

APPORTIONMENT OR SIZE? WHY THE U.S. HOUSE OF REPRESENTATIVES SHOULD BE EXPANDED

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I. INTRODUCTION

The United States is a very different place today than it was in 1929. In fact, in 1929, the United States only had 48 states.¹ Not only has the land mass of the United States changed, but the population of the United States has changed in terms of total population size,² race,³ and location.⁴

1. Alaska and Hawaii became states in 1959. See Alaska Statehood Stamp Features Iditarod Musher, U.S. NEWSWIRE (Jan. 5, 2009, 8:07 AM), <http://markets.financialcontent.com/stocks/news/read?GUID=7586507>; Mark Niese, *Muted Commemoration as Hawaii Turns 50 as a State*, THE SEATTLE TIMES (Aug. 21, 2009, 11:32 AM), http://seattletimes.nwsourc.com/html/nationworld/20090708516_apushawaiiat50.html.

2. In 1930, the total U.S. population was 137,008,435. U.S. CENSUS BUREAU, 1 FIFTEENTH CENSUS OF THE UNITED STATES: 1930, 5 (1931), available at <http://www.census.gov/prod/www/abs/decennial/1930.html>. And in July 2008, the U.S. Census Bureau estimated the total U.S. population to be 304,374,846. *Population Estimates*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited July 7, 2011).

3. In 1930, whites made up 89.8% of the population, African Americans made up 9.7% of the total population, and Hispanics were not included as a distinct racial grouping. U.S. CENSUS BUREAU, UNITED STATES - RACE AND HISPANIC ORIGIN: 1790 TO 1990, available at <http://www.census.gov/population/www/documentation/twps0056/tab01.pdf> (last visited July 7, 2011). In 2010, whites made up 63.7% of the population, African Americans made up 12.6%, while Hispanics made up 16.3%.

The increase in population size corresponded with an increase in government programs, spending, and involvement in the economy.⁵ In spite of this growth in both population and government size over the past 80 years, one aspect of the federal government that has remained unchanged is the House of Representatives. In fact, the current size of 435 representatives is the same as it was in 1911; in 1929, 435 was set as the permanent size of the House of Representatives.⁶

This Note argues that the current limit of 435 representatives in the House of Representatives should be removed and that a formula allowing the House of Representatives to grow with the population should be devised. Part II of this Note will give a history of the size of the House of Representatives, what the Founders believed about apportionment, and how apportionment and the size of the House have been intertwined and how they are different. Part III will examine the “one man, one vote” doctrine from *Wesberry v. Sanders* and look at the most recent Supreme Court decision on apportionment—*Montana v. Department of Commerce*. It will also examine whether there is any room in these decisions for the Supreme Court to rule the current size of the House is unconstitutional. Part IV will analyze policy reasons in favor of increasing the size of the House. Finally, Part V will conclude by tying together the history behind apportionment, the cases discussed in Part III, and the policy reasons for increasing the size of the House of Representatives.

II. THE HISTORY OF APPORTIONMENT

Dating back to the ratification of the Constitution, the size of the House of Representatives was a controversial issue.⁷ The Constitution does

QuickFacts, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited July 7, 2011).

4. In 1930, 56.2% of the population of the United States lived in an urban environment while 43.8% lived in a rural area. U.S. CENSUS BUREAU, *supra* note 2, at 8. As of 2005, around 17% of the U.S. population lived in an area classified as “rural.” *Rural Population and Migration*, U.S. DEPARTMENT OF AGRICULTURE, <http://www.ers.usda.gov/briefing/population/> (last visited July 7, 2011).

5. JAMES D. GWARTNEY ET AL., *ECONOMICS: PRIVATE AND PUBLIC CHOICE* 124 (1999) (noting that in 1930, the U.S. government’s spending accounted for 3.4% of the economy while by 2006, it represented 33.8% of the economy).

6. 2 U.S.C. § 2(a) (2006) (“On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.”).

7. See THE FEDERALIST NO. 58 (James Madison); BRUTUS, LETTER III (Nov. 15, 1787), reprinted in ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY, THE FEDERALIST WITH LETTERS OF “BRUTUS” 458 (Terence Ball ed., 2003).

not specify an exact membership size for the House.⁸ In failing to specify a required—or even an ideal—ratio of citizens per representative, the vagueness of the Constitution made the size of the House a continuing controversy in Congress until 1929. From 1790 to 1910, the size of the House increased after every census except in 1840.⁹ This Part will give a detailed history behind the apportionment and size debates in five Subparts: A. Ratification and the Failed First Amendment; B. The First Apportionment; C. Early Attempts to Limit the Size of the House; D. The 1920’s Debate; and E. The Adoption of the Hill Method.

A. Ratification and the Failed First Amendment

One of the earliest and most vehement arguments made by Anti-Federalists against the Constitution was that the size of the House of Representatives in the proposed Congress was too small and that the Constitution was too vague about when and if the House should be increased in size.¹⁰ Some of the concerns the Anti-Federalists had about a small legislature included: 1) members of a small body would be easier to bribe;¹¹ 2) the small size of the House would only leave membership in it open to the wealthy and elite;¹² and 3) the House would be so small that the population

8. Rather than specifying the exact size of the House, the Constitution merely sets a bare minimum requirement of representatives per state and a ceiling on the permissible number of citizens per representative. U.S. CONST. art. I, § 2, cl. 3 (“The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . .”).

9. Charles A. Kromkowski & John A. Kromkowski, *Why 435? A Question of Political Arithmetic*, 24 POLITY 1, 132–33 (1991).

10. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 78 (2005) (“No aspect of the federal Constitution provoked more trenchant criticism than House size.”). Commenting on the vagueness in the Constitution on the increase in size of the House in a speech to the Virginia Constitutional Convention, Patrick Henry stated:

I mean, when it says that there shall not be more representatives than one for every thirty thousand. Now, sir, how easy is it to evade this privilege! . . . This may be satisfied by one representative from each state. . . . Why was it not clearly and unequivocally expressed, that they should be entitled to have one for every thirty thousand?

Patrick Henry, Speech at The Virginia Convention (June 5, 1788), *reprinted in* CECELIA M. KENYON, *THE ANTI-FEDERALISTS* 242 (1985). Another prominent Anti-Federalist, George Clinton, wrote, “The most general objections to the first article, are . . . that the number of representatives are too few; that the apportionment and principles of increase are unjust [T]hese are some of the many evils that will attend the adoption of this government.” Letter from George Clinton To the Citizens of the State of New York (Nov. 22, 1787), *reprinted in* KENYON, *supra*, at 309–10. Madison recognized these charges against the Constitution and responded in *The Federalist No. 58*, writing, “The remaining charge against the House of Representatives which I am to examine, is grounded on a supposition that the number of members will not be augmented from time to time, as the progress of population may demand.” THE FEDERALIST NO. 58 (James Madison), *reprinted in* Ball, *supra* note 7, at 282.

11. AMAR, *supra* note 10, at 78 (“[M]embers of an overly select House would become targets for bribery and corruption”); BRUTUS, LETTER IV (Nov. 29, 1787), *reprinted in* Ball, *supra* note 7, at 460 (“The small number which is to compose this legislature, will . . . expose it to the danger of that kind of corruption, and undue influence, which will arise from the gift of places of honor and emolument, or the more direct one of bribery”).

12. AMAR, *supra* note 10, at 78 (“[I]n practice the House would be closed to men of modest fortune and station, howsoever virtuous and well respected by their neighbors”); BRUTUS,

would not know very much about its representatives.¹³ The concerns about the small size of the House led five states to send proposed amendments to the Constitution designating a mandatory people-per-representative ratio along with their ratification documents.¹⁴ These amendments were consolidated in the First Congress, and the First Amendment of the twelve proposed amendments (ten of which were passed and became known as the Bill of Rights) was an amendment that envisioned a House whose size was mandated to be proportional to the population, and that proportion was to increase as the size of the House increased.¹⁵ This amendment came one state short of being ratified into the Constitution.¹⁶

B. *The First Apportionment*

Without a mandated requirement for the ratio of people per representative, the Second Congress was faced with the difficult task of interpreting exactly what was meant by the Constitution language that “Number of Representatives shall not exceed one for every thirty thousand.”¹⁷ In the period surrounding the passage of the Constitution, the “habit of thought . . . [was] to fix upon some ‘ratio of representation,’ that is to declare that there shall be ‘one representative for every x persons,’ and then allow the house size to fall where it may.”¹⁸ Using this philosophy, both the first House apportionment bill and the first Senate apportionment bill took the total population of each state and divided it by a given number.¹⁹ Both chambers proposed dropping any remaining fractions from the number of

LETTER IV (Nov. 29, 1787), *reprinted in* Ball, *supra* note 7, at 460 (“That the choice of members would commonly fall upon the rich and great, while the middling class of the community would be excluded.”).

13. BRUTUS, LETTER IV (Nov. 29, 1787), *reprinted in* Ball, *supra* note 7, at 462 (“The people . . . will have very little acquaintance with those who may be chosen to represent them [The House] will consist of men, whose names they have never heard, and whose talents and regard for the public good, they are total strangers to”).

14. AMAR, *supra* note 10, at 82. Pennsylvania’s amendment merely stated “the House of Representatives shall be increased in number” while Massachusetts and Virginia proposed a thirty thousand citizen per representative requirement until the House reached membership of 200. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 124–25, 128, 140 (1992).

15. AMAR, *supra* note 10, at 260. The First Amendment envisioned a House whose membership was based on a House of one representative per 30,000 people until the size of the House reached 100. Once the size of the House reached 100, the proportion would be set by Congress as long as it did not exceed one representative per every 40,000 people until the size of the House reached 200. Once the size of the House reached 200, it could not drop below that number, and the proportion was to be set by Congress up to 50,000 people per representative. *Id.* Taking the U.S. population figure of 304,059,724, *see supra* note 1, and dividing by 50,000, the House would currently have 6,081 members.

16. Amar, *supra* note 10, at 82.

17. U.S. CONST. art I, § 2.

18. MICHEL L. BALINSKI & H. PAYTON YOUNG, *FAIR REPRESENTATION* 10–11 (2001). The House divided each state’s population by 30,000 while the Senate divided each state’s population by 33,000. *Id.* at 11, 13.

19. *Id.* at 10–11.

representatives per state.²⁰ For example, in the House's plan, Connecticut's population of 236,841 divided by 30,000 equaled 7.895 representatives for that state. The .895 was dropped, and Connecticut was given 7 representatives.²¹ Applying this method to every state led to the odd result of 112 apportioned representatives when the population of the nation as a whole, divided by the same number, would have given a total of 120 representatives—meaning 8 votes were lost from rounding down.²²

Like so many other issues during the period just after the ratification of the Constitution, the apportionment debate divided into two sides—one led by Jefferson and the other led by Hamilton. Many in the Hamilton camp questioned the fairness of the method of dropping remaining fractions of representatives. Some states, like Connecticut, had their number of representatives rounded down more drastically than others, given the system of dropping the remaining fractions. For instance, Connecticut's total of 7.895 representatives was rounded down to 7 while Virginia's total of 21.019 representatives was rounded down to 21.²³ Seeing the inequality in one state losing .895 representatives while another just lost .019, Hamilton developed an alternative plan.²⁴

Hamilton interpreted the phrase “shall not exceed one for every thirty Thousand”²⁵ to mean that “the *total* number of representatives was not to exceed one for every thirty thousand in the *total* population.”²⁶ The first step in Hamilton's formula involved coming up with the number of representatives available. Thus, the total population of the United States in 1792—3,615,920—was divided by 30,000 and the size of the House was determined to be 120. The second step in Hamilton's formula involved dividing the population of each state by 30,000. The difference between Hamilton's plan and Jefferson's was that the former provided for giving seats to states based on the size of their fractions remaining until the 120 seats were distributed. Thus, for example, Connecticut's total of 7.895 representatives was increased to 8, and Delaware's total of 1.851 representatives was increased to 2.²⁷ While this seemed like a practical solution and was ultimately passed by both the House and Senate, George Washington vetoed it because there was no single people-per-representative ra-

20. *Id.*

21. *Id.*

22. *Id.* The total population of the country in the 1790 census was 3,615,920. The Senate plan of dividing each state's population by 33,000 resulted in 109 total votes but only 105 apportioned representatives. *Id.*

23. BALINSKI & YOUNG, *supra* note 18, at 12.

24. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 131 (1997). For instance, Vermont congressman, Nathaniel Niles, believed the rounding down plan was wrong because Delaware, with a population of 58,000, was only awarded one representative. *Id.*

25. U.S. CONST. art. I, § 2, cl. 3.

26. BALINSKI & YOUNG, *supra* note 18, at 15 (emphasis in original).

27. CURRIE, *supra* note 24, at 132.

tio that produced 120 representatives. And, in 8 states, the total number of representatives divided by the total state population resulted in more than one representative for every 30,000 people.²⁸

Jefferson was convinced that the original plans by the House and Senate were the only way to apportion the House constitutionally. In fact, it was Jefferson who convinced Washington to veto the original apportionment bill proposed by Hamilton. According to Jefferson:

[T]he clause . . . is express that representatives shall be apportioned among the several states according to their *respective numbers*. That is to say, they shall be apportioned by some common ratio. For *proportion*, and ratio, are equivalent words; and it is the definition of *proportion among numbers*, that they have a *ratio common to all*, or in other words *a common divisor*.²⁹

Based on this interpretation of the Constitution, Jefferson believed each state's population must be divided by the same number and the fractions dropped. After an unsuccessful attempt to override Washington's veto, the House and Senate adopted the original Senate bill of apportionment in which each state's population was divided by 33,000 and the remaining fractions dropped, resulting in a House of 105 representatives.³⁰

C. Early Attempts to Limit the Size of the House

Continuing the use of the Jefferson Method for apportionment, from 1790 to 1830, Congress increased the size of the House from 105 to 240.³¹ However, discontent with the Jefferson Method led to the adoption of Daniel Webster's apportionment method for the 1840 census.³² The reason Jefferson's method was ultimately rejected in favor of the Webster Method was a combination of the belief that the Jefferson Method favored large states and Congress's inability to agree on a common people-per-representative ratio.³³ Under the Webster Method, Congress first determined the size of the House. Next, it chose a ratio that could be applied to the total population in order to produce the predetermined size. Then, this

28. *Id.* at 132–33. For example, Delaware had 55,540 people counted in the 1790 census but received two representatives resulting in one representative for every 27,770 people. *Id.* at 132.

29. *Id.* at 133 n.28 (quoting 23 THE PAPERS OF THOMAS JEFFERSON 371 (Charles T. Cullen et al. eds., 1990)) (emphasis in original).

30. *Id.* at 135.

31. BALINSKI & YOUNG, *supra* note 18, at 23.

32. *Id.* at 35.

33. *See id.* at 23–35. Congress's inability to agree on a person per representative figure can be demonstrated in that “[o]n one day alone, 59 different motions to fix a divisor were made in a House containing but 242 members. The values ranged from 30,000 to 140,000, with more than half between 50,159 and 62,172.” *Id.* at 34.

people-per-representative figure was applied to each state's population. The remaining fractions were rounded to the nearest whole number.³⁴ Thus, using the 1830 census figures, New York's 38.526 representatives would become 39 and Pennsylvania's 27.070 representatives would become 27.³⁵ In 1842, Congress, using the Webster Method, passed an apportionment bill that first set the size of Congress at 223 and then set a people-per-representative ratio of 76,680 to 1.³⁶ This resulted in the only reduction in the size of the House in the history of the United States.

After the 1840 apportionment debates, some in Congress felt a Constitutional amendment should be passed to permanently limit the size of the House.³⁷ The attempts to pass a Constitutional amendment to limit the size of the House failed; in 1850, Samuel F. Vinton, a representative from Ohio, proposed a permanent apportionment bill because he believed that the Constitution did not envision an apportionment debate every ten years and that permanently limiting the size of the House did not require a Constitutional amendment.³⁸ This permanent apportionment bill set the size of the House to 233 and adopted the previously discussed Hamilton Method of apportionment.³⁹ Interestingly, the 1850 Congress that enacted this law acknowledged that it was similar to the apportionment law vetoed by Washington in 1792.⁴⁰ Although the Vinton Method remained apportionment law until the early 1900s, its proposed cap on the House was never followed.⁴¹ In fact, in 1852, just two years after the bill passed, the size of the House was expanded to 234 seats, and by 1902, the size of the House had grown to 386.⁴²

The House continued to expand until 1911, when Congress ended its use of the Hamilton Method (as continued under the Vinton law from 1850) in favor of the Webster Method.⁴³ Using the Webster Method, the size of Congress was expanded to 433, which would be expanded to 435 if Arizona and New Mexico joined the Union before the 1920 census.⁴⁴ The reason 433 was chosen as the size of the House was that it was the smallest number that would also "prevent any State from losing a Representa-

34. *Id.* at 32–33.

35. *Id.* at 32.

36. LAURENCE F. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 113 (1941).

37. Previous attempts to amend the Constitution to limit the size of the House to 200 members or double the size of the Senate, had failed. *See* I PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION: 1787–2001, at 54–55 (John R. Vile ed., 2003).

38. BALANSKI & YOUNG, *supra* note 18, at 37.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 36–37.

43. *Id.* at 47.

44. *Id.*

tive.”⁴⁵ This would be the last time Congress increased the size of the House.

D. The 1920s Debate

After the 1920 census, some in Congress began to question whether it was a good idea to continue to increase the size of the House. In fact, before the Census Committee’s first meeting in 1920, its chairman, Isaac Siegel from New York, noted that the House would have to be increased by 60 representatives so that no state would lose a seat.⁴⁶ While acknowledging the precedent of increasing the size of the House, Siegel worried that increasing the House by 60 seats would create space issues, as the House was already crowded.⁴⁷ In reaction to proposals to further increase the House, some members, including two former speakers, openly discussed proposing a constitutional amendment to reduce the size of the House to 300.⁴⁸ While the Census Committee ultimately passed a bill that would increase the House to 483, it also recommended a constitutional amendment to cap the size of the House at 500.⁴⁹

When the bill was presented to Congress in January of 1921, the debate centered around whether it was a good idea to increase the House. Those in favor of increasing the House argued that a larger house would allow representatives to better serve their constituents. They argued it would better aid the internal operations of the House by preventing the power in the House from being consolidated in the hands of a few, preventing lobbyists and party bosses from gaining an increased influence over representatives. Finally, they argued increasing the House would protect rural areas from a decrease in representation and help steady the growing increase in urban power.⁵⁰ Those opposed to increasing the size of the House argued that if it was proper to limit the House at 500 then there was no need to increase the House at all; that a smaller body would work more effectively; and that “only self-interest, state pride, and personal friendship”⁵¹ were behind their opponents’ desire to increase the House membership.⁵² The House rejected the arguments in favor of increasing the House, and an amendment keeping the House at 435 was passed 279 to 76. In spite of the popularity of the bill in the House, it did

45. *Id.* at 47 (quoting *Apportionment of Representatives*, H. R. 12, 62d Cong. (1st Sess. 1911)).

46. CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S*, at 32–33 (1990).

47. *Id.* at 33. In fact, Siegel noted that since the 1911 census, representatives sat at long tables instead of individual desks due to space constraints. *Id.*

48. *Id.*

49. EAGLES, *supra* note 46, at 36.

50. *Id.* at 37–39.

51. *Id.* at 41.

52. *Id.* at 39–41.

not make it out of committee in the Senate.⁵³ After the House rejected a bill to increase the House to 460 in October of 1921, the apportionment controversy ended without any apportionment based on the population from the 1920 census.⁵⁴ This was the only time in U.S. history that Congress, in violation of the Constitution, failed to reapportion after a census.

Throughout the 1920s Congress debated on and off about reapportionment and the size of the House. The issue came to a head in the period between 1927 and 1929. In 1928, E. Hart Fenn, a Republican from Connecticut, pushed a proposal through the Census Committee that kept the House at 435 and provided for automatic reapportionment by the Census Bureau after the 1930 census. The bill called for a continuation of the Webster Method, which was used in the last reapportionment in 1910.⁵⁵ The bill contained other controversial provisions including the establishment of a permanent system of reapportionment in which the President would transmit a statement “showing the population of each state together with an apportionment of representatives to each state based on the existing size of the House.”⁵⁶ This bill would go through several rounds of committee consideration, would survive several failed amendments, and ultimately would be passed in the House by a voice vote in January 1929 as public pressure to reapportion began to grow.⁵⁷

When the Fenn bill came to the Senate, Michigan Senator Arthur Vandenberg fought for several months to see the bill pass the Senate. Calling the failure to reapportion “an ugly constitutional default,”⁵⁸ Vandenberg reintroduced the bill several times before finally getting enough votes to send the bill to committee. After a slightly altered bill that avoided the size of the House issue⁵⁹ made it through committee, the bill was introduced to the Senate for debate. Senator Hugo Black from Alabama was one of the main opponents of the bill. Black argued that the Constitution did not mandate reapportionment every ten years and that giving the President the power to implement the apportionment would weaken the legislative branch, and he objected to the use of the Webster Method because it favored the larger states.⁶⁰ Others argued that the bill should exclude aliens

53. *Id.* at 42.

54. *Id.* at 51.

55. *Id.* at 64–65.

56. GUIDE TO U.S. ELECTIONS: VOLUME II, at 848 (5th ed., CQ Press 2005).

57. EAGLES, *supra* note 46, at 65–73.

58. *Id.* at 74.

59. The title of the bill was changed, the president was to be responsible for the apportionment, and the language to limit the House to 435 and to use the Webster Method of apportionment was changed to provide that the House size would remain at its “existing number” while the Webster Method was described as “the method used in the last preceding apportionment.” *Id.* at 76–77.

60. *Id.* at 75–76.

from being included in the apportionment and thought the bill gave too much power to urban areas.⁶¹

In spite of this opposition, the bill passed in the Senate on May 29, 1929, by a vote of 57–26. The bill was then sent back to the House.⁶² It seems the House had an unspoken conclusion that the House should not be expanded as the debate surrounding this bill only focused on the method in which the number of representatives would be divided. There was no discussion about whether the size of the House should be expanded as there was in the last apportionment debate.

After two controversial amendments were added and then dropped from the bill in the House,⁶³ the bill was sent to a conference committee where, in addition to determining the date of the Census, the bill was changed to require the President to report to Congress the apportionment of the current number of representatives by using: 1) the method used in the past apportionment (the Webster Method); 2) the Webster Method (called “major fractions” in the bill), and 3) the Hill Method (called “equal proportions” in the bill).⁶⁴ The Hill Method was a formula that Joseph A. Hill, chief statistician of the Division of Revision and Results for the Bureau of the Census, proposed to be used in the 1910 apportionment.⁶⁵ Hill’s formula focused on the differences between the people-per-representative ratios among the states by focusing on the difference between the states percentage-wise as opposed to number-wise. Hill explained this difference:

[I]f a state has [an] average constituency [of] 100,000, and another 50,000, their absolute inequality is 50,000; whereas, if one has 75,000 and another 25,000 their absolute inequality is again 50,000, or the same. And yet the inequality in representation seems to be worse in the second case than in the first. For in the first case the state with 50,000 per representative is 100% better off, and in the second case the state with 25,000 per representative is 200% better off. Measuring in this manner, Hill believed, the injustice to the small states as compared with the large states would be redressed.⁶⁶

61. *Id.*

62. *Id.* at 76–78.

63. The first amendment, proposed by Alabama’s Representative Bankhead, “require[d] census takers to list the names and addresses of all aliens and to explain how each got into the country,” while the second amendment, proposed by George Tinkham, called for enforcing the Fourteenth Amendment by excluding “individuals barred from voting for reasons other than rebellion and other crimes” from being included in the census count. *Id.* at 80.

64. BALANSKI & YOUNG, *supra* note 18, at 57.

65. *Id.* at 47.

66. *Id.* at 48.

The Hill Method was viewed as favoring smaller states while the Webster Method was seen as favoring larger states.⁶⁷

By requiring the President to report to Congress using both, but only requiring that the preceding method be used, Congress was postponing the inevitable debate of which method should be used, yet providing for the automatic reapportionment using the previous method if this debate could not be resolved. On April 11, 1929, the House passed the apportionment bill by a voice vote; two days later, on April 13, 1929, the Senate voted 48-37 in approval of the bill. On June 19, 1930, President Hoover signed the bill, which would provide the House with its first apportionment to reflect the population changes over the past nineteen years.⁶⁸ This act “effectively froze the size of the House of Representatives.”⁶⁹

E. The Adoption of the Hill Method

Fortunately for those weary of apportionment debates, the Hill and Webster Methods came out with identical apportionment figures for each state in the 1930 Census, so Congress accepted the figures. The reprieve of apportionment debates would not last long. In the 1940 census, the two methods were nearly identical except that the Webster Method provided six representatives for Arkansas where the Hill Method provided seven, and the Webster Method provided eighteen representatives for Michigan where the Hill Method provided seventeen. The controversy over which state would receive more or fewer representatives came down to which political party wanted the advantage. Arkansas was a strong Democratic state while Michigan leaned Republican. With Democrats holding the presidency and majorities in both Houses, Public Law 291, designating the Hill Method be used in the apportionment of the House, was signed by President Franklin Roosevelt on November 15, 1941.⁷⁰ The passage of this apportionment bill did not involve any debate about the size of the House, and by this point it seems both chambers had conceded the size of the House should remain the same. The Hill Method has been used every apportionment since the 1940 census.⁷¹

This protracted history is necessary to demonstrate that there is a difference between the formula to reapportion the seats of the House of Representatives and the size of the House of Representatives itself. Often the two issues were mixed in together in the minds of the Representatives as

67. *Id.* at 53–55.

68. *Id.* at 82.

69. Kromkowski & Kromkowski, *supra* note 9, at 135.

70. *Id.* at 57–59; *see also* U.S. ELECTIONS, *supra* note 56, at 1636 (indicating Democrats had large majorities in both the House and Senate in the period between 1938 and 1942).

71. *Congressional Apportionment—Historical Perspective*, U.S. CENSUS BUREAU, <http://www.census.gov/population/apportionment/about/history.html> (last visited July 7, 2011).

well as in the minds of the people as sometimes the formulas had a double use of determining both the size of the House and how those representatives were apportioned. Interestingly, the Supreme Court has not addressed the issue regarding the size of the House and has only upheld the method in which the representatives are divided.

III. THE SUPREME COURT AND APPORTIONMENT

A. *One Man, One Vote*

The seminal case on apportionment and district sizes is *Wesberry v. Sanders*.⁷² In *Sanders*, the plaintiffs were citizens of Georgia's Fifth Congressional District. Their complaint was that population disparities between the districts in Georgia "deprived them and voters similarly situated of a right . . . to have their votes . . . given the same weight as the votes of other Georgians."⁷³ The disparity these voters complained of was apparent in the 1960 census: the population in the Fifth Congressional District was 823,680 while the rest of the districts had an average population of 394,312.⁷⁴

After determining that the case was justiciable under the rationale used in *Baker v. Carr*,⁷⁵ the Court proceeded with an in-depth analysis of the historical context of the meaning of Article I, § 2's mandate "that Representatives be chosen 'by the People of the several States.'"⁷⁶ In its historical survey, the Court examined the context behind the Great Compromise and the rationale for its passage. The Court concluded that the "principle solemnly embodied in the Great Compromise [was] equal representation in the House for equal numbers of people."⁷⁷ The Court also examined arguments in favor of the House of Representatives in the ratifying conventions in which supporters argued that "the House of Representatives was meant to be free of the malapportionment then existing in some of the State legislatures."⁷⁸ In light of the historical context of the everyday person having a say in the election his representative in the House, the Court concluded that "[r]eaders surely could have fairly taken this to mean 'one person, one vote.'"⁷⁹ To the *Sanders* Court, "one person, one vote" meant, to the greatest degree possible, congressional districts should have equal numbers of voters.⁸⁰

72. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

73. *Id.* at 3.

74. *Id.*

75. *Baker v. Carr*, 369 U.S. 186 (1962).

76. *Sanders*, 376 U.S. at 7 (quoting U.S. CONST. art I, § 2).

77. *Id.* at 14.

78. *Id.* at 16.

79. *Id.* at 18.

80. *Id.* ("While it may not be possible to draw congressional districts with mathematical precision,

While the Court did not describe what would be an acceptable difference in district sizes, this ruling sent the state legislatures a message that district sizes should not be so blatantly disproportionate. Furthermore, the *Sanders* decision and its progeny were based on cases involving challenges to disproportionate congressional district sizes within the same state.⁸¹ As the Court wrestled with intrastate apportionment issues, the issue arose as to whether the Court would apply the “one person, one vote” standard to interstate apportionments. After the 1990 census, Montana attempted to get an answer to this question.

B. Montana’s Apportionment Challenge

After the 1990 census, the average size of a House of Representative district was 572,466. Montana’s population at the time was 803,655, yet it had one district for the entire state—231,189 more than the average district size. The State of Montana challenged its disproportionate district size by arguing: 1) the Hill apportionment method violated Article I, § 2 of the Constitution because it failed to “achieve the greatest possible equality in the number of individuals per representative”; and 2) the current reapportionment formula violated Article I, § 2 and Article I, § 7 because the apportionment was made by the Department of Commerce and then transmitted automatically to the states rather than Congress taking a vote on the apportionment.⁸² At the district court level and on appeal to the Supreme Court, Montana argued that the Dean Method should be adopted, because under the Dean Method, “Montana would have two districts with an average population of 401,838, representing a deviation from the ideal of 170,638.”⁸³

A three-judge district court held “the principle of equal representation for equal numbers of people that was applied to intrastate districting in *Wesberry v. Sanders* . . . should also be applied to the apportionment of

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.”).

81. See *Karcher v. Daggett*, 462 U.S. 725, 728 (1983) (addressing whether New Jersey’s redistricting after the 1980 census was constitutional where New Jersey’s Fourth and Sixth districts had a difference in population of .6984%); *Connor v. Finch*, 431 U.S. 407, 418 (1977) (examining whether Mississippi’s state election districts were constitutional where the population differences between districts were around 16.5% for Senate districts and 19.3% for House districts); *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973) (holding no violation of the Constitution where difference between house districts was 7.83% and difference in Senate districts was 1.81%); *White v. Weiser*, 412 U.S. 783, 785 (1973) (holding a Texas apportionment bill where the difference from the ideal district size ranged from 2.43% above the ideal district size to 1.7% below was unconstitutional); *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969) (examining whether Missouri’s redistricting plan where the congressional district populations differed from 12,260 below the ideal standard to 13,542 above the ideal standard was constitutional).

82. *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 446 (1992) (internal quotation marks omitted).

83. *Id.* at 461.

seats among the States.”⁸⁴ The three-judge district court then applied the *Wesberry* standard⁸⁵ and held the difference in Montana’s district size and the “ideal” district size was enough to fail this standard. The district court did not defer to Congress’s decision to use the Hill Method because the *Wesberry* decision came out after this was adopted. It then held the current apportionment statute was unconstitutional and enjoined the government from using the current formula to reapportion the House.⁸⁶

On appeal to the Supreme Court, the Department of Commerce acknowledged that some apportionment questions are subject to judicial review. However, its argument was based on the *Baker v. Carr*⁸⁷ decision that held the formula used by Congress to apportion the House was a “political question” and not appropriate for judicial review. In short, the Department of Commerce was arguing that the Constitution set out a wide boundary of apportionment limitations and that cases alleging an overstepping of those boundaries are justiciable, but the Court may not decide anything within the boundary as that is Congress’s domain.⁸⁸

The Supreme Court first examined the history behind apportionment and how Congress arrived at the current formula.⁸⁹ After the historical review, it examined, and quickly rejected, the political question argument made by the Department of Commerce: “Without the need for another exploration of the *Baker* factors, it suffices to say that, as in *Baker* itself and the apportionment cases that followed, the political question doctrine does not place this kind of constitutional interpretation outside the proper domain of the Judiciary.”⁹⁰ The Court then addressed Montana’s argument that the Dean Method should be adopted.

While acknowledging that there was “some force to the argument that the same historical insights that informed [its] construction of Article I, § 2, in the context of intrastate districting should apply here as well,”⁹¹ the Court ultimately refused to apply the “one man, one vote” standard to intrastate apportionment. The Court agreed that the Dean Method would, in fact, bring Montana closer to the ideal district size. However, the cost of bringing Montana closer to the ideal district size would push Washington away from the ideal district size.⁹² Although the Court examined the

84. *Id.* at 446.

85. *Id.*; see *Kirkpatrick*, 394 U.S. at 531 (holding the standard to be population differences that “are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown”).

86. *Montana*, 503 U.S. at 447.

87. *Baker v. Carr*, 369 U.S. 186 (1962).

88. *Montana*, 503 U.S. at 456–57.

89. *Id.* at 447–56.

90. *Id.* at 459.

91. *Id.* at 461.

92. *Id.* at 462. The Court examined the relative difference and the absolute difference from the ideal district size under both the Dean and the Hill methods. Under the Hill Method, the relative

difference in district sizes under both the absolute difference in district size and relative difference in district size, it could not decide whether one method of measuring the difference in district sizes was clearly superior to the other.⁹³

Next, the Court addressed the issue of whether the *Wesberry* standard of “one man, one vote” should be applied for intrastate apportionment. It explained there is a the fundamental difference between apportioning districts within a state and apportioning representatives among many states given the constitutional requirements for apportionment, by noting the constitutional requirement that each state receive one representative regardless of population “makes it virtually impossible to have the same size district in any pair of States, let alone in all 50.”⁹⁴ The Court indicated Congress deserves more deference in apportionment than states because “according to their respective Numbers’ commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard.”⁹⁵

Finally, the Court addressed the district court’s holding that the apportionment law was unconstitutional because Congress did not vote on the apportionment after every census. Rejecting this contention out of hand, the Court endorsed the current way in which the apportionment is performed noting it avoids the partisan conflicts of past apportionments when Congress voted on them directly.⁹⁶ While endorsing the current method of apportionment, the Court did not foreclose any future challenges to the constitutionality of the method of apportionment, stating:

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

difference from ideal was 40.4% for Montana and 5.4% for Washington, while under the Dean Method the difference was 42.5% for Montana and 6.7% for Washington. Meanwhile, the absolute difference for Montana under the Hill method was 231,189 and 29,361 for Washington, while under the Dean method, the absolute difference for Montana was 170,638 and 38,527 for Washington. *Id.* at 461.

93. *Id.* at 463 (“Neither mathematical analysis nor constitutional interpretation provides a conclusive answer. In none of these alternative measures of inequality do we find a substantive principle of commanding constitutional significance.”).

94. *Id.*

95. *Id.* at 464.

96. *Id.* at 465; *see id.* at 466 n.45 (“Congress has the power to delegate the task to the president or other high official, if the size of the House and the method be definitely indicated It is very desirable that this permanent plan should embody the best method now known, so that it may operate for many decades without constant demands for revision Reapportionment will be taken out of politics.”) (quoting Zechariah Chafee, Jr., *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1047 (1929)).

year after year, the public is well served, provided, of course, that any such rule remains open to challenge or change at any time.⁹⁷

C. Is It Possible To Apply “One Man, One Vote” to Intrastate Apportionment?

Until now, most of the challenges to apportionment laws have focused on one particular method as being better able to apportion the representatives. In spite of the *Wesberry* standard giving each person the right to have as near an equal vote as another person, the Court in *Montana* acknowledged the limitations that come with “the need to allocate a fixed number of indivisible Representatives among 50 states of varying populations.”⁹⁸ It did not, however, question why there is a “fixed number” of representatives. It was not always so, and does not have to be so today. While the House has the freedom to choose from among the Hamilton, Webster, or Jefferson Methods to apportion the members, the Court can protect the value of the individual’s vote in intrastate apportionment by holding that Congress may not permanently cap the size of the House.

Perhaps the strongest argument in favor of increasing the size the House is the text of the Constitution. Regarding the apportionment of the House, the Constitution states, “The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.”⁹⁹ This language clearly indicates a type of proportional representation based on the population size. While it does not require a certain ratio, the plain meaning of this phrase is that there should be some ratio of representation of so many people for each representative in the House. Today, the opposite is done. First the size of the House is set, as it has been for nearly 100 years, then the ratio is determined. While there is only a slight mathematical difference, the constitutional implications are great. Rather than forcing Congress to debate on, and be responsible to the public for, the ratio of people-per-representative, Congress, through the Department of Commerce, uses a complicated formula that most Americans do not understand. As a result, the steady erosion of a vote’s value is never debated or even mentioned in the political discourse.

The historical context of apportionment demonstrates that those who participated in the drafting and ratification of the Constitution feared there would be too few representatives for the people in the new federal government. Understanding those fears, for fifty years, the size of the House increased with every apportionment as the Jefferson Method used the same ratio to determine both the size of the House and to determine how those

97. *Montana*, 503 U.S. at 465.

98. *Id.* at 463.

99. U.S. CONST. art. I, § 2.

representatives were apportioned. Even with a change in methods, the fear of too few representatives for the people of the United States led to—except for one time—the House increasing in size every ten years. Finally, a political impasse, not a ratio or formula or a determination about what is the best way to govern the people, led to the 435 number of representatives that is currently in place. Allowing Congress to abdicate its duty to grow as the population grows violates the constitutional tradition of expanding the House that lasted for nearly 130 years.

Forcing Congress to come to some determination about how the House can grow as the population grows will also prevent the very problem that states like Montana faced in *Department of Commerce v. Montana*. As the population grows, keeping the same size of the House will lead to greater discrepancies in district size and the ideal district size. For instance, Jeffrey W. Ladewig and Matthew P. Jasinski found that in 1910 the average discrepancy for the ten states with the largest representational discrepancy was 52,552, while the average discrepancy for the ten states with the smallest representational discrepancy was 1,607. In 2008, they estimated that the average discrepancy for the ten states with the largest representational discrepancy would be 144,490 in 2010 while the average discrepancy for the ten states with the smallest representational discrepancy was estimated to be 3,106 in 2010.¹⁰⁰ They write,

If the House were to increase its membership, small states would be apportioned a relatively small number of additional districts and large states would be apportioned a relatively larger number of additional districts. Together, the distribution problem of population remainders would be less acute, which, in turn, would also better approximate equal representation between the small and large states.¹⁰¹

In fact, even if Montana won in the *Montana* case, “changing apportionment methods would do little to diminish interstate malapportionment.”¹⁰² “Montana may have been wise . . . to argue against . . . the constitutionality of the 1929 Automatic Apportionment Act and the fixed size of House membership.”¹⁰³

It is difficult to tell which way the Supreme Court would have gone had Montana argued that the current size of Congress is unconstitutional. The Supreme Court seemed willing to consider apportionment issues in

100. Jeffrey W. Ladewig & Matthew 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, 92 (2008). At the time of publication of this Note, the actual numbers for 2010 were not available.

101. *Id.* at 93.

102. *Id.* at 96.

103. *Id.* at 100–02.

light of the “one man, one vote” principle espoused in *Wesberry*, and the best way to apply this principle to intrastate apportionments is to expand the size of the House. In *Montana*, the Court seemed to endorse the automatic nature of the current apportionment scheme since many of the divisive apportionment issues from much of U.S. history are no longer an issue. However, fair representation should not be trumped by political ease. Furthermore, it is not impossible to design an automatic apportionment scheme that grows as the population grows. The Court need not decide how Congress should grow the House as the particular details are a political issue. By requiring Congress to address the issue of its representative body, the Court will be able to apply the *Wesberry* standard to intrastate apportionments and ensure each voter’s vote is as near as equal as possible to his fellow citizen of a different state.

IV. BENEFITS OF EXPANDING THE HOUSE

There are a multitude of benefits that would result from expanding the House. However, this section will only address three: 1) It will increase opportunities for the regular person to participate in congressional elections; 2) Representatives will be better able to represent the people in their district; and 3) It will bring the U.S. to parity with other democracies throughout the world.

A. Increased Opportunities for Participation

The Constitution requires House members to be elected every two years.¹⁰⁴ To run for election every two years, to convey a campaign message to 646,952 people every two years is an expensive and grueling process for most individuals. As district sizes have grown, so have the costs to run for office. In the early 1990s it cost around \$500,000 to run for Congress.¹⁰⁵ By 2004, it would take over \$1 million to have a chance at winning an election for the House of Representatives.¹⁰⁶ The average House member’s net worth was \$645,503 in 2008, and 44% were millionaires.¹⁰⁷ For comparison, the average U.S. citizen’s net worth in 2001 was \$53,100,¹⁰⁸ and in 2008, only about 1% of people in the general popula-

104. U.S. CONST. art I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”).

105. Jeffrey H. Bimbaum, *Cost of Congressional Campaign Skyrockets*, WASH. POST, Oct. 3, 2004 at A08, available at <http://www.washingtonpost.com/wp-dyn/articles/A2935-2004Oct2.html>.

106. *Id.* In fact the focus of this article expected to spend \$4.5 million dollars to have a realistic chance at winning in a Congressional district in Philadelphia. *Id.*

107. David M. Lightman, *Congress, where 44 percent are millionaires, freezes pay*, MCCLATCHY NEWSPAPERS, May 3, 2010, <http://www.mcclatchydc.com/2010/05/03/93358/congress-where-44-percent-are.html>.

108. Melynda Doval Wilcox, *Are You Above Average?*, KIPLINGER’S PERSONAL FINANCE

tion were millionaires.¹⁰⁹ Most Americans do not have the financial resources to run for the House of Representatives, an odd prospect for a body supposed to represent them. Even if they are elected, perhaps with financial infusions from a political party, they then immediately have to start raising money because they will need it to run again in two years. The grueling prospect of having to raise millions in campaign funds in what becomes the never-ending campaign, combined with the added duties of being a member of the House of Representatives and the impossible task of representing over 600,000 people, likely dissuades many a talented person from running for office.

Opportunities to participate would be created for racial and political minorities. Smaller district sizes would help to thwart many of the gerrymandering problems that have faced minorities since the 1800s. It is much more difficult for a state legislature to dilute a particular party or minority group if the district sizes are small enough because the larger the districts, the easier it is to dilute minority votes. Some may argue that this is already checked by judicial review. The check of judicial review will continue even if the districts are decreased in size and perhaps less judicial time will be spent on these type of challenges if it is more difficult for the states to dilute the votes in the first place.

Smaller district sizes could help third parties gain a foothold in the American political sphere. Because third parties do not have the financial resources of the Democratic and Republican parties, it is often hard for them to even get a member elected to the House of Representatives. If district sizes are smaller, a third party could focus its effort on one particular district where it has a strong chance of winning. Although the House will be larger and thus, the percentage of one third-party member's vote will remain small, the party's ideas will be heard by Congress. The fact that a candidate in a smaller district would actually be able to meet a higher percentage of those she wanted to represent than she could in a larger district, further increases the chances that a strong third party candidate could win a seat in the House.

B. Representatives Could Represent Better

Between 1980 and 1990, a study was performed on whether district population sizes affected a citizen's ability to contact his representative in the House. The study compared the 20th percentile of the largest districts with the 20th percentile of the smallest districts. The findings indicate that

MAGAZINE, Jan. 2001, available at http://findarticles.com/p/articles/mi_m1318/is_1_55/ai_68147472/.

109. Kevin Drawbaugh, *Get Elected to Congress and Get Rich: Study*, REUTERS (Mar. 13, 2008, 5:04 PM), <http://www.reuters.com/article/idUSN1330776120080313>.

“the difference in the probability of a citizen having contact with the incumbent House member between the top quintile of district population and the bottom quintile of district population exceeds the difference between a citizen represented by a House member of the same party and someone who is not.”¹¹⁰ Even more telling, there is a 9% greater chance of a person in a smaller district giving his incumbent member of the House a rating of “very good” when asked how well the incumbent did at staying in touch with those she represents.¹¹¹ Furthermore, someone living in the smaller districts has a .32 predicted probability of calling his or her member “very helpful”¹¹² while someone living in the 20th percentile of the largest districts only had a .25 probability of the same.¹¹³ While the author of this study cautioned against exaggerating the importance of the findings, he stated that the study has shown that “individuals are less likely to report having contact with and to attempt to contact their House incumbent as the population of the district escalates.”¹¹⁴ Further, “[c]onstituents in larger House districts evaluate the performance of their representatives less favorably and feel less warmly towards them.”¹¹⁵

There is a connection between district sizes and the citizens’ approval of their representatives. It is much more difficult for a representative to serve 649,952¹¹⁶ people as opposed to 500,000 or 300,000. Not only would smaller district sizes lead to increased contact between a representative and the population he or she represents, but increasing the House would also make members of the House better representatives in terms of understanding the subject matter of the bills presented before them. The average member of the House sits on six committees.¹¹⁷ With an election every two years and the campaigning and fundraising associated with such an election, it is nearly impossible for each member of the House to be an expert on six different topics, provide service to their constituents, and have time for family and other personal issues. Increasing the size of the House would increase the pool of members to sit on committees, thus reducing the workload of House members. Fewer staff members would be needed as the representative would have much less on his or her plate, meaning increases in costs associated with paying more Representatives

110. Brian Fredrick, *Constituency Population and Representation in the U.S. House*, 36 AM. POL. RESEARCH 358, 368 (2008).

111. *Id.* at 370.

112. *Id.* at 372.

113. *Id.*

114. *Id.* at 375.

115. *Id.*

116. This is the current figure for how many people each member of the House represents. Ladewig & Jasinski, *supra* note 98, at 100.

117. *The Congressional Committee System*, <http://replay.waybackmachine.org/20101013065034/http://www.rules.house.gov/archives/jcoc2d.htm> (last visited July 7, 2011).

can be offset by reducing the number of staff.¹¹⁸ In a larger House, elected representatives would be better able to master a few topics and be more informed about the legislation on which they vote.

C. Bringing the United States to Parity with Other Democracies

While the United States was one of the first representative governments in the world, it has not kept up with the rest of the world in terms of providing its citizens with more representation. John A. Kromkowski and Charles A. Kromkowski analyzed the number of representatives from 14 representative governments during the years 1987–1990 in their article, *Why 435? A question of Political Arithmetic*. They found that during that period of time, Australia averaged 111,400 people per representative; Canada averaged 86,700; Great Britain averaged 87,500; Malaysia averaged 95,400; Japan averaged 238,600.¹¹⁹ During the same period of time, the U.S. averaged 574,000 people per representative.¹²⁰ Jeffrey W. Ladewig and Matthew P. Jasinski proposed that the United States use a cube-root formula to determine the size of the House in their article *On the Causes and Consequences of and Remedies for Interstate Malapportionment of the U.S. House of Representatives*.¹²¹ In the article, they noted in comparing the countries from the Organization of Economic Cooperation and Development that “[t]he sizes of most countries’ lower chamber hew closely to the cube-root trend line or err on the side of more representatives. The U.S. House stands alone in the degree to which its lower chamber is malapportioned relative to the national population.”¹²² In fact, comparing the U.S. to all representational governments for which there is data, “only India has a larger negative discrepancy (i.e., too few representatives) between its chamber size and the cube root of the population.”¹²³

Increasing the size of the House would bring our federal government more in line with the rest of the representational governments, many of which have based their forms of government on the U.S. model. Increasing the size of the House would strengthen the integrity of the United States in countries where it is pushing tyrannical regimes to provide more representation to their citizens. As it currently stands, the United States

118. This point was made by several other commentators. See Kromkowski & Kromkowski, *supra* note 9, at 143; Jonah Goldberg, *We Need a Bigger House*, NAT’L REV. ONLINE (Oct. 7, 2009, 12:00 AM), <http://www.nationalreview.com/articles/228369/we-need-bigger-house/jonah-goldberg>; Billy House, *Would A Bigger Congress Be Better?* (June 8, 2008), <http://www.mg.washington.com/index.php/news/article/would-a-bigger-congress-be-better/1219/>.

119. Kromkowski & Kromkowski, *supra* note 9, at 137.

120. *Id.*

121. Ladewig & Jasinski, *supra* note 99, at 99.

122. *Id.*

123. *Id.*

may have more leverage to push China, Iran, North Korea, and Afghanistan to give more rights and representation to their citizens if it increased the say that American citizens have in government.

V. CONCLUSION

At what point is each person's vote so diluted that he or she has no meaningful say in any election for Congress? Currently, each House member represents 646,952 people on average.¹²⁴ By 2100, the U.S. Census Bureau has predicted the U.S. population could be around 571 million people—doubling the 2000 population.¹²⁵ Would districts of two million people be unreasonable? What about ten million? Fairness demands that the House of Representatives be expanded at some point in the future. The question is whether this fairness will be enforced by the courts, or whether it will take a fundamental restructuring of the federal government to make it possible.

In terms of a vote's worth, a person living in 1930 had a more valuable vote than he or she would today. No laws have changed, yet the value of every U.S. voter's vote steadily erodes every ten years, and will continue to erode until the size of the House is expanded. Not only would expanding the House protect the value of a vote over time, it will protect the vote's value for citizens of different states. As it currently stands, a vote for a federal representative in Wyoming is almost worth twice as much as a vote for a federal representative in Montana. Expanding the House would better protect the equality of a vote regardless of the state a person lives in. These policy reasons, the "one man, one vote" doctrine, and the historical expansion of the House, all call for an expansion of the House as the population of the U.S. grows.

In writing about the failure of the Constitution to mandate a certain ratio of people-per-representative, the popular Anti-Federalist author known as Brutus wrote:

The number will be so small that but a very few of the most sensible and respectable yeomanry of the country can ever have any knowledge of them: being so far removed from the people, their station will be elevated and important, and they will be considered as ambitious and designing. They will not be viewed by the people

124. *Id.* at 100.

125. Frederick W. Hollman, Tammany J. Mulder, & Jeffrey E. Kallan, *Methodology and Assumptions for the Population Projections of the United States: 1999 to 2100*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/documentation/twps0038/twps0038.html> (last updated July 9, 2008). The high-end prediction was 1 billion by 2100. Haya El Nasser, *Expert: U.S. Population to Hit 1 Billion by 2100*, USA TODAY, http://www.usatoday.com/news/nation/census/2008-04-28-onebillion_N.htm (last updated April 30, 2008).

as part of themselves, but as a body distinct from them, and having separate interests to pursue; the consequence will be, that a perpetual jealousy will exist in the minds of the people against them; their conduct will be narrowly watched; their measures scrutinized; and their laws opposed, evaded, or reluctantly obeyed.¹²⁶

It seems Brutus's worst fears have come true. By mandating an increase in the size of the House, the Supreme Court can ensure the realization of Brutus's fears is undone. Expanding the House will restore the Constitutional vision of representation, protect the dilution of the vote, and ensure that the "one man, one vote" principle can be applied in interstate apportionments—thus guaranteeing as equal a say as possible for voters in the election of Representatives to the House, regardless of the state in which they live.

**Richard Edward McLawhorn Jr.*

126. Ball, *supra* note 7, at 462.

* J.D., University of Alabama, 2011. I would like to thank my wife for her constant support and my father for instilling in me an interest in government and the law.