AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Powers of the National Government

Congressional Debate on the Apportionment Act of 1842

Every ten years, the Constitution imposes on Congress the duty to conduct a census and reapportion the seats of the House of Representatives among the states in accord with their newly measured population and the overall size of the House. The states were left to determine how the seats that had been apportioned to them were to be filled. From the first congressional election onward, the states varied in the approach that they took. Some states followed a district-based system in which a single House seat was allocated to each of several geographical districts that the state legislature had drawn. Others followed a general-ticket system in which all the candidates for the House were elected "at-large" by the voters of the state as a whole, with winners being either the several individual candidates receiving the most votes or the slate of candidates offered by the political party that received the most votes. As party competition became more intense, the party that controlled the state legislature would likely adopt the system that was expected the yield the most House seats for their own party members. Although a growing number of states adopted the district-based system, over half the states used some version of at-large elections to fill House seats by the time of the sixth census in 1840.

In the federal elections of 1840, the Whigs for the first time captured both chambers of Congress and the White House. The Whigs were generally skeptical of party organization and competition and thus wary of the party-slate, general-ticket method adopted by some states. Since that method was also most likely to be adopted where Democrats had statewide popular majorities, the Whigs also calculated that they would do better in the nation as a whole if those Democratic winner-take-all blocs were broken up and every state used a district-based system. A Whig candidate might well win a seat representing a city, for example, even though the rest of the state voted Democratic.

Taking advantage of their potentially temporary but well-timed hold on the federal government during the sixth census, the Whigs used the apportionment act of 1842 to require all states to adopt the district-based system. They also reduced the overall size of the House. This feature was added to the bill in the Senate, much to the annoyance of the members of the House, who nonetheless accepted the change. It had the consequence of slightly reducing the proportion of southern seats in the House (and consequently the Electoral College). They also adopted the "Webster measure" that rounded-up major fractions in the allocation of seats to the states.

The Whig plan raised several constitutional issues. The Whigs themselves argued that the at-large schemes used in some states subverted the constitutional design for a popular chamber of Congress and undermined republican government by excluding electoral minorities from legislative representation. The Democrats in turn argued that the choice of district-based or at-large elections was a matter for the individual states to decide, and that the districting provision both exceeded congressional authority over federal elections and violated states' rights by directing what laws the state legislatures were to adopt.

Despite the change in election rules, the Whigs suffered a devastating defeat in the midterm House elections of 1842. The Democratic majority in the House after 1842 abandoned any effort to enforce the districting requirements and dropped the requirement when they reapportioned the House after the 1850 census. House districts were not required again by federal law until the Civil War, but even so most states did not return to the at-large system after they had made the switch in 1842.

Apportionment Act of 1842[1]

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That from and after the third day of March, one thousand eight hundred and forty-three, the House of Representatives shall be composed of members elected agreeably to the ratio of one Representative for every seventy thousand six hundred and eighty persons in each State, and of one additional representative for each State having a fraction greater than one moiety of the said ratio, computed according to the rule prescribed by the Constitution of the United States; that is to say: Within the state of Maine, seven . . . .

SEC. 2: *And be it further enacted*, That in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which the State may be entitled, no one district electing more than one Representative.

Congressional Debate on the Districting Provision (1842)[2]

Mr. ATHERTON [Democrat, New Hampshire]:

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The Constitution says "the times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." No right is given to the General Government to prescribe how the Legislatures of the States shall execute that duty. If the occasion should arise when it becomes necessary for Congress to interpose, Congress has a right to do – what? To "make or alter such regulations," – to exercise the power by a law; and not to command the State Legislature to exercise the power in a particular manner. A mandate from Congress to a State Legislature to do a particular act in a particular way . . . is unconstitutional and void. . . . Evidently, then, the amendment is nothing more or less than a command to the State Legislatures . . . .

. . . . It is gravely argued that the State Legislatures must district the States, or the States will be deprived of representation here. Yet there is no mandate. Gentlemen say to the State Legislatures, We do not command you to divide your State into districts. Oh, no! But mark, if you *do not* do it, your State shall be deprived of her representation!

Here is not only a mandate, but a mandate accompanied by a threat.

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It is not necessary that a State should be divided into districts, in order that the right of choosing Representatives should be exercised. If the "time" be prescribed – that is, the day on which the votes shall be given – the "places" where the people shall cast their votes, and the "manner" – as whether the votes shall be *viva voce* or by ballot – the power of electing Representatives is complete to the people of any State. . . .

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The design of the States in forming the Constitution was, to grant to the General Government only such powers as were indispensable to answer the ends of the General Government; and the spirit of a Constitution is, that those powers should be exercised by the General Government only when the occasion contemplated by the framers of the Constitution, and the people of the States adopting it, shall have occurred, and thus rendered their exercise necessary. The exercising of mere power – an extreme power – by the Government, when the occasion to suit which that power was conferred has not arrived, is a wanton abuse of power. . . . This appears from the contemporaneous construction of the Constitution in this respect. The evidence on the subject is all one way, and it is irresistible.

[1] 27 Cong. Ch. 47, June 25, 1842, 5 Stat. 491.

[2] *Congressional Globe*, 27th Cong., 2nd sess. (May 3, 1842), 397–398 (appendix); *Cong. Globe*, 27th Cong., 2nd sess. (June 3, 1842), 458 (appendix).

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. . . . To adopt this amendment would be to say to the States – True, you never imagined this power would be exercised by the General Government on an occasion like the present, when you consented to the Constitution. True, those advocating the adoption of the Constitution, and those venerable men who held to frame it, assured you that the power would never be exerted by the General Government except on some extraordinary contingency; and thus quieted your alarms. True, you were told it was "absurd to suppose" the power would ever be exercised by Congress, unless you neglected or refused to perform your duty. True, we are obliged to acknowledge that you have for more than fifty years performed your duty faithfully in this respect. But the mere naked power you have yielded in the Constitution. By smooth words you have been *cheated* into its adoption. And *now* we will exercise that power – not because the occasion for which you yielded it has arrived, but for the purpose of teaching you the salutary lessons that might makes right.

Mr. CRITTENDEN [Whig, Kentucky]:

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Sir, there are but five or six States in the Union that hold their elections by general ticket. Let us suppose that, in this instance, as in the election for President, all the States should adopt the general-ticket system; what would be the effect upon this Government? Would it not change its fundamental character?

It was intended by the framers of the Constitution that our form of government should be as nearly as possible the beau ideal of a republic – that this branch of Congress [the Senate] should be constituted by, and should represent, the States in their sovereign capacity, in opposition to the other branch, which was to be constituted by, and was to represent the people – in other words, there was to be a popular branch and a State branch. Now, if this was the contemplation and design of the framers of the Constitution, how will it comport with this design and what will be the effect, if every State shall elect its members to the House of Representatives by general ticket? Will not the representation, then, in both branches, be converted into a representation of States? The minorities, however large they may be, are not heard of; the people of each State will have but one voice; just as we are supposed in this branch [the Senate] to speak the voice of the State we represent. Could the House of Representatives, in that case, any longer be considered the democratic branch – the representative of the voice of the whole people of this Union? I am afraid not. . . . But further than this, it would be the most dangerous, the most disastrous oligarchy by which four or five of the chief States of the Union would be enabled to ride over, to trample upon, and, if you please, crush all the others. According to all the springs of human action, you would have alliances formed between the large States, such as Pennsylvania and New York; and when each of these great oligarchies had sent their representation here – when their great bodies meet here, how easy for them to perceive the advantages which would accrue to themselves from co-operation, from unity of action! . . . . I, Mr. President, might in vain deplore the circumstances; we could not change the results; – our destiny would be fixed – unalterably fixed. What State ever gave up power once acquired? . . . No, sir, it would be the exercise of a degree of self-control not to be expected from men engaged in the struggles of political ambition.

House Debate on Enforcing the Districting Provision (1844)[3]

In the elections of 1842, the Democrats won back the House of Representatives. Although most states had complied with the districting requirement of the Apportionment Act of 1842, four largely Democratic states, whether because of inability or design, did not. When the representatives of those states arrived at the capitol, their qualifications as legally elected congressmen were challenged and referred to the Committee of Elections. The majority report of the Committee determined that the districting requirement of the Apportionment Act was an

[3] House Report No. 60, "Relative to the Right of Members to their Seats in the House of Representatives," 28th Cong., 1st sess. (January 22, 1844); *Congressional Globe*, 28th Cong., 1st sess. (February 9, 1844), 196–200 (appendix).

unconstitutional exertion of congressional power, and thus the House could now seat representatives chosen in contradiction to that requirement. The debate over the constitutionality of the act of the previous Congress was thereby renewed, but this time with a Democratic majority and with the law already on the books. At the end of that debate, the House resolved that it was the proper forum for deciding the constitutionality of the provision, that the provision was in fact unconstitutional, and that the individuals elected under the general-ticket system could take their seats as lawfully elected representatives. The newly elected representative Stephen Douglas, fresh off the Illinois Supreme Court and recently experienced with partisan fights over legislative apportionment, prepared the Democratic report.

Mr. Stephen DOUGLAS [Democrat, Illinois], from the Committee of Elections, made the following REPORT:

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. . . . The privilege allowed Congress in altering State regulations, or of making new ones, if not in terms, is certainly in spirit and design, dependent and contingent. If the Legislatures of the States fail or refuse to act in the premises, or act in such a manner as will be subversive of the rights of the people, and the principles of the constitution, then this conservative power interposes, and, upon the principle of self-preservation, authorizes Congress to do that which the Sate Legislature ought to have done.

The history of the constitution, and especially the section in question, shows conclusively that these were the consideration which induced the adoption of that provision.

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The conventions of the States of Virginia, Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina, accompanied their ratifications with a solemn protest against the power of Congress over the elections. . . .

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The amendment and the instructions adopted by the convention of Massachusetts are as follows:

"The convention do, therefore, recommend the following alternations and provisions be introduced into the said constitution: That Congress do not exercise the powers vested in them by the fourth section of the first article, but in the cases where a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive or the rights of the people to a free and equal representation in Congress, agreeably to the constitution. . . ."

Thus we find that seven of the thirteen States then composing the Union, being a majority of the whole number, solemnly protested against the authority of Congress to establish regulations concerning the mode of election, or to alter those prescribed by the States; and that the constitution was adopted with the understanding (and probably never would have been adopted but for the understanding) that it was never to be exerted except in the few specified cases.

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. . . . The power of the States, in this respect, is as absolute and supreme as that of Congress, subject to the proviso that Congress may change or suspend their action, by substituting its own laws in lieu thereof. The right to change State laws, or to enact others which shall suspend them, does not imply the right to compel the State Legislatures to make such changes or new enactments. Whatever power the Legislature possess over elections, they derive from the constitution, and not from the laws of the United States. Congress has no more authority to direct the form of State legislation, than the States have to dictate to Congress its rule of action. Each is supreme within the sphere of its own peculiar duties. . . . The constitution contains no grant of power to Congress to superintend and control and direct the legislation of the States. This is not among the enumerated powers, nor can it be implied as necessary and proper to carry them into effect. Congress is invested with authority, co-extensive with its power of legislation, to make provision for the execution of its own laws, in its own way, without calling upon the States to come to its aid. . . .

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If the doctrine contended for in the second section of that act be correct, it is a remarkable fact, that, during the whole period of our constitutional history, Congress has never exercised, or claimed the

right to exercise, the power of directing the form of State legislation. It is said that, in the exercise of doubtful powers under the constitution, the safest rule of construction is to be found in the practical exposition of the Government itself, in all its various branches and departments, where the practice has been uniform, and the acquiescence of the people general. Indeed, it has been judicially determined by the highest tribunal in the land, that, in such a case, the practice establishes the construction so firmly and inflexibly that the court will not consider the question open for discussion or inquiry.

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We therefore submit the following resolutions, and recommend their adoption by the House:

Resolved, That the second section of "An act for the apportionment . . ." is not a law made in pursuance of the constitution of the United States, and valid, operative, and binding upon the States.

Resolved, That all the members of this House . . . have been elected in conformity with the constitution and laws, and are entitled to their seats in this House

Mr. Alexander STEPHENS [Whig, Georgia]:

. . . .

The question involved in the subject now under consideration, is one upon which great difference of opinion seems to prevail; and it is one neither for me or the majority of the people of Georgia, but for this House, to determine. This House, by the constitution, is made the sole "judge of the elections, returns, and qualifications of its members;" and if you say that the members elected by general ticket are legally and properly returned, your decision, by the constitution, is final and conclusive upon the subject . . . .

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. . . . No clause in the constitution met with warmer opposition in the States; and nothing is clearer than that it was well understood that full power thereby was given to Congress to exercise absolute and unconditional legislation upon the subject. This is apparent from the debates in all the States. . . .

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. . . . [T]hat there was not such understanding, as stated by the majority of the Committee of Elections, that [the congressional power to regulate the time, place and manner of federal elections] was to be exercised *only* in case of *failure* or *refusal* on the part of the States? That is the limitation upon which the States before-mentioned wished to restrict it by amendments; and that is the limitation to which the proposed amendment in the first Congress was intended to restrict it, which has never been ratified, leaving the power as originally incorporated in the constitution.

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. . . . The strength of the argument in this view, you will perceive, rests mainly upon the assumed principle, that, from the nature of the federal and State governments, in our complicated form, in legislation each is confined to its own sphere; and that Congress cannot pass a law, valid in itself, or such as should be regarded efficient and operative, which, for its execution, will require State legislation; and that the States are not bound, under the constitution, to make such legislation, in any instance, as will be necessary for the full execution and operation of a law of Congress. . . .

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Why, sir, since the organization of the government there have been six acts of apportionment; and . . . there has not been one of the six which did not require (not in the words, but from the necessity of the case) a majority of the States, in pursuance of their constitutional duty, in order to secure a representation on this floor, to pass laws reorganizing their districts in conformity to the apportionment of Congress.

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Now, sir, as a *precedent*, . . . I will ask the attention of the House to an act approved May 8, 1792 . . . which, for its full execution, required action on the part of the legislatures of the States in *laying off and arranging the divisions, brigades, etc*. and appointing officers according to the direction of the act. There was nothing then said about this act of Congress being a *mandamus* to the States, unauthorized by the constitution, and therefore *inoperative* and *void*, and such as the States should not regard. But every State

in the Union immediately conformed thereto; and the same, I believe, is the basis of the militia organization of the country to this day.

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. . . . I consider myself as one of those who hold the doctrine that the permanency of our institutions can only be preserved by confining the action of the State and federal governments each to its own proper sphere; and that, while there should be no encroachment upon the rights of the States by this government, there should also, on their part, be no disobedience or failure to perform their duties according to the terms of the constitutional compact.

But, sir, is it true that the second section of the act alluded to does subvert the entire system of State legislation, or even attempt to do so? . . . [I]s not the system of our State legislation as fixed and firm as ever? Do we not regulate all such matters as belong exclusively to ourselves, as fully and as absolutely as before? Have we not our legislatures, our executives, our judiciary, and all our officers, military and civil? And do not all things move on as smoothly and harmoniously as before?

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