



CSU
College of Law Library

Et Cetera

Volume 70 | Issue 1

Note

5-11-2022

Returning the House of Representatives to the People: An Apportionment Amendment Proposal Advocating for the Cube Root Rule

Michael DiDomenico
Cleveland State University College of Law

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/etcetera>



Part of the [Constitutional Law Commons](#), and the [Election Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Michael DiDomenico, *Returning the House of Representatives to the People: An Apportionment Amendment Proposal Advocating for the Cube Root Rule*, 70 Clev. St. L. Rev. Et Cetera 51 (2022) available at <https://engagedscholarship.csuohio.edu/etcetera/vol70/iss1/3>

This Note is brought to you for free and open access by the Cleveland State Law Review Home at EngagedScholarship@CSU. It has been accepted for inclusion in Et Cetera by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

**RETURNING THE HOUSE OF REPRESENTATIVES
TO THE PEOPLE: AN APPORTIONMENT
AMENDMENT PROPOSAL ADVOCATING FOR THE
CUBE ROOT RULE**

MICHAEL DiDOMENICO*

ABSTRACT

Since the approval of the Permanent Apportionment Act of 1929, the number of representatives in the United States House of Representatives has been capped at 435. While the “People’s House” has seen no growth since 1929, the United States population has nearly tripled since that time to 332 million people in 2022. Without additional representatives to accommodate this larger population, Americans have diluted voting power, representatives are more distant from the constituents they supposedly represent, partisanship stonewalls any productive legislation from being passed, an imbalanced Electoral College clouds the will of the people in selecting their president, and a lack of stable congressional districts allows for more opportunities for political parties to gerrymander districts in their favor.

This Note seeks to rectify these issues through a “Cube Root Amendment” to the Constitution. This Amendment would calculate the number of representatives in the House according to the cube root of the United States population. An additional provision adds districting language to force the courts to listen to constitutional claims about gerrymandering. This Note will demonstrate that the Amendment will result in more equitable representation, improve a currently flawed Electoral College scheme, and aid in fighting against gerrymandered districts.

CONTENTS

I. INTRODUCTION..... 52

II. BACKGROUND..... 54

 A. *Constitutional Underpinnings* 54

 B. *Apportionment In Action* 56

 C. *Apportionment Clashes In The 1920s* 57

 D. *Where We Are After The Permanent Apportionment Act Of 1929* 58

III. ANALYSIS 59

 A. *The Proposed Amendment And Its Immediate Implications* 59

* Michael DiDomenico is expected to receive his law degree from Cleveland-Marshall College of Law in May 2022. Michael graduated from Westminster College in 2018 with a Bachelor of Science degree in Biology. He would like to thank his Scholarly Writing professor, Lauren Collins, for helping him formulate his topic and learn the skills of writing a law review article. He also wants to thank his parents, Bob and Lisa, brother, Robby, and sister, Zoe, for their continuous support.

1. The Cube Root Amendment’s Proposed Text	59
2. The Impact Of The Cube Root Formula On The Structure Of The House Of Representatives	59
3. The Application Of The Huntington-Hill Method To The Cube Root Rule .	61
4. The Impact Of The New Districting Language	64
B. <i>More Equitable Representation</i>	64
C. <i>The Electoral College</i>	67
D. <i>Removing Gerrymandering From The Nation’s Maps</i>	70
E. <i>Implementation Of The Proposed Amendment</i>	74
IV. CONCLUSION	77

I. INTRODUCTION

Numbers do not lie. The United States population has increased from about 122 million in 1929¹ to almost 332 million in 2022.² In comparison, the number of representatives in the House of Representatives has remained the same: 435 in 1929³ and still 435 today.⁴ Due to the Permanent Apportionment Act of 1929 (Act), representation in the House of Representatives (House) has been fixed at 435 members even though nearly 210 million people have been added to the United States (U.S.) population since its enactment. This arbitrary cap dilutes the American people’s representation in the House with each passing year of population growth. While the number of constituents per representative averaged about 280,000 to one in 1929, that number has ballooned to about 763,000 to one today.

If these ratios alone do not indicate a representation problem in the United States, then consider the ratios of other countries. England’s ratio is 72,400 constituents per representative,⁵ and Japan’s ratio is about 270,000 constituents per representative.⁶ Even China, populated by over one billion people, manages to represent its large population by allocating nearly 3,000 delegates to their National People’s Congress.⁷

¹ *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, U.S. CENSUS BUREAU (June 28, 2000), <https://www2.census.gov/programs-surveys/popest/tables/1900-1980/national/totals/popclockest.txt>.

² *US States – Ranked by Population 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/states> (last visited Mar. 25, 2022) (providing state-by-state population data for 2021 and 2022).

³ Richard McLawhorn Jr., *Apportionment or Size? Why the U.S. House of Representatives Should Be Expanded*, 62 ALA. L. REV. 1069, 1070 (2011). See Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2018)).

⁴ *House of Representatives*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/House_of_Representatives_vrd.htm#:~:text=There%20are%20currently%20435%20voting,they%20can%20vote%20in%20committee (last visited Jan. 6, 2022).

⁵ Jennifer Karr, *Proportional Union or Paper Confederacy?*, 48 CONN. L. REV. 595, 603 (2015).

⁶ *Id.* at 604.

⁷ *Id.*; *Population, Total*, THE WORLD BANK, <https://data.worldbank.org/indicator/SP.POP.TOTL> (last visited Jan. 19, 2022).

Perhaps the United States is not as much of a shining example of representative democracy for the international community as it may claim to be.

The basic math indicates that American citizens' voices have become diluted over time as each additional constituent jockeys for the attention of their representative. The good news, however, is that basic math can also solve this representation issue. The legislatures of many nations tend to have a number of representatives roughly equal to the cube root of their population.⁸ This phenomenon has been analyzed by scholars including Rein Taagepera, a political scientist who first highlighted this trend in 1972.⁹ House representation roughly followed the cube root of the U.S. population until the fateful Act, approved in 1929.¹⁰ Because of the representation freeze, the ills of the House have metastasized: Americans have diluted voting power, representatives are more distant from the constituents they supposedly represent,¹¹ partisanship stonewalls any productive legislation from being passed,¹² an imbalanced Electoral College clouds the will of the people in selecting their president,¹³ and a lack of stable congressional districts allows for more opportunities for political parties to gerrymander districts in their favor.¹⁴ Even if citizens notice gerrymandering, they cannot even challenge it in court under the Supreme Court's recent holding in *Rucho v. Common Cause*.¹⁵

To bring the House's representation back in line with other nations, the number of representatives in the House should equal the cube root of the United States population

⁸ Rein Taagepera, *The Size of National Assemblies*, 1 SOC. SCI. RSCH. 385, 386–87 (1972).

⁹ *Id.*

¹⁰ *Growth in U.S. Population Calls for Larger House of Representatives*, POPULATION REFERENCE BUREAU (Apr. 1, 2000), <https://www.prb.org/resources/growth-in-u-s-population-calls-for-larger-house-of-representatives/>; Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2018)).

¹¹ See THE FEDERALIST NO. 55 (James Madison or Alexander Hamilton) (stating that having too few representatives means that they will not have an adequate knowledge base about their constituents).

¹² *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> (last visited Jan. 6, 2022) (indicating a trend since the 1970s of a decreasing number of enacted laws); Chris Cillizza, *The Least Productive Congress Ever*, WASH. POST (July 17, 2013, 3:50 PM), <https://www.washingtonpost.com/news/the-fix/wp/2013/07/17/the-least-productive-congress-ever/> (noting that the 112th Congress of 2011–2012 was the least productive according to number of bills passed in over six decades).

¹³ Katy Collin, *The Electoral College Badly Distorts the Vote. And it's Going to Get Worse*, WASH. POST (Nov. 17, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/17/the-electoral-college-badly-distorts-the-vote-and-its-going-to-get-worse/>.

¹⁴ Joseph Ax & Andrew Chung, *Electoral Map Bias May Worsen as U.S. Gerrymandering Battle Shifts to States*, REUTERS (June 29, 2019, 7:15 AM), <https://www.reuters.com/article/us-usa-court-gerrymandering/electoral-map-bias-may-worsen-as-u-s-gerrymandering-battle-shifts-to-states-idUSKCN1TU0G0> (explaining that Democrats and Republicans are both more emboldened to gerrymander congressional districts after the Supreme Court's decision in *Rucho v. Common Cause*).

¹⁵ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding that partisan gerrymandering claims are nonjusticiable political questions).

as determined by the decennial Census using an amendment to the Constitution. Ratifying a “Cube Root Amendment” would ensure more equitable representation for American citizens, provide a more moderate solution to the Electoral College without abolishing it, and reduce the amount of partisan gerrymandering occurring when states redistrict.

Part II of this Note will follow the background of the apportionment debate up to the present day. The apportionment debate has been a part of U.S. history since the Constitutional Convention of 1787, where it was already a hotly contested topic.¹⁶

The background will then follow the subsequent decennial apportionments starting in 1790.¹⁷ Emphasis will be placed on the failed 1920 apportionment, the first apportionment in American history where Congress did not uphold its constitutional duty.¹⁸ The Permanent Apportionment Act of 1929 will then be discussed, and its ramifications will be followed to present day.¹⁹

Part III will introduce the full text of the proposed Cube Root Amendment,²⁰ and it will explain why this amendment would solve many current problems in American government. These improvements will fall under three distinct aspects: (1) greater equity in representation,²¹ (2) the improved functioning of the Electoral College,²² and (3) the reduction of partisan gerrymandering when states draw congressional district maps.²³

II. BACKGROUND

A. Constitutional Underpinnings

The issue of apportionment in the U.S. stems from representation issues the colonies experienced while under British rule. Colonists were only virtually represented²⁴ in Parliament, but they were still required to pay taxes to the English government.²⁵ This eventually led to the rallying cry, “No taxation without representation!”²⁶ Delegates to the Constitutional Convention were also aware of the

¹⁶ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 78 (2005); *see discussion infra* Part II.A.

¹⁷ McLawhorn Jr., *supra* note 3, at 1071; *see discussion infra* Part II.B.

¹⁸ McLawhorn Jr., *supra* note 3, at 1077; *see discussion infra* Part II.C.

¹⁹ *See infra* Part II.C–D.

²⁰ *See infra* Part III.A.

²¹ *See infra* Part III.B.

²² *See infra* Part III.C.

²³ *See infra* Part III.D.

²⁴ JAMES CONNIFF, *THE USEFUL COBBLER: EDMUND BURKE AND THE POLITICS OF PROGRESS* 157–58 (1994) (defining virtual representation as the idea that members of Parliament spoke for all British subjects regardless of whether the subjects voted for them or not).

²⁵ Edmund S. Morgan, *Colonial Ideas of Parliamentary Power 1764-1766*, 5 WM. & MARY Q. 311, 335 (1948).

²⁶ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1135 (1991).

unequal representation of Parliament for citizens in England.²⁷ Sparsely populated boroughs had representation on par with higher populated cities like London.²⁸

Considering this background, apportionment was a contentious issue of debate at the Constitutional Convention of 1787.²⁹ Smaller states were concerned about having an equal voice compared to the larger states, and larger states were concerned about having a proportionally larger say in decision-making compared to the smaller states.³⁰

To appease both factions, the Great Compromise was brokered.³¹ Under this compromise, a House of Representatives and a Senate would form a bicameral legislative branch.³² The House would allocate representation according to population size, and the Senate would equally allocate two seats for each state regardless of population.³³ As summarized by William Samuel Johnson, a delegate of Connecticut: “[I]n one branch the people, ought to be represented; in the other, the States.”³⁴

The ratio of representatives to constituents was another topic of lively debate at the Convention. James Madison was a proponent of having a large House of Representatives.³⁵ He spotted four problems with having too small of a House: (1) Too few representatives will make them an unsafe depository of public interests, (2) They will not have an adequate base of knowledge about the local issues of their constituents, (3) They will be from a higher class of citizens than the general public, and (4) Having too few representatives will result in future defectiveness and will create more obstacles in the future to prevent representation increases.³⁶

After much discussion, the apportionment clause was formed. In the final, ratified version of the Constitution, representation and apportionment of the House follows the following rules: (1) States shall be apportioned representatives according to the number of qualified individuals counted during the enumeration (i.e., the Census conducted every ten years), (2) Every state shall have at least one representative, and (3) Representation shall not exceed one representative per 30,000 individuals.³⁷

²⁷ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 464 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

²⁸ *Id.* at 450.

²⁹ AMAR, *supra* note 16.

³⁰ MICHEL L. BALINSKI & H. PEYTON YOUNG, FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE 9 (2001).

³¹ A *Great Compromise*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/A_Great_Compromise.htm (last visited Jan. 19, 2022).

³² FARRAND’S RECORDS, *supra* note 27, at 524.

³³ *Id.* The apportionment scheme proposed during the Great Compromise was eventually ratified into the Constitution. *See* U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 3, cl. 1.

³⁴ FARRAND’S RECORDS, *supra* note 27, at 462.

³⁵ THE FEDERALIST NO. 55, *supra* note 11.

³⁶ *Id.*

³⁷ U.S. CONST. art. I, § 2, cl. 3.; *see also* Whelan v. Cuomo, 415 F. Supp. 251, 258 (E.D.N.Y. 1976) (“[T]he historical background and the plain meaning of the Constitution support the power of Congress to fix the number of representatives at a figure less than the maximum of one for every 30,000 inhabitants.”); *see also* FARRAND’S RECORDS, *supra* note 27, at 644.

Upon completion of the Constitution, twelve additional amendments were proposed in addition to the original text.³⁸ Ten of the proposed amendments were ratified by the states and became the Bill of Rights.³⁹ One of the amendments that did not get passed contemplated the growth of the nation and set new representation ratios as the population increased.⁴⁰ This amendment, which would have been the first to the Constitution, reads:

After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.⁴¹

This amendment failed to gain ratification by a single vote.⁴² Notwithstanding ratification, the Framers did expect the House to grow, as James Madison stated, “I take for granted . . . that the number of representatives will be augmented from time to time in the manner provided by the Constitution.”⁴³

B. Apportionment in Action

After the initial apportionment set forth by the Constitution,⁴⁴ Congress was able to successfully reapportion the House every decade through 1910.⁴⁵ Except for 1840, the size of the House increased with each apportionment.⁴⁶ Although there was an attempt to limit the number of House members during the 19th century, the legislation never made any real progress.⁴⁷

George Washington requested that the ratio be lowered from 1 per 40,000 to 1 per 30,000. This was the only time Washington made a remark at the Convention concerning a debated issue.

³⁸ Amar, *supra* note 26, at 1137.

³⁹ *Id.*

⁴⁰ Robert Longley, *The Original Bill of Rights Had 12 Amendments*, THOUGHTCO. (Feb. 4, 2020), <https://www.thoughtco.com/original-bill-of-rights-and-amendments-3322334>. The second proposed amendment in the Bill of Rights contemplated Congressional salaries. This amendment would finally be passed as the 27th Amendment 203 years after its initial proposal.

⁴¹ Amar, *supra* note 26, at 1137.

⁴² *Id.* at 1138.

⁴³ THE FEDERALIST NO. 55, *supra* note 11, at 321.

⁴⁴ U.S. CONST. art. I, § 2, cl. 3.

⁴⁵ See McLawhorn Jr., *supra* note 3, at 1070–77.

⁴⁶ *Id.* at 1071; Charles A. Kromkowski & John A. Kromkowski, *Why 435? A Question of Political Arithmetic*, 24 POLITY 1, 132–33 (1991).

⁴⁷ McLawhorn Jr., *supra* note 3, at 1075.

One of the ongoing issues concerning apportionment was the method used to allocate representatives to the states. The Hamilton method (proposed by Alexander Hamilton) would round up the number of allocated representatives; however, the method would be vetoed by President Washington because rounding up allowed some states to have a smaller ratio than the constitutionally mandated one per 30,000.⁴⁸ Instead, the Jefferson method (proposed by Thomas Jefferson), which rounds down any fractions, was implemented.⁴⁹ This method would be used for apportionments from 1790 to 1830.⁵⁰ Starting with the 1840 apportionment, the Webster method was introduced.⁵¹ This method was a mix of the Hamilton and Jefferson methods, as it rounds to the nearest whole number.⁵² Debates about allocation methods in the 19th century would eventually give way to serious discussions about whether the House's membership should be expanded at all beginning in the early 20th century.

C. Apportionment Clashes in the 1920s

The 1920 apportionment has been the only time in American history that Congress failed its constitutional duty to reapportion.⁵³ There was great debate about increasing the size of the House for the 1920 apportionment.⁵⁴ Those wishing to increase the House's size contended an increase would improve relationships with constituents and decentralize power away from just a few House members.⁵⁵ Opponents thought the increase would make House functioning too unwieldy.⁵⁶ Demographic shifts from rural areas to the cities also contributed to the Republicans in Congress stonewalling any representation increase.⁵⁷ The controversy never came to a resolution because the apportionment bill never came out of committee in the Senate.⁵⁸ After calls from the public and within Congress to pass a new apportionment bill, the Permanent Apportionment Act of 1929 (Act) was finally written and approved.⁵⁹ It capped the number of representatives in the House at 435.⁶⁰

⁴⁸ *Id.* at 1073–74.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1074–75.

⁵³ *Id.* at 1077.

⁵⁴ *Id.* at 1076.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 1920 Overview, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/overview/1920.html (last updated Dec. 17, 2019) (“[R]epresentatives elected from rural districts worked to derail the process, fearful of losing political power to the cities.”).

⁵⁸ McLawhorn Jr., *supra* note 3, at 1076.

⁵⁹ *Id.* at 1077–78.

⁶⁰ *Id.* at 1077–79. Even at its conception, the 435-member cap placed in 1929 fell short of the cube root of the U.S. population at the time. The cube root of the U.S. population in 1929 (about

D. Where We Are After the Permanent Apportionment Act of 1929

The Equal Proportions Method (also known as the Huntington-Hill method) has been used for every apportionment since 1940,⁶¹ and it has been codified into law.⁶² This method is a statistical formula that works similarly to the Webster method but rounds at the geometric mean.⁶³

The Equal Proportions Method underwent a legal challenge after the 1990 apportionment, when Montana lost one of its two representatives in the House.⁶⁴ The Supreme Court, after determining that congressional apportionment was justiciable as a non-political question, held that the use of the method was constitutional in *United States Department of Commerce v. Montana*.⁶⁵ Reaching the merits, it determined that the Equal Proportions Method was decided on by Congress after much debate and was not an arbitrary decision; therefore, its use was justified.⁶⁶

The effects of the Permanent Apportionment Act have periodically been challenged in the Supreme Court. The landmark case *Baker v. Carr* held that allegations of disparities in state legislative districts raise justiciable claims.⁶⁷ Then in *Reynolds v. Simms*, rationalizing under the 14th Amendment's Equal Protection Clause, the Court held that state districts cannot have significant disparities in population size because it violates the principle of "one person, one vote."⁶⁸ In addition, unequally-sized congressional districts were struck down as unconstitutional by the Court in *Wesberry v. Sanders*.⁶⁹ The Court held that Georgia's Fifth District, containing more than double the average number of people in a district, was disproportionately sized and "grossly discriminates against voters in the Fifth Congressional District."⁷⁰

As of 2022, the United States population is about 332 million people.⁷¹ Due to the cap on House representatives, the ratio of representatives to constituents is now the

122 million people) would equate to 495 House seats. *Historical National Population Estimates*, *supra* note 1.

⁶¹ McLawhorn Jr., *supra* note 3, at 1079.

⁶² See An Act to Provide for Apportioning Representatives in Congress Among the Several States by the Equal Proportions Method, Pub. L. No. 13, 55 Stat. 761 (1941) (codified as amended at 2 U.S.C. § 2a).

⁶³ See *Methods of Apportionment*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/apportionment/methods_of_apportionment.html (last updated Dec. 17, 2020).

⁶⁴ U.S. Dep't of Com. v. Montana, 503 U.S. 445, 445 (1992).

⁶⁵ *Id.* at 459, 466.

⁶⁶ *Id.* at 465–66.

⁶⁷ Baker v. Carr, 369 U.S. 186, 187–88, 237 (1962).

⁶⁸ Reynolds v. Sims, 377 U.S. 533, 536–37, 558 (1964) (holding malapportionment of state legislative seats violates the Equal Protection Clause—"one person, one vote").

⁶⁹ Wesberry v. Sanders, 376 U.S. 1, 4 (1964).

⁷⁰ *Id.* at 2, 7.

⁷¹ *US States – Ranked by Population 2022*, *supra* note 2.

highest it has ever been in American history: one representative per 763,000 constituents.

III. ANALYSIS

A. *The Proposed Amendment and Its Immediate Implications*

1. The Cube Root Amendment's Proposed Text

The proposed Cube Root Amendment for changing the apportionment process in the House will read as follows:

Amendment XXVIII

Section 1. The number of representatives in the House of Representatives shall be determined by calculating the cube root of the United States population in accordance with the latest enumeration. This number shall be rounded down in the case of a remainder.

Section 2. The representatives shall be apportioned to the states according to the method of equal proportions.

Section 3. The districts of each state shall be compact, continuous, and equally populated.

2. The Impact of the Cube Root Formula on the Structure of the House of Representatives

There would be immediate results upon ratification of this amendment. Beginning with Section 1, the amendment would immediately displace the representation cap of 435.⁷² Using current population estimates,⁷³ the Cube Root Rule would calculate 692 required representatives in the House. This means that 257 brand-new districts would be created across the country. The representative to constituent ratio would drastically decrease from about one representative per 763,000 down to one representative per 478,000, a decrease of over thirty-seven percent.

Different representation methods have been proposed besides the Cube Root Rule. One of them has been dubbed the Wyoming Rule.⁷⁴ This rule would set the ratio of representation according to the least-populated state in the Union, which is (as of 2022) Wyoming at 582,233 individuals.⁷⁵ While this rule would work well for the current population dynamics of America (allocating 569 representatives to the House in 2022),⁷⁶ this rule could go awry in the future.

First, the population of one state would retain all the power in setting the number of representatives, effectively rendering the population sizes of every other state irrelevant. Population shifts in the least-populated state could create major shifts in total House representation, which would go on to affect every state. An increase of

⁷² See Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2018)); see also U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁷³ *US States – Ranked by Population 2022*, *supra* note 2.

⁷⁴ CAROLINE KANE ET AL., *DEMOCRACY & CONST. CLINIC, WHY THE HOUSE OF REPRESENTATIVES MUST BE EXPANDED AND HOW TODAY'S CONG. CAN MAKE IT HAPPEN* 14–15 (2020).

⁷⁵ *Id.* at 14; *US States – Ranked by Population 2022* *supra* note 2.

⁷⁶ *US States – Ranked by Population 2022* *supra* note 2; KANE ET AL., *supra* note 74.

residents to the least-populated state would greatly reduce the number of representatives in the House and vice versa. For example, if there was a relatively small migration of people to Wyoming leading to a state population of 600,000, that increase would set the number of representatives at 553, a reduction of sixteen representatives because about 20,000 people decided to move to Wyoming.⁷⁷ A small group of migrants should not have such a disparate impact on the representation of other states, whose population dynamics carry no weight under the Wyoming Rule.

There are also statehood matters to consider here. The admission of states to the Union could be a political weapon under the Wyoming Rule. A U.S. territory such as the Virgin Islands, with a population of 87,146 people,⁷⁸ could be admitted and make the number of representatives in the House skyrocket. If the Virgin Islands were admitted to the Union, House representation under a Wyoming Rule would shoot up to 3,808 representatives,⁷⁹ a complete shock to the system.

The United States holds fourteen territories that are not states in the Union, including the U.S. Virgin Islands, Puerto Rico, and Guam.⁸⁰ Some of these territories, while having representation in Congress through delegates, do not have any voting power.⁸¹ If the Wyoming Rule were to apply, smaller territories asking for statehood⁸² could be used as a political tool to change the number of representatives in the House by wide margins. With such great consequences of admission under the Wyoming Rule, Congress would likely shy away from any potential pushes for statehood.

Under the Cube Root Amendment, these territories could be added as states without much change to the House's composition overall. The small population sizes of these territories will add little population to the United States; therefore, it will have a small effect on calculating the cube root of the population. When apportioned, these territories would likely get one or two representatives at most. The real significant changes in representation would be left to the Senate, where every state gets two senators no matter its size.⁸³

⁷⁷ This calculation assumes the national population remains the same at 331,817,234. *See US States – Ranked by Population 2022, supra* note 2.

⁷⁸ *Census Bureau Releases 2020 Census Population and Housing Unit Counts for the U.S. Virgin Islands*, U.S. CENSUS BUREAU (Oct. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-us-virgin-islands.html> (indicating population as of 2020 Census).

⁷⁹ Calculated by taking population of U.S. plus Virgin Islands (331,904,380) divided by the population of the Virgin Islands (87,146).

⁸⁰ *What are the US Territories?*, WORLDATLAS, <https://www.worldatlas.com/articles/the-territories-of-the-united-states.html> (last visited Jan. 6, 2022).

⁸¹ *United States Congressional Non-Voting Members*, BALLOTEDIA, https://ballotpedia.org/United_States_congressional_non-voting_members (last visited Jan. 6, 2022). American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, and the District of Columbia all have delegates.

⁸² Territories desiring statehood is not a remote possibility. In fact, Puerto Rico's citizens voted to become a state in the 2020 election, although the result does not compel Congress to do anything. *See Puerto Rico Statehood Referendum (2020)*, BALLOTEDIA, [https://ballotpedia.org/Puerto_Rico_Statehood_Referendum_\(2020\)](https://ballotpedia.org/Puerto_Rico_Statehood_Referendum_(2020)) (last visited Jan. 11, 2022).

⁸³ U.S. CONST. art. I, § 3, cl. 1.

There are multiple benefits to calculating the number of representatives in the House with a formula. Using a mathematical formula removes any bias that may result from partisan interests in the House during an apportionment debate to determine the number of representatives the House shall contain. A formula like the Cube Root Rule also means that representation will now track with overall population growth. The government succeeded in following population growth without a formula until the 1920 apportionment by periodically adding more seats to the House.⁸⁴ With the Cube Root Rule, there will be no worries about apportionment ever stopping again like it did after the 1929 apportionment bill. The Cube Root Rule also avoids explosive growth in the House even if the U.S. population greatly increases. The nature of the formula means that even if one billion individuals reside in the U.S., there will only be a relatively low 1,000 members in the House.⁸⁵

Some have questioned whether the number of senators should be deducted from the total number of representatives resulting from the Cube Root Rule.⁸⁶ This would reduce the number of representatives in the House by the number of Senators (currently 100). I believe that the Senate should be excluded from the representation calculation due to the historical interests at the Constitutional Convention. Congress was created out of a Great Compromise.⁸⁷ The Senate promised equal representation whereas the House promised proportional representation.⁸⁸ The Cube Root Rule's main purpose is maintaining the promise of proportional representation in the House, so it would be right to use only that house of Congress in the calculation and leave the different purpose of the Senate alone. By not including the Senate in the calculation, 100 more representatives are added and further reduce the representation ratio.

3. The Application of the Huntington-Hill Method to the Cube Root Rule

Section 2 of the proposed amendment, stating that “The representatives shall be apportioned to the states according to the method of equal proportions,” will maintain current procedures the most out of the three sections. It will continue to allocate representatives to the states in a method approved by Congress since 1941—the

⁸⁴ McLawhorn Jr., *supra* note 3, at 1074–75.

⁸⁵ See Karr, *supra* note 5, at 604. While 1,000 members in the House would seem too large, China manages to have a functioning National People's Congress that contains nearly 3,000 delegates.

⁸⁶ 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; see also Editorial, *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?mtrref=www.google.com&gwh=BECC21D50D971F8652E8E1E8D766D986&gwt=pay&assetType=REGIWALL>.

⁸⁷ See FARRAND'S RECORDS, *supra* note 27, at 436 n.2.

⁸⁸ See *id.* at 538.

Huntington-Hill method.⁸⁹ Each state is automatically allocated one representative,⁹⁰ and then the remaining available seats are allocated using the method of equal proportions.⁹¹ Using the previously calculated 692 seats from the Cube Root Rule, there are 642 more seats to allocate, 257 of them being brand-new. According to Table 1, the method of equal proportions under the Cube Root Rule will ensure that no state loses representation. All but four states gain a representative through the new amendment. Texas is the biggest winner as the state gains twenty-two new seats.

Table 1. The number of representatives allocated to each state using the Cube Root Rule and method of equal proportions (calculated using estimated 2022 populations of each state).⁹²

State	Estimated Population (2022)	Current Number of Representatives (Based on 2020 Census)	Number of Representatives Under Proposed Amendment	Net Gain
AL	4,949,697	7	11	+4
AK	720,763	1	2	+1
AZ	7,640,796	9	17	+8
AR	3,042,017	4	7	+3
CA	39,664,128	52	60	+8
CO	5,961,083	8	13	+5
CT	3,546,588	5	8	+3
DE	998,619	1	2	+1
FL	22,177,997	28	48	+20
GA	10,936,299	14	24	+10
HI	1,401,709	2	3	+1
ID	1,896,652	2	4	+2
IL	12,518,071	17	27	+10
IN	6,482,385	9	14	+5

⁸⁹ See An Act to Provide for Apportioning Representatives in Congress Among the Several States by the Equal Proportions Method, Pub. L. No. 13, 55 Stat. 761 (1941) (codified as amended at 2 U.S.C. § 2a); McLawhorn Jr., *supra* note 3, at 1078–79. The method of equal proportions and the Huntington-Hill method are two different names that refer to the same method.

⁹⁰ U.S. CONST. art. I, § 2, cl. 3 (requiring each state to have at least one representative in the House of Representatives).

⁹¹ See An Act to Provide for Apportioning Representatives in Congress Among the Several States by the Equal Proportions Method, Pub. L. No. 13, 55 Stat. 761 (1941) (codified as amended at 2 U.S.C. § 2a).

⁹² *US States–Ranked by Population 2022*, *supra* note 2; *Apportionment Calculator for US Census*, UNIV. OF MICH. INST. FOR SOC. RSCH., <https://isr.umich.edu/apportionment-calculator-for-us-census/> (last visited Mar. 25, 2022) (providing Huntington-Hill apportionment calculator); *2020 Census Apportionment Results*, U.S. CENSUS BUREAU (Apr. 26, 2021) <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html> (providing 2020 apportionment results).

IA	3,174,426	4	7	+3
KS	2,919,179	4	6	+2
KY	4,487,233	6	10	+4
LA	4,616,106	6	10	+4
ME	1,359,677	2	3	+1
MD	6,075,314	8	13	+5
MA	6,922,107	9	15	+6
MI	9,995,212	13	22	+9
MN	5,739,781	8	13	+5
MS	2,961,536	4	6	+2
MO	6,184,843	8	14	+6
MT	1,093,117	2	2	0
NE	1,960,790	3	4	+1
NV	3,238,601	4	7	+3
NH	1,378,449	2	3	+1
NJ	8,840,685	12	19	+7
NM	2,109,093	3	5	+2
NY	19,223,191	26	42	+16
NC	10,807,491	14	24	+10
ND	774,008	1	2	+1
OH	11,727,377	15	26	+11
OK	4,007,179	5	9	+4
OR	4,325,290	6	9	+3
PA	12,805,190	17	28	+11
RI	1,062,583	2	2	0
SC	5,342,388	7	12	+5
SD	902,542	1	2	+1
TN	7,001,803	9	15	+6
TX	30,097,526	38	60	+22
UT	3,363,182	4	7	+3
VT	622,882	1	1	0
VA	8,638,218	11	19	+8
WA	7,887,965	10	17	+7
WV	1,755,715	2	4	+2
WI	5,867,518	8	13	+5
WY	582,233	1	1	0
Total	331,817,234	435	692	+257

The primary advantage of the method of equal proportions over other methods of apportionment is that representatives can be allocated according to any number of representatives (i.e., there is no need to add or subtract representatives due to rounding because this method will always produce the total number of representatives desired),⁹³ which can be useful when the Cube Root Rule can result in different numbers every decade without a clear pattern.

⁹³ *Methods of Apportionment*, *supra* note 63.

4. The Impact of the New Districting Language

The Constitution is mum on the issue of congressional districts,⁹⁴ which means that Section 3 of the proposed amendment will introduce the first language regarding congressional districts. As a result, all states will have to conform to its guidelines when redrawing district lines.⁹⁵

Section 3 of the amendment, stating “The districts of each state shall be compact, continuous, and equally populated,” reintroduces the districting language removed by the Permanent Apportionment Act of 1929.⁹⁶ Because of the multiple factors involved in districting for each state, it is best to give more flexible guidelines here than rigid standards. The biggest advantage of adding this language to the Constitution is that the courts will now be able to hear cases on districting (and gerrymandering) matters. The addition of this language transforms districting into a constitutional question, and the courts can no longer dismiss these claims under the political question doctrine.⁹⁷ This section would also promote uniformity in districting rules among the states instead of having fifty different approaches.

B. More Equitable Representation

The Cube Root Amendment will lead to better formed congressional districts that are more responsive to their constituents. One way that constituents will benefit under the Cube Root Amendment will be through improved constituent services. Currently, each representative is limited to only eighteen permanent staff members.⁹⁸ Under the new Amendment, 4,626 new staffers could potentially be hired.⁹⁹ These staff members perform services such as being a liaison between constituents and representatives, helping constituents with federal matters, and performing research to help inform representatives on pressing issues.¹⁰⁰ One of the biggest changes in the way House representatives represent their districts is that constituent services have steadily increased. House offices just from 1993 to 2009 saw a sixty-seven percent increase in spending on constituent services.¹⁰¹ With more districts, there will be more staff ready

⁹⁴ Thomas E. Mann et al., *Redistricting and the United States Constitution*, BROOKINGS INST. (Mar. 22, 2011), <https://www.brookings.edu/on-the-record/redistricting-and-the-united-states-constitution/>.

⁹⁵ See U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁹⁶ Permanent Apportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a); SARAH J. ECKMAN, CONG. RSCH. SERV., IN11547, SIZE OF THE U.S. HOUSE OF REPRESENTATIVES 1 (2020).

⁹⁷ Compare *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (holding that partisan gerrymandering claims are non-justiciable political questions), with *Wesberry v. Sanders*, 376 U.S. 1, 4 (1964) (explaining congressional apportionment disparities are justiciable).

⁹⁸ 2 U.S.C. § 5321.

⁹⁹ *Id.* This is calculated by multiplying the 257 new representatives by the maximum of eighteen staff members allowed by statute.

¹⁰⁰ KANE ET AL., *supra* note 74, at 8.

¹⁰¹ Alexander C. Furnas, *Legislative Staff are Spending an Increasing Amount of Time on Constituent Services*, LEGBRANCH (Apr. 11, 2018), <https://www.legbranch.org/2018-4-11-legislative-staff-are-spending-an-increasing-amount-of-time-on-constituent-services/>.

to assist the people of their districts, which should improve service and perhaps foster a better connection with the district's representative.

Some may contend that adding this additional staff will cost too much in the federal budget. For the 2022 fiscal year, Congress allocated \$1.715 billion to the House of Representatives.¹⁰² While this seems like a large sum of money, the federal government is projected to spend \$6.011 trillion during fiscal year 2022.¹⁰³ With this House budget for 2022, the amount allocated to the House would only be 0.029% of the fiscal year's overall budget. Adding more staffers would be nearly negligible in the overall budgetary scheme of the government, and these additional hires could aid the part of government that controls spending¹⁰⁴ in creating better budgets in the future.

Citizens wishing to run for office in the House will face fewer obstacles toward getting elected. First, the transition to the Cube Root Amendment will create 257 brand-new, vacant seats that must be filled. Even if every single representative from the original 435 seats were reelected, at least thirty-seven percent of the next Congress would consist of new faces due to new vacancies. This presents a special one-time opportunity to bring fresh ideas and perspectives to the House floor.¹⁰⁵

Having this opportunity for new faces in Congress would potentially allow younger generations to finally gain more proportional representation in the national government. As of the 117th Congress, the median age of a House representative is 58.9 years old.¹⁰⁶ Generationally, the Baby Boomer generation has more power in the House than Generation X and the Millennial generation combined.¹⁰⁷ This skew towards older representatives may present an issue when Congress attempts to understand and legislate on topics like social media regulation and cybersecurity.¹⁰⁸ Having younger generations more in tune with these kinds of issues can make Congress more competent in these realms.

Besides youth, there is an increased potential to get more classes of people into the House. The median net worth of an average Congressperson member is very high

¹⁰² *Appropriations Committee Releases Fiscal Year 2022 Legislative Funding Bill*, HOUSE COMM. APPROPRIATIONS (June 23, 2021), <https://appropriations.house.gov/news/press-releases/appropriations-committee-releases-fiscal-year-2022-legislative-branch-funding>.

¹⁰³ OFF. OF MGMT. AND BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2022 40 tbl.S-4 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/05/budget_fy22.pdf.

¹⁰⁴ U.S. CONST. art. I, § 7, cl. 1 ("All Bills for Raising Revenue shall originate in the House of Representatives . . .").

¹⁰⁵ KANE ET AL., *supra* note 74, at 9.

¹⁰⁶ Carrie Elizabeth Blazina & Drew Desilver, *Boomers, Silents Still Have Most Seats in Congress, Though Number of Millennials, Gen Xers is Up Slightly*, PEW RSCH. CTR. (Feb. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/02/12/boomers-silents-still-have-most-seats-in-congress-though-number-of-millennials-gen-xers-is-up-slightly/>.

¹⁰⁷ *Id.* (indicating that in 2021 Boomers held 53%, Generation Z held 33%, and Millennials held 7% of seats in the House of Representatives).

¹⁰⁸ See, e.g., Alana Wise, *What Sen. Blumenthal's 'Finsta' Flub Says About Congress' Grasp of Big Tech*, NPR (Oct. 4, 2021, 5:52 PM), <https://www.npr.org/2021/10/04/1043150167/sen-blumenthals-finsta-flub-renews-questions-about-congress-grasp-of-big-tech>.

compared the average American at just over a million dollars.¹⁰⁹ Because the wealthier classes have such great representation, it may be more difficult for the viewpoints of lower classes to be understood or legislated in the House. Of all the branches of the U.S. government, the House was supposed to most reflect the people,¹¹⁰ so having an opportunity to elect new faces to vacant seats could allow America a chance to better reflect themselves in government in terms of youth and societal class.

Beyond the initial increase in seats, the Amendment should bring some lasting changes to House campaigns. Smaller district sizes and populations will reduce the costs of running a campaign, allowing for a leaner budget. Candidates can rely less on money from powerful interest groups and more on smaller contributions from individuals within the district.¹¹¹ Campaign spending is currently an average of \$1,663,716 per seat,¹¹² so this amendment should allow for reduced expenses to win smaller districts. This would also allow those interested in running for office with lower financial net worth a better opportunity at winning, which would decrease the overall net worth of the House as mentioned previously.

There is also an improved opportunity for candidates outside of the traditional political parties to successfully win a seat in the House. In a smaller district, an independent or third-party candidate will be able to run a campaign on a smaller budget.¹¹³ Smaller districts also mean that these candidates have to win over a smaller number of people, perhaps by speaking to issues specific to the geographic region.¹¹⁴ In a smaller community, third-party votes may feel less “wasted” to the voter if the candidates can convince a critical mass of constituents to vote for them.¹¹⁵

With more representatives overall, there are more voices within a party that could potentially defect from the general party stance on an issue.¹¹⁶ However, the presence of third parties and independents in the House would have a potentially large effect on American politics, even if the number of these kinds of representatives is relatively small. Because of the two-party system in America, there is only a need to have a majority over the opposing party in the House to have control. With a simple majority, the party in power can make large changes without caring much about the minority party. This power structure would be greatly reduced with even a few third party or independent representatives. This potential introduction of third parties would force the dominant parties to form coalitions to pass legislation.¹¹⁷ With a third party, neither

¹⁰⁹ Karl Evers-Hillstrom, *Majority of Lawmakers in 116th Congress are Millionaires*, OPENSECRETS (Apr. 23, 2020, 9:14 AM), <https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires/>.

¹¹⁰ FARRAND’S RECORDS, *supra* note 27, at 340, 468.

¹¹¹ KANE ET AL., *supra* note 74, at 9.

¹¹² *Elections Overview*, OPENSECRETS (Apr. 1, 2021), <https://www.opensecrets.org/elections-overview?cycle=2020&display=A&type=G>.

¹¹³ KANE ET AL., *supra* note 74, at 9.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

current party could have a simple majority. They would have to work with other parties to pass legislation, meaning that more viewpoints must be considered.

Finally, representatives could also spread committee workloads across more people. Instead of being seated on an average of six committees, this number could be reduced, and higher quality work could be put towards that lighter workload.¹¹⁸ This may encourage more informed debate and, in turn, produce better legislation.

C. The Electoral College

Elections for President of the United States do not follow a simple popular vote system. Instead, the founders of the Constitution developed the Electoral College system to determine who wins the presidency.¹¹⁹ Electors have had their discretionary power greatly reduced over the years to the point that electors are now mostly required to vote the way the state votes in the election.¹²⁰ The number of electors allocated to each state is determined by adding together the number of representatives and senators the state has in Congress.¹²¹ Currently there are 538 electors in the Electoral College.¹²² 270 electoral votes are required to win the presidency.¹²³ The House of Representatives will select the president if a majority is not reached.¹²⁴

The design of the U.S. Congress gives a natural advantage to smaller-populated states and increases their voting power. No matter the population size, every state is given at least three electors (two senators plus one required representative).¹²⁵ Small-state voting power has only become more outsized due to the representation cap placed on the House. If representation were to increase, then more electors would be created, increasing the size of the Electoral College and diluting the voting power of lower population states. Instead, millions of people have been added to the country, and the Electoral College has remained the same. States like California, even with 55 electoral votes,¹²⁶ are still being underrepresented under the current system.

The Cube Root Rule would result in 692 representatives having seats in today's House. When added to the 100 senators and Washington D.C.'s 3 electoral votes, the Electoral College will contain 795 electoral votes, and 398 electoral votes will be required to win the presidency. By increasing the number of electoral votes available, large states like California and Texas will have a much more proportional voting share,

¹¹⁸ *Id.* at 9–10.

¹¹⁹ U.S. CONST. art. II, § 1, cl. 3.

¹²⁰ *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020) (holding that a state may penalize a presidential elector for faithlessly voting on the Electoral College ballot). *See also* *The Electoral College*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 11, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx>.

¹²¹ U.S. CONST. art. II, § 1, cl. 2.

¹²² *See id.* amend. XXIII, § 1 (allocating three electors to Washington D.C.).

¹²³ *See id.* art. II, § 1, cl. 3; *id.* amend. XII (stating a majority of electors must be won to win the presidency).

¹²⁴ U.S. CONST. amend. XII.

¹²⁵ *See id.* art. II, § 1, cl. 2.

¹²⁶ *Distribution of Electoral Votes*, U.S. NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/allocation> (last updated Mar. 6, 2020).

states that have been losing votes due to population shifts like in the Midwest¹²⁷ will replenish their voting numbers, and small states will be able to have more electoral votes than the constitutionally mandated minimum of three.¹²⁸ Below, Figure 1 indicates how the Electoral College currently looks, and Figure 2 indicates how the Electoral College will look after enactment of the Cube Root Amendment.



Figure 1. The current Electoral College map.¹²⁹

¹²⁷ *2020 Apportionment of Congressional Seats*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/redistricting/2020-apportionment-of-congressional-seats.aspx> (last visited Jan. 23, 2022) (highlighting states such as Ohio and Illinois losing congressional seats in the 2020 apportionment process).

¹²⁸ See U.S. CONST. art. II, § 1, cl. 2.

¹²⁹ *Blank 2020 Electoral Map*, 270TOWIN, <https://www.270towin.com/maps/blank-2020-electoral-map> (last visited Oct. 25, 2020) (providing Electoral College map).



Figure 2. The Electoral College map under the Cube Root Amendment for 2022.¹³⁰

Although the number of electoral votes drastically changes under the Cube Root Amendment, it likely will not affect presidential elections too much, making it a more moderate solution compared to abolishing the Electoral College. In fact, the only election that likely would have flipped results was the famous closely contested election between Republican George W. Bush and Democrat Al Gore.¹³¹

While some Americans and representatives in Congress contend that the entire Electoral College should be abolished, there are some issues with a wholesale abolition. First, the Republican Party in particular benefits from the current structure.¹³² Because smaller states have increased influence that is further augmented by the representation freeze in the House, the Republican Party has a built-in advantage before a single vote is cast.¹³³ Second, because the Republican Party would oppose losing their advantage and has enough members in the House and Senate, an Amendment abolishing the Electoral College has no chance of passing in Congress.¹³⁴

¹³⁰ *Id.*

¹³¹ 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. POL. 89, 102 (2008) (noting that the Cube Root Rule would award Al Gore a narrow victory over George W. Bush by four electoral votes).

¹³² Geoffrey Skelley, *Even Though Biden Won, Republicans Enjoyed the Largest Electoral College Edge in 70 Years. Will That Last?*, FIVETHIRTYEIGHT (Jan. 19, 2021, 3:01 PM), <https://fivethirtyeight.com/features/even-though-biden-won-republicans-enjoyed-the-largest-electoral-college-edge-in-70-years-will-that-last/>.

¹³³ *Id.*

¹³⁴ *Party Divisions of the House of Representatives, 1789 to Present*, OFF. OF ART & ARCHIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Jan. 28, 2021); U.S. CONST. art. V (requiring two-thirds vote in both houses to approve an amendment).

Third, smaller states would lose their increased voice in the Electoral College system by going to a strict national popular vote. A state like North Dakota, with just over 0.2%¹³⁵ of the U.S. population, currently has a 0.55%¹³⁶ share of the Electoral College. A move to a popular voting system would immediately halve the voice of North Dakota in selecting the next President.

The Cube Root Amendment can address or compromise on all these points. First, the amendment offers a trade-off for a reduction of voting power in small states: more representation. States would get more representatives due to the House increase and would therefore reap the benefits described previously.¹³⁷ Second, while the Cube Root Amendment would work best as an amendment, it could be implemented first as a bill. Because of this, Congress would only need a majority in both houses of Congress and the President's signature to change the Electoral College rather than abolish it. This maneuver would likely be done by the Democrat Party, as they would reap the benefits of the bill from reducing their disadvantage in the Electoral College.¹³⁸ Finally, under the Cube Root Rule, small states like North Dakota would lose less of their voice in the Electoral College. Rather than losing nearly half of their voting power under a popular vote system, North Dakota would still make up 0.5% of a Cube Root Electoral College,¹³⁹ a decrease of only about 10% of voting power. These minimal decreases would again also come with the benefits of more representatives, more constituent services, smaller districts, and more.

D. Removing Gerrymandering from the Nation's Maps

The amount of gerrymandering occurring on the district maps in the United States has reached comical levels. Districts are drawn with the intent of maximizing one party's number of easy-to-win seats in Congress, resulting in some wacky structures.¹⁴⁰ Some of these designs, showcased in Figure 3, have even developed names, including "Goofy Kicking Donald Duck" in Pennsylvania,¹⁴¹ the "Snake by

Miles Parks, *Abolishing the Electoral College Would Be More Complicated than it May Seem*, NPR (Mar. 22, 2019, 3:32 PM), <https://www.npr.org/2019/03/22/705627996/abolishing-the-electoral-college-would-be-more-complicated-than-it-may-seem>.

¹³⁵ *US States – Ranked by Population 2022*, *supra* note 2 (providing state-by-state population data for 2021).

¹³⁶ Three electoral votes divided by a total of 538 in current system. *Electoral Votes by State 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/electoral-votes-by-state> (last visited Jan. 23, 2022) (providing number of electoral college votes per state for 2021).

¹³⁷ *See supra* Part III.B.

¹³⁸ Skelley, *supra* note 132.

¹³⁹ Four electoral votes divided by the 692 total with the application of the Cube Root Amendment.

¹⁴⁰ *See* Eric Luis, *The Most Gerrymandered Districts in America*, RANKER (Sept. 17, 2020), <https://www.ranker.com/list/most-gerrymandered-districts-in-america/eric-vega>.

¹⁴¹ *Id.*

the Lake” in Ohio,¹⁴² and a district in Maryland that a federal judge could only describe as a “broken-winged pterodactyl lying prostrate.”¹⁴³ As district drawing has become more akin to abstract art projects, the public has taken notice and demanded a way to fix these districts. Removing gerrymandering has proven to be popular among citizens, as a strong majority of people would support reform.¹⁴⁴



Figure 3. Some of the creative district designs mentioned above.¹⁴⁵

Based on the most recent ruling of the Supreme Court, there is not much the general public can do about gerrymandering from a legal perspective, even if the offense is obvious.¹⁴⁶ In *Rucho v. Common Cause*, Chief Justice John Roberts explains that although partisan gerrymandering is undemocratic, the Supreme Court cannot review it because it is a nonjusticiable political question.¹⁴⁷ He does, however, go on to say that states and Congress may pass laws to curb gerrymandering.¹⁴⁸

Because the Supreme Court has decided to punt on the issue of partisan gerrymandering, it is up to the states and Congress to solve it. They both can do this through the ratification of the proposed Cube Root Amendment, which provides districting guidelines. By including these guidelines within the Constitution, our principal governing document will no longer be mum on the issue of congressional

¹⁴² David Meyers, *The 12 Worst House Districts: Experts Label Gerrymandering’s Dirty Dozen*, THE FULCRUM (Nov. 7, 2019), <https://thefulcrum.us/worst-gerrymandering-districts-example/1-beside-lake-erie>.

¹⁴³ *Id.*

¹⁴⁴ *Bipartisan Poll Shows Strong Support for Redistricting Reform*, CAMPAIGN LEGAL CTR. (Jan. 28, 2019), <https://campaignlegal.org/update/bipartisan-poll-shows-strong-support-redistricting-reform>.

¹⁴⁵ Luis, *supra* note 140; Meyers, *supra* note 142.

¹⁴⁶ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019).

¹⁴⁷ *Id.* at 2507.

¹⁴⁸ *Id.* at 2507–08 (“As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.”).

districts.¹⁴⁹ The resulting language will force the Supreme Court to analyze gerrymandering as a constitutional question, removing the barrier of being labelled as a nonjusticiable political question. The courts should then become a friendlier place for obtaining better drawn districts. With the requirements listed in Section 3 of the proposed Cube Root Amendment, the courts will have a sort of checklist to use when analyzing district lines.

The first requirement of the amendment is that districts should be compact, meaning there should be minimal distance between all parts of the constituency.¹⁵⁰ Compact shapes include squares or hexagons.¹⁵¹ Because states have various shapes and different concentrations of population, it could be difficult to just overlay a grid of squares over a state and achieve fair districts. Another way to maintain compactness could be to do so along county borders. When this is done with the current district map, the oddly shaped districts resulting from gerrymandering are eliminated and more competitive districts are formed.¹⁵² While there are currently 72 competitive districts, this new map would increase that number to 99.¹⁵³ If a computer algorithm is used instead to make compact districts regardless of county lines, the number of competitive districts increases even further to 104.¹⁵⁴ The maps can be seen below in Figures 4 and 5.

¹⁴⁹ *Id.* at 2507 (“[T]here is no ‘Fair Districts Amendment’ to the Federal Constitution.”); *see also* Mann et al., *supra* note 94.

¹⁵⁰ *Redistricting Criteria*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 23, 2019), <https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx>.

¹⁵¹ *Id.*

¹⁵² Aaron Bycoffe et al., *The Atlas of Redistricting*, FIVETHIRTYEIGHT (Jan. 25, 2018, 6:00 AM), <https://projects.fivethirtyeight.com/redistricting-maps/#algorithmic-compact>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

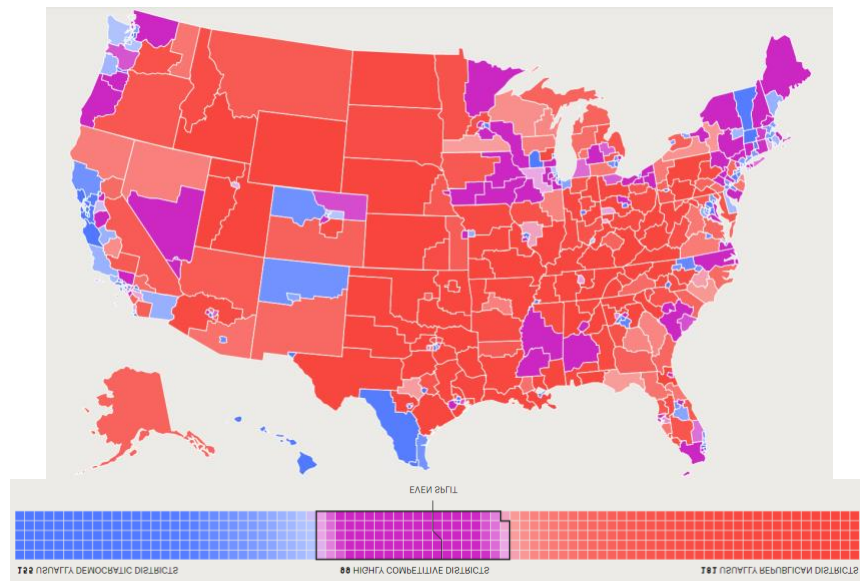


Figure 4. A district map of the United States with compact districts according to county lines.¹⁵⁵

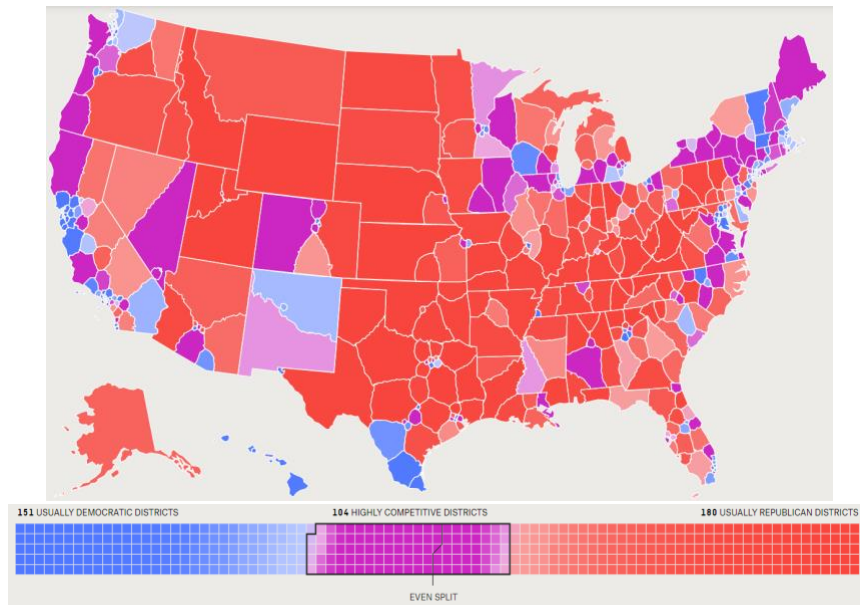


Figure 5. A district map of the United States with compact districts according to a computer algorithm.¹⁵⁶

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

The second requirement, that districts be continuous, would serve to codify the way districts are formed today across the nation. Currently, only twenty-three states specify that congressional districts must be continuous, even though all congressional districts in place right now are continuous.¹⁵⁷ While it may seem unnecessary now, this requirement will serve to prevent any potentially partisan political ploys in the future. The provision also moves toward the uniformity in districting laws sought by the amendment.

The third requirement of equally populated congressional districts has been implied into the Constitution by the Supreme Court,¹⁵⁸ but this requirement will set it firmly in place expressly within the Constitution under the proposed amendment. As previously mentioned, the Supreme Court has ruled in *Wesberry v. Sanders* that a district with double the population of the average district is unconstitutional.¹⁵⁹ More recently, in 2012, the Supreme Court held that a 0.79% deviation in population within congressional districts of West Virginia was small enough to be upheld as constitutional.¹⁶⁰ While the amendment will not cause an earthquake in precedent here, it will strengthen the platform equal representation has within the Constitution.

There are multiple advantages to implementing Section 3 of the Cube Root Amendment.¹⁶¹ One of them is the ability to go to the federal courts to hear cases on gerrymandering. By using federal courts, state judges, who are sometimes voted in by popular vote and therefore have terms, will not have to face these politically tricky issues that could cost them their seat on the bench. Instead, federal judges, with lifelong terms,¹⁶² can act as more neutral decisionmakers due to being removed from the state. They can also make a strong decision if necessary without facing backlash at the voting booth.

Another advantage of the Amendment is that, since it would be listed in the Constitution, every state would be beholden to its guidelines.¹⁶³ This means that state legislatures cannot create all sorts of different rules, therefore creating a more uniform, national standard that is fairer to everyone.

E. Implementation of the Proposed Amendment

The amendment process is stated in Article V of the Constitution, and it provides two routes for approving new amendments.¹⁶⁴ First, both houses of Congress can

¹⁵⁷ Justin Levitt, *Where are the Lines Drawn?*, ALL ABOUT REDISTRICTING, <https://live-all-about-redistricting.pantheonsite.io/redistricting-101/where-are-the-lines-drawn/> (last visited Dec. 1, 2020); see *Contiguity*, BALLOTPEdia, <https://ballotpedia.org/Contiguity> (last visited Jan. 26, 2022).

¹⁵⁸ See *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Tennant v. Jefferson Cnty. Comm’r*, 567 U.S. 758, 759 (2012).

¹⁵⁹ *Wesberry*, 376 U.S. at 7.

¹⁶⁰ *Tennant*, 567 U.S. at 764.

¹⁶¹ See *supra* Part III.A.

¹⁶² U.S. CONST. art. III, § 1.

¹⁶³ *Id.* art. VI, cl. 2 (Supremacy Clause).

¹⁶⁴ *Id.* art. V.

approve an amendment by a two-thirds vote and then send it to the state legislatures.¹⁶⁵ Three-fourths of the state legislatures must approve the amendment for ratification.¹⁶⁶ The second method, never used in American history,¹⁶⁷ would require two-thirds of states to call for a constitutional convention and then three-fourths of states approving the proposed amendment.¹⁶⁸

The amendment process has proven to be a difficult standard to meet. Thousands of amendments have been proposed during the nation's history, but only twenty-seven have gained enough support to be approved.¹⁶⁹ The natural question that arises out of these long odds is whether this amendment can possibly meet these lofty standards.

As it currently stands, this amendment likely does not have a chance of getting passed. But that is largely because people do not even realize there is a representation issue.¹⁷⁰ Because the House has been capped at 435 representatives since 1929, most of America likely does not even realize the number can be changed. To garner popularity among the people, awareness of the issue is necessary. The best method is having candidates for the House become proponents of this amendment. With enough candidates touting the benefits of the amendment, people will start discussing the issue, the media will note it, and the effects will aggregate from there.

To those who may contend that this would be a longshot, the concept of the Overton Window provides a path to relevance for the Cube Root Amendment.¹⁷¹ This concept provides a model for the range of policies that are acceptable to the general population.¹⁷² This window can be changed either by changing societal norms or by political leaders championing ideas outside the Overton window and moving them inside of it by gaining public support.¹⁷³

A recent example of moving the Overton Window can be seen through the idea of Universal Basic Income (UBI).¹⁷⁴ This idea would provide every citizen in a country a base amount of income each month regardless of working status, income, etc.¹⁷⁵ As

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Constitutional Amendment Process*, U.S. NAT'L ARCHIVES & RECS. ADMIN. (Aug. 15, 2016), <https://www.archives.gov/federal-register/constitution>.

¹⁶⁸ U.S. CONST. art. V.

¹⁶⁹ KANE ET AL., *supra* note 74, at 18.

¹⁷⁰ PEW RSCH. CTR., *THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY* 60 (2018), <https://www.pewresearch.org/politics/2018/04/26/the-public-the-political-system-and-american-democracy/> (indicating that support for an expansion of the House of Representatives increased when the surveyed were informed about the historical context of House apportionment).

¹⁷¹ *A Brief Explanation of The Overton Window*, MACKINAC CTR. FOR PUB. POL'Y, <https://www.mackinac.org/OvertonWindow> (last visited Feb. 8, 2022).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Annie Nova, *More Americans Now Support a Universal Basic Income*, CNBC (Feb. 28, 2018, 12:44 PM), <https://www.cnbc.com/2018/02/26/roughly-half-of-americans-now-support-universal-basic-income.html>.

¹⁷⁵ *Id.*

little as ten years ago, support for the concept in the U.S. was only 12%, but that number has quadrupled to 48% this year,¹⁷⁶ indicating that there is momentum for even higher approval numbers in the future.

Part of this momentum can be attributed to 2020 presidential candidate Andrew Yang, whose primary policy platform was offering a “Freedom Dividend” of \$1,000 a month to every American.¹⁷⁷ Yang took a relatively fringe idea and brought it to the mainstream by promoting it at rallies and mentioning it at debates.¹⁷⁸ This got the public discussing the issue, and major media outlets broadcasted views on the concept.¹⁷⁹

This amendment would be a good candidate for the progressive wing of the Democratic Party to pick up and campaign for it. If enough support could be garnered, then there is a shot at reaching the two-thirds requirement in Congress and sending the amendment to the states for approval. Amendments do not have to be approved in any set period,¹⁸⁰ so as long as the amendment is out there for approval, states could jump in and ratify it over time. In the meantime, only a simple majority is required to approve the contents of the amendment in the form of a bill. Thus, a Democrat-controlled Congress could start there, allow the process to be seen in action by the American people, and enough support will be available in the future to enshrine the bill in an amendment as originally intended.

To pass the Cube Root Amendment’s provisions in the form of a bill, it would have to pass both houses of Congress and then be signed by the President. Looking at the current state of politics, it is likely that one party, the Democrat Party, would be keen on passing such a bill while the Republican Party would oppose it.¹⁸¹ This difference in opinion would be because of previously discussed advantages the Republican Party has in not passing such measures.¹⁸² Because bipartisan support would be lacking here, it is recommended that the Democrats implement the bill while having control of both houses of Congress and the Presidency. One potential roadblock to this goal is the Senate’s filibuster rule, which in practicality forces a required sixty votes on a piece of legislation if invoked.¹⁸³ With control of the Senate

¹⁷⁶ *Id.*

¹⁷⁷ *The Freedom Dividend*, YANG 2020, <https://www.yang2020.com/policies/the-freedom-dividend/> (last visited Oct. 18, 2020).

¹⁷⁸ See Matt Stevens & Isabella G. Paz, *Andrew Yang’s \$1,000-a-Month Idea May Have Seemed Absurd Before. Not Now.*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/us/politics/universal-basic-income-andrew-yang.html>; Ben Mitchell, *The “Freedom Dividend”: Inside Andrew Yang’s Plan to Give Every American \$1,000*, CBS NEWS (Nov. 15, 2019, 11:17 AM), <https://www.cbsnews.com/news/the-freedom-dividend-inside-andrew-yangs-plan-to-give-every-american-1000/>.

¹⁷⁹ Mitchell, *supra* note 178.

¹⁸⁰ See generally Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992) (describing the ratification process of the 27th Amendment, which took over 200 years).

¹⁸¹ Skelley, *supra* note 132.

¹⁸² See *supra* notes 132–36.

¹⁸³ Molly E. Reynolds, *What is the Senate Filibuster, and What Would It Take to Eliminate It?*, BROOKINGS (Sept. 9, 2020),

(but not enough control to have sixty seats), the Democrats would have to end the filibuster with a majority vote.¹⁸⁴

Although passage of a bill would be nice, the frequent back-and-forth of power in Washington D.C. would mean that the Republican Party could just repeal the measures anytime they have the requisite power in Congress. This is not too unlikely as Republicans have held the required majorities in Congress and the Presidency multiple times and as recently as the 2016 election cycle.¹⁸⁵ This is the key purpose as to why these provisions should be enshrined within the text of the Constitution. Putting these provisions in the Constitutional text would prevent the quick repeal of the idea by another party. Because an amendment would be needed to undo a Cube Root Amendment, it would take a supermajority of Congress and/or states to remove it, and the repeal of an amendment with another amendment has only occurred one time in U.S. history with Prohibition.¹⁸⁶ This single amendment “repeal” is obviously much less than the number of repeals on legislation, so passing the Cube Root Amendment would provide an extra layer of security to the text and to the voices of Americans.

Notwithstanding this potential plan of execution, the goal of the Cube Root Rule and its districting language is not to cement one party into power; rather, it is the goal of the rules to better connect Americans with their representatives and have smaller districts, the result of which could lead to greater change in political parties in future years. A power grab now does not necessarily mean power will be retained into the future. In fact, the goal of the Cube Root Amendment is to allow more voices and potentially more parties to have power in the House.

IV. CONCLUSION

American society has greatly changed since 1929; it is time for the House of Representatives to update itself into the 21st century like the people have. From the country’s inception to 1929, representation increased alongside the growth of the United States population.¹⁸⁷ Then the Permanent Apportionment Act of 1929 capped the number of members in the House to 435.¹⁸⁸ This action has greatly reduced the voting power of American citizens and has distanced the House from the people it is intended to mirror.

A new amendment to the Constitution must be proposed to cure the ills of the 1929 bill. The amendment would tie the number of representatives in the House to the cube root of the population, apportion representatives to the states using the Huntington-Hill method, and reintroduce districting guidelines for states. The benefits of

<https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/>.

¹⁸⁴ *Id.*

¹⁸⁵ Sarah Frostenson, *Republicans Now Control the Presidency, the Senate, and the House*, VOX (Nov. 9, 2016, 9:00 AM), <https://www.vox.com/presidential-election/2016/11/9/13572972/republicans-control-presidency-senate-house>.

¹⁸⁶ Scott Bomboy, *What Does It Take to Repeal a Constitutional Amendment?*, NAT’L CONST. CTR. (Mar. 28, 2018), <https://constitutioncenter.org/blog/what-does-it-take-to-repeal-a-constitutional-amendment>.

¹⁸⁷ McLawhorn Jr., *supra* note 3, at 1071.

¹⁸⁸ *See* Permanent Apportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a).

approving this amendment include allowing representatives to foster closer relations with constituents, providing a more moderate fix to the Electoral College rather than its full abolition, and improving the sharply partisan gerrymandering situation in state district maps.

To generate the necessary approval to ratify the amendment, it is recommended that newcomer candidates for the House incorporate this amendment into their platform. This will create awareness for the issue among the general public and allow the amendment to gain public approval. Next, the contents of the amendment should be approved as a bill by a majority of both houses of Congress. Once the benefits of the proposed amendment are felt, there should be enough public support available such that a supermajority of Congress and state legislatures will ratify the amendment.

This amendment seeks to further improve American democracy and bring our country closer to the principle of “one person, one vote” by amplifying the voices of individual American citizens through reduced representation ratios, adjusting the Electoral College to better reflect the popular vote, and allowing for competitive congressional races in smaller and fairer districts.