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CONSTITUTIONAL REVOLUTION: A PATH TOWARDS EQUITABLE REPRESENTATION

CHRIS CHAMBERS GOODMAN, ESQ.*

*“We’ve learned that quiet isn’t always peace,
And the norms and notions
of what ‘just is’
Isn’t always justice”¹*

This Essay conceptualizes “constitutional revolution” from an equity perspective, asking the question: What changes would and should be made if equity was at the center of constitutional reform? The Preamble states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.²

In order to fulfill these promises, we must make two urgent modifications in the current system of congressional representation to more effectively guarantee equitable representation. Otherwise, we must convene a Constitutional Convention for 2037. The year 2037 is the 250th anniversary of the Constitution, which allows sixteen years to plan, study, evaluate, and implement reforms.³

Putting equity at the center of our analysis, the current method of allocating congressional representatives is notably inequitable. Imagine

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1. AMANDA GORMAN, *THE HILL WE CLIMB* 12 (2021).

2. U.S. CONST. pmb1.

3. Why wait? Politics. However, one could argue that ratification in 1788 calls for a convention in 2038.

being in John Rawls's "original position"⁴ beneath the "veil of ignorance,"⁵ not knowing whether you would be living in a large or small state, a rural or urban community, registered as a Democrat, Republican, or an Independent.⁶ Would you make this arrangement of somewhat proportional representation in the House of Representatives and somewhat equal representation in the Senate?⁷ For those who place equity at the center, the answer is emphatically "no." Justice as fairness requires initial equality and fair representation.⁸ While the Senate provided the space for initial equality, and the House for fair representation, the "people" are not represented equitably. History and recent events have redefined "we the people"—including the "people" to which the Constitution refers. Many groups were excluded from the constituency at the time of the Constitution's drafting.⁹ Amendments and interpretations have provided many of them with a "seat at the table." However, the past four years have demonstrated that the least privileged still remain "on the menu."

While the Framers thought they were making the best compromise by bringing formerly sovereign entities into one body politic, the present state of representation evolving from that compromise is wholly undemocratic. The small (in number of constituents) minority exercises an ever-increasing share of congressional votes, and there is no principled reason based on liberty nor equality to provide a benefit of this magnitude.¹⁰ As such, residents of "sparsely populated states must be protected against having their interests swamped in a legislative body apportioned according to

4. JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

5. *Id.*

6. See generally THE FEDERALIST NO. 10 (James Madison) (supporting the Constitution's proposal of a republican government). Madison believed that political groups were more likely to make self-interested decisions because each member only incurs a partial share of the public opprobrium caused by such decisions. *Id.* at 69–70.

7. See RAWLS, *supra* note 4, at 136–42 (arguing that the principles behind the veil of ignorance help to allocate resources fairly and form a just society). Rawls describes the veil of ignorance as when "[n]o one knows his situation in society nor his natural assets, and therefore no one is in a position to tailor principles to his advantage." *Id.* at 139.

8. *Id.* at 194–95; Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 2065–66 (2019).

9. See *We the People*, N.Y. HIST. SOC'Y, https://www.nyhistory.org/sites/default/files/newfiles/We-the-people-with-discussion-questions12_20_16.pdf (describing changes in the Constitution's interpretation of "we the people" to reflect new values over time). The Constitution defined "people" as "free, white men, meaning no women or people of color were given a voice in forming the new government." *Id.*

10. See Orts, *supra* note 8, at 2028 (explaining that the Seventeenth Amendment's promise of equal suffrage in the Senate confers equal voting power to Americans in Congress). Orts argues that "[s]urely, the founders had no original intent to privilege rural areas given that ninety-five percent of the country was rural at the time of the first census in 1790." *Id.* at 2080.

population,”¹¹ but if they require protections as discrete and insular minorities, “then it is not clear what is left of [the] principle” of majority rule.¹² For even if the majority does not possess all political power, it “must . . . enjoy at least a *majority* of it.”¹³

Thus, it is (past) time for a reallocation of methods of congressional representation. Part I frames this constitutional revolution.¹⁴ Part II analyzes current inequities.¹⁵ Parts III and IV provide strategies for modifying congressional representation allocations in the House and Senate.¹⁶

I. REVOLUTION? REALLY?

There is no fixed definition of the term “constitutional revolution.”¹⁷ Some believe revolution requires a sudden and/or violent change, while others find that revolutions can occur gradually. Some say that revolution occurs only when rights are vindicated; others, when change is outside of, rather than within, the existing constitutional structure.¹⁸ This Essay argues that the revolution can vindicate rights, transpire gradually, and occur within the existing structure through a reinterpretation of norms. It seeks to introduce change within the structure and resort to changing that structure only if necessary.

Depending on one’s definition, we have undergone several constitutional revolutions.¹⁹ For instance, 1937 is seen as a time of constitutional revolution based on then-President Franklin Delano Roosevelt’s battle with Supreme Court justices over his threatened “court-packing” plan and the latter’s rulings against New Deal legislation.²⁰ Perhaps

11. Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 237 (2020). Klarman understands that “[p]rotecting racial and religious minorities from oppression can be reconciled with the principle of majority rule.” *Id.*

12. *Id.*

13. *Id.*

14. *See infra* Part I.

15. *See infra* Part II.

16. *See infra* Parts III and IV. Numerous other equity issues in our democratic processes are beyond this Essay’s scope.

17. The 2020 book *Constitutional Revolution* provided the theme for the 2021 University of Maryland Carey School of Law Discussion Group on Constitutionalism. *See also* GARY JEFFREY JACOBSON & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION 36 (2020) (reserving “the term ‘revolution’ for incremental change that portends the promise of major transformation”).

18. Specific references are omitted, honoring the “do not copy, quote, or cite” rule of the Discussion Group.

19. *See generally Supreme Court Developments: The Constitutional Revolution*, THIRTEEN (Dec. 2006), <https://www.thirteen.org/wnet/supremecourt/timeline/1935.html> (listing even 1935 as a constitutional revolution when the court relocated from the old Senate chamber into its current opulent building).

20. *See* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), <https://www.smithsonianmag.com/history/when->

his threat convinced the Court to change its interpretations.²¹ Whatever the catalyst, the Court then began upholding President Roosevelt's legislation.²²

Other instances of constitutional revolutions followed the revolution initiated by the Court during the Roosevelt era.²³ For example, another contender is *Reynolds v. Sims*,²⁴ where the Court held that state legislatures with bicameral houses must apportion seats on the basis of population rather than at-large.²⁵ The Court reiterated its conclusion from *Wesberry v. Sanders*,²⁶ stating that “[n]o right is more precious . . . than that of having a voice in the election of those who make the laws under which . . . we must live,”²⁷ and that “[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.”²⁸ Although the state's allocation scheme was similar to that of the U.S. Senate,²⁹ the determinative distinction was that the federal system was “conceived out of compromise and concession indispensable to the establishment of our federal republic.”³⁰ In contrast, “subdivisions of States” were and have always been subdivisions of states, not independently functioning governmental units, and thus the “federal analogy” is

franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/ (relating the underlying conflict between Roosevelt and the Supreme Court regarding proposed New Deal programs).

21. See John M. Lawlor, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 975 (1986) (stating that Roosevelt's court-packing plan was denounced as a ploy to fill the Court with proponents of New Deal programs). Others disagree based on earlier cases and because the plan was rejected before the Court shifted its decisions to be more favorable. G. Edward White, *The “Constitutional Revolution” as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 881 (1997). White concludes that “the conventional explanation pays insufficient attention to the shift in the nature of constitutional interpretation heralded by decisions such as *Blaisdell*, handed down three years before the Court-packing plan.” *Id.* at 907.

22. See also JACOBSON & ROZNAI, *supra* note 17, at 25 n.31 (explaining that this shift “has . . . no coherent meaning”).

23. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 485 (1997) (revealing that the Court granted the federal government widespread powers during the New Deal period); see also Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Reynolds Reconsidered*, 67 ALA. L. REV. 485, 486 (2015) (explaining that *Reynolds* “and its companion cases revolutionized the nation”).

24. 377 U.S. 533 (1964).

25. *Id.* at 568. The Court recognized the paramount importance of “the right of all qualified citizens to vote, in state as well as in federal elections.” *Id.* at 554.

26. 376 U.S. 1 (1964).

27. *Id.* at 17.

28. *Reynolds*, 377 U.S. at 567. The Court noted that “[t]he Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.” *Id.* at 568.

29. *Id.* at 571. The Court noted, “[a]rguably, this is analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population.” *Id.*

30. *Id.* at 574.

“inapposite.”³¹ This Essay considers how *Reynolds* can ignite a constitutional revolution over an equitable reallocation in congressional representation.³²

II. BY THE NUMBERS

As *Reynolds* predicted, demographics have changed substantially.³³ When *Reynolds* was decided, the *New York Times* estimated that “the urban population of the United States is now 32.9 per cent of the whole; the suburban 20.3 per cent, and the rural 46.8 per cent.”³⁴ It also anticipated that “[t]he movement of population into the big metropolitan centers seems destined to continue.”³⁵ And it did. Between 2012 and 2016, over 80% of the U.S. population resided in urban and suburban areas.³⁶ A mere 14% resided in rural areas.³⁷ In millions, the rural population is about 46, the population of suburbs and small metropolitan areas is about 175, and the urban population is about 98.³⁸ The fifty-two largest metropolitan areas are now home to more than half of the country’s population.³⁹ Such geographic

31. *Id.* at 575.

32. *See infra* Part II.

33. *Reynolds*, 377 U.S. at 567. The Court noted that “[a] nation once primarily rural in character becomes predominantly urban.” *Id.* As such, “[r]epresentation schemes once fair and equitable become archaic and outdated.” *Id.* “But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen’s vote cannot be made to depend on where he lives.” *Id.*

34. *Constitutional Revolution*, N.Y. TIMES (June 16, 1964), <https://www.nytimes.com/1964/06/16/archives/constitutional-revolution.html>.

35. *Id.*

36. PEW RSCH. CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN AND RURAL COMMUNITIES 17 (2018) [hereinafter WHAT UNITES AND DIVIDES]. An urban county is one that is “located in the 53 U.S. metropolitan areas with at least a million people.” *Id.* Suburban or small metro counties “include those outside the core cities of the largest metro areas, as well as the entirety of other metropolitan areas.” *Id.*

37. *Id.* Rural areas are nonmetropolitan communities “with a median population size of 16,535.” *Id.*

38. The total of these numbers is 319, which demonstrates the overrepresentation of rural interests in Congress. A recent proposal to alter how the federal government categorizes metropolitan and micropolitan counties, however, could “increase the nonmetropolitan population from about 46 million to 64 million,” exacerbating this disparity and providing those counties “a louder voice in policy discussions.” Tim Marema, *What Would Redefining Metro Counties Mean for Rural America? It’s Complicated*, DAILY YONDER (Mar. 5, 2021), <https://dailyyonder.com/what-would-redefining-metro-counties-mean-for-rural-america-its-complicated/2021/03/05/>.

39. Richard Fry, *Prior to COVID-19, Urban Core Counties in the U.S. Were Gaining Vitality on Key Measures*, PEW RSCH. CTR. (July 29, 2020), <https://www.pewresearch.org/social-trends/2020/07/29/prior-to-covid-19-urban-core-counties-in-the-u-s-were-gaining-vitality-on-key-measures/>.

clustering impacts equitable representation,⁴⁰ as Republican candidates no longer regularly win any big cities, and there are few rural areas carried by Democratic ones.⁴¹

The lopsided distribution of urban versus rural residents also has racial impacts. Whites constitute a supermajority of residents in suburban, small metro areas⁴² and rural counties, while forming a minority in most urban counties since 2000.⁴³ Immigrants and their progeny are more concentrated in the cities and suburbs.⁴⁴

Other demographic characteristics, such as age, poverty, gender, and education levels also show sharp disparities. Rural areas have higher percentages of those over sixty-five and lower percentages of young adults.⁴⁵ One in five older Americans lives in rural areas, and thirty-three states have an even greater proportion.⁴⁶ Older men constitute the majority of the elderly

40. See Greg Martin & Steven Webster, *The Real Culprit Behind Geographic Polarization*, ATLANTIC (Nov. 26, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/why-are-americans-so-geographically-polarized/575881/> (arguing that political polarization occurs across geographic lines because “partisan preferences are strongly correlated with population density”). Geographic clustering occurs “where supporters of one or the other party cluster together in homogeneous enclaves, producing localities with lopsided distributions of political preferences.” *Id.*

41. *Id.*

42. See WHAT UNITES AND DIVIDES, *supra* note 36, at 17 (noting that in 2016, whites constituted 90% in suburban and small metro areas, and 89% in rural counties); see also *Racial and Ethnic Minorities Made up about 22 Percent of the Rural Population in 2018, Compared to 43 Percent in Urban Areas*, ECON. RSCH. SERV.: USDA, <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=99538> (Oct. 13, 2020) (noting that in 2018, rural populations were 78.2% white) [hereinafter *Racial and Ethnic Minorities*].

43. See WHAT UNITES AND DIVIDES, *supra* note 36, at 17 (explaining demographic differences among urban, suburban, and rural counties); see also *Racial and Ethnic Minorities*, *supra* note 42 (noting that in 2018, whites constituted 57.3% of the urban population).

44. See WHAT UNITES AND DIVIDES, *supra* note 36, at 17 (contrasting the concentration of immigrants in cities and suburbs against the concentration of U.S.-born residents in rural counties). In 2018, the top origin countries of the U.S. immigrant population were Mexico (25%), China (6%), India (6%), the Philippines (4%), and El Salvador (3%). Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/>. In 2018, most immigrants lived in twenty “major metropolitan areas” and around 28.7 million immigrants, or 64% of the nation’s total foreign-born population, call these twenty metro areas home. *Id.*

45. See WHAT UNITES AND DIVIDES, *supra* note 36, at 18 (explaining the impact of the Baby Boom generation on different county types). Seventeen and a half percent of the U.S. rural population was 65 years and older, in contrast to 13.8% of the urban population. AMY SYMENS SMITH & EDWARD TREVELYAN, *THE OLDER POPULATION IN RURAL AMERICA: 2012–2016*, at 1 (2019), <https://www.census.gov/content/dam/Census/library/publications/2019/acs/acs-41.pdf>.

46. *One in Five Americans Live in Rural Areas*, U.S. CENSUS BUREAU (Aug. 9, 2017), <https://www.census.gov/library/stories/2017/08/rural-america.html>. In thirty-three states, the “rural share of the older population” surpassed “the national average of 22.9 percent.” SMITH & TREVELYAN, *supra* note 45, at 4–6.

in rural areas,⁴⁷ and ten rural states have more men than women.⁴⁸ There are more college graduates than those whose formal education terminated at high school in urban and suburban counties, but not in rural counties.⁴⁹ Furthermore, while the poverty rate is within a small range, only 17% of the poor live in rural areas.⁵⁰

Age, race, ethnicity, gender, poverty, and education all impact political views and positions. And what “just is” is not always “just-ice.”⁵¹ With rural communities dominating Congress’s voter base, what does an equity-based focus suggest we do? Expand the House and reallocate Senate seats.

III. EXPANDING THE FOOTPRINT OF THE HOUSE

First, the nation must rectify the inequity in congressional representation. The Hill Method of reallocating House seats after each census favors sparsely populated states.⁵² In 1788, each congressperson represented no more than 30,000 people, but there was no mechanism for maintaining this ratio.⁵³ Madison proposed an unsuccessful amendment to

47. Amy Symens Smith & Edward Trevelyan, *In Some States, More Than Half of Older Residents Live in Rural Areas*, U.S. CENSUS BUREAU (Oct. 22, 2019), <https://www.census.gov/library/stories/2019/10/older-population-in-rural-america.html>.

48. Andy Kiersz, *There Are Only 10 States in the US with More Men than Women*, INSIDER (Dec. 1, 2018), <https://www.businessinsider.com/men-women-united-states-map-2018-11>.

49. See WHAT UNITES AND DIVIDES, *supra* note 36, at 27 (delineating the share of residents in urban and suburban counties who are college graduates); see also *Rural Education*, ECON. RSCH. SERV.: USDA, <https://www.ers.usda.gov/topics/rural-economy-population/employment-education/rural-education/> (Apr. 23, 2021) (noting that “[b]etween 2000 and 2019, the share of young adults between the ages of 25 and 34 with a bachelor’s degree or higher grew in urban areas from 26 percent to 39 percent”).

50. See WHAT UNITES AND DIVIDES, *supra* note 36, at 8 (depicting the varying poverty rates among rural, urban, and suburban counties). According to the 2015 American Community Survey, the poverty rate for individuals living in urban areas was 16% and about 13.3% of people in rural areas “lived in families with incomes below the official poverty thresholds.” Alemayehu Bishaw & Kirby G. Posey, *A Comparison of Rural and Urban America: Household Income and Poverty*, U.S. CENSUS BUREAU (Dec. 8, 2016), https://www.census.gov/newsroom/blogs/random-samplings/2016/12/a_comparison_of_rura.html.

51. See GORMAN, *supra* note 1 (recognizing democracy as a work in progress that requires collaboration from all Americans).

52. See Richard Edward McLawhorn Jr., *Apportionment or Size? Why the U.S. House of Representatives Should Be Expanded*, 62 ALA. L. REV. 1069, 1078–79 (2011) (describing the three main methods used by the President to report to Congress the apportionment of representatives); see also Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1939 (2018) (noting the deletion of an equal population requirement in the proposed 1929 Act).

53. See McLawhorn Jr., *supra* note 52, at 1070–71 (explaining that the Constitution’s ambiguity as to the ratio of citizens per representative resulted in “a continuing controversy in Congress until 1929”). As the anti-Federalist Brutus lamented, “[t]hey will not be viewed by the people as part of themselves, but as a body distinct from them.” BRUTUS, LETTER III (Nov. 15, 1787), reprinted in ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY, *THE FEDERALIST WITH LETTERS OF “BRUTUS”* 462 (Terence Ball ed., 2003).

link House size to population.⁵⁴ Until 1913, Congress repeatedly enlarged the House as the population grew, but has maintained 435 representatives since 1929.⁵⁵ The 1961 Congress unsuccessfully attempted expansion to address growing representational inequalities.⁵⁶ Unfortunately, the population has increased by 60% since then.⁵⁷

Currently, each congressperson represents about 761,169 people⁵⁸—except in low population states, where the constitutional requirement of at

54. See Charles A. Kromkowski & John A. Kromkowski, *Why 435? A Question of Political Arithmetic*, 24 *POLITY* 129, 132 (1991) (adding that Madison predicted that in the fifty years following the Constitutional Convention, “population increases would guarantee a 400-member House”); see *id.* at 132 (noting that “[i]ronically, the first constitutional amendment ever proposed by Congress . . . standardiz[ed] the basis for dividing members among the states, and explicitly grant[ed] Congress full authority to regulate its procedures”). However, “the apportionment amendment was never ratified.” *Id.* See also *America Needs a Bigger House*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html> (arguing that a larger House of Representatives would better reflect the U.S. population).

55. Following Hawaii and Alaska’s admission, the number of voting seats in the House rose to 437, but then reverted to 435. See KRISTIN D. BURNETT, CONGRESSIONAL APPORTIONMENT (2011), <https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-08.pdf> (emphasizing that the number of representatives in the House has consistently been 435); Tom Murse, *How Many Members Are in the House of Representatives?*, THOUGHT CO. (Feb. 12, 2020), <https://www.thoughtco.com/members-in-the-house-of-representatives-3368242>. In 1960, there were 437 representatives when Alaska and Hawaii first were admitted. See David Morris, *American Voice 2004: Why Are We Stuck at 435 Members of the US House?*, INST. FOR LOC. SELF-RELIANCE (June 1, 2004), <https://ilsr.org/why-are-we-stuck-at-435-members-of-the-us-house/> (noting that one of the consequences of a fixed House size is that “each Representative has become more and more remote from his or her constituents”).

56. Ultimately, the two major arguments against increasing the House’s size prevailed. *Increasing the Membership of the House of Representatives and Redistricting Congressional Districts: Hearing Before the H. Comm. on the Judiciary*, 87th Cong. 26 (1961). The first argument was the “lack of physical accommodations,” and the second argument “was that the House would become too unwieldy.” *Id.*

57. *United States: Population Growth*, CENSUSSCOPE, https://www.censusscope.org/us/chart_popl.html (last visited June 11, 2021). Between 1960 and 2000, the U.S. population increased by 63.7%. *Id.*

58. *Historical Apportionment Data Map*, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/library/visualizations/interactive/historical-apportionment-data-map.html>. This amounts to an increase of 50,402 constituents, which is 7.1% more compared to the 710,767 people represented by each congressperson based on the 2010 Census. Brynn Epstein & Daphne Lofquist, *U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment*, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/library/stories/2021/04/2020-census-data-release.html>. This increase in constituents reflects the need for a larger Congress, since smaller districts “would make it easier for members of Congress to get to know the communities and people they represent, and vice versa.” Steve Chapman, *Column: The Census is a Reminder that We Need a Bigger Congress*, CHI. TRIB. (Apr. 28, 2021), <https://www.chicagotribune.com/columns/steve-chapman/ct-column-census-illinois-expand-house-of-representatives-chapman-20210428-ovb7r5vsl5ejdhvyixb2hrl3cq-story.html>. As such, a bigger House would help legislators “serve the needs of their constituents, because they wouldn’t have so many to serve.” *Id.*

least one representative per state⁵⁹ means that Rhode Island's two congresspersons each represent about half a million people. Meanwhile, Montana's almost one million residents were represented by one congressperson until it attained a second House seat following the 2020 Census.⁶⁰

Congress could increase the House's size⁶¹ by amending or repealing the Permanent Apportionment Act of 1929.⁶² Given current statewide voter disenfranchisement statutes,⁶³ Congress could also make adjustments by enforcing Section 2 of the Fourteenth Amendment—reducing the

59. U.S. CONST. art. I, § 2.

60. 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://www.pewresearch.org/fact-tank/2018/05/31/u-s-population-keeps-growing-but-house-of-representatives-is-same-size-as-in-taft-era/>. Montana's new second seat means “just over half a million state residents per representative.” Iris Samuels, *Rapid Population Growth Gives Montana 2nd US House Seat*, AP NEWS (Apr. 26, 2021), <https://apnews.com/article/montana-census-2020-747de9091fc5108e47dd5b97e06642a6>. Rhode Island approximates 550,000 constituents per representative. Edward Fitzpatrick, *Rhode Island Will Not Lose a Seat in the US House of Representatives*, BOS. GLOBE (Apr. 26, 2021, 12:08 PM), <https://www.bostonglobe.com/2021/04/26/metro/rhode-island-expected-lose-seat-us-house-representatives-once-census-data-is-released/>.

61. See, e.g., COMM'N ON PRAC. OF DEMOCRATIC CITIZENSHIP, OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 23 (2020), https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf (explaining that “expanding the House will tighten the link between representatives and their constituencies and make the House more representative of the nation”) [hereinafter OUR COMMON PURPOSE]; see CAROLINE KANE ET AL., WHY THE HOUSE OF REPRESENTATIVES MUST BE EXPANDED AND HOW TODAY'S CONGRESS CAN MAKE IT HAPPEN 14 (2020), https://www.fordham.edu/download/downloads/id/14402/Why_the_House_Must_Be_Expanded_Democracy_Clinic.pdf (comparing the effects of the Cube Root Rule and the Wyoming Rule on the average constituency) [hereinafter WHY THE HOUSE].

62. See 2 U.S.C. § 2a (1996) (addressing the mechanism by which representatives are reapportioned according to the decennial census). Passed in 1929, the Permanent Apportionment Act capped the number of representatives at 435, which was the number decided after the 1910 Census. See Jacob Ausubel, *Expanding The House: A Not So Radical Proposal*, PENN. POL. REV. (Jan. 27, 2019), <http://pennpoliticalreview.org/2019/01/expanding-the-house-a-not-so-radical-proposal> (arguing that a larger House would “not only reduce the U.S. population-to-representative ratio, but would also diminish the malapportionment of seats across states”). Furthermore, the legislation established a procedure for automatically reapportioning House seats following every census. See *id.* (explaining that the Act's limit on “the number of seats in the House was bad public policy” in 1929 because of its harmful consequences on urban representation).

63. See *generally Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> (providing an overview of new restrictive laws passed nationwide and describing their effects on voting); see also Alexa Ura, *Gov. Greg Abbott Signs Texas Voting Bill Into Law, Overcoming Democratic Quorum Breaks*, TEX. TRIB. (Sept. 7, 2021), <https://www.texastribune.org/2021/09/01/texas-voting-bill-greg-abbott/>.

constituency by the proportion of people whose right to vote is “in any way abridged, except for participation in rebellion, or other crime.”⁶⁴

In determining the appropriate House size, the most principled method is based on the least populous state—Wyoming.⁶⁵ In 2020, each state would earn one representative for every 576,851 residents.⁶⁶ Adjusting the threshold for rounding up can remedy inequities.⁶⁷ This method would increase the House of Representatives to about 575 members.

Other proposals suggest the following: (1) increasing the House to 593, which is based on the population’s cube root by using a formula roughly adhered to by “other mature democracies;”⁶⁸ (2) adjusting the total number of representatives with every decennial census; and (3) capping the number

64. U.S. CONST. amend. XIV, § 2; see Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 785–90 (2018) (explaining that the “application of the penalty clause was part of the reapportionment process”); Karlan, *supra* note 52, at 1958.

65. The “Wyoming Rule” could just as easily be called the “least populous state rule.” See *Population of the US States and Principal US Territories.*, NATIONS ONLINE, <https://www.nationsonline.org/oneworld/US-states-population.htm> (last visited June 10, 2021) (listing states in order from most to least populous); Steven L. Taylor, *Representation in the House: The Wyoming Rule*, OUTSIDE BELTWAY (Dec. 14, 2010), <https://www.outsidethebeltway.com/representation-in-the-house-the-wyoming-rule/>.

66. *QuickFacts: Wyoming*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/WY/PST040219#PST04021> (last visited June 11, 2021). In 2020, Wyoming was the least populous state, with a population of 576,851. *2020 Census Apportionment News Conference*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/newsroom/press-kits/2021/20210426-apportionment-presentation.pdf> (last visited June 11, 2021).

67. See Taylor, *supra* note 65 (conceding that even though a larger House might mean increased costs, the expenses are well worth it “since the issue [of equal representation] . . . is a fairly fundamental one”). Taylor suggests rounding up to add a Senate seat if the state has 150% or more of the baseline population. *Id.*

68. *America Needs a Bigger House*, *supra* note 54. The cube root would actually be about 693 but that includes the number of senators. *Id.* If the Senate size also increased, then this House number would decrease. *Id.* There are four ways to expand the House’s size: the Cube Root Rule, the Wyoming Rule, the incremental approach based on a decennial census, and a one-time expansion to add fifty seats. See WHY THE HOUSE, *supra* note 61, at 11 (arguing that the Cube Root Rule is the best way to expand the House’s size). According to the authors, the Cube Root Rule “creates the optimal balance between representative-constituent communication and . . . legislators themselves.” *Id.* at 13. Furthermore, it would be comparable to other democracies. *Id.* at 17.

of constituents per representative at 500,000,⁶⁹ which in 2020 would mean 663 congresspersons.⁷⁰

Unfortunately, under the cube root formula, representatives still would have 560,000 constituents.⁷¹ Practically speaking, 593 may be too large for the current Capitol building (which may accommodate at least another fifty members),⁷² and 663 would require extensive renovations (which may be necessary given “social-distancing” mandates and the Capitol building’s recent destruction).⁷³ Further, facilities can more efficiently accommodate a one-time increase, rather than periodic, incremental increases.

IV. REALLOCATING SENATE SEATS

The second urgent reform focuses on the related disparity in the Senate’s overrepresentation of sparsely populated and rural areas and corresponding underrepresentation of urban communities.⁷⁴ The Senate is hardly representative of our nation, as 50% of senators are men over sixty—while only 6% are women sixty or younger.⁷⁵ 58% of senators from the twenty-five least populous states are Republican, while senators from the fifteen

69. 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, 195 (1992) (arguing that the gradual increase in the House’s size should reflect the steady growth in population). According to Yates, “[t]he fact that other countries have lower houses which are larger than the House of Representatives suggests that expansion is not only possible, but . . . necessary.” *Id.* at 187. Also, “almost all representative democracies, except the United States, have adjusted the size of their lower house . . . to accommodate population growth.” *Id.* at 188. Thus, “[a] rollback of the ratio to one member of Congress for each 500,000 people will . . . lead to greater accountability of representatives to their constituents . . . and . . . might enhance voter participation.” *Id.* at 195–96.

70. *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/POP010220> (last visited June 12, 2021). A total population of 331,449,281 divided by 500,000 yields 662.898562, or approximately 663. *Id.*

71. See WHY THE HOUSE, *supra* note 61, at 13 (depicting predicted changes in average constituency from 2010 to 2040).

72. See OUR COMMON PURPOSE, *supra* note 61, at 24 (explaining that while an extra fifty members “should be the starting bid,” the exact number should be decided “through vigorous discussion and debate”).

73. See Julian Borger, *Insurrection Day: When White Supremacist Terror Came to the US Capitol*, GUARDIAN (Jan. 9, 2021), <https://www.theguardian.com/us-news/2021/jan/09/us-capitol-insurrection-white-supremacist-terror> (describing the series of events leading up to the January 6, 2021 attack on the U.S. Capitol).

74. *Reynolds v. Sims*, 377 U.S. 533, 579–80 (1964) (explaining that “neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation”).

75. *Members of Congress*, GOVTRACK, <https://www.govtrack.us/congress/members> (last visited June 10, 2021).

most populous states are 37% Republican.⁷⁶ Astonishingly, a Senate majority can represent only one-fifth of the nation's population.⁷⁷

Akhil Amar, one of the nation's foremost constitutional historians and legal scholars, explains that this "malapportionment . . . is hardly trivial or outcome neutral; it drastically overrepresents the perspective of rural over urban America."⁷⁸ The voting power of Wyoming's citizens is about sixty-seven times that of California's.⁷⁹ This disparity will increase over the next two decades if current trends continue.⁸⁰

Many believe that the Senate's apportionment scheme is completely unchangeable.⁸¹ Others say that reallocation can only be accomplished by constitutional amendment, given that *Reynolds v. Sims*⁸² blessed it at the federal level. Further, public indifference to misallocation and fealty to longstanding tradition are significant obstacles.⁸³ A more modest option

76. See Lee Drutman, *The Senate Has Always Favored Smaller States. It Just Didn't Help Republicans Until Now.*, FIVETHIRTYEIGHT (July 29, 2020), <https://fivethirtyeight.com/features/the-senate-has-always-favored-smaller-states-it-just-didnt-help-republicans-until-now/> (demonstrating that Republicans have had an advantage in small states since the 1960s). Small states are disproportionately white. See William H. Frey, *The Nation is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> (noting the significant decline in the white population and growing diversity in the younger population).

77. Orts, *supra* note 8, at 1986. Orts also notes that "[o]nly one third of senators, currently representing less than eight percent of the U.S. population—or thirteen state legislatures representing less than five percent—are sufficient to block any reform by [Article V] amendment." *Id.* at 1990–91.

78. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1071, n.98 (1988).

79. See Eric W. Orts, *The Path to Give California 12 Senators, and Vermont Just One*, ATLANTIC (Jan. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172/> (advocating for a guaranteed allocation of one seat to each state and apportionment of remaining seats based on population).

80. See Klarman, *supra* note 11, at 236 (noting that if current circumstances continue, "Democrats may never again control the Senate"). According to Klarman, "[b]y 2040, seventy percent of Americans are projected to live in the fifteen most populous states." *Id.* Then, "[i]f sparsely populated states continue to vote mostly Republican, then the thirty percent of Americans who pick seventy percent of the senators would virtually guarantee Republican control, which would be a legitimacy crisis of massive proportions." *Id.* That is, "such a Senate might never again confirm a Democratic President's nominee to the Supreme Court." *Id.*

81. *Id.* at 234–35. Klarman explains the "malapportionment is constitutionally entrenched; it may not be altered without the consent of every state, which the smaller states will never give." *Id.* Furthermore, it provides a "massive political advantage" for the Republican Party. *Id.* at 235.

82. 377 U.S. 533 (1964).

83. See, e.g., FRANCIS E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 229–30 (1999) (analyzing the behavior of senators based on the size of their states).

would be to modify Senate rules—for instance, by requiring forty affirmative votes to filibuster, rather than sixty to block it.⁸⁴

Conversely, there are strong arguments that a statute could accomplish this change.⁸⁵ Closely parsing Article V,⁸⁶ Professor Amar argues that the requirement that states consent to unequal representation only applies “to the ordinary Article V amendment process . . . which has no application outside Article V,”⁸⁷ such as with congressional legislation and constitutional conventions. As such, “the principle of popular sovereignty” becomes the “true constitutional rule of recognition.”⁸⁸ “[C]ompliance with Article V,” then, is unnecessary and not “always sufficient for legitimate constitutional amendment.”⁸⁹ Since the Framers “never intended Article V to deny *our* generation’s inalienable right of amendment,”⁹⁰ it is unnecessary to have an amendment to reapportion Senate seats.⁹¹

Since modifications short of amendment are more realistic, we must consider a reallocation plan that increases the total number of senators by ten. Each state would have at least one senator, and then the remaining sixty would be apportioned based on each state’s percentage of the overall national population.⁹² For instance, a state with a population of 2/100ths of the U.S. population would get a second senator,⁹³ 3/100th a third, and so on.⁹⁴ Under this formulation, with 2020 data, Florida would have seven senators, New York would have six, Texas would have nine, and California would have twelve.⁹⁵

84. Such options are beyond the scope of this Essay. For more information, see Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U.L. REV. 303 (2011). See also TODD N. TUCKER, *FIXING THE SENATE: EQUITABLE AND FULL REPRESENTATION FOR THE 21ST CENTURY* (2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Fixing-The-Senate_report-201903.pdf (finding that representational inequalities are set to rise in the absence of structural reform in the Senate).

85. See Amar, *supra* note 78, at 1094 n.182 (evaluating three separate interpretations of Article V). Amar notes that “We the People can—and perhaps should—abolish the archaic apportionment rules of the Senate, but We must do so Ourselves, through Philadelphia II-type procedures,” including by national referendum. *Id.* at 1071.

86. *Id.* at 1043.

87. *Id.* at 1070.

88. *Id.* at 1071.

89. *Id.*

90. *Id.* at 1072.

91. For additional arguments that an Article V amendment is unnecessary, see Orts, *supra* note 8, at 2027–31.

92. *Id.* at 1999–2004.

93. See Orts, *supra* note 79 (adding that the apportionment must be updated accordingly based on the decennial census).

94. *Id.* Orts proposes a “Senate Reform Act,” federal legislation that would not implicate Article V. *Id.*

95. *Id.* Illinois, Pennsylvania, and Ohio would have four senators, North Carolina would have three, Colorado would have two, and Oregon, Montana, and West Virginia would have one. *Id.*

A second plan shuffles only the largest and smallest states' senatorial seats⁹⁶ by reallocating seven seats from the least populous to the most populous states.⁹⁷ Seven states would then have three senators, seven states would have one senator, and the remaining thirty-six states would retain two.⁹⁸ This proposal might be the easiest for which to obtain consent. If Article V was determined to govern, the proposal would require consent only from the fourteen states whose senatorial allocations would become unequal.⁹⁹

CONCLUSION

This Essay urges a gradual constitutional revolution to address inequities in congressional representation before celebrating our Constitution's 250th anniversary and provides two modifications that would achieve more equitable representation. With enough deliberation, and even cooperation, Congress and the states can make these changes without resorting to revolution through a Constitutional Convention; however, a looming deadline provides a greater incentive to effect change. Recognizing the rich diversity of our nation, and our dramatically different demographics, this Essay urges a re-conception of the notion of democratic representation, so that what "just is" can be closer to "just-ice" for nonrural communities.

96. See Benjamin Forest, *Reforming the US Senate: Original Intent and Representational Inequality*, 74 POL. GEOGRAPHY 1 (2019) (stating that reallocating Senate seats between the largest and smallest states would bring the representational ratio of the Senate closer in line to the vision of the Constitutional Convention's delegates). Forest assesses the trends and representational inequality by analyzing the ratio between the largest and smallest state populations to determine over- or under-representation. *Id.* The degree of inequality is significantly greater now than it was in 1790. *Id.* at 2. The eight most populous states (California, Texas, Florida, New York, Pennsylvania, Illinois, Ohio, and Georgia) comprise 48% of the overall U.S. population. See *2020 Census Apportionment News Conference*, *supra* note 66 (highlighting the changes in the apportionment of representatives across the states). The eight least populous states (Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Montana, Rhode Island) constitute only 2.05% of the total U.S. population. *Id.*

97. See Forest, *supra* note 96, at 3 (explaining that this proposal would "retain a state-centric Senate while returning the relative disparity between political power and population to the original level envisioned" at the Constitutional Convention).

98. In 2020, the seven most populous states excluded Georgia from the list cited in note 96. *2020 Census Apportionment News Conference*, *supra* note 66. The seven least populous states excluded Rhode Island. *Id.*

99. See U.S. CONST. art. V (describing the process of amending the Constitution).