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Increasing Voter Investment in American Democracy: Proposals for Reform

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ARTICLES

INCREASING VOTER INVESTMENT IN AMERICAN DEMOCRACY: PROPOSALS FOR REFORM

*Adam Drake**

Millions of Americans choose to stay home every election cycle. Polling suggests that these nonvoters are either apathetic with respect to the democratic process or feel alienated from the United States government. Reforms to the democratic system should focus on alleviating these sentiments, ultimately encouraging more voters to show up to the polls. As turnout increases, so too does the legitimacy and stability of the U.S. government.

With that goal in mind, this Article advocates for a five-prong approach to reforming the electoral system. The first proposed step is to eliminate unnecessary barriers to voting by establishing federal automatic voter registration. Second, partisan gerrymandering of congressional districts must be dramatically restrained. Third, the U.S. House of Representatives needs to be expanded. Fourth, the president should be elected through a national popular vote. Finally, the U.S. Senate should abolish the filibuster to create a more responsive government. Collectively, the goal of these proposals is to create an electoral system that encourages voters to participate and minimize feelings of apathy or alienation.

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INTRODUCTION

American troops fighting in the Revolutionary War were animated in part by a principle we take for granted today: the legitimacy of a government requires the consent of the governed.¹

Today, that consent derives from votes in free and fair elections. Without such consent, the government is, at best, unstable and, at worst, illegitimate. Voting itself, however, appears to some as irrational. As psychologist Jay Van Bavel has explained, “it’s remarkable that people will stand in line for hours to do something that might have little impact on their personal lives.”² Moreover, a single vote is unlikely to swing the outcome of an election. The way our federal election system is constructed makes voting seem even more irrational—significant barriers inhibit voting eligibility;³ partisan gerrymandering determining the winner of congressional elections;⁴ the Electoral College skewing those who determine the winner of presidential elections;⁵ voters feeling disconnected from their federal representatives;⁶ and the Senate filibuster blocking even the most widely approved legislation.⁷ While this is not an exhaustive list of systematic failures, these factors have created a less accountable and seemingly unresponsive federal government.

It is not shocking that in recent decades, turnout for presidential elections among eligible voters has been between 50 and 60 percent.⁸ Even in the record-breaking turnout year in 2020, tens of millions of eligible voters decided not to vote.⁹ Turnout in

¹ Senator Charles Sumner, Admission of Mississippi to Representation in Congress: Speech in the Senate (Feb. 17, 1870), reprinted in 13 THE WORKS OF CHARLES SUMNER 331, 333 (Boston, Lee & Shepard 1880).

² Catherine Clifford, *‘I Don’t Plan to Vote Ever Again’: The Psychology of Why so Many People Don’t Vote, Even in 2020*, CNBC (Oct. 20, 2020, 9:01 AM), <https://www.cnbc.com/2020/10/30/why-people-choose-not-to-vote.html> [<https://perma.cc/V74R-64CT>].

³ See, e.g., Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 RUTGERS L. REV. 1019, 1029 (2012).

⁴ See generally Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 12, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [<https://perma.cc/Q3VR-PB37>].

⁵ See generally John D. Feerick, *The Electoral College: Time for a Change?*, 90 FORDHAM L. REV. 395 (2021).

⁶ See Kevin R. Kosar, Opinion, *Should We Expand the House of Representatives? The Founders Thought So*, HILL (Jan. 10, 2022, 11:01 AM), <https://thehill.com/opinion/campaign/588859-should-we-expand-the-house-of-representatives-the-founders-thought-so> [<https://perma.cc/7RYY-2QP9>].

⁷ See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 184 (1997) (“The modern filibuster is simply a minority veto, and a powerful one at that.”).

⁸ See Clifford, *supra* note 2.

⁹ See *id.*

recent midterm elections has been even more disconcerting, peaking at 53 percent of eligible voters in 2018.¹⁰ A recent poll found that nonvoters in 2020 felt alienated from their representatives in Washington, D.C., and convinced that their votes would not make a difference in their daily lives.¹¹ Such voter apathy and alienation threaten to undermine the “consent” that underpins the legitimacy of the foundational government.

It follows that any systemic reform should aim to counter these feelings to bring more voters into the fold. The most effective way to do so is to create a more accountable and responsive government. Of course, voting will always require a level of selflessness. Still, if voters felt more connected to their government—and if factors other than votes were not determinative of election outcomes—voters would be more likely to participate in our democratic system. Consequently, our democracy would be healthier, more stable, and more legitimate.

I. PROPOSALS FOR REFORM

This Article proposes a five-pronged approach to create the reform we need. First, federal automatic voter registration should be established to eliminate unnecessary voting barriers. Second, partisan gerrymandering of congressional districts must be restricted. Third, the U.S. House of Representatives needs to be expanded. Fourth, the president should be elected through a national popular vote. Finally, the U.S. Senate should abolish the filibuster to create a more responsive government. Collectively, the goal of these proposals is to create a system that encourages voters to participate and minimizes feelings of apathy or alienation.

These five proposed reforms are by no means exhaustive. There are numerous avenues for change that could bring about a healthier democracy. Nonetheless, this Article argues for these five reforms because they are systemic in scale and would go a long way in making our democratic republic politically healthier. Incremental, narrow reforms are unlikely to curtail widespread voter apathy or alienation. Of course, some citizens may never buy into democracy in the United States, evidenced by the violent reaction to

¹⁰ See Jordan Mirsa, *Behind the 2018 U.S. Midterm Election Turnout: Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014*, U.S. CENSUS BUREAU (Apr. 23, 2019), <https://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html> [<https://perma.cc/Z9CM-4UYD>].

¹¹ See Mallory Newall & Sara Machi, *Why Don't People Vote*, IPSOS (Dec. 15, 2020), <https://www.ipsos.com/en-us/news-polls/medill-npr-nonvoters-2020> [<https://perma.cc/QT8D-ZNYV>].

the 2020 election on January 6, 2021.¹² But these citizens are presumably the minority in the United States. Indeed, autocratic impulses are not new in this country, and our democratic institutions have endured.¹³ Perhaps optimistically, the proposed reforms in this Article will facilitate increased participation in our democracy and create a more stable government.

A. Federal Automatic Voter Registration Legislation

The first step to increase voter investment in our democracy is to eliminate the barriers that prevent voters from exercising their right to vote. It is not uncommon for voters to show up to the polls on Election Day only to find they cannot vote because of a registration error.¹⁴ Meanwhile, individuals can become organ donors merely by checking a box at the Department of Motor Vehicles (“DMV”). Automatically registering all eligible voters should be just as feasible.

Indeed, as of January 2022, twenty-two states and the District of Columbia have implemented some form of automatic voter registration (“AVR”).¹⁵ Oregon was the first such state to do so in 2016.¹⁶ Under Oregon’s version of AVR,¹⁷ when an unregistered voter over the age of sixteen visits the DMV to apply for, renew, or replace their driver’s license, their information is automatically shared with the state’s election regulator—and they are automatically registered to vote.¹⁸ Then, a few days later, the

¹² See Lacy Crawford, Jr., *January 6th Was an Attack on Democracy Itself*, LAWS.’ COMM. FOR C.R. UNDER L. (Jan. 6, 2022), <https://www.lawyerscommittee.org/january-6th-was-an-attack-on-democracy-itself> [https://perma.cc/6R5M-H473].

¹³ See THE FEDERALIST NO. 63 (James Madison) (warning of the danger the “infection of [the] violent passions” stoked by “the artful misrepresentations of interested men” posed to the future of the United States).

¹⁴ See, e.g., Rachel Baye, *Did Voter Registration Errors Keep People from Voting?*, WYPR (July 23, 2018), <https://www.wypr.org/wypr-news/2018-07-13/did-voter-registration-errors-keep-people-from-voting> [https://perma.cc/PHC3-7SP2] (explaining that as many as 72,000 people were affected by voting registration errors on primary election day in Baltimore, Maryland).

¹⁵ See *Automatic Voter Registration*, NAT’L CONF. OF STATE LEGISLATURES (June 23, 2022), <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> [https://perma.cc/8ML7-JDQJ]. See generally Danielle Root, *The Case for Back-End Opt-Out Automatic Voter Registration*, CTR. FOR AM. PROGRESS (May 28, 2019), <https://www.americanprogress.org/article/case-back-end-opt-avr> [https://perma.cc/C3ZF-JL54].

¹⁶ See Root, *supra* note 15.

¹⁷ See OR. REV. STAT. § 247.017 (2017).

¹⁸ See Rob Griffin et al., *Who Votes with Automatic Voter Registration?*, CTR. FOR AM. PROGRESS (June 7, 2017), <https://www.americanprogress.org/article/votes-automatic-voter-registration> [https://perma.cc/6CT4-HCQZ]. See generally *Oregon Motor Voter Act FAQ*, OR. SEC’Y OF STATE, <https://sos.oregon.gov/voting/pages/motor-voter-faq.aspx> [https://perma.cc/6CT4-HCQZ].

potential voter registrant receives a pre-paid card that allows them to retract registration (a so-called “back-end opt-out” AVR system).¹⁹

By contrast, “front-end opt-out” systems allow potential voter registrants the opportunity to opt-out of automatic registration at the time of the agency interaction.²⁰ Front-end opt-out systems, however, are less effective than back-end opt-out systems because potential voter registrants have to take additional time during the agency interaction to either attest that they are eligible to vote or decline to be registered.²¹ California, for example, employs a front-end opt-out AVR system²² and registers approximately 60 percent of eligible voters who interact with the DMV.²³ Oregon’s back-end opt-out AVR system, on the other hand, boasts a 94 percent success rate.²⁴

Furthermore, back-end opt-out systems increase efficiency by eliminating interactions with the DMV, or other government employees, who are not necessarily trained to answer questions concerning voter registration.²⁵ Thus, Congress should require states to adopt a back-end opt-out AVR system. The For the People Act,²⁶ which passed the House in March 2021, and has languished in the Senate, contains such a provision and should be enacted into law. To be sure, however, either AVR system would be an improvement over the status quo.

Congress’s authority to regulate such voter registration rests on solid legal footing. The U.S. Supreme Court has specifically recognized Congress’s power to regulate voter registration under its Elections Clause powers.²⁷ In *Arizona v. Inter Tribal Council of Arizona, Inc.*,²⁸ the Court explained that the scope of the Elections Clause is broad, giving Congress ““authority to provide a complete

/X8UW-34MT] (last visited Oct. 20, 2022).

¹⁹ See Root, *supra* note 15.

²⁰ See *id.*

²¹ See *id.*

²² See CAL. ELEC. CODE § 2263 (2021).

²³ See *id.*

²⁴ See *id.* Of the 225,000 voters Oregon automatically registered in its first year of AVR, 100,000 (or 43 percent) voted. See Niraj Chokshim, *Automatic Voter Registration a ‘Success’ in Oregon*, N.Y. TIMES (Dec. 2, 2016), <https://www.nytimes.com/2016/12/02/us/politics/oregon-voter-registration.html> [https://perma.cc/A92C-JANQ].

²⁵ See Root, *supra* note 15.

²⁶ H.R. 1, 117th Cong., § 1011-21 (2021).

²⁷ See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013). The Elections Clause gives states plenary power to regulate federal congressional elections—subject to congressional limitations. U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .”).

²⁸ 570 U.S. 1 (2013).

code for congressional elections,’ including . . . regulations relating to ‘registration.’”²⁹

History also supports Congress’s power to regulate voter registration. In 1871, Congress passed a law requiring federal circuit judges to appoint election supervisors to guard and scrutinize voter registration at the request of any two citizens of a town of at least 20,000 people.³⁰ In 1993, Congress passed the National Voter Registration Act, requiring states to provide certain in-person registration opportunities, including at the DMV.³¹

Recent demonstrations of increased voter registration in states that employ AVR systems, coupled with Congress’s firm legal authority to regulate voter registration, should motivate Congress to mandate AVR to eliminate barriers to voting. A federal AVR system could register as many as 50 million voters.³² The onus will still be on the citizens to vote, but with one less barrier, more Americans will likely show up at the ballot box.

B. Ban Partisan Gerrymandering

Registration difficulties, however, are only one part of the equation. Feelings of apathy or alienation are central reasons why potential voters do not vote.³³ And what could be more alienating or foster more feelings of apathy than the perception that factors other than votes—as, for instance, how congressional districts are drawn—decide election outcomes? Partisan gerrymandering does just that.

Drawing districts to gain a partisan advantage creates representation in the House that leads to disproportionate vote shares for a given party. In New York State, for example, a Democrat-controlled legislature recently used partisan gerrymandering to entrench themselves in the majority.³⁴ Of course,

²⁹ *Id.* at 8-9 (emphasis added) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

³⁰ See Second Enforcement Act, ch. 99, 16 Stat. 433 § 2 (1871). See also Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1044 (2021).

³¹ See 52 U.S.C. §§ 20501-04.

³² See BRENNAN CTR. FOR JUST., THE CASE FOR AUTOMATIC VOTER REGISTRATION 2 (2016), <https://www.brennancenter.org/media/115/download> [<https://perma.cc/DXV2-KKUW>].

³³ Newall & Machi, *supra* note 11.

³⁴ See Madeline Halpert, *NY Court of Appeals Throws Out ‘Partisan’ Congressional Maps Drawn by Democrats*, FORBES (Apr. 27, 2022, 2:47 PM), <https://www.forbes.com/sites/madelinehalpert/2022/04/27/ny-court-of-appeals-throws-out-partisan-congressional-maps-drawn-by-democrats/?sh=4cafb68f7935> [<https://perma.cc/CV94-559X>]. The New York Court of Appeals, however, struck down the Democrat-friendly map on state constitutional grounds. See *In re Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022).

Republican legislators in Wisconsin, North Carolina, and Ohio have similarly drawn districts that have yielded greater shares of their delegations than votes would have engendered.³⁵ In North Carolina, for example, the redistricting map passed by the Republican-controlled legislature could allow Republicans to win “71 percent of the state’s congressional seats with only 48 percent of the statewide vote.”³⁶ Unfortunately, these examples are not unusual. Partisanship drives redistricting in many states, creating counter-majoritarian outcomes that can make the act of voting seem pointless.³⁷

In *Rucho v. Common Cause*,³⁸ the Supreme Court foreclosed federal courts as an avenue for redress for even the most egregious cases of partisan gerrymandering. Despite unanimous agreement among the Justices that partisan gerrymandering can undermine our democratic system,³⁹ the Court, by a one-vote majority, held that partisan gerrymandering claims are nonjusticiable.⁴⁰ The Court reached its holding despite reviewing two of the most outlandish instances of partisan gerrymandering.⁴¹ An expert examining the North Carolina map at issue produced 3,000 potential alternative maps that each created at least one more Democratic seat.⁴² Another expert ran 24,518 simulations, 99 percent of which produced at least one more Democratic seat—70 percent of the simulations produced two or more.⁴³ Despite this overwhelming evidence, the Court held that partisan gerrymandering is a problem for legislatures, not the federal courts.⁴⁴

³⁵ See Jane Mayer, *State Legislatures are Torching Democracy*, NEW YORKER (Aug. 6, 2022), <https://www.newyorker.com/magazine/2022/08/15/state-legislatures-are-torching-democracy> [<https://perma.cc/M5WP-B8V8>].

³⁶ Michael Li, *Partisan Gerrymandering Is Rampant This Cycle. Congress Needs to Act*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/partisan-gerrymandering-rampant-cycle-congress-needs-act> [<https://perma.cc/WBX2-NR97>].

³⁷ Disproportional outcomes concerning statewide vote share will always exist when districts are tied to geography. Nonetheless, this proposal aims to eliminate nefarious district drawing that further entrenches or gains seats for one political party.

³⁸ 139 S. Ct. 2484, 2508 (2019).

³⁹ See *id.* at 2506 (“[G]errymandering is incompatible with democratic principles[.]” (internal quotations omitted)). See also *id.* at 2512 (Kagan, J., dissenting) (“[P]artisan gerrymandering can make [democratic governance] meaningless.”).

⁴⁰ See *id.* at 2506 (“The only provision in the Constitution that specifically addresses the matter assigns it to the political branches.” (citing U.S. CONST. art. I, § 4, cl. 1)).

⁴¹ See Andrew Chin et al., *The Signature of Gerrymandering in Rucho v. Common Cause*, 70 S.C. L. REV. 1241, 1245-47 (2019).

⁴² See *Rucho*, 139 S. Ct. at 2518.

⁴³ See *id.*

⁴⁴ See *id.* at 2508 (“[T]he Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.”).

Given that the Court is unlikely to overrule *Rucho* in the near future, Congress should answer that call. Dozens of proposals have been introduced in Congress since 2000.⁴⁵ Most recently, the For the People Act—which also requires states to adopt AVR—would ban partisan gerrymandering.⁴⁶ If the Senate passes this bill, it will transfer district-drawing powers from state legislatures to independent redistricting commissions.⁴⁷ Each commission would have an equal number of Republican, Democratic, and independent commissioners.⁴⁸ Any map would require a majority vote for approval, including a vote from at least one member from each party, and an independent.⁴⁹

Further, the bill establishes five uniform criteria commissions must consider when drawing districts: “(1) population equality, (2) compliance with the Voting Rights Act, (3) compliance with additional racial requirements . . . (4) respect for political subdivisions and communities of interest, and (5) no undue advantage for any party.”⁵⁰ The For the People Act would additionally require commission meetings to be held in public, and for proposed maps to be shared with the public.⁵¹ Despite the bill’s promising provisions, the Senate has not yet considered this legislation.⁵²

If the Senate cannot pass the entire bill, passage of the provisions to end partisan gerrymandering would nevertheless be a valuable reform.⁵³ With less partisan redistricting, fewer voters will question whether politicians are choosing their voters rather than the other way around. These provisions would allow citizens to feel heard through the public comment process and mitigate the partisanship that tends to plague redistricting—and, in turn,

⁴⁵ *See id.*

⁴⁶ H.R. 1, 117th Cong. § 2401 (2021).

⁴⁷ *Id.*

⁴⁸ *Id.* § 2411.

⁴⁹ *Id.*

⁵⁰ Nicholas Stephanopoulos, *H.R. 1 and Redistricting Commissions*, ELECTION L. BLOG (Jan. 9, 2019, 7:30 PM), <https://electionlawblog.org/?p=103123> [<https://perma.cc/49E7-3V7D>].

⁵¹ *See* H.R. 1, § 2413.

⁵² A subsequent, narrower voter protection bill, the Freedom to Vote Act, H.R. 5746, 117th Cong. (2021), also stalled in the Senate. *See* Wendy R. Weiser et al., *Breaking Down the Freedom to Vote Act*, BRENNAN CTR. FOR JUST. (Sept. 23, 2021), <https://www.brennancenter.org/our-work/research-reports/breaking-down-freedom-vote-act> [<https://perma.cc/BGC3-2LCC>].

⁵³ In June 2021, Democratic Senator Joe Manchin voiced concerns about passing a voting rights bill with only Democratic support and stated that he would vote no on the For the People Act. *See* Joe Manchin, Opinion, *Why I’m Voting Against the For the People Act*, CHARLESTON GAZETTE-MAIL (June 6, 2021), https://www.wvgazette.com/opinion/op_ed_commentaries/joe-manchin-why-im-voting-against-the-for-the-people-act/article_c7eb2551-a500-5f77-aa37-2e42d0af870f.html [<https://perma.cc/SP2R-QTRA>].

ameliorate voter apathy and alienation. Voters may feel that their vote is more impactful and will be more likely to cast it, fostering a healthier, more stable democracy.

C. *Expand the House of Representatives*

Not only should House districts be drawn more fairly, but there should be more of them—many more. Despite the rapid growth of America’s population, the number of voting members in the House has not been expanded since 1913.⁵⁴ As of 2022, there are 435 House districts with voting members.⁵⁵ With a national population of more than 330 million, each House member represents approximately 761,000 people.⁵⁶ The process for determining how many representatives each state receives is relatively straightforward. The U.S. Census Bureau counts the number of people in each state every ten years and then uses that number to determine the proportion of a state’s population to the Nation’s. Once that percentage is derived, it is applied to the number of overall seats, 435.⁵⁷ Apportionment of House seats used to be more contentious, which led to the 1929 Permanent Apportionment Act that capped the number of House seats at 435.⁵⁸ As with so many acts of legislation, the number 435 was the result of political compromise in Congress.⁵⁹

The failure to expand the House has created an ever-increasing gulf between representatives and their constituents. The 1929 Act apportioned the 435 seats based on the 1930 Census. That Census found that the U.S. population was 137 million,⁶⁰ meaning that each representative’s district comprised approximately 314,000

⁵⁴ See Lee Drutman & Yuval Levin, Opinion, *One Way to Reform the House of Representatives? Expand It.*, WASH. POST (Dec. 9, 2021, 3:53 PM), <https://www.washingtonpost.com/opinions/2021/12/09/house-of-representatives-reform-expand-seats> [<https://perma.cc/LV6S-3YQ5>] (noting that in 1913, each House member represented approximately 210,000 people).

⁵⁵ See *About Congressional Districts*, U.S. CENSUS BUREAU (Oct. 8, 2021), <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/congressional-dist.html> [<https://perma.cc/M2XM-WFQE>].

⁵⁶ See Kosar, *supra* note 6.

⁵⁷ See *About Congressional Districts*, *supra* note 55.

⁵⁸ See Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21 (current version at 2 U.S.C. § 2a (2012)). See also Geoffrey Skelley, *How the House Got Stuck at 435 Seats*, FIVETHIRTYEIGHT (Aug. 12, 2021), <https://fivethirtyeight.com/features/how-the-house-got-stuck-at-435-seats> [<https://perma.cc/NN7W-H2G>] (detailing the decade-long impasse in Congress on how to reapportion the House).

⁵⁹ See Skelley, *supra* note 58 (“The House arrived at that number because of political expediency—and it has stayed there because of it, too.”).

⁶⁰ U.S. CENSUS BUREAU, 1930 CENSUS: VOLUME 1. POPULATION, NUMBER AND DISTRIBUTION OF INHABITANTS, UNITED STATES SUMMARY (1930), <https://www2.census.gov/library/publications/decennial/1930/population-volume-1/03815512v1ch02.pdf> [<https://perma.cc/GH2L-CNQS>].

people—less than half of what it is today.⁶¹ Consequently, today’s House is far from “the people’s house” that the Framers sought it to be.⁶² Instead, it has become rare for constituents to meet their representatives; indeed, a 2017 poll found that 63 percent of Americans do not know their representative’s name.⁶³ This disconnect creates an environment where feelings of alienation and apathy can flourish.

When House members represent fewer constituents, they are “more popular, more likely to have contact with their constituents and more likely to get higher marks for their constituent service.”⁶⁴ This fact alone should persuade representatives to vote to expand the House, since a more popular, well-liked member is more likely to get reelected.⁶⁵ Retaining the House at 435 districts diminishes the quality of representation, undoubtedly disincentivizing participation in our democracy.

If 435 is not the appropriate size for the House, what is? Political scientists examining this question have found other democracies follow the so-called “cube root” rule. In other words, the size of a country’s government often “hews to the cube root of the nation’s population.”⁶⁶ Canada, for example, tracks the cube root rule almost perfectly, with 338 members in its lower legislative chamber, representing around 112,000 constituents each.⁶⁷ If the United States followed the cube root rule, the House would expand by 258 seats—totaling 692 seats.⁶⁸

Congress should expand the House by passing legislation that apportions seats according to the cube root of the population. Adopting a cube root law would bring the United States in line with modern democracies, without necessarily providing a partisan advantage.⁶⁹ Indeed, the House would be more reflective of present demographics, thus improving the quality of representation.

⁶¹ See Skelley, *supra* note 58 (charting the number of people in each district since 1900 and observing a steady increase over time).

⁶² THE FEDERALIST NO. 52 (James Madison or Alexander Hamilton) (“[The House] should have an immediate dependence on, and an intimate sympathy with, *the people*.” (emphasis added)).

⁶³ See *Just 37% of Americans Can Name Their Representatives*, HAVEN INSIGHTS LLC (Apr. 24, 2017), <https://www.haveninsights.com/just-37-percent-name-representative> [<https://perma.cc/L55N-J84N>] (last visited Oct. 14, 2022).

⁶⁴ See Skelley, *supra* note 58.

⁶⁵ See *id.*

⁶⁶ *Id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See LEE DRUTMAN ET AL., THE CASE FOR ENLARGING THE HOUSE OF REPRESENTATIVES, AM. ACAD. OF ARTS & SCIS.’ 24-25 (2021) (showing that eleven of the last twelve Electoral College results would have been the same with an expanded House). *But see infra* Part II.D (arguing for the abolition of the Electoral College).

Smaller districts would also help constituents feel more connected to their government, mitigating the feelings of alienation and apathy experienced by many non-voters.

D. A National Popular Vote for President

The Electoral College cultivates similar feelings of apathy and alienation for presidential elections.⁷⁰ The Electoral College does this by undermining the core democratic tenet of “one person, one vote.”⁷¹ After the Supreme Court adopted this principle in the 1960s, it became the standard for equality in a healthy democracy in the minds of many voters.⁷² The Electoral College, however, overvalues the votes of those in smaller states at the expense of those in larger states. Additionally, all but two states have “winner-take-all” elections,⁷³ whereby the candidate with the most votes receives all of that state’s electoral votes. With one-party dominance in so many states, it is unsurprising that presidential candidates tend to focus their efforts on only a handful of “swing states.”⁷⁴ It makes little sense for a Democratic presidential candidate to spend time campaigning in Wyoming, a traditionally red state, which is almost guaranteed to cast its electoral votes for the Republican nominee.⁷⁵ The Democratic presidential candidate’s time is better served in a swing state like Pennsylvania.⁷⁶ This strategic calculation leaves many voters in ignored states feeling frustrated.

⁷⁰ In the United States, the president and vice president are chosen by presidential electors from each state, which is commonly known as the Electoral College. Specifically, every state (and Washington, D.C.) appoints a specific number of people to serve as electors, which constitutes the Electoral College. See Scott R. Anderson, *How to Resolve a Contested Election, Part 1: The States and Their Electors*, LAWFARE (Oct. 20, 2020, 3:25 PM), <https://www.lawfareblog.com/how-to-resolve-contested-election-part-1-states-and-their-electors> [<https://perma.cc/BF5U-TRHU>].

⁷¹ *Baker v. Carr*, 369 U.S. 186, 242 (1962).

⁷² See *id.*

⁷³ Maine and Nebraska are the two exceptions. See Tim Lau, *The Electoral College, Explained*, BRENNAN CTR. FOR JUST. (Feb. 17, 2021), <https://www.brennancenter.org/our-work/research-reports/electoral-college-explained> [<https://perma.cc/8XA4-TFBG>].

⁷⁴ See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 88 (2006) (“[T]he remaining two thirds of the states are, for all practical purposes, excluded from the campaign. They are mere spectators in the election process.”).

⁷⁵ Wyoming has only voted for a Democratic presidential candidate once since 1952: Lyndon Johnson in his 1964 landslide victory. 270TOWIN, *Voting History Trends by State: Wyoming*, <https://www.270towin.com/states/wyoming> [<https://perma.cc/P5CZ-T82X>] (last visited Oct. 20, 2022).

⁷⁶ Overvaluing swing states during the campaign also runs the risk that an incumbent president will favor swing states in policymaking to help their reelection chances. See John Hudak, *The Politics of Federal Grants: Presidential*

Advocates have spilled a lot of ink calling for the Electoral College's abolition.⁷⁷ This proposal adds to those calls.⁷⁸ There have been two proposed methods for achieving such a result: the National Popular Vote Interstate Compact ("NPVIC")⁷⁹ or a constitutional amendment.⁸⁰ The NPVIC requires state legislation whereby the state pledges its electors to the winner of the national popular vote instead of the state's winner.⁸¹ It becomes binding when enough states enact the legislation and account for 270 electoral votes (i.e., enough votes to win the presidency). Currently, sixteen states totaling 195 electoral votes have enacted NPVIC legislation.⁸² An additional nine states, possessing eighty-eight electoral votes, have passed NPVIC legislation through one legislative chamber.⁸³

While there is a possibility that the NPVIC could be triggered, an abiding constitutional issue may forestall its implementation. Specifically, Congress may have to approve the NPVIC before it becomes effective. This is because the Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State"⁸⁴ The Supreme Court has held that a "compact with another state" is any agreement that "encroach[es] upon or interfere[s] with the just supremacy of the United States"⁸⁵

Influence Over the Distribution of Federal Funds 2 (Ctr. for the Study of Democratic Insts., Working Paper No. 01-2011, 2011), <http://www.vanderbilt.edu/csdi/research/CSDI-WP-01-2011.pdf> [<https://perma.cc/X835-32EM>].

⁷⁷ See generally John D. Feerick, *The Electoral College—Why It Ought to be Abolished*, 37 *FORDHAM L. REV.* 1 (1968); *Electing the President: Recommendations of the American Bar Association's Commission on Electoral College Reform*, 53 *A.B.A. J.* 219 (1967). But see John Yoo, *A Defense of the Electoral College in the Age of Trump*, 46 *PEPP. L. REV.* 833, 860 (2019) ("If we should discard with the Electoral College as an obstacle to the majority, critics should explain why the American people should retain the Constitution's other limits on pure majoritarian democracy.").

⁷⁸ Conceivably, a proportional delegation of electoral votes could create a more democratic outcome, but the possibility of "faithless" electors would persist and threaten to produce anti-democratic outcomes that would alienate potential voters.

⁷⁹ See Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 *HARV. J. ON LEGIS.* 205, 210-14 (2007).

⁸⁰ See *id.* at 211.

⁸¹ See Elaine Kamarck & John Hudak, *How to Get Rid of the Electoral College*, *BROOKINGS INST.* (Dec. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/12/09/how-to-get-rid-of-the-electoral-college> [<https://perma.cc/JC8D-QBXH>].

⁸² See *Status of National Popular Vote Bill in Each State*, *NAT'L POPULAR VOTE*, <https://www.nationalpopularvote.com/state-status> [<https://perma.cc/7TX8-KFRY>] (last visited Oct. 20, 2022).

⁸³ *Id.* (Arkansas, Arizona, Maine, Michigan, Minnesota, North Carolina, Nevada, Oklahoma, and Virginia).

⁸⁴ U.S. CONST. art. I, § 10, cl. 3.

⁸⁵ *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

Whether the NPVIC is a “compact,” and would therefore require congressional approval, remains an open question.

Yet, supporters of the NPIVC point to Article II, Section 1’s delegation of power to each state to appoint its presidential electors “in such Manner as the Legislature thereof may direct.”⁸⁶ In opposition, some legal scholars argue that this grant of power is limited, highlighting the Framers’ express rejection of a direct popular vote for president.⁸⁷ Scholars have also raised a practical concern that as state populations fluctuate, there is the risk that the NPVIC-states’ electoral vote count would dip below 270, unbinding the compact.⁸⁸

In any event, the legal and practical uncertainties associated with the NPIVC make it a less desirable solution than passing a constitutional amendment. Certainly, amending the Constitution would be no small feat. Still, it is likely necessary to overrule the Founders’ explicit rejection of a popular vote for president and to pass constitutional muster. Indeed, such an amendment has overwhelming public support, with 63 percent of Americans supporting a constitutional amendment to abolish the Electoral College.⁸⁹

On a more fundamental level, abolishing the Electoral College through an amendment would enshrine in law the one-person, one-vote principle, which is currently a mere aspiration in presidential elections. It would establish formal voter equality such that a Wyomingite and Floridian’s votes for president carry the same electoral weight. Further, it would prevent the anti-democratic result where the popular vote losers win the Electoral College.⁹⁰ Ultimately, it would allow the American people to choose their president and alleviate feelings of alienation and apathy that stem from the belief that only swing state voters matter in presidential elections.

⁸⁶ U.S. CONST. art. II, § 1. Thus, allowing states to follow the national popular vote without congressional approval.

⁸⁷ See, e.g., Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 BYU L. REV. 1523, 1573-74 (2012).

⁸⁸ See *id.*

⁸⁹ Rebecca Salzer & Jocelyn Kiley, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Aug. 5, 2022), <https://www.pewresearch.org/fact-tank/2022/08/05/majority-of-americans-continue-to-favor-moving-away-from-electoral-college> [https://perma.cc/7E9U-EAHW].

⁹⁰ In 2016, Republican candidate Donald Trump lost the popular vote by nearly three million votes but ultimately won the election. See Jerry Schwartz, *They Lost the Popular Vote but Won the Elections*, AP NEWS (Oct. 31, 2020), <https://apnews.com/article/AP-explains-elections-popular-vote-743f5cb6c70fce9489c9926a907855eb> [https://perma.cc/C6YH-C53J].

E. Abolish the Senate Filibuster

Similar to the House and presidential elections, the current structure of the Senate, in which each state has the same two votes, leads to voter frustration. Beyond that fundamental issue, however, is the Senate's adopted rule that permits a filibuster, requiring sixty votes to end debate and move to a vote on an issue.⁹¹ This rule is neither a statutory nor a constitutional requirement. Rather, it is a procedure that dates back to 1805⁹² and was infamously used to block civil rights legislation in the 1950s and 1960s,⁹³ leading former President Barack Obama to describe the filibuster as a "Jim Crow relic."⁹⁴ Its use has steadily increased over time: of the 2,000 filibusters since 1917, approximately half have been invoked in the last twelve years.⁹⁵ As a result, the Senate is unable to pass even the most popular legislation, leading, at least in part, to Congress's 21 percent approval rating.⁹⁶

When in the Senate minority, Democrats and Republicans have both employed the filibuster to stymie the political agenda of the majority party. During the George W. Bush Administration, for example, Senate Democrats in the minority invoked the filibuster to block legislation to permanently repeal the estate tax and several other Republican legislative priorities.⁹⁷ More recently, Senate Republicans have used the filibuster to block climate and gun control legislation.⁹⁸ While one may not agree with all, or any, of

⁹¹ See, e.g., James Wallner, *Mitch McConnell Said the 115th Congress Was 'the Best,' but It's More Dysfunctional Than Ever*, LEGBRANCH (Feb. 4, 2019), <https://www.legbranch.org/mitch-mcconnell-said-the-115th-congress-was-the-best-but-its-more-dysfunctional-than-ever> [<https://perma.cc/C8AE-HSES>] (explaining that the 115th Senate only passed fifty-two pieces of legislation by recorded vote—a reliable indicator of whether a piece of legislation was significant).

⁹² See Mira Ortegón & Colleen Olsen, *Fixing the Senate Filibuster*, BRENNAN CTR. FOR JUST. (Aug. 11, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/fixing-senate-filibuster> [<https://perma.cc/CVG5-BKKC>].

⁹³ See Ian Millhiser, *Obama: The Filibuster Is a "Jim Crow Relic,"* VOX (July 30, 2020, 3:50 PM), <https://www.vox.com/2020/7/30/21348382/obama-filibuster-jim-crow-relic-john-lewis-funeral-voting-rights> [<https://perma.cc/898T-BBYY>].

⁹⁴ See *id.*

⁹⁵ See Tim Lau, *The Filibuster, Explained*, BRENNAN CTR. FOR JUST. (Apr. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/filibuster-explained> [<https://perma.cc/NTE9-4C7A>].

⁹⁶ See *Congress and the Public: Congressional Job Approval*, GALLUP (Nov. 1, 2022), <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/B6ND-2VHA>] (last visited Nov. 1, 2022).

⁹⁷ See Lau, *supra* note 95.

⁹⁸ See ALEX TAUSANOVITCH & SAM BERGER, *THE IMPACT OF THE FILIBUSTER ON FEDERAL POLICYMAKING*, CTR. FOR AM. PROGRESS 13-14 (2019), <https://www.americanprogress.org/wp-content/uploads/2019/12/Impact-Of-Filibuster.pdf> [<https://perma.cc/F9BL-ZTUQ>].

these policies, the filibuster clearly has substantially impacted Congress's ability to legislate. It has allowed parties in the Senate minority to veto legislation and frustrate the legislative priorities of the Senate majority. Even more striking is the fact that a bloc invoking the filibuster typically represents dramatically fewer constituents than the majority in favor of the legislation, leading to serious questions about its democratic legitimacy.⁹⁹ The Senate filibuster currently stands in the way of the For the People Act, which would implement federal AVR and anti-gerrymandering provisions discussed above.¹⁰⁰

Yet, not all legislation is subject to the filibuster. In fact, there are over 160 exceptions to the sixty-vote requirement.¹⁰¹ The sixty-vote supermajority is not even a permanent fixture of the rule, which used to be sixty-seven votes until 1975.¹⁰² The continued malleability of the rule, coupled with open calls by Senators for its abolition,¹⁰³ suggests that there may be political will for change. There are two possible avenues for doing so: (1) changing the Senate rules with a two-thirds majority vote; or (2) the so-called "nuclear option," where the Senate "majority leader would use a non-debatable motion to bring a bill for a vote and then raise a point of order that cloture can be invoked with a simple majority."¹⁰⁴ The current political landscape, however, presumably prevents the former option, thus leaving the nuclear option as the only possibility.

While there are not currently fifty-one votes for abolition,¹⁰⁵ there are nonpartisan justifications for abolishing the filibuster. Principally, a majority vote to pass legislation is consistent with how

⁹⁹ One scholar has gone as far as to say the filibuster is not only undemocratic, but unconstitutional because it is inconsistent with the Constitution's implicit premise of majoritarianism in the legislative process. *See generally* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011).

¹⁰⁰ *See* Lau, *supra* note 95.

¹⁰¹ *See* Ortegon & Olsen, *supra* note 92.

¹⁰² *See id.*

¹⁰³ *See* JM Rieger, *39 Senators Who Now Support Changing or Abolishing the Filibuster Previously Opposed to Doing So*, WASH. POST (June 18, 2021), <https://www.washingtonpost.com/politics/2021/06/18/39-senators-who-now-support-changing-or-eliminating-filibuster-previously-opposed-doing-so> [<https://perma.cc/NG3X-SX32>].

¹⁰⁴ Lau, *supra* note 95. For a scholarly analysis on eliminating the filibuster, see Molly E. Reynolds, *What is the Senate Filibuster, and What Would It Take to Eliminate It?*, BROOKINGS INST. (Sept. 9, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it> [<https://perma.cc/8R7T-HWE4>].

¹⁰⁵ *See* Rieger, *supra* note 103. The so-called "nuclear option" relies on a Senate procedure that allows the Senate to adopt a new interpretation of Senate rules with fifty-one votes. *See id.* Given that the filibuster is a Senate rule, it can be modified or eliminated with fifty-one votes using the nuclear option. *See id.*

almost every other legislative body in the Nation enacts laws.¹⁰⁶ Indeed, the Founders advocated for a simple legislative majority, and, except for very limited circumstances, a legislative majority is enshrined in the U.S. Constitution.¹⁰⁷ The filibuster, however, allows the majority party to hide behind the sixty-vote threshold as an excuse for not legislating, and simultaneously gives the minority party a legislative veto. This gridlock creates, at a minimum, a perception that government is ineffective. In such an environment, administrative agencies and judges—who are largely unaccountable to the public—often fill the rulemaking gap.¹⁰⁸

The Founders established the Senate to rein in the violent passions of the people.¹⁰⁹ They did not intend, however, for it to grind the wheels of government to a halt. Without the filibuster, the Senate would be able to function more effectively, facilitating an increase in accountability and responsiveness. In turn, this would improve confidence in government and increase participation in elections.

CONCLUSION

While these proposals are outlined separately, they are inextricably linked. Voters cannot cast a ballot if they cannot register. A more representative House cannot combat voter alienation and apathy if voters feel like their vote for president is undermined by the Electoral College; and, no reform will bring more voters into the fold if the Senate filibuster continues to paralyze the legislative process such that voters never receive the legislation they are promised.

With these five reforms in place, however, voters will feel more connected to their government. Government officials may more readily respond to the needs of the public and be more likely held accountable when they do not. As government becomes more responsive and accountable, and the barriers to voting are minimized, more people will, presumably, exercise their right to vote. Americans' feelings of apathy and alienation with the political process will diminish as they see that their voices, and more importantly, their *votes* matter. Thus, by adopting these proposals

¹⁰⁶ See *Supermajority Vote Requirements*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/supermajority-vote-requirements.aspx> [<https://perma.cc/R4RU-KSZE>] (last visited Oct. 16, 2022).

¹⁰⁷ See Chafetz, *supra* note 99, at 1015 (“[T]he Constitution cannot countenance permanent minority obstruction in a house of Congress.”).

¹⁰⁸ This argument has led some conservative commentators to call for restricting what Congress may delegate to administrative agencies. For a modern judicial view on this issue, see *Gundy v. United States*, 139 S. Ct. 2116, 2131-48 (Gorsuch, J., dissenting).

¹⁰⁹ See THE FEDERALIST NO. 63 (James Madison).

in their entirety, more voters will show up to the polls and thereby create a more representative, healthy, and stable democracy.