Articles

Why Capping the House at 435 is Unconstitutional

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ABSTRACT

Expanding the House of Representatives could offer several benefits, as noted by various public policy experts. It could make gerrymandering more difficult and mitigate the impact of money in our political system.

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Additionally, it could lessen political polarization, which some scholars argue has reached levels that threaten the long-term viability of our democracy. In fact, increasing the size of the House theoretically could impact all potential legislation at the federal level.

Congress fixed the House at 435 members nearly a century ago when it passed the Permanent Apportionment Act of 1929. Though the population of the country subsequently has increased by more than 200 million, the number of House delegates remains at 435. This Article argues that the Permanent Apportionment Act is unconstitutional because it eliminates Congress' responsibility to assess the size of the House every ten years. This review of House size in connection with the census was a significant tool used by proponents of the Constitution during the ratification period to convince skeptics who feared the House may one day transform into an oligarchical body.

The Permanent Apportionment Act violates various modes of originalism and textualism, as favored by more conservative jurists. Moreover, it runs afoul of living constitutionalism, espoused by more liberal judges. Finally, a formula, such as one that automatically adjusts House size to the cube root of the population, could avoid contentious fights while simultaneously passing constitutional muster.

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I. INTRODUCTION

The total size of the House of Representatives, though largely overlooked today, was one of the most vigorously examined issues at the Constitutional Convention of 1787.[1] Indeed, George Washington spoke up exactly once to offer a substantive comment during the Convention, and it occurred on the last day of the proceedings: to offer his opinion that the House of Representatives should be more representative of the people than

1. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 12–15 (Yale Univ. Press 1998).

originally had been proposed.[2] What we know as the "First Amendment"—that which guarantees freedom of speech and other expressive rights—was not the original First Amendment.[3] Rather, the original First Amendment described a procedure to calculate the total number of House delegates.[4]

Today, if one quizzed members of the public as to how many delegates currently serve in the House of Representatives, a civically engaged individual may reply "435."[5] But why is that specific number the standard, when it is not found in the Constitution?[6] How has that number come to define the norms of representation within the American political system?[7] Does 435 remain appropriate, especially considering that in the First Congress, each representative in the House answered to approximately 60,000 constituents,[8] whereas today, each representative on average answers to more than twelve times that amount?[9]

While this topic has received limited attention in legal scholarship,[10] the idea of increasing the number of representatives has been widely

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2. *See* James Madison, Minutes of Constitutional Convention (Sept. 17, 1989), https://perma.cc/HC6D-4WPQ. Madison's minutes noted remarks of George Washington, namely:

> The smallness of the proportion of Representatives had been considered by many members of the Convention an insufficient security for the rights & interests of the people. He acknowledged that it had always appeared to himself among the exceptionable parts of the plan, and late as the present moment was for admitting amendments, he thought this of so much consequence that it would give much satisfaction to see it adopted.

Id.

3. *See* AMAR, *supra* note 1, at 8–9.

4. *See id.* at 9.

5. *See The House Explained*, U.S. HOUSE OF REPS., https://perma.cc/4CC7-WSWQ (last visited Nov. 1, 2024) ("The number of voting representatives in the House is fixed by law at no more than 435, proportionally representing the population of the 50 states.").

6. *See* Christopher St. John Yates, *A House of Our Own or A House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157, 157 (1992) ("Many Americans would probably be surprised to discover that the House of Representatives' current size is set neither by the Constitution nor a constitutional amendment. Rather, the number 435 was simply the size of the House when that body froze its growth [and remains to this day].").

7. *See id.*

8. *See* Drew DeSilver, *U.S. Population Keeps Growing, but House of Representatives Is Same Size as in Taft Era*, PEW RSCH. CTR. (May 31, 2018), https://perma.cc/X4CT-ET3R ("Based on an estimated population for the 13 states of 3.7 million, there was one representative for every 57,169 people.").

9. *See* U.S. CENSUS BUREAU, TABLE C2. APPORTIONMENT POPULATION AND NUMBER OF SEATS IN U.S. HOUSE OF REPRESENTATIVES BY STATE: 1910 TO 2020, at 1 (2021), https://perma.cc/WH8E-W68W (noting that after the 2020 Census, each representative – from a *national perspective* – represents 761,169 individuals).

10. Certain scholars have noted that there may be a constitutional basis to increase the size of the House of Representatives. *See* Byron J. Harden, *House of the Rising*

discussed in political science and public policy circles,[11] and various benefits have been proposed.[12] This Article does not delve deeply into the policy considerations of increasing the House, as they are well-covered in existing literature.[13] Instead, this Article inquires into a surprisingly undertheorized domain, namely, the constitutional foundations that give rise to the magical numerical designation of 435.[14] Indeed, while the Constitution explicitly states that each state shall have two Senators,[15] it does not designate the precise number of representatives that should serve in the House.[16]

In fact, a convincing argument can be put forth that the Permanent Apportionment Act—the legislative initiative responsible for the 435 upper limit[17]—is unconstitutional. Part II of this Article reviews foundational law regarding the total number of House delegates. Part III

Population: The Case for Eliminating the 435-Member Limit on the U.S. House of Representatives, 51 WASHBURN L.J. 73, 74 (2011); Richard Edward McLawhorn Jr., *Apportionment or Size? Why the U.S. House of Representatives Should Be Expanded*, 62 ALA. L. REV. 1069, 1084 (2011); Yates, *supra* note 6, at 159–60. I am thankful for these foundational contributions. This Article extends the conversation by putting forth various novel arguments to support the idea of a constitutional need for a decennial review of House size. Further, this Article scrutinizes the Anti-Federalist Papers; the passage of the Apportionment Amendment as a means to induce North Carolina to join the union; key comments from House legislators at the First Congress that declaim the idea that the House can be permanently capped; utilizing the Apportionment Amendment as a mechanism to make various originalist arguments; and employing dictionaries contemporaneous to the founding, among others. It also reexamines the nondelegation doctrine in light of evolving Supreme Court jurisprudence, and expansively explores justiciability. While this Article focus mainly on the decennial need to consider House size, other legal scholars have drawn valuable focus to other aspects of the reapportionment process. *See generally, e.g.*, Gerard Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774 (2018); Quentin Barbosa, *The (Im)Permanent Apportionment Act: Unequal Congressional Representation and Apportionment Reform*, 53 U. PAC. L. REV. 239 (2021). Moreover, one researcher has asserted that the Apportionment Amendment is actually the law of the land, claiming the Amendment was in fact ratified by the appropriate number of states. EUGENE MARTIN LAVERGNE, HOW "LESS" IS "MORE": THE STORY OF THE REAL FIRST AMENDMENT TO THE UNITED STATES (2016).

11. *See, e.g.*, LEE DRUTMAN ET AL., THE CASE FOR ENLARGING THE HOUSE OF REPRESENTATIVES 17–25 (2021), https://perma.cc/BBE7-2EZ7; CAROLINE KANE ET AL., WHY THE HOUSE OF REPRESENTATIVES MUST BE EXPANDED AND HOW TODAY'S CONGRESS CAN MAKE IT HAPPEN 8–9 (2020), https://perma.cc/3FBD-FZSY.

12. *See* DRUTMAN ET AL., *supra* note 11, at 12–16 (noting that an increase in the size of the House of Representatives would have various benefits, including improving electoral accountability, increasing voter influence, expanding the talent pool of representatives, contributing to more substantive congressional deliberation, and reducing partisanship).

13. *See id.* at 17.

14. *See* Yates, *supra* note 6, at 157.

15. U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.").

16. *Id.* art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .").

17. *See* 2 U.S.C. § 2a.

contends that the Permanent Apportionment Act (the "Act") is unconstitutional because it forever fixes the number of delegates at 435. Part IV further questions the constitutionality of the Act on the grounds that it impermissibly delegates apportionment to the executive branch. Part V asserts that invalidating the Act is justiciable. Part VI briefly explores the policy implications of increasing the number of congressional representatives. Finally, Part VII concludes and explores areas for future legal scholarship.

A ruling that the Permanent Apportionment Act is unconstitutional does not mean that Congress necessarily will increase the total number of delegates in the House of Representatives. However, it would mean that Congress, after every census, would have to decide whether to increase the total number of delegates. While this certainly could prove disputatious—and the Permanent Apportionment Act was passed to resolve such arguments[18]—convenience should not determine constitutionality.[19] Furthermore, as explained *infra,* a formula, such as automatically linking the size of the House in connection with the cube root of the population, is likely constitutional.

Even if Congress ultimately decided against increasing the size of the House, a mandated discussion every ten years may help to keep the issue of adequacy of representation at the top of the public's mind. Indeed, it has been argued that increasing the size of the House could improve access to representation, mitigate the role of money in our political system, make gerrymandering more difficult, and reduce polarization.[20] Addressing the country's heightened polarization may be especially critical, as excessive polarization, according to scholars, can endanger the very fabric of democracy.[21]

18. *See* Harden, *supra* note 10, at 79 ("Congress failed to reapportion the House following the 1920 census, potentially violating its constitutional duty for the first time in the nation's history. One of the leading reasons for this failure was that many members of Congress questioned, or simply disliked, the results of the census.").

19. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) ("The choices we discern as having been made in the constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.").

20. *See* DRUTMAN ET AL., *supra* note 11, at 12–16.

21. *See* Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT (Jan. 18, 2022), https://perma.cc/V5TK-UWQ7 ("Quite strikingly, the United States is the only advanced Western democracy to have faced such intense polarization for such an extended period. The United States is in uncharted and very dangerous territory."); Stephanie Forrest & Joshua Daymude, *Reducing Extreme Polarization is Key to Stabilizing Democracy*, BROOKINGS (Jan. 26, 2022), https://perma.cc/QXV6-23PQ. As commented by *Brookings*:

II. FOUNDATIONAL LAW REGARDING DETERMINING THE NUMBER OF HOUSE DELEGATES

This Part explores foundational law regarding how to determine the number of House delegates, specifically: (a) the Apportionment Clause of the Constitution[22] and (b) the Permanent Apportionment Act of 1929.[23]

A. Constitutional Basis

The constitutional basis for determining the number of delegates in the House of Representatives emanates from the Apportionment Clause of the Constitution, which states:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[24]

> Political polarization, or the "violence of faction" James Madison warned of in Federalist 10, is as great a threat to democracy today as it was in 1787, dividing voters and their representatives into diametrically opposed camps that are unwilling to compromise or yield power to their opponents. Whether polarization is itself the core issue or merely a symptom, its current severity demands study and swift response if we hope to maintain a functioning democracy.

Id.

22. U.S. CONST. art. I, § 2, cl. 3.

23. *See* 2 U.S.C. § 2a.

24. U.S. CONST. art. I, § 2, cl. 3. It is impossible to discuss apportionment without recognizing the Constitution's embrace of slavery, specifically with the so-called "Three-Fifths Compromise." *See* Andréa L. Maddan, *Enslavement to Imprisonment: How the Usual Residence Rule Resurrects the Three-Fifths Clause and Challenges the Fourteenth Amendment*, 15 RUTGERS RACE & L. REV. 310, 311–12 (2014). As stated in the Madden article:

> The Three-Fifths Clause was a compromise that is said to have reconciled the differences between the North and the South. The compromise ordained that three-fifths of the number of slaves in a state would be added to the number of free citizens to determine how many congressmen the state would send to the House of Representatives. Though crucial to the count, slaves were not recognized as citizens.

Id. Further, it should also be noted that indigenous populations did not play a role in the drafting or ratification of the Constitution, and accordingly suffered. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 999–1000 (2014). Further, some Anti-Federalists objected to the propriety of including women and children, as well as enslaved persons, in the census. *See* CATO NO. VI, at 120 (George Clinton) (Herbert J. Storing ed., Univ. of Chi. Press 1981). As *Cato No. VI* asserted:

While the Constitution originally distinguished between free and enslaved persons, the Thirteenth Amendment abolished slavery,[25] and the Fourteenth Amendment changed the relevant calculation by eliminating the three fifths counting of enslaved persons.[26] Specifically, the Fourteenth Amendment provides: "Representatives shall be apportioned among the several States according to their respective numbers, counting *the whole number of persons* in each State, excluding Indians not taxed."[27]

The Constitution further articulates *when* such counting of persons should occur, namely, every ten years.[28] Specifically, the Constitution indicates: "[t]he 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."[29] The "Enumeration" is a reference to the census.[30]

Significantly, the Constitution links apportionment to the results of the census, by indicating that the apportionment shall be made "according to [the States'] respective numbers."[31] In other words, as the census occurs every ten years, so does apportionment.[32]

> [W]hat aid can the community derive from the assistance of women, infants, and slaves, in their deliberation, or in their defence? and what motive therefore could the convention have in departing from the just and rational principle of representation, which is the governing principle of this state and of all America . . . . [As such] representation ought to bear a proportion to the number of *free inhabitants* in a community.

Id. (emphasis added).

25. *See* U.S. CONST. amend. XIII, § 1.
26. *See id.* amend. XIV, § 2, cl. 1.
27. *Id.*
28. *See id.* art I, § 2, cl. 3.
29. *Id.*
30. 14 AM. JUR. 2D *CENSUS* § 5 (2024). As stated in *American Jurisprudence*:

> The United States Constitution requires an "enumeration" of "persons" every 10 years for the purpose of apportioning representatives to Congress and direct taxes among the states according to their respective "numbers." The provision for or suggestion of any federal census is considered to have originated in this constitutional provision, although it uses the words "enumeration" of "persons" and not the word "census."

Id.

31. U.S. CONST. art. I, § 2, cl. 3.
32. *See id.*

B. Permanent Apportionment Act of 1929

Congress enacted the Permanent Apportionment Act of 1929, the effect of which was to set the number of representatives at 435.[33] Prior to the Act, Congress had increased the number of representatives after nearly every census.[34] However, Congress could not agree on the number of representatives after the census of 1920.[35]

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33. *See* Harden, *supra* note 10, at 74.

34. *See* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1928–29 (2018). As stated in the Karlan article:

> Between the post-1790 census and 1920, Congress considered, and ultimately used, several different formulas. Each time, the Members were acutely aware of the distributional consequences of choosing one formula over the alternatives. Moreover, in every decade prior to 1920, not only did Congress pick the apportionment formula, but it also determined the number of seats to be apportioned, changing that number each time. Perhaps predictably, with the exception of the post-1840 apportionment, Congress consistently increased the number of seats. And between 1870 and 1920, it chose increases that interacted with the apportionment formula to ensure that no state actually lost a seat.

Id.

35. *See The Permanent Apportionment Act of 1929*, U.S. HOUSE OF REPS.: HIST., ART & ARCHIVES, https://perma.cc/K78V-JGXD (last visited Oct. 24, 2024). As stated on the webpage:

> Usually, the House reapportioned itself in a manner that increased, or at least preserved, the representation of most states. Gradually, however, the method for calculating apportionment caused smaller rural states to lose representation to larger urbanized states. A battle erupted between rural and urban factions, causing the House (for the only time in its history) to fail to reapportion itself following the 1920 Census.

Id.; *see also* Magliocca, *supra* note 10, at 778–79. As stated in the Magliocca article:

> Following the 1920 Census, though, Congress could not agree on a new reapportionment, and as a result, one was not done during that decade. To break that deadlock, Congress enacted the Reapportionment Act of 1929, which provided that (1) henceforth the total number of representatives would be maintained at 435, (2) a formula would be used to redistribute them based solely on population, and (3) Congress would no longer need to legislate for reapportionments to occur. This automatic system is still in operation.

Magliocca, *supra* note 10, at 778–79. Further, this failure to reapportion may have had a racial component. *See* Harden, *supra* note 10, at 79. As stated in the Harden article:

> Large scale immigration and growing ethnic populations in urban areas were two major causes of the population shift. Many of these immigrants hailed from areas other than Western Europe, which alarmed people of Western European ancestry. Many in the political establishment chaffed at the thought of House control shifting to these highly ethnic urban areas.

The Act eliminates Congress' ability to deliberate when it comes to determining the number of delegates in the House of Representatives.[36] Further, the Act removes Congress' role entirely in the apportionment process.[37] Rather, it is the President who indicates to Congress the results of the census,[38] and who informs Congress of the adjusted number of representatives that each state will receive out of 435.[39] In practice, the President does not engage in this process, but rather, sources such responsibility to the Census Bureau, which handles the apportionment calculations.[40]

III. THE PERMANENT APPORTIONMENT ACT IS UNCONSTITUTIONAL BECAUSE IT ELIMINATES THE POSSIBILITY OF INCREASING THE SIZE OF THE HOUSE IN LIGHT OF THE MOST RECENTLY CONDUCTED CENSUS

The Permanent Apportionment Act is unconstitutional because it eliminates the possibility of increasing the size of the House every ten years in relation to the results of the most recent census. This argument is supported by originalism and textualism, interpretative theories often favored by conservative jurists.[41] The Act is also improper under living

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Id.

36. 2 U.S.C. § 2a(b) ("Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required . . . .").

37. *See id.*

38. *See id.* As stated in the Act:

> On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, *the President* shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

Id. (emphasis added).

39. *See id.*

40. *See* Press Release, U.S. Census Bureau, 2020 Census Apportionment Results Delivered to the President (Apr. 26, 2021), https://perma.cc/AYZ2-GQWS.

41. *See* Thomas A. Schweitzer, *Justice Scalia, Originalism and Textualism*, 33 TOURO L. REV. 749, 750 (2017). As stated in the Schweitzer article:

> [Justice Scalia] was a reliable member of the conservative majority with Justice Alito and Justice Clarence Thomas, usually joined by Justice Anthony

constitutionalism, perceived to be favored by more liberal judges.[42] Some scholars argue that these differing interpretive philosophies may be harmonized to a degree.[43]

When constitutional scholars speak of "originalism," they recognize at least three variations to what "originalism" means.[44] First, some scholars believe that the Constitution should be interpreted based on what the framers intended.[45] Second, other scholars believe we should credit the constitutional interpretations of the delegates at the different state ratifying conventions.[46] The third mode of originalist theory—and arguably the one that is most prevalent today—emphasizes the importance of the original public meaning of the Constitution.[47]

Although conservative jurists often favor originalism, they also embrace the related interpretive paradigm of textualism.[48] Though these two paradigms are related, they are in fact distinct. It has been noted that "[t]extualism and originalism are not the same interpretive theory [because] textualism commands adherence to the text[, while originalism],

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> Kennedy and Chief Justice Roberts . . . . The most important mark Justice Scalia left on the Supreme Court may have been his advocacy of the jurisprudential doctrines of textualism and originalism . . . .

Id.

42. *See generally* Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICK. L. REV. 585 (2018). *But see* Sally K. Hilander, *Justice Scalia Debunks the "Living Constitution" Theory*, [24-OCT] MONT. LAW. 1, 33 (1998) (noting that the late Justice Scalia "contends constitutional interpretation is not a conservative-liberal issue. 'Conservatives are just as willing to twist the Constitution as are liberals,' Scalia said. 'The people who believe in a living Constitution want it done their way, coast to coast, permanently.'").

43. *See* Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31, 31–32 (2015). As stated in the Lund article:

> Professor Jack M. Balkin's "living originalism" seeks to eliminate the opposition between these theories, and he is open about his agenda: "The notion that in order for liberals to believe in a living Constitution they have to reject originalism in all of its forms is the biggest canard ever foisted on them." To adapt President Jefferson's famous statement in his First Inaugural Address, Balkin exhorts us to agree that we are all originalists, we are all living constitutionalists.

Id. (quoting Jack M. Balkin, *How Liberals Can Reclaim the Constitution*, WASH. POST (July 11, 2014), http://perma.cc/D8FB-E9DC).

44. *See* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 461–62 (2009).

45. *See id*. at 461.

46. *See id.* at 461–62.

47. *See id.* at 462.

48. *See* Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 115 (2022).

in contrast, commands adherence to history."[49] While it is true that "textualism and originalism may in some circumstances be harnessed to work in tandem—or may in some circumstances lead to the same result—they are different inquiries, and command fidelity to different ultimate guiding principles."[50] Specifically, "[i]n situations of conflict, a textualist is ultimately faithful to the text—while an originalist is ultimately faithful to history."[51]

Recently, many conservative justices on the Supreme Court have affirmed the importance of text, history, and tradition in constitutional interpretation.[52] Further, some justices have explained their thoughts regarding their interpretive methodologies in more detail.[53]

In contrast, the theory of living constitutionalism—often credited by more liberal judges—espouses that the Constitution should be interpreted in part based on contemporary societal contexts.[54] In other words, scholars who embrace this interpretative paradigm believe that the Constitution is a "living" document.[55] It should be noted that just as with the term "originalism," the phrase "living constitutionalism," is also subject to varying interpretations.[56]

However, before analyzing the constitutionality of the Permanent Apportionment Act under originalism, textualism, or living constitutionalism, it is worthwhile to catalogue the record of evidence that supports the notion that Congress is charged with a mandatory constitutional directive to consider increasing the size of the House every ten years in response to the most recently conducted census.

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49. *Id.*

50. *Id*.

51. *Id.*

52. *See* United States v. Rahimi, 602 U.S. 680, 691 (2024).

53. *See id.* at 719 (Kavanaugh, J., concurring) ("I now turn to explaining how courts apply pre-ratification history, post-ratification history, and precedent when analyzing vague constitutional text.").

54. *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1259 (2019).

55. *See id.*

56. *Id.* at 1261. As stated in the Solum article:

> As with "originalism," the label "living constitutionalism" is used to refer to several distinct theories, ranging from Professor David Strauss's common law constitutionalism, to various forms of pluralism (including the multiple modalities view associated with Professor Philip Bobbitt), to Professor James Fleming and Professor Ronald Dworkin's moral readings approach. And we might classify various other views as "living constitutionalism," including the Thayerian deference approach, and various forms of constitutional antitheory and constitutional rejectionism.

Id.

A. The Federalist Papers

The Federalist Papers, written by James Madison, Alexander Hamilton, and John Jay, were drafted to drum up support for constitutional ratification.[57] James Madison *expressly addressed the precise issue* of the need for a decennial consideration by Congress to determine the total number of House delegates.[58] In Federalist No. 58, quite aptly titled, "Objection That The Number of Members Will Not Be Augmented as the Progress of Population Demands Considered," Madison directly tied the taking of the census to a congressional evaluation of the number of House delegates.[59]

Madison noted that, "the remaining charge against the House of Representatives, which I am to examine, is grounded on a supposition that the number of members will not be augmented from time to time, as the progress of population may demand."[60] In this vein, Madison asserted that:

> Within every successive term of ten years a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to readjust, from time to time, the apportionment of representatives to the number of inhabitants, under the single exception that each State shall have one representative at least; *secondly, to augment the number of representatives at the same periods* . . . .[61]

Thus, Madison is explicit in that the census has two goals: first, to adjust the ratio of representatives amongst the states based on population,

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57. *See* George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 1043 (1991); *see also* J. Michael Martinez & William D. Richardson, *The Federalist Papers and Legal Interpretation*, 45 S.D. L. REV. 307, 311–12 (2000). As stated in the Martinez and Richardson article:

> Commentators on the American political tradition often have looked to The Federalist Papers for assistance in identifying the underlying principles of the republic, especially on questions of federalism . . . From their first appearance in New York newspapers in the fall of 1787, the 85 essays authored by the pseudonymous Publius were recognized even by critics as the most authoritative, contemporaneous explanation of the meaning of the Constitution, albeit they were hardly free from controversy. Modern political scientists continue to analyze the often self-serving, occasionally contradictory arguments advanced in The Federalist Papers. Yet, despite its flaws, the compilation remains the most authoritative source for understanding the political ideas of at least some of the Founders, namely the victorious Federalists.

Id.

58. *See* THE FEDERALIST NO. 58, at 295–300 (James Madison) (Ian Shapiro ed., Yale. Univ. Press 2009).

59. *Id.*

60. *Id.* at 295.

61. *Id.* at 295–96 (emphasis added).

but also, second, to consider an increase in the total number of delegates.[62] Furthermore, Madison uses the phrase "at the same period" to make plain that the augmentation debate should take place in concert with the recalculation of delegates.[63]

Madison further points out in Federalist No. 58 that the Constitution provides a unique mechanism to continuously monitor whether the people of the United States enjoy sufficient representation: namely, the existence of the House.[64] Specifically, Madison notes that while the Senate is capped at two senators for each state, the House is different, and is designed to accommodate increases in population.[65] Specifically, Madison states that the existence of the House constitutes "a peculiarity in the federal Constitution which insures a watchful attention in a majority both of the people and of their representatives *to a constitutional augmentation* of the latter."[66]

In fact, when comparing the Constitution with existing state constitutions, Madison asserts:

> Those who urge the objection [that the House will stay the same size] seem not to have recollected that the federal constitution will not suffer by a comparison with the state constitutions, *in the security provided for a gradual augmentation of the number of representatives*.[67]

Again, this sense of "gradual augmentation" of House delegates is significant, as it provides for "security" that the House will maintain an adequate size.[68]

Madison also wrote in Federalist No. 55 that the taking of the census every ten years may lead to a congressional discussion of increasing the

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62. *See id.*

63. *See id*. Madison also noted that the First Congress debated conducting a census earlier than ten years, namely, to keep pace with developing inequalities. Letter from James Madison to Edmund Pendleton (Jan. 21, 1792), https://perma.cc/PCW7-H7LS. As stated in Madison's letter:

> The motion alluded to proposes, as compensation for the present inequality of fractions, a repetition of the Census in 4 or 5 years, which will have not only the effect of shortening the term of the fractions complaind [sic] of, but of preventing the accumulation of much greater inequalities within a period of ten years. This expedient is relished generally by the Southern States, & by N. York & Vermont *which are growing States*.

Id. (emphasis added). This letter supports the notion that increased attention to population can be within the province of the legislature, and further condemns the notion that Congress can take a "hands off" approach to the issue of proportionate representation.

64. *See* THE FEDERALIST NO. 58, *supra* note 58, at 296 (James Madison).

65. *See id.*

66. *Id.* (emphasis added).

67. *Id.* at 295 (emphasis added).

68. *Id*.

size of the House.[69] Specifically, Madison asserted that, "within every successive period of ten years, the census is to be renewed, and augmentations may continue to be made . . . ."[70]

Madison confirmed in Federalist No. 55 that the census was a mechanism to allay the fears of the Anti-Federalists, who opposed constitutional ratification in part because of the diminutive size of the House.[71] Madison summarized Anti-Federalist concerns by writing that the Anti-Federalists believed that "defective as the number will be in the first instance, it will be more and more disproportionate, by the increase of the people, and the obstacles which will prevent a correspondent increase of the representatives."[72] Finally, in Federalist No. 10, Madison himself noted that a balance in House size was necessary, because too small a number could "render the representatives too little acquainted with all their local circumstances[,]" but too many delegates would fail to "comprehend and pursue great and national objects."[73]

1. The Anti-Federalist Concerns

The House's size was not a minor concern for the Anti-Federalists, but a foundational matter that impugned the legitimacy of the Constitution itself.[74] In fact, as one Yale Law constitutional scholar has noted, the smallness of the size of the House likely represented the Anti-Federalists' *biggest concern.*[75] First, the Anti-Federalists believed that a small number of representatives would be unable to adequately inform themselves of

69. *See* THE FEDERALIST NO. 55, *supra* note 58, at 283 (James Madison).

70. *Id.*

71. *See id.* at 282

72. *Id.* at 282.

73. *See* THE FEDERALIST NO. 10, *supra* note 58, at 52 (James Madison). Madison contemplated the size of the House in the same piece regarding partisan factions as a key threat to democracy, observing that "they have a tendency to break and control" and "[lead to] violence." *Id.* at 47. Madison stated that, "[factions have] divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good." *Id.* at 49. He further noted that, "a greater variety of parties and interests . . . make it less probable that [there is] a common motive to invade the rights of other citizens." *Id.* at 52.

74. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 515 (1998); *see also* CATO NO. VI, *supra* note 24, at 122 (George Clinton). As *Cato No. VI* asserted:

> Will the feeble efforts of the house of representatives, in whom your security ought to subsist, consisting of about seventy-three, be able to hold the balance against them, when, from the fewness of the number in this house, the senate will have in their power to poison even a majority of that body by douceurs of office for themselves or friends.

Id.

75. *See* AMAR, *supra* note 1, at 8.

local issues, if responsible for large populations.[76] Second, a paucity of House delegates ensured that the House would be comprised of those belonging to the oligarchical class, despite the fact that the House was intended to represent more plebeian sensibilities than the Senate.[77] Third, Anti-Federalists feared that the smallness of the House would be more susceptible to corruption.[78] Related to this last point, there was a fear that Congress—and in particular the House—would be disinclined to increase House size, as doing so would reduce the power of each individual House representative .[79]

Just as the Federalists authored pieces supporting the Constitution, the Anti-Federalists penned pieces opposing the Constitution. Indeed, the Anti-Federalists understood that the constitutional text actually provided for a review of House size every ten years, but *still* maintained their objections.[80] For example, an Anti-Federalist who wrote under the pseudonym Cato noted that the principle of proportional representation was reflected in "the establishment of a future census, in order to apportion the representatives, and to increase or diminish the representation . . . ."[81] Despite this, it was asserted that "the number of representatives are too few[, and] the apportionment and principles of increase are unjust."[82] This assertion was because "men are unwilling to relinquish powers which they once possess, [so] we are not to expect the House of Representatives will be inclined to enlarge the numbers."[83]

Significantly, the third main Anti-Federalist objection—i.e., that the size of the House would be too small, such that it would be prone to corruption—was especially significant. For example, Cato also wrote that "[i]t is a very important objection to this government, that the representation consists of so few; *too few to resist the influence of corruption*[, especially when compared] with the aggregate numbers in the United States."[84]

Moreover, at the Pennsylvania Ratifying Convention, the Anti-Federalists also focused on corruption:

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76. *See* WOOD, *supra* note 74, at 515.

77. *See id.*

78. *See id.*

79. *See, e.g.*, HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 156 (Univ. of Chi. Press. 1981).

80. *See* CATO NO. VI, *supra* note 24, at 120–22 (George Clinton).

81. *Id.* at 120 (emphasis added).

82. CATO NO. V, *supra* note 24, at 118 (George Clinton).

83. The Debates in the Convention of the State of New York on the Adoption of the Federal Constitution (June 17, 1788), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 205, 244 (Jonathan Elliot ed., J.B. Lippincott, 2d ed. 1901) (remarks of Melancton Smith).

84. CATO NO. V, *supra* note 24, at 119 (George Clinton).

> The representation is unsafe, because in the exercise of such great powers and trusts, *it is so exposed to corruption and undue influence* . . . the number of representatives will probably be continued at [its initial number], although the population of the country may swell to treble what it now is; unless a revolution should change.[85]

This discussion regarding the House needing to be large enough to avoid corruption came up again and again during the ratification period.[86]

B. Definitions of "Apportion" From Dictionaries Contemporaneous to the Founding

The Constitution mandates that representatives "shall be apportioned" every ten years.[87] The Permanent Apportionment Act focuses on redistributing the number of representatives from each state based on population changes, always using 435 as the total number of representatives.[88] However, the word "apportion" during the era of the founding of the nation was not simply about adjusting representation amongst the various states based on a preexisting number.[89] Rather, "apportion" meant ensuring that the size of the House was large enough to ensure justice for each individual and prevent against corruption.[90]

The Supreme Court, when interpreting constitutional terms, time and again has relied upon Samuel Johnson's *A Dictionary of the English Language* (4th ed.), which was contemporaneous to the drafting of the Constitution.[91] In Johnson's dictionary, which was published in 1773,

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85. The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (Dec. 18, 1787), https://perma.cc/9RWZ-PKAM (emphasis added).

86. *See id.*; *see, e.g.*, CATO NO. V, *supra* note 24, at 116–19 (George Clinton); Debate in Virginia Ratifying Convention (June 4–5, 1788), https://perma.cc/Q5N2-XM4F (remarks of Patrick Henry) ("Will these few protect our rights? Will they be incorruptible?").

87. *See* U.S. CONST. art. I, § 2, cl. 3.

88. *See* 2 U.S.C. § 2a.

89. *See* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 152 (4th ed., rev. 1773) (HeinOnline).

90. *Id.*

91. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (defining "arms" as "[w]eapons of offence, or armour of defence"); Torres v. Madrid, U.S. 306, 312 (2021) ("[T]he 'seizure' of a 'person" plainly refers to an arrest. That linkage existed at the founding. Samuel Johnson, for example, defined an 'arrest' as '[a]ny . . . seizure of the person.'"); Fulton v. City of Philadelphia, 593 U.S. 522, 579 (2021) (Barrett, J., concurring) (defining "peace"); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 813 (2015) ("We note, preliminarily, that dictionaries, even those in circulation during the founding era, capaciously define the word 'legislature.' Samuel Johnson defined 'legislature' simply as '[t]he power that makes laws.'"); Dep't of Com. v. U.S. House of Reps., 525 U.S. 316, 346–47 (1999). As noted by the Court in *Department of Commerce*:

"apportion" is defined as "to set out in just proportions."[92] It is imperative, then, to understand what "just" constitutes. The very first definition of "just" in Johnson's dictionary is "upright; incorrupt; equitable in the distribution of justice."[93] The second definition of "just" is "[h]onest; without crime in dealing with others."[94] These definitions nicely track the rampant Anti-Federalist fear that the House would be corrupt on account of its diminutive size and congressional reluctance to increase the number of delegates.

Furthermore, the word "justice," as used within the first definition of apportionment, namely, "equitable in the distribution of justice," also supports an Anti-Federalist reading. The definition of "justice" is:

> The virtue by which we give to *every man* what is his due: opposed to injury or wrong. It is either distributive, belonging to magistrates; or commutative, respecting common transactions between men.[95]

Notably, this definition focuses on giving *every man* his due, which is significant, because it supports the notion that the House should be of such a size that each specific individual in the nation has adequate representation in the people's chamber. Put another way, Johnson's dictionary definition of "apportion" supports the notion that the House should be large enough first, to avoid corruption, and second, to give every person their due such that they are adequately represented.

Furthermore, other dictionaries contemporaneous to the Constitution are congruent with this viewpoint. While Samuel Johnson's dictionary is one of the most preeminent dictionaries utilized to discern original intent,[96] *other* dictionaries relied upon by the Supreme Court similarly confirm this important definition of "apportion." For example, in

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> Dictionaries roughly contemporaneous with the ratification of the Constitution demonstrate that an "enumeration" requires an actual counting, and not just an estimation of number . . . Samuel Johnson's 1773 Dictionary of the English Language 658 (4th ed.) defines "enumerate" as "[t]o reckon up singly; to count over distinctly; to number"; and "enumeration" as "[t]he act of numbering or counting over; number told out."

Dep't of Com., 525 U.S. at 346–47.

92. *See* 1 JOHNSON, *supra* note 89, at 152.

93. *Id.* at 1151.

94. *Id.*

95. *Id.* at 1152 (emphasis added).

96. *See* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 359 (2014) ("[D]uring the past five years, in more than 100 law review articles making claims about the original meaning of the Constitution, legal scholars have cited various editions of Samuel Johnson's A Dictionary of the English Language, one of the most authoritative eighteenth-century dictionaries.")

Barclay's dictionary,[97] also cited by the Supreme Court,[98] apportion is defined as, "to allot or divide into two or more parts; *to set out in just proportions*."[99] Thus, Barclay's definition has the exact same definition, in part, as Johnson's dictionary. Moreover, in Barclay's dictionary, "just" employs a similar meaning of avoiding corruption.[100] More specifically, "just" is defined as:

> unbiassed [sic] in distribution of justice; honest in dealing with others; exact, proper, accurate, or agreeable to the standard of justice, virtuous, or living conformably to the laws of morality; true; well grounded; proportionate; regular.[101]

Moreover, in John Ash's dictionary[102]—also relied upon by the Supreme Court[103]—"apportion" is defined as "[t]o set out a proper share,"[104] with "proper" further defined as "belonging to an individual."[105] The full definition of proper is:

> *peculiar, belonging to an individual*; natural, original; fit; suitable; exact, just; tall, well proportioned, comely, with bulk; plain, literal.[106]

In fact, "peculiar" is further defined in Ash's dictionary as, "appropriate, *belonging to one to the exclusion of others*, particular, singular."[107] Thus, we again see this focus on an *individual's* ability to be appropriately represented when examining the word "apportion."

Contrast the definition of *apportion* with that of *regulation.* In Johnson's dictionary, "regulate" means "to adjust by rule or method" or "to direct."[108] In Ash's dictionary, the term "regulate" likewise means, "to adjust; to direct according to rule."[109] Further tracking these dictionaries, Barclay's dictionary defines regulate as "to adjust by rule of method; to

97. *See generally* JAMES BARCLAY, A COMPLETE AND UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (B. B. Woodward rev. ed. 1848).

98. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 638 (1997).

99. BARCLAY, *supra* note 97, at 42 (emphasis added).

100. *See id.* at 502.

101. *Id.*

102. *See generally* 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1795) (HeinOnline).

103. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 567 (2021).

104. 1 ASH, *supra* note 102, at xlii.

105. 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE, at cxxii (2d ed. 1795) (HeinOnline).

106. *Id.* (emphasis added).

107. *Id.* at lxiii (emphasis added).

108. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 517 (4th ed., rev. 1773) (HeinOnline).

109. 2 ASH, *supra* note 105, at clx.

direct; to manage."[110] Regulation often appears elsewhere in the Constitution, such as in the Commerce Clause.[111]

The Permanent Apportionment Act is not aimed at *apportioning*, it is aimed at *regulating.* Yet we have an Apportionment Clause of the Constitution, not a Regulation Clause. A permanent cap on the House of Representatives at 435 delegates is a *regulation,* and it is by no means an "apportionment," which takes into account matters of avoiding corruption and providing that every person is adequately represented. In fact, the Anti-Federalists were precisely worried about the type of corruption where House representatives would be disinclined to increase their numbers, because doing so would mean that their power would accordingly be decreased.[112] Moreover, the Anti-Federalists also were concerned that a smaller total House size would not be able to adequately inform themselves of the concerns of their citizens, such that a citizen was not properly afforded a voice.[113] As such, merely recalculating the representation amongst the states, without considering the total number of delegates, fails to take into account the texturized command within the word "apportion."

C. The Plain Text of the Constitution

The plain text of the Constitution expressly speaks in terms of *apportionment*; it does not speak to *reapportionment*.[114] In fact, the Constitution specifies when Congress may rely upon its own prior activities when fulfilling certain significant constitutionally specified duties. Indeed, the Constitution utilizes the words "reconsider,"[115] "repassed,"[116] and "revision"[117] in various locations. For example, with regard to "reconsider," the Constitution states that if the President chooses to veto a bill, then the specific House of Congress from which the bill originated, "shall enter the Objections at large on their Journal, and *proceed to reconsider it*."[118]

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110. BARCLAY, *supra* note 97, at 729.

111. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .")

112. *See, e.g.*, STORING, *supra* note 79, at 156.

113. *See* THE FEDERALIST NO. 55, *supra* note 58, at 282 (James Madison) (summarizing the Anti-Federalist concern that the representatives "will not possess a proper knowledge of the local circumstances of their numerous constituents").

114. *See* U.S. CONST. art. I, § 3, cl. 1.

115. *Id*. art. I, § 7, cl. 2.

116. *Id.* art. I, § 7, cl. 3.

117. *Id.* art. I, § 10, cl. 2.

118. *Id.* art. I, § 7, cl. 2 (emphasis added). The Constitution further states that "if after such Reconsideration two thirds of that House shall agree to pass the Bill," then that piece of legislation will go to the other House of Congress, whereby that piece of legislation

D. Massachusetts' Proposal for a Permanent Cap Gets Rejected

The document that was adopted in Philadelphia in 1787 at the Constitutional Convention did not contain a bill of rights,[119] which stirred significant debate among the states.[120] Those states who wished for a bill of rights proposed various versions of these rights, often with competing provisions.[121] The lack of a federal bill of rights was a key sticking point between Anti-Federalists and Federalists that prevented constitutional ratification.[122]

Massachusetts ratified the Constitution in conjunction with submitting proposed amendments it hoped would gain approval—an approach followed by other states.[123] One of these amendments would have permanently capped the House of Representatives at two hundred delegates:

"shall likewise *be reconsidered*." *Id.* Thus, the Constitution utilizes "reconsider" in the context of *an already considered piece of legislation*. *Id.* In a similar vein, the Constitution speaks of "repassed" legislation: in other words, Congress must pass the same bill again. *Id.* art. I, § 7, cl. 3. Furthermore, the Constitution speaks of "[re]vision" of laws dealing with "[i]mposts or [d]uties." *Id.* at art. I, § 8, cl. 1.

119. *See* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 196 (2006) ("[Madison] urged his colleagues to begin the debate [about the Bill of Rights], reminding the House that states had submitted amendments approved at their ratifying conventions that they wanted considered, and many citizens had only supported ratification only because they were told the First Congress would take up amendments.").

120. *See id*; *see also* Ratification of the Constitution by the State of Massachusetts (Feb. 6, 1788), https://perma.cc/B5AD-CEMZ. As stated by the Massachusetts delegates:

> And as it is the opinion of this Convention that certain amendments & alterations in the said Constitution would remove the fears & quiet the apprehensions of many of the good people of this Commonwealth & more effectually guard against an undue administration of the Federal Government, The Convention do therefore recommend that the following alterations & provisions be introduced into the said Constitution.

Ratification of the Constitution by the State of Massachusetts, *supra*; *see also* Ratification of the Constitution by the State of New York (July 26, 1788), https://perma.cc/D9WJ-D4VS. As stated by the New York delegates:

> AND the Convention do in the Name and Behalf of the People of the State of New York enjoin it upon their Representatives in the Congress, to Exert all their Influence, and use all reasonable means to Obtain a Ratification of the following Amendments to the said Constitution in the manner prescribed therein; and in all Laws to be passed by the Congress in the meantime to conform to the spirit of the said Amendments as far as the Constitution will admit.

Ratification of the Constitution by the State of New York, *supra*.

121. *See* AMAR, *supra* note 1, at 38.

122. *See* Ratification of the Constitution by the State of Massachusetts, *supra* note 120 (proposing various amendments with the hope they be adopted).

123. *See id.*

> Secondly, That there shall be one representative to every thirty thousand persons according to the Census mentioned in the Constitution until the whole number of the Representatives amounts to Two hundred.[124]

The Constitution does not contain a cap on the number of House delegates.[125] In fact, as will be explained *infra,* a Massachusetts-like amendment proposing a permanent cap on the size of the House of Representatives was expressly rejected in congressional debates surrounding the Apportionment Amendment.[126] This supports the notion that a permanent cap was not thought proper. Furthermore, it also lends credence to the notion that if a permanent cap is to be imposed, it must be done by way of constitutional amendment.

In contrast to Massachusetts, both Virginia and North Carolina proposed their own (essentially identical) version of an apportionment amendment.[127] Neither contained a permanent cap.[128] Furthermore, both contemplated an increase in House size "from time to time" after the House reached 200 delegates.[129]

E. The Apportionment Amendment of 1789

Madison, after considering the objections of the Anti-Federalists, as well as the different proposed amendments from the various states, drafted a version of the Bill of Rights, and submitted this to Congress.[130] While many Americans recognize the Bill of Rights as the first ten amendments, Congress initially adopted *twelve*.[131] In fact, the original First Amendment was not that which guaranteed freedom of speech, but rather, an amendment to dictate the methodology of apportionment of the House of Representatives.[132] As one scholar noted, [i]t is poetic that this amendment

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124. *See id.*

125. *See* U.S. CONST. art. I, § 2, cl. 3.

126. 1 ANNALS OF CONG. 753–56 (1789) (Joseph Gales ed., 1834).

127. *See* N.C. CONVENTION, PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA 272 (1789); Debate in Virginia Ratifying Convention, *supra* note 86 (remarks of George Mason).

128. *See* sources cited *supra* note 127.

129. *See* N.C. CONVENTION, *supra* note 127, at 272; *accord* Debate in Virginia Ratifying Convention, *supra* note 86.

130. *See* AMAR, *supra* note 1, at 8.

131. *See id.*

132. *See id.* Madison was acutely aware of the maelstrom that the size of the House had provoked, writing:

> [T]he number of which the House of Representatives is to consist, forms another and a very interesting point of view . . . Scarce any article, indeed, in the whole Constitution seems to be rendered more worthy of attention, by the weight of character and the apparent force of argument with which it has been assailed.

was first, for it responded to perhaps the single most important concern of the Anti-Federalists."[133]

Congress passed this "Article the First," thus putting the matter of the Apportionment Amendment (the "Amendment") to the various state legislatures for a vote.[134] Ultimately, the Amendment came just one vote shy of ratification.[135] In fact, the Amendment theoretically could still become law; unlike other proposed amendments to the Constitution, it possesses no deadline for ratification.[136] It remains the only unratified amendment of the original twelve proposed amendments, as the amendment concerning congressional emoluments was ratified by the requisite number of states in 1992, over two hundred years after its initial proposal.[137]

It is worthwhile to delve into the legislative history of this somewhat forgotten constitutional amendment. Madison started out with the premise that the House should have a minimum and maximum number, indicating that "the number shall never be less than __, nor more than __."[138] Madison submitted more detailed text with respect to the other amendments.[139]

Subsequently, a "Committee of Eleven"—consisting of one delegate from each state that had already ratified the Constitution, thus exclusive of North Carolina and Rhode Island—prepared a draft of the bill of rights for consideration by the whole House.[140] This first draft from the Committee

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THE FEDERALIST NO. 55, *supra* note 58, at 281 (James Madison).

133. AMAR, *supra* note 1, at 8.

134. *Id.*

135. *See id.*

136. *See id.* at 11.

137. *See id.*

138. 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834). The proposed amendment stated:

> After the first actual enumeration, there shall be one Representative for every thirty thousand, until the number amounts to -----, after which the proportion shall be so regulated by Congress, that the number shall never be less than ----, nor more than ----, but each State shall, after the first enumeration, have at least two Representatives, and prior thereto.

Id.

139. *See id*.

140. AMAR, *supra* note 1, at 8; 2B CTR. FOR LEGIS. ARCHIVES, NAT'L ARCHIVES, CONGRESS CREATES THE BILL OF RIGHTS 5, https://perma.cc/3KYC-KDU9 (last visited Dec. 5, 2024). As stated in *Congress Creates the Bill of Rights*:

> James Madison studied these and formulated a select set of amendments that he introduced to the whole House. A House select committee, the Committee of Eleven, transformed Madison's proposals into nineteen specific changes to

of Eleven, inclusive of the Apportionment Amendment, provided for a cap of 175 members to the House of Representatives.[141]

The whole House then debated this version that would have capped representation at 175 members.[142] During the debates, it was proposed that the cap on the House should be increased to 200 members.[143] In arguing for this hard cap, Fisher Ames, a delegate from Massachusetts—whose state ratifying convention had previously proposed the 200 member cap—stated the following:

> I am persuaded that the people are not anxious to have a large representation . . . . The great object which the convention in Massachusetts had in view by proposing this amendment [capping the House at 200] was to obtain a security that Congress should never reduce the representation below what they conceived to be a point of security. *Their object was not augmentation, it was certainty alone they wished for.*[144]

James Madison, however, noted that some states—including both Virginia and North Carolina—had "required an increase as far as two hundred *at least*," and stated that "[t]his does not look as if certainty was their sole object."[145]

Ultimately, the House of Representatives proposed their own version of an Apportionment Amendment which–once the House reached 200 representatives–would have *mandated* one additional representative for every 50,000 person increase in population.[146] Specifically, the House text indicated that there shall be "no[] less than one representative for every

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> the Constitution. These were then debated, refined, and approved by two thirds of the House as seventeen articles of amendment. The House articles were submitted to the Senate, where they were again deliberated, revised, reduced to twelve proposed amendments, and passed by a two-thirds majority. The House and the Senate then reconciled differences in a conference committee and by additional agreements between the bodies. Those changes were approved by two thirds of the House and the Senate. The amendments that finally passed Congress were sent to the state legislatures to be ratified. If and when three-quarters of the states voted to ratify an amendment, it was added to the Constitution. Articles Three through Twelve passed this last test and became the Bill of Rights.

Id.

141. *See* 1 ANNALS OF CONG. 747.

142. *See id.*

143. *Id.* at 753 (stating that Mr. Sedgwick "would move to strike out a hundred and seventy-five and insert two hundred").

144. *Id.* at 748 (emphasis added).

145. *Id.* at 749.

146. *See* House Apportionment Amendment, 1st Cong. (as proposed by House of Reps., July 28, 1789).

fifty thousand persons."[147] Furthermore, the House version also granted Congress discretion to make the House even larger.[148] Based on the 2020 Census, the House Apportionment Amendment would have mandated 6,620 representatives in today's House; in fact, Congress could decide upon even more representatives.[149]

The Senate agreed upon a different version of an Apportionment Amendment that—once the House reached 200 representatives—would have mandated one additional representative for every 60,000 person increase in population, as opposed to one for every 50,000 persons, as in the House version.[150] However, the Senate version did not allow any discretion to go beyond this number.[151] Thus, based on the 2020 Census, the Senate Apportionment Amendment would have mandated 5,516 representatives in today's House; though Congress would have no discretion to adjust the number even higher, as it would under the House version.[152]

In a conference committee to reconcile the two versions of the Amendment, a critical change was made that altered the impact of the Apportionment Amendment.[153] The exact same text of the House Apportionment Amendment was utilized, with one key exception,[154] specifically, the "not less than" one for every fifty thousand persons was substituted with "not more than" one for every fifty thousand persons.[155] It is unclear whether this change was made by accident or with intent, especially considering that the modification leads to a mathematical impossibility when the population of the country is between eight and ten million people.[156] As the famed constitutional scholar Akhil Amar explained:

> At this conference, the word *more* was inexplicably substituted for *less*, and the conference paste job was hurriedly adopted by both houses under the shadow of imminent adjournment, apparently without deep deliberation about the substitution's (poor) fit with the rest of the clause. Thus it is quite possible that the technical glitches in

147. *Id.*

148. *See id.*

149. *See* U.S. CENSUS BUREAU, *supra* note 9, at 1.

150. *See* Senate Apportionment Amendment, 1st Cong. (as proposed by Senate, Sept. 24, 1789).

151. S*ee id.*

152. *See id*; *see also* U.S. CENSUS BUREAU, *supra* note 9, at 1 (indicating that the population of the United States is approximately 331 million). The number is thus calculated by taking 331,000 and dividing by 60,000, which yields approximately 5,516.

153. *See* AMAR, *supra* note 1, at 15.

154. *See id.*

155. *See id.*

156. *See Article the First's Mysterious Defect*, THIRTY THOUSAND, https://perma.cc/L4U5-98UG (May 9, 2022).

> the First Amendment's formula became evident only during the later process of ratifying Congress's proposed amendments.[157]

This version was ultimately accepted by Congress. Indeed, the "no more than one for every fifty thousand persons" language does effectively provide for a maximum cap on the size of the House. However, it is critical to note that the maximum cap *changes with every single census.* In other words, every single decennial Congress would be faced with a new theoretical maximum number of representatives it could choose for the House, because the maximum size of the House would still be linked to the population of the country. Consider the full text of this revised Apportionment Amendment:

> 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*.[158]

Thus, once the House reaches 200 delegates, Congress has some discretion to choose the number of House delegates. Specifically, it can choose any number as low as 200 but as high as x, with "x" representing a number that changes every ten years based on the census results. Based on the 2020 Census,[159] the *maximum* size of the House would be 6,620, though Congress could choose any number between 200 and 6,620.[160]

Given that Madison was worried about too large of a House size,[161] it would make sense from his perspective to have the discussion of the size

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157. *See* AMAR, *supra* note 1, at 15.

158. Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res., 1st Cong. art. I (1789) (emphasis added).

159. *See generally* U.S. CENSUS BUREAU, *supra* note 9.

160. *See* Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res. art I.

161. THE FEDERALIST NO. 55, *supra* note 58, at 282–83 (James Madison). As stated by James Madison:

> Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. But it does not follow that six or seven hundred would be proportionably a better depositary. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought

of the House every ten years as a way to consider augmenting the House, but providing an upper limit. Yet it would be antithetical to the purpose of the Apportionment Amendment to construe it as somehow allowing a permanent cap on the House without ever needing to evaluate the total number of delegates. After all, the Apportionment Amendment was proposed to quell Anti-Federalists fears that the House would be too small, creating a propensity for corruption.[162] Thus, it would be ironic to construe it in a way that would exacerbate Anti-Federalist concerns. Given the fact that under the Apportionment Amendment, the theoretical upper limit of the House changes based on the population of the country, it makes sense for there to be a corresponding deliberation of the appropriate size of the House as to whether to increase the number of delegates.

This version of the Apportionment Amendment came tantalizingly close to adoption.[163] The Apportionment Amendment received more than two-thirds approval in both the House of Representatives, as well the Senate.[164] It was then put forth to the various states.[165] The Apportionment Amendment was then approved by the nine of the original thirteen states, still needing one more state's approval to become the law of the land.[166] Most of these states considered the Apportionment Amendment in concert with the other amendments that ultimately ended up in the Bill of Rights.[167] Delaware was the only state to vote against ratification, presumably on account of the fact that as the smallest state, the Apportionment Amendment could reduce its political influence.[168] Despite the large number of states that voted in favor of the Apportionment Amendment, it could not quite pass the 75% threshold needed for constitutional approval, as it hit 69%, only six percentage points and one state away from being ratified.[169]

It could be argued that the Apportionment Amendment was not ratified, so its significance should be discarded entirely. However, it came

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> at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.

Id.

162. *See* AMAR, *supra* note 1, at 9.

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.*

168. *Id.* at 16 ("With its tiny population and limited room for growth, the state had selfish reasons to favor as small a House as possible.").

169. *See id.*

as close as possible to becoming a constitutional amendment without actually doing so. Most federal legislators and state delegates endorsed it, and it was likely read by many citizens, as it was printed in newspapers and periodicals across the country alongside the other amendments that matured into the Bill of Rights.[170] As such, the history of the Apportionment Amendment serves as evidence that a permanent cap on the House is improper.

F. Analyzing the Particular Case of North Carolina

Certain states were more concerned about issues of apportionment than others. One was North Carolina.[171] As mentioned previously, the Constitution that was ratified at the Constitutional Convention in Philadelphia did not contain a formal bill of rights.[172] Different states desiring such a bill of rights proposed their own versions of various amendments.[173] For example, Massachusetts proposed an apportionment amendment to the Constitution that would have permanently capped the House of Representatives at 200 delegates, rendering any subsequent population increases as immaterial.[174] Other states pushing for a bill of rights made no mention whatsoever of the need for an apportionment amendment.[175]

170. *See, e.g.*, *Proceedings of Congress*, N.H. GAZETTE & GEN. ADVERTISER, Oct. 15, 1789, at 1, https://perma.cc/VX7B-AEFD.

171. *See generally* N.C. CONVENTION, *supra* note 127.

172. *See* LABUNSKI, *supra* note 119, at 196.

173. *See., e.g.*, Ratification of the Constitution by the State of New York, *supra* note 120.

174. *See* Ratification of the Constitution by the State of Massachusetts, *supra* note 120.

175. *See, e.g.*, Ratification of the Constitution by the State of Rhode Island (May 29, 1790), https://perma.cc/GCQ2-WR7P; Ratification of the Constitution by the State of New Hampshire (June 21, 1788), https://perma.cc/6EB2-3KQD; Ratification of the Constitution by the State of South Carolina (May 23, 1788), https://perma.cc/9Z5A-ZDC4.

Eleven of the thirteen states ratified the Constitution without seeing the final draft of the text of any amendment related to apportionment.[176] Two states—North Carolina and Rhode Island—remained holdouts.[177]

The issue of apportionment was not as concerning to Rhode Island as it was to North Carolina. Indeed, Rhode Island, when submitting its own version of a bill of rights, never mentioned apportionment.[178] In contrast, North Carolina, during its initial ratifying convention, requested the following amendment to the Constitution:

> That there shall be one representative for every 30,000, according to the enumeration or census mentioned in the constitution, until the whole number of representatives amounts to two hundred; after which that number shall be continued or encreased as Congress shall direct, upon the principles fixed in the constitution, by apportioning the representatives of each state to some greater number of people, *from time to time, as population encreases*.[179]

Significantly, this North Carolina version specifies a precise formula to increase the number of representatives, i.e., one delegate for every 30,000 people until the House reaches 200 delegates.[180] Afterwards, apportionment takes place according to "the principles fixed in the constitution," namely by "apportioning the representatives . . . to some greater number of people, *from time to time*, as population encreases."[181] This language affirms that the issue of House size should be revisited periodically, i.e., in connection with the census.

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176. *See Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789*, LIBRARY OF CONGRESS, https://perma.cc/4CS9-WMEJ (last visited Nov. 1, 2024). As stated on the *Library of Congress* website:

> On June 21, New Hampshire became the ninth state to ratify the new Constitution, making its adoption official. Preceding New Hampshire were Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, and South Carolina. Virginia and New York ratified shortly after New Hampshire, followed by North Carolina in November 1789. Rhode Island was last to ratify, not joining the Union until May 1790.

Id.; *see also* Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, J. Res., 1st Cong. art. I (1789).

177. *See* Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res. art. I; s*ee also* 1 ANNALS OF CONG. 759 (1789) (Joseph Gales ed., 1834) ("[T]here are two states not in the union, but which we hope to annex to it by the amendments now under deliberation.")

178. *See* Ratification of the Constitution by the State of Rhode Island, *supra* note 175.

179. *See* N.C. CONVENTION, *supra* note 127, at 273 (emphasis added).

180. *See id.*

181. *See id.* at 273 (emphasis added).

Moreover, in the floor debates in the federal House of Representatives regarding the (original House) Apportionment Amendment, Representative Ames stated in deliberations that, "[i]t has been observed that there will be an indisposition in future legislatures to increase the number of representatives. I am by no means satisfied that this observation is true."[182]

Nonetheless, another House member, Representative Elbridge Gerry, observed that because citizens were afraid that Congress would neglect to increase the House at a future time, the Apportionment Amendment should be passed to quell such fears.[183] Representative Gerry then noted how two remaining states at the time had not yet been admitted to the Union, and therefore, it was important to pass the Apportionment Amendment to secure their admission.[184] Specifically, Representative Gerry stated:

> The people suppose their liberties somewhat endangered; they have expressed their wishes to have them secured, and instructed their representatives to endeavor to obtain for them certain amendments, which they imagine will be adequate to the object they have in view. Besides this, there are two states not in the union; but which we hope to annex to it by the amendments now under deliberation. These are inducements for us to proceed and adopt this amendment, independent of the propriety of the amendment itself . . . .[185]

Thus, Representative Gerry specifically linked passage of the Apportionment Amendment as a means to induce the two remaining states, i.e., North Carolina and Rhode Island, to join the Union.[186]

As noted, Rhode Island never petitioned for an amendment related to apportionment.[187] Thus, the Apportionment Amendment can reasonably be read in light of North Carolina's proposed amendment. Furthermore, the idea of ongoing apportionment was especially concerning to the Southern states, which were expected to grow in population compared to their Northern counterparts.[188] As one North Carolinian delegate put it at the state's ratifying convention, "[t]he census or enumeration provided, is meant for the salvation and benefit of the southern states."[189]

Moreover, Representative Gerry indicated that it was especially important the Apportionment Amendment be passed, lest *future*

182. 1 ANNALS OF CONG. 727.
183. *See id.*
184. *See id.*
185. *Id.*
186. *See id.*
187. *See* Ratification of the Constitution by the State of Rhode Island, *supra* note 175.
188. *See* N.C. CONVENTION, *supra* note 127, at 236.
189. *Id.*

congresses decided to limit the number of House delegates.[190] Specifically, Representative Gerry stated:

> [T]here are [reasons] for us to proceed and adopt this amendment, [because] inducements as no future congress will have, the principle of self-interest and self-importance will always operate on them to prevent any addition to the number of representatives.[191]

Thus, the Apportionment Amendment was proposed by at least one federal delegate in the House as a means to induce North Carolina to enter the Union, and this sentiment was stated on the floor, and thus presumably heard by other members.[192] Moreover, it makes sense to construe the Apportionment Amendment in light of North Carolina's proposed apportionment amendment, which expressly mentions that augmentation should be evaluated from time to time, according to principles identified in the Constitution.

G. Elections as a Method to Vote Out Members Opposed to Increasing the Size of the House

As mentioned, there was concern by the Anti-Federalists that Congress would refuse to increase its numbers.[193] After all, increasing the size of the House would mean that each individual House member's power could become diluted.[194] Federalists responded to this Anti-Federalist concern in part by pointing out that *elections* would be a way to dispose of those House members who did not wish to increase the number of representatives.[195] Yet by forever setting the size of the House at 435, the Permanent Apportionment Act deprives voters of their ability to discard representatives who oppose an increase in the size of the House.

For example, the Federalist Fisher Ames, in debates surrounding the Apportionment Amendment, articulated the belief that elections would serve as an appropriate check.[196] Specifically, Representative Ames stated:

> My honorable colleague has intimated that a future Legislature will be against extending the number of this branch; *and if the people are displeased, they will have it in their power, by force, to compel their acquiescence*.[197]

190. *See* 1 ANNALS OF CONG. 759.
191. *Id.*
192. *See id.*
193. *See, e.g.*, STORING, *supra* note 79, at 156.
194. *See id.*
195. *See* 1 ANNALS OF CONG. 755.
196. *See id.*
197. *Id.* (emphasis added). This provision is arguably up for some interpretation, as the floor discussion also references the actual military. *See id.*

Further, James Madison, who was present at the Virginia Ratifying Convention, similarly stated that if Congress was disinclined to increase its numbers, then elections would serve as a method to check Congress.[198] Madison stated:

> [W]ith respect to the number of representatives, I reconcile it to my mind, when I consider that it may be increased to the proportion fixed, and that, as it may be so increased, *it shall, because it is the interest of those who alone can prevent it, who are representatives, and who depend on their good behavior for their reelection*.[199]

Decades after his Presidency, Madison indicated that apportionment was essential to a free government.[200] He further hoped that justice regarding apportionment would predominate.[201] Allowing Congress to go a step *further* and permanently cap the House effectively deprives voters of the ability to get rid of those representatives who oppose an increase in House size via elections.[202]

Moreover, Wilson Nicholas, a Federalist and future Governor of Virginia, similarly asserted that elections would be a key method to vote out representatives opposed to an increase in House size.[203] At the Virginia Ratifying Convention, Nicholas stated first, that the number of House representatives would increase every ten years based on the increase in population, and second, that House members would augment the number of representatives, or else they would be voted out.[204] Specifically, Nicholas asserted:

> [A]s a new enumeration will take place every ten years, I take it for granted that the number of representatives will be increased, according to the progressive increase of the population, at every respective enumeration . . . I formed this conclusion from the situation of those who will be our representatives. They are all chosen for two years; at the end of which term they are to depend on the people for their reelection. This dependence will lead them to a due and faithful discharge of their duty to their constituents: the augmentation of their number will conciliate the affections of the people at large; for the more the representatives increase in number, the greater the influence

198. *See* Debate in Virginia Ratifying Convention, *supra* note 86 (remarks of James Madison).

199. *Id.* (some emphasis added).

200. *See* Letter from James Madison to Philip Doddridge (June 6, 1832), https://perma.cc/VEZ7-R45X.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

> of the people in government, and the greater chance of re-election to the representatives.[205]

Nonetheless, despite these assurances by both James Madison and Wilson Nicholas, the Anti-Federalists maintained their objections to the Constitution.[206] As the Permanent Apportionment Act forever sets the House at 435 representatives, the Act effectively deprives voters of the ability to eliminate from Congress those representatives who are opposed to an increase in House size.

H. House as Large as 1,500 Was Understood as a Possibility

In February 1788, one newspaper, *The New-Hampshire Gazette and the General Advertiser*, reprinted the debates from the proceedings of the Massachusetts Ratifying Convention, where one delegate contemplated that the size of the House could reach as high as 1,400 or 1,500 delegates in a century:

> [Mr. Gorham] concluded by saying that the Constitution provides for an increase of members, as numbers increase—and that in 50 years there will be 360—in 100 years 1400 or 1500—if the Constitution lasts so long.[207]

This illustrates that the public may have been aware that some believed that the number of House delegates would rise dramatically in the coming century to over one thousand.[208]

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205. *Id.*

206. *See id.* Patrick Henry stated at this same Virginia Ratifying Convention:

> Remember, sir, that the number of our representatives is but ten, whereof six is a majority. Will those men be possessed of sufficient information? A particular knowledge of particular districts will not suffice. They must be well acquainted with agriculture, commerce, and a great variety of other matters throughout the continent; they must know not only the actual state of nations in Europe and America, the situations of their farmers, cottagers, and mechanics, but also the relative situations and intercourse of those nations. Virginia is as large as England. Our proportion of representatives is but ten men. In England they have five hundred and fifty-eight. The House of Commons, in England, numerous as they are, we are told, are bribed, and have bartered away the rights of their constituents: what, then, shall become of us? Will these few protect our rights? Will they be incorruptible?

Debate in Virginia Ratifying Convention, *supra* note 86 (remarks of Patrick Henry).

207. *Proceedings of the Massachusetts Convention*, N.H. GAZETTE & GEN. ADVERTISER, Feb. 13, 1788, at 1, https://perma.cc/CLN7-WZZH.

208. *See id.*

I. The Apportionment Practice of the First Congress as well as Subsequent Congresses

The apportionment practice of the First Congress, as well as the practice of subsequent Congresses, underscored the idea that the size of the House must be reconsidered every decade. Since the nation's founding, each decennial Congress independently determined the number of delegates in the House.[209] The only exception was in 1920, when Congress could not agree on the size of the House, which led to a stalemate that was finally resolved with the passage of the 1929 Permanent Apportionment Act.[210]

J. Only the Interpretation More Consistent With Constitutional Aims Should be Credited

Even if an alternate interpretation is potentially possible, only the interpretation more consistent with constitutional aims should be credited. In fact, during his Presidency, George Washington was confronted with two possible interpretations of the Apportionment Clause and asserted that *only the interpretation that was most faithful to the Constitution should be allowed*.

Specifically, George Washington employed the first presidential veto on an apportionment bill presented to him by the First Congress, because he believed the bill was unconstitutional.[211] Washington noted that the bill relied on a particular construction of the Apportionment Clause's mandate that "the number of Representatives shall not exceed one for every thirty thousand . . . ."[212] The apportionment bill presented to President Washington by Congress assumed that the thirty thousand number applied to the country as a whole, as opposed to each individual state.[213] The result of this "country-wide" interpretation meant that while specific states

209. *See* Byron, *supra* note 10, at 23.

210. *See id.*

211. *See* Clinton v. City of New York, 524 U.S. 417, 439 (1998); *see also* 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940). As stated by George Washington:

> You do me no more than Justice when you suppose that from motives of respect to the Legislature (and I might add from my interpretation of the Constitution) I give my Signature to many Bills with which my Judgment is at variance. In declaring this, however, I allude to no particular Act. From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto.

33 WRITINGS OF GEORGE WASHINGTON, *supra*, at 96; *see also* Letter from George Washington to U.S. House of Reps. (Apr. 5, 1792), https://perma.cc/Y2BV-ZDX7.

212. Letter from George Washington to U.S. House of Reps., *supra* note 211.

213. *See id.*

violated the thirty thousand number, the national average was acceptable.[214]

President Washington solicited legal opinions from various members of his administration on the bill's constitutionality.[215] Alexander Hamilton and Henry Knox believed that because the specific provision in the Apportionment Clause was susceptible to two different reasonable interpretations, *either* would be constitutional.[216] In contrast, Thomas Jefferson and Edmund Randolph opined that though two different interpretations were theoretically possible based on the plain language of the Constitution, it was important to consider which version was more consonant with constitutional aims.[217] In their view, only the interpretation most consistent with the Constitution could be considered

214. *See id.*

215. *See e.g.*, Letter from Alexander Hamilton to George Washington (Apr. 4, 1792), https://perma.cc/JWM8-SVN7; Letter from Henry Knox to George Washington (Apr. 3, 1792), https://perma.cc/S7Y7-GV88.

216. *See* sources cited *supra* note 215. Notably, Washington's Secretary of Treasury, Alexander Hamilton, argued for the bill's constitutionality by asserting that, "I am of opinion that either of these courses might have been constitutionally pursued—or in other words that there is no criterion by which it can be pronounced decisively that the one or the other is the true construction. Cases so situated often arise on constitutions and Laws." Letter from Alexander Hamilton to George Washington, *supra* note 215. In a similar vein, Washington's Secretary of War, Henry Knox, also asserted that a conceivable interpretation of constitutional text with regards to apportionment should be constitutional. *See* Letter from Henry Knox to George Washington, *supra* note 215. As stated by Henry Knox:

> It has been said that either construction may be deemed to be within the letter as well as the spirit of the constitution . . . it would result that the assent of the President of the United States is to be governed by the political equity of the measure.

Id.

217. Jefferson noted that the construction that applied the thirty thousand number to each individual state was the likelier interpretation. *See* Letter from Thomas Jefferson to George Washington (Apr. 4, 1792), https://perma.cc/PN53-4AE9. Jefferson wrote: "[s]uppose the phrase might bear both meanings: which will Common sense apply to it? Which did the universal understanding of our country apply to it? Which did the Senate and Representatives apply to it during the pendency of the first bill[?]". *Id.* Thus, Jefferson credited the state collective addition interpretation over the federal aggregate interpretation, and thus, asserted that the interpretation was unconstitutional. *See id.* Similarly, Randolph stated that "[i]t is remarkable, that most of the advocates of the bill do themselves admit, that the constitution is susceptible of the construction abovementioned, as well as of their own." Letter from Edmund Randolph to George Washington (Apr. 4, 1792), https://perma.cc/78Z5-944A. Despite the fact that such dual construction was possible, Randolph credited the state interpretation, noting that the framers could have made the Constitution clearer by simply adding certain words: "how much easier would it have been, and how much more proper, to have substituted other words which were so obviously at hand?" *Id.*

constitutional.[218] President Washington agreed with Jefferson and Randolph, and vetoed the bill.[219] In his message to the Senate and House of Representatives explaining his reasoning that the bill was unconstitutional, Washington asserted that "by the context and by fair and obvious construction,"[220] one particular interpretation was more appropriate.[221]

Theoretically, one may argue that the constitutional text does not prevent one Congress from indicating the appropriate number of representatives for future Congresses. Even if such interpretation were plausible, that is not the proper inquiry. Rather, the proper inquiry is which interpretation is more consistent with constitutional aims.

K. Putting It All Together Under Various Interpretative Theories

As noted, the most prevalent mode of originalism (i.e., "plain public meaning originalism") asks what a reasonable person at the time of the founding would have understood the Constitution to mean.[222] This Section argues that a reasonable person at the time of the founding would have credited a constitutional interpretation that allowed Congress to increase House size every ten years as being superior to an interpretation that allowed one Congress to permanently cap the size of the House for all future Congresses.

This interpretation is supported by the plain text of the Constitution, because Congress must "apportion" the representatives based on the results of the most recent census.[223] Significantly, the Apportionment Clause utilizes the word "apportion," and not "regulation."[224] The word "apportion" has a more robust meaning that necessitates the size of the House be large enough to avoid corruption and give every person their just due.[225] Forever capping the House at 435 members is merely a "regulation" that does not consider these important constitutional charges.

Furthermore, the text of the Constitution is also supported by the historical evidence, much of which might be consumed by a reasonable person at the time of the founding. For example, the Federalist Papers explicitly indicate that the role of the census every ten years was to consider an increase in the size of the House.[226] A reasonable person might have been aware that the size of the House was one of—if not the main—

218. *See id.*
219. *See* Letter from George Washington to U.S. House of Reps., *supra* note 211.
220. *Id*.
221. *See id.*
222. *See* Maggs, *supra* note 96, at 359.
223. *See* U.S. CONST. art. I, § 2, cl. 3.
224. *See id.*
225. *See* 1 JOHNSON, *supra* note 89, at 152.
226. *See* THE FEDERALIST NO. 58, *supra* note 58, at 295–96 (James Madison).

objection that the Anti-Federalists levied against the proposed Constitution. Additionally, while the Apportionment Amendment never became part of the Constitution, it came essentially as close as possible to being part of the Constitution, coming just one state vote shy of ratification, and its text was published in newspapers across the country.[227] Given that the Apportionment Amendment was ratified by so many states, it is logical to assume that it can serve to some degree as a proxy for what a reasonable person might believe the Constitution to mean. Indeed, this Apportionment Amendment did not provide for a permanent cap on the House, but rather gave each decennial Congress a different range of possible minimum and maximum House sizes.[228] Thus, it would seem strange to a reasonable person at the time of the founding that that one Congress could simply set the size of the House for all future Congresses. Further, as noted in the Federalist Papers, unlike the Senate, the House was supposed to be the chamber that was responsive to changes in population growth.[229]

With regards to the second and third forms of originalism—namely, the intent of the framers at the Philadelphia Constitution, as well as the intent of the delegates at the various state ratifying conventions[230]—it is difficult to separate the analysis, as so many framers and delegates had varying beliefs about the appropriate size of the House.[231] Further, these varying beliefs never ended up getting resolved. The Apportionment Amendment was *meant* to resolve the issue of the size of the House, but of course, it failed to become part of the Constitution by a single vote. Adding to the complexity, the records of the floor debates surrounding approval of the Bill of Rights are surprisingly scarce.

Nonetheless, it is worthwhile to point out that during the congressional debate surrounding the Apportionment Amendment, a permanent cap was rejected.[232] Further, the Apportionment Amendment was discussed as a way to induce North Carolina to join the Union,[233] and a permanent cap would be inconsistent with North Carolina's proposed amendment.[234] Further, many Anti-Federalists feared that a future House would simply refuse to increase their numbers, as doing so would dilute

227. *See* AMAR, *supra* note 1, at 9.

228. *See* Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res., 1st Cong. art. I (1789).

229. *See* THE FEDERALIST NO. 58, *supra* note 58, at 296 (James Madison).

230. *See* Maggs, *supra* note 96, at 359.

231. *See* Byron, *supra* note 10, at 242.

232. *See* 1 ANNALS OF CONG. 753–56 (1789) (Joseph Gales ed., 1834).

233. *See id.* at 759.

234. *See* N.C. CONVENTION, *supra* note 127, at 272.

the power of each House member.[235] Thus, *memorializing* such a permanent cap seems particularly confounding. Also, many delegates suggested that elections could serve as important way to vote out representatives who did not want to increase the size of the House.[236]

Finally, living constitutionalism also supports the idea that a permanent cap is improper. After all, each congressional representative now answers to more than 700,000 individuals, whereas at the founding of the Constitution, that number was approximately 60,000.[237] It is then at least worth considering whether to increase the size of the House every ten years in connection with the census, as doing so is more in line with promoting adequate representation of citizen interests in the people's body.

L. The Supreme Court Has Struck Down Statutes that Violate Specific Constitutional Procedure

The Supreme Court has struck down statutes that violate the procedural requirements imposed by the Constitution, even if they are laborious and inconvenient.[238] The Court invalidated both the line-item veto in *Clinton v. City of New York*,[239] as well as the one-house veto in *INS v. Chadha*,[240] on grounds that these respective practices both contravened the Presentment Clause of the Constitution.[241] Importantly, statutes have been found to be unconstitutional even if the activity is not expressly forbidden by the Constitution.[242] Rather, the fact that there has been some offense to separation of powers has seemed to be enough to render the statutes unconstitutional.[243] Significantly, the Supreme Court has often relied heavily on the Federalist Papers, the minutes of the Constitutional Convention, and the actions of the First Congress, when interpreting statutes related to appropriate constitutional procedure.[244]

In *Clinton v. New York*, the question was whether the Presentment Clause of the Constitution allowed the President to veto individual parts

235. *See* THE FEDERALIST NO. 55, *supra* note 58, at 282 (James Madison) (summarizing key Anti-Federalist concerns.)

236. *See* Debate in Virginia Ratifying Convention, *supra* note 86 (remarks of Wilson Nicholas).

237. *See* DeSilver, *supra* note 8.

238. *See* Clinton v. City of New York, 524 U.S. 417, 421 (1998).

239. *Id.*

240. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

241. *See id.* at 921; *Clinton*, 524 U.S. at 436.

242. *See Clinton*, 524 U.S. at 439.

243. *See id.* at 439–40.

244. *Id*. at 440 ("What has emerged in these cases . . . are not the product of the 'finely wrought' procedure that the Framers designed."); *see Chadha*, 462 U.S. at 949–50 (relying on various Federalist Papers and minutes from the Constitutional Convention to discern the intent of the framers).

of a bill.[245] Unlike a traditional veto, in which the President vetoes an entire bill, the line item veto allowed the President to selectively decide which portions of a bill could become law.[246] The Supreme Court held that under the Constitution, the President did not have the authority to selectively reject portions of a bill, but had to veto an entire bill.[247] The holding was based on the Presentment Clause of the Constitution, which states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.[248]

While the text of the Presentment Clause does not explicitly forbid the President from rejecting portions of the bill and accepting other parts of the bill,[249] the Court nonetheless held that a line-item veto would offend the Constitution.[250] As the Court noted, "[a]lthough the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes. There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition."[251]

Significantly, the Supreme Court noted in *Clinton* that constitutional silence of the line-item veto was effectively the same as its prohibition because "[t]he procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself."[252] Moreover, the *Clinton* Court found it especially worthwhile to construe the actions of George Washington in his dealings with nascent Congress.[253] Specifically, the Court found it highly relevant that "[o]ur first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.'"[254]

245. *See Clinton*, 524 U.S. at 421.
246. *See id.* at 445.
247. *See id.* at 421.
248. U.S. CONST. art. I, § 7, cl. 2.
249. *See id.*
250. *See Clinton*, 524 U.S. at 436.
251. *Id.* at 439.
252. *Id*.
253. *See id.* at 440.
254. *Id.*

Furthermore, in *INS v. Chadha*,[255] the Supreme Court also asserted that a one-house legislative veto over the actions of an administrative head constituted an unconstitutional violation of the Presentment Clause.[256] The *Chadha* Court noted that the one-house veto over administrative activity was convenient, but "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution."[257] In other words, if Congress wished to overrule an administrative head, then it would need to pass additional legislation that was signed by the President, because Congress needed to comply with the requirements of the Presentment Clause.[258]

In making this determination, the Court looked to the records of the Constitutional Convention, and noted that "[t]he choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."[259] The Court went on to say that "[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President."[260] Finally, the Court noted that this exhaustive procedure was critical to maintaining the notion of separation of powers.[261]

Based on these precedents, a permanent cap is improper. Even if one believes that the constitutional text is silent, *Chadha* and *Clinton* stand for the proposition that silence does not mean authorization.[262] Furthermore, *Clinton* noted that the practices and understandings of George Washington and the First Congress should be instructive.[263] As mentioned *supra*, George Washington considered two different interpretations of the Apportionment Clause, and believed that one interpretation better reflected the Constitution,—and as such, *only* that interpretation was constitutional.[264]

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255. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); *see* U.S. CONST. art. 1 § 2 cl. 3.

256. *See Chadha*, 462 U.S. at 959.

257. *Id.* at 945.

258. *See id.*

259. *Id.* at 959.

260. *Id.*

261. *See Clinton*, 434 U.S. at 439–40.

262. *See id.* at 440.

263. *See id.*

264. *See* 33 WRITINGS OF GEORGE WASHINGTON, *supra* note 211, at 96.

Moreover, while setting the size of the House at 435 certainly is convenient, for it means that Congress need not engage in a heated debate regarding House size, it was expressly noted in *Chadha* that convenience does not translate into constitutionality.[265]

M. Apportionment Clause in Relation to Direct Taxation

The next two subparts contain additional bits of supporting evidence that are somewhat sundry in nature. The Apportionment Clause of the Constitution deals with apportionment not just of representation in the House, but also deals with apportionment with regards to direct taxation of the states. A bill in January 1790 called for direct taxation, and Madison wrote:

> If the tax were to be apportioned according to numbers, it must be according to the numbers as last legally ascertained by census. If no new census were taken before the act took place, then the last must be the guide; but if a new census, then that must be the guide.[266]

Thus, it makes sense that the census should be used in a similar manner in both apportionment of representatives as well as apportionment of taxes, given that these items are both within the Apportionment Clause.

N. Corpus Linguistics

One mechanism to discern plain public meaning that is growing in popularity is corpus linguistics, which evaluates how a word or phrase is employed in a large dataset of relevant text, which is "called [a] corpora, [providing insight into] the ordinary usage of those words."[267] Thus, if many founding era references reveal a particular usage is common, that may serve as evidence of plain public meaning.[268] Technology that allows one to search vast datasets has contributed to the rise of corpus linguistics.[269]

This Article does not engage in a comprehensive evaluation of every reference to apportionment, as that is an expansive exercise outside the scope of this piece but which may be worthy of future scholarship. Nonetheless, a few examples are particularly notable. On the floor of Congress in 1792, in relation to the first apportionment statute, it was

265. *See Chadha*, 462 U.S. at 944.

266. Press Release, James Madison, U.S. Rep., U.S. House of Reps., Additional Revenue (Jan. 19, 1797), https://perma.cc/A6AY-VCJX.

267. Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401, 403 (2019). While discussing corpus linguistics, Zoldan also critiques it, asserting that the discipline allows for subjective cherry-picking, as opposed to objective insight. *See id.* at 403–04.

268. *See id.*

269. *See id.*

observed that "fix[ing] the number [does] not apportion them."[270] Further, in 1766, one British legislator who was born in America, wrote a congratulatory address in the *New Hampshire Gazette* to the "Merchants [and] Manufacturers . . . of Manchester," remarking upon the recent repeal of the Stamp Act.[271] Specifically, the legislator called the Stamp Act "ill apportioned":

> Born in America, and educated in the mercantile sphere, it was easy for me, from a knowledge of the local circumstances of that country, to foresee the difficulties likely to ensue from the enacting of [the Stamp Act], *the weight of which was ill apportioned*, and the execution of it impracticable . . . .[272]

By stating that the Stamp Act was "ill apportioned," the legislator essentially viewed the Stamp Act as unjust.[273] This usage comports with the dictionaries contemporaneous to the founding which indicate that "apportion" is connected to a sense of justice.[274] Further, in 1785, during the period of the Articles of Confederation, it was reported in a newspaper that Congress, in apportioning expenses to each state, needed to identify what was "just." The newspaper reported:

> The committee have not been able to obtain information how many states have complied with the resolution[s] . . . relative to a rule for adjusting the quotas of the several states in federal requisitions:—They are therefore of opinion . . . [to] *apportion to each [state] a just quota of the publick [sic] expenses* . . . .[275]

These references, while not exhaustive, do provide additional support for the idea that the Permanent Apportionment Act is simply a regulation, as opposed to an apportionment.

O. Addressing Counterarguments

There are various counterargument that could be made, such as: (1) the Apportionment Amendment actually supports a permanent cap by using the word "regulate"; (2) the Permanent Apportionment Act could be repealed at any point by Congress; (3) the need to embrace a functionalist instead of a formalist approach to the Apportionment Clause; (4) the real

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270. 3 ANNALS OF CONG. 411 (1789) (Joseph Gales ed., 1849).

271. John Huske, *Answer to the Congratulatory Address*, N.H. GAZETTE & HIST. CHRON., Oct. 17, 1766, at 1, https://perma.cc/64L8-8VTH.

272. *Id.* (emphasis added).

273. *See id.*

274. *See supra* Section III.C.

275. Charles Thompson, *By the United States in Congress Assembled, Sept. 27th, 1785*, N.H. GAZETTE & GEN. ADVERTISER, Nov. 4, 1785, at 1, https://perma.cc/6C8W-KFZC (emphasis added).

concern was ensuring the House reached a particular size for security, after which, House size was not considered relevant; and (5) the fact that the controversy regarding House size dissipated in the early decades after the Constitution's passage.

1. The Word "Regulate" in the Apportionment Amendment

As mentioned, there are significant differences between "apportion" and "regulate." Specifically, "apportion" invokes a robust consideration of numerous factors, such as distributing justice to individuals and avoiding corruption.[276] The word "regulate," in contrast, has no such corresponding component, and is merely akin to a directive.[277] A proponent of a permanent cap on the House may argue that the final Apportionment Amendment actually utilizes the term "regulate." Specifically, the final Apportionment Amendment states:

> 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.[278]

It could be argued, then, that had the Apportionment Amendment been passed, Congress could "regulate" the size of the House how it pleases after the number of House delegates reaches two hundred. After all, the 435 number could be construed as Congress "regulating" the number of representatives. Why then would there be a need for Congress to consider adjusting the size of the House every ten years under the Apportionment Amendment?

Importantly, the Apportionment Amendment—which contains "Apportionment" in the title—never strikes the language of "apportion" from the constitutional text, and further, it also keeps the apportionment occurring in connection with the census.[279] In other words, while Congress may "regulate" the delegates in the House, that regulation still must be an apportionment that aims to avoid corruption and provide for justice, and further, that apportionment must be done every ten years.

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276. *See* 1 JOHNSON, *supra* note 89, at 152.

277. *See* 2 JOHNSON, *supra* note 108, at 517.

278. Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res., 1st Cong. art. I (1789) (emphasis added).

279. *Id.*

However, there is a counterargument: notably, any number after 200 delegates would constitute not just a regulation, but an acceptable "apportionment." Put another way, the Apportionment Amendment provided guidance on what an acceptable apportionment would look like, and an acceptable apportionment could involve a permanent cap, so long as the number of delegates was greater than 200. This is improper for several reasons. At the top, the Amendment speaks of Congress regulating the proportion, as opposed to the number.[280] Thus, a permanent cap of 435 never actually considers the proportion of how many constituents a delegate represents, because that proportion is changed every ten years with the taking of the census.[281]

Moreover, there are additional reasons that indicate Congress would still have to independently arrive at that number of 435 every ten years, as opposed to implementing that number permanently without considering population size. First, the theoretical maximum size of the House changes every ten years in connection with the results of the census.[282] Thus, under the Apportionment Amendment, the population of the country remains important in determining House size, whereas a permanent cap is unresponsive to population growth.[283] Second, the final Apportionment Amendment could simply have set some number to permanently cap the House—i.e., a "forever upper limit"—but it expressly did not do this.[284] Third, allowing for a permanent cap, as opposed to providing for an evaluation of House size every ten years, is a much more drastic change than what was given to the conference committee.[285] Recall that prior to the conference committee, both the House and Senate passed versions that would have mandated—once the House had reached 200 delegates—that there must be an extra representative for every 50,000 or 60,000 individuals respectively.[286] Fourth, interpreting the Apportionment Amendment as permitting a permanent cap would seem dismissive of Anti-Federalists concerns, given that the size of the House was likely the biggest problem that the Anti-Federalists had with the Constitution.[287] Fifth, as discussed, the interpretation that provides for a periodic evaluation of House size is most consistent with the proposed

280. *See* Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res. art I.

281. *See id.*

282. *See id.*

283. *See id.*

284. *See id.*

285. *See* House Apportionment Amendment, 1st Cong. (as proposed by House of Reps., July 28, 1789); Senate Apportionment Amendment, 1st Cong. (as proposed by Senate, Sept. 24, 1789).

286. *See* sources cited *supra* note 285.

287. *See* AMAR, *supra* note 1, at 8.

apportionment amendment from North Carolina. Importantly, North Carolina was unlike the other states in that it did not ratify the Constitution until it received the text of the final version of the Apportionment Amendment.[288] Sixth, also previously discussed, there was an understanding that elections would serve as a way for the public to vote out members who refused to increase the size of the House, and a permanent cap effectively negates that opportunity.[289] Seventh, the interpretation more consistent with the Constitution should be credited. Indeed, George Washington was presented with an apportionment bill that could be construed as constitutional based on one interpretation of the Apportionment Clause, but Washington utilized the first presidential veto on this bill.[290] Specifically, Washington indicated in his veto to Congress that an alternative interpretation of the Apportionment Clause was superior, and as such, he could not sign the bill into law that utilized the inferior interpretation.[291]

2. The Permanent Apportionment Act is Subject to Congressional Repeal at Any Point

Those who wish to argue for the constitutionality of the Permanent Apportionment Act may point out that the statute is not actually "permanent" in the sense that it could be repealed at any time. After all, the Permanent Apportionment Act is not a constitutional amendment, but simply a statute, and what Congress has given, Congress can also take away. Given that the Act is not actually permanent, then, perhaps it should be construed as constitutional. This line of argument fails for several reasons.

First, the Act eliminates Congress' mandate to consider increasing the size of the House every ten years, which is supported by the evidence noted *supra*, such as the constitutional text, dictionary definitions of apportion, as well as the historical record. Again, President Washington vetoed an interpretation of the Apportionment Clause that he felt was not as consonant with the Constitution as other constructions. Second, the statute effectively does operate as a permanent cap, given that it has been in place for nearly the last century. Third, it discards the critical role of elections to hold representatives accountable for their position on increasing the number of delegates. Fourth, if this argument is credited, then an issue of finding a bright line rule is raised. Put another way, would a statute that sets the number of delegates for twenty years be

288. *See* N.C. CONVENTION, *supra* note 127, at 270–71.

289. *See* Debate in Virginia Ratifying Convention, *supra* note 86 (remarks of Wilson Nicholas).

290. *See* Letter from George Washington to U.S. House of Reps., *supra* note 211.

291. *See id.*

constitutional? Thirty years? Fifty years? Or, would it simply be that any statute subject to eventual repeal is constitutionally copacetic? Given that these scenarios lead to such ambiguity, the most obvious interpretation of the Apportionment Clause—i.e., an evaluation every ten years—should be credited.

3. The Need to Embrace Functionalism Over Formalism

Another counterargument would be to embrace functionalism over formalism, because having to set the House size ever ten years could prove controversial and difficult. Put another way, though the historical record may support an evaluation of House size every ten years, that is an overly technical perspective that compromises functional practicalities. Scholars have noted the tension between functionalism and formalism when it comes to drawing the lines to separate the powers of the branches of government.[292]

Evaluating the size of the House arguably is not just formalistic, but functional as well. First, as noted by scholars, the current apportionment procedure is particularly susceptible to gerrymandering, money in politics, and political polarization.[293] Thus, an alternative may be considered more functional. Second, save for the 1920 census, Congress did in fact engage in apportionment after each decennial census.[294] Third, practical alternatives, such as linking House size to the cube root of the population, could be constitutional, as explained *infra*.

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292. *See* Burt Neuborne, *Formalism, Functionalism, and the Separation of Powers*, 22 HARV. J.L. & PUB. POL'Y 45, 46–47 (1998). As stated in the Neuborne article:

> At some point, formalism and functionalism become metaphors for the traditional problem that we have distinguishing between easy cases and hard ones. One's philosophy of interpretation ultimately drives this choice. If a judge believes that there is a single right answer to a particular case because the text fairly commands him to act in a particular way, then he will tend to couch his opinion in formal terms. If, on the other hand, a judge is puzzled because his philosophy of interpretation is such that there are at least two plausible textual interpretations in a given case, then functionalism is brought in as a way to tip the balance. Not surprisingly, the lines between these two approaches are often blurred, and we see judicial opinions couched in formal terms despite being driven either openly or covertly by some sort of functionalist analysis about how the constitutional text works best in a particular setting.

Id. (footnotes omitted).

293. *See* discussion *infra* Part VI.

294. *See* Magliocca, *supra* note 10, at 778–79.

4. The Key Desire Was for the House to Reach a Certain Minimum Size

It was alleged by one Federalist that a key desire of the Anti-Federalists was for the House to reach a certain minimum size, after which it would be unnecessary to pay attention to augmentation.[295] However, Madison expressly observed that the Anti-Federalists were concerned not only with security, but augmentation as well.[296] Further, a permanent cap was considered in early discussions regarding the Apportionment Amendment but was rejected.[297] Moreover, the final Apportionment Amendment provided for a different maximum size of the House every ten years.[298] Additionally, at least one state delegate believed that the House would reach 1,500 representatives a century after the Constitution's passage, so it is not clear what particular "magic number" would constitute an adequate size after which it would be unnecessary to increase the House.[299] Additionally, North Carolina's proposed amendment indicated that even after 200 delegates, "the number of delegates shall be revisited from "time to time, as population encreases."[300]

5. The Controversy Regarding House Size Went Away After the First Few Decades

Joseph Story's *Commentaries on the Constitution* ("*Commentaries*") have been recognized by members of the Supreme Court as an important treatise in interpreting the document.[301] Story's Commentaries states that 40 years after the Constitution's passage, the rancor regarding House size was essentially non-existent:

> Time and experience have . . . greatly impaired, if . . . not utterly destroyed, the force of [the objections that the House would not increase]. The fears which were at that period so studiously cherished, the alarms which were so forcibly spread, the dangers to liberty which were so strangely exaggerated, and the predominance of aristocratical and exclusive power which was so confidently predicted, have all vanished into air, into thin air. Truth has silently dissolved the

295. *See* 1 ANNALS OF CONG. 748 (1789) (Joseph Gales ed., 1834).

296. *See id.* at 749.

297. *See id.* at 747.

298. *See* Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res., 1st Cong. art. I (1789).

299. *See Proceedings of the Massachusetts Convention*, *supra* note 207, at 1.

300. *See* N.C. CONVENTION, *supra* note 127, at 273.

301. *See e.g.*, Wallace v. Jaffree, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting) ("Joseph Story, a Member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared.").

> phantoms raised by imaginations heated by prejudice or controversy . . . at the distance of forty years . . . .[302]

This is in line with scholars who pointed out that the Federalists promised the Anti-Federalists to make the House as large as possible, at least for the first few decades, and that the Federalists kept this promise.[303] It is true that Anti-Federalist nightmares regarding House size did not materialize initially.[304] However, this fact does not mean that the issue of House size was then automatically solved forever.

In fact, Story's *Commentaries* also stresses the importance of the decennial census as a way to "justly represen[t]" the states by recalculating how many House delegates each state received:

> It was proposed to have the census taken once in fifteen years, and in twenty years; but the vote finally prevailed in favor of ten. The importance of this provision for a decennial census can scarcely be overvalued. It is the only effectual means by which the relative power of the several States could be justly represented.[305]

Similarly, then, the decennial census provides an opportunity to increase the size of the House so as to justly represent the people.

Story's *Commentaries* also recount the circumstances regarding the Apportionment Amendment and its failure to pass:

> [The] amendment was never ratified by a competent number of the States to be incorporated into the Constitution. It was probably thought that the whole subject was safe where it was already lodged; and that Congress ought to be left free to exercise a sound discretion, according to the future exigencies of the nation, either to increase or diminish the number of representatives.[306]

Story does not reference at all how the Apportionment Amendment came just one state shy of ratification.[307] Further, while there is mention that the number of House delegates should be left to congressional discretion, it does not follow that the discretion exercised nearly a century ago should be applicable forever. After all, Story observes that the decennial census was a critical tool to "justly represent[]," and further, that congressional discretion to change the number of House delegates should be made

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302. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 473 (Melville Madison Bigelow ed., William S. Hein & Co., 5th ed. 1994) (1833).

303. Akhil Reed Amar, *End of an Era*, AMARICA'S CONSTITUTION, at 25:00 (Jan. 22, 2025), https://perma.cc/5UPU-6XYB (noting that the Federalists represented to Anti-Federalists that they would increase the House for the first few decades and "were true to their word.")

304. *See* 1 STORY, *supra* note 302, at 473.

305. *Id.* at 471.

306. *Id.* at 490.

307. *See id.*

according to the "future exigencies of the nation"—a task which a permanent 435 cap cannot achieve.[308] Thus, Story's *Commentaries* does not preclude a decennial consideration of House size, and in fact, may seem to encourage it.

P. Constitutionality of Alternative Mechanisms, such as Setting Delegates in Proportion to the Cube Root of the Population

The Permanent Apportionment Act was passed in part to avoid disputes regarding setting the size of the House.[309] This is understandable from a practical perspective. Yet other practical alternatives are available that could pass constitutional muster.

For example, one proposed suggestion is to link the size of the House to the cube root of the population.[310] Based on the 2020 census results, this calculation would mean the House would have 692 delegates.[311]

Congress could pass an apportionment statute that automatically adjusted the size of the House in connection with the cube root of the population. Such an approach would be similar to earlier versions of the Apportionment Amendment, which mandated an increase in House delegates in response to increases in population.[312]

One might argue that mandating such population-based increase would be unconstitutional, given that the final Apportionment Amendment provided each decennial Congress with a range of delegate options, as opposed to a fixed number. This supposition is questionable given that both the House and Senate agreed upon actual equations that mandated an increase in House based on increases in population.[313] Moreover, like a cube root, the final Apportionment Amendment also contemplates a formula where the number of representatives increases at a faster rate at first (i.e., one additional delegate for every 30,000 person increase in population), but then at a slower rate as the country's population grows (i.e., one additional delegate for every 40,000, then every 50,000 person increase in population respectively).[314]

Other alternatives include a fixed rate, such as an additional representative for every 100,000 persons. The key point is that any

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308. *See id.* at 471, 490.

309. *See* Magliocca, *supra* note 10, at 778–79.

310. *See* DRUTMAN ET AL., *supra* note 11, at 19.

311. *See id.*

312. *See* Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res., 1st Cong. art. I (1789).

313. *See* House Apportionment Amendment, 1st Cong. (as proposed by House of Reps., July 28, 1789); Senate Apportionment Amendment, 1st Cong. (as proposed by Senate, Sept. 24, 1789).

314. *See* Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, H.R.J. Res. art. I.

formula, so long as it evaluates the number of delegates in response to decennial population increases, could likely pass constitutional muster, if it is in fact truly an apportionment, as opposed to a regulation.

IV. THE PERMANENT APPORTIONMENT ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE NEED FOR THE LEGISLATURE TO CONDUCT APPORTIONMENT, AS OPPOSED TO THE EXECUTIVE

Aside from its problematic permanent cap, the Permanent Apportionment Act also violates the constitutional mandate that the legislature engage in apportionment and cannot outsource this responsibility to the executive. Such a notion is supported by: (a) the plain text of the Constitution; and (b) Supreme Court precedent regarding the need to adhere to specifically identified constitutional directives. Furthermore, even if Congress could outsource a specifically identified constitutional directive, it is noted that (c) the current Supreme Court is perhaps more skeptical of delegation.

A. The Plain Text of the Constitution Indicates that Congress Shall be the Body that Engages in Apportionment

The plain text of the Constitution asserts that the legislature should engage in apportionment.[315] This proposition is supported by the fact that the Constitution allows Congress to "direct" the census, but uses no such language when it comes to apportionment.[316] More specifically, the Constitution allows Congress to "direct" the enumeration, with legal scholars agreeing that the term "enumeration" refers to the census: "[t]he 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."[317] Significantly, the sentence that provides for apportionment is immediately next to the sentence providing for the census.[318] The proximity of the sentences coupled with their varying language supports the notion that Congress shall be in charge of apportionment, but can direct others to complete the census.[319]

315. *See* U.S. CONST. art. I, § 2, cl. 3.

316. *See id.*

317. *Id.* The plain language meaning of "direct" indicates that Congress may supervise a third party when conducting the census. *See* 1 JOHNSON, *supra* note 89, at 599. Specifically, "direct" can mean "to order; to command." *Id.* This buttresses the idea that Congress can "order" or "command" a third party to conduct the census.

318. *See* U.S. CONST. art. I, § 2, cl. 3.

319. This makes sense from a practical perspective. Apportionment could be an abrasive and disputatious process, which is a natural fit for the deliberative body. The census, however, would require a laborious undertaking of surveying the nation's

B. Specific Constitutional Directive

In *Clinton* and *Chadha*, the Supreme Court generally seemed to indicate that the principle of separation of powers meant that specific constitutional directives could not be outsourced to a different branch of government.[320] As such, because the charge to "apportion" is a specifically identified constitutional directive,[321] it cannot be outsourced to the executive.

It is also interesting to note that, in debates surrounding the Permanent Apportionment Act, Representative William Bankhead believed that Congress could not delegate its apportionment responsibility to another branch because it was a specifically identified constitutional directive.[322] Representative Bankhead colorfully alleged that the law constituted "the abdication and surrender of the vital fundamental powers vested in the Congress of the United States by the Constitution itself."[323] He further asserted that, "the spirit if not the letter of the Constitution conferred upon the Congress, and the Congress alone, this power to deal with the question of apportionment of its own Members, because it is a matter of profound importance to every constituency in the country."[324] He also observed that "it certainly has been accepted as a correct interpretation throughout all the years that it is the legitimate and therefore the essential function of Congress to exercise this duty."[325]

C. The Supreme Court's Evolving Nondelegation Jurisprudence

The current composition of the Supreme Court may be skeptical of congressional delegation to the executive.[326] The specific boundaries of each of the three branches of government is not always cleanly defined. Madison admitted that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary."[327] Courts have examined at least two doctrines in the context of separation of powers: (1)

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population – as such, it would be appropriate for Congress to "direct" that responsibility to others.

320. *See, e.g.*, Immigr. & Natural Serv. v. Chadha, 462 U.S. 919, 959 (1983) (noting that one-House veto violated Presentment Clause); Clinton v. City of New York, 524 U.S. 417, 421 (1998) (noting that line item-veto also violated Presentment Clause).

321. *See* U.S. CONST. art. I, § 2, cl. 3; *see also id.* amend. XIV, § 2, cl. 1.

322. *See* 71 CONG. REC. 2259 (1929).

323. *Id.*

324. *Id.*

325. *Id.*

326. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron* deference to administrative agency).

327. THE FEDERALIST NO. 37, *supra* note 58, at 182 (James Madison).

the nondelegation doctrine and (2) the major questions doctrine.[328] Scholars have noted some tension in these doctrines.[329]

First, the nondelegation doctrine limits the authority of Congress, as the legislative body, to delegate to other branches of government.[330] The Supreme Court has noted that "in our increasingly complex society, [Congress] cannot do its job absent an ability to delegate power under broad general directives," so some leeway is needed.[331] In interpreting whether Congress has appropriately delegated to an administrative agency, the Supreme Court has employed the intelligible principles test.[332] The test notes that delegation is appropriate so long as Congress issues some intelligible principle to an administrative agency.[333] This traditionally has been an easy standard to meet, and the Supreme Court just twice has asserted that a Congressional delegation to an administrative agency was unconstitutional.[334] Indeed, the doctrine "has essentially

328. *See* Brian Chen & Samuel Estreicher, *The New Nondelegation*, 102 TEX. L. REV. 539, 541 ("Academic comparisons of the nondelegation doctrine and the major question doctrine are plentiful."); Colin T. Ridgell, *Nondelegation by Any Other Name: The Major Questions Doctrine and the Administrative State*, 59 WAKE FOREST L. REV. 811, 826 (2024). As stated by Justice Gorsuch:

> [T]he major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason for applying the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

Ridgell, *supra*, at 826 (quoting Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring)).

329. Chen & Estreicher, *supra* note 328, at 539 ("The major questions doctrine thus steers courts away from a robust nondelegation doctrine, while preserving the primacy of Congress as the Nation's policymaker-in-chief.").

330. *Id*. at 577.

331. Mistretta v. United States, 488 U.S. 361, 372 (1989).

332. *See id.*

333. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

334. *See* Andrew J. Yablonsky, *Congressional "Activation" of Executive Authority and the Nondelegation Doctrine*, 36 REGENT U. L. REV. 358, 361–62 (2024). As stated in the Yablonsky article:

> In practice, the evidence required to clear the intelligible principle bar is low, frustrating those who believe that the Constitution necessitates a more rigorous application of the nondelegation doctrine. When applying the nondelegation doctrine to statutes authorizing executive action, the Supreme Court has rarely found that Congress failed to provide an agency with an intelligible principle. In fact, the Court has done so only twice, each nearly a century ago.

remained dormant [since] 1935."[335] As long as Congress has articulated some standard for an agency to follow, the delegation will be appropriate. The Supreme Court has noted that "[o]nly twice in this country's history . . . have we found a delegation excessive—in each case because Congress had failed to articulate *any* policy or standard to confine discretion."[336]

Second, in contrast, the major questions doctrine only provides an administrative agency with discretion to "fill in statutory gaps [in non—major questions] where statutory circumstances indicate that Congress meant to grant it such powers."[337] Thus, it is necessary to identify the difference between major and nonmajor questions.[338] The doctrine will not apply when "the statutory gap concerns a question of deep economic and political significance that is central to the statutory scheme."[339] These distinctions are not always clear.[340]

In the 2019 Supreme Court decision of *Gundy v. United States,* a number of dissenting justices strongly signaled their desire to revisit nondelegation and clarify its relationship to both separation of powers and major questions.[341] Given recent conservative appointments, the viewpoint identified by the dissent in Gundy may eventually become the majority.

Gundy involved a federal statute regarding registration for sex offenders.[342] The statute left open the question of whether sex offenders convicted *before* the statute's passage were required to register.[343] The

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Id.

335. *Id.* at 549.

336. *Id*.

337. Gundy v. United States, 588 U.S. 128, 167 (2019) (Gorsuch, J., dissenting) (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

338. *See id.*

339. *Id.*

340. *See* Chen & Estreicher, *supra* note 328. As stated in the Chen and Estreicher article:

> Stephen Breyer coined the term major questions in an article from 1986, observing that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." That uncontroversial premise has blossomed into an immensely controversial legal doctrine. Even now, its metes and bounds remain undetermined. What distinguishes major and nonmajor questions? How clear does the congressional authorization have to be? Additionally, the Supreme Court has yet to fully clarify the doctrine's basis, beyond some cursory reference to "separation of powers principles and a practical understanding of legislative intent."

Id.

341. *See Gundy*, 588 U.S. at 167.

342. *See id.* at 133 (majority opinion).

343. *See id.* at 134.

Attorney General adopted administrative language requiring offenders convicted prior to the statute's passage to register.[344] One sex offender who was convicted prior to the statute's passage did not register.[345] Accordingly, he challenged his conviction on grounds that there had been an unconstitutional delegation of authority from the legislature to the Attorney General.[346]

The majority asserted that there was no constitutional violation, for in their view, the intelligible principles threshold had been cleared.[347] However, the dissent condemned the intelligible principles test, and noted that the nondelegation doctrine merited constitutional reconsideration.[348] Specifically, the *Gundy* dissent believed that delegation by the legislature to an administrative agency could only clear the intelligible principles test if three questions were answered.[349] Namely, these questions were as follows: first, "[d]oes the statute assign to the executive only the responsibility to make factual findings;" second, "[d]oes it set forth the facts that the executive must consider and the criteria against which to measure them?"; third, "[a]nd most importantly, did Congress, and not the Executive Branch, make the policy judgments?"[350]

The *Gundy* dissent further condemned what it considered the jurisprudential mess involved with distinguishing the separation of powers doctrine, the nondelegation doctrine, and major questions.[351] Specifically, the dissent noted that, "[w]hen one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names."[352] That being said, in *Allstates Refractory Contractors, LLC v. Su*, which would have provided an opportunity to revisit nondelegation, the Court denied certiorari, even though many justices may now support a reconceptualized nondelegation standard.[353]

In sum, Congress cannot disclaim itself from its apportionment responsibilities because the apportionment charge is a specifically identified constitutional charge. Further, the current majority of the Supreme Court may look askance at such delegation.

344. *See id.* at 172 (Gorsuch, J., dissenting).
345. *See id.* at 134 (majority opinion).
346. *See id.*
347. *See id.* at 135.
348. *See id.* at 164 (Gorsuch, J., dissenting).
349. *See id.* at 167.
350. *Id.* at 167.
351. *See Gundy*, 588 U.S. at 167.
352. *Id.*
353. *See* Allstates Refractory Contractors, LLC v. Su, 144 S. Ct. 2490 (2024).

V. INVALIDATING THE PERMANENT APPORTIONMENT ACT IS JUSTICIABLE

This Part analyzes the justiciability of the Permanent Apportionment Act through the lens of: (a) political question doctrine; (b) due process of lawmaking; and (c) standing.

A. The Political Question Doctrine

First, a key issue is whether the Supreme Court, or some other federal court, could even entertain a case involving the Permanent Apportionment Act, since federal courts will not consider "political questions."[354] In other words, courts should avoid deciding cases that are properly within the domain of another branch of government.[355] Scholar Erwin Chemerinsky has asserted that "the political question doctrine can only be understood by examining the specific areas where the Supreme Court has invoked it."[356] In *U.S. Dept. of Commerce v. Montana,* the Supreme Court entertained a constitutional challenge to the Permanent Apportionment Act on grounds other than the need for decennial review, and determined that the matter was indeed justiciable.[357]

The standard for determining a nonjusticiable political question was articulated in *Baker v. Carr*, another case involving apportionment (and where the Supreme Court also ruled in favor of justiciability).[358] The *Baker* Court offered six factors to help determine whether a matter constituted a nonjusticiable political question.[359] Specifically, the Court looked to: (1) whether there was a "textually demonstrable constitutional

354. *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 723 (2016) ("Since the very early republic, federal judges have considered 'political questions' beyond the scope of Article III."). One federal district court did dismiss a challenge to the Permanent Apportionment Act based on the fact that the issue was a political question, but the challenge was based on the notion that a scrivener's error actually meant that the Apportionment Amendment had in fact been ratified by the requisite number of states. LaVergne v. U.S. House of Representatives, 392 F. Supp. 3d 108, 117 (D.D.C. 2019) ("Plaintiffs' . . . claims [that the Apportionment Amendment was ratified] are barred by the political question doctrine because they hinge on the plaintiffs' scrivener's error argument.").

355. *See Political Questions, Public Rights, and Sovereign Immunity*, *supra* note 354, at 728.

356. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.6.1 (6th ed. 2012).

357. *See* U.S. Dept. of Com. v. Montana, 503 U.S. 442, 445 (1992).

358. *See* Baker v. Carr, 369 U.S. 186, 209 (1962). In *Baker*, the Supreme Court entertained a 14th Amendment equal protection claim from voters who complained they experienced a "debasement of their votes" because the Tennessee legislature had failed to reapportion seats, despite the "substantial growth and redistribution of [the State's] population." *Id.* at 188, 192. There, the Supreme Court held that "this challenge to an apportionment presents no nonjusticiable 'political question," and accordingly, the Supreme Court proceeded to entertain the case on the merits. *Id.* at 209.

359. *See id.*

commitment of the issue to a coordinate political department," i.e., another co-equal branch; (2) a "lack of judicially discoverable and manageable standards for resolving [an issue]"; (3) the need to resolve some "initial policy determination of a kind clearly for non-judicial discretion"; (4) whether a judicial decision would express "lack of respect [to] coordinate branches of government"; (5) the need for "adherence to a political decision already made"; or (6) "if a judicial decision would provide "the potentiality for embarrassment" because multiple branches would be weighing in on the same question.[360]

1. First *Baker* Factor

With regards to the first factor—a textually demonstrable commitment of the issue to another branch of government—the *Baker* Court was tasked with evaluating whether state law was consistent with the federal Constitution.[361] As such, *Baker* did not deal with a federal co-equal branch of government, but rather, state apportionment matters in light of federal rights.[362] Yet in *U.S. Dept. of Commerce v. Montana*, the Supreme Court expressly considered the Permanent Apportionment Act justiciable and did not believe the matter was a political question, and seemed to focus most of its attention on the first *Baker* factor.[363]

In *Montana*, the basis for the challenge to the Permanent Apportionment Act was not the need for a decennial review by Congress regarding the total number of House delegates.[364] Rather, the challenge was based on the Act's "equal proportions" method for awarding delegates.[365] The equal proportions method was one method, among several proposed, to resolve the issue of fractional delegates.[366] The results of the census often fail to cleanly translate into whole numbers. For example, without a numerical adjustment, one state might receive 4.89 delegates, another state might receive 8.52 delegates, and still another might receive 12.12 delegates.[367] To remedy this issue, the Permanent Apportionment Act mandates that such fractional inconsistencies be resolved via the equal proportions methodology.[368] Prior to the Act, different Congresses had utilized varying formulas to resolve such fractional dilemmas.[369]

360. *Id.* at 216.
361. *See id.*
362. *See U.S. Dept. of Com.*, 503 U.S. at 458.
363. *See id.* at 459
364. *See id.* at 444
365. *See id.* at 444–45.
366. *See id* at 451.
367. *See id.* at 355.
368. *See id.*
369. *See id.* at 450–51.

The *Montana* Court admitted that, unlike *Baker*, the issue involved *federal* legislation regarding apportionment, as opposed to a state decision regarding apportionment.[370] Thus, the first *Baker* factor—whether there was a textually demonstrable commitment of the issue to another branch of government—was present in *Montana* in a way that it was not in *Baker*.[371] Nonetheless, the Court did not hold that this barred justiciability. Specifically, the Court stated: "[r]espect for a coordinate branch of Government raises special concerns not present in our prior cases, but those concerns relate to the merits of the controversy rather than to our power to resolve it. As the issue is properly raised in a case otherwise unquestionably within our jurisdiction, we must determine whether Congress exercised its apportionment authority within the limits dictated by the Constitution."[372]

The then Court conceded that the matter was quite political in some respects, as resolving the matter "raises an issue of great importance to the political branches."[373] Further, the Court admitted that "the issue has motivated partisan and sectional debate during important portions of our history."[374] Nonetheless, the Court asserted that the case was not an impermissible political question, as the matter "turns on the proper interpretation of the relevant constitutional provisions," and thus, "the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary."[375]

Additionally, other Supreme Court cases have held that despite the authority one branch may seem to have over a domain, there is nonetheless a place for the judiciary to ascertain whether exercise of that authority adheres to constitutional mandates, and doing so does not run afoul of the first *Baker* factor.[376] For example, in *United States v. Munoz-Flores*, the Court examined whether a federal statute adhered to the contours of the Origination Clause.[377] The Court asserted that it had a "duty to review the constitutionality of congressional enactments . . . [o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."[378] The Court further stated that "alleged

370. *See id.* at 459.
371. *See id.*
372. *U.S. Dept' of Com.*, 503 U.S. at 459.
373. *Id.* at 458.
374. *Id.*
375. *Id.*
376. *See generally, e.g.*, United States. v. Munoz-Flores, 495 U.S. 385 (1990).
377. *See id.* at 390.
378. *Id.* at 391.

conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility."[379]

Similarly, in analyzing the first *Baker* factor—whether there has been a "textually demonstrable constitutional commitment" to a co-equal branch[380]—an analysis of *INS v. Chadha*[381] is helpful. *Chadha* involved a matter of constitutional process: specifically, whether the line-item veto conformed to the dictates of the Presentment Clause.[382] The government noted that it had broad authority to implement and enforce naturalization policy.[383] However, the *Chadha* Court countered that, "[t]he plenary authority of Congress over [implementing naturalization policy] is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."[384]

Thus, the relevant issue is not whether Congress possesses authority over the apportionment process. Rather, the issue is whether the current apportionment practice is a constitutionally permissible means of implementing its apportionment power.

2. Second *Baker* Factor

In *Rucho v. Common Cause*, the Court focused much of its attention on the second *Baker* factor, whether there was a "clear, manageable, and politically neutral" standard.[385] In a 5-4 decision, the Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts"[386]

It is worthwhile to delve into the *Rucho* Court's reasoning as to why partisan gerrymandering did not meet its "clear, manageable, and politically neutral" standard.[387] With regard to the mandate that any standard be "clear," the *Rucho* Court noted that if judicial intervention were to take place on "the most heated partisan issues," such as gerrymandering, then the courts "must be armed with a standard that can reliably differentiate unconstitutional from constitutional political gerrymandering."[388]

379. *Id.*
380. *See id* at 389.
381. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).
382. *See id.* at 959.
383. *See id.* at 940.
384. *Id.* at 940–41.
385. Rucho v. Common Cause, 588 U.S. 684, 703, 706 (2019).
386. *Id.* at 718.
387. *Id.* at 703.
388. *Id.* at 704 (first quoting Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring); and then quoting Hunt v. Cromartie, 526 U.S. 541, 551 (1999)).

Second, with regards to the "manageability" prong, the court observed that "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process . . . ."[389] Finally, third, in terms of political neutrality, the Court asserted that judicial imposition in the domain of partisan gerrymandering could not be politically neutral, for "the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly."[390] For example, if a state had eight congressional districts, then a court would be charged with the responsibility of determining whether a 6-2 or 5-3 apportionment (or some other ratio) would be constitutionally copacetic—a task that courts could not achieve reliably.[391]

This second *Baker* factor—the need for a cognizable standard that the judiciary can utilize—would not be a bar to justiciability.[392] A Court would simply be deciding whether Congress needed to engage in a decennial consideration of House size—and this focused analysis could easily hurdle the "clear, manageable, and politically neutral" language employed in *Rucho*.[393] With regards to the issue of clarity, the standard can be stated quite precisely: did Congress engage in a consideration of the total number of delegates every ten years, after the latest census count? With regards to "manageability," the issue of whether to increase the total number of delegates in the House arises exactly once every ten years, in relation to the population, which is a far cry from judicial intervention into political gerrymandering, which would involve consideration of nearly all elections. Finally, a consideration of whether to increase the House is politically neutral. After all, the judiciary is not dictating that Congress decide to increase or decrease the total number of delegates. The judiciary is also not advocating for one political party over another political party. Rather, the judiciary is simply asserting that Congress should not shirk its responsibility to determine the number of House delegates.

3. Remaining *Baker* Factors

The Court has often focused much of its attention on the first two of the *Baker* factors.[394] Nonetheless, the remaining factors would not vitiate justiciability. Courts would not be confronted with any initial policy determination that would clearly be the province of another branch, such

389. *Id.* at 703–04 (quoting Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring)).
390. *Id.* at 708.
391. *See id.*
392. *See id.*
393. *Id.* at 703.
394. *See, e.g.*, *id.*

that the third factor would be problematic. Indeed, a federal court would not be deciding on policy, but rather would be opining on constitutional process. Further, there would be no lack of respect accorded to the other branches, as per the fourth *Baker* factor. The legislative branch may have asserted that 435 should be the maximum number of representatives, but this was rendered nearly a century ago.[395] As such, even if there were disrespect, the judiciary would not be disrespecting the current Congress. Moreover, the fifth *Baker* factor is likewise inapposite, namely the need for "adherence to a political decision already made."[396] Even if deciding on the House size amounts to a political decision, it is a constitutional directive. Finally, the "potentiality for embarrassment" of the legislature is limited, as the legislature that opined on the matter convened nearly hundred years prior.[397]

B. Due Process of Lawmaking

Some scholars have noted that courts are hesitant to second guess the *process* by which Congress enacts laws.[398] This jurisprudence is called

395. *See* Harden, *supra* note 10, at 73.

396. U.S. Dep't. of Com. v. Montana, 503 U.S. 442, 456 (1992).

397. It is important to note that the Supreme Court's decision in *U.S. Department of Commerce v. Montana* only dealt with automatic apportionment via equal proportions method under the Permanent Apportionment Act. *See id.* at 444. The issue of the constitutional need for a decennial conversation about the total number of delegates in the House was not before the Court. It is true that the Court noted that automatic apportionment was convenient, and in its view, constitutional. But that holding of constitutionality only extended to the *methodology* for conducting the apportionment. *Id.* at 465. Specifically, the Court noted: "The District Court suggested that the automatic character of the application of the method of equal proportions was inconsistent with Congress' responsibility to make a fresh legislative decision after each census." *Id.* The Court further stated that, "[i]ndeed, 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." *Id.* Importantly, the Court noted that "[t]he decision to adopt the method of equal proportions was made by Congress after decades of experience, experimentation, and debate about the substance of the constitutional requirement." *Id.*

While the decision to adopt the method of equal proportions was subject to a debate regarding its constitutionality, significantly, there was no concomitant debate regarding the need for a constitutional decennial consideration of House size as related to the Permanent Apportionment Act. Thus, when the Court opined that, "[w]e see no constitutional obstacle preventing Congress from adopting such a sensible procedure [of equal proportions]," the logic employed does not extend to the decennial consideration of House size. *Id.* Further, the Court conceded that any rule providing for administrative efficiency "remains open to challenge or change at any time." *Id.* As such, the various arguments posed *supra*—including the plain text of the Constitution, as well as the original plain public meaning—support the need for a decennial conversation regarding House size.

398. *See* Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1925 (2011). As stated in the Bar-Siman-Tov article:

"due process of lawmaking"[399] or "structural due process."[400] However, this doctrine is not consistently applied across cases.[401] It is one matter to avoid second guessing how Congress enacts its laws; it is quite another to allow Congress to enact laws antithetical to constitutional procedures. The Supreme Court has expressly rejected congressional action that was contrary to constitutional procedure.[402] Furthermore, it is questionable whether apportionment can be adequately characterized as procedural issue, as opposed to a substantive matter, given its importance in providing the citizenry a voice in their republic. Finally, structural due process applies to lawmaking process.[403] This Article does not impugn the *procedure* by which the Permanent Apportionment Act was initially enacted. Rather, it rejects the Act's *continued applicability* to set apportionment. Specifically, the Act could constitutionally have set the number of delegates at 435 until the next census.

C. Standing

To meet the constitutional requirement of standing, a plaintiff must: (1) "have suffered an 'injury in fact,'"; (2) show "a causal connection between the injury and the conduct complained of"; and (3) demonstrate that it is "'likely,' as opposed to merely 'speculative,' that the injury will

> The resistance to [judicial review of the legislative process] is shared by many judges, constitutional scholars, and legislation scholars. The prevalent view is that courts should exercise substantive judicial review - and perhaps also structural judicial review, in the sense of separation of powers and federalism - but should abstain from engaging in [judicial review of the legislative process]. The rejection of [judicial review of the legislative process] is often explicitly accompanied by a reaffirmation that courts should, of course, review the constitutionality of the statute's content.

Id.

399. *See* Laurence H. Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking*, 10 CREIGHTON L. REV. 433, 444 (1977).

400. Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 86–87 (1987) ("Structural due process focuses on the structures through which policies are formed and applied. Under its mandate, courts constitutionally require that procedures for governmental policy making and applying take a certain form, following a process with certain features, or display a particular sort of structure.").

401. Bar-Siman-Tov, *supra* note 398, at 1917 n.6 ("I have argued elsewhere that this position is doctrinally unstable and hard to reconcile with decisions [from the Supreme Court related to separation of powers].").

402. *See, e.g.*, Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983); Clinton v. City of New York, 524 U.S. 417, 421 (1998).

403. *See* Bar-Siman-Tov, *supra* note 398, at 1925.

be 'redressed by a favorable decision.'"[404] As one scholar has noted, "structural claims present a . . . difficult fit with standing, [but] the Court has often articulated such claims as individual harms, thereby framing them in a standing-friendly manner," and further, that "[m]alapportionment claims present a good example of this dynamic."[405] Thus, questions of apportionment, though seeming to encounter facial difficulties to comport with standing requirements, are often interpreted in a manner where standing is found.[406] Several potential plaintiffs could have standing to sue, including a citizen from a specific district that would benefit from an increase in the number of delegates, a state congressional delegation that would enjoy a greater percentage voting power, a state attorney general, as well as the state itself.

The Supreme Court has noted in certain situations, there might never be standing:

> [I]t has been suggested that the plaintiffs here must have standing because if these plaintiffs do not have standing, then it may be that no one would have standing . . . . [T]his Court has long rejected that kind of "if not us, who?" argument as a basis for standing. The [argument] that if these plaintiffs lack "standing to sue, no one would have standing, is not a reason to find standing." *Rather, some issues may be left to the political and democratic processes* . . . .[407]

It is important to point out the situations where no theoretical plaintiff could exist are linked to scenarios where the political and democratic process would be an acceptable avenue to pursue reform.[408] Yet as mentioned, the Anti-Federalists were skeptical that the democratic process could serve as an effective mechanism to increase the size of the House given that members of Congress would essentially be charged with the task of diluting their own influence, and would thus be disinclined to increase their numbers.[409] Indeed, the clamor for an Apportionment Amendment arose from this precise concern, thus, it should be the case that *some* plaintiff must have standing to bring suit.[410] Furthermore, the

404. 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 8332 (2d ed. 2018) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

405. Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 191 (2011).

406. *See id.*

407. FDA v. All. for Hippocratic Med., 602 U.S. 367, 396 (2024) (emphasis added) (citations omitted) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)).

408. *See id.*

409. *See* The Debates in the Convention of the State of New York on the Adoption of the Federal Constitution, *supra* note 83, at 244.

410. *See* 1 ANNALS OF CONG. 727 (1789) (Joseph Gales ed., 1834) (recounting concerns that the House would not increase in size).

Permanent Apportionment Act deprives voters of evaluating every ten years whether their representatives objected to an increase the size of the House, thus rendering a resort to the democratic process ineffectual. One final point is that a standing claim might be couched not just in terms of increasing one's voting share, but rather, the opportunity to have such vote share increased.[411]

VI. POLICY REASONS SUPPORTING AN INCREASE IN HOUSE SIZE

The intent of this Article is not to argue that an increase in House size is necessarily desirable. Rather, its purpose is limited in scope: namely, to explore the constitutionality of current apportionment practice. Nonetheless, it is worthwhile to explore the ramifications of what might happen if Congress were forced to engage in a decennial reckoning of delegate size, and upon such reckoning, it decided to increase the number of House delegates.[412]

Several advantages have been proposed regarding a larger House of Representatives.[413] First, a representative may be more responsive to constituent needs.[414] Currently, each representative has on average nearly three quarters of a million constituents, and by 2050, that number may rise to one million.[415] Second, an increase in the number of House delegates may make partisan gerrymandering more difficult, as "a larger House would make it harder to entirely lock out a political minority of

411. A federal district court did reject a challenge to the Permanent Apportionment Act based on the idea of speculative harm. LaVergne v. U.S. House of Representatives, 392 F. Supp. 3d 108, 118–19 (D.D.C. 2019). As stated by the *LaVergne* court:

> [Plaintiff] offers broad-brush descriptions of types of putative harms he associates with the [Permanent Apportionment Act] . . . . [H]e does not explain how invalidation of [the Act] would lead to any identified alternative method of apportionment, nor how such method would cause him to regain the claimed lost representation.

Id. The court's insistence of providing evidence is at odds with deference given to standing in apportionment cases. Further, the Court does not discuss the foundational issue that the democratic process is unlikely to redress grievances, given the Anti-Federalist concern that congressional representatives are disincentivized to increase the House delegate count because of the corresponding dilution in their authority.

412. Of course, Congress could choose to decrease the number of delegates, or keep the number of delegates at 435.

413. KANE ET AL., *supra* note 11, at 8–9 (listing benefits as "local responsiveness and equal representation," "mitigating partisan gerrymandering," "electoral college parity," "preventing corruption and capture by special interests," "diversity," "third party representation," "party conformance and control," and "scope of work").

414. *See id.*

415. *See id.*

representation and cement the majority's hold on power."[416] Third, more representatives in the House could reduce corruption, as each representative's vote share would be diluted.[417] Fourth, expanding the House could reduce the incumbency advantage, as a challenger would not have to reach as many people, nor cover as much ground when campaigning.[418] Fifth, third party representation may also be improved, as a third party similarly need not expend as many resources to promote their message.[419] Sixth, logically, if a candidate has a smaller district, then they may need to raise less money than if they were competing in a larger district. However, various disadvantages to an increased House have also been identified, including increasing size of government.[420] Admittedly, a finding that Congress must engage in a decennial consideration of House size could be highly disputatious, and the aim of the Permanent Apportionment Act was to resolve future disagreements. Yet simply because an act is convenient does not render it constitutional.[421] Moreover, some other formula, such as linking House size to the cube root of the population, could avoid disputes while simultaneously being responsive to changes in population growth.

One other point is that it may actually be politically *unpopular* to resist an increase in the size of the House, given that many constituents may desire more representation. Indeed, a House member who votes to either keep the number of delegates the same—or perhaps even reduce the number of delegates—would face accusations that the House member was acting oligarchically in a manner designed to preserve their own power, an issue about which the framers themselves were worried. Arguably, such political considerations may not apply to the Senate, as each senator's voting power is not quantitatively impacted by a change in House size. Nonetheless, it may not be politically popular for an individual senator to resist a push to increase the size of the House, and accordingly, the Senate may also be strategically inclined to embrace a larger House.

Finally, increasing the size of the House may serve as an efficacious method to enact electoral college reform.[422] After all, increasing the number of delegates would change the number of votes in the Electoral College that each state possesses. Indeed, just as the number 435 may be altered based on an increase in the size of the House, so too may be the famed number of 538 delegates, with 270 needed to win.

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416. *Id.* at 8.
417. *See id.* at 20.
418. *See id.*
419. *See id.* at 21.
420. *See id.*
421. *See, e.g.*, Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 945 (1983).
422. Some have argued for the need to reform the electoral college. *See generally* JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT (2020).

VII. CONCLUSION

It is not an understatement to say that the size of the House of Representatives has the potential to affect every single piece of legislation considered at the federal level. Indeed, the number of House delegates was one of the most contentious issues deliberated at the Constitutional Convention in Philadelphia.[423] While the Permanent Apportionment Act appears to be a sensible fix in that it avoids conflict regarding the size of the House, the Act is unconstitutional under various theories of originalism, textualism, and living constitutionalism.

A finding that the Permanent Apportionment Act is unconstitutional would be significant, as it would force a dialogue about increasing the size of the House. Most decennial Congresses prior to the Act's passage voted to increase the total number of House delegates.[424] Further, as noted *supra*, a formula that automatically increased the size of the House, such as one that links the number of House delegates to the cube root of the population, would likely pass constitutional muster. Such a formula may be a sensible fix in that it avoids disputes over the size of the House, while simultaneously responding to population growth. An increase in House size may have profound consequences. Indeed, scholars have noted that polarization is an extraordinary threat to our democracy, and increasing the size of the House may substantially reduce such polarization.[425]

Finally, revisiting the Permanent Apportionment Act may provide an opportunity for the Supreme Court to clarify more expansively the appropriate divisions of the branches of government, as the Act operates squarely within the nexus of constitutional directive, legislative fiat, and administrative action. Yet "We the People" should not have to press the issue of the Act's constitutionality by seeking redress through the courts. Rather, Congress should live up to its grave constitutional responsibility to apportion. It should repeal the Permanent Apportionment Act and consider implementing some formula, such as automatically increasing the size of the House in connection with the cube root of the population.

423. *See* Byron, *supra* note 10, at 242.
424. *See id.*
425. *See* McCoy & Press, *supra* note 21.