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### Author

Ghatak, Atreya

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ATREYA GHATAK

## The House of Representatives Needs to Expand

**ABSTRACT.** In 1929, the United States limited the number of congressional districts for the House of Representatives to 435 seats through the Permanent Apportionment Act. At the time, the average number of people within a congressional district stood at around 280,000 persons. In the 2020 census, this number has risen to 761,000 people per district. As a result, the voting power of citizens has been diminished. Representatives also face issues including logistical challenges in providing aid and information to constituents due to large populations. Importantly, the 435-seat limit dilutes the voting power of the electorate by reducing representation in states that have disproportionately large populations. This article argues that the 435 limit enacted by the 1929 Permanent Apportionment Act and the current method of apportioning districts to each state conflicts with precedent set by the Supreme Court from the cases *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Wesberry v. Sanders*, 376 U.S. 1 (1964). The 1929 Permanent Apportionment Act also violates the Fourteenth Amendment right to equal protection of residents who live in states with slow growth rates. This article will advocate for Congress to repeal the 1929 Permanent Apportionment Act and return to the practice of expanding the number of House seats every ten years, as well as lowering the size of each congressional district.

**AUTHOR.** This article is written by Atreya Ghatak. Ghatak is a student at the University of California San Diego and is majoring in Political Science: Public Policy. He would like to thank his editor, Hung Le, for his invaluable contributions to the paper and Professor Simeon Nichter for his help and guidance with this article.

### INTRODUCTION

The House of Representatives has acted as a direct connection between the will of the people and the federal government throughout American History.<sup>1</sup> While the Senate initially had its members appointed by state legislatures, House Representatives have always been elected by their constituents.<sup>2</sup> Even after the Seventeenth Amendment established the direct election of senators, the House of Representatives remains the closest body to the people. Citizens and communities need their representatives to hear their interests so they may improve their constituent's lives.

The current function of the House of Representatives is problematic due to a finite number of Congress members representing a continually growing United States population. Since the 1929 Permanent Apportionment Act, the number of seats are apportioned at 435 to the 50 states based on population, while the current population of the United States has risen to 336 million.<sup>3</sup> This means the average number of constituents in each congressional district is 754,574. In 1929, the average stood at 300,000 people per congressional district. The issue arises when considering the logistical challenges many Congressional representatives face, as they would need to allocate considerable resources to address the concerns of many diverse communities. Due to the significant population within a district, Congresspeople face certain challenges that make it difficult to serve their constituents. It is also a problem for citizens of a district, who may have to compete with other communities for their interests to be heard.

Additionally, the limited number of congressional districts leads to ineffective representation due to uneven population distributions between districts in different states. This means that certain states with high variation in population distribution will have some citizens with less voting power than the citizens of another district.<sup>4</sup> This can be seen by comparing Delaware and Rhode Island in the 2020 census, which have populations of 1,031,890 and 1,095,962 respectively.<sup>5</sup> Despite Delaware only having 65,000 persons less than Rhode Island, the former was only allocated one district. Not

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<sup>1</sup> U.S. Const. art. I, § 2.

<sup>2</sup> *Id.* at § 3.

<sup>3</sup> Blake Ziegler, Congress has a Representation Problem, *The Observer* (Oct. 14, 2021, 12:02 AM) <https://ndsmcobserver.com/2021/10/congress-has-a-representation-problem/>.

<sup>4</sup> Christopher S. 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. and Soc. Probs.* 157, 166 (Feb. 17, 2024), HeinOnline.

<sup>5</sup> U.S. Census Bureau, Quickfacts, <https://www.census.gov/quickfacts/> (last visited Jan. 29, 2024).

only do these disparities greatly disadvantage certain states with single districts, but they also work to discriminate against citizens of states that happen to have slower growth rates. These imbalances stem from the Hill method, a theorem used by the United States government to determine how many districts each state should have, which will be discussed in Part I.

This article will explore how the 1929 Permanent Apportionment Act and the Hill Theorem came into effect, analyze in depth why such restrictions create problems for constituents and representatives and argue that these precedents are inconsistent with the principle of “One-person, One-vote.” Both the 1929 Permanent Apportionment Act and the Hill method are inconsistent with the “One-person, One-vote” doctrine established by Supreme Court cases *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Wesberry v. Sanders*, 376 U.S. 1 (1964). This is because the Apportionment Act and Hill method conflict with the Fourteenth Amendment rights of residents in overpopulated single-district states and residents of states with low growth rates. Additionally, Congress should consider repealing the 1929 Permanent Apportionment Act and expanding the House of Representatives during reapportionment every ten years as was previously practiced. While the literature on expanding the House does frequently deal with the concept of One-person, One-vote, this article differs from others in that it discusses the issue of taking away representation from states with little population change.

Part I will cover the history of House apportionment and the problems that have arisen since. Part II will examine landmark decisions by the Supreme Court and state courts. Part III will explain why such cases conflict with limiting the size of the House of Representatives, and why Congress should consider expanding it as well as setting a smaller population average for each district.

## **BACKGROUND**

### *A. The Great Compromise*

The Constitution under Article I, Section II states that representation must be apportioned among the states every ten years, after the census. Each state was required to have at least one representative, with additional districts apportioned based on population.<sup>6</sup> Through this process, the number of seats in the House increased to reflect population growth in the country starting in 1790.

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<sup>6</sup> U.S. Const. art. I, § 2.

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Such a system emerged as a result of the Great Compromise of 1787, which created the House of Representatives and the Senate. Motivated by the failures of the Articles of Confederation, many founding fathers sought to create a more stable government and legislature. During the Constitutional Convention of 1787, one of the main contentions was the type of legislature that would be part of the new system. James Madison introduced the Virginia Plan, which would create a bicameral legislature based on population. Smaller states opposed this model as it gave disproportionate power to larger, more populous states such as New York or Virginia. The New Jersey Plan provided an opposite model that gave greater advantage to small states, where each state is given an equal vote in a unicameral legislature.<sup>7</sup> To reconcile the interests of both large and small states, the founding fathers created a bicameral legislature with the Senate and House. Representation in the House would be determined by population, while the Senate would represent each state regardless of size or population.<sup>8</sup>

The Founding Fathers made their intentions clear in Federalist Papers. In Federalist 54, Madison also makes it clear that population numbers are the best way to base representation on, as it would be the best indicator of wealth.<sup>9</sup> In Federalist 58, Madison also points out many states that add more representatives based on population growth, and that constituents tend to support their representatives in these systems. Madison makes it clear in the Federalist Papers that there needs to be adjustments to the size of the House in every census.<sup>10</sup> Federalist 54 also suggests that Madison and the founding fathers intended for the population, in terms of numbers, determine representation.

The Great Compromise is important because it provides the basis for future rulings on House apportionment. *Wesberry v. Sanders*, 376 U.S. 1 (1964) uses the Great Compromise in its reasoning as to why congressional districts need to have equal populations.<sup>11</sup> It also indicates the intent of the founding fathers in terms of how they

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<sup>7</sup> U.S. S., About the Senate & the U.S. Constitution: Equal State Representation, <https://www.senate.gov/about/origins-foundations/senate-and-constitution/equal-state-representation.htm> (last visited Jan. 20, 2024)

<sup>8</sup> Legal Info. Inst., The Great Compromise of the Constitutional Convention (last visited May 12, 2024), <https://www.law.cornell.edu/constitution-conan/article-1/section-1/the-great-compromise-of-the-constitutional-convention>

<sup>9</sup> The Federalist No. 54 (Alexander Hamilton).

<sup>10</sup> The Federalist No. 58 (Alexander Hamilton).

<sup>11</sup> See *Wesberry v. Sanders*, 376 U.S. 1, 12 (1964).

wanted to shape the House of Representatives, as will be elaborated later in this article.

*B. 1929 Permanent Apportionment Act*

More than a century later, conflicts over House apportionment began to impede the process. After decades of conflict over-allocation, the House expanded for the final time when the 62nd Congress increased the number of seats from 391 to 433.<sup>12</sup> The 1920 census revealed that 51.9% of the US population was living in cities, a major increase in urbanization.<sup>13</sup> Many politicians from rural areas did not want to see their representation diminished in favor of urban interests. Policy-makers at the time were also worried about the growing size of the House and the inefficiency of such expansion. The House had also started to become overcrowded due to the influx of new members, forcing legislators to share desks.<sup>14</sup> The House did not expand for a decade because of these factors, as well as the general public's preference for a small legislative body.<sup>15</sup> Although proposals were given to alleviate this issue, the polarization led to little action toward resolving this issue.

Finally, the 1929 Permanent Apportionment Act worked to solve these problems by limiting the number of House seats to 435. Instead of creating new seats in response to the growing population of a state, districts would automatically reapportion based on the state's growth. This legislation would avoid the many frequent political battles over which state was allocated a district.

*C. Hill Method*

Congress passed a bill in 1941 establishing that reapportionment would use the Hill Method.<sup>16</sup> The Hill Method is a theorem that apportions districts by identifying the geometric mean in a state's population to determine how many seats each state is allocated. More specifically, the Hill Method works by identifying how many districts would be allocated to the general population through a standard divisor. The standard divisor is found by dividing the total population of the country by the total districts

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<sup>12</sup> H.R. 2983, 62nd Cong. (1st Sess. 1911).

<sup>13</sup> Nicholas G. Napolio & Jeffrey A. Jenkins, *Conflict over Congressional Reapportionment: The Deadlock of the 1920s*, 35 J. Pol'y Hist. 91, 94 (Jan. 2022).

<sup>14</sup> *Id.* at 97

<sup>15</sup> Richard Edward McLawhorn Jr., *Apportionment or Size? Why the U.S. House of Representative Should Be Expanded*, 62 Ala. L. Rev. 1069, 1076 (2011).

<sup>16</sup> See Yates, *supra* note 4, at 168.

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being allocated. A state's population is then divided by the standard divisor to create the quota of districts being allocated. The value of the quota rounded up or down in order to determine the number of seats is given to a state<sup>17</sup>.

To explain this concept in a mathematical sense, hold that the standard divisor is  $D = US \text{ population} / \text{Number of House Seats}$ . The state quota is determined by calculating  $\text{State population} / D$  and rounding the quotient down to find  $n$ .  $\sqrt{n(n + 1)}$  is the geometric mean of  $n$  and  $n+1$ . If the state quota is larger than the geometric mean, then an additional seat is given to the state<sup>18</sup>.

### *D. Problems with 435 Limit*

The 1929 Permanent Apportionment Act is problematic because of the unequal distribution of populations within each district, logistical issues in communication and resource allocation, and feelings of under-representation. Large populations make it harder for representatives to provide resources to their constituents. The increasing number of people in each district makes it more difficult for representatives to hire staff and allocate congressional spending toward who they represent.<sup>19</sup> In 2020, the legislative branch only received less than 1% of non-defense discretionary spending, or about five billion dollars.<sup>20</sup> This limits the salaries that can be paid to recruit and maintain congressional staff. The resulting shortage of workers makes it difficult for congressional staff to meaningfully listen to constituent concerns or input.<sup>21</sup> Another problem comes with the lack of data on certain issues in a district. For example, Representatives may not have had enough information about their districts during the Covid-19 pandemic. If this data existed, legislators would be able to effectively direct relief and unemployment funding to their districts.<sup>22</sup>

Lastly, communities may be less represented in large districts. This can be seen

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<sup>17</sup> David Lippman, *Math in Society* § 4.5 (Mar. 11, 2024), [https://math.libretexts.org/Bookshelves/Applied\\_Mathematics/Math\\_in\\_Society\\_\(Lippman\)/04%3A\\_Apportionment/4.05%3A\\_Huntington-Hill\\_Method](https://math.libretexts.org/Bookshelves/Applied_Mathematics/Math_in_Society_(Lippman)/04%3A_Apportionment/4.05%3A_Huntington-Hill_Method).

<sup>18</sup> Micheal J. Caulfield, *Apportioning Representatives in the United States Congress- Hill's Method of Apportionment*, *Convergence* (Nov. 2010).

<sup>19</sup> Kathy Goldschmidt and Bradley J Sinkaus, *The Future of Citizen Engagement: Rebuilding the Democratic Dialogue* 8 (2021).

<sup>20</sup> Danial Schuman, *The Undermining of Congress* 2 (2020).

<sup>21</sup> See Goldschmidt, *supra* note 19, at 8

<sup>22</sup> Priyanka N. DeSouza and S.V Subramanian, *COVID-19 across United States congressional districts*, 2 *Journal of Global Health Science* Dec. 2020, at 9.

through the practice of gerrymandering. In gerrymandering, districts are constructed in a way that “cracks” or “packs” certain groups of people. In cracking, communities are separated from each other and grouped with others in order to dilute their voting power. Packing works by filling up similar communities or demographics into a single district to limit their influence.<sup>23</sup> Large congressional districts make gerrymandering easier, as it can fit as many similar communities or demographics into a single district.<sup>24</sup> By itself, gerrymandering is problematic as it gives an edge to politicians of a certain party. By drawing districts in a way that benefits one group, it creates a legislature that does not accurately represent a state’s partisan leanings and denies citizens the ability to vote for their preferred candidates.<sup>25</sup> Gerrymandering also has a racial element, as some legislators may draw a congressional or legislative map in a way that attempts to undermine the voting power of certain racial groups.<sup>26</sup>

Many issues surrounding the 1929 Permanent Apportionment Act also stem from the Hill Method. The Hill Method has caused uneven populations in different districts across states. For example, Wyoming had a population of 577,719 in 2022, making it the least populous state in the country. Nonetheless, it only has one congressional district. Compare that to an average district in California at the same census, which is 761,091.<sup>27</sup> A voter in Wyoming would have more voting power because their vote would have a greater impact on congressional elections than one in California. This inequality is more stark in states with roughly similar populations. For example, Montana got its second congressional representative for the first time in 2022 with a total population of 1,084,225.<sup>28</sup> In the 2010 census, 994,416 Montana voters were given a single district, while Rhode Island, with a population of 1,052,567, was

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<sup>23</sup> Sabrina Pickett, *The Threat of Gerrymandering and Voter Suppression to American Democracy and Why Grassroots Activism is the Most Viable Solution*, 43 J. Nat’l Ass’n L. Jud. 127, 130 (2022)

<sup>24</sup> Caroline Kane et al., *Why the House of Representatives Must Be Expanded and How Today’s Congress Can Make It Happen* 8 (2020).

<sup>25</sup> Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. and Mary L. Rev. 2115, 2121 (2018).

<sup>26</sup> *Id.* at 2117.

<sup>27</sup> U.S. Census Bureau, *Apportionment of Seats in the U.S. House of Representative. and Average Population Per Seat: 1910 to 2020*, <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-data-table.pdf>, (Accessed on March 11 2024).

<sup>28</sup> Am. Counts Staff, *Montana Population Topped the 1 Million Mark in 2020*, U.S. Census Bureau <https://www.census.gov/library/stories/state-by-state/montana-population-change-between-census-decade.html>.(Aug. 25, 2021)



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allotted two, The average population of each district in Rhode Island was 527,000.<sup>29</sup> This kind of population discrepancy creates unequal voting power among voters, as one state's votes are less influential than another. In this instance, a voter in Montana would have less of an impact on the election of their district than a voter in Rhode Island. This is because that person's individual vote would have less influence within an election, as more people would dilute their vote.

### SUPREME COURT PRECEDENT

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

Between 1901 and 1961, the State of Tennessee's voting-eligible population quadrupled due to a rapid increase in population by 1.5 million people.<sup>30</sup> However, the state legislature failed to create a legislative district map that reflected the population growth. Plaintiffs in urban areas sued the state government for using the same districts since 1901 despite major population imbalances. Additionally, the inaction of the Tennessee legislature weakened the power of growing urban areas and gave disproportionate power to rural areas stemming from these population imbalances.<sup>31</sup> The federal district court dismissed the initial case on the grounds that it had no jurisdiction on the subject matter.

The Supreme Court disagreed with the lower court's decision, mainly under Article III, section 2 of the Constitution.<sup>32</sup> Instead, the Court made clear that the plaintiff's complaint of a Fourteenth Amendment violation in Baker was justified. The Court also created the "political question" doctrine, which maintained a six-prong standard determining whether a court should hear a case. These standards considered prior precedent, whether a nonjudicial branch can or has resolved such concerns, and whether the court can make a policy determination. Consequently, the majority of the Court determined that questions on reapportionment were under the Court's jurisdiction.<sup>33</sup> The concurring opinions were addressed by Justice William O. Douglas and Justice Tom C. Clark. In his opinion, Justice Douglas emphasized the significance of individual voting rights and believed that the Fourteenth Amendment provided a basis for challenging such dilution. Justice Clark focused on the importance of citizens'

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<sup>29</sup> *Id.*

<sup>30</sup> Baker v. Carr, 369 U.S. 186, 192 (1962).

<sup>31</sup> Legal Info. Inst., Baker v. Carr (1962),

<sup>32</sup> U.S. Const. art. III, § 2.

<sup>33</sup> Baker, 369 U.S. at 237.

accessibility to address grievances related to the fundamental right to vote. On the other hand, Justice Felix Frankfurter wrote the dissenting opinion of this case, and Justice John Marshall Harlan. The Justices pointed out that the majority's reliance on the Fourteenth Amendment as the basis for jurisdiction was misplaced. They argued that the amendment was intended to address racial discrimination and equal protection, not the apportionment of legislative districts. Nonetheless, the court overturned Tennessee's state legislative map and agreed with the plaintiff's argument that it violated the Fourteenth Amendment.

*A. Reynold v. Sims, 377 U.S. 533 (1964)*

*Reynolds v. Sims*, 377 U.S. 533 is another case regarding legislative redistricting. It regards the malapportionment in the Alabama legislature during the 1960s. Voters in Jefferson County, Alabama sued the state for drawing state legislative districts in a way that discriminated against urban residents. It was alleged that their district near Birmingham, Alabama, had 41 times the population of another neighboring district. The complaint also included the fact that the Alabama legislature drew legislative maps without taking into account population growth since the 1900 census, despite being constitutionally required.<sup>34</sup>

The Supreme Court had to determine whether Alabama's legislative redistricting violated the 14th Amendment's equal protection clause by having one senator per county, despite massive population imbalances. The Court ruled against Alabama, arguing that the Equal Protection Clause requires equal legislative representation for all citizens and that the Alabama legislative district map violates this principle.<sup>35</sup> In the majority opinion by Chief Justice Earl Warren, it is suggested that the right to suffrage may be denied by diluting a person's vote in a federal or state election.

It could hardly be again said that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in

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<sup>34</sup> *Reynolds v. Sims*, 377 U.S. 533, 540 (1964).

<sup>35</sup> *Reynolds*, 377 U.S. at 575.

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another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.<sup>36</sup>

The equal protection clause requires substantially equal representation for citizens, and that legislators represent people. Representation based on where people live is inherently discriminatory.<sup>37</sup> This case expressed what is now considered the principle of One-person, One-vote, in which one individual's vote is not weighted more than another's.<sup>38</sup>

Justice John Marshall Harlan was the sole dissenter in the *Reynolds*, utilizing an originalist perspective to disagree with the majority opinion. Harlan states that the rest of the court misunderstood the intent and history of the Fourteenth Amendment, which was never meant to regulate a state's ability to apportion districts.

In South Carolina, Charleston, with a population of 88,863, elected two Senators; each of the other counties, with populations ranging from 10,269 to 42,486, elected one Senator. In Florida, each of the 39 counties was entitled to elect one Representative; no county was entitled to more than four. These principles applied to Dade County, with a population of 85, and to Alachua County and Leon County, with populations of 17,328 and 15,236, respectively.

It is incredible that Congress would have exacted ratification of the Fourteenth Amendment as the price of readmission, would have studied the State Constitutions for compliance with the Amendment, and would then have disregarded violations of it.<sup>39</sup>

Harlan argues that several instances of restrictions on voting rights existed in Southern States that would have violated the Fourteenth Amendment, yet they were allowed back into the United States after the Civil War. Additionally, the writers of the Fourteenth Amendment intended that the federal government would not be able to interfere with a state's ability to legislate based on voting issues. As a result, many of the states that ratified the Fourteenth Amendment did not expect that it would impose such a restriction of suffrage.

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<sup>36</sup> *Id.* at 562.

<sup>37</sup> *Id.* at 563.

<sup>38</sup> Lyle Denniston, *The new look at "one person, one vote," made simple*, SCOTUSblog (Jul. 27, 2015, 12:01 AM), <https://www.scotusblog.com/2015/07/the-new-look-at-one-person-one-vote-made-simple/>

<sup>39</sup> *Reynolds*, 377 U.S. at 607.

*B. Wesberry v. Sanders*

*Wesberry v. Sanders*, 376 U.S. 1 is another case relating to legislative redistricting. While the *Reynolds* case focused on malapportionment on the state level, *Sanders* is instead based on unequal populations in Congressional districts. The plaintiff, James B Wesberry, lived in the 5th congressional district of Georgia. His complaint asserted that his district had two to three times the population of other districts in the state.

That district, one of ten created by a 1931 Georgia statute, includes Fulton, DeKalb, and Rockdale Counties and has a population, according to the 1960 census, of 823,680. The average population of the ten districts is 394,312, less than half that of the Fifth. One district, the Ninth, has only 272,154 people, less than one-third as many as the Fifth. Since there is only one Congressman for each district, this inequality of population means that the Fifth District's Congressman has to represent from two to three times as many people as do Congressmen from some of the other Georgia districts.<sup>40</sup>

Wesberry argued that his vote was diluted by having one representative per district. Therefore, such a gross imbalance of population per district violated Article I, Section II of the Constitution, Section II of the Fourteenth Amendment, and the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment. While the district court did recognize a disparity between districts, it determined that redistricting was a political question and dismissed the case, resulting in its appeal to the Supreme Court.<sup>41</sup>

The Supreme Court ruled in favor of Wesberry, reaffirming that one person's vote was worth as much as another's. In the majority opinion by Justice Hugo Black, the Supreme Court refers to the intent of the Founding Fathers during the Constitutional Convention of 1787. More specifically, the Court describes the Great Compromise of 1787, and how it relates to the House of Representatives.

Sherman and other delegates from Connecticut. It provided, on the one hand, that each State, including little Delaware and Rhode Island, was to have two Senators. As a further guarantee that these Senators would be considered state emissaries, they were to be elected by the state legislatures, Art. I, § 3, and

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<sup>40</sup> *Wesberry*, 376 U.S. 1 at 2.

<sup>41</sup> *Wesberry*, 376 U.S. 1 at 3.

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it was specially provided in Article V that no State should ever be deprived of its equal representation in the Senate. The other side of the compromise was that, as provided in Art. I, § 2, members of the House of Representatives should be chosen "by the People of the several States," and should be "apportioned among the several States . . . according to their respective Numbers".<sup>42</sup>

The Great Compromise of 1787 was meant to preserve the power of small states while allowing larger states to be adequately represented. The House of Representatives in particular was meant to be directly elected by the people. Based on the Convention, the Court further refers to how many of the Founding Fathers expected House representation would work. Black refers to several significant figures, including James Madison, Charles Cotesworth Pickney, and James Wilson. For example, Madison, in the Federalist Papers, suggested that "numbers are the best scale of wealth and taxation, as they are the only proper scale of representation."<sup>43</sup>

While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.<sup>44</sup>

Ultimately, Black argues that the founding fathers enacted the Great Compromise of 1787 by giving representation by state and by people (the Senate and House of Representatives).<sup>45</sup> Apportioning districts with unequal populations defeated the purpose of the Great Compromise, by giving some people a greater voice in choosing their representatives than others. Based on the history of the Constitution through the Great Compromise, the Court determined that Article I, Section II had to be interpreted through the Founding Fathers' intent of equal representation. Moreover, Justice Black suggests that by creating such uneven districts, the weight of an individual voter in a certain area is reduced in a congressional election. This kind of policy, according to the majority opinion, runs counter to what the founding fathers

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<sup>42</sup> *Wesberry*, 376 U.S. 1 at 13.

<sup>43</sup> The Federalist No.51 (Alexander Hamilton).

<sup>44</sup> *Wesberry*, 376 U.S. 1 at 18.

<sup>45</sup> *Id.* at 17.

wanted as well as the principle of a democratic government elected by the people.<sup>46</sup> The congressional plan enacted by Georgia was thereby unconstitutional, as it conflicted with Article I, Section II of the Constitution.<sup>47</sup>

Once again, Justice Harlan wrote the dissenting opinion, joined by Justice Potter Stewart. Harlan discredits the Court's reasoning for using the Great Compromise by mentioning the 3/5ths compromise. By doing this, Harlan explains that the Court came to its conclusion without analyzing the proper history and context of Article I, Section II. The Founding Fathers, according to Harlan, never mention this part of the Constitution when talking about congressional malapportionment. Additionally, Harlan points out that several states, such as Wyoming, Nevada, and Alaska have at-large representation, thus making these congressional districts unequal.<sup>48</sup>

Justice Thomas Campbell Clark wrote a partial dissent, agreeing with parts of both the Court's opinion and Harlan's dissent. Clark suggests that Harlan is correct in that the principle of "One-person, One-vote" is unproven and incorrect. However, Clark shares the Court's idea that congressional redistricting falls under court scrutiny.<sup>49</sup>

Consequently, *Wesberry v Sanders* changes how states throughout the country draw their congressional and legislative districts. Many states held similar districting schemes as Georgia, where major population imbalances diluted the power of certain voters. Many of these states worked to diminish the power of urban areas to disproportionately empower rural communities.<sup>50</sup>

### C. *Montana v Department of Commerce*, 503 U.S. 442 (1992)

*Montana v Department of Commerce* concerns the Hill Method of apportioning congressional districts. After the 1990 census, it was determined that Montana would lose a congressional district in order to accommodate growth in other states such as California and Texas.<sup>51</sup> This action left Montana with a single House seat representing 803,655 people, 200,000 more than the then-average population of 572,

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<sup>46</sup> *Id.* at 18.

<sup>47</sup> *Id.* at 18.

<sup>48</sup> *Id.* at 21.

<sup>49</sup> *Id.* at 18-19.

<sup>50</sup> *Wesberry v Sanders*, Rose Institute of State and Local Government <https://roseinstitute.org/redistricting/wesberry/> (last visited Apr. 20, 2024).

<sup>51</sup> *Department of Commerce v. Mont.*, 503 U.S. 442, 445 (1992).

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466 people per district. Statewide officials in Montana sued the federal government, alleging that such representation violated Article I, section II by not creating a roughly equal population per district.<sup>52</sup>

Montana also proposed the use of the Dean Method instead of the Hill Method, which would preserve Montana's second district at the expense of Washington, while minimizing population deviations.<sup>53</sup> The US District Court for the District of Montana ruled in favor of the state, stating that the precedent set by *Wesberry v Sanders* on districting should apply to all states. More specifically, *Wesberry* did not apply to the apportionment of districts between states, only to the districting process within states. The district court affirmed that the ruling in *Wesberry* applied to redistricting among the states.

The Supreme Court overturned the lower court's ruling, instead deciding that Montana's loss of a seat did not constitute a *Wesberry* violation.<sup>54</sup> The Court first establishes that the Dean method does not decrease the total population deviation from the nationwide average. Instead, the Dean method would offset the population deviation to other states, including Washington.<sup>55</sup> The Supreme Court then stated that the *Wesberry* standard is not a better method of apportioning districts. According to the majority opinion, if Congress provides a constitutional apportionment scheme that provides little partisan controversy, then its use is legitimate.<sup>56</sup> Furthermore, the Court concludes that the one representative per state requirement and limit of 435 congressional districts means that it is impossible to have equal populations per district in different states.<sup>57</sup>

The *Montana* ruling caused the current issue of overpopulated congressional districts by finding no *Wesberry* violation. However, the Court permitted future challenges towards the Hill method.<sup>58</sup> Cases after *Montana* proved to be less

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<sup>52</sup> *Id.* at 447.

<sup>53</sup> The Hill method finds the geometric mean of  $n$  and  $n+1$ . The Dean method instead finds the harmonic mean through  $n(n+1)/(n+0.5)$ . If the state quota is higher than the harmonic mean, then the state is given another district. This theorem tends to benefit smaller states, rather than larger ones. See Micheal J. Caulfield, *Apportioning Representatives in the United States Congress - Dean's Method of Apportionment*, Convergence (Nov. 2010), <https://maa.org/press/periodicals/convergence/apportioning-representatives-in-the-united-states-congress-deans-method-of-apportionment>.

<sup>54</sup> *Mont.*, 503 U.S. at 442.

<sup>55</sup> *Id.* at 462.

<sup>56</sup> *Id.* at 465.

<sup>57</sup> *Id.* at 463.

<sup>58</sup> See Lawhorn, *supra* note 15, at 1083

successful, as seen in *Clemons v US Department of Commerce*. The US District Court for the Northern District of Mississippi ruled against the interstate malapportionment claim by citing the *Montana* ruling.<sup>59</sup>

## MAIN ARGUMENT

### A. 1929 Apportionment Act conflicts with One-Person, One-Vote

Based on previous rulings, the 1929 Apportionment Act goes against much of the precedent and principles suggested by the Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1 (1964) and *Reynold v. Sims*, 377 U.S. 533 (1964). This portion of the article argues that this 435 limit, as established by the 1929 Apportionment Act, conflicts with what the Supreme Court views as equal representation.

To reiterate, *Reynold v. Sims*, 377 U.S. 533 (1964) established that the right to suffrage may be denied by diluting a person's vote in a federal or state election.<sup>60</sup> This violates the Equal Protection clause of the Fourteenth Amendment, which requires that every citizen's vote be considered equal. Furthermore, the decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964) states that apportioning districts with drastically uneven populations defeats the purpose of representative democracy.<sup>61</sup> The Court concluded that unevenly populated districts conflicted with what the Founding Fathers intended with the House of Representatives.

It is evident then that the 1929 Apportionment Act decisively contradicts such principles when carefully considering these cases. The 435-seat limit creates massive population imbalances that prevents states from having adequate representation. As mentioned in Section I, issues such as logistical challenges and gathering data to allocate congressional funding to constituents can occur due to overly populated districts. This also conflicts with voters' Fourteenth Amendment rights to equal representation as established by *Reynolds*. Given the *Reynolds* ruling, these population imbalances would dilute people's votes in districts with disproportionately large populations. This is because compared to other districts, the residents of the larger congressional district would individually have less of an impact on an election than in a smaller electorate.<sup>62</sup> Returning to the example mentioned in the introduction, despite

<sup>59</sup> *Clemons v. U.S. Dep't. of Commerce*, 710 F. Supp. 2d 570 (N.D. Miss. 2010).

<sup>60</sup> *Reynolds*, 377 U.S. at 562

<sup>61</sup> *Wesberry*, 376 U.S. 1 at 18.

<sup>62</sup> Richard A. Walawender, *At-Large Elections and Vote Dilution: An Empirical Study*, 19 UMICH. J. L. REFORM 1221, 1222 (1986).



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having a larger population than the average congressional district, Montana was deprived of representation in the 2010s simply because it had a slightly smaller population than Rhode Island.<sup>63</sup> This unequal distribution directly conflicts with One-person, One-vote, as well as discriminates against voters within exceedingly large population districts.

Additionally, the Hill Method creates these kinds of population imbalances. One state with small population differences may have a geometric mean that may be rounded down, depriving residents of a congressional district for ten years.<sup>64</sup> As a result, partisan legislatures are able to more effectively gerrymander the state and block accurate demographic or political representation in Congress. A lower number of legislative seats allows for gerrymandering by grouping more communities and neighborhoods into one district.<sup>65</sup>

There are major arguments against increasing the size of the House of Representatives. Concerns regarding the infrastructure of the House in terms of offices for the new members would prove to be difficult to solve. These logistical issues may create a problem in being able to efficiently represent people due to a lack of funding, staff, and offices. However, it is important to note that there are countries that have an extremely high number of representatives for a smaller population than the United States. Other countries like the United Kingdom, which has 650 seats in its lower house, can function despite the larger number of members.<sup>66</sup> Additionally, the US spends a small amount of its budget on the legislative branch itself.<sup>67</sup> The federal government could expand Congress or the House with greater funding, as well as pay a legislator's salary in this expanded House. In general, settling for a solution based on convenience should not be acceptable, as people face tangible issues as a result of the problems with the current system.

Another argument relates to the inefficiency of the House of Representatives in reaching consensus and passing legislation.<sup>68</sup> A larger number of Congresspeople may make it more difficult to coordinate between members and pass important policies. This can also be a response to concerns regarding the inability of Congress in the 1920s to initially pass an apportionment scheme. However, an expansion of the House does not necessarily lead to inefficiency. Once again, many other countries like

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<sup>63</sup> See U.S. Census Bureau, *supra* note 27.

<sup>64</sup> See Lippman, *supra* note 17.

<sup>65</sup> See Kane, *supra* note 24, at 8.

<sup>66</sup> *Id.* at 12.

<sup>67</sup> See Schuman, *supra* note 20, at 2.

<sup>68</sup> See Kane, *supra* note 24, at 10.

the United Kingdom have larger legislatures compared to the United States and are still able to govern effectively. Moreover, members of Congress currently need to fulfill their responsibilities as members of a congressional committee. The House's fixed size creates small committees which results in a greater workload on legislators. If the House expands, legislators may spend less time on committee assignments and focus more on policy making and consensus-building.<sup>69</sup> Once again, it can be mentioned that this is also an argument based on political convenience. Just because legislating is made easier does not make it acceptable for citizens to face situations such as voter dilution. A larger House would be able to mitigate voter dilution and make representatives closer to their constituents. Legislation passed with ease should not be worth the loss in representation among the US population.

Another possible problem may arise from the inability to expand the number of House Seats within a state. For example, the average population in a district may hypothetically be around 400,000. A state such as Pennsylvania may not be able to effectively divide its population to be as close to the national average. As the United States population grows, malapportionment from the indivisibility of seats in a specific state will become an issue. However, it is important to note that One-person, One-vote does not necessarily have to mandate perfect representation. Justice Black in *Wesberry* admits that all districts do not need to be drawn with mathematical precision.<sup>70</sup> This problem does not have to be a major issue as long as states make a good-faith effort to create equal representation. Moreover, some malapportionment can exist due to the unequal distribution of this country's population. The goal should be to mitigate voter dilution if it cannot be eliminated.

### B. *The Ruling in Montana is Flawed*

While *Montana v The Department of Commerce*, 503 U.S. 442 (1992) does provide an exception for unequal Congressional districts in interstate apportionment, there lies an inherent contradiction in the justification for its ruling. This aforementioned exception is the constitutional requirement for one representative in each state, and the limit imposed by Congress over the number of House seats in all 50 states that makes it impossible to have equal populations per district.<sup>71</sup> This

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<sup>69</sup> 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, 98 (2011).

<sup>70</sup> *Wesberry*, 376 U.S. at 18 (1964).

<sup>71</sup> *Montana*, 503 U.S. at 463.

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contradiction comes from the fact that the court's former reason lies in the Constitution, while the latter does not. The Constitution states that "the actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."<sup>72</sup> While the Constitution does allow Congress to determine how enumeration happens, it does not say that there can be a hard limit. However, the Court uses the 1929 Permanent Apportionment Act as a reason for preventing interstate equal representation, despite no mention of limiting the number of House seats in the Constitution.

Another critique of the verdict in the Montana ruling is that the Supreme Court appeared to leverage the absence of political contention to validate the adoption of the Hill Method.

"Indeed, if a set formula is otherwise constitutional, it seems to us that the use of a procedure that is administered efficiently and that avoids partisan controversy supports the legitimacy of congressional action, rather than undermining it."<sup>73</sup>

The 1929 Apportionment Act not only created limits to the number of House seats, but it also transferred the power of allocating districts to the Department of Commerce. The authors of this bill intended to avoid the partisan politics of Congress in the apportionment process. While Congress may have an interest in preventing party polarization and facilitating apportionment, the courts also need to balance the precedent set in prior cases that the 435-seat limit conflicts with. If the Court recognizes fair or substantially equal representation as a right based on the *Reynolds* and *Wesberry* rulings, then the risk of political polarization should not be a justification for preventing equal representation.<sup>74</sup>

There is also the consideration that the process of redistricting, especially in cases where a state is losing a congressional district, is in itself polarizing. For example, in the 2021-2022 redistricting cycle, Democratic-controlled states like New York and Illinois worked to remove a Republican-leaning House seat due to losing a

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<sup>72</sup> U.S. Const. art. I, § 2.

<sup>73</sup> *Mont.*, 503 U.S. at 465.

<sup>74</sup> See Lawhorn, *supra* note 15, at 1086.

congressional seat in the previous census.<sup>75</sup> This led to gerrymandering that worked to minimize Republican success in those states. In fact, the New York congressional map was struck down by state courts and redrawn by an appointed special master.<sup>76</sup> The Montana ruling is flawed because the redistricting process it initiates increases partisanship. The Hill method similarly creates political controversy, which is what the Supreme Court suggests that it avoids. By not allowing for the precedent in *Wesberry* to apply to interstate apportionment, the Court instead prolongs the controversial process that disadvantages states that lose congressional representation.

*C. 435 Limit Punishes States With Lower Growth Rates*

Although it has been established that certain states with a single congressional district experience voter dilution due to the Permanent Apportionment Act, larger states are also disadvantaged by this law. More specifically, states with lower growth rates lose representation to other rapidly growing states. For example, the 2020 census caused California, Ohio, West Virginia, Pennsylvania, Michigan, Illinois, and New York to lose congressional districts. On the other hand, Texas, Colorado, Oregon, Florida, Montana, and North Carolina gained seats.<sup>77</sup> At the expense of states that lost representation, others gained because of their rapidly growing populations. Out of the states that lost their congressional seats, only two had decreases in population between the 2010 and 2020 census.<sup>78</sup> While not to the extent of Texas, States such as Ohio and California gained population but still lost representation.<sup>79</sup>

This again stems from the Hill method of apportionment and the geometric mean of a state. Since population changes per census, the standard divisor may also

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<sup>75</sup> Stephanie Akin, How state losing House seats decide which districts are cut, Roll Call (Apr. 29, 2021, 6:15AM)

<https://rollcall.com/2021/04/29/how-states-losing-house-seats-decide-which-districts-are-cut/>.

<sup>76</sup> Micheal Li, What Went Wrong with N. Y.'s Redistricting (2022),

<https://www.brennancenter.org/our-work/research-reports/what-went-wrong-new-yorks-redistricting?ref=am-quickie.ghost.io>.

<sup>77</sup> Weiyi Cai and Reid J. Epstein, Which States Will Gain or Lose Seats in the Next Congress, N. Y. Times (Apr. 26, 2021, 6:45PM).

<https://www.nytimes.com/interactive/2021/04/26/us/politics/congress-house-seats-census.html>.

<sup>78</sup> U.S. Census Bureau, Quickfacts,

<https://www.census.gov/quickfacts/fact/table/PA,WV,IL,CA,OH,NY/POP010210> . (last visited May 23, 2024).

<sup>79</sup> *Id.*

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change. A state may be able to gain representation if its quota becomes higher than the geometric mean. However, a state with low population growth may have a lower geometric mean compared to the last census, resulting in a loss of a district despite no population decrease.

Such a method of apportionment violates the Fourteenth Amendment because it leads to residents losing individual voting power.<sup>80</sup> When residents in a state are put into districts with higher populations, they would also need to compete in a larger electorate. This in turn lowers a citizen's individual electoral power in an election. If the Equal Protection clause requires mostly equal legislative representation, then taking away a seat from a state that keeps roughly the same population conflicts with this principle.

### POLICY PRESCRIPTION

#### *A. Remedy to House Apportionment*

The main argument in *Montana v US Department of Commerce*, 503 U.S. 442 (1992) used by the Supreme Court in its decision is that the minimum of one district per state and 435 seat limit constrains the ability to create roughly equal districts.<sup>81</sup> Furthermore, the Court concludes that the Hill method was put into place explicitly because other methods to apportion districts have failed.<sup>82</sup> While this may be true in the current system of limited congressional districts, removing this limit should be considered by Congress as a way to prevent voter dilution. Congress should take a two-pronged approach to solve this issue. The first would be to repeal the 1929 Permanent Apportionment Act, and reinstitute the system of increasing the number of districts after every census to reflect population growth.

The second should be to decrease the average size of congressional districts. Limiting the number of House districts to 435 has created districts that hold above-average electorates, thus diluting voting power and depriving communities of direct access to representation. It also takes away representation from states that show slower but positive growth rates.<sup>83</sup> Increasing the number of seats within the House of

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<sup>80</sup> See *Reynolds*, 377 U.S. at 607.

<sup>81</sup> *Montana*, 503 U.S. at 463.

<sup>82</sup> *Id.* at 463

<sup>83</sup> Nick Reisman, Census: New York to lose 1 House Seat, Spectrum News (Apr. 26, 2021, 3:19PM) <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2021/04/26/new-york-to-lose-1-ho-use-seat>.

Representatives would be a solution to this problem, because instead of taking representation from one state and giving it to another, the number of congressional districts may remain the same for that state.<sup>84</sup> Adjusting congressional apportionment to population would still award states that are growing at a rapid rate, while also allowing states with no decreases to preserve their representation.

Congress would also need to lower the average population of congressional districts in order to solve logistical issues and give certain states the representation they need. This is mainly due to politicians and their staff being unable to provide adequate services for their constituents. One major solution would be to institute the Wyoming Rule, or apportioning districts with the population of the least populous state. This would add 139 seats to the House, making the total number of seats at 574. The problem with this Wyoming rule is that it still carries on the issue of population variances between states because the population distribution of the United States is not uniform.<sup>85</sup> The best way to decrease the size of districts would be to find an appropriate number that would allow each state to have as much of an equal population per congressional district.

## CONCLUSION

In conclusion, the concept of One-person, One-vote works to establish fair and equal voting for each citizen, no matter what district they are in. As such, the Permanent Apportionment Act and Hill method conflict with this, as voters are given differing influences in their congressional elections simply because of the state they live in. This can be viewed by how certain single-district states hold disproportionately large electorates compared to similarly populated states. It can also be demonstrated by states that post positive, yet slower growth rates than others throughout the country. Congress should consider repealing the 1929 Permanent Apportionment Act and expanding the House of Representatives during reapportionment every ten years. In states such as Montana and Delaware, the 435-seat limit works to deprive and dilute the voting power of these electorates by making individual voters less meaningful in an

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<sup>84</sup>*Id.*

<sup>85</sup>Quentin Barbosa, *The (Im)Permanent Apportionment Act: Unequal Congressional Representation and Apportionment Reform*, 53 U. PAC. L. REV. 239-268, 259-260 (2021).

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election. Additionally, the Hill method of apportioning districts to each state fails to create equal representation. As a result, electorates of some districts are unable to have their interests adequately represented in the federal government. To remedy this, Congress should consider repealing the 1929 Permanent Apportionment Act and replacing it with the previous system of increasing House districts after every census while decreasing the average population per congressional district.