# The (Im)Permanent Apportionment Act: Unequal Congressional Representation and Apportionment Reform

Quentin Barbosa

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## I. INTRODUCTION

For a nation that considers itself the exemplary representative democracy, the United States House of Representatives' structure is disgraceful.[1] The stagnation in House membership is a main reason the House—the only federal majoritarian democratic institution—is failing to check executive power and accurately represent Americans.[2] The Constitution requires that each state have a minimum of one representative and that Congress apportion the remaining representatives to the states based on population.[3] Yet, representation in the House—and the Electoral College—is unequal due to an outdated, century-old cap on the number of representatives.[4] Despite population growth, the House reapportions the same number of seats each decade.[5]

The current reapportionment regime makes a half-hearted attempt to factor in population growth but results in jarringly uneven representation.[6] For example, Montana has roughly 1,000,000 residents while Wyoming has roughly 570,000 residents, yet both states have one representative.[7] Because of this inequality in

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1. Daniel Greenburg, *Why 435? How We Can Change the Size of the House of Representatives*, FAIR VOTE (Oct. 12, 2017), https://www.fairvote.org/how_we_can_change_the_size_of_the_house_of_representatives (on file with the *University of the Pacific Law Review*); Chris Wilson, *How to Fix the House of Representatives in One Easy, Radical Step*, TIME (Oct. 15, 2018), https://time.com/5423623/house-representatives-number-seats/ (on file with the *University of the Pacific Law Review*).

2. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 569 (Sept. 2014), https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf (on file with the *University of the Pacific Law Review*) (finding that the preferences in law or policy in Congress of the top 10% of earners routinely defeated those of average Americans); *see also* Israel Klein, *To Make the House of Representatives Work Again, Make It Bigger*, HILL (Aug. 17, 2018), https://thehill.com/opinion/campaign/402234-to-make-the-house-of-representatives-work-again-make-it-bigger (on file with the *University of the Pacific Law Review*) (noting that underrepresentation can kill democracies and that each member will represent districts of at least 1,000,000 by 2050, so the House should be expanded to ensure adequate representation of constituents and accountability of members); Boxer Orwell, *Unrepresentative Government: No, Our Elected Oligarchy in Congress Doesn't Represent Your Interests*, MEDIUM (Oct. 18, 2019), https://boxerorwell.medium.com/unrepresentative-government-no-our-elected-oligarchy-in-congress-doesnt-really-represent-your-b4b2794f5dc3 (on file with the *University of the Pacific Law Review*).

3. U.S. CONST. art. I, § 2.

4. *See* Editorial Board, *America Needs a Bigger House*, N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html (on file with the *University of the Pacific Law Review*) (noting that a state's proportion of electoral college votes is equal to the state's number of representatives plus the number of senators).

5. U.S. CONST. art. I, § 2.

6. CAROLINE KANE ET AL., FORDHAM UNIV. SCH. OF LAW, WHY THE HOUSE OF REPRESENTATIVES MUST BE EXPANDED AND HOW TODAY'S CONGRESS CAN MAKE IT HAPPEN 3, 8 (2020), https://www.fordham.edu/download/downloads/id/14402/Why the House Must Be Expanded Democracy Clinic.pdf (on file with the *University of the Pacific Law Review*); Editorial Board, *supra* note 4.

7. Greenburg, *supra* note 1; Editorial Board, *supra* note 4; U.S. CENSUS BUREAU, STATE POPULATION TOTALS AND COMPONENTS OF CHANGE: 2010–2019 (2020), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html (last visited Sept. 1, 2021) (on file with the *University of the Pacific Law Review*); Editors of Encyclopedia Britannica, *United States House of Representatives Seats by State*, ENCYC.

constituents per representative, a Wyomingite has nearly twice the representation in the House as a Montanan.[8] Rhode Island has roughly 1,000,000 residents, but two House seats—half as many constituents per representative as Montana.[9] Large states also suffer; California's population outnumbers Wyoming's 66-to-1, but California's share of representatives compared to Wyoming's is 53-to-1.[10] These inequalities violate the fundamental democratic principle of "one person, one vote."[11] There is no reason to distinguish *interstate* district malapportionment from *intrastate* district malapportionment.[12]

These examples illustrate that states receive the mathematically correct number of seats, yet the 435-member cap under- or over-represents low population states by unequally distributing constituents per representative.[13] The best solution to these unconstitutional disparities is to expand the House of Representatives to reflect state population growth.[14] Reforming the House to be a more effective majoritarian institution will help repair other crumbling democratic institutions.[15] Furthermore, the representative cap has no constitutional basis; therefore, it is subject to the one person, one vote constitutional requirement and Congress can

BRITANNICA (updated June 7, 2017), https://www.britannica.com/topic/United-States-House-of-Representatives-Seats-by-State-1787120 (on file with the *University of the Pacific Law Review*).

8. U.S. CENSUS BUREAU, *supra* note 7; Editors of Encyclopedia Britannica, *supra* note 7.

9. U.S. CENSUS BUREAU, *supra* note 7; Editors of Encyclopedia Britannica, *supra* note 7.

10. Jeffery W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125, 1134 (2011).

11. *See* Wesberry v. Sanders, 376 U.S. 1, 7–9, 18 (1964) (finding that state laws that unequally distribute constituents in House districts to make a vote worth more in one district than in another are unconstitutional under Article I, § 2).

12. *See* U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 461 (1992) ("There is some force that the same historical insights that informed our construction of Article I, § 2, in the context of intrastate districting should apply here as well."); *see also* Wesberry, 376 U.S. at 7 ("A single Congressman represents from two to three times as many Fifth District voters as are represented . . . [in] other Georgia congressional districts. The apportionment statute thus contracts the value of some voters and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand."); Ladewig, *supra* note 10, at 1156.

13. Ladewig, *supra* note 10, at 1130, 1134.

14. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 727–28 (1983) (holding a 1980 New Jersey redistricting plan unconstitutional where New Jersey's Fourth and Sixth districts had a difference in population of .6984% of the average district); *see also* White v. Weiser, 412 U.S. 783, 793–97 (1973) (finding a Texas redistricting plan unconstitutional and required immediate reform because there was a difference in population among districts of 4.13%); Greenburg, *supra* note 1; Editorial Board, *supra* note 4; Chris Wilson, *How to Fix the House of Representatives in One Easy, Radical Step*, TIME (Oct. 15, 2018), https://time.com/5423623/house-representatives-number-seats/ (on file with the *University of the Pacific Law Review*).

15. *See Democracy Index 2019*, ECONOMIST INTEL. UNIT, 40 (2020), http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy-Index-2019.pdf&mode=wp&campaignid=democracyindex2019 (on file with the *University of the Pacific Law Review*) (ranking the United States as a flawed democracy due to a decline in the functioning of government and public trust in basic democratic institutions); *see also* The Federalist Society, *Should We Change the Size of Congress? [Article I Initiative]*, YOUTUBE (Feb. 10, 2020), https://www.youtube.com/watch?v=kh1pgfj5LoM&ab_channel=TheFederalistSociety (on file with the *University of the Pacific Law Review*) (explaining how more members in the House could ensure adequate oversight of the federal government and better represent constituents in smaller population districts).

replace it by statute.[16] Instead of diluting voting power and representation, Congress should adopt the Cube Root Rule as an additional automatic formula to manageably expand the House and promote equal representation.[17]

Part II of this Comment provides background on the Founders' intent, constitutional language, 435-member cap, and seat apportionment method.[18] Part III details the development of one person, one vote caselaw.[19] Part IV analyzes the 435-member cap's constitutionality, the need for an expanded House, and alternative solutions.[20] Part V explains how to expand the House.[21] Part VI explains the policy implications of an expanded House.[22]

## II. HISTORICAL BACKGROUND

Apportioning representatives based on state population originates in the Constitution.[23] However, the Founders had comparatively different ideas for apportionment than today's method.[24] Section A examines the Constitution and the Founders' intent.[25] Section B discusses the 435-seat cap's history.[26] Section C explains the Huntington–Hill Apportionment Method: the current method for granting House seats.[27]

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16. Wilson, *supra* note 1.

17. *See* Greenburg, *supra* note 1 (explaining that the Cube Root Rule involves taking the cube root of national population after each census and subtracting the number of senators to determine how many representatives should be in the House of Representatives for that decade); Editorial Board, *supra* note 4; Oliver Staley & Nikhil Sonnad, *What Would Happen to the Electoral College if Congressional Districts Were Apportioned Evenly?*, QUARTZ (Dec. 19, 2016), https://qz.com/865380/to-fix-the-electoral-college-increase-the-size-of-the-house-of-representatives/ (on file with the *University of the Pacific Law Review*).

18. *Infra* Part II.

19. *Infra* Part III.

20. *Infra* Part IV.

21. *Infra* Part V.

22. *Infra* Part VI.

23. *See Proportional Representation*, OFF. OF THE HOUSE HISTORIAN, https://history.house.gov/Institution/Origins-Development/Proportional-Representation/ (last visited Dec. 18, 2020) (on file with the *University of the Pacific Law Review*) (discussing the foundations for the proportional representation system in the House of Representatives).

24. THE FEDERALIST NOS. 55, 58 (James Madison); *Legislative History of Article the First of the Federal Bill of Rights*, THIRTY THOUSAND.ORG (updated June 28, 2007), http://www.thirty-thousand.org/pages/A1LegHistory.htm (on file with the *University of the Pacific Law Review*); *see Methods of Apportionment*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/apportionment/methods_of_apportionment.html (on file with the *University of the Pacific Law Review*) (explaining the mathematically complex method the Census Bureau uses to allocate House seats to states based on population within the 435-seat cap).

25. *Infra* Section II.A.

26. *Infra* Section II.B.

27. *Infra* Section II.C.

*A. The Founders' Intent for House Membership and Later Changes to the Constitution*

One of the main issues at the Constitutional Convention of 1787 was the level of representation in Congress for both the small and large population states.[28] Small states advocated for equal representation because they believed proportional representation in Congress would cause large states to bury their interests.[29] Conversely, large states advocated for proportional representation because they believed equal representation in Congress would amplify small states' power and reduce large states' power.[30] The solution was the Great Compromise, which created a bicameral legislature consisting of the House of Representatives and the Senate.[31] House membership is based on proportional representation; the Senate has equal representation regardless of population.[32] Without this compromise, the Convention might have dissolved without the states ratifying the Constitution.[33]

The Constitution requires Congress to reapportion seats in the House every ten years based on the census.[34] After the Civil War, the Fourteenth Amendment refined the Constitution, providing, "[r]epresentatives shall be apportioned among the several States according to their respective numbers."[35] In doing so, the Constitution expressly requires proportional representation *among* the states, rather than *within* the states.[36]

The Constitution requires each district have one representative and no less than 30,000 people; however, each state must have at least one representative, regardless of its population size.[37] But since Congress must allocate additional seats based on population, it follows that representation in the House should be proportional with most states having more than one seat.[38] Meanwhile, the Constitution imposes no cap on seats.[39]

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28. OFF. OF THE HOUSE HISTORIAN, *supra* note 23.

29. *Id.*

30. *Id*.

31. Ladewig, *supra* note 10, at 1140–41 (citing WALTER B. MEAD, THE UNITED STATES CONSTITUTION: PERSONALITIES, PRINCIPLES, AND ISSUES 71 (1987)); OFF. OF THE HOUSE HISTORIAN, *supra* note 23.

32. OFF. OF THE HOUSE HISTORIAN, *supra* note 23.

33. *Id.*

34. U.S. CONST. art. I, § 2.

35. *Compare* U.S. Const. art. I, § 2 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."), *with* U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

36. U.S. CONST. amend. XIV, § 2.

37. U.S. CONST. art. I, § 2.

38. *See id.* (explaining that there are more seats to apportion based on state population, which leads to the rational conclusion that the Constitution implies that states will have more than one seat in an even ratio to other states if their proportion of the population passes a certain threshold).

39. *Id.*

The Constitution does not command a maximum number of constituents per representative, but the Founders seemingly believed 30,000 was ideal.[40] During the 1787 Constitutional Convention, the only time George Washington expressed an opinion was when he suggested making the minimum constituency size 30,000 people rather than 40,000 people.[41] At the convention, Anti-Federalists claimed the size of the House was too small to adequately represent the people or protect them from congressional abuses of power.[42] In response, James Madison explained the size of the House was a delicate balance between the ability to legislate and keeping legislators in touch with their constituents.[43]

First, Madison noted that the size of the House will grow as more states joined the Union because of population increases.[44] Similarly, he dismissed complaints that the number of members in the House will not change "as the progress of population may demand."[45] Madison argued the House will slowly grow by pointing to the Constitution's requirement that "[t]he Number of Representatives

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40.  *Id.*; *see* THE FEDERALIST NO. 55 (James Madison) (explaining that the House would grow as the population of states grew).

41.  *See* Jonah Goldberg, *George Will Called Me an Idiot*, NATIONAL REVIEW (Jan. 15, 2001), https://www.nationalreview.com/2001/01/george-will-called-me-idiot-jonah-goldberg/ (on file with the *University of the Pacific Law Review*) (discussing how the only time George Washington interrupted the Constitutional Convention on a substantive point was to suggest a lower minimum constituency of 30,000 persons to avoid districts being too large for adequate communication between representatives and constituents about local interests).

42.  THE ANTI-FEDERALIST NO. 55–58 (Federal Farmer) http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/antifed.htm (on file with the *University of the Pacific Law Review*) (noting the Constitution did not guarantee small constituencies in the House, even as population grew over time, which Anti-Federalists believed would result in massive constituencies and create a House comprised of demagogues and the elite—who could only win in such broad constituencies through access obtained via their wealth or appealing to the desires and prejudices of people—that was out of touch from the interests of the common, rational constituent). To some degree, the concerns of Anti-Federalists have materialized: the average number of constituents per member is currently 747,184. Drew Desilver, *U.S. Population Keeps Growing, but House of Representatives is Same Size as in Taft Era*, PEW RSCH. CTR. (May 31, 2018), https://www.pewresearch.org/fact-tank/2018/05/31/u-s-population-keeps-growing-but-house-of-represen atives-is-same-size-as-in-taft-era/ (on file with the *University of the Pacific Law Review*). There are also examples of demagogues and the elite winning elections to the House. In 2018, nearly half of the House had a net worth of over $1,000,000. *Net Worth - 2018*, OPEN SECRETS, https://www.opensecrets.org/personal-finances/top-net-worth (last visited Dec. 19, 2020) (on file with the *University of the Pacific Law Review*). In 2020, two far-right QAnon conspiracy theorists—Marjorie Taylor Greene of Georgia and Lauren Boebert of Colorado—bashed the "deep state" to win election to the House. Katherine Tully-McManus, *QAnon Goes to Washington: Two Supporters Win Seats in Congress*, ROLL CALL (Nov. 5, 2020), https://www.rollcall.com/2020/11/05/qanon-goes-to-washington-two-supporters-win-seats-in-congress/ (on file with the *University of the Pacific Law Review*). Greene and Boebert both objected to the election results in favor of President Joseph R. Biden, Jr., claiming widespread voter fraud without evidence. Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html (on file with the *University of the Pacific Law Review*).

43.  *See* THE FEDERALIST NO. 55 (James Madison) (noting the House must be "of the people," tracking their interests and growing parallel to the population).

44.  *Id.*

45.  THE FEDERALIST NO. 58 (James Madison).

shall not exceed one for every thirty Thousand."[46] However, Madison warned that too large of a House would perpetuate oligarchic tendencies and reduce legislative efficiency as well as the power of representatives.[47] He voiced the need for representatives to directly communicate with their constituents while also diluting the power of other representatives.[48] Madison justified the House's size by pointing to the system of checks and balances that prevents one branch from gaining too much power.[49]

To assuage Anti-Federalists' fears, James Madison proposed a package of constitutional amendments in the First Congress that would become the Bill of Rights.[50] One of these proposed amendments pertained to congressional apportionment, addressing the House's allegedly inadequate size to check federal power and prevent minority rule.[51] The states failed to ratify the apportionment amendment, which clarified that House districts can have *no more* than 30,000 constituents until there were 200 representatives.[52] Once the House had 200 representatives, districts could have no more than 50,000 constituents.[53] The apportionment amendment would have created an unworkable, 6,500-member

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46.  U.S. CONST. art. I, § 2; THE FEDERALIST NO. 58 (James Madison).

47.  THE FEDERALIST NO. 58 (James Madison).

48.  *See* THE FEDERALIST NO. 55 (James Madison):

[F]irst, that so small a number of representatives will be an unsafe depositary of the public interests; secondly, that they will not possess a proper knowledge of the local circumstances of their numerous constituents; thirdly, that they will be taken from that class of citizens which will sympathize least with the feelings of the mass of the people, and be most likely to aim at a permanent elevation of the few on the depression of the many. . . . The truth is, that in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.

*Id.*

49.  *Compare* U.S. CONST. art. I, § 2 (implying that the membership of the House will grow due to seat apportionment based on population of states), *with* U.S. CONST. art. I, § 3 (explaining that membership of the Senate is fixed with two Senators per state); *see also* THE FEDERALIST NO. 55 (James Madison) (noting that equal representation in the Senate served as a check on potential "mob rule" in the House and provided more power to smaller population states).

50.  U.S. CONST. amends. I–X; *Observing Constitution Day*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/constitution-day/ratification.html (last visited Sept. 1, 2021) (on file with the *University of the Pacific Law Review*); Dylan Matthews, *The Case for Massively Expanding the House of Representatives, in One Chart*, VOX (June 4, 2018), https://www.vox.com/2018/6/4/17417452/congress-representation-ratio-district-size-chart-graph (on file with the *University of the Pacific Law Review*).

51.  *Bill of Rights*, NAT'L ARCHIVES, *https://www.archives.gov/legislative/features/bor#* (on file with the *University of the Pacific Law Review*); Dylan Matthews, *The Case for Massively Expanding the House of Representatives, in One Chart*, VOX (June 4, 2018), https://www.vox.com/2018/6/4/17417452/congress-representation-ratio-district-size-chart-graph (on file with the *University of the Pacific Law Review*).

52.  *Legislative History of Article the First of the Federal Bill of Rights*, THIRTY THOUSAND.ORG (updated June 28, 2007), http://www.thirty-thousand.org/pages/A1LegHistory.htm (on file with the *University of the Pacific Law Review*).

53.  *Id.*

House today, but its existence indicates the Founders' intention for the House to accurately and proportionately represent the people.[54]

## B. The 435-Member Cap in House of Representatives

The Constitution provides no mechanism for congressional apportionment or the number of House seats.[55] During the 1920s, the House failed to reapportion itself for the first time.[56] In 1929, Congress passed the Reapportionment Act ("the Act"), which capped the number of House seats at 435—the number of seats since 1913.[57] Membership in the House has since remained at 435 seats, except for a temporary increase when Alaska and Hawaii became states.[58] Congress passed the cap partly out of concern for the House's size but mostly to avoid decennial urban–rural reapportionment conflicts that plagued Congress for 120 years.[59] Nevertheless, opponents cast doubt on the cap's constitutionality.[60]

## C. The Huntington–Hill Apportionment Method

In addition to the 435-member cap, the Act also featured an automatic apportionment method after each census to avoid bitter apportionment battles in

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54. Lyman Stone, *Pack the House: How to Fix the Legislative Branch*, MERE ORTHODOXY (Oct. 17, 2018), https://mereorthodoxy.com/congressional-apportionment-amendment/ (on file with the *University of the Pacific Law Review*).

55. U.S. CONST. art. I, § 2.

56. Ladewig, *supra* note 10, at 1147 (2011) (quoting CHARLES W. EAGLES, DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN–RURAL CONFLICT IN THE 1920S 116 (1990), and BRIAN FREDERICK, CONGRESSIONAL REPRESENTATION & CONSTITUENTS: THE CASE FOR INCREASING THE U.S. HOUSE OF REPRESENTATIVES 25–26 (2010)).

57. Reapportionment Act of 1929 (codified as amended at 2 U.S.C. § 2a (2020)); *The 1911 House Reapportionment*, OFF. OF THE HOUSE HISTORIAN, https://history.house.gov/Historical-Highlights/1901-1950/The-1911-House-reapportionment/ (last visited Dec. 18, 2020) (on file with the *University of the Pacific Law Review*); OFF. OF THE HOUSE HISTORIAN, *supra* note 23.

58. Congress granted Alaska and Hawaii one representative each from 1959 until the 1960 apportionment entered effect in 1963, when the number of seats returned from 437 to 435. OFF. OF THE HOUSE HISTORIAN, *supra* note 57. There are also six non-voting delegates in the House, representing the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and American Samoa. *United States Congressional Non-Voting Members,* BALLOTPEDIA, https://ballotpedia.org/United_States_congressional_non-voting_members (last visited Dec. 18, 2020) (on file with the *University of the Pacific Law Review*).

59. OFF. OF THE HOUSE HISTORIAN,  *supra* note 57; OFF. OF THE HOUSE HISTORIAN, *supra* note 23.

60. *See* OFF. OF THE HOUSE HISTORIAN, *supra* note 23 (quoting Representative William B. Bankhead of Alabama, who exclaimed the cap was an "abdication and surrender of the vital fundamental powers vested in the Congress of the United States by the Constitution itself."); *see also* OFF. OF THE HOUSE HISTORIAN, *supra* note 57 (quoting Representative Edgar Crumpacker of Indiana during debates on the 1911 Apportionment Act, "Members are . . . supposed to reflect the opinion and to stand for the wishes of their constituents. If we make the ratio [of persons per Representative] too large the idea of representation becomes attenuated and less definite. The personal interest of the voter in his representative becomes less important to him, and we may lose something of the vital strength of our representative form of government.").

the House.[61] The House could decide between the method of "major fractions" or the method of "equal proportions" ("Huntington–Hill method") for future reapportionments.[62] After the 1940 Census, Congress passed a law that made the Huntington–Hill method automatically govern all future congressional reapportionments within the 435-seat cap.[63]

Under the Huntington–Hill method, the United States Census Bureau ("Census Bureau") finds a common divisor by dividing the national population by the number of seats.[64] If a country's population was 10,000 and it had 20 seats, the common divisor would be 500.[65] Next, the Census Bureau divides each state's population by the common divisor to calculate quotients for how many seats each state *should* have.[66] If there are four states, A with 3,300 residents, B with 3,210 residents, C with 2,500 residents, and D with 990, their quotients would be A = 6.6, B = 6.42, C = 5, D = 1.98.[67] Next, round at each quotients' "geometric mean"—the square root of the product of $n (n + 1)$, where $n$ is the lower of the two nearest whole numbers to a given quotient.[68] The higher of the two nearest whole numbers

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61. Reapportionment Act of 1929 (codified as amended at 2 U.S.C. § 2a (2020)); *see* OFF. OF THE HOUSE HISTORIAN, *supra* note 23 (quoting Majority Leader John Q. Tilson of Connecticut who felt the Act would prevent the "danger of failing to reapportion after each decennial census as contemplated by the Constitution.").

62. *See* Reapportionment Act of 1929 (codified as amended at 2 U.S.C. § 2a (2020)) (stating that Congress could choose the method of "major fractions" or "equal proportions" for the 1930 apportionment); MICHEL L. BALINSKI & H. PEYTON YOUNG, FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE 57 (2d ed. 2001).

63. Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761 (codified as amended at 2 U.S.C. § 2a (2020)). The House used other methods in the past: the Jefferson method (1792–1842), Hamilton method (1850–1900), and Webster method ("major fractions") (1840–1850, 1910–1920, 1930–1940). It also considered the Adams and Dean methods. BALINSKI & YOUNG, *supra* note 62, at 58–59; *Apportionment Legislation 1790–1830*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/apportionment/apportionment_legislation_ 1790_-_1830.html (last visited Sept. 1, 2021) (on file with the *University of the Pacific Law Review*); *Apportionment Legislation 1840–1880*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/ apportionment/apportionment_legislation_1840_-_1880.html (last visited Sept. 1, 2021) (on file with the *University of the Pacific Law Review*); *Apportionment Legislation 1890-Present*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/apportionment/ apportionment_legislation_1890_-_present .html (last visited Sept. 1, 2021) (on file with the *University of the Pacific Law Review*). The Webster method was a compromise between the Jefferson method and the Adams method—biased to large and small states respectively. The Hamilton method suffered from a paradox: adding seats decreased some states' share in representation, so the House returned to the Webster method. BALINSKI & YOUNG, *supra* note 62, at 33–35, 38; *Apportionment Legislation 1890–Present*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/ reference/apportionment/apportionment_legislation_1890_-_present.html (last visited Sept. 1, 2021) (on file with the *University of the Pacific Law Review*).

64. *Methods of Apportionment*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/ apportionment/methods_of_apportionment.html (last visited Sept. 1, 2021) (on file with the *University of the Pacific Law Review*).

65. H. PEYTON YOUNG, U.S. CENSUS BUREAU, FAIRNESS IN APPORTIONMENT 15–16 (2004), https://www.census.gov/history/pdf/Fairness_in_Apportionment_Young.pdf (on file with the *University of the Pacific Law Review*); U.S. CENSUS BUREAU, *supra* note 64.

66. YOUNG, *supra* note 65, at 15–16; U.S. CENSUS BUREAU, *supra* note 64.

67. YOUNG, *supra* note 65, at 15–16; U.S. CENSUS BUREAU, *supra* note 64.

68. YOUNG, *supra* note 65, at 15–16; U.S. CENSUS BUREAU, *supra* note 64.

to a given quotient is $(n + 1)$.[69] So A's geometric mean would be $\sqrt{(6 \times 7)} = 6.48$, B's geometric mean would be $\sqrt{(6 \times 7)} = 6.48$, C's geometric mean would be $\sqrt{(5 \times 6)} = 5.48$, D's geometric mean would be $\sqrt{(1 \times 2)} = 1.41$.[70] If a state's quotient is larger than its geometric mean, the Census Bureau allocates seats equal to the $(n + 1)$ value.[71] If the state's quotient is smaller than its geometric mean, the Census Bureau allocates seats equal to the $n$ value.[72] So, A would receive 7 seats, B would receive 6, C would receive 5, and D would receive 2.[73] If the total of those seat allocations apportions less than the pre-determined total number of seats, the Census Bureau must reduce the divisor and recalculate.[74] If that total apportions more than the total number of seats, the next step is to increase the divisor and recalculate.[75] The Census Bureau repeats this process until it reaches the total number of seats.[76] In the example, there is no need to modify the divisor and recalculate: $7 + 6 + 5 + 2 = 20$, the pre-determined total number of seats.[77]

## III. DEVELOPMENT OF ONE PERSON, ONE VOTE CASELAW

The Supreme Court has decided several cases on intrastate congressional malapportionment.[78] The first intrastate malapportionment case was *Baker v. Carr*, in which the Court held apportionment is justiciable and not a political question.[79] Although the Court remanded the *Baker* case to the lower court, it decided *Gray v. Sanders*—a congressional apportionment case—a year later on substantive grounds.[80] The plaintiffs in *Gray* alleged that Georgia violated the Fourteenth Amendment's Equal Protection Clause by granting counties points in primaries for statewide elections.[81] Georgia based those points roughly—but not exactly—on county populations.[82] Instead of using total votes, Georgia used total county points to decide the election winner.[83]

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69. YOUNG, *supra* note 65, at 15; U.S. CENSUS BUREAU, *supra* note 64.
70. YOUNG, *supra* note 65, at 15–16; U.S. CENSUS BUREAU, *supra* note 64.
71. YOUNG, *supra* note 65, at 15–16; U.S. CENSUS BUREAU, *supra* note 64.
72. YOUNG, *supra* note 65, at 15–16; U.S. CENSUS BUREAU, *supra* note 64.
73. YOUNG, *supra* note 65, at 15–16; U.S. CENSUS BUREAU, *supra* note 64.
74. YOUNG, *supra* note 65, at 16.
75. *Id.*
76. *Id.*
77. YOUNG, *supra* note 65, at 15–16 (2004); U.S. CENSUS BUREAU, *supra* note 64.
78. Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).
79. *See* Baker, 369 U.S. at 199, 208 (holding that courts have power to order reconfiguration of districts to ensure equal protection even when voting power is unequal due to district population discrepancies, stating "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.") (citations omitted).
80. Gray, 372 U.S. at 380; Baker, 369 U.S. at 199.
81. Gray, 372 U.S. at 370.
82. *Id.* at 372.
83. *Id.*

The Court held the county-based system gave small-rural votes more weight than urban and large-rural votes in violation of the Equal Protection Clause.[84] It reasoned the weighted point allocations gave a person in one county "10 times the voting power of another person."[85] Analogizing to amendments that bar denying the right to vote based on race or sex, the Court noted Georgia's system devalued voting rights for specific, targeted groups.[86] The Court stated that the Constitution ensures voter equality and states must weigh votes equally.[87] Accordingly, the Court concluded the county system unconstitutionally targeted urban and large rural voters by diluting their voting power.[88]

The Court advanced the one person, one vote requirement in *Wesberry v. Sanders* and *Reynolds v. Sims*.[89] In *Wesberry*, voters brought a lawsuit against Georgia for failing to evenly realign U.S. House districts.[90] Plaintiffs' district had 823,680 constituents; other districts had as little as 272,154 constituents.[91] The Court held that those levels of malapportionment "grossly discriminate[d]" against the voters of the plaintiffs' district and were unconstitutional.[92] The Court stated

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84. *See* Gray, 372 U.S. at 379.

[T]he county unit system . . . weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties. . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, [sex, occupation, or income], and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

*Id.*

85. *Id.*

86. *See* Gray, 372 U.S. at 379.

The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?

*Id.* (citations omitted).

87. *See id.* at 380 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.").

88. *See* Gray, 372 U.S. at 380–81.

The Court has consistently recognized that all qualified voters have a constitutionally protected right "to cast their ballots and have them counted at Congressional elections." Every voter's vote is entitled to be counted once. It must be correctly counted and reported. . . . "the right to have one's vote counted" has the same dignity as "the right to put a ballot in a box." It can be protected from the diluting effect of illegal ballots. . . . [T]here is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State. . . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

*Id.* (citations omitted).

89. Reynolds, 377 U.S. at 558; Wesberry, 376 U.S. at 18.

90. Wesberry, 376 U.S. at 2, 7.

91. *Id.* at 2.

92. *Id.* at 7.

that Georgia's malapportionment diluted the power of some votes and amplified others.[93] Citing to *The Federalist*, the Court noted the Founders intended for equality in voting power.[94] Although exact equality of population in each district is virtually impossible, the Court held impossibility is "no excuse" for sidestepping the Constitution's requirement of voter equality.[95]

In *Reynolds*, plaintiffs challenged Alabama's malapportionment of state legislative districts—which had been the same for over sixty years—under the Equal Protection Clause.[96] The Court held Alabama's malapportionment was unconstitutional because the state failed to make good-faith efforts to make districts "as nearly of equal population as is practicable."[97] According to the Court, mathematical exactness was not the constitutional requirement.[98] However, the Court indicated that severe inequalities in district populations are unconstitutional under the Equal Protection Clause because they dilute voting power based on "place of residence."[99]

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93. *See* Wesberry, 376 U.S. at 7–9, 18.

[T]he command of Art. I, § 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. . . . We do not believe that the Framers of the Constitution intended to permit . . . vote-diluting discrimination . . . through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention. . . . The history of the Constitution . . . reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

*Id.*

94. *See id.* at 18 (quoting Madison in THE FEDERALIST NO. 57, "'Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.' Readers surely could have fairly taken this to mean, 'one person, one vote.'") (citing Gray, 372 U.S. at 381).

95. *See id.* ("While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.").

96. Reynolds, 377 U.S. at 540. The distribution of the Alabama state districts was severely unequitable. For example, two Alabama counties with populations of 13,462 and 15,286 each received two seats. Meanwhile, two counties with populations of 314,301 and 634,864 received three seats and seven seats respectively. Reynolds, 377 U.S. at 545–46.

97. *Id.* at 577.

98. *Id.*

99. *See* Reynolds, 377 U.S. at 566–67.

[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters . . . . Diluting the weight of votes because of place of residence impairs constitutional rights under the Fourteenth Amendment. . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle

Since *Wesberry* and *Reynolds*, the Court has decided several cases on House district apportionment within states.[100] In each instance, the Court has found the population discrepancies among districts unconstitutional.[101] However, those cases involve *intrastate* district malapportionment as opposed to *interstate* district malapportionment—an issue the Court has not yet decided.[102] In *U.S. Department of Commerce v. Montana*, the Court held that congressional apportionment among the states—including interstate malapportionment—is justiciable.[103] However, the Court did not decide the interstate malapportionment issue despite noting that one person, one vote cases may apply to interstate malapportionment.[104] Rather, the Court focused on the issue Montana voters raised: whether a different federal apportionment method other than Huntington–Hill better reflects the constitutional requirements of *Wesberry*.[105] Instead of focusing on discrepancies in district sizes from the seat cap, the Court focused on how the apportionment method affects seat allocation.[106] The Court held that Huntington–Hill is a practicable, good-faith option to fairly apportion seats among states to avoid conflict and promote efficiency.[107] Ultimately, the Court has not decided the interstate

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of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.

*Id.*

100.    Karcher, 462 U.S. at 727–28; White, 412 U.S. at 784; Wells v. Rockefeller, 394 U.S. 542, 543 (1969); Kirkpatrick v. Preisler, 394 U.S. 526, 528 (1969).

101.    *See, e.g.*, Karcher, 462 U.S. at 727–28, 730 (finding that New Jersey district malapportionment levels were unconstitutional because they failed to be as equal "as nearly as practicable," even with the plan only implementing a deviation of 0.6984% from the average district and a 0.1384% difference in the state's ideal district size); White, 412 U.S. at 785, 790 (holding that a Texas apportionment plan implementing a deviation of 4.13% from the average district size and a 0.75% difference in the state's ideal district size were unconstitutional because they "were not 'unavoidable,' and the districts were not as mathematically equal as possible."); Wells, 394 U.S. at 543, 546 (explaining that New York's district region-based apportionment plan was unconstitutional, "[e]quality of population among districts in a sub-state is not a justification for inequality among all the districts in the State . . . . Nor are the variations in the 'North country' districts justified by the fact that these districts are constructed of entire counties."); Kirkpatrick, 394 U.S. at 528–30 (finding Missouri's House seat apportionment plan "did not meet the constitutional standard of equal representation for equal numbers of people 'as nearly as practicable.'").

102.    *But see* U.S. Dep't of Commerce v. Montana, 503 U.S. at 461 (stating that the Court's interpretation of Article I, § 2 of the Constitution "in the context of intrastate districting" may apply to interstate malapportionment); Ladewig, *supra* note 10, at 1140.

103.    *See* U.S. Dep't of Commerce v. Montana, 503 U.S. at 458 ("As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary.").

104.    *Id.* at 461.

105.    *Id.*

106.    *Id.* at 461–63.

107.    *See id.* at 465 ("[A] procedure that is administered efficiently and that avoids partisan controversy supports the legitimacy of congressional action, rather than undermining it. To the extent that the potentially divisive and complex issues associated with apportionment can be narrowed by the adoption of both procedural and substantive rules that are consistently applied year after year, the public is well served . . . . We see no constitutional obstacle preventing Congress from adopting such a sensible procedure.").

malapportionment issue, so some states continue to have inadequate representation in the House relative to population.[108]

### IV. WHY THE CONSTITUTION REQUIRES AN EXPANDED HOUSE AND THE INADEQUACY OF ALTERNATIVE SOLUTIONS

The 435-member cap—while perhaps well intentioned—creates an unconstitutional disparity among constituencies.[109] Supreme Court precedent dictates that district populations must be as equal as practicable, yet some districts in the country are incredibly unbalanced in terms of constituents per representative.[110] Section A discusses how the 435-member cap violates the Constitution under one person, one vote precedent.[111] Section B explains why alternative solutions to the representation issue—other than expanding the number of House seats—are ineffective or provide their own host of issues.[112]

### A. How the 435-Representative Cap Violates the Constitution

Proponents of the current representative cap argue it is imperative to promote legislative efficiency and other practical concerns.[113] Even if that were true, that standard is irrelevant to the cap's constitutionality; the focus is whether representatives are "apportioned among the states according to their respective numbers."[114] Not only must Congress apportion representatives respective to state populations, the Constitution also requires congressional districts to be equal "as is practicable" to ensure "equal representation."[115] The Constitution demands this standard; popular government can only succeed if representatives are accessible to

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108. *See* Clemons v. Dep't of Commerce, 562 U.S. 1105, 1105 (2010) (dismissing a challenge against interstate malapportionment for lack of jurisdiction). *But see* Clemons v. Dep't of Commerce, 710 F. Supp. 2d 570, 588–90 (N.D. Miss., 2010) (finding that the Constitution did not require an increase in the number of seats in the House because Congress has discretion to set its own size after balancing competing interests).

109. *Cf.* Wesberry, 376 U.S. at 7 (finding that a Georgia statute "grossly discriminate[d]" against voters in a district that had two to three times as many voters as other districts); Ladewig, *supra* note 10, at 1142.

110. *Cf.* Reynolds, 377 U.S. at 577 ("[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); Ladewig, *supra* note 10, at 1129–31.

111. *Infra* Section IV.A.

112. *Infra* Section IV.B.

113. *See, e.g.*, *Apportionment of Representatives: Hearing on H.R. 130 Before the H. Comm. on the Census*, 70th Cong. 32–47 (1928) (statement of Hon. Joe Crail, Rep. from Cal., H.R.) (advocating for reducing and capping the size of the House to 300 seats after the 1940 Census because it would be more efficient, allow each member to be heard during debate, and permit each representative to adequately focus their attention on each piece of legislation).

114. U.S. CONST. art. I, § 2; *Apportionment of Representatives in Congress Amongst the Several States: Hearing on H.R. 13471 Before the H. Comm. on the Census*, 69th Cong. 120–23 (1927) (statement of Hon. Elbert S. Brigham, Rep. from Vt., H.R.) [hereinafter *Hearing on H.R. 13471*].

115. Reynolds, 377 U.S. at 577.

their constituents.[116] This standard is clear in both the Constitution's language and the Founders' intent for an evolving and growing House.[117] Recent population growth has made clear that districts are not as equal "as is practicable," violating the one person, one vote constitutional requirement.[118]

The Huntington–Hill method's goal is to make a good-faith effort to fairly redistribute House seats based on state populations, partly satisfying the constitutional requirement.[119] But unlike the *Montana* case, the constitutional claim here is not about which states receive a seat, but the effects of the representative cap on interstate malapportionment.[120] Because of other apportionment requirements and uneven population growth between states, the representative cap exacerbates district malapportionment among states.[121] These challenges make Huntington–Hill inadequate on its own to comply with the Constitution, even if it is a good-faith attempt to apportion seats as equal as practicable.[122]

While there is a population-based system to apportion seats within the 435-seat cap, there is not a perfect distribution of constituents per district.[123] Exact equality is mathematically impossible under the seat cap and other apportionment requirements: urban states will always have substantially higher populations than rural states.[124] Requiring one representative per state ensures districts in smaller states have more representation than in larger states, while capping the number of seats amplifies the issue.[125] But the seat cap is not in the Constitution, making it subject to the one person, one vote constitutional requirement.[126]

Capping the number of representatives, while these other limitations are in place, is the exact opposite of the government's good-faith attempt at equality.[127]

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116.  *Cf.* THE FEDERALIST NOS. 55, 58 (James Madison) (explaining the importance of the representatives in the House being sympathetic to the needs of the people); *Hearing on H.R. 13471*, *supra* note 114, at 121–22 (statement of Hon. Elbert S. Brigham, Rep. from Vt., H.R.).

117.  THE FEDERALIST NOS. 55, 58 (James Madison).

118.  Reynolds, 377 U.S. at 577 (1964); Ladewig, *supra* note 10, at 1129–31.

119.  U.S. Dep't of Commerce v. Montana, 503 U.S. at 464–65.

120.  *Id.* at 460–62.

121.  *See* Jeffery W. Ladewig & Mathew P. Jasinski, *On the Causes and Consequences of and Remedies for Interstate Malapportionment of the U.S. House of Representatives*, 6 PERSP. ON POL. 89, 90–91 (2008) (noting that uneven state populations, requiring one representative per state, barring districts from crossing state lines, and the 435-seat cap amplify interstate malapportionment).

122.  *See Id.* at 91 (explaining that any apportionment formula will produce interstate malapportionment because of other constitutional requirements and unequal population growth).

123.  Ladewig, *supra* note 10, at 1148.

124.  Ladewig & Jasinski, *supra* note 121, at 90–91.

125.  *Id.*

126.  One person, one vote would not apply if the Constitution imposed the cap, but since the cap is mere legislation, the constitutional principle of one person, one vote takes precedent over the cap. Ladewig, *supra* note 10, at 1143–44.

127.  *See* Ladewig & Jasinski, *supra* note 121, at 90–91 (explaining how territorially bounded house districts and uneven state populations amplify the effects of the seat cap on attaining mathematical equality in House districts).

Without the cap on House seats, there would be more parity in constituency sizes.[128] Complete equality is not a guarantee if Congress expands the House, but it would at least bring as much equality as is practicable in district sizes.[129] Today's *interstate* malapportionment resulting from the seat cap is incredibly severe compared to the low degrees of *intrastate* malapportionment the Court held unconstitutional.[130] The Court has held *intrastate* malapportionment of under one percent to be unconstitutional; the same standard should apply to 2010's *interstate* malapportionment of over sixty-five percent.[131] *Wesberry* dictates that interstate malapportionment resulting from the cap fails "the constitutional standard of equal representation for equal numbers of people 'as nearly as practicable.'"[132]

The disparities in the House reflect disparities in the Electoral College too, especially considering that a state's electoral votes are equal to its congressional delegation.[133] For example, Texas has 38 electoral votes and a population of 25,268,000, while Vermont has 3 electoral votes and a population of 630,000.[134] A Texas electoral delegate represents 664,000 people and a Vermont electoral delegate represents 210,000 people; therefore, a Texas delegate represents 3 times the people of a Vermont delegate.[135] As with House districts, this dilemma makes a Vermont voter have a greater individual impact than a Texas voter.[136] Similarly, Wyoming has 189,000 people per delegate and California has 679,000 people per delegate, giving a Wyoming voter 3.5 times the Electoral College representation of a California voter.[137]

These stark examples are not outliers, the Electoral College allows some voters to be more impactful than others.[138] In comparison to larger states with less electoral votes relative to population, smaller states with more electoral votes relative to population are often one-party strongholds and less diverse.[139] Therefore, not only is there a disparity in representation and voting power in presidential elections, there is also a clear demographic inequity in the Electoral

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128.   *Id.* at 100; Staley & Sonnad, *supra* note 17; Editorial Board, *supra* note 4.

129.   *Cf.* Wesberry, 376 U.S. at 18 (explaining that mathematical precision in equality of House district sizes is the goal of the Constitution, even if such precision is impossible); Ladewig & Jasinski, *supra* note 121, at 100.

130.   Karcher, 462 U.S. at 727–28; White, 412 U.S. at 785; Ladewig, *supra* note 10, at 1142.

131.   Karcher, 462 U.S. at 727–28; White, 412 U.S. at 785; Ladewig, *supra* note 10, at 1142.

132.   Kirkpatrick, 394 U.S. at 529–30.

133.   Ladewig, *supra* note 10, at 1134.

134.   Andrew Prokop, *The Electoral College, Explained*, VOX (Nov. 2, 2020), https://www.vox.com/21539173/electoral-college-explained-2020-trump-biden (on file with the *University of the Pacific Law Review*).

135.   *Id.*

136.   *Id.*

137.   *Id.*

138.   *Id.*

139.   *See Id.* (noting in an embedded video link that states with more electoral votes compared to population like Wyoming, Vermont, Maine, Delaware, and New Hampshire are more homogenous than states with less electoral votes compared to population like California, Texas, New Jersey, New York, Florida).

College.[140] This situation is far from "equal representation" "as nearly as practicable"; instead, it ensures outsized influence of small states in government.[141] Far from the *Montana* case's good-faith standard, the seat cap reduces equality among large and small states in bad-faith.[142]

Giving larger states more representatives would be more equitable and provide parity in representation in both the House and Electoral College.[143] Adding more representatives would make district populations smaller and more equal while also increasing state electoral votes and reducing the disparate impact of small states on the Electoral College.[144] This solution is also practicable because it only requires legislation in Congress, and the country has expanded the number of representatives many times prior to the 1920s.[145] Following *Wesberry*'s holding, expanding the House is a constitutional necessity to avoid inequity in representation.[146]

## B. Alternatives to Expanding the House

There are various potential solutions other than adding House seats; however, these solutions are inadequate, extremely difficult, or problematic.[147] Subsection 1 explains why changing the apportionment method is inadequate to provide equal representation.[148] Subsection 2 discusses how decreasing the size of the House presents significant issues.[149] Subsection 3 highlights the problems with allowing districts to cross state lines to have perfectly equal districts.[150]

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140. Prokop, *supra* note 134.

141. *Cf.* Kirkpatrick, 394 U.S. at 529–30 (upholding the constitutional standard of good-faith, practicable efforts to promote equal representation in the House).

142. U.S. Dep't of Commerce v. Montana, 503 U.S. at 463.

143. *See* Staley & Sonnad, *supra* note 17 (explaining that adding members to the House of Representatives would promote proportionality within both the House and the Electoral College).

144. *See Id.* (discussing how the number of electoral votes each state receives is equal to the number of people the state sends to Congress so increasing House membership would rebalance the power of states in the Electoral College); *see also* Wilson, *supra* note 1 (calculating that an increase in the number of House seats would significantly reduce disparities in district equality).

145. *See* Ladewig, *supra* note 10, at 1147 (quoting CHARLES W. EAGLES, DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S, at 26 (1990)) (noting that Congress had changed the size of the House in the first 120 years of the nation from 1790 until 1910).

146. Wesberry, 376 U.S. at 7–9, 18.

147. *See* Ladewig & Jasinski, *supra* note 121, at 90–91, 96–97 (noting that the alternatives to expanding the House are either infeasible, inadequate, or problematic).

148. *Infra* Subsection IV.B.1.

149. *Infra* Subsection IV.B.2.

150. *Infra* Subsection IV.B.3.

### 1. Changing the Apportionment Method

In the *Montana* case, the Court held that the Huntington–Hill method was a valid, good-faith, and practicable solution to fairly apportion House seats among states.[151] That holding precludes the arguments that Huntington–Hill is unconstitutional and that Congress must use a different method to allocate seats.[152] The Court would not overrule its precedent because each method affects different equality measurements in different degrees, reducing the significance of a particular method.[153]

Furthermore, even if Congress changed the apportionment method, it would hardly impact inequalities in representation.[154] While switching apportionment methods could decrease interstate malapportionment slightly, severe interstate malapportionment would persist.[155] There are five practical alternative methods to Huntington–Hill, but their changes to seat allocations and district size would be insignificant and only affect a handful of states.[156] Such meager impacts are far from the comprehensive, equal representation the Constitution demands.[157]

### 2. Making the House of Representatives Smaller

Some scholars and politicians have suggested making the House of Representatives smaller for efficiency and parity in representation.[158] Reducing the size of the House so that Montana is no longer the most under-represented state would marginally equalize state representation.[159] However, making the House smaller would not make changes substantial enough to meet the demands of the

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151. U.S. Dep't of Commerce v. Montana, 503 U.S. at 463–64.

152. *See* U.S. Dep't of Commerce v. Montana, 503 U.S. at 463–64 ("What is the better measure of inequality absolute difference in district size, absolute difference in share of a Representative, or relative difference in district size or share? Neither mathematical analysis nor constitutional interpretation provides a conclusive answer.").

153. *Id.* at 454–55; Ladewig, *supra* note 10, at 1144.

154. Ladewig, *supra* note 10, at 1145–46; Ladewig & Jasinski, *supra* note 121, at 90–91, 96–97; BALINSKI & YOUNG, *supra* note 62, at 157–80 (illustrating the marginal effects of changes in apportionment method by mapping out differences in seat allocation based on census data from each decennial census).

155. *See* Ladewig, *supra* note 10, at 1145–46 (detailing that a switch in methods in 1990 would only make marginal changes in interstate malapportionment metrics).

156. *See* BALINSKI & YOUNG, *supra* note 62, at 157–80 (charting the differences in seats per state for each apportionment from 1790–2000 based on six different apportionment methods. Only a few states would get an increase or decrease in seats, and those that did usually only lost or gained one seat).

157. *See, e.g.*, Karcher, 462 U.S. at 727–28 (finding very low levels of intrastate district malapportionment unconstitutional).

158. *See Apportionment of Representatives: Hearing on H.R. 130 Before the H. Comm. on the Census*, 70th Cong. 32–47 (1928) (statement of Hon. Joe Crail, Rep. from Cal., H.R.) (noting that a smaller House might be more efficient); *see also* Ladewig, *supra* note 10, at 1151 (explaining that a House size of 419 could slightly decrease malapportionment statistics).

159. *See* Ladewig, *supra* note 10, at 1150 n.153 (noting that dissolving sixteen House seats could slightly reduce interstate district malapportionment).

Constitution.[160] With its marginal impacts, this solution merely shifts the burden of inequality from one group of states to a new group of over- and under-represented states.[161]

It is also difficult to shrink the government—representatives want to keep their jobs and communities would hate losing their current representative to join a larger district.[162] Another practical implication of this solution is the increase in workload of almost all representatives.[163] Each representative would have more people to represent and more committees to sit on, despite already representing substantially more constituents than the Founders anticipated.[164] As a result, representatives would over-rely on staff for tasks the representatives could once do themselves, which likely means more staff.[165] More staff would result in more bureaucratic bloat, salaries, and office space.[166] Finally, some tasks require the direct attention of representatives, like writing letters to constituents.[167] This change not only creates more work for representatives by increasing constituency size, but also is incongruous with the Founders' intention that representatives directly understand local needs.[168]

### 3. Allowing Districts to Cross State Lines

Ending the constitutional requirement that House districts may not cross state lines could make perfectly equal districts.[169] Even the Supreme Court has noted that geographical constraints on districts prevent true equality in representation among states.[170] Under this solution, neighboring under- and over-represented

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160.  *Cf.* Karcher, 462 U.S. at 727–28 (holding intrastate malapportionment levels of under 1% unconstitutional); *see* Ladewig, *supra* note 10, at 1151 (noting that a House size of 419 would still have a malapportionment level of 63.26%).

161.  Ladewig, *supra* note 10, at 1150 n.153, 1151.

162.  *See, e.g.*, *Apportionment of Representatives: Hearing on H.R. 130 Before the H. Comm. on the Census*, 70th Cong. 32–47 (1928) (statement of Hon. Joe Crail, Rep. from Cal., H.R.) (featuring comments from the members of the Committee on the Census about the increased constituent case workload and the unpopularity among members of losing their seats) [hereinafter *Hearing on H.R. 130*].

163.  *Hearing on H.R. 130*, *supra* note 162 (statement of Hon. Joe Crail, Rep. from Cal., H.R.).

164.  *Hearing on H.R. 130*, *supra* note 162 (statement of Hon. Joe Crail, Rep. from Cal., H.R.); The Federalist Society, *supra* note 15.

165.  *Hearing on H.R. 130*, *supra* note 162 (statement of Hon. Joe Crail, Rep. from Cal., H.R.).

166.  *Hearing on H.R. 130*, *supra* note 162 (statement of Hon. Joe Crail, Rep. from Cal., H.R.); *Apportionment of Representatives in Congress Amongst the Several States: Hearing on H.R. 13471 Before the H. Comm. on the Census*, 69th Cong. 124–25 (1927) (statement of Hon. Elbert S. Brigham, Rep. from Vt., H.R.).

167.  *Apportionment of Representatives: Hearing on H.R. 130 Before the H. Comm. on the Census*, 70th Cong. 32–47 (1928) (statement of Hon. Joe Crail, Rep. from Cal., H.R.).

168.  *Hearing on H.R. 130*, *supra* note 162 (statement of Hon. Joe Crail, Rep. from Cal., H.R.); *Hearing on H.R.* 13471, *supra* note 114, at 124–25 (statement of Hon. Elbert S. Brigham, Rep. from Vt., H.R.).

169.  Ladewig & Jasinski, *supra* note 121, at 90–91, 96–97.

170.  U.S. Dep't of Commerce v. Montana**,** 503 U.S. at 463.

"The constitutional guarantee of a minimum of one Representative for each State inexorably compels a significant departure from the ideal. In Alaska, Vermont, and Wyoming, where the statewide districts

states could share districts.[171] According to 2010 estimates, this solution would ensure perfectly equal districts except for one district with a 218-person difference from the national district average.[172]

While this solution would create districts of equal sizes, it presents an issue regarding proper representation of constituents.[173] Assume part of a district is in Montana—a state with legalized cannabis—and the other part is in Idaho—where cannabis is illegal for all uses.[174] The representative in that district would face a conflict on which states' interest to represent in Congress if there was a federal bill on decriminalizing or legalizing cannabis.[175] Additionally, each state has different election laws—such as campaign finance requirements—presenting uncertainty as to which laws would apply in a district that crosses state lines.[176] This solution is also impractical given the difficulty in changing the Constitution.[177] A constitutional amendment requires a two-thirds vote in both the House and Senate and then three-quarters of state legislatures must ratify the proposed amendment.[178] Given political polarization, it would be imprudent to advocate for this politically infeasible solution.[179]

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are less populous than the ideal district, every vote is more valuable than the national average. Moreover, the need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50. Accordingly, although 'common sense' supports a test requiring 'a good faith effort to achieve precise mathematical equality' within each State, the constraints imposed by Article I, 2, itself make that goal illusory for the Nation as a whole."

*Id.* (quoting Kirkpatrick, 394 U.S at 530–31).

171.  Ladewig & Jasinski, *supra* note 121, at 90–91.

172.  *Id.*

173.  *But see* Asher Schechter, *Study: Politicians Vote Against the Will of Their Constituents 35 Percent of the Time*, PROMARKET (June 16, 2017), https://promarket.org/2017/06/16/study-politicians-vote-will-constituents-35-percent-time/ (on file with the *University of the Pacific Law Review*) (noting that politicians frequently do not vote on legislation in their constituents' interests).

174.  Jiachuan Wu & Daniella Silva, *MAP: See the States Where Marijuana Is Legal*, NBC NEWS (updated Nov. 4, 2020), https://www.nbcnews.com/news/us-news/map-see-if-marijuana-legal-your-state-n938426 (on file with the *University of the Pacific Law Review*).

175.  Alexandra Hutzler, *Bill to Federally Decriminalize Marijuana, Expunge Records Reintroduced in Congress,* NEWSWEEK (May 28, 2021), https://www.msn.com/en-us/news/politics/bill-to-federally-decriminalize-marijuana-expunge-records-reintroduced-in-congress/ar-AAKuxfK (on file with the *University of the Pacific Law Review*).

176.  *See generally* KAREN L. SHANTON, CONG. RSCH. SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES (2019) ("The administration of elections in the United States is highly decentralized. Elections are primarily administered by thousands of state and local systems rather than a single, unified national system.").

177.  Ladewig & Jasinski, *supra* note 121, at 95.

178.  U.S. CONST., art. V.

179.  *See* Michael Dimock & Richard Wike, *America Is Exceptional in the Nature of Its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/ (on file with the *University of the Pacific Law Review*) ("Americans have rarely been as polarized as they are today.").

V. SOLUTIONS TO EXPAND THE HOUSE

The seat cap is incompatible with equal representation, but a second automatic formula for adding House seats that works in tandem with Huntington–Hill is a practicable solution.[180] *Wesberry* and its progeny are clear that the Constitution demands equal representation, and a cap on seats is antithetical to ensuring equal representation.[181] Establishing an automatic method to increase the number of House seats after each census and then apportioning those seats according to Huntington–Hill would represent a proper solution.[182] Scholars advance two main formulas to add seats: the Wyoming Rule and the Cube Root Rule.[183] Section A discusses the mechanics and merits of the Wyoming Rule.[184] Section B explains the Cube Root Rule.[185]

A. *The Wyoming Rule*

Applying *Reynolds* on a nationwide scale, the Wyoming Rule first requires the Census Bureau to take the national population and divide by the smallest state's population.[186] The result of that equation is rounded to the nearest whole number to get the number of House seats for that decade.[187] The average district size is the population of the smallest state.[188] Wyoming is the lowest population state, but projections indicate Vermont will be the smallest by 2040.[189] This method is easy to explain, makes fewer states have only one representative, and prevents substantial under-representation of larger states.[190]

This method would initially make a small addition of 113 House seats, but over time would add more seats than the Cube Root Rule by 2040.[191] By making each district roughly the same population as the smallest population state, this method creates less disparities in nationwide constituency size.[192] However, this trait exposes a significant downside: the Wyoming Rule guarantees the smallest state only one representative.[193] Like small states at the Constitutional Convention,

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180. KANE ET AL., *supra* note 6, at 17–18.

181. *See* Kirkpatrick, 394 U.S. at 529–30 (explaining that the Constitution ensures equal representation in House districts to the extent it is practicable).

182. KANE ET AL., *supra* note 6, at 17–18.

183. Greenburg, *supra* note 1.

184. *Infra* Section V.A.

185. *Infra* Section V.B.

186. KANE ET AL., *supra* note 6, at 14.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 14–15.

191. *Id.* at 13–14 (noting that by 2040 the House would have 630 seats under the Wyoming Rule and 623 seats under the Cube Root Rule).

192. KANE ET AL., *supra* note 6, at 14.

193. *Id.* at 14–15.

small states that miss the cutoff between one and two representatives will oppose this rule.[194] Additionally, each state will not have a population that is an exact multiple of the smallest state's population, causing variances in district sizes.[195] Scholars criticize the Wyoming Rule as arbitrary because the smallest state's population is not consistent or an optimal district size.[196] In theory, the Wyoming Rule's inconsistencies could destabilize Congress by having massive fluctuations in the size of Congress and state delegations because of substantial changes in state populations.[197]

## B.  The Cube Root Rule

Most national legislatures conform to the Cube Root Rule to ensure a proper balance between constituent communications and legislative efficiency.[198] The Cube Root Rule is more complex than the Wyoming Rule, requiring that either all of Congress or just the House equal the cube root of national population.[199] There is a split in the literature on whether to include the Senate in the calculation or only ensure the House approximates the cube root of national population.[200] Most advocates in the United States include the Senate in the cube root calculation.[201] Under this paradigm, the size of the House is equal to the cube root of national population minus the number of senators.[202]

Expanded legislatures risk difficulties in collaboration, but the Cube Root rule would slow the House's growth rate after the first expansion.[203] The Cube Root Rule would initially add 141 House seats, but each subsequent apportionment would add an average of 15 seats per decade for the next few decades.[204]

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194.  OFF. OF THE HOUSE HISTORIAN, *supra* note 23.

195.  *See* KANE ET AL., *supra* note 6, at 15 (noting that differences in state population sizes will make the Wyoming Rule likely to produce wide variances in constituency sizes due to the new average district size being unable to perfectly divide into state populations).

196.  *Id.* at 15.

197.  *See id.* ("Because of the Wyoming Rule's arbitrariness, the number of House seats is not guaranteed to move in one direction, or at a measured rate. The size of the nation's smallest state can vary dramatically, significantly altering the size of the House. . . . The possibility of drastic changes in state population highlights the extent to which the Wyoming Rule could become unworkable.").

198.  *Id.* at 11–13.

199.  *Id.* at 13.

200.  Including the Senate in the calculation would not change the size of the Senate but make the size of the House dependent on the cube root of national population minus the number of senators. Not including the Senate would make the size of the House—rather than the entire Congress—equal to the cube root of national population. *Id.*

201.  Advocates for including the Senate in the calculation of the size of the House believe that the Senate is a more significant deliberative body than small chambers of other nations. This claim justifies subtracting the number of Senate seats from the cube root of national population and reduces the size of the House compared to using the cube root on its own. KANE ET AL., *supra* note 6, at 13; Editorial Board, *supra* note 4.

202.  KANE ET AL., *supra* note 6, at 13.

203.  *Id*.

204.  *See id.* (calculating that after the first expansion of 141 seats, the formula adds 17 seats in the subsequent decade, 17 more seats in the second decade, and 13 seats in the third decade).

One downside of the Cube Root Rule is that many of its benefits reduce over time as constituent size grows and seat growth slows.[205] In particular, representatives would become less responsive and representative of their districts over time.[206] Additionally, districts would slowly become less proportional and the anti-corruption effects would decline after a few decades.[207]

On balance, the Cube Root Rule is the superior solution to expand the House, satisfy the Constitution, and promote key policy benefits.[208] In harmony with the Constitution, the Cube Root Rule's congressional apportionment scheme uses the national population and can account for increases or decreases in population.[209] The Cube Root Rule also ensures more consistent district sizes than the Wyoming Rule, meeting the Constitution's demand that districts be as equal as practicable.[210] Studies show the Cube Root Rule optimizes both constituents per representative and the most efficient number of representatives in the chamber for communication.[211] Furthermore, smaller districts will allow more constituents to interact with their representatives.[212]

Although the Cube Root Rule has an initial rapid expansion, it eventually slows to expand in a consistent and measured way.[213] While small population states will dislike a larger House because it may dilute their power, the Cube Root Rule would grant most states more seats.[214] Unlike the Wyoming Rule, the Cube Root Rule can provide more than one representative to the smallest states.[215]

## VI. POLICY IMPLICATIONS OF AN EXPANDED HOUSE

Expanding the House to equalize constituency sizes would have significant policy implications.[216] Section A addresses concerns about adding more representatives.[217] Section B touches on the direct benefits of an expanded House.[218]

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205. *Id.*

206. *Id.*

207. *See id.* at 9, 13 (noting that a larger House makes politicians more familiar with the issues in their districts due to having a smaller constituency, which limits special interest influence, but that these effects may dissipate over time as district population grows).

208. KANE ET AL., *supra* note 6, at 17.

209. Reynolds, 377 U.S. at 566–67; KANE ET AL., *supra* note 6, at 17.

210. Reynolds, 377 U.S. at 566–67; KANE ET AL., *supra* note 6, at 13–15.

211. Ladewig & Jasinski, *supra* note 121, at 98.

212. KANE ET AL., *supra* note 6, at 17.

213. *Id.* at 13, 18.

214. Greenburg, *supra* note 1.

215. KANE ET AL., *supra* note 6, at 13–15.

216. *Id.* at 8–10; Editorial Board, *supra* note 4.

217. *Infra* Section VI.A.

218. *Infra* Section VI.B.

## A. Criticism of an Expanded House

Ending the seat cap raises concerns about costs, space, and inefficiency.[219] The biggest financial concern about expanding the House is that more representatives means more staff and representatives to pay.[220] Under either the Wyoming or Cube Root Rules, the House automatically expands after every census, putting some expansion critics on guard about increasing budget costs.[221] However, some scholars believe a larger legislature could reduce federal costs.[222] Additionally, the costs are miniscule compared to other areas of federal spending.[223] The U.S. budget is in the trillions of dollars; a decennial increase in the tens of millions is insignificant and easy to cover with economic reform.[224] Congressional salaries and office budgets—$1,000,000 per representative each year—are a small portion of the federal budget.[225] Congress can allocate funds from other sources to fulfill the constitutional requirement of equal representation.[226]

While federal spending would increase rapidly in Congress' first permanent, corrective expansion in over 100 years, subsequent expansions would be marginal and have limited effects on spending.[227] The spending argument comes down to a value judgment, but the values of equal representation are within the

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219. KANE ET AL., *supra* note 6, at 10; Editorial Board, *supra* note 4.

220. Editorial Board, *supra* note 4.

221. KANE ET AL., *supra* note 6, at 13–15, 17 ; *see, e.g.*, Morris Silverman, *Better Yet, Reduce the Size of the House*, N.Y. TIMES (Jan. 14, 1991), https://www.nytimes.com/1991/01/14/opinion/l-better-yet-reduce-the-size-of-the-house-633391.html (on file with the *University of the Pacific Law Review*) (noting that it would cost "millions of dollars more in salaries, as well as for more office staffs, office space, postage, and printing").

222. *See, e.g.*, Larry Sabato, *Expand the House of Representatives*, DEMOCRACY J. MAG. (2008) https://democracyjournal.org/magazine/8/expand-the-house-of-representatives/ (on file with the *University of the Pacific Law Review*) ("Staff resources could be held constant, more or less, with costs divided by 1,000 instead of 435.").

223. *See Spending*, PETER G. PETERSON FOUND. (last visited Jan. 10, 2021), https://www.pgpf.org/finding-solutions/understanding-the-budget/spending (on file with the *University of the Pacific Law Review*) (noting that defense made up half of the federal discretionary spending in 2019).

224. *See, e.g.*, Kimberly Amadeo, *FY 2019 Federal Budget: Trump's Budget Request*, BALANCE (updated January 18, 2021), https://www.thebalance.com/fy-2019-federal-budget-summary-of-revenue-and-spending-4589082 (on file with the *University of the Pacific Law Review*) (noting that the federal government spent about $4.45 trillion in fiscal year 2019); *cf. Taxes*, PETER G. PETERSON FOUND. (last visited June 6, 2021), https://www.pgpf.org/finding-solutions/tax-reform (on file with the *University of the Pacific Law Review*) (explaining that tax reform could help reduce deficit spending); *see also National Security*, PETER G. PETERSON FOUND. (last visited June 6, 2021), https://www.pgpf.org/finding-solutions/national-security (on file with the *University of the Pacific Law Review*) (discussing defense spending reform "to address America's long-term fiscal challenges").

225. IDA A. BRUDNICK, CONG. RSCH. SERV., RL30064, SALARIES AND ALLOWANCES: IN BRIEF 6 (2019); IDA A. BRUDNICK, CONG. RSCH. SERV., R40962, MEMBERS REPRESENTATIONAL ALLOWANCE: HISTORY AND USAGE (2020).

226. Editorial Board, *supra* note 4 ("Salaries for [additional] lawmakers and their staffs would total less than one million dollars per representative—which means a couple hundred representatives could be added for the price of, say, five F-14 fighter jets.").

227. KANE ET AL., *supra* note 6, at 13–14 (2020), https://www.fordham.edu/download/downloads/id/14402/Why the House Must Be Expanded Democracy Clinic.pdf (on file with the *University of the Pacific Law Review*).

Constitution.[228] Ignoring those values because it is inconvenient or more expensive directly ignores the Constitution's command of fair, equal, and adequate representation.[229] Americans' distrust of politicians may stem from structural and institutional inadequacies of Congress: a more representative Congress might increase approval and make better policy.[230] Perhaps the benefits will far outweigh the costs.[231]

Concerns about space are distractions: the House chamber is perfectly capable of seating more people as demonstrated at the annual State of the Union Address.[232] Claims that the House will have to meet in stadiums or require *Star Wars* Galactic Senate hover platforms to fit all the representatives are hyperbolic and disingenuous.[233] The number of seats added under either expansion method would be under 200, even after three decades.[234] Even if the House was unable to fit the representatives, Congress could build more office space or expand the Capitol.[235] This concern is fanciful given the reality that most actions in the House do not take place with every representative present.[236] Finally, the COVID-19 pandemic revealed how easy technology has made remote work and communication.[237] During the pandemic, Congress and legislatures across the country used video conferencing platforms for hearings and floor votes.[238] If space ever became an issue, technology presents reasonable alternatives.[239]

228. Wesberry, 376 U.S. at 18; Editorial Board, *supra* note 4.

229. Wesberry, 376 U.S. at 18.

230. KANE ET AL., *supra* note 6, at 10; Sabato, *supra* note 222

("The American public's cynicism toward Congress cannot be diluted by tinkering around the margins. . . . But it's no longer enough to throw out the incumbents–we first need to add more members to their ranks.").

231. *See* Wilma Rule, *Expanded Congress Would Help Women*, N.Y. TIMES (Feb. 24, 1991), https://www.nytimes.com/1991/02/24/opinion/l-expanded-congress-would-help-women-175991.html (on file with the *University of the Pacific Law Review*) (arguing that the costs of expanding the House are small when compared with the benefit of a legislature that is closer to its constituents).

232. *See* KANE ET AL., *supra* note 6, at 10 (noting that all Representatives, Senators, Cabinet secretaries, Supreme Court justices, chief military officers gather on the House floor to hear the President's State of the Union Address).

233. *See id.* ("Some may argue that the Capitol building cannot accommodate more members of Congress.").

234. *Id* at 13–14.

235. *Id.* at 10.

236. *See* Charles A. Kromkowski & John A. Kromkowski, *Why 435? A Question of Political Arithmetic*, 24 POLITY 129, 142, 144 (1991) (noting that most deliberation and negotiation in the House happens in committee hearings or behind closed doors, and that representatives often give speeches on the House floor in front of an empty chamber).

237. *Coronavirus: How the World of Work May Change Forever*, BBC (Oct. 23, 2020), https://www.bbc.com/worklife/article/20201023-coronavirus-how-will-the-pandemic-change-the-way-we-work (on file with the *University of the Pacific Law Review*).

238. *See, e.g.*, Tony Romm et al., *Facebook, Google, Twitter CEOs Clash with Congress in Pre-election Showdown*, WASH. POST (Oct. 28, 2020), https://www.washingtonpost.com/technology/2020/10/28/twitter-facebook-google-senate-hearing-live-updates/ (on file with the *University of the Pacific Law Review*).

239. *Id.*

Critics' claims of inefficiency are similarly unfounded because a larger body does not ensure less productivity.[240] In fact, the Senate is a smaller body, yet often takes longer to pass legislation.[241] What causes gridlock is not the number of members in a chamber but divided government, different partisan composition and policy views between chambers, and the Senate filibuster.[242] Expanding the House could actually decrease gridlock by splitting gerrymandered districts and making more seats competitive.[243] More competitive seats may produce more centrists in Congress and incentivize compromise.[244] Votes may take longer but representatives will have less committee work and more time for constituents, learning the issues, and developing expertise.[245]

## B. Benefits of an Expanded House

Expanding the House has significant benefits that far outweigh critics' concerns.[246] First and foremost, an expanded House creates a more responsive and egalitarian legislative body.[247] More representatives means more districts, shrinking the average district size and making constituent communications much easier.[248] Currently, candidates must reach out to a greater number of voters to get elected in larger districts—a costly endeavor.[249] Candidates must make deals with interest groups to pay for campaign costs, sacrificing the views of other groups and constituents in the process.[250] The Founders feared a rise in corrupt politicians if the House were too small and representatives were unfamiliar with voters' needs.[251] Expanding the House will make districts smaller, shield against special interest influence, and require representatives to uphold their constituents' preferences.[252]

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240. KANE ET AL., *supra* note 6, at 10.

241. *See, e.g.*, *Apportionment of Representatives in Congress Amongst the Several States: Hearing on H.R. 13471 Before the H. Comm. on the Census*, 69th Cong. 133–35 (1927) (statement of Hon. James G. Strong, Rep. from Kan., H.R.) ("I think the House of Representatives, large as it is, functions a lot better than the Senate. We have more business than the Senate; yet we are always ahead of the Senate with legislation."); *see* Sarah A. Binder, *Going Nowhere: A Gridlocked Congress*, BROOKINGS INST. (Dec. 1, 2000), https://www.brookings.edu/articles/going-nowhere-a-gridlocked-congress/ on file with the *University of the Pacific Law Review*) (explaining the sources of gridlock and noting that Senate rules make it inefficient).

242. Binder, *supra* note 241.

243. KANE ET AL., *supra* note 6, at 10; Editorial Board, *supra* note 4.

244. Binder, *supra* note 241.

245. KANE ET AL., *supra* note 6, at 10.

246. *Id.* at 8–10.

247. *Id.* at 8.

248. *Cf.* THE FEDERALIST NOS. 55, 58 (James Madison) (highlighting the need for representatives to represent a manageable number of people to understand and respond to the needs of their constituents).

249. Wilson, *supra* note 1.

250. KANE ET AL., *supra* note 6, at 8.

251. Christopher St. John Yates, *A House of Our Own or A House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157, 175–79 (1992).

252. KANE ET AL., *supra* note 6, at 8, 9.

These anti-corruption effects would make elections more competitive.[253] Lowering campaign costs by making smaller districts—many initially without incumbents—could launch the candidacies of ordinary citizens that currently decline to run due to costs.[254] This effect could help seat more women and minorities in Congress—and could make it easier for third-party and independent candidates to win elections—better reflecting America's diversity.[255] Breaking the two-party mold could break partisan control by encouraging coalition government.[256]

Increasing the number of representatives would provide more Electoral College parity between large and small states.[257] However, an expanded House would not have changed the result of most past Presidential elections, nor would it ensure the popular vote winner would win the Electoral College.[258] Therefore, this issue is not partisan, it is about ensuring equality in representation.[259]

After January 6, 2021, it is difficult to deny the modern decline of American democratic institutions.[260] If other indicia of a constitutional crisis were insufficient to show this decline, surely the President stoking a violent mob on Congress to remain in power is enough.[261] Moreover, polarization prevented Congress from holding him accountable, despite the Constitution describing its required procedure.[262] This decline makes expanding the House more pressing;

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253. Editorial Board, *supra* note 4.

254. *See* John A. Kromkowski, *Framers Would Approve of a Larger House*, N.Y. TIMES (Jan. 30, 1991), https://www.nytimes.com/1991/01/30/opinion/l-framers-would-approve-of-a-larger-house-839491.html (on file with the *University of the Pacific Law Review*) ("[More] persons per district dilute[s] the political power of groups in urban areas and contribute to spiraling campaign costs, effectively cutting off the electoral process from a wide range of potential candidates.").

255. *See* KANE ET AL., *supra* note 6, at 9 ("Smaller districts allow independent and third-party candidates to run issue-driven campaigns . . . . They also make it easier for candidates to reach the critical number of voters needed to win a seat. Finally, more seats in the House diminishes the significance of any single seat in determining a congressional majority."); St. John Yates, *supra* note 251, at 193; Editorial Board, *supra* note 4.

256. KANE ET AL., *supra* note 6, at 9.

257. *Id.*; Staley & Sonnad, *supra* note 17.

258. Staley & Sonnad, *supra* note 17.

259. Wesberry, 376 U.S. at 18; The Federalist Society, *supra* note 15.

260. *See* Timothy Snyder, *The American Abyss*, N.Y. TIMES (Jan. 9, 2021), nytimes.com/2021/01/09/magazine/trump-coup.html (on file with the *University of the Pacific Law Review*) (analyzing America's democratic backsliding and descent into pre-fascism).

261. Ladewig, *supra* note 10, at 1143; Snyder, *supra* note 260; *see* Christina Pazzanese, *Where are We Now After a Second Impeachment?*, HARV. GAZETTE (Jan. 13, 2021), https://news.harvard.edu/gazette/story/2021/01/american-democracy-could-be-at-inflection-point-say-experts/ (on file with the *University of the Pacific Law Review*) (noting the Capitol Riot may either "reinvigorat[e] democratic norms," reduce "hostile partisan rhetoric," and bolster institutions, or "could be the beginning . . . of a prolonged period of acute recriminations and hostility.").

262. *See* Julia Azari & Seth Masket, *The 4 Types of Constitutional Crises*, FIVETHIRTYEIGHT (Feb. 9, 2017), https://fivethirtyeight.com/features/constitutional-crisis/ (on file with the *University of the Pacific Law Review*) (describing the failure of institutions and the failure to follow the Constitution because it is politically infeasible as constitutional crises. Both likely occurred in the lead up to and aftermath of the Capitol Riot); Catie Edmondson, *Why Seven Republican Senators Voted to Convict Trump*, N.Y. TIMES (Feb. 14, 2021),

repairing America's only federal majoritarian institution could accelerate the restoration and reaffirmation of other democratic norms and institutions.[263] Fixing the House could make individual's votes more impactful, encourage voting, and reduce the power of extremists.[264] A diverse House would likely pass much-needed democratic reforms.[265] These reforms would promote a healthy democracy by empowering citizens and strengthening institutions.[266] Without reforms, American democracy will continue to unravel.[267] Expanding the House could bring it closer to the average American, inject fresh ideas into Congress, and ensure more democratic reforms are a priority in the future.[268]

## VII. CONCLUSION

The 435-seat cap creates unconstitutional levels of malapportionment.[269] To be constitutional, the seat cap must produce districts that are as equal "as is practicable" to ensure "equal representation."[270] However, uneven population growth, the 435-seat cap, and other limitations produce disparities in district size that violate the one person, one vote requirement.[271]

While perfect population distribution among districts is mathematically impossible, the current scheme ensures districts in small states have more

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https://www.nytimes.com/2021/02/14/us/politics/republican-senators-impeachment-trump.html (on file with the *University of the Pacific Law Review*).

263. *See* THE FEDERALIST NO. 58 (James Madison) (explaining that the Senate balances the majoritarianism within the House); *see also* Matthew Yglesias, *America Needs a Democratic Revolution*, VOX (Sept. 17, 2020), https://www.vox.com/21429181/democracy-reform-senate-gerrymandering (explaining that structural inequalities in voting power are threatening democracy, and how addressing those inequalities can protect the nation); Pazzanese, *supra* note 261 (noting that the nation is likely at an inflection point on democracy); Klein, *supra* note 2.

264. *Apportionment of Representatives in Congress Amongst the Several States: Hearing on H.R. 13471 Before the H. Comm. on the Census*, 69th Cong. 121–22 (1927) (statement of Hon. Elbert S. Brigham, Rep. from Vt., H.R.); Binder, *supra* note 241.

265. KANE ET AL., *supra* note 6, at 9; *see, e.g.*, H.R. 1, 117th Cong. (2021) (requiring several democratic reforms, including independent redistricting commissions).

266. Ian Millhiser, *11 Ways to Fix America's Fundamentally Broken Democracy*, VOX (Sept. 14, 2020), https://www.vox.com/21336225/voting-rights-senate-electoral-college-gerrymandering-supreme-court (on file with the *University of the Pacific Law Review*).

267. *See* Gilens & Page, *supra* note 2 (highlighting the influence of the elite on Congress); KANE ET AL., *supra* note 6, at 9 (explaining that a large House prevents corruption); Snyder, *supra* note 260 (discussing how more politicians will continue to attempt to break American democracy for their own personal gain—perhaps to the point of true fascism—if no action is taken); Fareed Zakaria, *Trump Shows That We Need to Reform US Democracy*, WASH. POST (DEC. 3, 2020), https://www.washingtonpost.com/opinions/global-opinions/trump-shows-that-we-need-to-reform-us-democracy/2020/12/03/437b5da2-35ab-11eb-8d38-6aea1adb3839_story.html (noting the importance of democratic reform in the wake of the Trump presidency so the system will not fail if a "Trump-like politician tries to pervert the system again").

268. KANE ET AL., *supra* note 6, at 8–9.

269. Ladewig, *supra* note 10, at 1142.

270. U.S. CONST. art. I, § 2; Reynolds, 377 U.S. at 577; *Apportionment of Representatives in Congress Amongst the Several States: Hearing on H.R. 13471 Before the H. Comm. on the Census*, 69th Cong. 120–23 (1927) (statement of Hon. Elbert S. Brigham, Rep. from Vt., H.R.).

271. Reynolds, 377 U.S. at 577; Ladewig, *supra* note 10, at 1131.

representation than large states.[272] Capping the number of seats while population growth is uneven severely limits equality.[273] Increasing the number of House seats would create more equal district sizes consistent with *Wesberry*.[274] Present inequalities in district sizes are comparatively more severe than past inequalities the Court has held unconstitutional.[275] Furthermore, the cap also produces disparities in the Electoral College.[276] The end result is that voters in some states have more power in the House and Electoral College than voters in other states.[277] This situation is a far cry from the Constitution's demand of "equal representation" of people "as nearly as practicable."[278]

Using the Cube Root Rule to expand the House is the best, most practical, and most adaptable solution.[279] The Cube Root Rule's use of the national population satisfies the Constitution.[280] Additionally, the Cube Root Rule is more consistent in making district sizes "as equal as practicable."[281] Adding more representatives makes the ratio of constituents per representative more ideal and egalitarian.[282] Similarly, adding representatives increases the electoral votes of larger states, reducing the disparate impact of small states on the Electoral College.[283]

This solution only requires Congress to pass a statute repealing the Apportionment Act of 1929 and replacing it with new legislation to expand the House.[284] The Cube Root Rule would act as a second, separate automatic formula that adds seats every ten years according to the cube root of the national population minus the number of Senators.[285] Huntington–Hill would then automatically apportion those additional seats and prior seats proportionately based on respective

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272. Ladewig & Jasinski, *supra* note 121, at 90–91.

273. *See Id.* (explaining how territorially bounded house districts and uneven state populations amplify the effects of the seat cap on attaining mathematical equality in House districts).

274. *Cf.* Wesberry, 376 U.S. at 18 (explaining that exact equality of House district sizes is the goal of the Constitution, even if impossible); Ladewig & Jasinski, *supra* note 121, at 100; Staley & Sonnad, *supra* note 17.

275. Ladewig, *supra* note 10, at 1142.

276. *Id.* at 1134.

277. Prokop, *supra* note 134.

278. Kirkpatrick, 394 U.S. at, 529–30.

279. KANE ET AL., *supra* note 6, at 17.

280. Reynolds, 377 U.S. at 566–67; KANE ET AL., *supra* note 6, at 17.

281. Reynolds, 377 U.S. at 566–67; KANE ET AL., *supra* note 6, at 13, 15.

282. *See* Wilson, *supra* note 1 (calculating that an increase in the number of House seats would significantly reduce disparities in district equality).

283. *See* Staley & Sonnad, *supra* note 17 (discussing how the number of electoral votes each state receives is equal to the number of people the state sends to Congress so increasing House membership would rebalance the power of states in the Electoral College).

284. KANE ET AL., *supra* note 6, at 17–18.

285. *Id.*

state populations.[286] These automatic formulas would prevent representatives from engaging in partisan apportionment battles that plagued past apportionments.[287]

Not only does the Cube Root Rule advance the Constitution's goals, but it also promotes key policies that protect against democratic backsliding.[288] First, the Cube Root Rule makes districts smaller, which facilitates communication between constituents and representatives.[289] It also ensures a balance between optimal constituent size and legislative efficiency.[290] In doing so, the Cube Root Rule prevents special interest capture and lowers the cost to get elected.[291] The increase in membership could bring new, diverse people and viewpoints to Congress, more adequately representing the people.[292] A more representative House could facilitate much-needed democratic reforms necessary to keep the Republic afloat in uncertain times.[293] While expanding the House is certainly not the cure-all for America's declining democracy, it could catalyze other democratic reforms.[294]

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286.   *See* Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761 (codified as amended at 2 U.S.C. § 2a (2020)) (requiring the Secretary of Commerce and the Census Bureau to automatically apportion House seats based on state populations according to the Huntington–Hill method).

287.   KANE ET AL., *supra* note 6, at 17–18.

288.   Klein, *supra* note 2.

289.   KANE ET AL., *supra* note 6, at 17.

290.   Ladewig & Jasinski, *supra* note 121, at 98; CAROLINE KANE ET AL., *supra* note 6, at 13, 17.

291.   KANE ET AL., *supra* note 6, at 8–9.

292.   *Id.*

293.   *Id.* at 9, 17.

294.   *See id.* at 8, 10 (noting that expanding the House will not end gerrymandering but could mitigate it).