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### Why the House of Representatives Must Be Expanded and How Today's Congress Can Make It Happen

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The House of Representatives was designed to expand alongside the country's population—yet its membership stopped growing a century ago. Larger and, in some cases, unequal sized congressional districts have left Americans with worse representation, including in the Electoral College, which allocates electors partially on the size of states' House delegations. This report recommends tying the House's size to the cube root of the nation's population, which would lead to 141 more seats. It also calls for an approach to drawing districts that would eliminate gerrymandering.

This report was researched and written during the 2018-2019 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, which is focused on developing non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic's reports are available at [law.fordham.edu/democracyreports](http://law.fordham.edu/democracyreports).



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**Democracy and the Constitution Clinic**  
Fordham University School of Law

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THE SCHOOL OF LAW



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**Democracy and the Constitution Clinic**

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**January 2020**

This report was researched and written during the 2018-2019 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, which is focused on developing non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic is supervised by John D. Feerick and John Rogan.

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# Executive Summary

The House of Representatives is not functioning how the Constitution's framers intended. To ensure that the body provides fair and democratic representation, the size of the House must expand and a new approach should be used for drawing congressional districts.

Other than setting a minimum of at least 65 representatives and requiring that each state have at least one, the Constitution does not specify a size for the House. But the framers intended for the size to increase alongside the country's population, which essentially happened until 1910.

In 1910, Congress approved a reapportionment of House seats and an increase in the size of the House to 433. The membership was further increased to 435 in 1912 to accommodate the entry of Arizona and New Mexico as states. However, Congress was unable to pass legislation reapportioning the House in 1920. Congress finally passed new legislation in 1929, but it froze the size of the House at 435. That number, however, was an arbitrary cap. In the interest of political expediency, those members who voted for the limit forced their successors to represent two to three times as many constituents as they themselves represented. The cap of 435 members still exists today, and it creates a host of problems for our representative democracy.

An expansion of the House is important for several reasons. First, each member of the House represents—on average—about 750,000 constituents. In 2050, it is projected that each member of Congress will represent a million or more people. Everything a congressperson does will become even more challenging. Some responsibilities might be entirely neglected. Americans who depend on their representatives for help will be one of a million. Second, the 435-member cap creates unequal representation among districts. That district sizes vary so greatly throughout the country is problematic—the quality of representation Americans receive in the House should not depend on the district in which they reside. This disparity extends to presidential elections because the number of electors that each state receives in the Electoral College is the total of its representation in the House and Senate. Third, increasing the size of the House may, in fact, help to fix the issue of partisan gerrymandering. The more districts there are, the harder it becomes to gerrymander effectively. Increasing the size of the House means more accountability, better representation, and increased diversity in Congress.

How many seats should be added to the House? We propose using the Cube Root Rule to determine the number. Under the Cube Root Rule, the size of a country's legislature is the cubed root of the country's population. This means the number of House seats would be the cubed root of the U.S. population, minus 100 (to account for the 100 Senators). Based on the 2010 census, this approach would add 141 seats to the House (and decrease the average constituency size to around 540,000 people). Adhering to the Cube Root Rule would put the U.S. in good company with many other democratic nations. Importantly, the Cube Root Rule should be implemented as a permanent formula to determine House seats so Congress would not need to pass a new law every time the population significantly changes. The Cube Root Rule simply responds to population changes—as the U.S. population increases or decreases, so can the size of Congress.

To draw districts following the House expansion, we recommend a novel plan: the Primary Allocation Model. This system would practically eliminate partisan gerrymandering and it would increase voter turnout in congressional elections.

Under the Primary Allocation approach, there would be two "election rounds." The first round would take place four to six months before the second round. All voters would register with a political party (or remain independent) before the first round. The first round would be open to the entire state. Voters would cast votes for their preferred political party, not for a specific candidate. Districts would then be allocated to political parties based on results of the first round. Each political party with multiple districts would draw a district map across the entire state. A political party with one district would have an "at large" district covering the entire state. The second round of the elections would have the declared candidates campaigning against members of their own party in their districts. Voters in the second round would be eligible to vote only for candidates of the party they supported in the first-round election.

Allowing political parties to create their own districts would end the incentive for partisan gerrymandering. Elections would also be far more competitive, which would inspire more voters to come to the polls.

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# Introduction

*“The truth is, that in all cases, a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.”<sup>1</sup>*

—James Madison, Federalist No. 55

In 1929, there were 435 members of the House of Representatives. If that number seems familiar, it may be because in 2020 there are still 435 members of the House.

This is by design—a 1929 law capped the number of House members at 435. Today, this law causes many problems for our representative democracy, primarily because dramatic growth in the U.S. population has created exceedingly large congressional districts. This report addresses how to fix the problems inherent with large districts. Part I looks at the history of the House, with an emphasis on size and seat allocation. Part II discusses the reasons the House should be expanded. Part III analyzes methods for expanding the House, ultimately recommending a population-based mathematical rule. Finally, Part IV discusses a serious problem created by large districts—partisan gerrymandering—and offers a solution.

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1 THE FEDERALIST NO. 55 (James Madison).



# I. A History of Representation

## A. The People's House

The concept of fair representation has been a crucial element of American government since the nation's founding. The Revolution was, in part, a contest about the very definition of representation. In England, the House of Commons represented every British subject regardless of whether all of the subjects could actually vote for the Commons' membership. In this sense, most people living in areas under British rule—including North America—were only “virtually represented” in Parliament.<sup>22</sup> American colonists, who were accustomed to controlling their local affairs in the directly-elected colonial legislatures, lacked a voice in Parliament and resented the British policies imposed on them. They rallied behind the now familiar motto: “No taxation without representation!”<sup>3</sup> After the war, the founders struggled to design a system of government to better represent the inhabitants of the new country. The Articles of Confederation created the first national congress to represent the interests of the states; under the Articles, each state appointed between two and seven delegates to the congress, and each state delegation had one vote.<sup>4</sup>

This system proved unworkable. The Articles did not vest enough power in congress to effectively govern national affairs and prevent interstate conflict.<sup>5</sup> The founders had largely avoided complicated questions of how to balance the interests of different states and their citizens in national policymaking by leaving most fundamental governing issues to state legislatures.<sup>6</sup> The failure of this model led the delegates to the Constitutional Convention of 1787 to design a system with a stronger national government. A key question was how such a government would best represent and empower individuals, communities, and states across the nation.

One of the main concerns that overtook the Convention was the size of the House of Representatives.<sup>7</sup> It was part of the struggle between large and small states that colored most of the Convention. Pennsylvania Delegate Benjamin Franklin summed up the disagreement, observing,

If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges of planks do not fit, the artist takes a little from both and makes a good joint.<sup>8</sup>

The “good joint” that emerged from weeks of gridlock was called the “Great Compromise.” It created a bicameral legislature with a House, where state population determined membership, and a Senate, where each state had two seats regardless of population.<sup>9</sup>

The House of Representatives was intended to be the branch of government most intimately tied to popular will. Federalist No. 52, which either James Madison or Alexander Hamilton authored, argued the House should have “an immediate dependence on, and intimate sympathy with, the people.”<sup>10</sup>

Members of the House have been directly elected by American voters since the chamber's formation.<sup>11</sup> Unlike the Senate, the House is not a continuing body. Its members must stand for election every two years, after which it convenes for a new session and essentially reconstitutes itself—electing a Speaker, swearing-in the members, and approving a slate of officers to administer the institution. Direct, biennial elections and its relatively large size have made the House receptive to a continual influx of new ideas and priorities that contribute to its longstanding reputation as the “People's House.”

The framers intended for the House to continuously grow.<sup>12</sup> Most agreed that the strength of the lower house would be derived from the continued ability of the representatives to accurately reflect the “interests and circumstances” of their constituents.<sup>13</sup> Only through gradual expansion would the House remain a democratic and truly representative institution.

2 See Edmund S. Morgan, *Colonial Ideas of Parliamentary Power 1764-1766*, 5 WM. & MARY Q. 311, 331-34 (1948).

3 *Id.*

4 See ARTICLES OF CONFEDERATION OF 1781, art. V.

5 JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN 291 (2003).

6 *Id.*

7 See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 78 (2005); see also FERLING, *supra* note 5, at 292.

8 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488 (Max Farrand ed., 1911).

9 See *id.* at 524.

10 THE FEDERALIST NO. 52.

11 U.S. CONST. art. I, § 2.

12 See Christopher St. John Yates, *A House of Our Own or A House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157, 175-79 (1992); see also THE FEDERALIST NO. 58 (James Madison) (explaining that one of the purposes of the Decennial Census was “to augment the number of representatives ... under the sole limitation that the whole number shall not exceed one for every thirty thousand inhabitants”).

13 Yates, *supra* note 12, 178-79.

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## B. Growth of the House and the Permanent Apportionment Act

As the U.S. population grew in the nation's early history, so too did the size of the People's House. The Constitution imposed only one limit on the House's size: that the "Number of Representatives shall not exceed one for every thirty Thousand."<sup>14</sup> Though an amendment was attempted after the Convention to tie the House's size to the nationwide population, it fell short of ratification by one state.<sup>15</sup>

The Constitution requires reapportionment of House seats every ten years following the census.<sup>16</sup> Congress has used several methods to determine the size of the House and the allocation of its seats.<sup>17</sup>

Congress initially used what has been called the Jefferson method.<sup>18</sup> This approach involved setting a desired population-to-representative ratio, such as 30,000 to 1, and then dividing each state's population by the population figure in the ratio to determine the size of each state's respective House delegation.<sup>19</sup> Under this approach, decimals are rounded to the lowest whole number.<sup>20</sup> If a state's population was 920,000 and the ratio chosen was 30,000 to 1, the formula would give the state 30 representatives after rounding down from 30.66. Congress used the Jefferson method through the expansion based on the 1830 census.<sup>21</sup> For the rest of the 19th century, Congress used either the Webster or Hamilton method, which instead asked Congress to choose a number of representatives and used people-to-representative ratios and rounding to ensure appropriate allocation of those seats.<sup>22</sup> In any case, the size of the House steadily increased during this period—though the ratio of people to representatives had increased to roughly 70,000 by 1830. Following the 1830 census, the House had grown to 240 members from 105 after the first apportionment in 1792.<sup>23</sup>

By the mid-1800s, some legislators were beginning to question whether the House should continue to expand and whether Congress should engage in a debate over the issue every decade. A permanent apportionment bill setting the size of the House at 233 was enacted by Congress in 1850,<sup>24</sup> though Congress effectively ignored that cap and continued expanding in successive decades.<sup>25</sup> Following the Civil War, the population expanded dramatically due to heavy immigration from Southern Europe to American cities.<sup>26</sup> By 1900, the House had reached 386 members and was expanded to 433 following the 1910 census.<sup>27</sup> Two more states, Arizona and New Mexico, entered the Union in the following decade, bringing the total membership to the modern cap of 435.<sup>28</sup> In 1920, it was anticipated that to avoid any single state losing a representative, the membership would need to be expanded by another 60 seats.<sup>29</sup>

Members of Congress began to believe that the size of the House needed to be capped. While some argued for continued expansion to allow the House to better represent constituents, others asserted that a larger size would prevent the House from functioning efficiently.<sup>30</sup> Immigration also impacted this debate—rural representatives were fearful that the 1920 apportionment would result in urban areas receiving several new seats, which would give those communities much greater relative power in the legislature.<sup>31</sup> Division over the issue prevented the House from being expanded following the 1920 census.<sup>32</sup>

Debate on the apportionment issue in Congress lingered through the 1920s without a resolution.<sup>33</sup> With the 1930 census approaching, public pressure was coming to bear on the issue, as the population of several states had grown significantly, and the allocation of representatives had remained entirely unchanged. In 1928, the House took up a bill that would cap its membership at 435 representatives and establish an automatic allocation procedure following the upcoming census.

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14 U.S. CONST. art. I, § 2, cl. 3.

15 See Richard Edward McLawhorn Jr., *Apportionment or Size? Why the U.S. House of Representatives Should Be Expanded*, 62 ALA. L. REV. 1069, 1072 (2011).

16 U.S. CONST. art. I, § 2.

17 See McLawhorn, *supra* note 15, at 1070-76; Methods of Apportionment, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/reference/apportionment/methods\\_of\\_apportionment.html](https://www.census.gov/history/www/reference/apportionment/methods_of_apportionment.html).

18 MICHEL L. BALINSKI & H. PAYTON YOUNG, FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE 23 (2001).

19 *Id.* at 10-11.

20 *Id.* at 11.

21 McLawhorn, *supra* note 15, at 1074.

22 *Id.* at 1074-75.

23 *Id.* at 1074.

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24 BALINSKI & YOUNG, *supra* note 18, at 37.

25 McLawhorn, *supra* note 15, at 1075.

26 Byron J. Harden, *House of the Rising Population: The Case for Eliminating the 435-Member Limit on the U.S. House of Representatives*, 51 WASHBURN L.J. 73, 79 (2011-2012).

27 McLawhorn, *supra* note 15, at 1075.

28 Charles A. Kromkowski & John A. Kromkowski, *Why 435? A Question of Political Arithmetic*, 24 POLITY 129, 133 (1991).

29 McLawhorn, *supra* note 15, at 1076.

30 *Id.*

31 Harden, *supra* note 25, at 79.

32 Kromkowski & Kromkowski, *supra* note 28, at 134.

33 McLawhorn, *supra* note 15, at 1077.

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Ultimately, the legislation gave Congress approval power over the method used in any given reapportionment, with a default to the method used in the prior reapportionment if no approval was given.<sup>34</sup> The Permanent Apportionment Act became law in 1929.<sup>35</sup>

## C. The House Today

The Permanent Apportionment Act continues to dictate the size of the House and the allocation of seats among the states. The issue has not been substantively revisited by Congress since the Act's passage nearly a century ago, and it has received limited scholarly attention in recent decades. As a result, congressional districts have more than tripled in size over the

last century—from an average of roughly 212,000 inhabitants after the 1910 Census to about 710,000 inhabitants following the 2010 Census.<sup>36</sup> It is projected that each member of Congress will represent a million or more people by 2050.<sup>37</sup>

At a minimum, the ballooning size of districts suggests the House is functioning in a way that provides lower quality representation to constituents than when Congress's membership froze in 1911.<sup>38</sup> In recent years, a small number of scholars and journalists have begun arguing that apportionment should be revisited as a matter of democratic prerogative.<sup>39</sup> This is where our analysis begins.

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<sup>34</sup> See Yates, *supra* note 12, at 180.

<sup>35</sup> *The Permanent Apportionment Act of 1929*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1901-1950/The-Permanent-Apportionment-Act-of-1929/>.

<sup>36</sup> *United States Population Projections: 2000-2050*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/working-papers/2009/demo/us-pop-proj-2000-2050/analytical-document09.pdf>.

<sup>37</sup> *Id.*

<sup>38</sup> See Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1248 (1989) (“The Framers believed that the potential danger of factionalism in the House of Representatives would be counteracted by its close dependence on the people and its impermanence relative to the other institutions of government.”).

<sup>39</sup> See, e.g., Editorial Board, *America Needs a Bigger House*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html>; Dylan Matthews, *The Case for Massively Expanding the U.S. House of Representatives*, in *One Chart*, VOX (June 4, 2018), <https://www.vox.com/2018/6/4/17417452/congress-representation-ratio-district-size-chart-graph>; Chris Wilson, *How to Fix the House of Representatives in One Easy, Radical Step*, TIME (Oct. 15, 2018), <http://time.com/5423623/house-representatives-number-seats/>.

## II. Why The House Must Be Expanded

Expanding the House would allow the chamber to conform to the framers' vision for it and to modern political and popular notions of what representative democracy should be. We identify eight discrete and distinct reasons for this change. We also respond to the primary arguments made by opponents of a House expansion.

### A. Local Responsiveness and Equal Representation

As districts grow in size,<sup>40</sup> more constituents are deprived of adequate representation. To win re-election, candidates are practically required to bargain with some interest groups over others within their districts. The interest groups and political minorities that candidates eschew are ultimately losers in the electoral process, both deprived of a functional vote and representation of their interests in the House. A larger House corrects for this issue by granting more representatives to each state and allowing those new districts to capture the preferences of a greater number of political communities.

Large districts may make it harder for constituents to receive help navigating the federal bureaucracy. Many Americans rely on their members of Congress to obtain essential information about government programs and benefits. By 2050, Americans who depend on their representatives for help will be one of a million; members and their staffs will necessarily have to triage constituent concerns to an even greater degree than they do now. Expanding the House would allow representatives to provide more hands-on help to constituents and relieve the burden on each member's staff.

The cap on House members creates unequal representation among districts.<sup>41</sup> Each state's congressional delegation changes as a result of population shifts, with many states either gaining or losing seats after each census. But this process is imperfect. Given the increasingly wide population disparity between small and large states, it is mathematically impossible to ensure that each member represents the same number of constituents, or even roughly the same number in many cases. Currently, Montana's population of 1,050,493 people grants it just one House member.<sup>42</sup> Rhode Island, has only a slightly larger population, with 1,059,639 residents, but that's enough to give it two representatives, which grants Rhode

Islanders one representative for every 529,820 residents.<sup>43</sup> Courts have not applied the "one person, one vote" doctrine to congressional districts across state lines; it is only a restriction on the drawing of legislative districts within states.<sup>44</sup> However, constitutional doctrine notwithstanding, the quality of Americans' representation should not depend on the state they happen to live in. Increasing the number of representatives who can be allocated among the states makes the task of equal apportionment easier by increasing the pool of seats to be equally divided and produces more parity in interstate representation ratios.

### B. Mitigating Partisan Gerrymandering

Increasing the size of the House may limit partisan gerrymandering.<sup>45</sup> After seats are apportioned every ten years, each state is responsible for drawing districts. Partisan gerrymandering of these districts has been a feature of American democracy for centuries, but recent decades have seen particularly extreme cases of statehouse majorities using their districting power to greatly diminish the representation of the opposing political party.<sup>46</sup> Larger legislatures make it more difficult to gerrymander effectively.<sup>47</sup> If there was a state with 100 residents and 100 congressional districts, gerrymandering would be impossible; if there are 50 congressional districts, it would not be impossible, but very difficult. The House would never be expanded to such a point that gerrymandering could be wholly eliminated, but a larger House would make it harder to entirely lock out a political minority of representation and cement the majority's hold on power.

### C. Electoral College Parity

Each state's vote total in the Electoral College is derived from its total congressional representation—the sum of its two senators and its total House delegation.<sup>48</sup> This means legislative apportionment and representation are inherently tied to presidential selection. The lack of parity in House apportionment among states impacts states' influence in the Electoral College. Large states would be the primary

40 Drew Desilver, *U.S. Population Keeps Growing, but House of Representatives is Same Size as in Taft Era*, PEW RESEARCH CTR. (May 31, 2018), <https://www.pewresearch.org/fact-tank/2018/05/31/u-s-population-keeps-growing-but-house-of-representatives-is-same-size-as-in-taft-era/>.

41 *Id.*

42 *Id.*

43 *Id.*

44 See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

45 Harden, *supra* note 26, 98-99.

46 See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013); *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Cooper v. Harris*, 137 S. Ct. 1455 (2017). See also *Gerrymandering at the Supreme Court*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/gerrymandering-scotus> (last visited Aug. 9, 2019).

47 *Id.*

48 See U.S. CONST. art. II, § 1, cl. 2.

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beneficiaries of a House expansion because they typically have higher than average population-to-representative ratios due to the limited number of seats and the requirement that each state receive at least one. But some small states, such as Montana, that have high ratios would also benefit. Expanding the House mitigates these parity disadvantages and cabins the small-state advantage in the Electoral College to the two-vote baseline, which is the advantage the system was originally intended to confer.

## D. Preventing Corruption and Capture by Special Interests

A stagnant political body is vulnerable to capture by powerful interests. The House is no exception. This concern was paramount among supporters of the proposed constitutional amendment in the Framing Era to tie the House's membership to population growth.<sup>49</sup> They feared corruption was more likely where representatives were not intimately familiar with their voters, and that the powerful would more easily commandeer a smaller body than a larger one.<sup>50</sup> Special interests have become intimately familiar with the operation of both chambers of Congress, and exert considerable influence over committee assignments, legislative priorities, primary candidates, campaigns, and government oversight of their activities.<sup>51</sup> There are manifold reasons for this phenomenon beyond the structure of the House, but increasing its membership would disrupt these dynamics by requiring some changes to House administration.

Additionally, large districts make campaigns costlier. Winning the support of a majority of voters in a 750,000-person district requires significant financial resources that candidates often need to obtain from wealthy benefactors and powerful interest groups. An expanded House would reduce the financial barrier to entry for candidates and, in effect, decrease the leverage that well-financed groups have over them.

## E. Third Party Representation

Third parties struggle to obtain any representation at the federal level. This is in part because congressional districts are too large for third-party candidates to reach a critical level of

support, either because of high financial costs or because of the necessary compromises with interest groups. Smaller districts allow independent and third-party candidates to run issue-driven campaigns that speak specifically to the concerns of a geographic community. They also make it easier for candidates to reach the critical number of voters needed to win a seat. Finally, more seats in the House diminishes the significance of any single seat in determining a congressional majority. A third-party voter may therefore feel less concerned that their third-party vote will be “wasted” or will “spoil” the election of a preferred major party candidate and preferred congressional majority. Given the confines of the plurality system, House expansion may be the most effective means of promoting independent and third-party representation.

## F. Diversity

Incumbency is very powerful in federal elections, especially in safe districts where a major party is overwhelmingly likely to win regardless of its candidates. Expanding the House would not eliminate the benefits of incumbency. However, an immediate increase in House seats to accommodate for several decades of stagnation would create tremendous opportunity for new voices to enter government. Overwhelmingly, these voices would likely be younger, more female, more non-white, and more demographically representative of America than the current makeup of Congress. Political and socioeconomic diversity would also be enhanced, as discussed.

## G. Party Conformance and Control

Expanding the House may help undo the bitter partisan dynamic in the chamber. A larger House would create greater opportunity for members to defect from their parties on key issues and build coalitions with other members to advance legislation and oversight prerogatives. An increase in third party representation could also reduce partisanship by denying a major party a majority or forcing some kind of coalition government.

## H. Scope of Work

Finally, expanding the House may make some administrative functions easier. The scope of Congress's powers and work have only expanded in the modern era, and the issues that each congressperson deals with, either in representing their community or in their committee and legislative assignments, has only continued to grow. Representatives in the House arguably have too much work, and do not perform their jobs as well as they would like because of it. Smaller districts would

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49 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, 1006 (2013).

50 Yates, *supra* note 12, at 177-78.

51 See Richard A. Smith, *Interest Group Influence in the U. S. Congress*, 20 *LEGIS. STUD. Q.* 89, 139 (Feb. 1995).

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reduce the number of salient interests representatives must consider in legislating because their districts would have fewer political communities. Additionally, a larger House allows committee work and assignments to be distributed among more members, giving each member more time to focus on their remaining tasks.

## J. Responding to Critics

The idea of lifting the 435-member limit is not without its critics. This Part addresses some of their concerns.

### 1. Physical Space

Some may argue that the Capitol building cannot accommodate more members of Congress. One of the primary concerns behind this criticism is that insufficient space could undermine the body's deliberative nature by preventing members from gathering in the House chamber to debate and collaborate on important legislation.

But the current House chamber is almost certainly capable of seating more than 435 people; in fact, it does so every year at the State of the Union Address, when most, if not all, Senators, Cabinet secretaries, Supreme Court justices, and military service chiefs assemble on the House floor. Even if the current facilities were not large enough, more space could be created. Office buildings could be erected within the Capitol complex to accommodate more members, and the Capitol building itself could be modified or expanded to allow every member to fit on the floor. Additionally, most negotiation and deliberation does not take place on the floor of the House—it occurs in committee meetings, behind closed doors, and in other settings.<sup>52</sup> Often, House members speak to a mostly empty chamber when they make speeches from the floor.<sup>53</sup> Others members and their staffs track the proceedings on the floor on C-SPAN from their offices.

### 2. Inefficiency

A larger number of representatives with more divergent viewpoints could result in some inefficiencies, such as making consensus-building harder and more time consuming. Creating space for more views would involve making the effort and

taking the time to accommodate those new perspectives. But hierarchies will still exist in House administration such that individual representatives will look to leadership—in committees, in their party, or otherwise—to help develop their views on specific issues. If members have a smaller committee load, as would probably result from a larger House, they may also be able to develop greater expertise and influence in the policy areas they choose to focus on. Additionally, if expanding the House reduces partisan advantage from gerrymandering, there will likely be a greater number of swing districts in the House, increasing the incentive for compromise across the aisle and the likelihood that legislation can be passed. Though coordinating among more members would present new challenges, there are offsetting benefits and good reasons for the additional work it would require.

### 3. Cost and Size of Government

Finally, some may question whether taxpayers should foot the bill for an expansion of Congress, particularly at a time when public satisfaction with Congress (and politicians broadly) is especially low.<sup>54</sup> But there are two strong counterpoints. First, the budget for congressional salaries is already an exceedingly low percentage of the total federal budget—a representative's salary and office budget totals about \$1 million each year.<sup>55</sup> Appropriating for the salaries of even 200 more members would not make a substantial dent in the budget. Second, dissatisfaction with Congress may be impacted by the structure of the body. A more representative Congress may produce greater public approval, and better political outcomes for the body politic. This could especially be true if a House expansion reins in the influence of moneyed interests. And some studies even suggest an increased legislature size would reduce government spending in aggregate.<sup>56</sup>

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54 *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> (last visited Aug. 7, 2019).

55 IDA A. BRUDNICK, CONG. RESEARCH SERV., RL300064, SALARIES AND ALLOWANCES: IN BRIEF 5 (2018), <https://www.senate.gov/CRSpubs/9c14ec69-c4e4-4bd8-8953-f73daa1640e4.pdf>; IDA A. BRUDNICK, CONG. RESEARCH SERV., R40962, MEMBERS' REPRESENTATIONAL ALLOWANCE: HISTORY AND USAGE (2019), <https://fas.org/sgp/crs/misc/R40962.pdf>.

56 See, e.g., Larry Sabato, *Expand the House of Representatives*, DEMOCRACY J. MAG., Spring 2008, <https://democracyjournal.org/magazine/8/expand-the-house-of-representatives/>.

52 Kromkowski & Kromkowski, *supra* note 28, at 144.

53 *Id.*

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## III. Expanding the House

For a century and a half after the first Congress met, Congress expanded the House and allocated seats on a piecemeal basis as the nation's population grew. Partisan and legislative incentives always permeated the process—re-allocations rarely took seats away from states,<sup>57</sup> for example—but these tensions reached a breaking point when no reapportionment occurred after the 1920 census. Congress further abdicated its role in 1929 when it capped the size of the House at 435 and delegated some of its reallocation power to the executive branch.<sup>58</sup> Following the 1940 and 1941 amendments to the Permanent Apportionment Act, reapportionment was placed on “automatic pilot.”<sup>59</sup>

Congress cannot continue to ignore the issues caused by the House's insufficient size. The institution is not living up to the framers' vision for it. Expansion of the chamber's membership will help it function as intended and more effectively serve the nation. This section examines four practical and politically realistic methods of expansion: two population-based rules (the Cube Root Rule and the Wyoming Rule), an incremental approach, and a one-time expansion. This section ultimately recommends passage of a single piece of legislation to repeal the Permanent Apportionment Act and tie the size of the House to the cube root of the nation's population.

### A. Four Methods of Expansion

Before arguing for the Cube Root Rule as the best approach to House expansion, we describe and analyze that method alongside three other viable approaches to increasing the House's membership.

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57 *Congressional Apportionment*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Appointment/Appointment/> (last visited May 15, 2019).

58 McLawhorn, *supra* note 15, at 1079.

59 Kromkowski & Kromkowski, *supra* note 28, at 134-35.

### 1. The Cube Root Rule

The Cube Root Rule is a commonly-suggested formula in academic literature for determining a national legislature's size. In Rein Taagepera's influential 1972 article, *The Size of National Assemblies*, Taagepera noted a geometric pattern among population size and assembly size throughout the world.<sup>60</sup> After examining the size of the lower chambers of national assemblies in the 1960s, he found that the size of a country's national assembly often approximated the cube root of its population.<sup>61</sup> Since Taagepera's findings, the “Cube Root Rule” has been widely studied,<sup>62</sup> and research suggests the U.S. roughly adhered to this calculation until 1910.<sup>63</sup> Research also reveals that many national assemblies still conform to this rule. Figure 1 displays the population, cube root of the population, and national legislature size of 37 countries that comprised the Organization for Economic Co-operation and Development in 2017. The size of most of the legislatures is either very close to the cube root of the population or contains more representatives than the cube root would suggest.<sup>64</sup> Congress, however, is significantly smaller than the cube root of the U.S. population. Among the countries listed in Figure 1, only Colombia has a greater negative discrepancy between the cube root of its population and the size of its legislature.

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60 Rein Taagepera, *The Size of National Assemblies*, 1 SOC. SCI. RESEARCH 385 (1972).

61 *Id.* at 386; Arend Lijphart, *Reforming the House: Three Moderately Radical Proposals*, 31 PS: POL. SCI. & POL. 10, 12 (1998).

62 Jeffrey W. Ladewig & Mathew P. Jasinski, *On the Causes and Consequences of and Remedies for Interstate Malapportionment of the U.S. House of Representatives*, 6 PERSP. ON POL. 89, 98 (2008).

63 *Id.* at 99-100.

64 *Id.* at 99.

Figure 1.<sup>65</sup>

Country	National Population*	Cube Root of Population**	National Legislature Size***	Difference of National Legislature Size and Cube Root
Australia	23,800,000	288	150	-138
Austria	8,679,000	206	183	-23
Belgium	11,288,000	224	150	-74
Canada	35,950,000	330	337	+7
Chile	17,763,000	261	120	-141
Colombia	48,229,000	364	166	-198
Czech Republic	10,604,000	220	200	-20
Denmark	5,689,000	179	179	0
Estonia	1,315,000	110	101	-9
Finland	5,482,000	176	200	+24
France	64,457,000	401	577	+176
Germany	81,708,000	434	630	+196
Greece	11,218,000	224	300	+76
Hungary	9,784,000	214	199	-15
Iceland	330,000	69	63	-6
Ireland	4,700,000	168	158	-10
Israel	8,065,000	201	120	-81
Italy	5,9504,000	390	630	+240
Japan	127,975,000	504	475	-29
Korea	50,594,000	370	300	-70
Latvia	1,993,000	126	100	-26
Lithuania	2,932,000	143	141	-2
Luxembourg	567,000	83	60	-23
Mexico	125,891,000	501	500	-1
Netherlands	16,938,000	257	150	-107
New Zealand	4,615,000	166	119	-47
Norway	5,200,000	173	169	-4
Poland	38,265,000	337	460	+123
Portugal	10,418,000	218	230	+12
Slovak Republic	5,439,000	176	150	-26
Slovenia	2,075,000	128	90	-38
Spain	46,398,000	359	350	-9
Sweden	9,764,000	214	349	-135
Switzerland	8,320,000	203	200	-3
Turkey	78,271,000	428	550	+122
United Kingdom	65,397,000	403	650	+247
United States	319,929,000	684	535	-149

\* Data concerning population was provided in thousands. It is based on 2015 population data.

\*\* Cube root is rounded to the nearest hundred.

\*\*\* Generally, the national legislature size refers only to the lower house in each country. For the United States, the number is the combined size of the House and Senate.

65 *Government at a Glance 2017: Contextual Factors*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/gov/government-at-a-glance-2017-contextual-factors.pdf> (last visited May 15, 2019).



Why do most legislatures conform to this rule? The reasons are not clear. Every nation determines the size of its legislature differently. Taagepera theorized that conformance to the Cube Root Rule creates the optimal balance between representative-constituent communication and communication among legislators themselves.<sup>66</sup>

The Cube Root Rule provides for the growth of a legislature with the size of the population it represents—a natural evolution in a robust, representative democracy. Over time, the practicalities of governing—like collaborating with other legislators—start to become more difficult the larger a legislature expands. These consequences are met, however, by the slowing rate of growth of the legislature under the cube root formula. In other words, the growth will be marginal relative to additions to the total national population. In a nation as large as the U.S., the Cube Root Rule would provide a consistent and measured approach to expanding the legislature in response to population growth, and if Taagepera’s theory is correct, it will optimize constituent responsiveness and congressional relationships.

Rule.<sup>70</sup> The majority of proposals advocating adoption of the Cube Root Rule in the U.S. have taken the latter approach. Figure 2 illustrates the number of House seats that would be added under that system.

An initial increase in representation under the Cube Root Rule based on the population in the 2010 census would result in about 141 additional House seats. Subsequent increases would be relatively stable according to current population projections at roughly 15 new seats per decade, even alongside population growth of over 70 million people. The hallmark feature of the Cube Root Rule—slowing legislature growth as the population gets larger<sup>71</sup>—is clear in this model. The projected population growth between decades is roughly equivalent in the table (about 21-25 million), but by 2040, this growth produces only 13 additional seats (compared to 17 additional seats in both 2020 and 2030). This trend is even more apparent on a larger scale. At 500 million residents, the Cube Root Rule produces a total legislature size of roughly 800; at 1 billion, it calls for exactly 1,000—an increase of only 25% when the population

**Figure 2.**

Year	Total U.S. Population <sup>67</sup>	Cube root of U.S. population (to 2 decimals)	Total Number of House seats	Change from prior size	Average Constituency
2010	308,745,538	675.88	576	+141	536,017
2020	332,527,548	692.80	593	+17	560,755
2030	357,975,719	710.04	610	+17	586,845
2040	379,392,779	723.93	623	+13	608,977

Literature advocating the Cube Root Rule’s application to the House is divided on whether the number of House seats should account for the 100 Senate seats. Those who argue against including Senate seats cite Taagepera’s original finding that the size of many countries’ lower (usually largest) legislative chambers approximate the cube root of the countries’ populations,<sup>68</sup> while others eschew this finding to advocate for counting the total seats in the House and Senate.<sup>69</sup> The latter group views the Senate as a more significant body than small chambers in other countries, which, they argue, supports including all federal legislators when applying the Cube Root

is doubled. Accordingly, one would expect successively smaller increases in decades after 2040 even if large and fast population growth continues.

Slower growth in the House over time makes the body more manageable and avoids the potential for runaway growth in the chamber. However, under the Cube Root Rule, as the national population increases, so does the average constituency size; in Figure 2, the average district grows by 13% from 2010 to 2040. Many of the reasons for expanding the House discussed in this report (specifically: responsiveness, representativeness, proportionality, and anti-corruption) are intimately tied with a decrease in constituency size. A system that increases that metric over time may mitigate the important, beneficial effects of additional House seats.

66 Ladewig & Jasinski, *supra* note 62, at 98.

67 *Observed and Total Population for the U.S. and the States, 2010-2040*, DEMOGRAPHICS RES. GROUP, WELDON COOPER CTR. FOR PUB. SERVICE, <https://demographics.coopercenter.org/national-population-projections> (last updated Dec. 2018).

68 See Lijphart, *supra* note 61; see also Ladewig & Jasinski, *supra* note 62, at 99.

69 See Daniel Greenberg, *Why 435? How We Can Change the Size of the House of Representatives*, FAIRVOTE (Oct. 12, 2017), [https://www.fairvote.org/how\\_we\\_can\\_change\\_the\\_size\\_of\\_the\\_house\\_of\\_representatives](https://www.fairvote.org/how_we_can_change_the_size_of_the_house_of_representatives); see also *America Needs a Bigger House*, *supra* note 39.

70 See *America Needs a Bigger House*, *supra* note 39.

71 See Brian Frederick, *Not Quite a Full House: The Case for Enlarging the House of Representatives*, 28 BRIDGEWATER REV., Dec. 2009, at 23, 23.

Notably, an important benefit of the Cube Root Rule is that it could decrease the discrepancies in district size across the country. An article published before the 2010 census found that application of the Cube Root Rule would “significantly diminish” the extent of interstate malapportionment.<sup>72</sup> Among states with the largest discrepancies between average constituency size and the national average, the discrepancy would be reduced by 40 percent.<sup>73</sup> Among the ten largest states, the discrepancy would be reduced by 56 percent.<sup>74</sup> The article acknowledged that though not every state would see a decrease in the discrepancy between its average constituency size and the national average, the representation of each person would become more equal in Congress.<sup>75</sup>

Although the Cube Root Rule has support in the political science community, convincing lawmakers to support it may prove difficult. Because the Cube Root Rule is a formula based on data that Congress cannot control (the national population), lawmakers may favor an incremental or onetime expansion where they control how much the House size increases and at what pace. Furthermore, the Cube Root Rule’s higher complexity compared to other approaches may present challenges in fostering public understanding and support. Lawmakers will probably not act on a specific method of expansion unless they have the support of voters.

**Figure 3.**

Year	Total U.S. Population <sup>76</sup>	Population of Smallest State <sup>77</sup>	Total Number of House seats	Change from prior decade	Average Constituency
2010	308,745,538	563,626 (WY)	548	+113	563,404
2020	332,527,548	585,380 (WY)	568	+20	585,436
2030	357,975,719	605,972 (WY)	591	+23	605,712
2040	379,392,779	601,865 (VT)	630	+39	602,211

## 2. The Wyoming Rule

The Wyoming Rule is an alternative and uniquely American approach to a mathematical population-based rule for legislature size. Its purpose is to apply the “one person, one

vote” doctrine on a national scale.<sup>78</sup> Under the Wyoming Rule, the total national population would be divided by the population of the smallest state (which is currently Wyoming),<sup>79</sup> and the resulting quotient would be rounded to the nearest whole number.<sup>80</sup> This number would become the size of the House.<sup>81</sup> Figure 3 illustrates the rule’s application to the House today and for the projected population for the next three decades. Interestingly, the formulation would come to depend on the state of Vermont, as Vermont is projected to have the smallest state population by 2040.<sup>82</sup>

The Wyoming Rule initially expands the House by a smaller number than the Cube Root Rule, but it dictates a larger total body by 2040. While the average constituency is smaller than the average constituency produced by the Cube Root Rule from 2010 to 2030, by 2040, the average constituency under the Wyoming Rule is larger than the average constituency produced by the Cube Root Rule.

Making the average House district represent the same number of people as the smallest state’s population produces less difference in constituency sizes across the nation. Theoretically, this deviation would be smaller than under the Cube Root Rule because the size of each constituency is measured according to the size of the smallest constituency (the smallest state). But this feature leads to a potential downside of the

Wyoming Rule—the smallest state will always only have one representative. This could lead to opposition from states that are at risk of becoming the smallest state. However, there are currently seven states with a single representative in the House.<sup>83</sup> After the next census, Rhode Island is expected to lose

72 Ladewig & Jasinski, *supra* note 62, at 100.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 See FAIRVOTE, MORE MEMBERS, MORE VOICES: POLICIES AND IMPLICATIONS FOR CHANGING THE SIZE OF THE U.S. HOUSE 8 (2018), [https://www.fairvote.org/house\\_size\\_report](https://www.fairvote.org/house_size_report).

79 *Id.*

80 *Id.*

81 *Id.*

82 *Observed and Total Population, supra* note 70.

83 The seven states are: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming.

one of its two seats, and, unless offset by another small state, the House will have more single-member state delegations than it has ever had.<sup>84</sup> This is the predictable result of a system with low population states and an increasing average constituency size nationally; inevitably, more small states will fall closer in total population to the average district size and lose their additional representatives. The Wyoming Rule tethers the ratio low enough so that fewer states are stuck with a single representative and provides plenty of additional seats for larger states to avoid being grossly underrepresented.<sup>85</sup>

The benefits of the Wyoming Rule would extend into presidential elections. Under the Rule, the apportionment of votes each state gets in the Electoral College would more closely align with the population of each state.<sup>86</sup> As explained in Part II, the total number of electoral votes each state receives is its total number of representatives in both houses of Congress. If congressional districts are more or less the same size, then the outcome of the Electoral College would, theoretically, more closely align with the outcome of the popular vote. However, a recent study of presidential elections dating back to 1912 found that while the Wyoming Rule would have changed the number of electoral votes presidential candidates received, the outcomes of the elections would not have changed.<sup>87</sup> Thus, while the Wyoming Rule would theoretically align the outcome of the popular vote more closely with the outcome of the Electoral College vote, it would not necessarily align closely enough to change the outcome of an election where there is a split between the popular and electoral votes. This possibility exists because the Wyoming Rule would still produce variance in district population size<sup>88</sup>—every state population will not be an exact multiple of the population of the smallest state.

The key criticism of the Wyoming Rule is that tying the size of the House to the population of the smallest state is too arbitrary. As shown in Figure 3, the representative-to-population ratio changes decade to decade according to the smallest state's population. There is nothing particularly reasoned about that level

of representativeness—though it ensures some degree of parity between state representation, it is not at all consistent from year-to-year, nor is it necessarily the optimal size of a congressional district. The population of Vermont is predicted to decline in every decade prior to 2040,<sup>89</sup> if it continued on this trend (and Vermont remained the smallest state), the Wyoming Rule would produce an increasingly small average constituency size in the future.

Because of the Wyoming Rule's arbitrariness, the number of House seats is not guaranteed to move in one direction, or at a measured rate. The size of the nation's smallest state can vary dramatically, significantly altering the size of the House. For example, had the Wyoming Rule been used in 1920, there would have been over 1,000 House seats.<sup>90</sup> The possibility of drastic changes in state population highlights the extent to which the Wyoming Rule could become unworkable.

Though the Wyoming Rule is arbitrary, it is more easily explained than perhaps any of the four methods of expansion discussed in this report. On its surface, the Wyoming Rule makes sense—each district has the same number of people as the smallest state. This seeming equality could be appealing to lawmakers and the public and make implementation of this approach the easiest to accomplish. Though the Wyoming Rule may not be the best method for expansion, it could be the only method that gets enough support from lawmakers and the public to actually achieve an expansion of the House.

### 3. The Incremental Approach

Another approach could involve increasing the House's size incrementally every decade by a predetermined number. One method of incremental expansion, proposed in a 1991 article by Charles A. Kromkowski and John A. Kromkowski, contemplated "marginal but decennial" increases in House size.<sup>91</sup> The article envisioned a 15-member increase each decade.<sup>92</sup> The relevant calculations for such an increase are included in Figure 4, with an adjustment made to reflect the time passed since the article was published. A very small incremental increase might attract less opposition but it would very likely produce only minimal benefits, if any.

84 Sean Trende, *It's Time to Increase the Size of the House*, UNIV. OF VA. CTR. FOR POL. (Mar. 6, 2014), <http://www.centerforpolitics.org/crystalball/articles/its-time-to-increase-the-size-of-the-house/>.

85 See FAIRVOTE, MORE MEMBERS, MORE VOICES, *supra* note 76, at 9-10; see also Charles M. Biles, *Congressional Apportionment: A Liberal Arts Perspective*, DIGITAL COMMONS @ HUMBOLDT ST. U. 36 (Sept. 20, 2016), <https://pdfs.semanticscholar.org/c7d4/3270e47c1a129666c787c6a9ea779979ee11.pdf>.

86 *Implementing the "Wyoming Rule,"* DAILY KOS (June 5, 2018), <https://www.dailykos.com/stories/2018/7/5/1778149/-Implementing-the-Wyoming-Rule>.

87 FAIRVOTE, MORE MEMBERS, MORE VOICES, *supra* note 76, at 12.

88 *Id.* at 15.

89 *Observed and Total Population*, *supra* note 70.

90 FAIRVOTE, *supra* note 76, at 9. Nevada was the smallest state in 1920, at around 77,000 residents, which meant the state represented about .07% of the U.S. population. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 32-33 (1921), <https://www2.census.gov/library/publications/1921/compendia/statab/43ed/1920-02.pdf>.

91 Kromkowski & Kromkowski, *supra* note 28, at 144.

92 *Id.* at 145.

**Figure 4.**

Year	Total U.S. Population <sup>93</sup>	Total Number of House seats	Change from prior decade	Average Constituency Size
2010	308,745,538	480	+45	643,221
2020	332,527,548	495	+15	671,998
2030	357,975,719	510	+15	696,276
2040	379,392,779	525	+15	711,482

Alternatively, the increment could be set at a level that would roughly maintain the same average constituency size. This approach is uniquely workable at this moment, where population growth over the next three decades is expected to be remarkably consistent.<sup>94</sup> The House could leave the number unchanged for the foreseeable future, or re-visit the number once the “planned-for” period has expired (in say, 2040). Figure 5 illustrates what this particular approach would look like if Congress determined the average constituency should be about 660,000 people. This approach would require a 35-member increase in the House every ten years.

to less predictable variations driven by the cube root of the population (the Cube Root Rule) or population of the smallest state (the Wyoming Rule). A plan that puts Congress in control and uses straightforward math would likely be quite palatable to legislators. It would afford Congress the freedom to decide growth rate and what goals it wants to accomplish by expansion. The plan’s simplicity might also attract more public support for the plan than some of the other possible approaches.

A formidable downside of the incremental approach is its dependence on population projections. These estimates cannot

**Figure 5.**

Year	Total U.S. Population <sup>95</sup>	Total Number of House seats	Change from prior decade	Average Constituency Size
2010	308,745,538	470	+35	656,905
2020	332,527,548	505	+35	658,470
2030	357,975,719	540	+35	662,918
2040	379,392,779	575	+35	659,814

**Figure 6.**

Year	U.S. Population	Number of House Seats	Average Constituency Size
2010	308,745,538	485	636,589
2020	332,527,548	485	685,624
2030	357,975,719	485	738,094
2040	379,392,779	485	782,253

The main benefit of an incremental approach is foresight. The pre-determined expansion gives House members time to anticipate necessary practical changes that come with expansion, like physical space and budget. It also gives political parties and institutions a clear sense of how many new lawmakers to anticipate each decade, which could help them adjust their campaign strategies and resource allocations. Finally, legislators would feel more in control of the expansion process. An incremental approach relies on an expansion pace set by Congress, as opposed to one subject

accommodate for unforeseen mass changes in population. If the national population changed drastically and Congress felt compelled to act, it would need to pass a new expansion law. The possibility of unanticipated changes in population weighs against the benefit of foresight that an incremental approach would provide.

#### **4. A Onetime Expansion**

Perhaps the most straightforward approach to expanding the House is a onetime expansion. Like the incremental approach, the number of added seats could be any integer, and it could be chosen to achieve any number of goals. In an interview we conducted with Dr. Norman Ornstein of American Enterprise Institute, he proposed adding 50 additional seats to the

93 Observed and Total Population, *supra* note 70.

94 See *id.*

95 *Id.*

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House.<sup>96</sup> Dr. Ornstein called 50 additional seats a “pragmatic number.”<sup>97</sup> The addition of 50 seats would bring the House’s size to 485 members. Figure 6 illustrates what this onetime expansion would look like over the next several decades.

A major benefit of this approach is the freedom it provides to Congress. As with the incremental approach, lawmakers can choose any integer, based on any (or no) criteria. An even larger expansion may be possible with the onetime expansion method as opposed to the incremental approach because a large onetime expansion might be more palatable to many than a change every decade. There would only need to be one-time changes to the Capitol complex’s physical spaces and committees’ functioning and make-up. Congress could also have time to learn how to function efficiently as a larger body, and not need to readjust every decade after there is a new addition of seats.

It would be hard to tie the onetime expansion to national population changes. The onetime expansion sets a pre-determined course that does not accommodate for unanticipated fluctuations. If Congress determined after the fact that the size of the House was seriously at odds with the national population, it could pass a new expansion bill, but this would reduce the benefits of using a one-and-done expansion method in the first place.

Because the onetime expansion method does not accommodate for changes in the national population, there is a strong probability that, should this method of expansion be utilized, the size of the average constituency would not be greatly decreased from its current levels (or, the substantial decrease would last only a decade or two). Figure 6 illustrates that if 50 seats were added, the average constituency size would surpass the current average constituency of roughly 750,000 people by 2040. If lawmakers could be convinced that more than 50 additional seats were needed in the House, then the average constituency size could stay below current levels for a longer period of time. However, population increases would eventually catch up to the addition of seats, and the current average constituency would be surpassed.

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96 Dr. Norman J. Ornstein proposed an expansion of the House as a way to address the inequity of the Electoral College. Video Interview with Dr. Norman J. Ornstein, Resident Scholar, American Enterprise Inst. (Apr. 9, 2019).

97 *Id.*

## B. Recommendation

We recommend repealing the Permanent Apportionment Act and codifying the Cube Root Rule as the method to determine the size of the House. Additionally, we recommend a public education campaign to increase understanding of the benefits of expanding the House and how the Cube Root Rule works. Public knowledge will be essential to garnering enough support for Congress to take action.

### 1. Why the Cube Root Rule is the Best Method for Expansion

The Cube Root Rule is the most practical and beneficial method to expand the House. The greatest advantage it has over the other methods discussed here is that it is tied to the national population; as such, it is a dynamic formula that is able to respond to both increases and decreases in the population. The Wyoming Rule only considers the population of the smallest state, while the incremental approach and onetime expansion are not necessarily influenced by population. If population is considered under these approaches, it is only projected population figures. The Wyoming Rule, incremental approach, and onetime expansion are also incapable of responding to national population decreases without additional legislation. Because the Cube Root Rule automatically accounts for population changes, Congress would not need to enact any subsequent legislation.

There is evidence that the Cube Root Rule creates the optimal-sized legislature with regards to communication between lawmakers and communication between lawmakers and their constituents. Furthermore, the Cube Root Rule would put the size of Congress in-line with legislatures in other modern democracies.<sup>98</sup>

Congress is deeply polarized and gridlocked.<sup>99</sup> Unsurprisingly, the vast majority of Americans disapprove of how it is working.<sup>100</sup> Large scale reform is needed to make the House function how its architects at the Constitutional Convention intended. Tying the House’s membership to the population and allowing its size to automatically adapt after every census based on a predetermined formula would make the chamber more effective. Americans would receive better representation.

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98 *Government at a Glance 2017*, *supra* note 65.

99 Mark Hay, *Breaking: Congress Continues to Do Pretty Much Nothing*, VICE (July 5, 2018, 6:13 PM), [https://www.vice.com/en\\_us/article/ev8gbk/why-congress-cant-get-anything-done-in-2018](https://www.vice.com/en_us/article/ev8gbk/why-congress-cant-get-anything-done-in-2018).

100 *Congress and the Public*, *supra* note 54.

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Smaller districts would allow a higher proportion of the districts' residents to meaningfully and productively interact with their representatives and their staffs. At the same time, the Cube Root Rule would allow the chamber to function efficiently; it would prevent unwieldy expansion by eventually slowing its rate of growth. And the automatic nature of the of Cube Root Rule approach would spare Congress and the public contentious debates over House expansion every decade. Such debates might often end without any agreement. After all, it was disagreement over expansion that stilted the chamber's growth over a century ago. The House must grow again, and the Cube Root Rule provides the most practical and effective way to make it happen.

## 2. The Legislative Proposal

The Constitution grants the legislative branch the power to determine House size and apportionment. Thus, we recommend legislation repealing the Permanent Apportionment Act of 1929 and directing that the size of the whole Congress be determined by the cubed root of the nation's population following each decennial census. Under this proposal, the size of both the House and Senate would be equivalent to the cube root of the population. This legislation should be approved in time for it to be implemented immediately after the completion of the 2020 census.

House expansion could be achieved through constitutional amendment, but we recommend using a statute given the urgency of reforming the House and the difficulty of amending the Constitution. Over 11,000 amendments have been proposed, but only 27 have been enacted.<sup>101</sup> Passing a

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<sup>101</sup> Eric Posner, *The U.S. Constitution is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), <https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html>.

new law would be easier, especially considering that winning the required approval of three-fourths of states for an amendment<sup>102</sup> would be challenging when small states would likely oppose House expansion.<sup>103</sup>

## 3. Public Knowledge and Support

Lawmakers are unlikely to address House expansion without strong public support, and right now, that support is weak. A recent study on House expansion gauged respondents reactions to three objectives of House expansion: (1) decreasing constituency size, (2) preventing loss of seats by states, and (3) allowing for more women and minorities to serve in the chamber.<sup>104</sup> None of these objectives taken alone led a majority of respondents to support increasing the House's size.<sup>105</sup> But when the supportive responses across the three questions were totaled, 55% of respondents favored expansion.<sup>106</sup> These results suggest there is room for large public support for expanding the House if proponents rely on a range of arguments designed to appeal to large cross section of the public.<sup>107</sup> The nine reasons for expansion discussed in Part II would be a good place for advocates to start. Supportive lawmakers should address the topic at town halls and in other settings where they interact with their constituents. Members of the general public who support expansion could advocate on social media and write op-eds and letters to newspapers.

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<sup>102</sup> U.S. CONST. art. V.

<sup>103</sup> FAIRVOTE, MORE MEMBERS, MORE VOICES, *supra* note 76, at 16.

<sup>104</sup> Brian Frederick, *The People's Perspective on the Size of the People's House*, 41 PS: POL. SCI. & POL. 329, 330 (2008).

<sup>105</sup> *Id.* at 332.

<sup>106</sup> *Id.* at 332-33.

<sup>107</sup> *Id.* at 333.

## IV. Drawing Districts for an Expanded House

House expansion is an important step in returning to the representative democracy the framers envisioned. Expansion, however, is not the only step that should be taken. The drawing of new district lines that would accompany an expansion of the House presents an opportunity to address the widespread and persistent use of partisan gerrymandering. In this Part, we propose a second reform: the use of the primary allocation method of districting.

### A. Background

Gerrymandering is a practice as old as America. The phrase “gerrymandering” dates back to 1812, from a political cartoon mocking a Massachusetts state legislative district drawn by Governor Elbridge Gerry to benefit his political party.<sup>108</sup> Through the present day, gerrymandering has existed in nearly every state in the union. For decades, the practice went largely unregulated. The Supreme Court refused to hear gerrymandering cases until its 1962 decision in the landmark case *Baker v. Carr*.<sup>109</sup>

*Baker* held that a challenge to a Tennessee state legislative district map, which had not been updated since 1901, presented a claim the courts could decide.<sup>110</sup> The state’s population distribution had changed so significantly in six decades that districts in predominately African-American urban areas had ten times more residents than districts in predominately white rural areas.<sup>111</sup> On remand, the federal trial court in Tennessee held that the districts violated the Equal Protection Clause of the Fourteenth Amendment.<sup>112</sup> In 1964, the Supreme Court extended the “one person, one vote” principle to the drawing of congressional districts, holding in *Wesberry v. Sanders* that malapportioned districts within a state were unconstitutional.<sup>113</sup> The Court has also invalidated district maps that racially discriminate.<sup>114</sup>

But these holdings have done little to prevent states from continuing to engage in partisan gerrymandering. And the Court has now ruled that partisan gerrymandering is beyond the federal courts’ reach. In June 2019, the Court decided two cases: one from Maryland and one from North Carolina

that both involved challenges to partisan gerrymandering of congressional districts.<sup>115</sup> The lawmakers who created the districts at issue in both cases made no secret of their intention to draw lines that benefited their parties. In the North Carolina case, a Republican state legislator stated “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.”<sup>116</sup>

But the Court held that partisan gerrymandering presented a political question that it did not have jurisdiction to resolve.<sup>117</sup> Its 5-4 decision asserted that it was impossible to create a constitutional standard for determining when gerrymandering was excessively partisan.<sup>118</sup> The Court reasoned that regulating partisan gerrymandering was best left to the state legislatures and Congress.<sup>119</sup>

### B. The Need to End Gerrymandering

With a solution from the federal courts out of reach, a legislative solution to partisan gerrymandering becomes increasingly necessary. Congress needs to pass a law dramatically changing the way districts are drawn.

Lawmakers will always have a natural incentive to help their parties through gerrymandering, while advances in technology are going to make gerrymandering worse in the future. Voting and voter registration data has become easily accessible, and predictive algorithms have gotten better at forecasting election results for proposed district maps, allowing state legislators to gerrymander their district maps with more precision.<sup>120</sup>

Partisan gerrymandering has broad consequences for America’s democratic process. The most blatant is the disproportionate representation of populations in Congress and state legislatures. North Carolina’s congressional district map, for example, resulted in 77% of the congressional seats being won by Republican candidates in the 2018 election, even though only 50% of North Carolina voters voted for Republican candidates.<sup>121</sup>

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108 ELMER CUMMINGS GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 72-73 (1907).

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

110 *Id.*

111 *Id.* at 192.

112 206 F. Supp. 341 (M.D. Tenn. 1962).

113 376 U.S. 1 (1964).

114 See *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

115 *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

116 *Id.* at 2491.

117 *Id.* 2506-07.

118 *Id.* at 2507.

119 See *id.* at 2507-08.

120 Jordan Ellenberg, *How Computers Turned Gerrymandering Into a Science*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/opinion/sunday/computers-gerrymandering-wisconsin.html>.

121 *North Carolina Election Results*, WASH. POST, <https://www.washingtonpost.com/election-results/north-carolina/> (last updated Apr. 6, 2019).

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Another consequence of gerrymandering, and our current congressional election format in general, is that it dilutes the number of “competitive” elections nationwide. This, in turn, results in lower total voter turnout. In 2018, there were 86 congressional elections decided by ten percentage points or less.<sup>122</sup> That is less than 20% of all congressional districts. In these 86 “competitive” elections, turnout was 16% higher than the 348 elections decided by more than ten percentage points.<sup>123</sup> Voters have a greater incentive to turnout to vote when elections are more competitive, and voters feel like their vote has a greater impact on the outcome. If all congressional elections in 2018 had the same voter turnout as the competitive elections, there would have been more than 13.6 million additional votes cast nationwide.

Gerrymandering also damages the country’s political climate and public trust in democratic institutions. A lack of fair representation causes voters in gerrymandered districts to become less engaged in democratic processes because they feel their involvement in politics does not matter. It also worsens political polarization because voters of a minority political party resent the majority party for diluting their representation in Congress and the state legislature.

## C. Recent Proposed Gerrymandering Solutions

Several proposed solutions to gerrymandering have been recently implemented or proposed by several states.

### 1. Independent Commissions

There are currently only six states in the country that draw district maps using independent commissions: Alaska, Arizona, California, Idaho, Montana, and Washington.<sup>124</sup> All of these states but Alaska appoint their commissioners using a bipartisan method.<sup>125</sup> Montana has only one congressional district and uses their independent commission to draw the state legislature district map.<sup>126</sup> These states have 76 of the 435 congressional seats, meaning independent commissions draw less than a fifth of districts nationwide.<sup>127</sup>

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122 *Forecasting the Race for the House*, FIVE THIRTY EIGHT, <https://projects.fivethirtyeight.com/2018-midterm-election-forecast/house/> (updated Nov. 6, 2018).

123 *Id.*

124 Justin Levitt, *Who Draws the Lines*, ALL ABOUT REDISTRICTING, LOY. L. SCH., <http://redistricting.lls.edu/who.php>.

125 *Id.*

126 Directory of Representatives, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/representatives>.

127 *Id.*

The Supreme Court upheld the constitutionality of independent commissions drawing congressional district maps in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.<sup>128</sup> The Court ruled that Article I, Section 4, which requires the “Time, Place, and Manner” of elections to be prescribed by the state legislatures, was broad enough to permit states to designate districting powers to independent, unelected bodies.<sup>129</sup>

Additionally, legislation passed in the House in 2019 would require states to use 15-member independent commissions to draw district lines.<sup>130</sup> The Supreme Court has indicated that such a requirement is within Congress’ authority.<sup>131</sup>

Independent commissions have not been implemented in enough states for a comprehensive evaluation of their efficacy and fairness. But in states where they are used, the results are mixed. In Arizona and Washington, with nine and ten congressional districts respectively, the congressional districts won by each party in 2018 closely resemble the percentage of votes won by each party in those states.<sup>132</sup> In California, however, the congressional seats won in 2018 do not closely resemble the percentage of votes won by each party. The Democratic Party won 66% of all votes cast in 2018 but won 87% of the congressional districts in the state.<sup>133</sup> This is an example of the flaw in independent commissions. While independent commissions result in fairer districts that both parties are happy with, they ultimately do not guarantee that the results of elections will accurately represent the people in those states. This is mostly caused by the first-past-the-post electoral systems used in most states, but independent commission district drawing is still a tepid solution to a bigger, more fundamental problem.

### 2. Proportional Districting

Proportional districting draws electoral districts and/or allocates seats in a legislature based on the percentage of votes parties receive in elections. This districting method was first devised by John Stuart Mill in the 19th century<sup>134</sup> and has since been adopted in 87 countries, but not in any state in the U.S. Proportional districting’s most significant advantage is that it is much more responsive to the voting preferences

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128 135 S. Ct. 2652 (2015).

129 *Id.* at 2673.

130 For the People Act of 2019, H.R. 1, 116th Cong., §§ 2401, 2411 (2019).

131 See *Rucho*, 139 S. Ct. at 2495.

132 *Forecasting the Race for the House*, *supra* note 124.

133 *Id.*

134 See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861).



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of the electorate from one election to another. Proportional representation would minimize wasted votes, uncompetitive districts, and “would make it impossible for one party to have a monopoly on the seats in a district.”<sup>135</sup>

The most common type of proportional districting, the party list system, has large disadvantages. In a party list system, voters cast ballots for a party and seats are allocated based on the percentage of the votes each party gets.<sup>136</sup> Voters cannot vote for a specific candidate, only for a group of candidates running under a particular party. Thus, the representatives sent to Congress or state legislatures would not be geographically tied to the voters they represent. It is important for representatives to have geographic ties to their constituencies to help ensure they will advocate for the needs of the people in the area of a state they represent, especially if those needs are unique and specific to that area.

### 3. Multi-Member Districting

Multi-member districts (MMDs) are districts that send two or more representatives to Congress or the state legislature. These districts are drawn larger than single-member districts to accommodate multiple members. Currently, no states use MMDs to elect members to Congress, but ten states use MMDs to elect members to their state legislatures.<sup>137</sup> There are several advantages to MMDs. MMDs make it harder to gerrymander and easier for third party candidates to be elected. They also promote challenges to incumbents and increase the ideological diversity of district representatives.

But MMDs raise constitutional issues and may not be compatible with the Voting Rights Act. Federal law has required congressional districts to be single-member since 1842.<sup>138</sup> The Supreme Court has not held multi-member state districts to be *per se* unconstitutional but it has affirmed a preference for single-member districts.<sup>139</sup> The Court has invalidated MMDs

for state legislatures when it produces discriminatory results in violation of the Fourteenth Amendment and the Voting Rights Act, regardless of discriminatory intent.<sup>140</sup> Using multi-member congressional districts would require a new federal law, and might require an amendment to the Constitution if they violate the “one person, one vote” rule applied by the Court in evaluating gerrymandering violations of the Fourteenth Amendment.<sup>141</sup> Therefore, creating a constitutionally acceptable MMD plan for Congress would be complicated and perhaps impractical.

## D. Primary Allocation Proposal

The solutions to gerrymandering discussed above have many benefits, and each are preferable to most of the current approaches to drawing congressional and state legislative districts. However, as discussed, each proposal has drawbacks. We endorse a new districting proposal that borrows elements from each of the proposals discussed in the prior section. Our proposal, Primary Allocation, would effectively end gerrymandering, promote more competitive elections, and increase the importance of each American’s vote in nearly every state and district in the country.

### 1. How Primary Allocation Would Work

Primary Allocation would require two election rounds, a primary election and general election. The primary election would take place a few months before the general election. All candidates would be required to declare for the election and with a political party before the primary election. The primary election would be open to the entire state, and voters would select their preferred political parties, not candidates. Congressional and state legislative districts would then be allocated to political parties in proportion to their share of the vote. Each state’s political party that received multiple districts would draw district maps across the entire state for the general election. With each political party having its own, separate district maps for the whole state, districts would vary in geographic size and shape and would overlap with district maps drawn by other political parties. Political parties allocated one district would have an at-large district representing the entire state.

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135 Douglas J. Amy, *How Proportional Representation Would Finally Solve Our Redistricting and Gerrymandering Problems*, FAIRVOTE, [https://www.fairvote.org/how\\_proportional\\_representation\\_would\\_finally](https://www.fairvote.org/how_proportional_representation_would_finally).

136 Matthew Yglesias, *The Real Fix for Gerrymandering is Proportional Representation*, VOX (Nov. 6, 2017), <https://www.vox.com/policy-and-politics/2017/10/11/16453512/gerrymandering-proportional-representation>.

137 Karl Kurtz, *Changes in Legislatures Using Multimember Districts After Redistricting*, THICKET AT ST. LEGISLATURES (Sept. 11, 2012), [https://ncsl.typepad.com/the\\_thicket/2012/09/a-slight-decline-in-legislatures-using-multimember-districts-after-redistricting.html](https://ncsl.typepad.com/the_thicket/2012/09/a-slight-decline-in-legislatures-using-multimember-districts-after-redistricting.html).

138 *The 1842 Apportionment Act*, FAIRVOTE, <http://archive.fairvote.org/library/history/flores/apportn.htm>.

139 *Connor v. Williams*, 404 U.S. 549, 551-52 (1972).

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140 *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

141 *Reynolds*, 377 U.S. at 558.

The candidates chosen to represent the districts allocated to each political party would be determined by the general election. The general election would have declared candidates campaigning against members of their own party in their corresponding party districts. Only declared candidates from political parties that had been allocated districts from the primary election would be eligible to run in the general election. Similarly, voters in the general election would be eligible to vote only for the candidates of the party they supported in the primary election. Thus, candidates and voters who ran for or voted for political parties who are not allocated any districts would be barred from running or voting in the general election. The general elections for each eligible party would happen concurrently. With the districts allocated proportionately, the population of each party's district would be similar in size to each other, but different in geographic size.

## 2. Primary Allocation in Practice

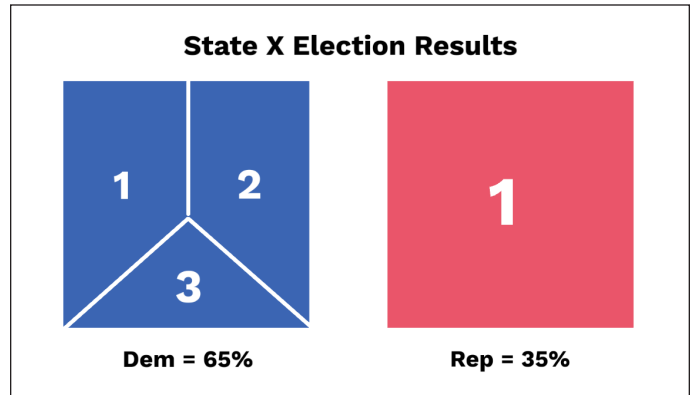
To illustrate how Primary Allocation would work in practice, we will use a sample "State X" for examples. If State X has four congressional districts, that means there will be five possible electoral outcomes:

Democratic Seats	Republican Seats
4	0
3	1
2	2
1	3
0	4

With five possible electoral outcomes, the vote percentage thresholds to determine allocation of seats in the primary election will be divided into fifths:

Seats	Percentage
4	>80%
3	>60%
2	>40%
1	>20%
0	<20%

Suppose in State X's primary election, the Democratic Party receives 65% of the vote and the Republican Party receives 35% of the vote. The resulting congressional district maps for the general election could resemble something like this:



The Republican Party is allocated one at-large congressional district, and the 35% of voters for the Republican Party from the primary election will participate in the one general election between the Republican candidates. The Democratic Party is allocated three congressional districts, and the 65% of voters for the Democratic Party from the primary election will vote in the general election between the Democratic candidates running in their respective districts. The Democratic Party is free to draw their three districts whichever way they choose, so long as the districts are roughly equal in population.

Suppose there is a third party in State X who receives a significant number of votes in the primary election. If the results in the primary election leave the Democratic Party with 50% of the vote, the Republican Party with 32%, and the Libertarian Party with 18%, only three of the four district allocation thresholds have been reached by the parties combined, with one district outstanding. In such a scenario, the outstanding district will be allocated to the political party that is closest to their next district threshold. Here, the Libertarian Party is closest to their next threshold (20%), so the one outstanding district will be allocated to it, with two districts for the Democratic Party and one for the Republican Party.

## 3. Applying Primary Allocation to 2018 Election

Now we will examine how Primary Allocation would impact political representation when applied to a real-world scenario. The table below compares the results of the 2018 congressional election by state, and how the results would have changed under a Primary Allocation system.

The total number of seats awarded to each party would not be much different than the actual results from the election, with only an eight-seat partisan shift. However, Primary Allocation would flip the party that controlled 66 congressional seats across 36 states. This would change the congressional representatives of about 50 million Americans.

State	Dem %	Rep %	Dem '18 Seats	Rep '18 Seats	Dem PA Seats	Rep PA Seats	Change
AL	41	59	1	6	3	4	D +2
AK	47	53	0	1	0	1	-
AZ	50	48.7	5	4	5	4	-
AR	35	62.6	0	4	1	3	D +1
CA	66	32.6	46	7	35	18	R +11
CO	53	43	4	3	4	3	-
CT	62	38	5	0	3	2	R +2
DE	65	35	1	0	1	0	-
FL	47	52	13	14	13	14	-
GA	48	52	9	5	7	7	D +2
HI	75	23	2	0	2	0	-
ID	35	62	0	2	1	1	D +1
IL	60	39	13	5	11	7	R +2
IN	44	55	2	7	4	5	D +2
IA	51	47	3	1	2	2	R +1
KS	44	54	1	3	2	2	D +1
KY	39	50	1	5	2	4	D +1
LA	38	57	1	5	2	4	D +1
ME	53	39	2	0	1	1	R +1
MD	65	32	7	1	5	3	R +2
MA	78	20	9	0	7	2	R +2
MI	52	45	7	7	7	7	-
MN	55	44	5	3	5	3	-
MS	42	50	1	3	2	2	D +1
MO	43	55	2	6	3	5	D +1
MT	46	51	0	1	0	1	-
NE	38	62	0	3	1	2	D +1
NV	51	46	3	1	2	2	R +1
NH	55	44	2	0	1	1	R +1
NJ	60	39	11	1	7	5	R +4
NM	58	38	3	0	2	1	R +1
NY	67	31	21	6	18	9	R +3
NC	48	50	3	10	6	7	D +3
ND	36	60	0	1	0	1	-
OH	47	52	4	12	8	8	D +4
OK	36	62	1	4	2	3	D +1
OR	57	38	4	1	3	2	R +1
PA	55	45	9	9	10	8	D +1
RI	65	35	2	0	1	1	R +1
SC	44	54	2	5	3	4	D +1
SD	36	60	0	1	0	1	-
TN	39	59	2	7	3	6	D +1
TX	47	50	13	23	17	19	D +4
UT	36	59	1	3	1	3	-
VT	69	26	1	0	1	0	-
VA	56	43	7	4	6	5	R +1
WA	63	35	7	3	6	4	R +1
WV	41	58	0	3	1	2	D +1
WI	53	46	3	5	4	4	D +1
WY	30	64	0	1	0	1	-
<b>Total</b>			<b>239</b>	<b>196</b>	<b>231</b>	<b>204</b>	<b>R +8</b>

Source: Forecasting the Race for the House, supra note 124.

## 4. Effects and Future Elections

The most important effect of Primary Allocation on future elections is that it would end partisan gerrymandering. This districting method makes it impossible for parties to dilute votes from the rival political party because political parties can only draw their own districts. Parties could still draw districts to protect long-term incumbents from challengers within their own party. But all districts would be required to be similar in population size and to comply with the Voting Rights Act, so district map manipulation would be of little concern when it comes to partisan and ideological representation. Coupled with the proposed expansion of the size of the House of Representatives, Primary Allocation will help elected Congress members be more personalized and accurately representative to the voters in each district.

Primary Allocation would also greatly increase turnout by making almost all congressional and state legislative elections much more competitive. The primary elections would be competitive even in highly partisan states. Voters would be highly incentivized to vote in primary elections because those elections would determine how many congressional seats their political party would be awarded for the general election. Third-party voters would also have a strong incentive to turnout because their party might have a realistic chance at securing a seat in Congress. There are no third-party politicians in Congress after the 2018 election; Primary Allocation would likely change that and give third-party voters greater representation.

Voters of all parties in all areas of the country will have much greater incentives to turnout to vote in the general elections as well. In 2018, more than 80% of congressional elections were decided by double-digit percentages. The results of such elections are essentially pre-determined before any votes are cast due to the partisan make up of the districts. This gives voters in these districts much less incentive to vote. Under Primary Allocation, the partisanship of a particular geographic area would not pre-determine the winners of each district's general election because the races would be between candidates from the same party.

A concern raised by the Primary Allocation system is the practicality of adding an additional election day for every two-year election cycle. While the additional cost would surely be worth it for the improvement over the current election method, online voting could alleviate the increase in costs. Countries

like South Korea<sup>142</sup> and Switzerland<sup>143</sup> have already begun using online voting, and West Virginia successfully tested online voting using blockchain technology in the 2018 election.<sup>144</sup> Recent trends point towards fully secure online voting being possible in the near future, which would make holding two election days per election cycle much more viable.

Another possible concern with Primary Allocation is its constitutionality and conformity with the Voting Rights Act. Any legislation to enact Primary Allocation districting should contain requirements to comply with the Voting Rights Act relating to equality in district population and representation of minority groups. Although Primary Allocation would permit multiple district maps drawn for each state, the format for drawing these districts would be nearly the same as the current format, so there is nothing about Primary Allocation that is inherently incompatible with the Voting Rights Act.

There is also nothing about Primary Allocation that is inherently unconstitutional. It complies with the "one person, one vote" rule established in *Reynolds v Sims*.<sup>145</sup> It maintains single-member districts that the Supreme Court has previously held it prefers over multi-member districts, and proportional representation has never been declared unconstitutional. In fact, proportional representation is more fundamentally aligned with equal protection under the Fourteenth Amendment, so any challenge to Primary Allocation based on its use of proportional representation is unlikely to be struck down as unconstitutional.

## E. A Legislative Answer to a Persistent Problem

Legislation can be passed at the state and federal level to implement Primary Allocation. But the political benefits of gerrymandering would likely disincentivize many state lawmakers from changing the current districting rules. To ensure access to Primary Allocation elections in all states, a congressional districting amendment to the constitution is needed.

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142 Tim Meisburger, *Korean Elections: A Model of Best Practice*, THE ASIA FOUND. (Apr. 20, 2016), <https://asiafoundation.org/2016/04/20/korean-elections-a-model-of-best-practice/>.

143 Susan Misicka, *Hackers Wanted for Swiss E-Voting System*, SWISSINFO (Feb. 14, 2019), [https://www.swissinfo.ch/eng/intrusion-test\\_hackers-wanted-for-swiss-e-voting-system/44753278](https://www.swissinfo.ch/eng/intrusion-test_hackers-wanted-for-swiss-e-voting-system/44753278).

144 Aaron Mak, *West Virginia Introduces Blockchain Voting App for Midterm Election*, SLATE (Sep. 25, 2018), <https://slate.com/technology/2018/09/west-virginia-blockchain-voting-app-midterm-elections.html>.

145 377 U.S. at 587.

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## Conclusion

Each House member currently represents, on average, about 750,000 constituents. With an ever-increasing population, this number can only grow. At what point is each individual's representation so diluted that he or she has no meaningful say in Congress? At what point do the responsibilities of over-grown districts simply become too much to bare for House members? The 435-member cap on the House of Representatives should not persist. The House should be expanded in a measured, formulaic manner that responds

changes in the national population. Thus, Congress should codify the Cube Root Rule as soon as possible to address the multitude of issues that decades of inaction have caused. The framers vision cannot be realized in the modern world, however, without addressing the ever-present use of partisan gerrymandering. Congress needs to allow for a new districting model—Primary Allocation—in its elections. Only then will the country have a chance of reclaiming the People's House.



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