

2011

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Connecticut Law Review. 112.

https://opencommons.uconn.edu/law_review/112

CONNECTICUT LAW REVIEW

VOLUME 43

MAY 2011

NUMBER 4

Article

One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements

JEFFREY W. LADEWIG

Beginning in the 1960s and 1970s, the Supreme Court began to establish and enforce a constitutional requirement for the apportionment of legislative districts at the national, state, and local levels. This requirement, the “one person, one vote” principle, has become a benchmark of the constitutional jurisprudence as well as a conceptualization of the fundamental democratic norm of political equality. Since these early cases, apportionment plans that violate this constitutional requirement—even with levels of intrastate malapportionment of less than 1%—have been held to be unconstitutional. Yet, there is a much more severe form of malapportionment that continues today and will worsen with the reapportionment of the United States House of Representatives after the 2010 Census: interstate malapportionment. The levels of interstate malapportionment are over 9,000% greater than the levels of intrastate malapportionment already found unconstitutional. This Article explores the causes and possible solutions to this problem. It concludes that the constitutional requirement of “one person, one vote” can only be constitutionally addressed—to any considerable degree—by reconsidering the twentieth century statutory requirement that fixed the size of the House at 435 seats.

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One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements

JEFFREY W. LADEWIG*

I. INTRODUCTION

The U.S. Census Bureau recently released the results from the 2010 Census. In addition to the constitutionally-mandated population count,¹ the U.S. Census also provides the new apportionment for the House of Representatives.² As the United States' apportionment population grew from 281,424,177 in 2000 to 309,183,463 individuals in 2010,³ the national average House district size also grew from 646,952 to 710,767 individuals.⁴ Furthermore, although only one state actually had a smaller population in 2010 than in 2000 (Michigan's population decreased by 0.6%),⁵ ten states lost seats in 2010 (New York and Ohio each lost two seats),⁶ and eight states gained seats (Florida gained two seats and Texas gained four).⁷

The federal government has been performing a similar process since 1790.⁸ Currently, there are only four constitutional and two statutory requirements for the apportionment process. The first three constitutional apportionment requirements are found in Article I, Section 2 of the Constitution: (1) no House district can cross state lines; (2) every state

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¹ See U.S. CONST. art. 1, § 2 (providing that representatives "shall be apportioned among the several States . . . according to their respective Numbers"); *Prigg v. Pennsylvania*, 41 U.S. 539, 619 (1842) ("[T]he Constitution has declared that representatives shall be apportioned among the states according to their respective federal numbers; and, for this purpose, it has expressly authorized Congress, by law, to provide for an enumeration of the population every ten years; yet the power to apportion representatives after this enumeration is made, is nowhere found among the express powers given to Congress, but it has always been acted upon as irresistibly flowing from the duty positively enjoined by the Constitution.").

² U.S. CENSUS BUREAU, APPORTIONMENT DATA—2010 CENSUS, <http://2010.census.gov/2010census/data/apportionment-data-text.php> [hereinafter U.S. CENSUS BUREAU, APPORTIONMENT DATA] (last visited Apr. 2, 2011).

³ U.S. CENSUS BUREAU, RESIDENT POPULATION DATA—2010 CENSUS, http://2010.census.gov/news/pdf/apport2010_table4.pdf [hereinafter U.S. CENSUS BUREAU, RESIDENT POPULATION DATA] (last visited Apr. 2, 2011).

⁴ U.S. CENSUS BUREAU, APPORTIONMENT DATA, *supra* note 2 (showing that the average number of people per representative increased from 646,952 in 2000 to 710,767 in 2010).

⁵ U.S. CENSUS BUREAU, RESIDENT POPULATION DATA, *supra* note 3.

⁶ U.S. CENSUS BUREAU, APPORTIONMENT DATA, *supra* note 2.

⁷ *Id.*

⁸ Margo Anderson & Stephen E. Fienberg, *Census 2000: Politics and Statistics*, 32 U. TOL. L. REV. 19, 25 (2000).

must have at least one representative; and (3) no state's average district size can be less than 30,000 individuals.⁹ The fourth constitutional requirement is found in Amendment 14, Section 2. In part, it states, "[r]epresentatives shall be apportioned among the several States according to their respective numbers."¹⁰

The two statutory requirements stem from the heated apportionment debates (about the size of the chamber as well as the apportionment method) during the first half of the twentieth century. The Apportionment Act of 1929 states that the U.S. House is set at 435 seats.¹¹ It also states that both the Webster and the Hill methods of apportionment should be estimated, and that Congress can then choose which to use.¹² In 1941, Congress subsequently legislated that the Hill method should be exclusively used and implicitly continued to freeze the U.S. House at 435 seats.¹³

These requirements are widely accepted, perhaps to the point of being overlooked. For example, during the current reapportionment, there were some discussions in the press and among experts about what the census count would be and, thus, which states would gain or lose seats.¹⁴ The bulk of the discussion, though, was centered on the stage after reapportionment: redistricting. Yet, these six requirements impose

⁹ The third constitutional requirement had been a point of some controversy. The primary question was whether the Constitution required the national average district size to be not less than 30,000 individuals, or whether every individual state's average district size must be not be less than 30,000 individuals. As George Washington discovered, the first census and reapportionment in 1790 presented this question. The first apportionment plan passed by Congress increased the U.S. Congress from 65 seats to 120 seats. This plan offered the maximum number of seats while keeping the national average district size at or above 30,000 individuals. In so doing, it also provided eight states with state average district sizes below 30,000 individuals. George Washington believed that this plan violated the U.S. Constitution and issued the first presidential veto in U.S. history. Congress then successfully redrafted the apportionment with 105 seats and all of the states having state average district sizes above 30,000 individuals. MICHEL L. BALINSKI & H. PEYTON YOUNG, *FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE* 21 (2d ed. 2001).

¹⁰ U.S. CONST. amend. XIV, § 2.

¹¹ Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26 (codified as amended at 2 U.S.C. § 2a (2006)) (stating that the number of representatives will be apportioned to states from the existing total number of representatives), *invalidated by* *Montana v. U.S. Dep't of Commerce*, 775 F. Supp. 1358, 1366 (D. Mont. 1991). When Arizona and New Mexico achieved statehood, the total was set at 435. Reapportionment Act of 1911, ch. 5, §§ 1–2, 37 Stat. 13, 13–14 (codified as amended at 2 U.S.C. § 2 (2006)).

¹² Reapportionment Act of 1929 § 22 (stating that apportionment may follow the method of "major fractions" or "equal proportions"); *see also* BALINSKI & YOUNG, *supra* note 9, at 57 (explaining that the Webster method is referred to as "major fractions" and the Hill Method is referred to as "equal proportions").

¹³ Act of Nov. 15, 1941, ch. 470, 55 Stat. 761, 761–62 (codified as amended at 2 U.S.C. § 2a (2006)) (amending the Reapportionment Act of 1929 to specify that apportionment will exclusively follow the "method of equal proportions").

¹⁴ *See, e.g.,* Matt Bloch et al., *Census 2010: Gains and Losses in Congress*, N.Y. TIMES, www.nytimes.com/interactive/2010/12/21/us/census-districts.html (last visited Apr. 2, 2011) (stating how the 2010 census results mean that the South and West will gain congressional seats while the Northeast and Midwest will lose some).

constraints on congressional apportionment that undermine the ability of all six being satisfied. In other words, there are serious constitutional problems with the current congressional apportionment—and, it is receiving very little attention. The remainder of this Article will provide a discussion of the constitutional problem as well as constitutional evaluations and solutions.

II. CONSTITUTIONAL PROBLEM

The 2000 Census and reapportionment of the 435 seats in the U.S. House of Representatives created a national average district size of 646,952 individuals.¹⁵ Some states, though, were far from this benchmark. That is, many states were under- or over-represented compared to the national average as well as compared to a number of other states.¹⁶

Perhaps not surprisingly, the 2000 reapportionment provided twenty-six states with a state average district size that was below the national average district size.¹⁷ Some of these over-represented states have relatively small deviations from the national average. Some, on the other hand, are much more considerable. The top five over-represented states, for example, after the 2000 reapportionment were West Virginia (the average district size was 6.58% smaller than the national average district size), Iowa (9.36% smaller), Nebraska (11.62% smaller), Rhode Island (18.88% smaller), and Wyoming (23.44% smaller).¹⁸

A similar pattern, but actually a more severe one, exists among the twenty-four states that have a state average district size larger than the national district average.¹⁹ The top five most under-represented states were: Mississippi (the average district size was 10.24% larger than the national average district size), Utah (15.24% larger), South Dakota (16.99% larger), Delaware (21.35% larger), and Montana (39.94% larger).²⁰

These deviations from the national average district size are not a

¹⁵ U.S. CENSUS BUREAU, 2000 CENSUS BRIEF ON CONG. APPORTIONMENT 1 (2000), available at www.census.gov/prod/2001pubs/c2kbr01-7.pdf.

¹⁶ See *id.* at 2 (listing each state's population and number of representatives).

¹⁷ See *id.* (including Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, and Wyoming).

¹⁸ See *id.* (estimating West Virginia's average congressional district size at 604,359 persons, Iowa's average district at 586,385 persons, Nebraska's average district at 571,790 persons, Rhode Island's average district at 524,831 persons, and Wyoming's average district at 495,304 persons).

¹⁹ See *id.* (including Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Montana, Nevada, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, and Wisconsin).

²⁰ See *id.* (estimating Mississippi's average congressional district size at 713,232 persons, Utah's average district at 745,571 persons, South Dakota's average district at 756,874 persons, Delaware's average district at 785,068 persons, and Montana's average district at 905,316 persons).

localized problem with the 2000 reapportionment. The 2010 reapportionment reveals that, even though not all of the states are in the same position, the pattern of under- and over-representation among the states persists. The current top-five over-represented states after the 2010 reapportionment are: (5) Vermont (the average district size is 11.32% smaller than the national average district size), (4) West Virginia (12.78% smaller), (3) Nebraska (14.09% smaller), (2) Wyoming (20.04% smaller), and (1) Rhode Island (25.77% smaller).²¹ The top-five most under-represented states are: (5) Oregon (the average district size is 8.29% larger than the national average district size), (4) Idaho (10.69% larger), (3) South Dakota (15.33% larger), (2) Delaware (26.75% larger), and (1) Montana (39.91% larger).²²

These deviations in individual states can be compared among each other in order to get a sense of the relative deviations. For instance, after the 2000 reapportionment, the average of the absolute difference between each state's average district size and the national average district size, (hereinafter referred to as the "Absolute Total Deviation Percentage"), was 5.75% and, the 2010 Absolute Total Deviation Percentage has increased to 6.11%.²³ In terms of the number of individuals that these percentages represent, it means that the average state district size after the 2000 reapportionment was 37,227 individuals smaller or larger than what the national average was and, after the 2010 reapportionment, it is 43,421 individuals.²⁴

Another comparative metric that is often used to estimate the relative level of variation in any given apportionment is the difference, expressed as a percentage of the average national district size, between the average district size of the most under-represented and the most over-represented states, hereinafter referred to as the Maximum Deviation Percentage.²⁵ After the 2000 reapportionment, Montana was the most under-represented state with an average district size of 905,316 individuals,²⁶ and Wyoming was the most over-represented state with an average district size of

²¹ See U.S. CENSUS BUREAU, APPORTIONMENT DATA, *supra* note 2 (providing the average people per representative in the United States and providing the average people per representative for each state).

²² See *id.* (providing the average people per representative in the United States and providing the average people per representative for each state).

²³ These data are a result of the author's own calculations; for the raw data see *id.* (providing the average people per representative in the United States and providing the average people per representative for each state).

²⁴ These data are a result of the author's own calculations; for the raw data see *id.* (providing the average people per representative in the United States and providing the average people per representative for each state).

²⁵ See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 728 (1983) (applying the formula to estimate the level of variation in the reapportioned districts of New Jersey from the "ideal" figure determined by the 1980 census).

²⁶ U.S. CENSUS BUREAU, APPORTIONMENT DATA, *supra* note 2.

495,304 individuals.²⁷ The difference is 410,012 individuals, or a Maximum Deviation Percentage of 63.38%. This measurement also increased after the 2010 reapportionment to 65.67%: The most under-represented state is still Montana with an average district size of 994,416,²⁸ but the most over-represented state is now Rhode Island with an average district size of 527,624.²⁹

To look at these differences another way, the Voter Equivalency Ratio,³⁰ after the 2000 reapportionment, indicates that an individual in the state of Wyoming has the same representational value as 1.83 individuals in the state of Montana. Or, to reverse the ratio, the representation of a person from Montana is worth less than three-fifths of that of a person from Wyoming.³¹ The 2010 Voter Equivalency Ratio indicates that an individual in Rhode Island has the same representational value as 1.88 individuals in Montana.³²

The 2000 and 2010 data show severe levels of interstate malapportionment. That is, the districts across the nation for the U.S. House of Representatives have considerably different population sizes.³³ It is expected, as state-level demographics change in the ten years after a census and reapportionment, that there will be growing population discrepancies. This is a consequence of censuses and reapportionments being conducted decennially, instead of more frequently. These data, however, indicate that even at the moment when the population sizes among the House districts should be most equal, there are still persistent and considerable variations.³⁴

Interstate malapportionment is caused by state population variations as well as the constitutional and statute requirements of reapportionment. No state has ever had, nor is one ever likely to have, exactly the same population size as, or an exact multiple of, the national average district size. Without either one of these conditions being met for all of the states, and given the current constitutional and statute requirement, there will always be population remainders when apportioning representatives.

For example, according to the 2010 Census, the national average district size is 710,767 individuals,³⁵ and Connecticut has an apportionment

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ The Voter Equivalency Ratio is calculated by dividing the average district size of the most under-represented state by the average district size of the most over-represented state.

³¹ See U.S. CENSUS BUREAU, APPORTIONMENT DATA, *supra* note 2 (stating that in 2000, the average people per representative in Montana is 905,316 and the average people per representative in Wyoming is 495,304).

³² See *id.* (stating that in 2010, the average people per representative in Montana was 994,416 and 527,624 in Rhode Island).

³³ See *id.* (showing the populations of the different U.S. districts).

³⁴ See *id.* (depicting the variation in populations of the different U.S. districts).

³⁵ See *id.* (showing that the average number of people per representative is 710,767).

population of 3,581,628 individuals.³⁶ Dividing the former into the latter indicates that Connecticut deserves 5.039102828 representatives. Apportioning the population remainder of 0.039102828 of a representative is, of course, impossible. Given that the 2010 apportionment provides Connecticut with five representatives,³⁷ Connecticut will be under-represented in the 113th through the 118th Congresses by 0.039102828 representatives. To put it another way, Connecticut will have a population remainder of 27,793 more individuals than an ideal population with five representatives, and thus, each House district in Connecticut will, on average, be 5,559 individuals larger than the national average district size.³⁸

The problem with population remainders reveals a mathematical identity. Specifically, the smaller the state population, the fewer districts the state will have.³⁹ With fewer districts, any population remainder must be divided among fewer districts. As such, smaller states tend to find it more difficult to create U.S. House districts that are close to the national average district size.⁴⁰ Therefore, smaller states tend to have greater levels of interstate malapportionment than larger states.

Consider the 2010 Connecticut apportionment again. A population remainder of 27,793 individuals is actually the sixth smallest among all the states.⁴¹ If Connecticut had the same population remainder, but also only had one district, then that one district would be malapportioned by the full 27,793 individuals. Alternatively, if Connecticut had the same population remainder, but had fifty districts, then each of those fifty districts would only be malapportioned by just 556 individuals. Thus, states with fewer House districts are systemically more likely to be under- or over-

³⁶ See *id.* (showing that there are 3,574,097 people in Connecticut); U.S. CENSUS BUREAU, OVERSEAS POPULATION OF THE 50 STATES AND THE DISTRICT OF COLUMBIA: 2010 CENSUS tbl.3 [hereinafter U.S. CENSUS BUREAU, OVERSEAS POPULATION], <http://2010.census.gov/news/press-kits/apportionment/apport.html> (last visited Apr. 2, 2011) (follow “PDF” or “Excel” hyperlink to download Table 3) (reporting that the population of Connecticut, as of April 1, 2010, includes an additional 7,531 people overseas).

³⁷ U.S. CENSUS BUREAU, APPORTIONMENT DATA, *supra* note 2.

³⁸ See *id.* (showing that the average number of people per representative in the United States is 710,767).

³⁹ U.S. CENSUS BUREAU, APPORTIONMENT POPULATION AND NUMBER OF REPRESENTATIVES, BY STATE: 2010 CENSUS tbl.1 [hereinafter U.S. CENSUS BUREAU, APPORTIONMENT POPULATION], <http://2010.census.gov/news/press-kits/apportionment/apport.html> (last visited Apr. 2, 2011) (follow “PDF” or “Excel” hyperlink to download Table 1) (showing total state population and apportionment of representatives).

⁴⁰ Compare U.S. CENSUS BUREAU, A NEW PORTRAIT OF AMERICA, FIRST 2010 CENSUS RESULTS, <http://2010.census.gov/news/press-kits/apportionment/apport.html> (last revised Dec. 12, 2010) (“[E]ach member of the U.S. House of Representatives will represent an average population of 710,767.”), with U.S. CENSUS BUREAU, APPORTIONMENT POPULATION, *supra* note 39 (showing Montana with one representative for 994,416 people).

⁴¹ See discussion *supra* Part II (describing method for calculating Absolute Total Deviation); U.S. CENSUS BUREAU, APPORTIONMENT POPULATION, *supra* note 39 (providing numerical data for calculations).

represented than states with more House districts.

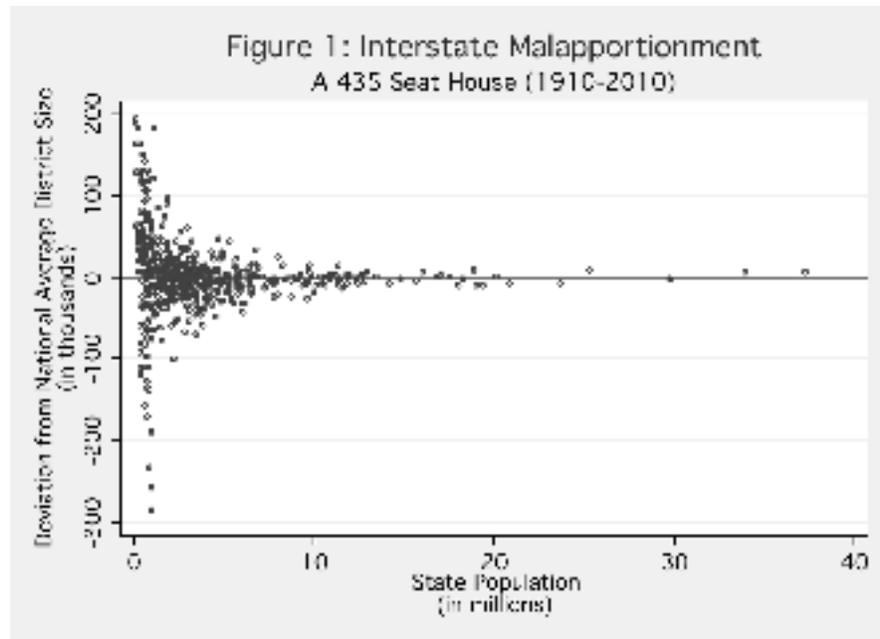


Figure 1 graphs each state's apportionment population and its average district size, subtracted from the national-average district size, from 1910 through 2010. These are the years that the House has been apportioned with 435 members. The pattern supports the mathematical identity, and it demonstrates the range of interstate malapportionment over these years.

It may be difficult to generate much sympathy for under-represented small states when the small states also have an unambiguous undemocratic bias in the U.S. Senate—arguably, the most malapportioned democratically-elected legislative chamber in the world.⁴² The over-representation of the small states, though, also makes the larger states relatively under-represented vis-à-vis these over-represented small states.

An egregious, but not even the most severe, example illustrates the point.⁴³ After the 2010 reapportionment, Wyoming was the second most over-represented state with an apportionment population of 568,300

⁴² SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 50–51 (2006).

⁴³ Wyoming and California are chosen for this example because they demonstrate the point while keeping the math simple. The most severe results after the 2010 reapportionment are generated from a comparison between Rhode Island (the most over-represented state) and Wisconsin (the best apportioned state). The Voter Equivalency Ratio for the former pair is 1.24 and for the latter pair is 1.35.

individuals and was granted one House district.⁴⁴ This produced a population remainder that is the same as the state average deviation from the national-average district size: 142,467 individuals.⁴⁵ Meanwhile, California has an apportionment population of 37,341,989 individuals and was granted fifty-three House districts.⁴⁶ This produced a population remainder of 328,662 individuals, but a state average deviation from the national-average district size of just 6,201 individuals.⁴⁷ The ratio of the apportionment populations of these two states is 66:1, but the ratio of granted House districts is 53:1. This implies that the Voter Equivalency Ratio of one individual from Wyoming has the same representational value as 1.24 individuals in California. The over-representation of Wyoming—as well as other over-represented states—makes the well-apportioned, mostly larger, states relatively under-represented.

This imbalance does not just affect the U.S. House, but also the Electoral College—an institution that is already biased towards the smaller states due to the apportionment of the U.S. Senate. A more accurate apportionment would diminish the possibility that a presidential nominee could win the Electoral College but lose the popular vote—like George W. Bush did over Al Gore in the 2000 presidential election.⁴⁸

In sum, interstate malapportionment is the systematic pattern of under- and over-representation of smaller states. As a result, it also makes many other states, which may actually be well-apportioned (like California in the above example), under-represented relative to the over-represented states. Together, these point to structural inequalities in the representation in the U.S. House of Representatives. Some states have vastly more representational power per individual in the House than other states.

More importantly, interstate malapportionment is both caused by but also violates the set of apportionment requirements prescribed by the U.S. Constitution and statutory law. The 2000 and 2010 reapportionments,⁴⁹ for example, demonstrate that the first three constitutional requirements are satisfied: (1) no district crosses state lines, (2) all states have at least one representative, and (3) no state has an average district size less than 30,000

⁴⁴ U.S. CENSUS BUREAU, APPORTIONMENT POPULATION, *supra* note 39.

⁴⁵ The average district size in the United States after the 2010 Census was 710,767. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See generally Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 195–96 (2004) (arguing, among other things, that the Electoral College does not “avoid the possibility of a ‘regional’ winner” but rather “enhances the troubling prospect . . . of a President supported by only a minority of voters, in a minority of states”); Brian Knowlton, *Decision: It’s Bush: Gore Suspends Recount Effort as Texas Governor Savors His Victory*, INT’L HERALD TRIB., Dec. 14, 2000, at 1 (reporting on then Vice President Al Gore’s decision to suspend his recount effort and cede the presidency to then Texas Governor George W. Bush); David Stout, *The 43rd President: The Electoral College*, N.Y. TIMES, Dec. 19, 2000, at A31 (reporting on the operation of the Electoral College that had “made Mr. Bush president despite Mr. Gore’s capture of the popular vote”).

⁴⁹ U.S. CENSUS BUREAU, APPORTIONMENT DATA, *supra* note 2.

individuals.⁵⁰ Both of the statutory requirements are also satisfied: (1) the Hill method of apportionment was used, and (2) the U.S. House has 435 seats. But the fourth constitutional requirement is violated. Representatives are not apportioned among the several States according to their respective numbers.

III. CONSTITUTIONAL EVALUATION

It is clear that the apportionment of the U.S. House is not perfectly distributed “among the several States according to their respective numbers”⁵¹ As the discussion of the population remainder should also make evident, it is impossible—or, at least, infinitely improbable—that it ever could be. But much like the constitutional protection of the freedom of speech, the Constitution is not applied without some restraint and caveats. So the question then becomes: Are the current levels of interstate malapportionment sufficiently severe to raise constitutional concern?

To be sure, the U.S. Supreme Court has never ruled on the constitutionality of *interstate* malapportionment. There is a long history, however, of jurisprudence by the Court on *intrastate* malapportionment. Beginning in the 1960s, legislative districts with unequal population sizes within states became a prominent constitutional issue in a number of cases decided by the Court. These cases have produced one of most recognizable statements on democratic equality and representation: the “one person, one vote” constitutional principle.

In 1962, the Court heard the case *Baker v. Carr*.⁵² At the time, Tennessee had not reapportioned the districts of their state General Assembly since 1901.⁵³ The 1901 apportionment procedure was to assign seats according to the total voting population by county.⁵⁴ In the fifty following years, the county population sizes had changed considerably—not to mention the passage of the Nineteenth Amendment in 1920. Given these apportionment procedures, it is not easy to calculate malapportionment statistics that have since become common. Still, an example can be illustrative. According to the 1950 Census, Tennessee had 1,978,548 voters and the General Assembly had ninety-nine seats; Moore County had 2,340 voters and had one representative in the General Assembly; and Shelby County had 312,345 voters and seven representatives.⁵⁵ This means that the Moore County seat represented 2,340 voters, and it was over-represented by 17,645 voters. The average

⁵⁰ U.S. CONST. art. I, § 2, cl. 3.

⁵¹ *Id.* amend. XIV, § 2.

⁵² *Baker v. Carr*, 369 U.S. 186 (1962).

⁵³ *Id.* at 192.

⁵⁴ *Id.*

⁵⁵ RICHARD C. CORTNER, *THE APPORTIONMENT CASES* 267–68 (1970).

Shelby County seat represented 44,621 voters, and it was under-represented by 24,635 voters. This implies that the Maximum Deviation Percentage was 211.56%.

Baker and the other co-plaintiffs alleged that they suffered, under the Due Process and Equal Protection Clauses, from a debasement of their votes because of the population discrepancies among the assembly's districts, such as the one noted between Moore and Shelby counties.⁵⁶ The Court agreed. It remanded the case back to the district court, which had dismissed the case due to issues of jurisdiction and justiciability, and ordered it to produce a decision consistent with the Court's opinion that the "complaint's allegations of a denial of equal protection presented a justiciable constitutional cause of action."⁵⁷

The year following *Baker*, the Court decided *Gray v. Sanders*.⁵⁸ The plaintiff alleged that Georgia had violated his constitutional rights, also under the Equal Protection Clause, by allotting electoral points per county—based roughly, but not exactly, on population sizes—in the primary election for U.S. Senator and other statewide offices.⁵⁹ The total number of county-unit points, not the total number of votes, would decide these elections.⁶⁰ The Court decided that:

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.⁶¹

The Court concluded that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."⁶² This was the Court's first use of the term "one person, one vote."

The next year, the Court further enforced and defined the new constitutional principle of "one person, one vote" in *Wesberry v. Sanders*⁶³ and *Reynolds v. Sims*.⁶⁴ *Wesberry* is particularly relevant to this study, as it is the first of the apportionment cases that challenges the population sizes

⁵⁶ *Baker*, 369 U.S. at 199.

⁵⁷ *Id.*

⁵⁸ *Gray v. Sanders*, 372 U.S. 368 (1963).

⁵⁹ *Id.* at 370.

⁶⁰ *Id.*

⁶¹ *Id.* at 379.

⁶² *Id.* at 381.

⁶³ *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

⁶⁴ *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

of seats in the U.S. House of Representatives. The appellants in *Wesberry* were qualified voters of Fulton County, Georgia concerned about the fact that Georgia had not realigned its House districts for the past thirty years.⁶⁵ Given the resulting demographic changes that occurred over such a long period of time, the population sizes of the districts had become severely unequal.⁶⁶ For example, the appellants were from the Fifth Congressional District of Georgia, which had a population of 823,680 individuals, while the average district size in Georgia was 394,312.⁶⁷ Furthermore, one district, the Ninth, had a district size of a mere 272,154 individuals.⁶⁸ These figures indicate that the Maximum Deviation Percentage in Georgia at that time was 138.39%.

In response to the inequalities in these districts, the Court held that:

[T]he command of Art. I, § 2, that Representatives be chosen “by the People of the several States” means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s. . . . We do not believe that the Framers of the Constitution intended to permit . . . vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected “by the People,” a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.⁶⁹

Accordingly, it can be said that the ruling in *Wesberry* supports the extension of the constitutional principle of “one person, one vote” to the U.S. House of Representatives.⁷⁰ The holding also clearly and forcibly states the constitutional foundations of equal representation in the U.S. House of Representatives and furthers the process of setting practical limits on legislative malapportionment.⁷¹

⁶⁵ *Wesberry*, 376 U.S. at 2.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.* at 2.

⁶⁸ *Id.*

⁶⁹ *Id.* at 7–9 (footnotes omitted).

⁷⁰ *Id.* at 18.

⁷¹ *Id.*

In *Reynolds v. Sims*, a case substantively similar to *Baker*, the Supreme Court held that Alabama's state legislative district had become increasingly, and unconstitutionally, malapportioned since its last apportionment in 1900.⁷² Again, the Court reiterated the constitutional requirement of equal legislative populations:

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. 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. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.⁷³

The Court ordered that Alabama's districts must be “as nearly of equal population as is practicable.”⁷⁴

In 1968, the Court was asked if the Equal Protection Clause also applied to local governments. In *Avery v. Midland County*, the Midland County, Texas Commissioners Court—the governing body of the county—had elective districts with vastly unequal populations.⁷⁵ The Court, again, applied the constitutional requirement of “one person, one vote,” and reiterated that it is a fundamental constitutional principle applicable across the nation and across all levels of government:

Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment.⁷⁶

In the fifteen years after *Avery*, the Court heard a number of additional cases in which it further defined and enforced the constitutional principle of “one person, one vote.” At least four of these concerned apportionment

⁷² *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964).

⁷³ *Id.* at 567 (footnote omitted).

⁷⁴ *Id.* at 577.

⁷⁵ *Avery v. Midland Cnty.*, 390 U.S. 474, 475–76 (1968).

⁷⁶ *Id.* at 482 n.6.

among seats in the U.S. House of Representatives. The first is *Kirkpatrick v. Preisler*, which concerned the redistricting of Missouri's House seats.⁷⁷ The Court affirmed the lower court's decision, which held that the apportionment plan "did not meet the constitutional standard of equal representation for equal numbers of people 'as nearly as practicable.'"⁷⁸ The plan had apportioned districts with an Absolute Total Deviation Percentage of 1.61% and a Maximum Deviation Percentage of 5.97%. The Voter Equivalency Ratio, the population ratio of the most under-represented district to the most over-represented district, was 1.061.⁷⁹

The second case is *Wells v. Rockefeller*, which involved a challenge to New York's plan to apportion its forty-one U.S. House districts.⁸⁰ The plan apportioned districts with an Absolute Total Deviation Percentage of 3.79% and a Maximum Deviation Percentage of 13.09%. The Voter Equivalency Ratio was 1.042. New York tried to justify its apportionment plan with two arguments. First, the State argued that it created the districts to maintain population equality among districts within a geographic region (for instance, those in parts of Manhattan, Queens, the Bronx, or those around Buffalo and Erie), even though these relatively equal regions differed in size across the regions.⁸¹ The Court disagreed with the logic: "Equality of population among districts in a sub-state is not a justification for inequality among all the districts in the State."⁸² Second, some of the upstate population deviation arose from the state attempting to apportion whole counties. The Court also disagreed with this: "Nor are the variations in the 'North country' districts justified by the fact that these districts are constructed of entire counties."⁸³

The third case, *White v. Weiser*,⁸⁴ challenged the redistricting of Texas's twenty-four U.S. House districts. Texas's original plan apportioned districts with an Absolute Total Deviation Percentage of 0.75% and a Maximum Deviation Percentage of 4.13%. The Voter Equivalency Ratio was 1.042. Even though these were the smallest levels of malapportionment that the Court had heard to date, it held that these deviations "were not 'unavoidable,' and the districts were not as mathematically equal as reasonably possible."⁸⁵

The fourth case, *Karcher v. Daggett*, involved the redistricting plan of New Jersey following the 1980 U.S. Census.⁸⁶ This case presented the

⁷⁷ *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969).

⁷⁸ *Id.* at 529–30.

⁷⁹ *Id.* at 529 n.1.

⁸⁰ *Wells v. Rockefeller*, 394 U.S. 542, 543 (1969).

⁸¹ *Id.* at 545–46.

⁸² *Id.* at 546.

⁸³ *Id.*

⁸⁴ 412 U.S. 783, 784 (1973).

⁸⁵ *Id.* at 790.

⁸⁶ 462 U.S. 725, 727 (1983).

Court with malapportionment figures even smaller than those found in *White*. The plan apportioned districts with an Absolute Total Deviation Percentage of 0.1384% and a Maximum Deviation Percentage of 0.6984%.⁸⁷ The Voter Equivalency Ratio was 1.007. The appellants defending the original New Jersey apportionment argued that the population differences were *de minimis*—in other words, the differences were not functionally different from zero given the imprecision of the original Census figures.⁸⁸ The Court did not agree and went to lengths to reiterate the previous arguments of, in particular, *Wesberry* and *Kirkpatrick*.⁸⁹ It affirmed that the constitutional requirement of “one person, one vote,” found in the “equal representation” standard of Article I, Section 2, necessitated an implementation that provides legislative districts that are as equal “as nearly as practicable.”⁹⁰ Even a Maximum Deviation Percentage of less than one percent may not meet that standard.

All of the above cases played an important role in defining and enforcing the constitutional requirement of “one person, one vote.” Since the Court has decided these cases, “one person, one vote” has become a foundational principle—for the Court as well as the public—of democratic representation.

Still, all of these cases only address intrastate malapportionment: population variances among districts within a single state. There is nothing, however, within these cases that explicitly limits this constitutional requirement to state variations. The constitutional requirement is not “one person in one state, one vote in one state.” In fact, there are at least two reasons to posit that the constitutional requirement should be applied equally within states as well as among states.

First, the Court has gone to great lengths to express the constitutional requirement as a normative requirement: representational equality is a fundamental principle of American democracy. The Court, for example, concluded its majority opinion in *Wesberry* as follows:

While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.⁹¹

Second, the premise of the “Great Compromise” during the

⁸⁷ *Id.* at 728.

⁸⁸ *Id.* at 735–36.

⁸⁹ *Id.* at 732–33.

⁹⁰ *Id.* at 730 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)).

⁹¹ *Wesberry*, 376 U.S. at 18.

Constitutional Convention of 1787 was that the apportionment of the U.S. House, which represented individuals, would balance the apportionment of the U.S. Senate, which represented individual states.⁹² This requires that individuals be equally represented across the states and not just within them—for U.S. Senators have perfectly equal intrastate apportionment, but vastly unequal interstate apportionment. The Federalists and Anti-Federalists both expressed sentiments in this vein. For instance, James Wilson, a delegate from Pennsylvania to the Constitutional Convention, argued on June 9, 1787 that “equal numbers of people ought to have an equal [number] of representatives.”⁹³ Wilson continued “[e]very citizen of one state possesses the same rights with the citizen of another.”⁹⁴ Despite opposing the passage of the U.S. Constitution, at least one Anti-Federalist viewed the apportionment of the U.S. House in a similar light. In *Essay III* by Brutus (Robert Yates), published on November 15, 1787, the author states that the House “is to be chosen by the people of the respective states, in proportion to the number of their inhabitants.”⁹⁵

These expectations were made explicit in Article I, Section 2 of the U.S. Constitution and refined in the Fourteenth Amendment: “Representatives shall be apportioned among the several States according to their respective numbers.”⁹⁶ To point, the Amendment does not read “within the several States,” but “among the several States.”

Given these points, it is difficult to assume—perhaps, even illogical given the malapportionment comparisons with Senators—that the Framers of the Constitution or the Court meant to restrict the requirement of equal representation to only within states, irrespective of any inequality among the states. Nor does it seem plausible that the Constitution is meant to apply to state policies—such as the state-level apportionment plans for local, state, and federal districts—but not to federal policies. In sum, there are few, if any, normative, logical, or constitutional justifications that can be made that would delineate any constitutional differences between intrastate malapportionment and interstate malapportionment.

⁹² WALTER B. MEAD, *THE UNITED STATES CONSTITUTION: PERSONALITIES, PRINCIPLES, AND ISSUES* 71 (1987).

⁹³ *Notes by James Madison on the Proceedings of Committee of the Whole House (June 9th, 1787)*, in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 179 (Max Farrand ed., 1911).

⁹⁴ *Notes by Robert Yates on the Proceedings of Committee of the Whole House (June 9th, 1787)*, in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 183 (Max Farrand ed., 1911).

⁹⁵ BRUTUS, *ESSAY III* (1787), reprinted in *THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 185–86* (Michael P. Zuckert & Derek A. Webb eds., 2009).

⁹⁶ U.S. CONST. amend. XIV, § 2.

	<i>Wesberry v. Sanders</i>	<i>Kirkpatrick v. Preisler</i>	<i>Wells v. Rockefeller</i>	<i>White v. Weiser</i>	<i>Karcher v. Daggett</i>	2000 Interstate Malapportionment	2010 Interstate Malapportionment
Ideal District Size	394,312	431,981	409,340	466,530	526,059	646,952	710,767
Most Over-Represented Size	272,154	419,721	382,277	458,581	523,798	495,304	527,624
Deviation (#)	122,158	12,260	27,063	7,949	2,261	151,648	183,143
Deviation (%)	30.98%	2.84%	6.61%	1.70%	0.43%	23.44%	25.77%
Most Under-Represented Size	823,680	445,523	435,880	477,856	527,472	905,316	994,416
Deviation (#)	429,368	13,542	26,540	11,326	1,413	258,364	283,649
Deviation (%)	108.89%	3.13%	6.48%	2.43%	0.27%	39.94%	39.91%
Maximum Deviation (#)	551,526	25,802	53,603	19,275	3,674	410,012	466,793
Maximum Deviation (%)	139.87%	5.97%	13.09%	4.13%	0.70%	63.38%	65.67%
Absolute Total Deviation (#)	n.a.	6,912	15,519	3,421	726	37,227	43,421
Absolute Total Deviation (%)	n.a.	1.60%	3.79%	0.75%	0.14%	5.75%	6.11%
Voter Equivalency Ratio	3.03	1.06	1.14	1.04	1.01	1.83	1.88
Supreme Court's Decision	Unconstitutional	Unconstitutional	Unconstitutional	Unconstitutional	Unconstitutional		

In light of this, Table 1 provides a summary of the intrastate malapportionment measurements found in the Supreme Court cases concerning the U.S. House of Representatives as well as the 2000 and 2010 interstate malapportionments discussed above. The intrastate malapportionment discussed in *Wesberry* was more severe than the malapportionment in any of the other cases cited. The last of these cases, *Karcher*, involved Maximum Deviation measurements of just 3,674 individuals, or 0.7% of the state-average district size. The Maximum Deviation measurements of interstate malapportionment after the 2000 Census were 410,012 individuals, or 63.38% of the national-average district size. The same measurements after the 2010 Census were 466,792 individuals, or 65.67%.

In other words, the 2000 interstate Maximum Deviation measurement for individuals is 11,160% larger than the levels declared unconstitutional in *Karcher*. As a percentage of the ideal district size, it is 9,054% larger. The 2010 interstate Maximum Deviation for individuals is 12,705% larger than the levels declared unconstitutional in *Karcher*; and, as a percentage of the ideal district size, it is 9,381% larger.

The levels of interstate malapportionment are massive compared to the levels of intrastate malapportionment in many of the cases that defined and enforced the constitutional principle of “one person, one vote.” If the Constitution mandates “equal representation” as the Court has said that it does, then any malapportionment should raise constitutional concern. The Court has been vigorous and forceful in its denunciation and mitigation of intrastate malapportionment. In the process, the Court has ruled a number

of state districting statutes to be unconstitutional.⁹⁷ The Court, however, has not spoken to the issue of interstate malapportionment.⁹⁸ If there is a remedy that is constitutional—even if statutes need to be deemed unconstitutional—then the Court should be equally vigorous and forceful in its application of the principle of “one person, one vote”⁹⁹ in the context of interstate malapportionment.

IV. CONSTITUTIONAL SOLUTIONS

Interstate malapportionment is a problem caused by the incongruent mix of constitutional and statutory apportionment requirements and by the growing, but unequal, state populations. These factors cause smaller states to have too few districts to adequately distribute their population remainders.¹⁰⁰ There are a number of extra-constitutional solutions to this problem. For example, if House districts were allowed to cross state lines, House members’ roll-call votes were weighted by the home state’s average district size, or the United States switched to a system of proportional representation instead of single-member districts, then the issue of interstate malapportionment could be eliminated almost entirely.¹⁰¹ But, each of these would require a constitutional amendment; and, if an amendment is possible, then the first order of business should be to change the vastly more egregious interstate malapportionment of the U.S. Senate.¹⁰²

⁹⁷ See, e.g., *White v. Weiser*, 412 U.S. 783, 794–97 (1973) (declaring a Texas plan for congressional redistricting unconstitutional and mandating that the state enact an alternate plan); *Reynolds v. Simms*, 377 U.S. 533, 587 (1964) (holding that the existing and two legislatively-proposed plans for apportionment of seats in the two houses of the Alabama Legislature were invalid under the Equal Protection Clause in that the apportionment was not on a population basis and completely lacked rationality); *Baker v. Carr*, 369 U.S. 186, 209–10 (1962) (holding that a complaint containing allegations that a state statute effected an apportionment that deprived plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment presented a justiciable constitutional cause of action).

⁹⁸ See Jeffrey W. Ladewig & Mathew P. Jasinski, *On the Causes and Consequences of and Remedies for Interstate Malapportionment of the U.S. House of Representatives*, 6 *PERSP. ON POL.* 89, 90 (2008) (“Despite the Court’s aggressive stance toward intrastate malapportionment, it declined its only opportunity to date to address interstate malapportionment.”).

⁹⁹ See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 152 (1994) (explaining that the “one-vote, one-value” principle makes the assumption that each voter should enjoy the same opportunity to effect election outcomes); Ladewig & Jasinski, *supra* note 98, at 89 (citing the Court’s efforts to reduce intrastate malapportionment).

¹⁰⁰ Ladewig & Jasinski, *supra* note 98, at 92–93.

¹⁰¹ See *id.* at 95, 102 (stating that each of these methods could “go a long way in reducing or eliminating malapportionment and is deserving of greater debate”).

¹⁰² To the point, many find the malapportionment of the Senate troubling. The Senate, though, is perfectly apportioned in terms of the all of the Supreme Court intrastate malapportionment cases discussed—that is, no state has different “district” populations for their own Senators. Instead, the Senate only has interstate malapportionment—different “district” populations among the states. If the interstate malapportionment of the Senate can be so troubling for some, should not the House and its interstate malapportionment also raise their ire?

This leaves consideration of the two statutory requirements for apportionment. First, the current apportionment method—the Hill (or Equal Proportions) method—was set by the Apportionment Act of 1941.¹⁰³ Since the founding of the country, Congress has debated and used about six different apportionment methods.¹⁰⁴ Each of these methods apportions seats by way of different mathematical formulas;¹⁰⁵ each has its own advantages and disadvantages. For instance, Balinski and Young argue that the Webster method—not the Hill method—better approximates the constitutional principle of “one person, one vote.”¹⁰⁶

The Court addressed the constitutionality of the Hill method in *U.S. Department of Commerce v. Montana*.¹⁰⁷ Montana argued that a third apportionment method, the Dean (or Harmonic Mean) method, better approximates the constitutional principles found in *Wesberry*.¹⁰⁸ Using the Dean method for the 1990 reapportionment, not coincidentally, would have also provided Montana, at the expense of Washington state, with an additional U.S. House district; there would have been no other changes across the country.¹⁰⁹ This change would have decreased the Absolute Total Deviation, but it would have increased the relative deviations between these two states.

The Court stated that the intrastate malapportionment—as indicated above—pointed to no single standard by which equality must be measured.¹¹⁰ Given that each apportionment method minimizes a different equality measurement,¹¹¹ the Court held that Congress had the discretion to choose the method that it deemed best—thereby rejecting Montana’s argument.¹¹²

There are four particularly relevant consequences for this Article from *U.S. Department of Commerce v. Montana*. First, unlike the intrastate malapportionment cases, *U.S. Department of Commerce v. Montana* concerns issues that relate, though are not identical, to interstate malapportionment.¹¹³ Second, the Court declared the apportionment method of the House is not a political question beyond the reach of the Court, and that interstate malapportionment is justiciable.¹¹⁴ Third, the

¹⁰³ 2 U.S.C. § 2a (2006).

¹⁰⁴ See generally BALINSKI & YOUNG, *supra* note 9 (describing the various methods that have been used over the history of the United States and their effects on representation).

¹⁰⁵ See *id.* at ix (examining the various formulas utilized by each method of apportionment).

¹⁰⁶ *Id.* at 23–35.

¹⁰⁷ U.S. Dep’t of Commerce v. Montana, 503 U.S. 442, 460–66 (1992).

¹⁰⁸ *Id.* at 460–61.

¹⁰⁹ *Id.* at 461–62 & n.40.

¹¹⁰ *Id.* at 463.

¹¹¹ *Id.* at 454–55.

¹¹² *Id.* at 452–54.

¹¹³ *Id.* at 445.

¹¹⁴ *Id.* at 458.

Court concluded that *Wesberry* and the other cases that defined the principle of “one person, one vote” are likely applicable to issues of interstate malapportionment.¹¹⁵ Specifically, the Court stated:

There is some force to the argument that the same historical insights that informed our construction of Article I, § 2, in the context of intrastate districting should apply here as well. As we interpreted the constitutional command that Representatives be chosen “by the People of the several States” to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States “according to their respective Numbers” would also embody the same principle of equality. Yet it is by no means clear that the facts here establish a violation of the *Wesberry* standard.¹¹⁶

Fourth, switching apportionment methods (even if to the unlikely alternative of the Dean method) may decrease some of the interstate malapportionment measurements.¹¹⁷ Although it would not happen with every decennial census count, switching from the Hill to the Dean method for the 1990 reapportionment would have reduced both the Maximum Deviation Percentage (from 60.73% to 52.09%)—a nonmarginal amount—as well as the Absolute Total Deviation Percentage among all of the states (from 5.97% to 5.79%).

Even if the Court held that the Maximum Deviation measurements are the standard by which interstate malapportionment should be evaluated, switching from the Hill to the Dean methods would have typically produced only modest improvements. And, it would have still left the Maximum Deviation Percentage well above almost all of the intrastate malapportionments ruled unconstitutional. In other words, perhaps a change in apportionment methods could better apportion the House along the lines of “one person, one vote”—though, as mentioned before, that is disputed by the Court because of no clear measure of equality¹¹⁸—but in almost all circumstances the change would affect only a handful of seats and states.¹¹⁹ And, it is unlikely that these changes would make much headway in diminishing interstate malapportionment. As such, the first

¹¹⁵ *Id.* at 460.

¹¹⁶ *Id.* at 461.

¹¹⁷ *Id.* at 443.

¹¹⁸ *See id.* at 463 (“What is the better measure of inequality—absolute difference in district size, absolute difference in share of a Representative, or relative difference in district size or share? Neither mathematical analysis nor constitutional interpretation provides a conclusive answer.”).

¹¹⁹ *See* BALINSKI & YOUNG, *supra* note 9, at 157–80, for a comparison of all six apportionment methods as applied to the states during each of the reapportionments from 1790 to 2000.

statutory requirement of apportionment—the use of the Hill method—does not seem to be a major factor in causing, or changing it would not be a major factor in mitigating, interstate malapportionment.

The second statutory requirement for the apportionment of the House is the fixed number of seats.¹²⁰ The Constitution is silent on the size of the House—other than the initial 1789 apportionment size,¹²¹ but the Founders were not silent. In fact, it was hotly debated among them.¹²² The Founders discussed the size of the House in at least three ways. The first was through their intent that House members should represent an equal number of individuals, as discussed above.¹²³ The second was through their concern that district sizes would be too large. For example, the only time that George Washington spoke during the Constitutional Convention was to register his concern that a minimum district size of 40,000 individuals was too large.¹²⁴ Washington favored the proposal suggested by Nathaniel Gorham of Massachusetts to change the minimum to 30,000 individuals; after Washington spoke, it passed with no opposition.¹²⁵ And Madison, in *The Federalist No. 55*, suggested that district sizes should be kept small enough for district representatives to “possess a proper knowledge of the local circumstances of their numerous constituents.”¹²⁶

The third way the Founders discussed the size of the House was through their intent that the House should grow in size in some proportion with the growth of the U.S. population. For instance, Madison argued in *The Federalist No. 55*, “I take for granted here what I shall in answering the fourth objection hereafter show, that the number of representatives will be augmented from time to time in the manner provided by the [C]onstitution.”¹²⁷ Or, as he argued in *The Federalist No. 58*,

The remaining charge against the [H]ouse of [R]epresentatives, which I am to examine, is grounded on a

¹²⁰ The Apportionment Act of 1911 set this number at 433, but the current number is 435. Apportionment Act of 1911, ch. 5, § 1, 37 Stat. 13, 13 (codified as amended at 2 U.S.C. § 2a (2006)).

¹²¹ The original size of the House was sixty-five persons. BALINSKI & YOUNG, *supra* note 9, at 8. According to the Constitution, “Representatives . . . shall be apportioned among the several States . . . 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.” U.S. CONST. art. 1, § 2, cl. 3. This provision was modified, however, by the Fourteenth Amendment. *Id.* amend. XIV, § 2.

¹²² See BALINSKI & YOUNG, *supra* note 9, at 11–13 (describing the debate between the Founders on the size of the House, and noting that “[t]he contest over the division of seats arose from deep political divisions: the emerging conflict between North and South, between Republican and Federalist, between agricultural and industrial interests”).

¹²³ See *supra* notes 92–95 and accompanying text.

¹²⁴ *Report of Committee of Style, Notes of James Madison, Sept. 17, 1787*, in 2 THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 590, 644 (Max Farrand ed., 1911).

¹²⁵ *Id.* at 643–44.

¹²⁶ THE FEDERALIST NO. 55, at 141, 143 (James Madison) (J. & A. McLean ed., 1788).

¹²⁷ *Id.* at 144.

supposition that the number of members will not be augmented from time to time, as the progress of population may demand. It has been admitted that this objection, if well supported, would have great weight.¹²⁸

In fact, the first Congress of the United States passed twelve amendments to the Constitution, the first of which established that the number of House seats would increase at a diminishing rate along with the U.S. population.¹²⁹ This amendment came one state short of passing and becoming part of the Bill of Rights.¹³⁰ Still, the House generally followed the intentions of this proposed amendment.

The initial size of the House in 1789 was sixty-five seats.¹³¹ The following year, the first Census and reapportionment were conducted, and Congress increased the size of the House to 105 seats.¹³² From 1790 through 1910, after each decennial census, Congress changed the size of the House—in only one of these changes, in 1840, was the size decreased.¹³³ In the 1910 reapportionment, the size of the House was increased to 435 seats.¹³⁴ And, during the 1920 reapportionment, the initial proposal was to increase the size to 483, but it was defeated by a coalition of those who felt that the House was becoming “unwieldy”¹³⁵ as well as by members from rural states that stood to lose members to the states with larger urban areas—the 1920 Census was the first to show the United States as a majority urban country.¹³⁶

With no apportionment legislation, the House stayed at 435 seats. A similar constellation of issues arose before the 1930 Census and reapportionment. In response, in 1929 Congress passed, and President Hoover signed, the Reapportionment Act of 1929,¹³⁷ which froze the U.S. House of Representatives at 435 seats.¹³⁸ The Apportionment Act of 1941, which replaced the 1929 Act, established the Hill method of apportionment

¹²⁸ THE FEDERALIST NO. 58, at 160 (James Madison) (J. & A. McLean ed., 1788).

¹²⁹ See CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S*, at 23 (1990) (describing the First Congress’s first amendment to the Constitution).

¹³⁰ *Id.*

¹³¹ *Id.* at 21–22.

¹³² *Id.* at 23, 25.

¹³³ See *id.* at 26 (“The Senate insisted on a smaller House and on abandoning Jefferson’s approach, in use since 1792. . . . The adopted ratio . . . for the first time actually shrank the House of Representatives to . . . fewer than provided in 1832.”).

¹³⁴ See *id.* at 21 (noting that, by 1912, U.S. House membership stood at 435 representatives).

¹³⁵ BRIAN FREDERICK, *CONGRESSIONAL REPRESENTATION & CONSTITUENTS: THE CASE FOR INCREASING THE U.S. HOUSE OF REPRESENTATIVES 25–26* (2010) (internal quotation marks omitted).

¹³⁶ EAGLES, *supra* note 129, at 116; FREDERICK, *supra* note 135, at 25–26; *Congressional Apportionment*, NAT’L ATLAS OF THE UNITED STATES OF AMERICA, http://www.nationalatlas.gov/articles/boundaries/a_conApport.html (last visited Apr. 2, 2011).

¹³⁷ Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26 (codified as amended at 2 U.S.C. § 2a (2006)).

¹³⁸ FREDERICK, *supra* note 135, at 29–30.

and continued freezing the House at 435 seats.¹³⁹ No legislation to change the number of seats of the House has passed since 1941—except for the temporary extension of one seat for each of the newly admitted states of Alaska and Hawaii in 1959.¹⁴⁰ As such, the size of the lower chamber has basically remained at its fixed size of 435 seats since 1910.¹⁴¹

Perhaps a House with 435 seats has become publically accepted. But it is clear that the House has not always been this size or fixed at one size. Furthermore, the Founders believed that the House size should change along with the U.S. population, and it did change for the first 120 years of the country.¹⁴² It is currently set at 435 seats only by a federal statute.¹⁴³

Will changing the size of the House mitigate interstate malapportionment? The answer is somewhat complicated. This is because of four factors. First, given the pattern of state populations, unless the House is increased in size to the apportionment population of the United States—in other words, everyone is a member of the U.S. House of Representatives—there will always be a population remainder. Regardless of the difficulties this would generate, if everyone is a representative, then “districts” would be less than 30,000 individuals—they would be one individual—and thereby unconstitutional. Perfect equality, therefore, is impossible to achieve under the current constitutional requirements. Regardless of size, the House will never perfectly attain the constitutional standard of “one person, one vote.”

Second, the pattern of the malapportionment measurements—as the House size is expanded—depends on the specific distribution of state populations. As the distribution of state populations changes after each Census, so does the pattern. Third, with certain distributions of state populations, an increase in the House size can actually cause some measurements of interstate malapportionment to increase. This is generated because the most under-represented state is not always the next state to receive an additional district,¹⁴⁴ but the national-average district size always decreases. Fourth, as the Court noted in *U.S. Department of Commerce v. Montana*, there is no constitutional definition of how to measure interstate malapportionment.¹⁴⁵ And, the different measures do not always change at the same rate or in the same direction.

¹³⁹ Apportionment Act of 1941, ch. 470, §§ 1–2(a), 55 Stat. 761, 761–62 (codified as amended at 2 U.S.C. § 2a (2006)).

¹⁴⁰ *Congressional Apportionment*, *supra* note 136.

¹⁴¹ *See id.* (noting that the number of seats in the U.S. House of Representatives has remained at 435 since 1911, with the exception of the temporary increase in size following the admission of Alaska and Hawaii into statehood).

¹⁴² *See supra* note 133 and accompanying text.

¹⁴³ *See supra* notes 137–39 and accompanying text.

¹⁴⁴ *See infra* notes 148–49 and accompanying text.

¹⁴⁵ *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 463 (1992).

The recent decennial distributions of state populations create a pattern for the interstate malapportionment measurements that, if the House size is changed, is similar to a “saw-tooth” pattern. As the number of seats increases, for example, many of the malapportionment measurements actually also increase until the most under-represented state is granted an additional district, at which point there is typically a sharp drop in the measurements. As the size of the House continues to increase, these measurements will again rise, until the next most under-represented state is granted an additional district. As such, the Court’s standard that malapportionment should be decreased as much as is “practicable”¹⁴⁶ leads to an examination of when interstate malapportionment is locally minimized; if it is practicable to further increase the size of the House, then the next sharp drop to a new (and typically lower) localized minimum should be considered.

Seats	435	436	437	438	439	440	441	442	443	444	445
Ideal District Size	646,952	645,468	643,991	642,521	641,057	639,600	638,150	636,706	635,269	633,838	632,414
Last State to Get a Seat	Carolina	Utah	New York	Texas	Michigan	Indiana	Montana	Illinois	Mississippi	California	Wisconsin
Most Over-Represented State	Wyoming	Wyoming	Wyoming	Wyoming	Wyoming	Wyoming	Montana	Montana	Montana	Montana	Montana
Most Over-Represented Size	495,304	495,304	495,304	495,304	495,304	495,304	452,658	452,658	452,658	452,658	452,658
Deviation (#)	151,648	150,164	148,687	147,217	145,753	144,296	185,492	184,048	182,611	181,180	179,756
Deviation (%)	23.44%	23.26%	23.09%	22.91%	22.74%	22.56%	29.07%	28.91%	28.75%	28.58%	28.42%
Most Under-Represented State	Montana	Montana	Montana	Montana	Montana	Montana	Delaware	Delaware	Delaware	Delaware	Delaware
Most Under-Represented Size	905,316	905,316	905,316	905,316	905,316	905,316	785,068	785,068	785,068	785,068	785,068
Deviation (#)	258,364	259,848	261,325	262,795	264,259	265,716	146,918	148,362	149,799	151,230	152,654
Deviation (%)	39.94%	40.26%	40.58%	40.90%	41.22%	41.54%	23.02%	23.30%	23.58%	23.86%	24.14%
Maximum Deviation (#)	410,012	410,012	410,012	410,012	410,012	410,012	332,410	332,410	332,410	332,410	332,410
Maximum Deviation (%)	63.38%	63.52%	63.67%	63.81%	63.96%	64.10%	52.09%	52.21%	52.33%	52.44%	52.56%
Absolute Total Deviation (#)	37,227	36,893	36,817	36,718	36,587	36,437	34,833	34,792	34,538	34,520	34,518
Absolute Total Deviation (%)	5.75%	5.72%	5.72%	5.71%	5.71%	5.70%	5.46%	5.46%	5.44%	5.45%	5.46%
Voter Equivalency Ratio	1.83	1.83	1.83	1.83	1.83	1.83	1.73	1.73	1.73	1.73	1.73

Consider, for example, the apportionment of the House—by the Hill method—with 435 seats after the 2000 Census (see Table 2). North Carolina was granted the 435th seat;¹⁴⁷ if the House were to be increased to

¹⁴⁶ *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

¹⁴⁷ Matt Canham, *Census Count To Exclude Overseas Missionaries—Again*, SALT LAKE TRIB., Aug. 16, 2009, available at <http://ldsfiles.com/newforums/lds-news-ldsfiles-com/21084-census-count-exclude-overseas-missionaries-again-salt-lake-tribune.html>.

436 seats, Utah—not the most under-represented state of Montana¹⁴⁸—would be granted the 436th seat.¹⁴⁹ As such, the Maximum Deviation as measured by the number of individuals would remain at 410,012 individuals. But, because the national average district size would decrease (from 646,952 to 645,468 individuals) and the most under-represented state is more malapportioned than the most over-represented state, the Maximum Deviation Percentage actually increases (from 63.38% to 63.52%). Still, the Absolute Total Deviation—expressed as the number of individuals or as a percent of the National Average District Size—decreases. This pattern persists until the 441st seat is granted to Montana.¹⁵⁰ At this point, there are considerable drops in almost all of the interstate malapportionment measurements. For instance, the Maximum Deviation Percentage drops appreciably from a 64.01% to 52.09%, and the Absolute Total Deviation Percentage drops from 5.70% to 5.46%. The one statistic that still increases is the malapportionment of the most over-represented state. As Montana is granted its second district, it moves from the most under-represented state to the most over-represented state.¹⁵¹ And, Montana is more over-represented than the previous most over-represented state, Wyoming.¹⁵²

Nonetheless, the addition of just six seats to the House after the 2000 reapportionment would reduce the key measurements of interstate malapportionment: Maximum Deviation Percentage decreases by 18.74% and Absolute Total Deviation Percentage decreases by 4.18%.¹⁵³ As more seats are initially added, the pattern of small increases in the Maximum Deviation Percentage resumes—but, it is still less than what it was before the addition of the 441st seat. And, the Absolute Total Deviation

¹⁴⁸ See Peter Baker, *Expand the House?*, N.Y. TIMES, Sept. 18, 2009, available at <http://www.nytimes.com/2009/09/18/us/politics/18baker.html> (intimating that Montana is the most populated state with only one House vote); see also *supra* notes 26–30 and accompanying text.

¹⁴⁹ See D'Vera Cohn, *Census 2010: The Last Seat in Congress*, PEW RESEARCH CENTER (Jan. 11, 2011), <http://census.pewsocialtrends.org/2011/census-2010-the-last-seat-in-congress> (“After the 2000 Census, when North Carolina won the 435[th] seat, Utah would have been next in line . . .”).

¹⁵⁰ FAIRVOTE, IMPACT OF INCREASING HOUSE SIZE, <http://archive.fairvote.org/?page=1765> (last visited Apr. 2, 2011).

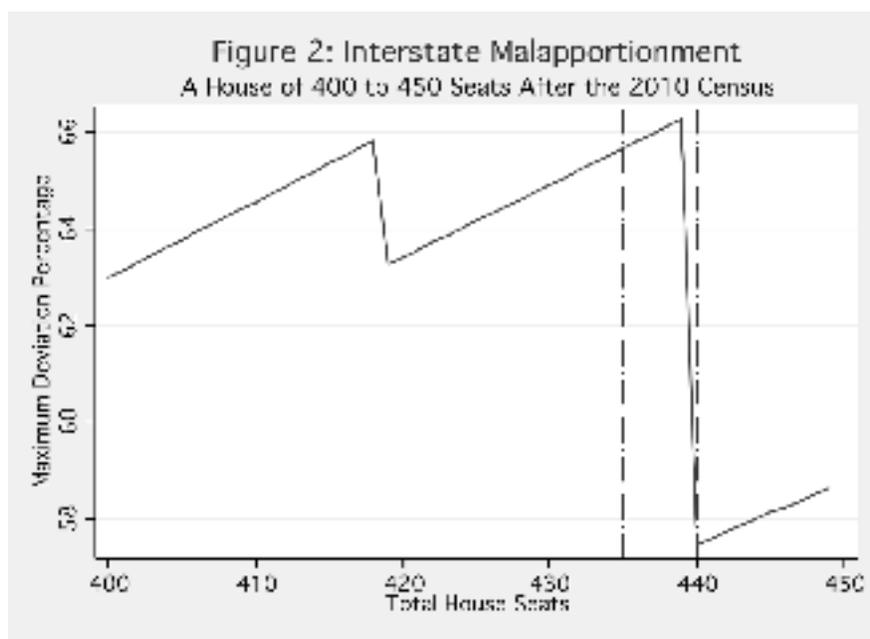
¹⁵¹ As explained in Part II, after the 2010 reapportionment, Montana stands as the most under-represented state in the country, with 994,416 citizens in one district, while Rhode Island, with an average district size of 527,624 citizens, is the most over-represented state. See *supra* Part II. Given these statistics, once Montana receives a second seat in the House of Representatives, it will overtake Rhode Island for smallest average district size and, in turn, most over-represented state.

¹⁵² See Bob Unruh, *Lawsuit Seeks Larger House Under ‘One Person, One Vote,’* WORLDNETDAILY (Sept. 17, 2009, 3:44 PM), <http://www.wnd.com/?pageId=110124> (noting that Wyoming was the most over-represented state according to the 2000 census).

¹⁵³ Shrinking the size of the House would have the opposite effect. That is, ironically, there would be very small improvements in some of the interstate malapportionment statistics as the House is shrunk smaller than 435 seats until enough seats are removed that a new state replaces Montana as the most under-represented. At which point, there is a spike upwards in the interstate malapportionment statistics.

Percentage continues to decrease until the 444th seat is added; then, it, too, begins to increase slightly.

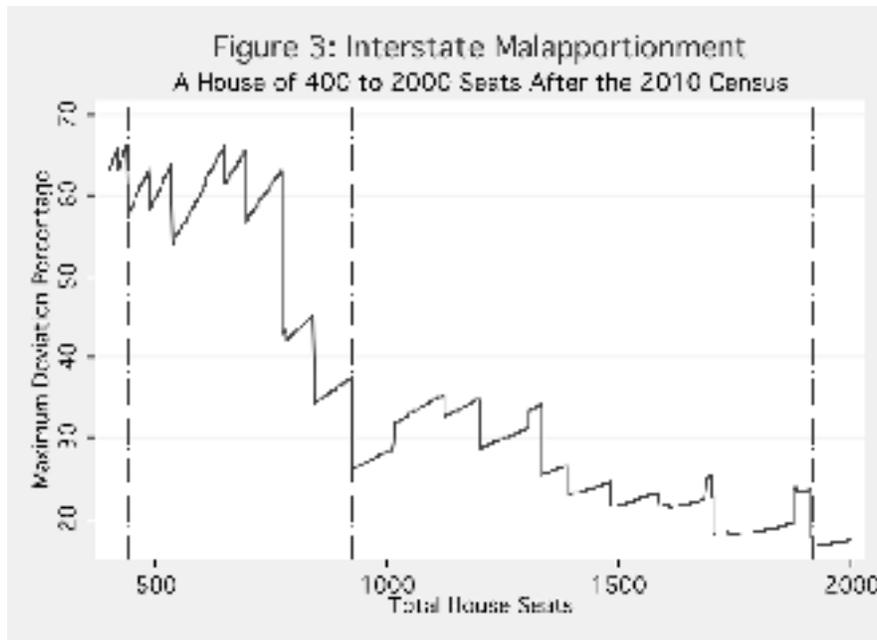
This example demonstrates at least three things. First, there is a “saw-tooth” pattern for the interstate malapportionment measurements as the House size is increased. It also demonstrates that the different interstate malapportionment measurements follow a similar, but not identical, pattern as the House size increases. Third, it defines the first House-seat size above 435 that provides a localized minimum at 441 seats. That is, the interstate malapportionment measurements are higher prior to and after the 441-seat apportionment—at least until the next “saw-tooth” drop occurs. Thus, the addition of this seat makes nonmarginal improvements in both the Absolute Total Deviation Percentage and the Maximum Deviation Percentage.



To view the “saw-tooth” pattern and a locally minimized House size option for the current 2010 Census data, Figure 2 graphs the Maximum Deviation Percentage for all House sizes from 400 to 450 seats. This range of seats demonstrates the clear “saw-tooth” pattern from 400 to 439 seats. The dashed vertical on the left represents the reapportionment, based on the 2010 Census, of 435 seats for the 113th Congress. Decreasing the size of the House from 435 seats to 419 seats could actually marginally reduce the Maximum Deviation Percentage from 65.67% (435 seats) to 63.26% (419 seats)—and thus, marginally decrease interstate malapportionment. An additional one-seat reduction to 418, though, would spike the

Maximum Deviation Percentage back up to 65.83%. Conversely, increasing the size of the House from 435 seats to 439 seats would actually marginally increase the Maximum Deviation Percentage from 65.67% to 66.28%—and thus, marginally increase interstate malapportionment. Adding just one more additional seat, to a House of 440 seats (the dashed line on the right), provides Montana—the most under-represented state—with its second seat. As such, there is marked decrease to 57.45% in the Maximum Deviation Percentage, and thus a marked decrease in interstate malapportionment. The “saw-tooth” pattern begins again after the 440th seat is added.

Figure 2 suggests that for the 2010 reapportionment, interstate malapportionment could be marginally decreased if the House size were actually decreased. But there is also a much lower localized minimum in interstate malapportionment within just 5 additional seats of the current apportionment of 435 seats. This 12.5% decrease in the level of the Maximum Deviation Percentage with a 440 seat House is similar to the one found with the 2000 apportionment populations, though it occurs one seat sooner because of the particular variations in state population found in the 2010 Census. But, it again demonstrates that even a small adjustment (subtractions or additions) to the size of the House can result in an improvement in interstate malapportionment.



This begs the question of how a House of 434 seats or 440 seats, either of which better approximates the constitutional principle and democratic

norm of “one-person, one-vote,” could violate the practicability standard set by *Wesberry*.

Figure 3 provides the same data as Figure 2 but with a range of House sizes after the 2010 Census from 400 seats to 2000 seats—an upper limit that is still constitutional but beyond which is probably impracticable. Figure 3 demonstrates that the localized minimum at the 440th seat (the far left vertical dashed line) is just that: localized. After the 440th seat, the “saw-tooth” pattern continues until the largest drop in the series occurs once the 772nd seat is added. With the addition of the 772nd, the Maximum Deviation Percentage falls from 63.12% to 42.81%. But, by adding thirteen additional seats, there is a localized minimum at 785 seats. At this point, the Maximum Deviation Percentage dips to 42.22%. During this series of seat adjustments, the Absolute Total Deviation Percentage is also falling, but not as dramatically as the changes in the Maximum Deviation Percentage. The Absolute Total Deviation Percentage reaches a localized minimum at the 772nd seat, falling from 4.97% to 4.72%, and with the addition of the 785th seat, it falls from 4.82% to 4.79%. Both of these measures continue to fall—though, in its own “saw-tooth” pattern—relatively quickly as more seats are added until the 926th seat (the middle vertical dashed line). At this House size, the Maximum Deviation Percentage is just 27.89% and the Absolute Total Deviation Percentage is just 2.87%. After this seat addition, the pattern persists, but is more stable. The lowest Maximum Deviation Percentage (16.71%) within this series occurs with a House of 1,921 seats (the far right vertical dashed line). The lowest Absolute Total Deviation Percentage is 1.56% at 1,800 seats.

In sum, the statute requirement that freezes the House of Representatives at 435 seats considerably limits the chamber from minimizing interstate malapportionment as measured by either the Absolute Total Deviation Percentage or the Maximum Deviation Percentage. Even slightly smaller or larger House size would improve the malapportionment statistics most frequently cited by the Supreme Court. Thus, the statutory requirement also undermines the constitutional requirement—as well as the norm of democratic representation—of “one person, one vote.” Because of the other constitutional requirements of congressional apportionment, no apportionment size can perfectly bring the House in line with “one person, one vote.” But, given recent trends in the distributions of state populations, the House is likely to only witness increasing levels of interstate malapportionment, and thereby continue to move further and further away from this constitutional and democratic benchmark. Only by enlarging the size of the House can all of the malapportionment measures in 2010 and into the future be constitutionally and considerably lowered.

V. CONCLUSION AND DISCUSSION

Legislative malapportionment has been a serious issue for the public, the courts, and legislative chambers. The Supreme Court took especially bold steps in the 1960s and 1970s to alleviate the problem of intrastate malapportionment.¹⁵⁴ But, the issue of interstate malapportionment remains—and, in many ways, it is much more severe today than intrastate malapportionment was under many of the apportionment plans deemed unconstitutional by the Court under the constitutional standard of “one person, one vote.” Yet, it has not been addressed.

This is not to say that interstate malapportionment must be as small as intrastate malapportionment. For example, the Court held in *Wells v. Rockefeller* that the goal to apportion along the boundaries of whole counties in upstate New York did not justify the resulting intrastate malapportionments;¹⁵⁵ but, the drawing of boundaries of whole states is a constitutional requirement. In addition, in the cases concerning state legislatures, such as *Reynolds v. Sims*,¹⁵⁶ the Court has held that more discretion is warranted because, in part, “there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats”¹⁵⁷—just as there are more House districts across the nation than in any one state. These caveats cannot be perfectly translated to interstate malapportionment in the House, but they seem to be reasonable guideposts that would allow for somewhat greater allowances in interstate malapportionment than in intrastate malapportionment.

This is particularly relevant because, given the first three constitutional requirements that dictate the apportionment of House seats, there is no perfect solution to the problem of interstate malapportionment. Nonetheless, if the fourth constitutional requirement, “[r]epresentatives shall be apportioned among the several States according to their respective numbers,”¹⁵⁸ is to be taken seriously across institutions—as the Court has argued it should—then the public, representatives, and the Court should, at the very least, have a discussion about the current size of the House. And, if it were deemed “practicable” to meet one of the core democratic standards of voting, which is “of the most fundamental significance under our constitutional structure”¹⁵⁹ in the United States, the size of the House should be increased.

Increasing the size of the House would also be consistent with the

¹⁵⁴ See discussion *supra* Part III.

¹⁵⁵ See *Wells v. Rockefeller*, 394 U.S. 542, 546 (1969) (“To accept a scheme such as New York’s would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations.”).

¹⁵⁶ 377 U.S. 533 (1964).

¹⁵⁷ *Id.* at 578.

¹⁵⁸ U.S. CONST. amend. XIV, § 2.

¹⁵⁹ *Ill. State Bd. of Elections v. Socialist Worker Party*, 440 U.S. 173, 184 (1979).

expectation of most of the Founders. Many of them expected that the size of the House would increase—though, typically, at some lesser rate—with increases in the U.S. population. This premise is embedded in no more important place than the “Great Compromise” itself.¹⁶⁰ It would also be consistent with the actions of the U.S. Congress for the first 120 years of the republic, when the size of the House changed after each of the first twelve censuses.¹⁶¹ This stalled in 1920 largely due to political and partisan interests, which hardly seem like reasonable justifications to limit the progress towards greater individual equality.

As mentioned, the Court has never ruled directly on the issue of interstate malapportionment and the size of the House, though it did recently have the opportunity to do so. In 2010, voters from Mississippi, Delaware, Montana, South Dakota, and Utah filed a complaint, *Clemons v. U.S. Department of Commerce*,¹⁶² in the Northern District of Mississippi.¹⁶³ The complaint was primarily based on arguments that I had previously published¹⁶⁴ and have made here. The Department of Commerce countered that the House is held only by the first three constitutional requirements and not at all by the fourth.¹⁶⁵ Given these three constitutional requirements, the Department argued that Congress had the discretion to set its own size.¹⁶⁶ This surprising argument would mean that if Congress decided to provide the House with just fifty members—each state receiving its one constitutionally required member—the government would deem that as constitutional.

The District Court agreed that the constitutional requirement first set forth in *Wesberry v. Sanders*¹⁶⁷ had “some force” in the case of interstate malapportionment¹⁶⁸—using the same phrase as in *U.S. Department of Commerce v. Montana*.¹⁶⁹ The District Court also agreed that Congress had discretion to set its own size.¹⁷⁰ Without providing much additional justification, the District Court held that Congress must have balanced the

¹⁶⁰ See *supra* notes 92–96 and accompanying text.

¹⁶¹ See *supra* notes 131–34 and accompanying text.

¹⁶² 710 F. Supp. 2d 570 (2010), *vacated*, 131 S. Ct. 821 (2010).

¹⁶³ I was an expert witness on the case, and parts of this Article are based on briefs submitted for the case. Plaintiffs Reply Memorandum in Support of the Plaintiffs’ Motion for Summary Judgment at 1–7, *Clemons v. U.S. Dep’t of Commerce*, No. 3:09-CV-00104-WAP-MPM (N.D. Miss. May 13, 2010); see also Affidavit of Jeffrey Ladewig at 3–4, *Clemons v. U.S. Dep’t of Commerce*, No. 3:09-CV-00104-WAP-SAA (N.D. Miss. Feb. 19, 2010) (discussing the author’s experience with interstate apportionment calculations, as well as the concepts of overrepresentation and underrepresentation).

¹⁶⁴ See Ladewig & Jasinski, *supra* note 98, at 89–90 (describing interstate malapportionment and the lack of discussion on the issue).

¹⁶⁵ *Clemons*, 710 F. Supp. 2d at 574–75.

¹⁶⁶ See *id.* at 571–75 (discussing the arguments of the plaintiff voters and the defendant, the U.S. Department of Commerce).

¹⁶⁷ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

¹⁶⁸ *Clemons*, 710 F. Supp. 2d at 588–89 (internal quotation marks omitted).

¹⁶⁹ 503 U.S. 442, 461 (1992).

¹⁷⁰ *Clemons*, 710 F. Supp. 2d at 574.

competing interests in choosing 435 seats for the U.S. House of Representatives, and thus ruled against the plaintiffs.¹⁷¹ The case was appealed to the Supreme Court, and, on December 13, 2010, the Court vacated and remanded the District Court's ruling for lack of jurisdiction.¹⁷²

As such, it is still unclear if and how the fourth constitutional requirement for the apportionment of the U.S. House of Representatives applies to interstate malapportionment. How could "one person, one vote" apply to the apportionment of House seats within states, but not the apportionment of House seats among states? Is the current level of, say, the Maximum Deviation Percentage at 65.67% constitutional? If not, what level would be? Is the Apportionment Act of 1941 that freezes the size of the House constitutional?¹⁷³ Is it constitutional that the Supreme Court holds states to a higher standard—in terms of the malapportionment statistics as well as the arguments that were rejected, for example, in *Wells*, but that have federal analogues—than it holds the federal institutions?

This Article attempts to take steps towards answering these questions. In particular, interstate malapportionment should be viewed as normatively no different than intrastate malapportionment. There are some practical differences, but they do not rise—in the view of this author—to the level of holding a partisan-based statute superior to a fundamental and constitutional principle of democratic representation. At this point, perhaps the next step in answering these questions is a more direct and open debate on these issues among the public, representatives, and the Court. The premise of the Great Compromise and the constitutional requirements of "equal representation" and "one person, one vote" demand nothing less.

¹⁷¹ *Id.* at 590.

¹⁷² *Clemons v. U.S. Dep't of Commerce*, 131 S. Ct. 821 (2010).

¹⁷³ Apportionment Act of 1941, ch. 470, §§ 1–2(a), 55 Stat. 761, 761–62 (codified as amended at 2 U.S.C. § 2a (2006)).