtain federal approval before making any changes to voting laws or procedures.[107] So, under federal law, far from having unfettered authority to create congressional districts, states must redistrict after each federal census before the ensuing election; create single-member, racially-neutral districts; and obtain federal preclearance for the redistricting plan if the state has a history of discrimination.[108]

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99. *See id.* at 1233 (discussing Wesberry v. Sanders, 376 U.S. 1 (1964)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1234. At-large elections differ from single-member districts in that under an at-large election scheme, all members of Congress could be elected from the same part of the state. *Id.* Instead of drawing a district and requiring one congressman per district, no districts are drawn in at-large elections, and the people with the highest vote totals are elected regardless of what region of the state they come from. *Id.*

104. *Id.*

105. *See id.*, 79 P.3d at 1233 (finding that "[a]nother limitation on the General Assembly's freedom to redistrict is tbe Voting Rights Act.").

106. *Id.* at 1234 (citing Thornburg v. Gingles, 478 U.S. 30, 50 (1986)).

107. *Id.*

108. *Id.* at 1234-1235.

The United States Constitution and federal statutes restrict the states' authority to redistrict, and a state constitution can only further restrict a state legislature's authority to draw congressional districts—it cannot expand it. [109] Unlike the Texas Constitution, which is silent on redistricting and therefore only subjects the legislature to federal redistricting limitations, Colorado's Constitution has a clause addressing redistricting. Article V, Section 44 states:

> The General Assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district. *When a new apportionment shall be made by congress, the General Assembly shall divide the state into congressional districts accordingly.*[110]

Notwithstanding the court's analysis of federal redistricting law, the court held that since there was a clause in the state constitution dealing with redistricting, its holding would be based entirely upon state law.[111] The court determined that the crucial language, "when a new apportionment shall be made by Congress, the General Assembly shall divide the state into congressional districts accordingly," did not permit redistricting to occur more than once per decade.[112]

First, the court held that the plain meaning of this provision did not contemplate mid-decade redistricting. The court stated that the word "when" meant that redistricting could only occur after apportionment.[113] The state must redistrict "any and every time" a new apportionment occurs, and it must take place "just after" a new apportionment.[114] "Conversely, redistricting may not happen spontaneously or at the inducement of some other unspecified event; it must happen after *and only after* a new apportionment."[115]

Second, the court looked to history and custom in redistricting. Never before had Colorado drawn congressional districts more than once per decade.[116] In addition, the court emphasized that political control of the State had flipped several times, and "[i]f the General Assembly ha[d] always understood the state constitution to allow

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109. *Id.* at 1235.

110. COLO. CONST. art. V, § 44 (emphasis added).

111. *See* People *ex rel* Salazar v. Davidson, 79 P.3d 1221, 1231 (Colo. 2003) (stating that the court's decision is based upon the Colorado Constitution and that federal law is discussed to "put state law in context.").

112. *Id.* at 1235.

113. *Id.* at 1238.

114. *Id.*

115. *Id.* (emphasis added).

116. *Id.* at 1239.

redistricting more than once per decade, there should be some evidence that it exercised that power."[117] Furthermore, the court noted that this "tradition" is also found in many other states that have changed party control of their state government mid-decade.[118]

C. Colorado Dissent

Although the majority in *Salazar* asserted that its decision was based purely upon state law, Justice Kourlis' dissent forcefully argued that redistricting authority truly stems from federal law and is not an independent creation of a state constitution.[119] Justice Kourlis argued that even if the issue were one of state law, the plain meaning of the Colorado Constitution's redistricting provision does not allow for a time limit and thus allows for mid-decade redistricting.[120]

Justice Kourlis objected to the use of state law because, although the Supreme Court has given the states broad discretion to define the process of redistricting, courts become involved only because they need to enforce federal constitutional rights.[121] Consequently, any court order protecting those rights must be governed by an application of federal, as well as state, law.[122] Unless the state constitution provides for a clear limiting factor on redistricting, the United States Constitution should be viewed as the ultimate arbiter on redistricting rights.

The dissent also argued that even if the case should be decided under state law, the Colorado Constitution "neither assigns a specific function in redistricting to the courts, nor a specific time within which to complete that role."[123] Constitutional provisions should be given their plain and ordinary meaning, and Colorado's constitutional redistricting provision plainly has no requirement that redistricting may only occur once per decade.[124] The majority relied upon the word "when," which it viewed as establishing a clear timeframe that expires after the decennial census is completed and before the first election.[125]

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117. *Id.* at 1240.

118. *Id.*

119. *Id.* at 1249 (Kourlis, J., dissenting).

120. *Id.* (Kourlis, J., dissenting).

121. *Id.* (Kourlis, J., dissenting).

122. *See id.* (Kourlis, J., dissenting) (stating that "the duration of a court order protecting those rights, or the jurisdiction of a court to review existing districts when constitutional infirmities exist, must be governed by an intermixed application of state and federal law.").

123. *Id.* at 1249 (Kourlis, J., dissenting).

124. *Id.* (Kourlis, J., dissenting).

125. *Id.* at 1238. (Kourlis, J., dissenting).

Justice Kourlis wrote that while the redistricting provision can be read to impose a duty upon the legislature to act as soon as possible after the census is released, "it does not in any way imply the imposition of a back-end limitation upon that duty."[126] To read into the redistricting provision an implied intention that the right to redistrict is abrogated if not exercised within a narrow time frame is a long leap to make.[127]

In conclusion, while *Session* is based on the federal Constitution and *Salazar* is ostensibly based upon state law, the holdings of the two cases are largely incompatible. First, for the reasons expressed in the *Salazar* dissent, it is not clear that a state's constitution should govern mid-decade redistricting. Second, states that do not have constitutional provisions relating to redistricting may base their decisions on the United States Constitution, as did the Texas District Court in *Session v. Perry*.[128] Finally, of the states that do have constitutional provisions relating to redistricting, only a very limited number have constitutional provisions that clearly preclude mid-decade redistricting.[129] The majority of state constitutional provisions are similar to Colorado's provision, which is highly ambiguous and does not make clear whether there is a back-end limitation that prevents redistricting from occurring after a certain date.[130] Consequently, while the *Session and Salazar* courts seem to be based on different sources of law, it is possible to compare the two opinions, and the differences between them seem to be irreconcilable. The ambiguity of the Colorado Constitution, and similar constitutional provisions of other states, ultimately leads to an analysis that leans heavily upon federal law found in the United States Constitution. As a result, Congress, the courts, or both, will have to resolve this discrepancy, irrespective of the different language used in state constitutions.

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126. *Id.* at 1250. (Kourlis, J., dissenting).

127. *Id.* (Kourlis, J., dissenting). The dissent further noted that several states have read their constitutional provisions on redistricting to implicitly allow for mid-decade redistricting. In *State v. Weatherill*, the Minnesota Supreme Court interpreted its constitutional provision referring to the "first session after each (census)" as a duty to reapportion in the first session but not a prohibition on reapportionment at a later time. 147 N.W. 105, 106 (Minn. 1914). *See also* Harris v. Shanahan, 387 P.2d 771, 795 (Kan. 1963) (holding that "the duty to properly apportion legislative districts is a continuing one"); Selzer v. Synhorst, 113 N.W.2d 724, 733 (Iowa 1962) (holding that the legislature's duty to reapportion continues until performed); Lamson v. Sec'y of the Commonwealth, 168 N.E.2d 480, 483 (Mass. 1960) (same).

128. *Session v. Perry*, 298 F. Supp. 2d 451, 458-59 (E.D. Tex. 2004).

129. *See supra* note 127.

130. *Id.*

IV. ARTICLE I ANALYSIS: STATES HAVE THE PLENARY POWER TO CONDUCT MID-DECADE REDISTRICTING, SUBJECT ONLY TO THE SUPERVISORY POWER OF CONGRESS

After completion of the 2000 census, the Texas and Colorado legislatures had a constitutional duty to draw new congressional district maps. When the legislatures could not do so, courts fulfilled the states' constitutional duty to produce a map, and these lawfully enacted maps were used in the 2002 elections. It is undisputed that after using the court-ordered maps in the 2002 elections, the states had satisfied their constitutional duty to redraw congressional lines. This Note seeks to answer, however, whether the intervening election not only ended the state's duty to redistrict, but also ended its *ability* to once again change congressional districts before the next decennial census. In answering this question, it is crucial to keep in mind that there is a fundamental difference between the apportionment of representatives *among* the states and the apportionment and election of representatives *within* the states.[131] An examination of the Constitution, the intent of the Constitution's Framers, and Supreme Court precedent show that absent congressional action, Article I of the United States Constitution does not forbid a state from engaging in mid-decade redistricting.

A. Constitutional Text

The plain meaning of the Elections Clause of the United States Constitution does not allow for a temporal limitation on redistricting.[132] The Elections Clause is a grant of power to the states that allows them to enact the "time, places, and manner" of voting regulations.[133] Other than the supervisory power granted to Congress, there is absolutely nothing in the text of the Clause that can be interpreted to limit the ability of a state to decide when and how frequently it chooses to redistrict. The Constitution only requires redistricting to occur after each decennial census is completed, and is silent on whether states can redistrict more often.[134] Since the Constitution is silent on this matter, each state can choose to

131. *See supra* note 67.

132. The Elections Clause states in pertinent part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chasing Senators." U.S. CONST. art. 1, § 4, cl. 1.

133. *Id.*

134. *Id.*

redistrict during whatever "times" it chooses. While Congress can override state election decisions by enacting regulations of its own, unless it does so there is no limitation in the Elections Clause that prohibits states from using their election power repeatedly after each census.

The text of the Census Clause also fails to provide a limitation on a state's ability to engage in mid-decade redistricting.[135] Any argument that reads the requirement of redistricting every ten years as a limitation on a state's ability to redistrict is severely misguided. The entire purpose of the Census Clause is to set a requirement regarding apportionment *among the states*—which requires that population changes be taken into account and the number of congressional seats granted to each state be reassigned to reflect its change in population.[136] The Clause lacks even a single requirement explaining how a state is to create districts *within its own borders*. Not only does the Clause not expressly limit the ability of a state to redistrict repeatedly after every census but also it does not even mention the states or their power to redistrict within their own borders.[137] Since the Clause never even references the ability of states to reapportion within their own borders, it is impossible to read into the Clause an implicit limitation that states may only change district boundaries a single time following the completion of the decennial census.

B. Framers' Intent

The plain meaning of the Elections and Census Clauses are reinforced by the debates at the Constitutional Convention, the state ratifying conventions, and the Federalist Papers, which show that the Framers never intended these constitutional clauses to limit a state's ability to determine redistricting procedures within its own borders.

It was not until 1962 that redistricting disputes became a justiciable cause of action under the United States Constitution. *Baker v. Carr* considered an allegation that Tennessee's state senate and representative districts were so disparate in the number of qualified voters that the plaintiffs and persons similarly situated were

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135. The Census Clause states in pertinent part: "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers. . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." U.S. CONST. art. I, § 2, cl. 3.

136. *See generally* Wesberry v. Sanders, 376 U.S. 1, 24 (1964) (Harlan, J., dissenting).

137. *See id.* at 33-34 (Harlan, J., dissenting).

"by virtue of the debasement of their votes," denied equal protection of the laws guaranteed by the Fourteenth Amendment.[138] After reviewing the Court's long history of avoiding involvement in reapportionment controversies, the Court held that federal courts had jurisdiction over the subject matter and that the plaintiffs had established a justiciable cause of action on which relief could be granted.[139] This decision firmly established the federal judiciary as a player in redistricting debates.

The most extensive discussion given by the Supreme Court on the Framers' view of reapportionment comes from *Wesberry v. Sanders*.[140] *Wesberry*, while not directly on point, is the most illuminating Supreme Court decision on whether a state legislature has the authority under Article I, Section 2 of the Constitution to redraw a lawfully enacted congressional redistricting plan after it has been used in an election. In *Wesberry*, plaintiffs resided in a Georgia congressional district with a population almost three times as great as any other district in the state.[141] Since there is only one congressman per district, the plaintiffs contended that the inequality of population meant that their congressman had to represent almost three times as many constituents as other Georgia congressmen, thus leading to a debasement of their votes.[142] The majority held that "construed in its historical context, the command of Art. I, Section 2, that Representatives be chosen 'by the people of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[143]

In support of its holding, the Court looked to the records of the Constitutional Convention of 1787.[144] The Court stated that "one principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress."[145] For example, James Madison said "[i]f the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all."[146] James Wilson stated that "equal numbers of people ought to have an equal number of

138. 369 U.S. 186, 187-88 (1962).
139. *Id.*
140. 376 U.S. 1 (1964).
141. *Id.* at 2.
142. *Id.*
143. *Id.* at 7-8.
144. *Id.* at 7-17.
145. *Id.* at 10.
146. *Id.*

representatives"[147] and that representatives "of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other."[148] Edmund Randolph's proposal for a periodic census was adopted to ensure "fair representation of the people," an idea endorsed by George Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives.[149] In addition, the Court pointed to James Wilson's statement that "[a]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same."[150] All of this, the Court stated, adds up to "one person, one vote."[151]

Justice Harlan's dissent, however, took a different view of the historical context and argued that only action by the Georgia legislature or Congress could offer plaintiffs the relief they sought.[152] Justice Harlan correctly noted that the quotations used by the majority "were focused on the problem of how representation should be apportioned *among* the States in the House of Representatives," and that there "is nothing which suggests even remotely that the delegates had in mind the problem of districting *within* a State."[153] Justice Harlan wrote that while there was "unanimous silence" on apportionment *within* the States at the Constitutional Convention, there are repeated references to this issue in the ratifying conventions.[154]

As applied to the mid-decade redistricting situation, Justice Harlan's view of the historical context of Article I is largely accurate, while the majority's view is misguided. Justice Harlan's dissent is faithful to the historical context for three reasons. First, he correctly noted that the debates over redistricting at the Constitutional

147. *Id.* at 10-11 (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 472 (Farrand ed. 1911)).

148. *Id.* (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 180 (Farrand ed. 1911)).

149. *Id.* at 13-14.

150. *Id.* at 17.

151. *Id.*

152. *See id.* at 24 (Harlan, J., dissenting) (stating that "[i]n short, in the ahsence of legislation providing for equal districts hy the Georgia Legislature or by Congress, these appellants have no right to the judicial relief which they seek").

153. *Id.* at 31-32.

154. *Id.* at 34.

Convention centered on redistricting *among* the states, and not redistricting *within* the states. The majority's reliance on quotations concerning redistricting among different states simply is not helpful in the present context—mid-decade redistricting exclusively involves redistricting borders within the states. Second, the quotations relied upon by the majority are quantitative in nature and are used to advance the principle of one man, one vote. Again, these are not applicable to mid-decade redistricting. The interest here is not quantitative allocation of voters within districts, which the majority's discussion of the historical context addressed, but rather the qualitative differences between redistricting among the states and within them, which the dissenting opinion accurately captured.

Finally, the dissenting opinion is much more helpful in understanding mid-decade redistricting because it makes use of the debates at the state ratifying conventions and the Federalist Papers. These sources, which the majority did not examine, both strongly support the argument that Article I does not limit a state's ability to redistrict mid-decade. Since Justice Harlan's dissent is far more relevant than the majority opinion to the mid-decade redistricting scenario, this Note will now turn to a closer examination of his dissent, the state ratifying debates, and the Federalist Papers.

At the Virginia convention, James Madison made it clear that Article I, Section 4 applied to redistricting within a state.[155] Madison said:

> Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government. *It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution.*[156]

Madison's statement makes clear that while the Constitutional Convention may have been silent on redistricting within a state, the United States Constitution was not to interfere with the ability of a state to set its own election and redistricting procedures.

Justice Harlan elaborated on Madison's position, writing that the Framers thought that the power to make particular election regulations should be submitted to the states, while the power to create the general framework should be given to the federal

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155. *See id.* at 37-38 (stating that "[i]n the Virginia Convention, during the discussion of s[ection] 4, Madison . . . stated unequivocally that he looked solely to that section to prevent unequal districting").

156. *Id.* (emphasis added by Justice Harlan).

government.[157] Had the regulations been exclusively under the control of state governments, then the federal government might easily be dissolved.[158] However, so long as states were aware of the prospect that the federal government could use its supervisory power to regulate state elections, there was no need to worry about the dissolution of the national government.[159] Implicit in the argument fearing state action is that until the federal government chooses to regulate state elections, there is nothing in the Constitution that prevents mid-decade redistricting. Article I, Section 4 was intended to regulate abuses of state election procedures by providing for congressional supervisory power, but it was never intended to limit states in any way. As this Note will argue later, the use of mid-decade redistricting is precisely the kind of event that should trigger congressional intervention under Article I, Section 4. But there is nothing in the Constitution itself that prevents such a use of state redistricting power.

In discussing Article I, Section 4 at the Massachusetts ratifying convention, Mr. Parsons stated: "Indeed, if the Congress could never agree on any regulations, then certainly no objection to the 4th section can remain; for *the regulations introduced by the state legislatures will be the governing rule of elections, until Congress can agree upon alterations.*"[160] Parson's statement shows that while the United States Constitution preserves the right for Congress to make laws regulating redistricting, there is nothing in the Constitution itself that prevents states from making their own redistricting choices.

The New York Convention also offered evidence that the Framers did not intend the Constitution to regulate apportionment within the states. During a debate about the use of elections at large, Mr. Jones noted that the constitutional proposal "was not intended to impose a requirement on the other states," but to "enable the states to act their discretion, without the control of Congress."[161] The New York Convention passed a resolution stating that "nothing in this Constitution shall be construed to prevent the legislature of any state to pass laws, *from time to time, to divide such state into as many convenient districts as the state shall be entitled to elect representatives*

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 36 (emphasis in original).
161. *Id.* at 37.

for Congress."[162] This statement explicitly shows not only that redistricting within a state is not a concern regulated by the Constitution, but also that absolutely no limit was placed on the amount of times redistricting could occur within a state after each decennial census.

Finally, the Pennsylvania ratifying convention expressed similar views. At the convention, James Wilson described Article I, Section 4 as "placing into the hands of the state legislatures" the power to regulate elections and retaining for Congress the ability to use "self-preserving power" to make regulations lest "the general government . . . lie prostrate at the mercy of the legislatures of the several states."[163] Again, the statement shows that so long as Congress chooses not to interfere in state election and redistricting procedures, the exercise of those powers belongs to the states. There is no mention in the state convention records suggesting that the Constitution itself limits the ability of states to redistrict, and since Congress has never used its supervisory power to prevent mid-decade redistricting, the views of the Framers must be followed.

An examination of the Federalist Papers also shows that the Framers intended to make the power to redistrict within a state the exclusive province of the states, barring congressional action. In the Federalist, No. 54, Madison pointed out the "fundamental cleavage" that Article I made between apportionment of representatives *among* the states and the selection and districting of representatives *within* each state:[164]

> It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, *so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants, as the State itself may designate.*[165]

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162. *Id.* (emphasis added) (citing II ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 329 (2d ed. 1836))

163. *Id.* at 39-40.

164. *See id.* (stating that "[i]n No. 54, [Madison] discussed the inclusion of slaves in the basis of apportionment. He said: 'It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation. This statement was offered simply to show that the slave population could not reasonably be included in the basis of apportionment of direct taxes and excluded from the basis of apportionment of representation. Further on in the same number of the Federalist, Madison pointed out the fundamental cleavage which Article I made between apportionment of Representatives among the States and the selection of Representatives within each State . . . .").

165. *Id.* at 31, n.15 (quoting THE FEDERALIST NO. 54. at 369 (James Madison) (Cooke ed., 1961)).

So while each state is required to provide districts for the assigned number of representatives, both the procedures used for that process as well as the qualifications of the state's voters are not constrained by the Constitution.

The most extensive and persuasive discussion of Article 1, Section 4 was given by Alexander Hamilton in The Federalist, No. 59:

> It will not be alleged, that an election law could have been framed and inserted into the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways, in which this power could have been reasonably organized; that it must either have been lodged wholly in the National Legislature, or wholly in the State Legislatures, or primarily in the latter, and ultimately in the former. The last mode has, with reason, been preferred by the Convention. *They have submitted the regulation of elections for the Federal Government, in the first instance, to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the National authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.*[166]

For the sake of convenience the regulation of election law was given exclusively to the states—only congressional intervention could impose limitations on the ability of the states to regulate their redistricting and election procedures. While mid-decade redistricting may be one of those "extraordinary circumstances" of which Hamilton spoke, there has not yet been congressional intervention preventing it, and so the ability to redistrict within its own borders remains the province of each and every state.

As Justice Harlan recognized, the discussion of the regulation of federal elections found in the state ratifying conventions and the Federalist Papers "unequivocally stated that the state legislatures have plenary power over the conduct of congressional elections subject only to such regulations as Congress itself might provide."[167] In conclusion, the constitutional scheme vests in the states plenary power to regulate the conduct of and election procedures for their representatives, and in order to protect the federal government, provides for congressional supervision of the states' exercise of that power.[168] Since Congress has not exercised its power in an effort to ban mid-decade redistricting, states must be allowed to engage in this practice if they choose to do so.

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166. THE FEDERALIST NO. 59, at 325-36 (Alexander Hamilton) (E.H. Scott ed., 2002) (emphasis added).

167. *Sanders*, 376 U.S. at 41 (Harlan, J., dissenting).

168. *Id.* at 42.

V. EQUAL PROTECTION ANALYSIS: MID-DECADE REDISTRICTING AS A PARTISAN GERRYMANDER

Mid-decade redistricting is a particular type of partisan gerrymander, designed to benefit the political party that most recently received unified control of the state government. These types of gerrymanders are particularly difficult to challenge: the Supreme Court's test for striking down maps resulting from partisan gerrymanders is nearly insurmountable.[169] While this case law was developed by claims against redistricting maps enacted immediately after a census, mid-decade redistricting is simply a particular type of partisan gerrymander, and thus the reasoning of this precedent weighs heavily against the overturning of a map created mid-decade.

In *Davis v. Bandemer*, the Supreme Court considered whether a redistricting map governing elections in the Indiana House of Representatives constituted a political gerrymander intended to disadvantage Democrats across the state.[170] Democrats argued that the map, which was drawn by the Republican-controlled legislature following the 1980 census, was intended to and did violate their right, as members of the Democratic Party, to equal protection under the Fourteenth Amendment.[171] A four-Justice plurality laid down a test requiring plaintiffs to prove "both intentional discrimination against a politically identifiable group and an actual discriminatory effect on that group."[172] The Court noted that "politics and political considerations are inseparable from districting and apportionment," and that "[t]he reality is that districting inevitably has and is

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169. *See* Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196, 1207 (2004) (discussing the stringent tests and high standards of proof lower federal courts have adopted in order for a plaintiff to succeed in bringing a partisan gerrymandering claim). Although some Justices sought to reject these stringent criteria, the criteria are currently still in effect because a majority of the court could not agree on a standard to assess political gerrymandering claims. *See also* Vieth v. Jubelirer, 124 S. Ct. 1769, 1778 (2004) (holding that "[e]ighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.").

170. 478 U.S. 109 (1986).

171. *See Bandemer*, 478 U.S. at 115 (explaining that "[i]n early 1982, this suit was filed by several Indiana Democrats (here the appellees) against various state officials (here the appellants), alleging that the 1981 reapportionment plans constituted a political gerrymander intended to disadvantage Democrats. Specifically, they contended that the particular district lines that were drawn and the mix of single-member and multimember districts were intended to and did violate their right, as Democrats, to equal protection under the Fourteenth Amendment.").

172. *Id.* at 127.

intended to have substantial political consequences."[173] Consequently, the "intentional discrimination" prong of the test is nearly always satisfied: "as long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[174]

The "actual discriminatory effect" prong of the test, however, is much more difficult to satisfy. The Court explained that "the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination."[175] Overt political considerations and lack of proportionality are not enough to strike down a map — "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole" will a redistricting map be declared unconstitutional.[176] Such a finding of degradation "must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[177]

The Court wrote that the inability to influence the political process could not be proven by relying on the results of a single election.[178] A single year's election results are insufficient because they fail to show, on their own, that a political party could not secure a sufficient share of the vote to take control of the legislature in one of the next few elections.[179] Furthermore, there can be no Equal Protection violation unless there is a finding that the redistricting map would consign a political party to minority status in the legislature for the entire decade or that the political party would have "no hope of doing any better in the reapportionment that would occur" after the next census.[180] In short, simply showing that districts are "constructed so as to be safely Republican or Democratic in no way bolsters the contention that there has been statewide discrimination" against voters of a political party.[181]

Bandemer's holding on *state* legislative redistricting was extended to *congressional* redistricting by a federal district court in

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173. *Id.* at 128-29.

174. *Id.* at 129.

175. *Id.* at 132. In this case, the lack of proportional representation involved Democrats winning far fewer House seats than their statewide percentage of the vote would have suggested.

176. *Id.*

177. *Id.* at 133.

178. *Id.* at 135.

179. *Id.*

180. *Id.* at 135-36.

181. *Id.* at 136 (emphasis removed).

Badham v. Eu.[182] Since the redistricting map in *Badham* was created by the legislature, the discriminatory intent prong was automatically satisfied, and the district court looked only to the sufficiency of the alleged discriminatory effects of the redistricting plan.[183] Plaintiffs failed to meet this standard because there was no evidence that Republicans were "shut out" of the political process and nothing to suggest that "anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning."[184] The court also pointed to the fact that California Republicans still held 40 percent of the state's congressional seats, "a sizeable block that is far more than mere token representation."[185] Finally, the court noted that it was impossible to argue that Republicans were shut out of the political process after they were successful in overturning the redistricting bill by a voter referendum.[186] This ruling was summarily affirmed by the Supreme Court, and lower courts have adopted the holding to decide partisan gerrymandering claims.[187]

Supreme Court precedent on partisan gerrymandering strongly supports the allowance of mid-decade redistricting under the Equal Protection Clause. While the aforementioned cases dealt with redistricting plans enacted following the results of a census, it is likely that mid-decade redistricting, a particular type of partisan gerrymander, will be held to the same test articulated in *Bandemer* and extended in *Badham*. Under this test, it is highly unlikely that mid-decade redistricting could be held unconstitutional. Like the situation in *Bandemer* and *Badham*, mid-decade redistricting occurs as a result of legislative action, and thus there will never be a problem satisfying the "discriminatory intent" prong of the test. An application of the factors employed under the "discriminatory effect" prong,

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182. 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024. The facts in this case are almost identical to those in *Bandemer*. Following the 1980 census, the Democratic-controlled legislature passed a redistricting map that disadvantaged Republicans. *Id.* at 666. The Republican Party initiated a voter referendum to prevent the use of the redistricting map, which the voters passed. *Id.* The California Supreme Court, however, ordered the challenged map to be used in the elections because it was the only practical alternative. *Id.* A special session of the legislature later affirmed the use of the redistricting plan, and several Republican congressmen sued, giving rise to the action in *Badham*. *Id.*

183. *Badham*, 694 F. Supp. at 670.

184. *Id.*

185. *Id.* at 672.

186. *Id.*

187. *See* Note, *supra* note 169, at 1207 (stating that "[t]he Badham test, under which a major party must prove that it has effectively been shut out of the entire political process, has since become the law that lower courts have applied to partisan gerrymandering claims.").

however, shows that mid-decade redistricting is likely to be held constitutional.

The Supreme Court's unequivocal assertion that the lack of proportionality between a political party's share of the statewide vote and their percentage of House seats can never alone be enough to declare a partisan gerrymander unconstitutional makes it difficult to invalidate mid-decade redistricting.[188] As a consequence of this requirement, even large shifts in a congressional delegation, as was the case in Texas in 2004, cannot render a redistricting map unconstitutional. This belief was underscored in *Badham*, where the court suggested that so long as a political party does not have "token representation" in a congressional delegation, there can never be an unconstitutional partisan gerrymander.[189]

In addition, it will be extremely difficult for a political party to show that it was entirely "shut out" of the political process, which was one of the driving factors in the *Badham* decision.[190] For example, the situation in Texas clearly fails this test. Despite complete Republican control of the Texas legislature, Democrats successfully used parliamentary tactics to defeat two special sessions called to create a new map.[191] This sort of political power, just like the referendum passed in *Badham*, is hardly representative of a group that holds no political power and is shut out of the political process. Furthermore, parliamentary tactics (though never as extreme as the fleeing of the state that occurred in Texas) may be used routinely in state legislatures across the country to influence, frustrate, and defeat the redistricting process. These available procedures make it very difficult, if not impossible, for a political party to claim that a redistricting map must be declared unconstitutional because it has been completely shut out of the political process. Finally, the *Badham* court stressed the importance of the availability of voter registration, organizing, voting, fundraising, and campaigning.[192] Mid-decade

188. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (stating that "[a]s with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Again, without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.").

189. *Badham*, 694 F. Supp. at 672.

190. *Id.* at 670.

191. *See supra* notes 38-46 and accompanying text.

192. *See id.* ("Specifically, there are no factual allegations regarding California Republicans' role in "the political process as a whole. There are no allegations that California Republicans

redistricting generally does not affect these activities, and thus such plans still leave the opportunity for a political party to fully participate in public debate.

The Supreme Court's requirement that the results of more than one election be used to support a claim against a partisan gerrymander offers the best hope of declaring mid-decade redistricting unconstitutional, but even these challenges likely will fail in all but the most egregious abuses of mid-decade redistricting.[193] When a legislature engages in mid-decade redistricting, it almost certainly will result in disproportionate representation, with the minority party in the legislature losing more congressional seats than the statewide balance of power would suggest.[194] Mid-decade redistricting will offer a court at least one more look at election returns under a different congressional map, and the more frequently a state engages in mid-decade redistricting, the more evidence a court will have to weigh in determining its constitutionality. The problem is that while frequent mid-decade redistricting is likely to offer repeated evidence of disproportionality, it does not address the Supreme Court's statement that a political party must have no hope of doing any better following the next census.[195] In short, while frequent mid-decade redistricting may offer *retrospective* evidence of discriminatory effects, it does nothing in itself to satisfy the court's inquiry into *prospective* discriminatory effects.

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have been 'shut out' of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any impediments to their full participation in the 'uninhibited, robust, and wide-open' public debate on which our political system relies.") (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

193. *See Bandemer*, 478 U.S. at 132-133 (stating that the only scenario where a complaining party can prevail is one in which it has been "unconstitutionally denied its chance to effectively influence the political process.").

194. This hypothesis has yet to be tested, as the Texas redistricting plan was enacted to correct a pre-existing disproportionality, not to create one. But the enormous success of Texas' redistricting plan in the 2004 elections only underscores the ability of a newfound majority to create dramatic swings in the political party representation of a state's congressional delegation.

195. *Id.* at 135-36.

VI. THE SOLUTION: CONGRESS SHOULD EXERCISE ITS SUPERVISORY POWER TO PREVENT MID-DECADE REDISTRICTING BECAUSE IT FUNDAMENTALLY VIOLATES PUBLIC POLICY

The United States Constitution is silent on the use of mid-decade redistricting. As this Note has shown, unless Congress decides to use its supervisory power to enact a law regulating mid-decade redistricting, the states are required to redistrict immediately after the census, and most likely will be free to redistrict again whenever they so choose. Congress has not used its supervisory power in this area, and consequently states such as Texas have not been limited in the amount of times they can redistrict. While there is currently no barrier to mid-decade redistricting, the use of this practice is fundamentally against public policy. This Note proposes that Congress exercise its supervisory power to enact a statute prohibiting mid-decade redistricting and limiting the ability of states to redistrict only after the release of the decennial census.

The Framers of the Unites States Constitution sought to make the House of Representatives both representative of and accountable to the people.[196] The House of Representatives was the only federal institution created to be directly accountable to the people, since the President and Vice President were to be elected indirectly by the Electoral College for four-year terms, senators were to be chosen by state legislatures for six-year terms, and federal judges were to be appointed for life.[197] True representation was to be achieved through reapportioning congressional seats among the states every ten years based on a decennial census of the population.[198] Accountability was to be achieved by requiring an election every two years "by the People" of

196. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 821 (1995) (stating that "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people."); *see also* Cook v. Gralike, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring) (noting that "Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside. . . . The idea of federalism is that a National Legislature enacts laws which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office.").

197. *See* Note, *supra* note 169, at 1199 (stating that "[t]he institution that the Framers chose to truly represent 'the People' was, as its name suggests, the House of Representatives. Under the Great Compromise, which resolved the controversy over representation that had impeded formation of the Union, the Senate would represent the states, while the House of Representatives would represent the people. Indeed, the House of Representatives was the only national institution in the constitutional framework designed to be directly accountable to the people.").

198. U.S. CONST. art. I, § 2, cl. 3.

each of the states.[199] At the Constitutional Convention, George Mason of Virginia explained that the vision of the House of Representatives was to make it "the grand depository of the democratic principle of the Gov[ernmen]t."[200] The Framers intended the House of Representatives to "have an immediate dependence upon, and sympathy with the people."[201] Unlike its Senate counterpart, the House should come directly from the American people and "guard their interests, support their rights, express their opinions, make known their wants, redress their grievances, and introduce a pervading popular influence throughout all the operations of the government."[202] In order to realize this goal, representatives must be tied to the people directly and made accountable to them. Justice Story wrote that a "fundamental axiom of republican governments" is that there must be "a dependence on, and a responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents."[203]

The Framers of the Constitution recognized that the only true way to achieve accountability was to provide for stability in representation. At the Constitutional Convention, James Madison stated that "[i]nstability is one of the great vices of our republics, to be remedied."[204] While instability was an evil that the Framers sought to curb, the goal of equal representation required that the distribution of congressional seats be altered as the populations of states shifted and grew. Ultimately, the fundamental tension between stability and equal representation led the Framers to adopt a decennial census that is used both as a method for apportioning seats among the states and as a calendar for determining when to apportion the seats.[205]

The best way of satisfying the Framers' goal of limiting instability and maximizing accountability is to limit redistricting to

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199. U.S. CONST. art. I, § 2, cl. 1.

200. Wesberry v. Sanders, 376 U.S. 1, 10 (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 48 (Farrand ed., rev. ed. 1966)).

201. JOSEPH STORY, STORY'S COMMENTARIES ON THE CONSTITUTION § 291 (1833) [hereinafter STORY'S COMMENTARIES].

202. *Id.*

203. People *ex rel* Salazar v. Davidson, 79 P.3d 1221, 1242 (Colo. 2003) (Kourlis, J., dissenting) (citing STORY'S COMMENTARIES at § 300).

204. *Id.* (Kourlis, J., dissenting) (citing I 1787: DRAFTING THE U.S. CONSTITUTION 212 (Wilbourne E. Benton ed., 1986) (notes of Mr. Madison)).

205. *See id.* (Kourlis, J., dissenting) (stating that "[t]his fundamental tension between stability and equal representation led the Framers to require ten years between apportionments. This ten-year interval was short enough to achieve fair representation yet long enough to provide some stability.").

once every ten years. While mid-decade redistricting has only occurred twice so far, several other states have threatened to engage in mid-decade redistricting. By all appearances, the use (or at least the threat) of this new tactic is likely to increase in the future. If congressional districts were to change at the whim of state legislatures, members of Congress could often find their constituents voting in a different district in subsequent elections. In this situation, "a congressperson would be torn between effectively representing the current constituents and currying the favor of the future constituents."[206] If a congressman knows that his district will be moved, then there is very little incentive for him to actively represent the people in the original district, who elected him to the House. In order to get reelected, he likely will have to spend time with residents of the new congressional district and make sure that his votes are in line with their interests. Consequently, the voters in the original district most likely will be left with less than effective representation.

Continuous redistricting based on changing partisan control of state governments inherently disrupts the links between incumbent representatives and their constituents, and much dicta can be found in Supreme Court opinions emphasizing the importance of the bond between a member of Congress and his constituents. In *White v. Weiser*, the Court applauded the use of a state's good faith effort to "maintain existing relationships between incumbent congressmen and their constituents."[207] Similarly, the Court in *Bush v. Vera* noted that the maintenance of the unique relationship between a member of Congress and his constituents is a "legitimate state goal" and a "traditional [redistricting] principle."[208] In both these cases, the Supreme Court unmistakably noted the importance of the bond between members of Congress and their constituents. Yet circumventing this goal was clearly the motivation in the Texas redistricting saga. The map passed by the Republican Party was specifically designed to cut the links between incumbent representatives and their constituents. The central strategy for that goal was breaking up districts where Republican-leaning voters had very strong relationships with long-standing Democratic incumbents, thereby destroying the congressman-constituent bond and undermining accountability.[209] Congressional silence is likely to allow such redistricting to continue, and this practice will lead to a

206. *Id.* at 1242.

207. 412 U.S. 783, 790 (1973).

208. 517 U.S. 952, 964-65 (1996).

209. Motion to Prohibit at 23, *Balderas* (6:01-CV-158).

breakdown of the congressional-constituent bond in many congressional districts across the country.

If members of Congress do not represent the same voters until the next census, accountability could be undermined. When the states manipulate district boundaries to determine which incumbents will be reelected and which will be defeated, it prevents the people from making that decision.[210] Instead of owing their election to the people, as the Framers of the Constitution intended, congressmen will owe their elections to the mercy of the state legislatures.[211] The Texas redistricting case offers a good example. Before the redistricting, several Democrats were reelected in moderately Republican-leaning districts. By engaging in mid-decade redistricting, the mapmakers targeted several of these members and crafted their new districts to be heavily Republican.[212] This action effectively doomed those members of Congress to defeat, whereas they probably would have won reelection if the mid-decade redistricting had not occurred. One could argue that the voters in the newly-created, heavily Republican districts are still making the decision, but realistically, there is only a certain amount of cross-over voting that occurs. If a congressional district has a heavy enough partisan edge in voter registration, it is nearly impossible for the minority party in that district to win it.[213] As a result, while the voters themselves would be likely to reelect the incumbent, by placing the incumbent in an district impossible to win, the leaders of the majority party make a decision that effectively ensures the incumbent is defeated regardless of the level of voter satisfaction with him.

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210. *Id.* at 20.

211. *See* Note, *supra* note 169, at 1202 (arguing that "[a]lthough it might be hyperbolic to claim, as Hamilton did, that the very 'existence of the Union' is subject to the whims of state legislatures, ample evidence demonstrates that many of today's congressional representatives owe their election not to 'the People of the several states' but to the mercy of state legislatures. With increasingly sophisticated redistricting technology, today's state legislators have even greater opportunities to 'pack,' 'crack,' and 'kidnap' voters in congressional elections.").

212. A party's voting strength effectively can be destroyed in a variety of ways. *See, e.g.*, Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 194 (2003) (noting that "[a] group's voting strength can be diluted either by over-concentrating, or 'packing,' its members into the fewest possible districts and thus effectively wasting votes that might have had a meaningful impact in neighboring districts, or by fragmenting, or 'cracking' concentrations of the group's members and dispersing them into two or more districts where they will constitute an ineffective minority of the electorate.").

213. The 2004 congressional elections in Texas provide a good example. Despite being well-known and well-liked, every targeted Democratic incumbent except for one was defeated in their new, overwhelmingly Republican districts. *See supra* note 52.

Even without mid-decade redistricting, congressional elections are becoming remarkably uncompetitive, thus eliminating the voices of millions of voters.[214] For example, in the 2002 congressional elections, only four challengers defeated incumbents, more than 80 percent of House members won reelection in landslide victories (garnering at least 60 percent of the vote), and in eighty districts one of the two major parties declined even to field a candidate.[215] The uncompetitive nature of congressional elections is greatly exacerbated when a political party engages in mid-decade redistricting, because it almost automatically defeats members of the opposite party and ensures the election of members of the controlling party. By limiting redistricting to once every ten years, the uncompetitive nature of congressional elections can be diluted over time. But when a political party has complete control over the redistricting process and can use it repeatedly, congressional elections will become increasingly predictable.[216] By effectively eliminating competitive congressional elections, mid-decade redistricting will silence the voices and thwart the will of millions of voters.

Mid-decade redistricting also may reduce the quality of representation as a whole. By cutting the link between incumbent members of Congress and their constituents, elections would place the incumbent representative before voters whom he had never before represented. A member of Congress who had served his constituents well could be knocked out of office if his district is shifted to an overwhelmingly new set of voters, while an ineffective member of Congress who belongs to the party in power could be saved by removing from his district his most dissatisfied constituents.[217] Moreover, the quality of the incumbent congressmen that are moved

214. *See supra* note 211 and accompanying text.

215. *See* Note, *supra* note 169, at 1202-03.

216. The 2002 elections left little doubt that the partisan control of the redistricting process affects who gets elected to Congress. For a detailed explanation of redistricting's impact on the 2002 elections, see *id.* at 1203 (citing Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 198, 200 (2003)). Statistics show that in the fourteen states where Republicans had complete control over the redistricting process, Republicans captured 67 percent of the House seats in 2002, even though George Bush received only 51 percent of the vote in these states in 2000. *Id.* Similarly, in the nine states where Democrats had complete control over redistricting, Democrats won 57 percent of the House seats in 2002 even though Al Gore received only 51 percent of the vote in these states in 2000. *Id.* In sharp contrast, in the twenty-seven states where neither party had unilateral control over redistricting, the distribution was split *exactly* down the middle — with each party winning 50 percent of the House seats in 2002, and Gore and Bush each earning 50 percent of the votes in these states in 2000. *Id.*

217. Motion to Prohibit at 22, *Balderas* (6:01-CV-158).

into overwhelmingly unfavorable districts is likely to be high.[218] These incumbents are routinely targeted because of their cross-over appeal and their ability to win votes from members of the opposite party. In order to win in a district where voter registration numbers are against the incumbent,[219] the incumbent must provide high quality representation and constituent services. When these members of Congress are effectively removed from office by being drawn into a district with a heavily partisan disadvantage, the state loses a high quality representative.

History shows that mid-decade redistricting is virtually unheard of in the modern era; in fact, Texas and Colorado are the only states to have done so, although other states will no doubt follow.[220] The recent mid-decade redistrictings have occurred only in states where a political party that lacked unilateral control over the redistricting process in 2001 (when states are required to redistrict after the release of the decennial census) subsequently gained complete power in state government and sought to entrench their power nationally by wiping out members of Congress from the minority party.[221] This practice poses an enormous risk of permanently entrenching the majority party in Congress by preventing any competitive and disputed elections. If the states can redistrict mid-decade, they can fine-tune their maps every two years with data from the latest elections to further tweak congressional district boundaries.[222] This practice most likely will put the minority

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218. "Unfavorable" is measured by the partisan disadvantage in voter registration within the district. "Quality" refers to congressmen who have been effective (as measured by approval ratings) and personally popular despite being a member of a different political party than a majority of their constituents.

219. When voter registration numbers are against the incumbent, it means that more people in the district are registered voters of the party the incumbent does not belong to than are registered to the incumbent's party.

220. *See* People *ex rel* Salazar v. Davidson, 79 P.3d 1221, 1240 (Colo. 2003) (Kourlis, J., dissenting) (noting that "[d]espite the differences in state approaches to congressional redistricting, we have found no decision by any state's highest court that has interpreted its constitution to allow redistricting more than once per decade. To the contrary, many have concluded that congressional redistricting may only occur once per census period.").

221. Motion to Prohibit at 23, *Balderas* (6:01-CV-158). New technology has made tweaking congressional boundaries remarkably easy to perform. *See, e.g.*, Caliper Corporation, *Maptitude® for Redistricting: State Edition*, *available at* http://www.caliper.com/Redistricting/state_edition.htm (last visited Oct. 20, 2004) (describing redistricting software that includes "nationwide geographic data sets including streets with address information, and states, counties, census tracts, and other census boundaries with over 600 demographic variables" and allows users to "[a]dd areas to a target district . . . by pointing, by dragging a circle, by defining the corners of a polygon (lassoing), and by attribute values.").

222. Motion to Prohibit at 6, *Balderas* (6:01-CV-158).

party at a near crippling disadvantage and may end competitive elections within an entire state.

In addition to these public policy concerns, mid-decade redistricting also undermines the balance of federalism.[223] When a state engages in mid-decade redistricting, the state legislature asserts a power over the composition of the national legislature, and unnecessarily interposes itself between the people and Congress.[224] In other words, not only is there an injury in the non-exercise of voter choice, but there is one in the exercise of state choice as well.[225] When a state redistricts mid-decade to skew the composition of the national legislature by favoring candidates of its dominant political party, it reflects not the citizen's preferences, but the state legislature's.[226]

VII. CONCLUSION

The political and public policy considerations discussed in this Note unmistakably show that mid-decade redistricting presents an affront to the democratic process. Mid-decade redistricting eviscerates the Framers' goals of making the House of Representatives both accountable to and representative of the people. Pursuing redistricting more than once per decade breaks the bond between a representative and his constituents. In addition, the quality of overall representation is likely to decline since it is the congressmen who are most popular and best able to achieve cross-over appeal who will be targeted. Finally, mid-decade redistricting has the potential to end competitive elections. The party in power will have the ability to entrench itself further, election after election, thus leading to the near demise of the minority party within the state, and establishing one-party control over the state's congressional delegation. For these reasons, it is essential for Congress to exercise its supervisory power to enact legislation preventing the use of mid-decade redistricting. Both Article I of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment will allow states to continue this practice

223. *See* Note, *supra* note 169, at 1197 (arguing that "the real injury of partisan gerrymandering is its upset of the balance of federalism: through redistricting, state legislatures have essentially replevied the power they once had to choose their respective states' delegates to the national government.").

224. *Id.* at 1204, 1209.

225. *See id.* at 1211 (stating that "states are not exercising any meaningful authority of their own in redistricting, but are simply the pawns of congressional leaders.").

226. *See id.* (concluding that "[s]tates are skewing the composition of the national legislature by favoring classes of candidates and are thereby reflecting not their citizens' preferences, but their own.").

until Congress ends its silence. Should Congress fail to do so, there is a serious risk that elections in many states will become mere formalities, and that the people of these states will receive subpar representation. While the Framers of the Constitution were silent on the issue of mid-decade redistricting, the practice is antithetical to their vision of good government. Congress must step forward to prevent the decaying of our political process and ensure that the Framers' vision of democracy be maintained.

Patrick Marecki[*]

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