

CONNECTICUT LAW REVIEW

VOLUME 48

DECEMBER 2015

NUMBER 2

Note

Proportional Union or Paper Confederacy?

JENNIFER KARR

American Founders worked tirelessly to end the lack of representation colonists had faced under British rule. The Constitution requires that each state be apportioned a proportional number of representatives in the House of Representatives. Throughout the first 120 years of the nation's history, the size of the House increased in proportion to population. Though population continued to grow exponentially, the Apportionment Act of 1911 limited the House to 435 representatives. One hundred years later, the population has increased by nearly 220 million, but the number of representatives in the House remains stunted at 435. This mismatched growth and stiltedness results in greatly disparate representation in the federal government between residents of neighboring states, as well as inaccurate outcomes in federal elections.

This Note argues that the Founders' goal of proportionality in representation should be striven for in four ways. First, repealing the limit on representatives in the Apportionment Act of 1911 should be accompanied by a new formula for determining the number of representatives apportioned to each state that resembles the formula used in other western countries. Second, we should change the formula for determining how many representatives each state will receive to a method previously used, which lacks all bias. The second two changes I propose are geared towards fairer presidential elections. First, each state should elect to split Electoral College votes in order to better represent the choices of the electorate. Second, the Twelfth Amendment requirement that in the event of no Electoral College winner the vote must go to the House should be repealed. Enacting these changes will result in a better represented electorate, which will more closely resemble the Founders' vision.

NOTE CONTENTS

| | |
|---|-----|
| I. INTRODUCTION | 597 |
| II. HISTORY AND CURRENT STATUS OF APPORTIONMENT | 599 |
| A. THE GREAT COMPROMISE..... | 599 |
| B. THE ORIGINAL FIRST AMENDMENT..... | 600 |
| C. RATIOS OF REPRESENTATION | 601 |
| D. SUPREME COURT RULINGS | 606 |
| E. JUSTICIABILITY..... | 607 |
| III. PROBLEMS ARISING FROM THE CURRENT SYSTEM..... | 611 |
| IV. MODERNIZING APPORTIONMENT TO REFLECT THE FRAMERS' GOALS..... | 617 |
| A. TWO STEPS TO GREATER PROPORTIONALITY | 617 |
| B. MY PROPOSALS AND THE CONSTITUTIONAL FRAMEWORK | 621 |
| V. THE ELECTORAL COLLEGE AND PROPORTIONALITY..... | 622 |
| A. ELECTORAL COLLEGE VOTE-SPLITTING | 622 |
| B. AMENDING THE CONSTITUTION TO ALLOW FOR PRESIDENTIAL PLURALITY WINNERS | 631 |
| C. MY PROPOSALS AND THE CONSTITUTIONAL FRAMEWORK | 635 |
| VI. CONCLUSION..... | 636 |



Proportional Union or Paper Confederacy?¹

JENNIFER KARR*

I. INTRODUCTION

The current method of representative apportionment in the United States results in wide chasms between average district sizes in each state. For example, Montana has only one district, consisting of its entire population of 994,416.² Conversely, Rhode Island's two districts contain 527,624 people each.³ That means that a voter in Rhode Island is worth 1.88 times that of a voter in Montana. When Montana challenged this apportionment in 1992, the U.S. Supreme Court ruled against the state, finding that granting Montana a second representative (by taking away a representative from Washington) would actually increase the relative deviation from ideal district size in both states.⁴ With a statutory cap at 435 representatives in the House of Representatives, such disparities are unavoidable.

Not only does this statutory cap result in voters in some states counting as more than voters in other states, but it skews the results of presidential elections. Many more people cast votes for president than any other type of representative.⁵ Apportionment affects the amount of representation each state has in Congress, *and* it controls how many Electoral College votes each state receives.⁶ Rhode Island, a state with 1,052,567 residents,

¹ During the Constitutional Convention Debates, James Madison warned that lack of proportional representation would result in a "paper confederacy." *Rule of Representation in the First Branch of the Legislature* [29 June] 1787, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/01-10-02-0049> [<http://perma.cc/K9Y7-KH2B>] (last visited May 2, 2015).

* University of Connecticut School of Law, J.D. Candidate 2016; University of Central Florida, M.F.A. Creative Writing, 2013. First, I would like to thank my family for their love and support. I would especially like to thank Professor Douglas Spencer, for his thorough and insightful comments and suggestions, as well as his support, in writing this Note. Finally, I would like to thank my colleagues on the *Connecticut Law Review* for their thoughtful feedback and editing.

² U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CONGRESSIONAL APPORTIONMENT: 2010 CENSUS BRIEFS 2 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [<http://perma.cc/FJ6R-N5QQ>].

³ *Id.*

⁴ U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 462 (1992).

⁵ See, e.g., Drew Desilver, *Voter Turnout Always Drops Off for Midterm Elections, but Why?*, PEW RES. CTR. (July 24, 2014), <http://www.pewresearch.org/fact-tank/2014/07/24/voter-turnout-always-drops-off-for-midterm-elections-but-why/> [<http://perma.cc/X537-HWB2>] (noting that fewer votes have been cast in midterm elections since 1840).

⁶ *What Is the Electoral College?*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/about.html> [<http://perma.cc/DB5P-ZHZQ>] (last visited May 13, 2015).

received a total of four Electoral College votes in 2010.⁷ Montana, on the other hand, with a resident population of 989,415, only 63,152 less than Rhode Island, received three Electoral College votes.⁸

Among the reasons this apportionment is problematic is that, while the Senate was created as part of The Great Compromise to give small states equal representation in Congress, the House of Representatives was formed to give states proportional representation.⁹ The proportionality of House representation must be questioned when a vote in Rhode Island is worth 1.88 times that of a vote in Montana. The single House representative in Montana is expected to know, understand, and act on the needs of nearly one million people, whereas each representative from Rhode Island need only advocate for a little over 525,000 people. Further, Montana and Rhode Island are vastly different in size and population density. Montana is 145,545.8 square miles, with only 6.8 people per square mile.¹⁰ Rhode Island, on the other hand, is 1,033.81 square miles with 1,018.1 people per square mile.¹¹ A Rhode Island representative has to account for only 525,000 people who live within close proximity to one another, whereas a Montana representative must serve almost twice as many people in a state that is nearly 141 times the size of Rhode Island. Montana's population is 94% that of Rhode Island, yet it receives only 75% of the voting power of Rhode Island in presidential elections.

The problem does not end there. Not only must Congress fix interstate apportionment, but the states must each change how their electors vote in the Electoral College to better reflect the preferences of all voters.

This Note explores the history of apportionment in the United States and argues that an increase in Representatives in the House is necessary in order to preserve proportional representation. Further, this Note suggests splitting Electoral College votes to give each state a greater chance of being adequately represented and the U.S. electorate an increased likelihood of electing the presidential candidate of its choice.

Part II discusses the history and current state of U.S. interstate apportionment. Part III delves into the problems with the current system, and Part IV offers a solution to these problems. Part V discusses improvements that should be made to the Electoral College and Twelfth Amendment, and Part VI applies a solution to the 2000 presidential election in order to show how the result could have been different. Finally,

⁷ U.S. CENSUS BUREAU, *supra* note 2, at 2.

⁸ *Id.*

⁹ See *infra* note 22. For context, note that the Senate deviation, as of 2010, was 66.1.

¹⁰ *State and County QuickFacts: Montana*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/30000.html> [<http://perma.cc/Z4CP-S4GQ>] (last visited May 11, 2015).

¹¹ *State and County QuickFacts: Rhode Island*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/44000.html> [<http://perma.cc/FH2X-CBG5>] (last visited May 11, 2015).

Part VII concludes by reiterating the importance of proportionality and accuracy in apportionment.

II. HISTORY AND CURRENT STATUS OF APPORTIONMENT

Since the founding of the United States, disagreement over how to conduct the apportionment process has led to somewhat varied, and arguably arbitrary, outcomes. The Constitution provides only four requirements: (1) there cannot be more than one representative for every thirty thousand individuals;¹² (2) each state must be given at least one representative;¹³ (3) House districts may not cross state lines;¹⁴ and (4) “[r]epresentatives shall be apportioned among the several States according to their respective numbers.”¹⁵ These requirements are at best a rough guide, but we can look to history for their source and purpose.

A. *The Great Compromise*

The Continental Convention’s apportionment discussions leading up to The Great Compromise¹⁶ have been described as “intense debates”¹⁷ and as being marked by “nearly paralyzing bitterness.”¹⁸ Tension existed between the more populated and less populated states, which were loath to relinquish any power they might glean for themselves.¹⁹ For instance, while James Madison, who hailed from the large state of Virginia, argued for proportional representation,²⁰ delegates from small states argued for “equality of voices,” security for the small states, and “equivalent state sovereignty.”²¹ On July 16, 1787 the Convention approved the Compromise by a margin of only one vote, giving small states equal representation in the Senate and large states proportional representation in the House.²²

¹² U.S. CONST. art. 1, § 2, cl. 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ U.S. CONST. amend. XIV, § 2.

¹⁶ The Great Compromise was a decision voted on by the Founders that provided for the House of Representatives and the Senate. *A Great Compromise*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/A_Great_Compromise.htm [<http://perma.cc/7UUL-UJG5>].

¹⁷ MICHEL L. BALINSKI & H. PEYTON YOUNG, *FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE* 1–2 (1982).

¹⁸ Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U. L. REV. 1091, 1145 (2012).

¹⁹ See BALINSKI & YOUNG, *supra* note 17, at 9 (discussing the small states’ fear of, and the large states’ preference for, proportional representation).

²⁰ See Coenen, *supra* note 18, at 1146 (noting Madison’s adamancy towards proportional representation).

²¹ *Id.* (internal quotation marks omitted).

²² *A Great Compromise*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/A_Great_Compromise.htm [<http://perma.cc/Z9MM-FFQ3>].

While the Great Compromise provided for proportional representation in the House of Representatives, it did not explain precisely how to apportion seats. The only requirements were that congressional districts must consist of at least thirty thousand people, and that each state must have at least one representative.²³ It was expected that “[t]he House of Representatives would indeed grow as the nation enlarged,”²⁴ but what exactly that might entail as far as apportionment remained unclear at the time.

While today the House is set at 435 seats, the Framers, rather, “approached the question . . . as a ratio of representation.”²⁵ Thomas Jefferson worried that a House too small might risk “domination by special interests[.]” and critics noted that a small House “would result in Representatives lacking ‘a proper knowledge of the local circumstances of their large constituencies.’”²⁶ James Madison, on the other hand, asserted that “the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.”²⁷ However, Madison also argued that since the passage of every ten years required a new census, the House would grow to four hundred members within fifty years, thereby rendering moot any concerns of a small House.²⁸ However, he also spoke when there were only thirteen states and fewer than four million people.²⁹

B. *The Original First Amendment*

The first Congress met in 1789 to propose twelve amendments to the Constitution.³⁰ Of these twelve, the third through the twelfth were ratified, but not the first or second.³¹ The originally proposed first amendment remains the only one of the twelve to never have been ratified. It reads:

After the first enumeration required by the first article of the Constitution, there shall be one Representative for every

²³ See *supra* notes 12–15.

²⁴ 1 FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 31, 38 (John P. Kaminski & Richard Leffler eds., 2d ed. 1998).

²⁵ Anthony J. Gaughan, *To End Gerrymandering: The Canadian Model for Reforming the Congressional Redistricting Process in the United States*, 41 CAP. U. L. REV. 999, 1005 (2013).

²⁶ *Id.* at 1006.

²⁷ THE FEDERALIST No. 55 (James Madison).

²⁸ *Id.*

²⁹ 1790 *Fast Facts*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html [<https://perma.cc/M2DW-ZPNY>] (last visited Sept. 28, 2015).

³⁰ *The Bill of Rights*, CHARTERS OF FREEDOM, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html [<http://perma.cc/FUK4-L8Q4>] (last visited Apr. 26, 2015).

³¹ *Id.* The original second amendment stated: “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened[.]” and was ratified in 1992 as the Twenty-Seventh Amendment. *Id.*

thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.³²

Though never ratified, this original first amendment was defeated in 1789 by merely one vote.³³ While the amendment would not affect the size of the House today, this proposed amendment shows that the Framers were deeply concerned with creating a fair and accurate ratio of persons to representatives.

C. Ratios of Representation

With the first inaugural census in 1790 came disagreements over what to do with fractions of seats.³⁴ Should the math determine that a state receive six votes, apportioning six votes would be easy enough. But how should numbers coming out to 5.25, 5.5, and 5.75, be evaluated? Should they be rounded up or down? Or should another method be adopted? Congress adopted Hamilton's method,³⁵ and subsequently other methods were used.³⁶

While the size of the House steadily grew from 1790 to 1910, the Apportionment Act of 1911 established a cap at 435 representatives.³⁷ Thus, the House grew over 120 years based on population, but in the last 105 years, it has remained static. The 1790 census revealed a population of a little over 3.9 million.³⁸ In 1910, the population had grown to just over 92 million.³⁹ By 2010, the population was over 308 million.⁴⁰ Figure 1, below,

³² *Id.*

³³ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1138 (1991).

³⁴ See Gaughan, *supra* note 25, at 1007–08 (discussing disagreements over whether fractions of seats should be rounded up, rounded down, or treated otherwise).

³⁵ For a discussion of Hamilton's method, see *Methods of Apportionment*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/apportionment/methods_of_apportionment.html [<https://perma.cc/QU4T-N5A9>] (last visited Apr. 26, 2015).

³⁶ For a discussion of all the methods the United States has used, see *supra* note 35.

³⁷ Apportionment Act of 1911, ch. 5, § 1, 37 Stat 13, 13–14; see also Gaughan, *supra* note 25, at 1010 (discussing the steady growth of the House of Representatives until the Apportionment Act of 1911).

³⁸ *1790 Fast Facts*, *supra* note 29.

³⁹ *1910 Fast Facts*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1910_fast_facts.html [<https://perma.cc/LMG3-LEA9>] (last visited Sept. 24, 2015).

⁴⁰ *Resident Population Data*, U.S. CENSUS 2010, <http://www.census.gov/2010census/data/apportionment-pop-text.php> [<http://perma.cc/2RHS-TU9T>] (last visited Apr. 26, 2015).

compares U.S. population and House size since 1790.

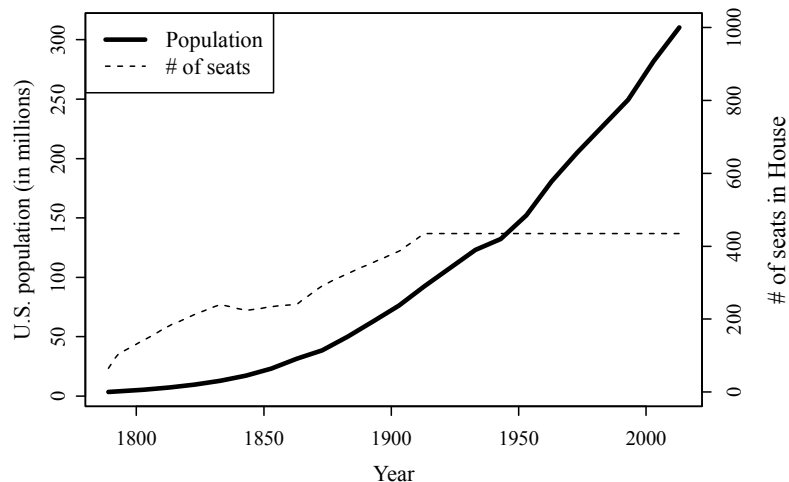


Figure 1

This figure illustrates that, in 1790, one member of the House represented roughly 60,000 people; in 1910, one member represented roughly 212,000; and in 2010, one member represented roughly 710,000 people. In other words, a representative in 2010 was responsible for representing nearly twelve times more constituents than if he had been a representative in 1790. The U.S. Census Bureau projects a rise in population by 2020 to 341.4 million.⁴¹ If the House stays at 435 seats, that will leave one representative for about every 784,828 people, or thirteen times as many constituents per representative as in 1790. Recall that some critics, including Thomas Jefferson, believed the size of the House in 1790 to be too small to adequately represent the People. Given that James Madison expected the House to consist of four hundred members by 1840, it is difficult to imagine that even he would have approved of our current ratio.

A major catalyst for the American Revolution was the colonists' lack of representation in British Parliament.⁴² American colonists were "virtually represented" in the House of Commons.⁴³ Under this virtual

⁴¹ Mitra Toossi, *Labor Force Projections to 2020: A More Slowly Growing Workforce*, 135 MONTHLY LAB. REV. 43, 45 (2012).

⁴² See *American Revolution History*, HISTORY, <http://www.history.com/topics/american-revolution/american-revolution-history> [<http://perma.cc/MA6F-3YHM>] (last visited May 13, 2015).

⁴³ *Proportional Representation*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Origins-Development/Proportional-Representation/> [<http://perma.cc/V3SS-Q6RU>] (last visited May 13, 2015).

representation, members of Parliament were considered to represent everyone, even though there were no representatives in Parliament who were residents of the colonies.⁴⁴ Another—albeit less catchy—way of putting the familiar cry of “No taxation without representation” is that it comes from the colonists’ frustration that the British Parliament kept raising taxes on them without apportioning the colonists any actual representation in Parliament.⁴⁵ Thus, apportionment “was viewed as one of the most fundamental issues to be decided at the Convention.”⁴⁶

Other industrialized nations have addressed apportionment in various ways. Like the United States, Canada performs a decennial census followed by reapportionment in order to facilitate proportional representation.⁴⁷ Since 1867, the number of representatives in the Canadian House of Commons has increased from 181 to 308.⁴⁸ The United Kingdom is divided into 650 constituencies.⁴⁹ Each constituency elects one representative to the House of Commons.⁵⁰ The median constituency size across the United Kingdom varies from 56,800 in Wales to 72,400 in England.⁵¹

Japan has enabled even more malapportionment than the United States. For example, in 2012, the ratio of disparity between the smallest and largest districts was 1:2.38.⁵² However, the Japanese Supreme Court ruled that a ratio of disparity of 1:2 or greater was unconstitutional.⁵³ While Japan is known for its malapportionment, it differs from the United States in that Japanese malapportionment “does not significantly affect election outcomes.”⁵⁴ And despite such disparity, Japan’s apportionment method

⁴⁴ *Id.*

⁴⁵ *American Revolution History*, *supra* note 42 (discussing events leading up to the Revolutionary War).

⁴⁶ BALINSKI & YOUNG, *supra* note 17, at 6.

⁴⁷ *The House of Commons and Its Members*, PARLIAMENT OF CANADA, <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?Sec=Ch04&Seq=2&Language=E> [<http://perma.cc/FDN2-SHMF>] (last visited May 13, 2015).

⁴⁸ HOUSE OF COMMONS PROCEDURE AND PRACTICE (Audrey O’Brien & Marc Bosc eds., 2d ed. 2009), <http://www.parl.gc.ca/procedure-book-livre/document.aspx?sbdid=2ae20cbe-e824-466b-b37c-8941bbc99c37&sbpid=2> [<http://perma.cc/4P5R-7D6L>]; *House of Commons Seat Allocation by Province*, ELECTIONS CANADA, <http://www.elections.ca/content.aspx?section=res&dir=cir/red/allo&document=index&lang=e> [<http://perma.cc/72WM-ET7V>] (last modified Mar. 23, 2012).

⁴⁹ *How MPs Are Elected*, PARLIAMENT.UK, <http://www.parliament.uk/about/mps-and-lords/members/electing-mps/> [<http://perma.cc/27B7-ZP9D>] (last visited May 13, 2015).

⁵⁰ *Id.*

⁵¹ *Parliament Constituencies*, PARLIAMENT.UK, <http://www.parliament.uk/about/how/elections-and-voting/constituencies/> [<http://perma.cc/R6CW-QUS9>] (last visited May 13, 2015).

⁵² Ray Christensen, *Malapportionment and the 2012 House of Representatives Election*, in ROBERT PEKKANEN, STEVEN REED & ETHAN SCHEINER, *JAPAN DECIDES 2012: THE JAPANESE GENERAL ELECTION 139* (2013).

⁵³ *Id.*

⁵⁴ *Id.* at 140.

avoids “contorted or gerrymandered election districts.”⁵⁵ Japan, with a population of 127.9 million, has 475 representatives in its lower chamber (or one representative for every 269,263 people).⁵⁶

India attempts to maintain as close to an equal ratio of representation in its *Lok Sabha* (“House of the People”) between states as possible.⁵⁷ Yet, with a population of 1,236,344,631 (about four times that of the United States), India has only 552 representatives in the *Lok Sabha*.⁵⁸ Different from most Western countries, China has a unicameral Congress known as the National People’s Congress (NPC).⁵⁹ According to the NPC, apportionment of delegates is based on “the proportion of the population” with a minimum of fifteen delegates to each province.⁶⁰ “At the same time, the allocation should make sure that there is appropriate representation of all ethnic groups, people from all walks of life and all political parties within the NPC.”⁶¹ There are nearly 3,000 delegates to the NPC, but some commentators doubt whether the delegates really represent the people.⁶²

Each industrialized nation has addressed apportionment of representatives in its own way, having each faced challenges unique to their histories. Yet, as a matter of empirics, most lower house chambers in the world are about the size of the cube root of the population.⁶³ This phenomenon is known as the Cube Root Law of National Assembly Size (“Cube Root Law”).⁶⁴ See Figure 2 for an illustration of where other countries and the U.S. fall in relation to the cubed root of their populations.

⁵⁵ *Id.*

⁵⁶ *Countries of the World*, WORLD ATLAS, <http://www.worldatlas.com/aatlas/populations/cty/popls.htm> [<http://perma.cc/F6TC-WL7N>] (last modified Aug. 11, 2015); *Strength of the In-House Groups in the House of Representatives*, HOUSE OF REPRESENTATIVES, http://www.shugiin.go.jp/internet/itdb_english.nsf/html/statics/english/strength.htm [<http://perma.cc/9KYT-WEVT>] (last modified Aug. 20, 2015).

⁵⁷ LOK SABHA HOUSE OF THE PEOPLE, <http://loksabha.nic.in/> [<http://perma.cc/4BYV-R82S>] (last visited May 12, 2015).

⁵⁸ *Id.*; *Country Comparison: Population*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> [<https://perma.cc/PGT2-7V9S>] (last visited Aug. 22, 2015).

⁵⁹ *National People’s Congress*, NAT’L PEOPLE’S CONGRESS PEOPLE’S REPUBLIC OF CHINA, http://www.npc.gov.cn/englishnpc/Organization/node_2846.htm [<http://perma.cc/WB66-DL4N>] (last visited May 12, 2015).

⁶⁰ NAT’L PEOPLE’S CONGRESS, <http://www.china.org.cn/english/archiven/27743.htm> [<http://perma.cc/M2NJ-4TVW>] (last visited May 12, 2015).

⁶¹ *Id.*

⁶² See, e.g., *How China Is Ruled: National People’s Congress*, BBC NEWS (Oct. 8, 2012), <http://www.bbc.com/news/world-asia-pacific-13908155> [<http://perma.cc/9N3B-CRY7>] (discussing the National People’s Congress’s lack of independence).

⁶³ Ryan Teague Beckwith, *Is Congress Too Small? Some Think So*, DENVER POST (Feb. 20, 2013, 7:46 AM), <http://www.denverpost.com/politics-national/2013/02/is-congress-too-small-some-think-so/> [<http://perma.cc/K4JL-VMB7>].

⁶⁴ *Id.*

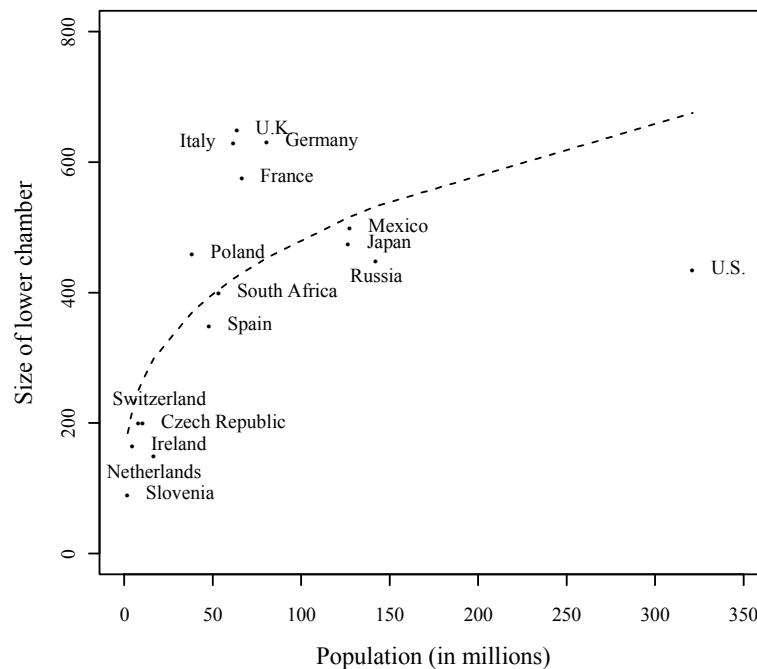


Figure 2⁶⁵

In Figure 2, the x-axis represents the country's population and the y-axis represents the size of the lower house chamber. Note that the dotted line represents the cube root of the population, and that most nations fall somewhere along or near that line. The U.S. is an outlier with a House size of only about sixty-five percent of its population's cube root. The United Kingdom and Italy are also outliers; however, they each have much larger chambers for their population sizes, meaning there are more representatives per person in the United Kingdom and Italy than in most other nations. In other words, the people in these nations are more fully represented than Americans.

The U.S. Supreme Court has agreed that apportionment should be proportional.⁶⁶ However, its navigation of intra- and interstate malapportionment has not been entirely consistent.

⁶⁵ To see the size of each country's population and lower chamber, see *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/> [http://perma.cc/9P9U-CHXN] (last visited Oct. 1, 2015).

⁶⁶ *Wesberry v. Sanders*, 36 U.S. 1, 17 (1964), discussed in greater detail *infra*.

D. Supreme Court Rulings

The Supreme Court has avoided officially ruling on the constitutionality of interstate malapportionment. However, it has ruled that intrastate malapportionment is unconstitutional.⁶⁷ Let us first look at two cases in which the Court at least addressed interstate malapportionment.

When Montana challenged apportionment based on a disparity between its own district size and those of Washington, the Court found that, in matters of interstate apportionment, Congress is entitled to expansive deference.⁶⁸ The Court acknowledged that “common sense supports a test requiring a good-faith effort to achieve precise mathematical equality,”⁶⁹ but found that “the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.”⁷⁰ Yet, in *U.S. Department of Commerce v. Montana*, ruling in favor of Montana would have resulted in “increasing the variance in the *relative* difference between the ideal and the size of the districts in both Montana and Washington.”⁷¹ This, the Court found problematic.

Four years later, the Court evaluated whether changes to the method of conducting the census might be required, and addressed the matter of interstate apportionment.⁷² Though the Court of Appeals applied the *Wesberry v. Sanders* standard of “one person-one vote,” the Supreme Court found that the appellate court “undervalued the significance of the fact that the Constitution makes it impossible to achieve population equality among interstate districts.”⁷³ Though this may sound damning to proponents of interstate apportionment reform, the impossibility of achieving exact population equality should not be a deterrent to improving on our current system for two reasons: (1) *Wesberry* has set the stage for greater equality in interstate apportionment, and (2) the legislature could also make several changes to increase equality without amending the Constitution.

Despite having given little direction for remedying interstate malapportionment, the Court has specifically addressed *intrastate* malapportionment. Writing for the majority in *Wesberry*, Justice Black stated: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good

⁶⁷ *Id.*

⁶⁸ *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 464 (1992) (“[A]pportionment of Representatives among the several States ‘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.”).

⁶⁹ *Id.* at 463 (internal quotation marks omitted).

⁷⁰ *Id.*

⁷¹ *Id.* at 462.

⁷² *Wisconsin v. New York*, 517 U.S. 1, 14, 17 (1996).

⁷³ *Id.* at 17.

citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”⁷⁴ In *Wesberry*, citizens and qualified voters of one Georgia county challenged the apportionment among Georgia districts due to vast discrepancies in their populations.⁷⁵ The Court held “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.”⁷⁶

Justice Black went on to write:

We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished 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 . . . run counter to our fundamental ideas of democratic government⁷⁷

While the Court referred only to intrastate apportionment, at least some argue that the standard should or could be applied to interstate apportionment. Professor Jeffrey Ladewig, a well-known political science scholar, asserts: “There is nothing . . . within these cases that explicitly limits this constitutional requirement to state variations. The constitutional requirement is not ‘one person in one state, one vote in one state.’”⁷⁸

In fact, the Court in *Wisconsin* cited *Wesberry* in stating, “[C]onstitutional requirements make it impossible to achieve precise equality in voting power nationwide.”⁷⁹ However, “the impossibility of achieving precise mathematical equality is no excuse for [the Federal Government] not making [the] mandated good-faith effort.”⁸⁰

Though the Court remains reluctant to formally rule on interstate apportionment, leaving the issue to Congress, it has at least moved in the direction of “one person, one vote” by stating such with regard to intrastate districts.

E. *Justiciability*

Another dimension to these cases (in addition to equal representation) was justiciability, with the Court articulating new ideas about the Political

⁷⁴ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁷⁵ *Id.* at 2.

⁷⁶ *Id.* at 7–8 (internal quotation marks omitted).

⁷⁷ *Id.* at 8.

⁷⁸ Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125, 1140 (2011).

⁷⁹ *Wisconsin v. New York*, 517 U.S. 1, 16 (1996).

⁸⁰ *Id.* (internal quotation marks omitted).

Question Doctrine.

Under Article III of the Constitution, “the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”⁸¹ In *Marbury v. Madison*, the Court held, “questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”⁸² This formed the “Political Question Doctrine.”

Current case law would support an interstate apportionment claim as justiciable, and not a matter of political question. In *Baker v. Carr*, the Court evaluated the justiciability of an intrastate malapportionment claim.⁸³ Baker argued, under the Fourteenth Amendment, that the Tennessee legislature’s failure to redistrict since 1901, following its 1900 census, deprived him of equal protection.⁸⁴ The Court found that dismissing his complaint due to the political question doctrine would “be justified only if that claim were so attenuated and unsubstantial as to be absolutely devoid of merit, or frivolous.”⁸⁵ The Court noted that “the mere fact that the suit seeks protection of a political right does not mean it presents a political question.”⁸⁶ It went on to hold, “Appellants’ claim that they are being denied equal protection is justiciable, and if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.”⁸⁷ So, from *Baker* we learned not only that apportionment claims can be justiciable, but that they can be evaluated under the Equal Protection Clause.

Two years later, in *Wesberry*, the Court once again visited the issue of political questions.⁸⁸ In *Wesberry*, citizens of Georgia claimed population disparities between districts within the state “deprived them and voters similarly situated of a right under the Federal Constitution to have their votes for Congressmen given the same weight as the votes of other Georgians.”⁸⁹ In upholding its ruling in *Baker*, the *Wesberry* Court found, “[t]he right to vote is too important in our free society to be stripped.”⁹⁰

The issue of political questions arose in an interstate apportionment

⁸¹ U.S. CONST. art. 3, § 2.

⁸² *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

⁸³ *Baker v. Carr*, 369 U.S. 186 (1962).

⁸⁴ *Id.* at 199.

⁸⁵ *Id.* (internal quotation marks omitted) (citations omitted).

⁸⁶ *Id.* at 209.

⁸⁷ *Id.* at 209–10 (internal quotation marks omitted) (citations omitted). This case overturned *Colegrove v. Green*, 328 U.S. 549, 556 (1946), in which the Court held that challenges to apportionment of congressional districts raised only nonjusticiable political questions.

⁸⁸ *Wesberry v. Sanders*, 376 U.S. 1, 3–4 (1964).

⁸⁹ *Id.* at 3.

⁹⁰ *Id.* at 7.

case as well.⁹¹ In *U.S. Department of Commerce v. Montana*, the Court found that the issue was “political in the same sense that *Baker v. Carr* was a political case.”⁹² The Court went on to hold that “the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary.”⁹³

The Court has rightly left cases of apportionment open to the judiciary. The *Baker* Court found justiciability in malapportionment which resulted in discrimination. The plaintiffs had faced individual harms which could be remedied. Further, the Court found that they were protected under the Equal Protection Clause. Shutting down the judiciary to issues of apportionment would result in voters being subjected to discrimination without an avenue for relief. Professors Williams and MacDonald describe the holdings of *Baker* and *Wesberry* as decisions that “empower the citizenry to achieve boundless progress in the future by being able to vote effectively.”⁹⁴

Consistency demands that the courts take up the issue of interstate apportionment, and do so with the aim (or at least motivating desire) of equalizing district population. The Constitution uses the phrase “among the several states,”⁹⁵ not “within” the several states. While the Court has left the matter of interstate apportionment to the discretion of Congress, the Court should rule on its constitutionality, based on the holdings in previous cases. In *Wesberry*, the Court relied on this wording when it applied a “one person, one vote” standard,⁹⁶ leaving no reason to assume this should only apply to apportionment within states. On the contrary, more equality in interstate apportionment may rise to an even higher level of importance, since interstate apportionment affects who will become president.

In *Wesberry*, the Court stated:

A single Congressman represents from two to three times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts. The apportionment statute *thus contracts the value of some votes 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

⁹¹ *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442 (1992).

⁹² *Id.* at 458 (internal quotation marks omitted).

⁹³ *Id.*

⁹⁴ Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and its Twelfth Amendment Restatement: Challenging Our Nation’s Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 245 (1994).

⁹⁵ U.S. CONST. amend XIV, § 2 (emphasis added).

⁹⁶ *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

this statute cannot stand.⁹⁷

There is no reason this standard should not be applied to interstate apportionment. In *Wesberry*'s most egregious instance, there was a difference of over 550,000 individuals between Georgia districts.⁹⁸ If such a difference contracts the votes of some, then large differences in interstate district sizes must contract the votes of many.

Citing to *Wesberry*, the Court in *Reynolds v. Sims* struck down malapportionment of the Alabama state legislature under the Equal Protection Clause.⁹⁹ Chief Justice Warren wrote:

Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, or economic status.¹⁰⁰

While the *Reynolds* Court ruled only on apportionment as related to electing state legislators,¹⁰¹ the same logic can easily be applied to national elections. Fair and effective representation, as well as avoiding vote dilution, were clearly the Framers' goals as they relate to federal elections as much as state elections.¹⁰²

Though a pure "one person one vote" standard may not be feasible in regard to interstate apportionment because not more than one representative can be apportioned per thirty thousand people, the inability for perfection does not reduce the necessity for striving for as close to equal district sizes as possible. A deviation of ten percent or less is accepted for districts voting for state legislatures.¹⁰³ The Supreme Court has not presented justification for not applying a similar standard to interstate apportionment.¹⁰⁴ The Court need not establish a ten percent limit

⁹⁷ *Id.* at 7 (emphasis added).

⁹⁸ *Id.* at 2.

⁹⁹ *Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

¹⁰⁰ *Id.* at 565–66 (citations omitted).

¹⁰¹ *Id.* at 566.

¹⁰² *See supra* Part II.A–C.

¹⁰³ MARK JONATHAN MCKENZIE, BEYOND PARTISANSHIP? FEDERAL COURTS, STATE COMMISSIONS, AND REDISTRICTING 32–33 (2007) (discussing how the Court seems to have determined a ten percent (or smaller) deviation is generally accepted).

¹⁰⁴ The Court only said Congress should handle this issue and it would be impossible for exactness in interstate apportionment. *See U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 464 (1992) ("The constitutional framework that generated the need for compromise in the apportionment

on interstate malapportionment, but it should find a reasonable range that could be sustainable under the other proposed changes. Because some small states have only one district, which could throw off percentages, the Court should look at how far a state's district sizes deviate from the average district size in determining the constitutionality of apportionment.

Based on my proposals as applied to the 2000 census, the average district's deviation from the average district size would be about seven percent.¹⁰⁵ While our current system allows for a difference between the district sizes in Rhode Island and Montana of 466,792, had my method been applied in 2000, the largest disparity between district sizes would have been 264,778 (between North Dakota's single district and South Dakota's two districts). Fourteen states would have deviations from the average of less than ten thousand people. Thirty-five states would deviate by less than twenty-five thousand people; and only four states (including the District of Columbia and the single-district states of Vermont, North Dakota, and Alaska) would deviate by more than one hundred thousand people. If those three single district states and Washington D.C. are taken out of the equation, the average district size disparity is just over 21,254, or 4.7% away from average. The average district size would also be cut down to 477,619 people.

An interstate malapportionment challenge should not face opposition as it relates to the Political Question Doctrine. Though the Court has historically left the issue to Congress, Congress has failed to act. Because the Court was vehement in finding intrastate malapportionment unjust, it should rule the same way with regard to interstate malapportionment. Rather than look at disparities between states, the Court might find it easier in determining a cut off for deviations from the average district size of all states. Once the Court has made such a ruling, Congress will have to act to change how to apportion representatives.

III. PROBLEMS ARISING FROM THE CURRENT SYSTEM

With such broadly constructed Constitutional requirements,¹⁰⁶ disagreement over apportionment in the twenty-first century is an inevitability. Three of the four requirements instruct only on a minimum and maximum number of representatives as well as restrict House districts from crossing state lines. The fourth requirement—that “[r]epresentatives shall be apportioned among the several states according to their numbers”¹⁰⁷—could lead to several different understandings. Pertinent

process must also delegate to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders.”).

¹⁰⁵ See *infra* Part VI.

¹⁰⁶ *Supra* notes 12–15 and accompanying text.

¹⁰⁷ U.S. CONST. amend XIV.

questions remain unanswered: Is it really acceptable to cap the House at 435 representatives? For how long? How equal must interstate district sizes be? The Constitution makes no mention of interstate or intrastate apportionment, yet the Court has read into it a “one person one vote” standard.¹⁰⁸ Currently, House representatives are technically apportioned among the states based on their respective numbers, though the differences between district sizes threatens the constitutionality of that apportionment—as the gaps in district sizes between states grow, the ability to claim that representatives are apportioned according to their numbers weakens. The lack of guidelines allows for a wide range of interpretation by both the Legislature and the Court. This lack of guidance also led to the passing of the Apportionment Act of 1911 and its century-plus-long hold on the size of the House.

As interstate apportionment proportionality decreases as a result of the minimal constitutional requirements, so does the accuracy in how we choose the president.¹⁰⁹ Thomas Jefferson said: “No invasions of the Constitution are fundamentally so dangerous as the tricks played [by members of Congress] on their own numbers, apportionment, and other circumstances respecting themselves.”¹¹⁰ Leaving the cap on representatives at 435 inevitably results in (1) states with an unacceptably high, and not to mention growing, number of under-represented individuals; and (2) states with over-represented individuals.¹¹¹ This mixture of states where individuals are over- and under-represented defies the “one person one vote” standard set out by the Court in *Wesberry*. Professor Ladewig points out, “after the 2000 reapportionment, one example of interstate malapportionment was more than 21 times greater than the intrastate malapportionment [previously] ruled unconstitutional.”¹¹²

To John Adams, fairness in elections was essential. In his essay, *Thoughts on Government*, he wrote:

The principal difficulty lies, and the greatest care should be

¹⁰⁸ See *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964) (discussing the Founders’ intention regarding Article I, Section 2 of the Constitution).

¹⁰⁹ This is due to widening gaps between the power residents of under- and over-represented states have in Washington D.C. and in the Electoral College.

¹¹⁰ Thomas Jefferson, *Opinion on the Bill Apportioning Representation* (Apr. 4, 1792), in 5 THE WRITINGS OF THOMAS JEFFERSON 500 (Paul Leicester Ford ed., 1895).

¹¹¹ See, e.g., 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, 93 (2008) (giving examples of states in which citizens are under- and over-represented). In fact, “The average discrepancy of the ten states with the smallest apportionment discrepancy was 3,796 individuals; of the ten states with greatest apportionment discrepancy, 112,561 individuals: a difference of nearly 30 times.” *Id.*

¹¹² *Id.*

employed, in constituting this representative assembly. It should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this assembly to do strict justice at all times, it should be an equal representation, or, in other words, equal interests among the people should have equal interests in it. Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections.¹¹³

At the Constitutional Convention debates (“Debates”), James Wilson said: “The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively.”¹¹⁴ While James Madison championed fairness and proportionality in representation in *The Federalist*,¹¹⁵ Brutus did the same in *The Anti-Federalist*: “It is a matter of the highest importance, in forming this representation, that it be so constituted as to be capable of understanding the true interests of the society There is no possible way to effect this but by an equal, full and fair representation.”¹¹⁶ During the Debates, James Madison said: “If the power is not immediately derived from the people in proportion to their numbers, we may make a paper confederacy, but that will be all.”¹¹⁷

Given that the Framers intended proportional representation, and given the text of the Constitution,¹¹⁸ the fact that the legislature curbed the growth of the House of Representatives, as well as the ability for individuals to be proportionally represented, may not be entirely constitutional. When looking at the actual statistics, the issue becomes even more problematic. For example, the 2000 reapportionment resulted in each person’s vote from Montana being worth less than three-fifths of a person’s from Wyoming.¹¹⁹ Smaller states, in general, will face greater levels of malapportionment than larger states (whether that be by under- or over-representation).¹²⁰

As it currently stands, even medium-sized states are not proportionally represented. For example, based on the 2010 apportionment, North Carolina’s districts run about 23,000 people greater than the average, whereas South Carolina’s districts run about 49,000 people less than the

¹¹³ John Adams, *Thoughts on Government* 4:86–93, UNIV. CHICAGO, <http://press-pubs.uchicago.edu/founders/documents/v1ch4s5.html> [<http://perma.cc/78VM-5JMM>] (last visited Aug. 22, 2015).

¹¹⁴ Frederick Upham Adams, *The New Democracy*, 3 NEW TIME 29, 32 (1898).

¹¹⁵ *Supra* note 27 and accompanying text.

¹¹⁶ THE COMPLETE ANTI-FEDERALIST 382–83 (Herbert J. Storing ed., 1981).

¹¹⁷ *Rule of Representation in the First Branch of the Legislature* [29 June] 1787, *supra* note 1.

¹¹⁸ The Fourteenth Amendment states, “Representatives shall be apportioned among the several States according to their respective numbers.” U.S. CONST. amend XIV (emphasis added).

¹¹⁹ Ladewig, *supra* note 78, at 1131.

¹²⁰ *Id.* at 1132.

average district, for a total disparity between the Carolinas of 72,000 people per district.¹²¹ A vote in Oregon is worth about eighty-six percent of a vote in Minnesota.¹²² Districts in Louisiana comprise about 46,000 more people than the average, and in Washington about 37,600 less, for a total disparity between the states of about 83,600 per district.¹²³ And, of course, the disparities between small states are even more egregious. Districts in Iowa are made up of nearly 153,000 more individuals than districts in Nebraska.¹²⁴ Delaware's single district boasts 900,877 people, 187,902 above average, while Vermont's single district comprises 630,337, 82,600 below average.¹²⁵ The greatest disparity lies between Wyoming's single district of 568,300 people and Montana's single district of 994,416 people (a 426,116 difference).¹²⁶ While the large states experience the least malapportionment, even the difference in district sizes between Florida and Ohio is about 23,000, and those states are made up of many more districts than the small states.¹²⁷ So, each of Ohio's sixteen districts are made up of 23,000 fewer individuals than each of Florida's twenty-seven districts. While an exact "one person one vote" standard with regard to interstate apportionment may, indeed, be unattainable, deliberately stopping the growth of the House, and therefore lessening the proportionality of representation, only serves to undercut that standard.

And let us not forget the reason the House of Representatives exists: so that the people can be represented in government.¹²⁸ During the Debates, George Mason said, "Representatives should sympathize with their constituents; [they] should think as they think, and feel as they feel."¹²⁹ As discussed previously, as district sizes increase, the ability for Representatives to know and adequately represent their constituents decreases.¹³⁰ Further, with such a small group of representatives, special interest groups can buy the support of enough Representatives to pass bills

¹²¹ U.S. CENSUS BUREAU, *supra* note 2, at 2. Note that the average district size is about 710,000. *Id.*

¹²²

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/content/learn/> [<http://perma.cc/25TX-87H5>] (last visited May 14, 2015) ("[E]ach representative is elected to a two-year term serving the people of a specific congressional district.").

¹²⁹ JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE AND THE CULTURE OF PERFORMANCE* 43 (1993).

¹³⁰ See BALINSKI & YOUNG, *supra* note 17, at 30 (quoting and discussing Daniel Webster's Senate address, which emphasized the importance of as near proportional representation as possible); see also Gaughan, *supra* note 25, at 1006 (discussing the importance to early Americans of larger bodies of representation).

they support.¹³¹ One journalist argues that “[t]he House of Representatives has become another U.S. Senate where a rarefied few supposedly represents the needs of the many.”¹³² He asserts that the relatively small size of the House is “the main reason that hyper-partisanship and special interests seem to control the legislative agenda.”¹³³

Lack of proportionality also results in greater competition in states where district sizes are larger than the average.¹³⁴ For example, constituents from Montana have to compete nearly twice as hard for their representative’s ear than constituents from Wyoming. Worse still, Montana and Wyoming border each other, so a person living next to the border on the Wyoming side will have more power in Washington than someone living just across the border on the Montana side. In 1977, Richard Fenno Jr. wrote about the problematic relationship between representatives and constituents.¹³⁵ The 1970 census revealed a population of 203,302,031.¹³⁶ By 2010, the United States had more than 105 million more people than in 1970, when such constituency problems were studied.¹³⁷ Yet, despite a fifty percent increase in the U.S. population, the House has remained stagnant at 435 representatives.¹³⁸ The average representative in 1970 needed to understand constituencies of about 467,361 people.¹³⁹ The average representative in 2010 represented 709,760 people.¹⁴⁰ Recall that the average representative in the early twentieth century was expected to speak for just over 200,000 individuals, more than three times fewer than today.¹⁴¹

Another problem with the current system is that apportionment is governed by a complicated mathematical formula, the Huntington-Hill

¹³¹ Brian Flynn, *What’s Wrong with Congress? It’s Not Big Enough*, CNN (Mar. 3, 2012), <http://www.cnn.com/2012/03/09/opinion/flynn-expand-congress/> [<http://perma.cc/NWT5-2J46>].

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Election System*, 141 U. PA. L. REV. 1991, 2024 n.162 (1993) (noting that constituents of a state with district sizes of 700,000 will have to compete seven times as hard for representation as a state with district sizes of 100,000).

¹³⁵ Richard F. Fenno Jr., *U.S. House Members and Their Constituencies: An Exploration*, 71 AM. POL. SCI. REV. 883, 887, 893, 894, 898, 900 (1977) (discussing various disconnects between representatives and their constituents, such as differentiating between who might and who might not vote for the representative, the amount of time representatives have to spend in their home districts, and viewing constituencies as homogenous).

¹³⁶ *Population, Housing Units, Area Measurements, and Density: 1790 to 1990*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/censusdata/files/table-2.pdf> [<http://perma.cc/CSE5-J225>] (last visited Nov. 30, 2015).

¹³⁷ *Resident Population Data*, *supra* note 40.

¹³⁸ *The U.S. House of Representatives*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/content/learn/> [<http://perma.cc/L93Z-5XXM>] (last updated Sept. 22, 2015).

¹³⁹ 203,302,031 divided by 435 equals 467,360.9908.

¹⁴⁰ 308,745,538 divided by 435 equals 709,759.8575.

¹⁴¹ See *supra* Part II.C.

Method (“Hill Method”) that is not intuitive and that can lead to bias. The Hill Method requires first dividing the population by the number of representatives.¹⁴² Using 2010 data, the solution to this equation is 709,759.8575. The population of each state is then divided by this number.¹⁴³ Each state is assigned an “upper quotient” and “lower quotient.” Next, one must determine each state’s geometric mean.¹⁴⁴ This is done by first multiplying the upper and lower quotient by each other, and then taking the square root of the product.¹⁴⁵ If the geometric mean is less than the quotient, the state gets an additional representative, but if the geometric mean is greater than the quotient, the state rounds down. Consider the following table featuring four states as examples:

| State | Population | Quotient | Lower Quot. | Upper Quot. | Geom. Mean | Seats App’d |
|--------|------------|----------|-------------|-------------|------------|-------------|
| Calif. | 37,253,956 | 52.488 | 52 | 53 | 52.498 | 52 |
| Ga. | 9,687,653 | 13.65 | 13 | 14 | 13.49 | 14 |
| Iowa | 3,046,355 | 4.29 | 4 | 5 | 4.47 | 4 |
| Mont. | 989,415 | 1.39 | 1 | 2 | 1.73 | 1 |

Table 1

But what if, after determining how many seats each state should be apportioned, the total number does not come out to 435? In that case, one must find a modified divisor by trial and error until the correct number of seats is found.¹⁴⁶

While we currently use the Hill Method, this has not always been the case. Changes in the use of apportionment methods have largely been politically motivated. Complaints that one method affected northern states differently than southern states were succeeded by complaints that another method affected large states differently than small states.¹⁴⁷ Using an apportionment method that lacks bias is the apolitical and fair solution.

Keeping the House from gaining more than 435 seats may have even more consequences than poor representation. Professor Gaughan et al.

¹⁴² *Methods of Apportionment*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/apportionment/methods_of_apportionment.html [http://perma.cc/DG9R-MZ6F] (last visited Aug. 19, 2015).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Apportionment Methods*, U. ALA., <http://www.ctl.ua.edu/math103/apportionment/appmeth.htm> [http://perma.cc/UGL7-U569] (last visited Aug. 19, 2015).

¹⁴⁷ BALINSKI & YOUNG, *supra* note 17, at 35 (“The United States congressional debates of 1792 through 1832 were largely fired by sectional and political self-interest in the face of growth and of relative shifts in population.”).

claim that the 435-seat cap allows “federal apportionment law [to] aid[] and abet[] partisan gerrymandering.”¹⁴⁸ For example, in the 2010 election, more people voted for Democratic candidates than Republicans, yet Republicans won the House due to gerrymandering.¹⁴⁹

Our current method of apportionment fails to proportionally represent the people, as it was intended to do, resulting in a lack of fairness and accuracy. Representatives are expected to understand the needs of twelve times as many constituents as when the country was founded.¹⁵⁰ Other consequences, like partisan gerrymandering, infect the integrity of the system. A solution would return to the Framers’ vision by increasing accuracy and fairness through proportionality.

IV. MODERNIZING APPORTIONMENT TO REFLECT THE FRAMERS’ GOALS

In this Part, I discuss the two main steps Congress should take in order to improve interstate apportionment. In Part V, I discuss further solutions that build upon these two core solutions.

A. *Two Steps to Greater Proportionality*

First, the Cube Root Law should govern the number of representatives in the House. Recall that under the Cube Root Law, the number of representatives should be approximately equal to the cubed root of the total population.¹⁵¹ This equation expedites efficiency while not overwhelming the House with a directly proportional number of representatives.¹⁵² In 2010, the total U.S. population was 308,745,538.¹⁵³ The rounded cubed root of this population is 676.¹⁵⁴

Implementing the Cube Root Law requires only repealing Section 1 of the Apportionment Act of 1911¹⁵⁵ and passing a new, up to date, apportionment act. A constitutional amendment would also work, but a statute is preferable for procedural reasons because a statute is easier and

¹⁴⁸ Gaughan, *supra* note 25, at 1025; *see also* H. Peyton Young, *Dividing the House: Why Congress Should Reinstates an Old Reapportionment Formula*, BROOKINGS POL’Y BRIEF SERIES (Aug. 2001), <http://www.brookings.edu/research/papers/2001/08/politics-young> [<http://perma.cc/65YA-R6MN>] (arguing that politics play a part in choosing apportionment methods).

¹⁴⁹ *See* Dana Milbank, *Republicans’ Stacked Deck in the House*, WASH. POST, Jan. 6, 2013, at A15 (asserting that, due to redistricting, the “Republican House majority is impervious to the will of the electorate”).

¹⁵⁰ *Supra* Part II.C.

¹⁵¹ BRIAN FREDERICK, CONGRESSIONAL REPRESENTATION & CONSTITUENTS: THE CASE FOR INCREASING THE U.S. HOUSE OF REPRESENTATIVES 15 (2010).

¹⁵² *Id.* at 15–16. For a longer discussion of the Cube Root Law, *see* FREDERICK, *supra* note 151. Notably, if the House was assigned one seat per 30,000 people, there would be 10,291 representatives.

¹⁵³ *Resident Population Data*, *supra* note 40.

¹⁵⁴ Taking the cubed root of 308,745,538 results in 675.875799983, which would be rounded up to 676.

¹⁵⁵ Apportionment Act of 1911, ch. 5, § 1, 37 Stat 13, 13–14.

more likely to pass. Moreover, should future legislators find reason to change the method of apportionment to suit their modern needs, they would find it easier to repeal such a statute and create their own apportionment act than to pass and ratify a new constitutional amendment.

My second proposal is to replace the Hill Method with the simpler, fairer, and more intuitive Webster Method. The Webster Method requires first determining a standard divisor by dividing the U.S. population by the number of representatives.¹⁵⁶ Then, each state's population is divided by the standard divisor.¹⁵⁷ The solutions are simply rounded up or down.¹⁵⁸ In the following table, I show the results of applying the Cube Root Law and the Webster Method to the 2000 House of Representatives. Using the Cube Root Law would result in a House of approximately 655 representatives.¹⁵⁹

| State | Pop/Div | State | Pop/Div |
|---------------|----------|----------------|----------|
| Alabama | 10.35551 | Montana | 2.10085 |
| Alaska | 1.45987 | Nebraska | 3.98484 |
| Arizona | 11.94718 | Nevada | 4.65313 |
| Arkansas | 6.22527 | New Hampshire | 2.87765 |
| California | 78.87349 | New Jersey | 19.59364 |
| Colorado | 10.01591 | New Mexico | 4.23582 |
| Connecticut | 7.93019 | New York | 44.18856 |
| Delaware | 1.83114 | North Carolina | 18.74362 |
| Florida | 37.21650 | North Dakota | 1.49542 |
| Georgia | 19.06296 | Ohio | 26.43691 |
| Hawaii | 2.82118 | Oklahoma | 8.03518 |
| Idaho | 3.01310 | Oregon | 7.96706 |
| Illinois | 28.91955 | Pennsylvania | 28.59765 |
| Indiana | 14.15901 | Rhode Island | 2.44111 |
| Iowa | 6.81423 | South Carolina | 9.34236 |
| Kansas | 6.26053 | South Dakota | 1.75772 |
| Kentucky | 9.41165 | Tennessee | 13.24805 |
| Louisiana | 10.40645 | Texas | 48.55553 |
| Maine | 2.96878 | Utah | 5.20015 |
| Maryland | 12.33339 | Vermont | 1.41771 |
| Massachusetts | 14.78450 | Virginia | 16.48302 |
| Michigan | 23.14265 | Washington | 13.72504 |
| Minnesota | 11.45549 | West Virginia | 4.21090 |

¹⁵⁶ *Methods of Apportionment*, *supra* note 35.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Resident Population Data*, *supra* note 40. The cubed root of the 2000 population, 281,421,906, is 655.318809119, which can be rounded down to 655.

| | | | |
|-------------|----------|-----------|----------|
| Mississippi | 6.62406 | Wisconsin | 12.48984 |
| Missouri | 13.02900 | Wyoming | 1.14982 |
| | | DC | 1.33209 |

Table 2¹⁶⁰

After rounding up and down, the final representative count for each state would be as follows:

| State | Reps. | State | Reps. |
|---------------|-------|----------------|-------|
| Alabama | 10 | Montana | 2 |
| Alaska | 1 | Nebraska | 4 |
| Arizona | 12 | Nevada | 5 |
| Arkansas | 6 | New Hampshire | 3 |
| California | 79 | New Jersey | 20 |
| Colorado | 10 | New Mexico | 4 |
| Connecticut | 8 | New York | 44 |
| Delaware | 2 | North Carolina | 19 |
| Florida | 37 | North Dakota | 1 |
| Georgia | 19 | Ohio | 26 |
| Hawaii | 3 | Oklahoma | 8 |
| Idaho | 3 | Oregon | 8 |
| Illinois | 29 | Pennsylvania | 29 |
| Indiana | 14 | Rhode Island | 2 |
| Iowa | 7 | South Carolina | 9 |
| Kansas | 6 | South Dakota | 2 |
| Kentucky | 9 | Tennessee | 13 |
| Louisiana | 10 | Texas | 49 |
| Maine | 3 | Utah | 5 |
| Maryland | 12 | Vermont | 1 |
| Massachusetts | 15 | Virginia | 16 |
| Michigan | 23 | Washington | 14 |
| Minnesota | 11 | West Virginia | 4 |
| Mississippi | 7 | Wisconsin | 12 |
| Missouri | 13 | Wyoming | 1 |

¹⁶⁰ Though the District of Columbia has a delegate in the House of Representatives, it does not get a vote in the House, nor does it have any senators because it is not a state. *Directory of Representatives*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/representatives/> [<http://perma.cc/ZU2H-GGBJ>] (last visited May 8, 2015); DC.GOV, <http://dc.gov/page/statehood> [<http://perma.cc/9B48-RBNG>] (last visited May 8, 2015). However, under the Twenty-Third Amendment, D.C. is given at least three Electoral College votes, and no more than the smallest state. U.S. CONST. amend. XXIII, § 1.

| | | | |
|-------|--|----|------------|
| | | DC | 1 |
| Total | | | 651 |

Table 3

Though the total number of representatives is 651, rather than 655, this is not a problem under the Webster Method. If the total number of representatives does not come out to the pre-determined House size, no refiguring is necessary. Alternatively, if the total number after rounding had come to 660, the House would have 660 representatives. The Webster Method allows a flexibility that does not exist in the Hill Method.

This basic arithmetic approach of the Webster Method is more accessible to the general public than the complicated Hill Method. Even Canada's method of apportionment resembles Webster's. A large part of Canada's apportionment method requires finding a quotient, dividing the population by the quotient, and rounding up for decimals of 0.5 or greater.¹⁶¹ The Webster Method, also known as the "Sainte-Lague" method, is used in Germany, as well.¹⁶² It was used in the United States from 1842–1852 and 1901–1941, and at least considered in the years in between.¹⁶³

Most importantly, the Webster method is considered to lack all bias.¹⁶⁴ It is also unlikely to break quota.¹⁶⁵ Balinski and Young argue that "it should not be possible to transfer a seat from one state to another and bring both nearer to their true quotas . . . [m]athematical analysis proves that the only divisor method that meets this requirement is Webster's."¹⁶⁶ The method currently used, the Hill Method, is more likely to result in bias.¹⁶⁷ For these reasons, Balinski and Young make a persuasive case for returning to the Webster Method.

For purposes of efficiency, a requirement that apportionment be based on the Webster Method should be part of the same new apportionment act providing for a House size based on the Cubed Root Law.

¹⁶¹ *The House of Commons and Its Members*, *supra* note 47.

¹⁶² ELECTION OF MEMBERS AND THE ALLOCATIONS OF SEATS, DEUTSCHER BUNDESTAG, http://www.bundestag.de/htdocs_e/bundestag/elections/arithmetic [<http://perma.cc/MV7J-2KE8>] (last visited May 14, 2015).

¹⁶³ *A Little History*, UNIV. ALA., <http://www.ctl.ua.edu/math103/apportionment/apphisty.htm> [<http://perma.cc/WL28-LJUD>] (last visited Aug. 22, 2015).

¹⁶⁴ BALINSKI & YOUNG, *supra* note 17, at 85; Paul H. Edelman, *Getting the Math Right: Why California Has Too Many Seats in the House of Representatives*, 59 VAND. L. REV. 297, 340 (2006).

¹⁶⁵ Edelman, *supra* note 164, at 339.

¹⁶⁶ BALINSKI & YOUNG, *supra* note 17, at 85.

¹⁶⁷ *Id.* at 86.

B. *My Proposals and the Constitutional Framework*

The Constitution puts no maximum on the size of the House other than that there cannot be more than one representative for every thirty thousand people. Following the Cube Root Law could not mathematically result in a violation of this requirement. In order to implement this change, only the Apportionment Act of 1911 would have to be repealed, and a new apportionment act passed. Webster's method of apportionment has been used before and no law currently forbids it from being used again.¹⁶⁸ A comprehensive new apportionment act would repeal Section 1 of the Apportionment Act of 1911, require the number of representatives in the House to reflect the cubed root of the population, and require usage of Webster's method for apportioning representatives. Should these methods be implemented, Congress would currently have 676 representatives in the House,¹⁶⁹ with an average district size of 456,724.¹⁷⁰ That is a 35.7% increase in representation.¹⁷¹ Notably, the United Kingdom maintains a lower chamber of 650 representatives for a population of only 64.1 million.¹⁷² Repealing Section 1 of the Apportionment Act of 1911 and passing a new act increasing the size of the House to more adequately and proportionally represent the people would allow a suffocating system to breathe.

The Apportionment Act of 1911 consists of five parts.¹⁷³ Section 1 mandates a cap on the House at 433 representatives, with Section 2 allowing for two more upon Arizona's and New Mexico's admittance to the union.¹⁷⁴ Section 3 requires that representatives "shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants."¹⁷⁵ Section 4 provides that if a state's number of representatives is increased, the additional representatives will be elected at large until redistricting occurs.¹⁷⁶ Finally, Section 5 states that any representatives in the at-large election will be nominated in the same manner as the governor.¹⁷⁷

¹⁶⁸ See *A Little History*, *supra* note 163 (providing a timeline of the use of each apportionment method).

¹⁶⁹ See *supra* note 154.

¹⁷⁰ 308,745,538 (population) divided by 676 (representatives) equals 456,724.17 people per representative.

¹⁷¹ 456,724.17 divided by 709,759.86 equals 64.35%. One hundred percent minus 64.35% equals 35.7%.

¹⁷² *Population and Migration*, OFF. FOR NAT'L STAT., <http://www.ons.gov.uk/ons/guide-method/compendiums/compendium-of-uk-statistics/population-and-migration/index.html> [http://perma.cc/Z6AK-2SWG] (last updated June 5, 2014).

¹⁷³ Apportionment Act of 1911, ch. 5, 37 Stat 13.

¹⁷⁴ *Id.* §§ 1–2.

¹⁷⁵ *Id.* § 3.

¹⁷⁶ *Id.* § 4.

¹⁷⁷ *Id.* § 5.

Section 1 shows apportionment, once again, being dictated by politics—this time in a battle between urban and rural states.¹⁷⁸ Gaughan notes that “in the decade before the 1920 census, approximately six million people moved from rural to urban areas.”¹⁷⁹ As more people moved into cities, and the nation changed from agrarian to urban, increasing the size of the House threatened to reduce the power of rural states.¹⁸⁰ Further, while representatives cited a shortage of office space and supplies as reason to halt the House’s growth, evidence suggests that this was not the case, and in fact, the House ran more efficiently than the Senate.¹⁸¹

Sections 3 through 5 need not be altered for my proposal to take effect. Only Section 1, imposing the first-ever cap on the number of House representatives, should be repealed by a new apportionment act. The size of the House of Representatives is important for more than just congressional representation. There is also the matter of the Electoral College. In the next Part I discuss the implications of my solution to the Electoral College.

V. THE ELECTORAL COLLEGE AND PROPORTIONALITY

The number of representatives apportioned to each state determines that state’s voting power in the Electoral College. Currently, only two small states, one generally conservative and one generally liberal, split their Electoral College votes.¹⁸² In the spirit of proportional representation, all states, and the District of Columbia, should split their Electoral College votes based on the votes of the people.

A. *Electoral College Vote-Splitting*

Because electors are awarded based on a state’s number of senators and representatives, the Electoral College can be viewed as an amalgam of federalism and “majoritarianism.”¹⁸³ This mirrors the nation’s bicameralism and the Framers’ careful balancing of small and large states’ interests.

Each state’s Electoral College votes should be split in a manner that

¹⁷⁸ See Christopher M. Straw, *The Role of Electoral Accountability in the Madisonian Machine*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 339–41 (2008) (discussing the effect of the shift in rural to urban domination in the 1920s).

¹⁷⁹ Gaughan, *supra* note 25, at 1011.

¹⁸⁰ See *id.* at 1011–12 (discussing the effects of a decreasingly rural nation on apportionment).

¹⁸¹ Straw, *supra* note 178, at 344–47.

¹⁸² See *Split Electoral Votes in Maine and Nebraska*, 270 TO WIN, <http://www.270towin.com/content/split-electoral-votes-maine-and-nebraska/#.VTMLzfDCfSM> [http://perma.cc/5J5G-YWLU] (last visited May 7, 2015) (explaining the electoral process in both Maine and Nebraska).

¹⁸³ Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 193 (2011). For a more robust defense of the Electoral College, see generally *id.*

reflects the state's popular vote. For example, consider a state with twelve votes, and its percentage of popular votes for the Democrats, Republicans, and a third party, respectively, is 56 to 42 to 2. Those twelve votes would be multiplied by each percentage, resulting in: 6.72 to 5.04 to 0.24, which would leave the state with seven votes for the Democratic candidate, five votes for the Republican candidate, and zero votes for the third party candidate. Consider a state with seventy votes. Perhaps that state's popular vote for the Democrats, Republicans, and the third party, respectively, is 44 to 51 to 5. This would result in: 30.8 to 35.7 to 3.5. The Democratic candidate would receive thirty-one votes, the Republican thirty-six, and the third party three. (Since 0.8 and 0.7 are both greater than 0.5, the two extra votes would be granted, one each, to the Republican and Democrat candidates.)

1. *Effect on States*

Large blocs of votes have “power beyond [their] numbers.”¹⁸⁴ Electoral College vote-splitting not only allows for greater equality in interstate apportionment and representation, but it also allows minority voters to feel like their votes matter, *because they do*.¹⁸⁵ For example, consider a state like Texas, with a traditionally Republican majority, or one like California, with a traditionally Democratic majority. Democrats in Texas and Republicans in California may feel like their votes do not count or their voices are not heard.¹⁸⁶ Allowing minority parties in heavily Democratic or Republican states, like Texas or California, to garner Electoral College votes will not only allow more citizens to feel represented, but should make candidates care more about representing the greatest number of people. Currently, neither party sees reason for vigorous campaigning in heavily partisan states.¹⁸⁷ But if the Republican

¹⁸⁴ BALINSKI & YOUNG, *supra* note 17, at 9.

¹⁸⁵ See, e.g., Benjamin A. Schoenkin, *Proposed Bill Would Change Electoral Vote System in Nebraska*, DAILY NEBRASKAN (Feb. 5, 2015), http://www.dailynbraskan.com/news/proposed-bill-would-change-electoral-vote-system-in-nebraska/article_fee09204-acec-11e4-a446-fbd95a04c488.html [<http://perma.cc/DE86-LU2J>] (emphasis added) (quoting a university history student expressing that a winner-takes-all system in Nebraska will likely result in a decrease of young voter turnout).

¹⁸⁶ See, e.g., Ina Jaffe, *In California, “Republican” Is Becoming a Toxic Label*, NAT’L PUB. RADIO (Nov. 16, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/11/16/165216636/in-california-republican-is-becoming-a-toxic-label> (discussing how California has become more Democratic over the years, making it difficult for Republicans to win office); Bud Kennedy, *For Texas Democrats, the Bad News Gets Worse*, STAR TELEGRAM (Oct. 23, 2014), <http://www.star-telegram.com/opinion/opn-columns-blogs/bud-kennedy/article3887266.html> [<http://perma.cc/NAT3-YHQ2>] (discussing Texas’s history of conservatism, and the difficulty securing Democratic wins).

¹⁸⁷ During the 2012 presidential campaign, there were zero campaign stops in North Dakota or Kansas; there were 45, 19, 52, and 25 in California, New York, Texas, and Massachusetts respectively; and 115, 148, and 98 in Florida, Ohio, and Virginia, respectively. *Presidential Campaign Stops: Who’s Going Where*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/2012-presidential-campaign-visits/> [<http://perma.cc/NR66-3CBA>] (last visited Dec. 1, 2015).

candidate can snatch up some New York votes, both candidates are incentivized to campaign in New York—the Republicans to grab as many Electoral College votes as possible, and the Democrats to retain as many Electoral College votes as possible.

Further, the hyper-focus on “battleground” states like Florida and Ohio will wane. While candidates tend to spend a lot of time in these states,¹⁸⁸ hoping to win even a slight majority of the large chunks of Electoral College votes,¹⁸⁹ they could be spending more time in states visited less often, knowing that, for example, a state like Florida, with the fourth highest Electoral College vote count, will dole out its votes to two or three candidates, rather than as a winner-takes-all bloc. Rather than Florida giving its entire bloc of votes to one candidate, its votes could be split almost evenly. Because these states still offer high Electoral College vote counts,¹⁹⁰ they are not at risk of becoming altogether unimportant; rather, their importance will more closely resemble traditionally more partisan states.

Messy battles over small numbers of votes could also be curbed by splitting Electoral College votes. In 2000, for example, though nearly six million people voted in Florida, the difference between votes for Al Gore and votes for George W. Bush was only 537. In my system, discussed in Part V.A.4–5 below, Bush and Gore would both have received nineteen of thirty-nine votes, leaving the final Electoral College vote for Ralph Nader, who received a small portion of Florida’s vote. In this way, generally all Floridians would have been represented in proportion to how they voted. Instead, the battle over those 537 plus votes turned into a U.S. Supreme Court case.¹⁹¹ Nine thousand votes in the liberal county of Miami-Dade had gone uncounted due to voting machines not detecting a vote for president.¹⁹² Another 110,000 were over-voted.¹⁹³ That is not to say that application of my solution would have stopped the recount or the Supreme

¹⁸⁸ *Id.*

¹⁸⁹ For example, despite Florida offering less Electoral College votes than California, Texas, and New York, there were more than twice as many campaign stops in Florida than the latter states during the 2012 presidential election. *Id.* There were 148 campaign stops in Ohio and 19 in Texas. *Id.*

¹⁹⁰ For example, Florida currently has twenty-nine Electoral College votes. *Distribution of Electoral College Votes*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/allocation.html> [<http://perma.cc/4A6G-GCJ5>] (last visited Aug. 22, 2015). Even if Florida’s Electoral College votes were to be split in half, with the remainder going to a third party candidate, each major party would still receive fourteen votes.

¹⁹¹ See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (holding that Florida’s “safe harbor” recount process was unconstitutional because it violated the Equal Protection Clause).

¹⁹² *Id.* at 102.

¹⁹³ *Id.* at 108. An over-vote occurs “when a voter makes more than the permitted number of selections in a single race/contest or when a voter makes a selection in a race/contest on which he/she was not eligible to vote.” *Overvotes and Undervotes*, ELECTION ASSISTANCE COMM’N, <http://www.eac.gov/assets/1/AssetManager/2004%20EAVS%20Chapter%208.pdf> [<http://perma.cc/SU47-CX6L>] (internal quotation marks omitted).

Court decision. Rather, the real benefit would be the splitting of the votes. Giving all of Florida's Electoral College votes to Bush ignored the wishes of a nearly equal amount of Gore supporters. Because the Supreme Court did not allow the recount to continue,¹⁹⁴ we may never know the exact amount of votes for each candidate. Given that Miami-Dade County leans left,¹⁹⁵ however, it would not be unreasonable to assume that the majority of uncounted votes would have gone to Gore, propelling him ahead of Bush and securing for him the large chunk of Florida Electoral College votes which would have won him the election. In any event, had everything gone the same except that my method had been used, the Electoral College votes would have been split, and the controversy over the large chunk of Florida votes going to the candidate who may not actually have won Florida's popular vote would not exist.

2. Increase in Third-Party Contenders

Later in this Part, I apply my method to the 1992 and 2000 elections. One important result of this application is that, in 2000, the third-party candidate would have won sixteen Electoral College votes (as opposed to the zero that he actually won), and in the 1992 election, the third-party candidate would have won just over eighteen percent of the Electoral College vote, similar to the amount of the popular vote that he won.¹⁹⁶ Nearly sixty percent of Americans feel that the two-party system is a hindrance.¹⁹⁷ If third parties could garner Electoral College votes, it might open our system to more than just the two parties—both of which are unpopular.¹⁹⁸ Added competition could spur greater instances of debate and

¹⁹⁴ See *Bush*, 531 U.S. at 111 (“Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy.”).

¹⁹⁵ See, e.g., *Final Cumulative Report*, MIAMI-DADE CNTY. ELECTIONS, <http://www.miamidade.gov/elections/results/ele110204/cumu110204.pdf> [<http://perma.cc/LED7-9H6Y>] (last visited Aug. 22, 2015) (showing that John Kerry won 52.9% of the vote in Miami-Dade County in 2004); *Miami-Dade County Elections*, CLARITY ELECTIONS, <http://results.enr.clarityelections.com/FL/Dade/42008/113201/en/summary.html> [<http://perma.cc/TRJ5-Q4SZ>] (last updated Nov. 20, 2012) (showing that Barack Obama won 61.58% of the vote in Miami-Dade County in 2012); *Miami-Dade County Elections*, CLARITY ELECTIONS, <http://results.enr.clarityelections.com/FL/Dade/8930/14419/en/summary.html> [<http://perma.cc/7KXA-4BSR>] (last updated Dec. 30, 2008) (showing that Barack Obama won 57.81% of the vote in Miami-Dade County in 2008).

¹⁹⁶ See *infra* Part V.A.4. (showing that Ross Perot would have won 18.86% as a third-party candidate in the 1992 presidential election).

¹⁹⁷ Jeffrey M. Jones, *Americans Continue to Say a Third Political Party Is Needed*, GALLUP (Sept. 24, 2014), <http://www.gallup.com/poll/177284/americans-continue-say-third-political-party-needed.aspx>.

¹⁹⁸ In recent years, both parties have consistently had approval ratings of under fifty percent. See, e.g., Andrew Dugan, *Democratic Party Favorable Rating Falls to Record Low*, GALLUP (Nov. 12, 2014), <http://www.gallup.com/poll/179345/democratic-party-favorable-rating-falls-record-low.aspx> 2014 (noting that the Democratic Party's favorable rating is at thirty-six percent and the Republican Party's favorable rating is at forty-two percent).

force candidates of the two major parties to listen more closely to the will of the people, which they currently do not seem to do.¹⁹⁹ Further, the classic argument that voting for a third party is analogous to voting for the candidate one likes least would hold less water if people see that third-party candidates truly have a chance of winning. If third parties can take Electoral College votes away from the two major parties, Democrats and Republicans would have to alter their platforms.²⁰⁰

Under the existing system, it is not surprising that many people who would otherwise vote for a third party choose not to vote. Consider the 1992 election. Independent candidate Ross Perot received nearly twenty percent of the popular vote, but zero Electoral College votes.²⁰¹ That means that almost one-fifth of the voting public wanted Perot for president, yet that fifth of the country was not represented at all in the Electoral College. Less egregious, but still inaccurate, was the election of 1912 when Progressive candidate Theodore Roosevelt won almost 30% of the popular vote, coming in second place, but only 16.6% of the Electoral College vote.²⁰² Conversely, Woodrow Wilson won 41.8% of the popular vote, but a whopping 81.9% of the Electoral College vote.²⁰³ In 1992, Perot became the most successful third-party candidate since Roosevelt, eighty years earlier. Despite the popular opinion that third parties would benefit our democratic system,²⁰⁴ no third-party candidate has recreated Roosevelt's or Perot's success since.

3. Implementing Electoral College Vote-Splitting

Because each state determines how its electors are chosen and how they are to vote,²⁰⁵ the states must choose Electoral College vote-splitting. For reasons previously discussed, voters in states which generally go either left or right would benefit from vote-splitting. If enough liberal- and conservative-leaning states enact laws requiring vote-splitting, large swing

¹⁹⁹ See, e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 575 ("[T]he preferences of the average American appear to have only a miniscule, near-zero, statistically non-significant impact upon public policy.").

²⁰⁰ See Keith Darren Eisner, Comment, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 983–85 (1993) (discussing the myriad ways third parties have influenced public policy, social change, and major party platforms).

²⁰¹ *Election of 1992*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1992> [<http://perma.cc/B64C-LYYP>] (last visited May 8, 2015).

²⁰² *Election of 1912*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1912> [<http://perma.cc/56CK-XXWX>] (last visited May 8, 2015).

²⁰³ *Id.*

²⁰⁴ Jones, *supra* note 197.

²⁰⁵ *Who are the Electors?*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/electors.html> [<http://perma.cc/7DY4-EU8J>] (last visited May 7, 2015).

states will eventually follow.²⁰⁶ Currently, two states—Nebraska and Maine—split their votes.²⁰⁷ In fact, despite being a generally conservative state,²⁰⁸ Nebraska cast one of its Electoral College votes for Barack Obama in 2008 when the Omaha area voted Democratic.²⁰⁹ Vote-splitting is not a new experiment to these states, either; Nebraska's law has required vote-splitting since 1992, and Maine's since 1972.²¹⁰ In fact, three separate attempts at overturning this method of voting have been defeated in Nebraska.²¹¹ Because in sixty percent of states voters have changed their choice of party in subsequent presidential elections,²¹² it is likely that these states would see vote-splitting as beneficial. In the winner-takes-all system, large states remain at a disadvantage, often going ignored by candidates.²¹³ Nebraska provides an example of a small state that benefitted from vote-splitting, since then-candidate Obama campaigned in a state that otherwise would have gone ignored by a Democratic candidate.²¹⁴ Because choosing a proportional Electoral College vote system would increase the representation of voters in every state, all fifty states and Washington, D.C. should enact this method.

In the following two examples, I demonstrate how the 1992 and 2000 elections would have turned out had we used the Cube Root Law, the Webster Method, and Electoral College vote-splitting.

4. *The Presidential Election of 2000*

The infamous 2000 presidential election resulted in a candidate being elected to the presidency who did not win a majority or plurality of the

²⁰⁶ This is because swing states will become less important on the campaign trail if previously conservative and liberal states can be split; there will be less emphasis on competing for swing state votes if a conservative candidate can take votes from a liberal state (or a liberal candidate from a conservative state).

²⁰⁷ *Split Electoral Votes in Maine and Nebraska*, *supra* note 182.

²⁰⁸ Walter Hickey, *And Now Here Are the Most Conservative States in America . . .*, BUS. INSIDER (Feb. 4, 2013, 9:45 AM), <http://www.businessinsider.com/most-conservative-states-2013-2> [<http://perma.cc/AS3G-QHWQ>] (naming Nebraska as the ninth most conservative state).

²⁰⁹ Mitch Smith, *Blue Dot for Obama Prompts Red Nebraska to Revisit Electoral College Rules*, N.Y. TIMES, Feb. 1, 2015, at A11.

²¹⁰ Stacy Conradt, *Why Do Nebraska and Maine Split Electoral Votes?*, MENTAL FLOSS (Nov. 7, 2012, 1:30 PM), <http://mentalfloss.com/article/13017/why-do-nebraska-and-maine-split-electoral-votes> [<http://perma.cc/F2WX-8NA3>].

²¹¹ *Id.*

²¹² Vincy Fon, *Electoral College Alternatives and U.S. Presidential Elections*, 12 SUP. CT. ECON. REV. 41, 68 (2004).

²¹³ See, e.g., Craig J. Herbst, *Redrawing the Electoral Map: Reforming the Electoral College with the District-Popular Plan*, 41 HOFSTRA L. REV. 217, 246 (2012) (noting that Texas has been ignored in presidential campaigns since 1980).

²¹⁴ See Jean Ortiz, *Obama Wins Nebraska Electoral Vote*, HUFFINGTON POST (Dec. 15, 2008, 5:12 AM), http://www.huffingtonpost.com/2008/11/14/obama-wins-nebraska-elect_n_143924.html [<http://perma.cc/545A-AQYN>] (noting that the first time in history that Nebraska split its votes was also the first time in forty-four years that a Democrat won one of its electoral votes).

popular vote.²¹⁵ In a survey taken seven years after the 2000 election, seventy-two percent of respondents said they would support abolishing the Electoral College in favor of a national popular vote.²¹⁶

In 2000, Republican George W. Bush ran against Democrat Al Gore and Green Party candidate Ralph Nader.²¹⁷ Though Gore won the popular vote by over half a million votes, Bush took the presidency by winning 271 Electoral College votes (as opposed to Gore's 266).²¹⁸ Despite nearly three million people voting for him, Nader did not receive any Electoral College votes.²¹⁹

The 2000 census revealed a population of 281,421,906.²²⁰ Taking the cubed root of that population results in a House of 655 representatives.²²¹ The following table shows what the results would have been had my proposal been implemented in 2000.

| State | Bush | Gore | Nader | State | Bush | Gore | Nader |
|--------|------|------|-------|--------|------|------|-------|
| Ala. | 7 | 5 | 0 | Nebr. | 4 | 2 | 0 |
| Alaska | 2 | 1 | 0 | Nev. | 4 | 3 | 0 |
| Ariz. | 7 | 6 | 1 | N.H. | 3 | 2 | 0 |
| Ark. | 4 | 4 | 0 | N.J. | 9 | 12 | 1 |
| Calif. | 34 | 43 | 3 | N.Mex. | 3 | 3 | 0 |
| Colo. | 6 | 5 | 1 | N.Y. | 16 | 28 | 2 |
| Conn. | 4 | 6 | 0 | N.C. | 12 | 9 | 0 |
| Del. | 2 | 2 | 0 | N.Dak. | 2 | 1 | 0 |
| Fla. | 19 | 19 | 1 | Ohio | 14 | 13 | 1 |
| Ga. | 12 | 9 | 0 | Okla. | 6 | 4 | 0 |

²¹⁵ See *2000 Presidential Election, Popular Vote Totals*, U.S. ELECTORAL COLLEGE, http://www.archives.gov/federal-register/electoral-college/2000/popular_vote.html [http://perma.cc/WYM7-CZGL] (last visited May 7, 2015) (showing that George W. Bush received 50,456,062 votes and Al Gore received 50,996,582 votes).

²¹⁶ WASH. POST KAISER FAMILY FOUND. & HARV. UNIV., *SURVEY OF POLITICAL INDEPENDENTS* 12–13, <http://www.washingtonpost.com/wp-srv/politics/interactives/independents/post-kaiser-harvard-topline.pdf> [http://perma.cc/5G8P-VBT9] (last visited Dec. 1, 2015).

²¹⁷ *2000 Official Presidential General Election Results*, FED. ELECTION COMM'N, <http://www.fec.gov/pubrec/2000presgeresults.htm> [http://perma.cc/JSP8-NRWY] (last updated Dec. 2001). Other candidates will not be considered here, as they did not garner enough votes to have received Electoral College votes.

²¹⁸ *2000 Presidential Election*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/votes/2000.html> [http://perma.cc/UYW3-UVDY] (last visited May 8, 2015).

²¹⁹ *2000 Presidential Popular Vote Summary for All Candidates Listed on at Least One State Ballot*, FED. ELECTION COMM'N, <http://www.fec.gov/pubrec/fe2000/prespop.htm> [http://perma.cc/9D AT-4EEE] (last updated Dec. 2001) [hereinafter *2000 Presidential Popular Vote Summary*]; *Electoral Vote Totals, 2000 Presidential Election*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/votes/2000.html> [http://perma.cc/ZBC4-QFFM] (last visited Sept. 2, 2015).

²²⁰ *Census 2000 Gateway*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/cen2000.html> [http://perma.cc/AZ8R-HSP5] (last visited May 8, 2015).

²²¹ The cubed root of 281,421,906 is 655.318809119, which can be rounded down to 655.

| | | | | | | | |
|--------|----|----|---|--------------|------------|------------|-----------|
| Hawaii | 2 | 3 | 0 | Oreg. | 5 | 5 | 0 |
| Idaho | 3 | 2 | 0 | Pa. | 14 | 16 | 1 |
| Ill. | 13 | 17 | 1 | R.I. | 1 | 3 | 0 |
| Ind. | 9 | 7 | 0 | S.C. | 6 | 5 | 0 |
| Iowa | 4 | 5 | 0 | S.Dak. | 2 | 2 | 0 |
| Kans. | 5 | 3 | 0 | Tenn. | 8 | 7 | 0 |
| Ky. | 6 | 5 | 0 | Tex. | 30 | 20 | 1 |
| La. | 6 | 6 | 0 | Utah | 5 | 2 | 0 |
| Maine | 2 | 3 | 0 | Vt. | 1 | 2 | 0 |
| Md. | 6 | 8 | 0 | Va. | 10 | 8 | 0 |
| Mass. | 6 | 10 | 1 | Wash. | 7 | 8 | 1 |
| Mich. | 12 | 13 | 0 | W.Va. | 3 | 3 | 0 |
| Minn. | 6 | 6 | 1 | Wis. | 7 | 7 | 0 |
| Miss. | 5 | 4 | 0 | Wyo. | 2 | 1 | 0 |
| Mo. | 8 | 7 | 0 | DC | 0 | 3 | 0 |
| Mont. | 3 | 1 | 0 | Total | 367 | 369 | 16 |

Table 4

As Table 4 shows, Gore would have won with a plurality of the Electoral College votes, which matches his plurality win of the popular vote. The third-party candidate, Nader, would also have had a chance to win Electoral College votes. Nader won 2.74% of the popular vote.²²² Under our current system, he was awarded zero Electoral College votes.²²³ Under my method, he would have won 2.13% of the Electoral College votes. In the real 2000 election, Bush won 47.87% of the popular vote and 50.47% of the Electoral College vote.²²⁴ Gore won 48.38% of the popular vote and 49.53% of the Electoral College vote.²²⁵ Under my method, Bush would have received 48.8% of the Electoral College vote, and Gore the remaining 49.07%. These results much more closely mirror the actual election results and the will of the people. Gore's plurality win in the Electoral College would have matched his plurality success with the popular vote.

²²² 2000 Presidential Popular Vote Summary, *supra* note 219.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

5. The Presidential Election of 1992

In 1992, Republican George H.W. Bush ran against Democrat Bill Clinton and independent Ross Perot.²²⁶ Clinton won 43% of the popular vote and 68.8% of the Electoral College vote.²²⁷ Bush won 37.4% of the popular vote and 31.2% of the Electoral College vote.²²⁸ Perot won 18.9% of the popular vote and zero Electoral College votes.²²⁹ If my method had been in place at the time, the House would have had 635 representatives.²³⁰ Accounting for the Electoral College votes attributable to Senate seats, the total Electoral College votes would have been 737. The following table shows how, based on the 1992 popular vote, the Electoral College votes would have been counted.

| State | Bush | Clinton | Perot | State | Bush | Clinton | Perot |
|--------|------|---------|-------|-------|------|---------|-------|
| Ala. | 6 | 5 | 1 | Nebr. | 3 | 2 | 1 |
| Alaska | 1 | 1 | 1 | Nev. | 2 | 2 | 1 |
| Ariz. | 4 | 4 | 3 | N.H. | 2 | 2 | 1 |
| Ark. | 3 | 4 | 1 | N.J. | 9 | 10 | 3 |
| Calif. | 25 | 36 | 16 | N.M. | 2 | 3 | 1 |
| Colo. | 4 | 4 | 2 | N.Y. | 16 | 23 | 8 |
| Conn. | 4 | 4 | 2 | N.C. | 8 | 8 | 3 |
| Del. | 1 | 2 | 1 | N.D. | 2 | 1 | 1 |
| Fla. | 14 | 14 | 7 | Ohio | 11 | 12 | 6 |
| Ga. | 8 | 8 | 2 | Okla. | 4 | 4 | 2 |
| Hawaii | 2 | 2 | 1 | Oreg. | 3 | 4 | 2 |
| Idaho | 2 | 2 | 1 | Pa. | 12 | 14 | 6 |
| Ill. | 11 | 15 | 5 | R.I. | 2 | 2 | 1 |
| Ind. | 7 | 6 | 3 | S.C. | 5 | 5 | 1 |
| Iowa | 3 | 4 | 2 | S.D. | 2 | 1 | 1 |
| Kans. | 3 | 3 | 2 | Tenn. | 6 | 7 | 1 |
| Ky. | 5 | 5 | 1 | Tex. | 21 | 19 | 12 |
| La. | 5 | 6 | 2 | Utah | 3 | 1 | 2 |
| Maine | 1 | 2 | 2 | Vt. | 1 | 1 | 1 |
| Md. | 5 | 7 | 2 | Va. | 8 | 7 | 3 |
| Mass. | 5 | 8 | 4 | Wash. | 5 | 6 | 3 |

²²⁶ Robin Toner, *The 1992 Elections: President—The Overview*, N.Y. TIMES (Nov. 4, 1992), <http://www.nytimes.com/1992/11/04/us/1992-elections-president-overview-clinton-captures-presidency-with-huge.html>.

²²⁷ *Election of 1992*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1992> [http://perma.cc/S7CX-H57G] (last visited Aug. 11, 2015).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ The cubed root of the 1990 population was 628.875, but the Webster Method would have provided for 635 representatives.

| | | | | | | | |
|-------|----|----|---|--------------|------------|------------|------------|
| Mich. | 10 | 11 | 5 | W.V. | 3 | 3 | 1 |
| Minn. | 4 | 6 | 3 | Wis. | 5 | 6 | 3 |
| Miss. | 4 | 4 | 1 | Wyo. | 1 | 1 | 1 |
| Mo. | 5 | 7 | 3 | DC | 0 | 3 | 0 |
| Mont. | 1 | 2 | 1 | Total | 279 | 319 | 139 |

Table 5

Under my method, the Electoral College votes would have more closely matched the popular vote. Clinton still would have won the presidency, as he won 43.28% of the Electoral College vote to Bush's 37.86%. However, Perot would have won 18.86% of the Electoral College vote, which more closely resembles the amount of the popular vote that went in his favor.

With vote-splitting, however, plurality wins will become more likely to occur. For this reason, the Twelfth Amendment should be reconsidered.

B. Amending the Constitution to Allow for Presidential Plurality Winners

The most difficult change to make would be to amend the Constitution to allow for plurality vote winners. Because implementation of my proposals would likely result in an increase in plurality wins, the importance of allowing for plurality winners to take the presidency would increase. The Twelfth Amendment requires a majority of Electoral College votes for a presidential candidate to win.²³¹ Should the Electoral College not choose a majority, the choice of the next president would be in the hands of the House of Representatives.²³² Only three times in our nation's history has this occurred, and of those three times, only once did the outcome reflect the votes of the people.

In 1800, Thomas Jefferson won the popular vote and defeated incumbent John Adams in the Electoral College,²³³ but tied with his running mate Aaron Burr for the Electoral College vote, due to electors failing to distinguish between the offices of president and vice president on their ballots.²³⁴ Though the Twelfth Amendment had yet to be

²³¹ U.S. CONST. amend. XII.

²³² *Id.*

²³³ *Election of 1800*, DUKE UNIV. LIBR., <http://library.duke.edu/exhibits/sevenelections/elections/1800/winner.html> [<http://perma.cc/9SQN-QJXT>] (last visited May 7, 2015).

²³⁴ NAT'L ARCHIVES, TALLY OF ELECTORAL VOTES FOR THE 1800 PRESIDENTIAL ELECTION, <http://www.archives.gov/global-pages/larger-image.html?i=/legislative/features/1800-election/images/1800-election-l.jpg&c=/legislative/features/1800-election/images/1800-election.caption.html> [<http://perma.cc/9L6K-YG6Q>] (last visited Dec. 1, 2015); *Presidential Election of 1800: A Resource Guide*, LIBR. OF CONGRESS, <http://www.loc.gov/rr/program/bib/elections/election1800.html> [<http://perma.cc/BL8L-T3QQ>] (last visited May 7, 2015) [hereinafter *Presidential Election of 1800*].

envisioned,²³⁵ Article II, Section 1 of the Constitution provided for a House vote in the case of an Electoral College tie,²³⁶ and so the House chose the third president—Thomas Jefferson.²³⁷ While, after long deliberation, the House finally chose the candidate whom the people had elected, partisanship controlled the discussion and the decisions of many representatives, and the result could easily have been different.²³⁸

In 1824, Andrew Jackson won the popular vote and a plurality of Electoral College votes.²³⁹ Yet, because of the Twelfth Amendment, the House determined the next president of the United States.²⁴⁰ Speaker of the House Henry Clay used his influence to ensure an Adams win, and in return Adams made Clay his secretary of state.²⁴¹ Despite Jackson's plurality wins in both the popular vote and the Electoral College, his candidacy for president ended when the House chose John Quincy Adams to be the sixth president.²⁴²

Though the presidential outcome of 1876 was not dictated by the Twelfth Amendment, Congress determined the winner and nineteenth president.²⁴³ Democrat Samuel Tilden won the popular vote.²⁴⁴ Due to suspicions of unfairness in the election process, three states underwent recounts.²⁴⁵ Rutherford B. Hayes needed all nineteen Electoral College votes from the recounted states in order to secure the presidency.²⁴⁶ When all nineteen votes were awarded to Hayes, the Democrats showed their outrage by inaugurating their own governors and legislatures.²⁴⁷ Because

²³⁵ The election of 1800 was a large part of the reason for the creation of the Twelfth Amendment, which was first proposed in 1803. *Presidential Election of 1800*, *supra* note 234.

²³⁶ U.S. CONST. art. II, § 1.

²³⁷ *Presidential Election of 1800*, *supra* note 234.

²³⁸ *Id.* ("Still dominated by Federalists, the sitting Congress loathed to vote for Jefferson—their partisan nemesis.").

²³⁹ NAT'L ARCHIVES, LIST OF VOTES FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, AS COUNTED IN THE PRESENCE OF THE TWO HOUSES OF CONGRESS, IN THE CHAMBER OF THE HOUSE OF REPRESENTATIVES, ON WEDNESDAY, THE 9TH OF FEBRUARY, 1825, <http://www.archives.gov/education/lessons/electoral-tally/images/tally-1824.jpg> [<http://perma.cc/KD5F-3UC9>] (last visited Dec. 1, 2015); *1824 Presidential Election, 270 TO WIN*, http://www.270towin.com/1824_Election/ [<http://perma.cc/LP5L-969Y>] (last visited Sept. 2, 2015).

²⁴⁰ Under the Twelfth Amendment, any presidential vote resulting in a plurality win must go to the House of Representatives. U.S. CONST. amend. XII.

²⁴¹ *December 1, 1824: Presidential Election Goes to the House*, HISTORY, <http://www.history.com/this-day-in-history/presidential-election-goes-to-the-house> [<http://perma.cc/ENS3-M9WN>] (last visited May 7, 2015).

²⁴² *Id.*

²⁴³ *The Disputed Election of 1876*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/general-article/grant-election/> [<http://perma.cc/6Y4M-23XZ>] (last visited May 7, 2015).

²⁴⁴ *Election of 1876*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucs.edu/showelection.php?year=1876> [<http://perma.cc/KCS9-2Y3N>] (last visited May 7, 2015).

²⁴⁵ *The Disputed Election of 1876*, *supra* note 243.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

the Constitution provided no guidance in such a matter, Congress created a commission of ten congressmen and five Supreme Court justices to make a determination.²⁴⁸ In the end, Southern Democrats made a deal with the committee; in exchange for ending harsh Reconstruction policies, all nineteen votes would go to Hayes, resulting in a total Electoral College vote of 185–184, and a Hayes presidency.²⁴⁹ Though the 1876 election was not governed by the Twelfth Amendment, leaving the decision in the hands of Congress resulted in partisanship, and may or may not have ended with the general electorate's choice for president.

When an election goes to the House, each state and the District of Columbia casts one vote for president.²⁵⁰ A candidate would need to win at least twenty-six states in order to win the presidency. Given the extreme partisanship in the House of Representatives, and the fact that in recent years representatives have almost exclusively voted along party lines,²⁵¹ it follows that representatives would likely vote for the presidential candidate from their own party.

Recall that, in 2000, Al Gore won the popular vote, but not the presidency.²⁵² A look at each states' 2000 representatives' parties reveals a majority of Republican representatives in twenty-five states, a majority of Democrat representatives in twenty-one states,²⁵³ and no majority in five states. Had the 2000 Electoral College votes been split, without a constitutional amendment repealing the majority vote requirement of the Twelfth Amendment, the vote would have gone to the House, and Al Gore would have won only if all five tie states had voted for him.

In fact, Democrats rely on larger states with higher Electoral College votes, whereas Republicans rely on larger amounts of small states in reaching for a majority. For example, Democrats often win states like California, New York, New Jersey, and Illinois, which all have high Electoral College vote counts. On the other side, Republicans rely on many small states, such as Alaska, Kansas, Kentucky, Montana, Nebraska, Utah, and others to collectively contribute large amounts of Electoral College votes. In 2008, John McCain won the Electoral College votes of twenty-two states, yet the final tally revealed an overwhelming win for Barack

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ U.S. CONST. amend XII.

²⁵¹ See Wesley Lowery, *How Congress Became So Partisan, in 4 Charts*, WASH. POST (Apr. 14, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/14/how-congress-became-more-partisan-over-time-in-four-charts> [<http://perma.cc/THJ9-CAB4>] (mapping out the partisanship of Congress from the late 1960s through the 2010s to show how Congress has grown more partisan over time).

²⁵² 2000 *Presidential Popular Vote Summary*, *supra* note 219.

²⁵³ This number includes independent Representative Bernie Sanders of Vermont, whose ideology more closely aligns with Democrats than Republicans.

Obama, with 365 Electoral College votes to McCain's 173.²⁵⁴ McCain took much of the South and the Midwest, resulting in a high state count voting in his favor, but a much smaller collective Electoral College vote count.²⁵⁵

While the Electoral College exists to vote for the candidate most desired by the electorate of each state,²⁵⁶ House representatives exist to represent their respective constituencies, not the state as a whole.²⁵⁷ Even if, alternatively, representatives were to vote for the Electoral College winner of their state, Democrats would find it difficult, if not impossible, to win any presidency left to the House. Under my proposal, in the 2000 election Democrats would have won fifteen states; Republicans would have won twenty-five; and eleven states would have no majority. So, for Al Gore, who won the popular vote, to win, he would have to win every single non-majority state.

To allow the House to determine the president is to go against the "one person one vote" standard enunciated in *Wesberry*.²⁵⁸ While voters in Rhode Island counting for 1.88 times voters in Montana is egregious and contrary to Article I, Section 2 of the Constitution, allowing each state's representatives to cast one vote for president would be many times more unfair to voters. California, with a population of nearly forty million, would cast one vote for president; Wyoming, with a population of just over half a million would also cast one vote for president. That means that Wyoming voters would count for more than sixty-seven times California voters.

Because this change is so important to our election system, a constitutional amendment is appropriate. The amendment would only have to change the following lines of the Twelfth Amendment:

The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose

²⁵⁴ *Election for the Fifty-Sixth Term*, U.S. ELECTORAL COLLEGE, http://www.archives.gov/federal-register/electoral-college/votes/2000_2005.html#2008 [<http://perma.cc/ARK3-EQ9J>] (last visited May 7, 2015).

²⁵⁵ *Federal Elections 2008: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMM'N (July 2009), <http://www.fec.gov/pubrec/fe2008/federaelections2008.pdf> [<http://perma.cc/K36Z-GJLF>].

²⁵⁶ *Who Are the Electors?*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/electors.html> [<http://perma.cc/L3RW-GT5H>] (last visited May 7, 2015).

²⁵⁷ This is the job of senators. See *The Senate and the United States Constitution*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm [<http://perma.cc/c/48E7-D7LL>] (last visited May 14, 2015) (discussing the role of the Senate).

²⁵⁸ *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.²⁵⁹

Congress should pass such an amendment to make sure their constituents are adequately represented. However, should my other proposals be implemented, elections will become more fair and representative even without this constitutional amendment.

C. My Proposals and the Constitutional Framework

Unlike with my two core proposals, the states must support Electoral College vote-splitting and amending the Constitution. Each state will have to choose Electoral College vote-splitting in its own turn. However, non-swing states are incentivized to do so,²⁶⁰ and once enough of these states choose vote-splitting, swing states will be incentivized to follow.²⁶¹ Because the Constitution expressly allows for states to choose their electors,²⁶² and each state may choose its method of Electoral College voting, and two states have already successfully done so, no constitutional challenge to states making this decision exists.

Finally, part of the Twelfth Amendment would have to be repealed by a new constitutional amendment in order to allow for plurality winners. While passing a constitutional amendment is not as easy as passing a statute, Congress has reason to take up this cause. Though the House of Representatives would technically be giving up a power, it is a power that has scarcely been used. Further, both parties have cause to want to avoid a House vote. Should there be more Democratic representatives during a presidential vote sent to the House, Republicans will likely lose the presidency, even if they win the plurality or popular vote. The same goes for a House controlled by Republican representatives and a Democratic plurality winner. States should ratify such an amendment because it is in the best interest of their constituents.

The Framers agreed during the Great Compromise that the House of Representatives should be proportional. For this proportionality, small states took disproportionate representation in the Senate.²⁶³ Wyoming,

²⁵⁹ U.S. CONST. amend. XII.

²⁶⁰ See *supra* Part V.A.1 (discussing the benefits of Electoral College vote-splitting).

²⁶¹ See *supra* note 206. Further, swing states would benefit too because voters would be more accurately represented.

²⁶² U.S. CONST. art. II, § 1.

²⁶³ See *supra* note 23.

population 563,626, and California, population 37,253,956, each have two senators.²⁶⁴ It is because the House is supposed to be proportional that California having sixty-six times the population of Wyoming, yet the same number of senators, is permissible. But when the House is capped at 435 representatives, a growing amount of proportionality is lost. For these reasons, the vote should not go to the House, and the Twelfth Amendment should be amended to allow for plurality winners.

My proposal is summarized as follows: (1) Congress passes a statute repealing the Apportionment Act of 1911 and providing for a House with as many representatives as the cubed root of the population; (2) requiring usage of the Webster Method of apportionment; (3) states choose to split their Electoral College votes proportionally; and (4) Congress proposes and the states ratify a constitutional amendment nullifying the part of the Twelfth Amendment that requires a majority Electoral College vote for any candidate to win the presidency. To see how this might work, Part V.A.5 above applies my plan to the controversial 2000 presidential election.

VI. CONCLUSION

Though, in the strictest sense, applying “one person one vote” to interstate apportionment is unlikely to happen, apportionment procedure should at least strive towards that goal. The Framers believed in a larger House so that constituents might be adequately represented. Because the Electoral College is based on apportionment, it is imperative that proportionality, accuracy, and fairness dominate the process.

Using the Cubed Root Law will increase the size of the House by over two hundred representatives, which will help to create district sizes in each state closer to the average. Using the Webster Method will increase accuracy in apportionment. States choosing to split Electoral College votes will result in presidential elections that more closely reflect the will of the people. And amending the Constitution to change the majority requirement of the Twelfth Amendment will ensure that the candidate with the highest vote count wins.

The Court should not hesitate to take up the issue of interstate apportionment. So far it has already found that disparities between in-state district sizes are unconstitutional. Their justification for this finding also applies to interstate apportionment. House representatives could only benefit their constituents by making these proposed changes to the law and to the Constitution. Creating a better-represented electorate will help to ensure the right outcomes in presidential elections.

²⁶⁴ *Id.*; *Resident Population Data*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/data/apportionment-pop-text.php> [<http://perma.cc/EN6H-5QAC>] (last visited Sept. 2, 2015).