

Article the first
of the
Bill of Rights

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Constitutional representation – the forgotten
story of *We the People*

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Made in the United States of America.

*This book is dedicated to those who served “for the duration”
in our Revolutionary War.*

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Chapter Summaries

Thesis: Constitutional representation is the forgotten story of We the People.

The US Constitution, in Article 1, Section 2, and Clause 3, as written and never amended, guarantees We the People a right to representation at the ratio of “one for every thirty Thousand.” Article the first of the Bill of Rights would have amended the ratio and changed it to “fifty thousand.” But it was not ratified. That means one for every thirty thousand remains the supreme law of the land and the constitutional ratio of representation.

Chapter 1 argues that our Revolutionary War was for constitutional representation of citizens and against virtual representation. The founders fought for a written constitution that the people could live by.

Chapter 2 highlights the fundamental role of the representation ratio at the Constitutional Convention and the founders’ support for the compromise. George Washington acknowledges the representation ratio as “among the exceptionable parts” of the Constitution.

Chapter 3 discusses the post-revolutionary divide between Federalists and AntiFederalists, *The Federalist Papers*, and the New York ratifying convention, to see how the representation ratio is portrayed. This debate centers on how Congress will use Article 1, Section 2, and Clause 3 of the Constitution.

Chapter 4 clarifies the issues surrounding the ratification of *Article the first* and the other eleven Articles in the Bill of Rights. This chapter focuses on the forgotten element in a representative government – representing We the People.

Chapter 5 describes what happened during the first census and why President Washington vetoed the first attempt by Congress in 1792 to augment House membership. Unable to override the veto, the Second Congress passed a new law that set the ratio at one Representative for every 33,000. In essence, Congress ignored the Constitution instead of changing it.

Chapter 6 points out that yes, *any Congress* can set House membership, but members of Congress are bound by oath to obey the Constitution. The Constitution dictates the use of a ratio. The legal term is *cy pres* – as near to the constitution as possible.

Chapter 7 addresses the immediate future of constitutional representation and finds four alternatives: first, We the People could enforce the ratified representation ratio found in the Constitution, one representative for every thirty thousand inhabitants of a state; second, twenty-seven states could ratify *Article the first* (completing the Bill of Rights), amending the Constitution with the new representation ratio of one for every fifty thousand persons; third, we could amend the Constitution with a new representation ratio; or fourth, the status quo of congressional representation with 435 Representatives for a nation of 300 million.

Events

The French and Indian War
1754-1763

Stamp Act Congress
October 1765

First Continental Congress
5 September 1774 to 26 October 1774

Lexington and Concord: siege of Boston begins
19 April 1775

Second Continental Congress
10 May 1775 to 1 March 1781

Washington takes command of Boston siege
3 July 1775

Boston evacuated by British forces
17 March 1776

The Declaration of Independence
4 July 1776

British occupy New York City
15 September 1776

British capture Fort Washington, New York
16 November 1776

British capture Fort Lee, New Jersey
20 November 1776

Americans defeat Hessians at Trenton, New Jersey
26 December 1776

Americans defeat British forces at Princeton, New Jersey
3 January 1777

British forces surrender at Saratoga
16 October 1777

Valley Forge
Winter 1777-78

France declares war on Great Britain
17 June 1778

Americans defeat British forces at King's Mountain, South Carolina
7 October 1780

British forces surrender at Yorktown
19 October 1781

The Articles of Confederation and Perpetual Union
1781-1789

Treaty of Paris – ending the Revolutionary War
3 September 1783

Constitutional Convention in Philadelphia
25 May 1787 to 17 September 1787

US Constitution becomes law
4 March 1789

Twelve Articles proposed as the Bill of Rights
25 September 1789

Ten Articles (numbers 3-12) ratified as the first ten amendments
15 December 1791

Kentucky is the eleventh and last state to ratify *Article the first*
24 June 1792

Article the second becomes our Twenty-seventh Amendment
5 May 1992

Introduction

1

As citizens, many of us have a general understanding of how the US Constitution works. We might be able to discuss amendments and talk about the Senate and the House of Representatives. Most citizens even know a few specifics about how Congress makes our laws and how the presidency and judiciary function. But here is something we as citizens have forgotten: how did the founders define the “We” in the statement “We the People”? In other words, who counted?

The founders defined “We” in terms of population. They considered other measures, such as wealth and landownership – but agreed on population as the best measure of We the People. Their solution, the “representation ratio”, is found in Article 1, Section 2, and Clause 3 of our Constitution (See Appendix A):

The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative;¹

This is the law as written and ratified. It has never been changed. *Article the first* of the Bill of Rights would have amended the ratio. *Article the first* was included in the Bill of

¹ US Constitution, Article 1, Section 2, Clause 3.

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Rights because even after ratification of the Constitution, the principle of ‘who counted’ remained a divisive issue.

In 1789, the First Congress proposed twelve “Articles” to the states to be voted on as amendments. Ten of the Articles, numbers three through twelve, were ratified. For example, “*Article the third*” became known as the First Amendment; “*Article the fourth*” became known as the Second Amendment, and so on (See Appendix B). These ten Articles became the first ten amendments to the US Constitution.

In 1992, another Article from the original twelve, *Article the second*, became our Twenty-seventh Amendment.

One Article, *Article the first*, remains unratified. It would have amended the ratio used to represent, that is, define, We the People. In the 18th century, *Article the first* fell one vote short from being ratified as the First Amendment and has never become law.

What was the focus of *Article the first*? It was designed to augment representation of We the People in the US House of Representatives:

Article the first – After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.²

² First Congress of the United States, the Bill of Rights, 25 September 1789. See Appendix B for all twelve Articles. The original document is online on the National Archives website.

Article the first would have amended Article 1, Section 2, and Clause 3 of our Constitution. It would have increased the representation ratio first to “nor less than one Representative for every forty thousand persons” and then to “nor more than one Representative for every fifty thousand persons.” The proposed amendment also forced Congress to augment representation by building membership thresholds into the federal process. For example, when membership reached the threshold of 100, then the ratio was to become one for every forty thousand. In essence, *Article the first* was an amendment to the constitutional guarantee of increased representation. This was to be accomplished by augmenting membership in the House of Representatives every ten years.

The vote on *Article the first* was close. It passed in eleven state ratifying conventions. The last one was Kentucky in 1792, making the ratification count at the time eleven out of fifteen states, or 73.3 percent. That was close; if it had reached the constitutional requirement of 75 percent, it would have become law. *Article the first* missed by one state, or less than two percentage points, from becoming the First Amendment to the US Constitution.

Also of interest, when the voting ended, only one state, Delaware, actually voted against *Article the first*. Three of the original states, Massachusetts, Georgia, and Connecticut, did not ratify the Bill of Rights until 1939 as part of the 150th anniversary of the Constitution.³ In the 18th century, those three states did not send votes back to the federal government on the proposed twelve Articles. If one of those four states – Delaware, Massachusetts, Georgia, or Connecticut – had voted in favor of *Article the first*, it would have become law in 1792 after Kentucky voted for the amendment.

2

This is the forgotten story of constitutional representation and We the People. Representation and the ratio are part of our heritage – part of our revolution. In fact, We the People is a

³ Leonard W. Levy, *Origins of the Bill of Rights*, (New Haven and London: Yale Nota Bene, 2001), 40-43. Published in 1999 by Yale University Press.

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continuous and *ongoing* revolution, one that began on 17 September 1787, the day the founders completed and signed the Constitution, giving the people a constitutional right to representation.

We can think of our Constitution as a trial in self-government. It is an attempt, effort, and experiment with moving parts – that is what we call change. The founders understood change well.

I know we can call the founders many things and think of them in many ways: that matters less than the fact that they were revolutionaries. They looked at the world and saw change, change that they could enact, and then they built a new government. Of course there are stories of power and slavery and whiteness and maleness and on and on. But if read through the *lenses* of change, we can bring their world to ours, and we can learn from their words – excuse me – our words. That is the beauty in the concept *citizen*. As a citizen of the United States, those words in the Constitution are yours and mine – and they are a trial in self-government. And, as the saying goes, if you don't govern yourself, someone will govern you.

This book is about the revolution within our Constitution, so we have to begin with faith in words – the idea that words matter. If one does not have faith in words, then one will not have faith in constitutions, as they are just words about power. In a famous Supreme Court decision, *Marbury v. Madison* (1803), Chief Justice John Marshall discussed why we write things down:

The powers of the legislature are defined and limited; and that those limits may not be mistaken or *forgotten*, the constitution is written.⁴

Justice Marshall points to our problem, as we have forgotten a constitutional right, *the right to representation*. Simply stated, the right to representation is written into our

⁴ *Marbury v. Madison*, 5 U.S. 137, 176 (1803). Italics added.

Constitution. It is the right of groups to be included in We the People at the ratio of one for every 30,000.

What has happened to the United States since our founding is called history, but the words in our Constitution are not historical. The words live on as law. Yes, our Constitution has a history, but until amended or abolished, the words in it are supreme.

As suggested, the process for self-government is a trial of faith: first, faith in governing oneself; second, faith in other people, other citizens, to govern themselves. This faith creates doubt. Constitutions were created and written because of this doubt. Theoretically, if there is no degree of doubt, in oneself or others, there is no need for government.

The founders approach to government was scientific. They had many ideas about how to build a new government, but they also had a lot of doubt. This led to debates on how to proceed, as revolutions are never clear.

The founders attempted to build a system that would protect such rights as the now famous “Life, Liberty, and the Pursuit of Happiness.” They also knew, when talking of citizens and representation, that there was no monopoly on how to define those three rights. Freedom is a deep well; it has also been aptly referred to as an abyss. Our revolutionaries certainly knew the abyss. Thirteen colonies do not revolt against their King and fight an eight-year civil war and not come to know the abyss. Those subjects-turned radical revolutionaries who took up arms against *their* law, the King of England – they had first-hand knowledge of how deep the well of human freedom ran – they lived it and then left us a blueprint – the US Constitution.

The first time I considered *constitutional representation* a political issue, rather than an historical one, was in graduate school at Purdue. Before that, when I taught high school US history classes, I recall discussing the representation ratio but dismissing it. Frankly, it seemed old.

Then, as a political science graduate student, I worked with a professor who was lecturing on the workings of the US Constitution, *The Federalist Papers*, and James Madison. At one point, the third clause in Article 1, Section 2 entered the

lecture. After class we discussed the size of a constitutional House, one based on the ratio of one for every thirty thousand. The House would be huge, we agreed, but mostly we thought it impractical.

That was more than ten years ago. Since then I began to think of the representation ratio in *constitutional*, and not *congressional*, terms. If we were to build a new Congress based on the constitutional ratio of one for every thirty thousand, we would have a House of Representatives of 10,000 members. This would bring dozens of groups (factions) into the constitutional process and fundamentally change Congress. For example, women won the right to suffrage with the Nineteenth Amendment (1920), but have never received their right to representation according to their numbers. Women are more than 50 percent of We the People, and yet they are represented in the current Congress, our 109th, with 70 Representatives, or 16 percent of the representation. That is a 34 percent *under-representation* of women as a group. Such under-representations create profound political, and constitutional, consequences.

Many citizens may find such a House too large; others may find it just right. In any case, the representation ratio, as one of our founding principles and as constitutional law, is the issue. The ratio in Article 1, Section 2, and Clause 3 of our Constitution is the measure of the people. It is a constitutional standard for representing We the People. There is no other measure.

Congress created this unconstitutional situation, beginning in 1792, and most recently in 1929, but that is no reason to allow it to continue. If We the People, in theory and practice, are under-represented, then We the People should ask for our representation back. It is that simple.

This was not an unimportant or small issue. Representation played a fundamental role in the political ideology of the revolutionary period ("No Taxation Without Representation") and was part of the key compromise at the Constitutional Convention (the Connecticut Compromise). In fact, the

representation ratio is the theory of We the People ratified into constitutional law.

The compromise is premised on a small ratio and a large House. This, in fact, has not happened as the Constitution intended. This is our own fault, meaning the citizenry. One of our modern characteristics is that we do not act until things get bad enough, or until a better way to act comes along – or both. Then, once we hear the new news – like how to change the federal government so that We the People are constitutionally represented – then we might begin to listen.

One more important point about words before proceeding: the current 435 Representatives and 100 Senators who compose our Congress, take an oath to uphold the Constitution (See Appendix C). Included in the Constitution, and thus part of their oath, are the words in Article 1, Section 2, and Clause 3: *The Number of Representatives shall not exceed one for every thirty Thousand.*

“Be your word” is a good place to start.

3

Numbers are used in our Constitution to avoid such things as the charge of impracticality, as they are, by design, a compromise, which makes them practical to the parties involved. Supreme Court Chief Justice John Roberts said at his confirmation hearing on 15 September 2005, “If the phrase in the Constitution says two-thirds of the Senate – everybody’s a literalist when they interpret that.”⁵

If that principle were applied to the representation ratio, then a literal interpretation of “The Number of Representatives shall not exceed one for every thirty Thousand” would mean there should be one representative for every 30,000 people. It is a simple math equation. There is nothing complex in any of the words. Their meaning was clear to President George Washington, as he understood them. He pointed out their meaning in the first veto ever – of any US presidency – in 1792. Washington later lost the political battle, as we will discuss in

⁵ Adam Liptak, “Chief Justice Nominee Speaks Volumes, While Saying Little”, New York Times, 16 September 2005.

chapter 5, but he pointed out which side of the debate he was on. This is called standing on principle: it is also called following the Constitution. In the years leading up to 2010 and the next census, the representation ratio has ballooned to greater than *one for every six hundred and fifty thousand*. That is correct – each federal representative represents more than 650,000 fellow-citizens.

How could that happen? – How could our Constitution specify one number and guarantee a right to representation, and then any Congress enact laws that undermine our Constitution and the representation ratio used to define We the People?

Such questions led to this book. The short answer is we began to lose constitutional representation in April 1792. The long answer involves that old soothsayer, *power*, which political scientists are fond of using to foretell the future. Political scientists tend to use power to explain everything, but in this case it happens to be true. The US House of Representatives *is* the place of power for the people. If you subtract, diminish, and negate the representation of that power, you also subtract, diminish, and negate what Madison called “the sovereignty of the people.”

The first time Congress tried to augment constitutional representation, in the Second Congress, 5-10 April 1792, it unraveled. But that just reflects the politics of a few days – and a short time has a way of not telling the whole story. In particular, it does not tell us what they were fighting *for*. The *for* is and was power, “people power” – the power of self-government. And it is still there, in Article 1, Section 2, and Clause 3 of the US Constitution.

The first reason the representation ratio has been forgotten and left un-amended, as mentioned above, is because it is the source of power for We the People. The second reason builds on the first. The ratio itself is controversial in that it sets a constitutional standard for measuring We the People; but when you realize who recommended, supported, and advocated for the representation ratio, such founders as George Washington, James Madison, Alexander Hamilton, and Benjamin Franklin, to name just a few, you begin to understand the historical

silence. Instead of the guarantee of *constitutional representation*, We the People have inherited the whims of *congressional representation*; whereas the Constitution dictates one standard – one Representative for every thirty Thousand – Congress simply began setting its own rules concerning representation.

Over time, little by little, with every ten years and the national census, the ratio went from abused, to ignored, to forgotten. In the 21st century, We the People of the United States have inherited an unconstitutional situation that was never intended, proposed, ratified, or amended. Washington and the others would have called this “usurpation” – meaning, power has been taken. In chapter 7 we will discuss building a new House of Representatives, which means a new Congress, for all the groups who are not constitutionally represented according to their numbers.

And yes, it will be a big House. The proposed and unratified *Article the first* is our nation’s first effort to amend the Constitution to prohibit this usurpation. As we will see, our revolution was for constitutional representation in word and deed – not just words.

4

Many states asked for a Bill of Rights as they were ratifying the Constitution, and the First Congress agreed. As mentioned earlier, they proposed twelve Articles to the states for a vote. Ten of those twelve, Articles three through twelve, became the first ten amendments to the US Constitution.

Of interest for this story, *Article the second* became the Twenty-seventh Amendment to the US Constitution in 1992. The amendment was still active after more than 200 years because, unlike recent amendments, such as the Equal Rights Amendment, the initial amendments had, and *Article the first* still has, no time limit. For example, the Equal Rights Amendment had a seven-year time limit attached to it; it had to pass enough states in that time or it was no longer viable.

Article the first is the only proposed amendment from the original twelve Articles that has not become law. This also

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means, Article 1, Section 2, and Clause 3 of the US Constitution is the only ratified definition of We the People. No other constitutional definition is available to us.

This points to a broken compromise: the compromise was, and still is, a Congress composed of a House of Representatives with one representative for every thirty thousand, and a Senate with two members from each state. The founders shook hands on it and signed their names; the states ratified it and made it our supreme law. Simply put, constitutions are deals – a deal or agreement between all of us. In fact, the word “constitution” should be considered a synonym for accommodation and compromise.

In a letter from Mount Vernon, Virginia, 20 July 1788, Washington wrote about the Constitutional Convention that he presided over during the previous summer, and expressed the necessity for compromise – what he called “accommodation”:

Although there were some few things in the Constitution recommended by the federal Convention to the determination of the People, which did not fully accord with my wishes; yet, having taken every circumstance seriously into consideration, I was convinced it approached nearer to perfection than any government hitherto instituted among men. I was also convinced, that nothing but a genuine spirit of amity and *accommodation* could have induced the members to make those mutual concessions and to sacrifice (at the shrine of enlightened Liberty) those local prejudices, which seemed to oppose an *insurmountable barrier*, to prevent them from harmonising in any System whatsoever.⁶

⁶ Max Farrand, ed., *The Records of the Federal Convention of 1787*, 3:339-340. The letter is from George Washington to Sir Edward Newenham. Italics added. *Farrand's Records* are available online on the Library of Congress website “A Century of Lawmaking.”

The “insurmountable barrier” was how to represent the people. At the time, one of the biggest challenges to the founders was how to build a process to manage the expected growth of the nation – in both land and people. The future was well understood to lie to the West, over the Allegany Mountains, into the Ohio River valley, and then the Mississippi River and beyond. They knew growth was coming, and they wanted to plan for it. The solution? – The representation ratio.

5

Constitutional representation answers the questions “Who is counted?” and “How is that count divided into power?” Fundamentally, that is what our revolution was about. With *Article the first* as our focal point, and the current House of Representatives as our end point, our story begins with our revolt from the law of the British Empire, King George III.

The King declared the colonies in rebellion on 26 October 1775. This made Washington and his ilk outside the law (the law of Britain) and the King declared his intention to bring them back into line – into submission – and back into the Empire. What began at Lexington and Concord in the colony of Massachusetts on 19 April 1775, he assured the Empire, would be put to an end – and quickly.

Well, big talk, lots of action, but not the result he had intended. Eight years later, King George would be signing a peace treaty with the colonies, the Treaty of Paris, 1783, after the rebellion had outlasted and defeated the best efforts of the British Empire. As with all things revolutionary, it was not possible in advance to know the victors or what actually would be won and lost. Washington and his band of revolutionaries, though small in numbers, won liberty and a new concept, citizen – and lost the old identification – subject.

That is why the principle of constitutional representation is not a theory. Washington and his band of revolutionaries *gave* us a way to self-government. The Constitution can be amended, as we learn in any high school US history class, but it is ridiculous, given our sacrifices around the world, to say *your*

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people should live by a constitution but *We the People* of the United States will not. A ridiculous policy is bound to fail.

This book has two parts. Part One is called *Law* and examines the concept of constitutional representation from its beginnings in our revolutionary period to its ratification into law as part of our Constitution. Part Two is called *Amendments* and focuses on *Article the first* of the Bill of Rights as the initial effort to amend constitutional representation; it failed as an amendment for political reasons, but the circumstances that created it have not changed. In fact, if measured by the ratio, those circumstances have never been worse.

And, as you might expect, a constitutional House of Representatives would revolutionize Congress. I do not see any doubt in that; the only doubt I see is *when* this will happen. The citizenry will build a new House when we are ready. I believe this will happen sooner rather than later; that is because there is no political theory in our Constitution to support 435 Representatives for 300 million people. None. The political theory in our Constitution is one of small districts and a large House. That is not what we have today. Augmentation of the House will happen as soon as *We the People* want it to happen – perhaps with the next census in 2010. That is when our Constitution dictates augmentation of representation – every ten years with the census – and Congress did, until 1920; but we will cover that in chapter 6. For now, let us begin with the revolution, the theory of representation, and our Constitution. In a self-governed citizenry, there really is no other place to start. Power, as is well known, will work any which way. It is fickle. But as our revolution affirmed, power is best represented by the people – constitutionally speaking.

Chicago 2006

Part One

Law

1

Revolution – a sovereignty of the people

1

History can be thought of as a story of past things. In recognition of some parts of that story, certain events and names receive special commemoration – perhaps carved in stone, for example. Many small towns and cities in the United States have such a monument dedicated to an ideal. The names and ideas tell a story of sacrifice. Stone monuments are, of course, for the minds of the living and not the bodies of the dead.

We memorialize sacrifice in stone, but we build governments with paper. Our Constitution was written on paper because one can amend paper – change it – more easily than stone. For instance, on the last day of the Constitutional Convention, 17 September 1787, they erased part of the Constitution, just one word, and changed the word *forty* into the word *thirty*.

It is perhaps cliché to say historical moments, those moments when ideas are born, shape our present. But when discussing revolutions, one should focus on such moments. We have to remember that things could have turned out differently. The battles in our Revolutionary War were often fought by “armies” of 2,000 or less. Many times both sides only numbered in the hundreds. A win or loss here or there and our history would have been written differently.

The power of the United States federal government is outlined on old paper and in simple terms. We can see what so few words have created and will yet create. The words in our Constitution provide the basis for the ongoing revolution for constitutional representation. From an old idea – the idea of being something other than the *subject* of a King – many joined the revolution in defense of the colonies and in revolt from their King. We should remember they were subjects of the British Empire before they were citizens of any state. They became something else in their revolution, something new. Out of their rebellion, out of the sacrifice of many, came the idea of a US citizen.

To get there, to that idea, there were people who stood up when needed. In particular, there was a group of soldiers that signed up “*for the duration*”: this meant until the end of the revolt against the British Empire, win or lose. That is a pretty steep challenge given the hardships of the time and the length of the war (1775-1783). There are lots of names who served for the duration: George Washington served the whole time, as did his slave and servant, William “Billy” Lee. Lee didn’t actually volunteer to serve, of course, but he served for the duration nonetheless, and an eight-year war is a long time.

In the general hailed as “His Excellency” and his slave named “Billy” we can see the importance of all things in a revolution, as the war itself, with its declaration of “All men are created equal,” was a call to serve. It became apparent rather quickly to the rebels: unless the colonies were to arm the slaves, every other free-person, regardless of color, was needed.

The problem soon confronted Washington. After taking command on 3 July 1775 of the militias laying siege to Boston, he ordered that the army – it was that in name only; it was more like an assembly of militias – be a white army. At first the militias accepted this, but then there were complaints. One in particular was that the British were welcoming the black free men into Boston and honoring their free status as subjects of the Empire. To stop this, Washington soon rescinded the general

order. This made the “Continental Army” the first black and white integrated American army.¹

There would not be another fully integrated American army until the fighting in Korea forced the issue in 1950. Officially, it happened on 26 July 1951, but it was the fighting in the summer of 1950 on the Korean peninsula that made them do it – places like Pusan, Chinju, and in the fighting along the Nam and Naktong Rivers. Strange names compared to Lexington and Concord, but the casualties were so high that they didn’t have enough white replacements for the white units: blacks were sent in their place. Just makes it clear, doesn’t it? Bullets start flying and bodies begin piling up and suddenly racism becomes a secondary concern – that is, no longer a necessity – and something like “fellow citizen-soldier” can replace color.

The call for an army “for the duration” went out in September 1776 and is part of the folklore of the so-called *Spirit of ‘76*. The soldiers were to get \$20 and one hundred acres of land. Some who served were slaves. They sometimes were told they would get their freedom if they served, and many did. Other slaves served in place of their owner.

This call for service in an army for the duration was something Washington had been pleading for. The militias kept going home when their time of service expired. Unlike the British regulars, the rebels came and went. But many understood this need to change; the situation was desperate and the war would not be ending soon. A so-called “standing army” was needed.

David McCullough, author of the best-seller *1776*, provides a glimpse of Washington’s despair in a letter he wrote 30 September 1776: “Such is my situation that if I were to wish the bitterest curse to an enemy on this side of the grave, I should put him in my stead with my feelings.”²

¹ The Continental Army was created by a resolution of the Second Continental Congress on 14 June 1775. George Washington, who attended the congress dressed in military uniform, was the unanimous selection for the commander-in-chief of the Continental Army on the next day, 15 June 1775.

² David McCullough, *1776*, (New York: Simon & Schuster, 2005), 227.

Washington went on to complain he was “wearied to death” with problems: mainly, the lack of soldiers. One regiment reportedly had only fourteen soldiers ready for duty. He wrote, “In confidence I tell you that I never was in such an unhappy, divided state since I was born.”³

Without the commitment of a few thousand volunteers – the commitment of the “for the duration” soldiers – there would have been no victory at Trenton, New Jersey on 26 December 1776, where Washington and his band of revolutionaries won a battle with about 2,400 soldiers. There would have been no victory at King’s Mountain, South Carolina in 1780 without those citizen-soldiers, or no siege and victory at Yorktown, Virginia in 1781. There also would have never been a federal convention in Philadelphia in 1787. Simply stated, without the service of the “for the duration” individuals, there would have been no US Constitution – period.

We could use some of that spirit and conviction today: it is called commitment and it is found in all acts of liberty. I will argue later in the book that when Washington was defending and supporting constitutional representation, he was taking into consideration the common people-become-soldiers he served with – the “for the duration” soldiers, for example. What they fomented, a rebellion against a monarchy and its theory of representation, we now face on paper. Instead of a King, we face, in political theory terms, an oligarchy, which simply means rule by the few.

The point is that our revolution and Constitution are victories over the arbitrary acts of government. That was true in the 18th century and it is still true in the 21st century: We the People have a constitutional right to representation and the rule of law. As citizens we may have to *think* differently – as the revolution in self-government is demanding. We have been bequeathed a piece of paper that represents We the People. We should read and enforce it.

³ Ibid.

2

From 1754 to 1763, the British Empire fought the French Empire all over the world: in the North American colonies they called it *The French and Indian War*. When the war ended – a mere 13 years before our Declaration of Independence – the British had a lot of debt from the war and they wanted to tax the American colonies to pay it. The idea came to law with the Stamp Act of 1765. The folks on one side of the water – London – didn't expect any issues to arise from the tax, but resistance in the colonies grew quickly. By 29 May 1765 – only sixty days after the passage of the Stamp Act – the Virginia House of Burgesses endorsed a resolution with the following assertion:

That any person who shall, by speaking or writing, maintain that any person or persons, other than the general assembly of that colony, have any right or power to impose any taxation whatever on the people there, shall be deemed enemies to that, his majesty's colony.⁴

This inflammatory resolution was later withdrawn, but five others did pass. A 29 year-old patriot named Patrick Henry was the chief instigator. One historian described Henry's influence in this way:

The effect was immediate. Instead of making another protest to London, the Virginia assembly had rejected the Stamp Act outright – in effect declared it illegal in the colony – and sanctified open resistance if the English tried to enforce it. Virginia had acted, and the other colonies would not lag far behind.⁵

⁴ Quoted in Don Cook, *The Long Fuse: How England Lost the American Colonies, 1760-1785*, (New York: The Atlantic Monthly Press, 1985), 75.

⁵ Ibid.

You can begin to see the tension. The British Parliament in London wanted the colonies to pay. The colonies didn't mind paying taxes applied to all British subjects – but the Stamp Act was a tax on them alone – and that sparked political dissent. The idea brewing was “No Taxation Without Representation,” and you could see the seeds of conflict as they were being sown. In the summer, an even more open act of defiance took hold in the Boston riots of August 1765, when the Lieutenant Governor's house was sacked and burned. The symbolism – the burning of the King's property, and by inference, the King's power – brought home to the British public the trouble brewing in America.

In October 1765, there was a meeting in New York City to discuss a colonial response. Nine colonies sent delegates: Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and South Carolina. The meeting became known as the Stamp Act Congress and they adopted a resolution called *The Declaration of Rights and Grievances*. In the resolution, declarations two through five (there were thirteen) focus on the King, his subjects, and representation:

2d. That His Majesty's liege *subjects* in these colonies are entitled to all the inherent rights and privileges of his natural born *subjects* within the kingdom of Great Britain.

3d. That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their *representatives*.

4th. That the people of these colonies are not, and from their local circumstances cannot be, *represented* in the House of Commons in Great Britain.

5th. That the only *representatives* of the people of these colonies are persons chosen therein, by themselves; and that no taxes ever have been or can be constitutionally imposed on them but by their respective legislatures.⁶

In moments like the Stamp Act Congress, ideas come into being; these ideas, such as “only representatives of the people” can impose taxes, are the leading elements of our revolution. These ideas were present years before the bullets started flying. In revolutions, individuals first begin to think differently – and soon those individuals began making demands of their sovereign.

It was not just in the colonies that the ideas surrounding representation were being discussed, as it was also happening in the London papers in the letters-to-the-editors. In *The Preliminaries of the American Revolution as Seen in the English Press 1763-1775*, Fred J. Hinkhouse quotes a writer named “Rationalis.” It was common for writers to use a pen name, as did such notable founders as Benjamin Franklin (“Richard Saunders” of Poor Richard’s Almanac) and James Madison and Alexander Hamilton (“Publius”). The letter-writers were often influential members of society who wanted to influence discussion with the weight of their words rather than their name.

Concerning representation and identity, Rationalis argued against creating a problem where one did not exist. In a letter published in the *London Magazine*, November 1765, he argued that without unity in the colonies, there is no problem. But laws like the Stamp Act create the conditions when –:

They must unite in their own defence. They accordingly cry out for a union: and we even see, by the public papers, that there is to be a conference, or congress of deputies for that

⁶ *Journal of the First Congress of the American Colonies, in Opposition to the Tyrannical Acts of the British Parliament, Held at New York, October 7, 1765*, (New York, 1845), 27. Italics added.

purpose, which is first proposed for *representation* only; but should they not therein succeed, ought we not to be aware of what they may next proceed to consult on, and what may be the consequences of either rooted hatred, or rash desperation?⁷

Because of the discontent, the Stamp Act was repealed by Parliament in 1766, but, as Rationalis had pointed out, once the colonial delegates started meeting in New York, the very act of meeting was playing into the idea of representation – literally, *Who are we?* – And from the act of gathering come other, and more complex, ideas of representation. In a letter published earlier in the fall of 1765, Rationalis argued that the best thing for Britain, given the population growth in the colonies, would be disunity of interests: “with their progressive increase of strength from population, would be found in their disunion, from rival interests and their discordant religious principles.”⁸ The only way unity could come about was “by an ill-judged measure of the mother country’s to involve them in a common calamity of oppression.”⁹

3

The official British viewpoint was straightforward: the colonists were already represented, through the theory of “virtual representation,” simply by being British subjects. But that became the issue, both in the colonies and Parliament: the colonists did not feel represented.

In 1765, to address this feeling, the administrative arm of the British Empire attempted a clarification of the issue by publishing the *Regulations Lately Made Concerning the Colonies*. The regulations stated succinctly the opinion of the Crown concerning representation:

⁷ Fred J. Hinkhouse, *The Preliminaries of the American Revolution as Seen in the English Press, 1763-1775*, (New York: Columbia University Press, 1926), 67. Italics added.

⁸ Ibid., 66.

⁹ Ibid.

All British subjects . . . are *virtually represented* in Parliament; for every member of Parliament sits in the House, not as a *representative* of his own constituents, but as one of that august Assembly by which all the Commons of England are *represented*. . . . The colonies and all British subjects whatever, have an equal share in the general *representation* of the Commons of Great Britain, and are bound by the consent of the majority of that House, whether their own particular *representatives* consented to or opposed the measures there taken, or whether they had or had not particular *representatives* there.¹⁰

So, if you were from the “common” class, other commoners represented you in the House of Commons. If you were a Lord or had a title like that, you were represented in the House of Lords. Together, they formed the Parliament. According to the theory of virtual representation, “a member of the House of Commons from any given part of England represented not only his own constituency, but also all other members of the commonalty within the empire.”¹¹ As an example, some of the larger cities in England did not have a representative in the House of Commons – cities such as Manchester, Birmingham, Leeds, and Sheffield.

I also want to point out that this kind of representation, *virtual representation*, was the best the world had to offer. The concept how to represent various factions (the people) was of much debate, both in the time period before our revolution and at the debates about government after the war – during the Constitutional Convention, for example. You will find that representation is, has been, and will remain, a debatable idea. That is part of its center – a debate and a compromise: first

¹⁰ Quoted in Alfred de Grazia, *Public and Republic: Political Representation in America* (New York: Alfred A. Knopf, 1951), 75. Italics added.

¹¹ Hinkhouse, 89.

between the colonies and subjects with the King of England, and now with citizens and states living under the US Constitution. It is helpful to think of representation as synonymous with people *and* power – as in “We the People.”

Another penname published often was “Pacificus.” *The London Evening Post* published a letter from Pacificus on 11 December 1765. The letter expressed a view commonly held by English subjects: “The doctrine of virtual representation is the very basis on which our constitution stands.”¹² The “constitution” Pacificus writes about is the unwritten constitution of the British Empire. It was thought and believed at the time that sovereignty came from the natural rights of man. Today we would call this the natural rights of humans, but the idea is the same by degrees.

Alfred de Grazia, an early scholar in the field of political science, discussed how virtual representation was replaced by another form of representation. In his 1951 book, *Public and Republic: Political Representation in America*, de Grazia noted, “the revolution established the idea of non-virtual representation in America.”¹³ As a civil war, it pitted British subject vs. British subject: as a revolution, it transformed an individual from a British subject to a “citizen” – first of a state, such as Virginia, and later of the United States. That required a new way of thinking and of organizing representation. In political theory terms, this new political consciousness, the transformation from subject to citizen, defined the revolutionary spirit.

While enduring years of war, and in many states, strong Loyalist support for the rule of British law, citizenship, more than any other idea, allowed individuals to proclaim revolutionary goals. Those goals, those *certain unalienable Rights*, are perhaps best summarized in the Declaration of Independence:

WE hold these Truths to be self-evident, that all
Men are created equal, that they are endowed by
their Creator with certain unalienable Rights,

¹² Ibid.

¹³ De Grazia, 77. See also “Virtual Representation and the Crown”, 14-21.

that among these are Life, Liberty, and the Pursuit of Happiness – ¹⁴

Representation was well argued in the Declaration of Independence: it is the third in a long series of complaints about his majesty's rule. Concerning representation, the charge is tyranny because the King did not accommodate large districts of population – the colonies – with representation:

HE has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.¹⁵

Immediately following this sentence, the next two complaints in the Declaration are about “Legislative Bodies” and “Representative Houses”:

HE has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.

HE has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.¹⁶

The call for independence was also signed by the revolutionaries as – “We, therefore, the Representatives of the United States of America . . .”

¹⁴ *Declaration of Independence*, Action of the Second Continental Congress, 4 July 1776.

¹⁵ Ibid.

¹⁶ Ibid.

Yes, the subjects who turned revolutionary, understood representation. John Locke, one of the philosophers favored by the colonists, said, to paraphrase a great deal, he said you have to own yourself before all else – in other words, with citizenship, individual white men, mostly, could literally form a new identity by representing themselves as citizens. That is self-government. And you can see why this caused a stir among slaves and slaveholders: liberty is contagious – and it was the theoretical flaw regarding slavery and representation. In the next chapter we will discuss the three-fifths constitutional “compromise” and its impact, but for now, just note how citizenship, by excluding slaves, set itself up as an *antagonist* to liberty. Those two, liberty and slavery, would wear on each other until our other, more horrific, civil war. All of them – the founders, and, most certainly, Washington too – were flawed men. No one is flawless, and, like the rest of us, often it is the visible mistake, in this case the founders’ three-fifths compromise, which highlights a good beginning place.

Hinkhouse provided a nice summary of the whole issue from *The Universal Magazine of Knowledge and Pleasure*, February 1775 by quoting a Josiah Tucker. Tucker wrote that the colonists, “all the disciples of Mr. Locke have recourse to what they call immutable proofs, - the abstract reasonings, and eternal fitness of things, - and, in short, to such rights of human nature, which they suppose to be unalienable and indefeasible.”¹⁷

In less than three months from that letter, those disciples of Locke took up arms to bring about those rights of human nature. On 19 April 1775, shots were exchanged between 700 British soldiers and armed colonists at Concord and Lexington in the British colony of Massachusetts. What had been a war of words became a war of bullets, and some new ideas were also being kindled to life. They didn’t see the irony of liberty and slavery being discussed at literally the same time. Or maybe they did: perhaps slavery provided the *pathos of distance* necessary for other ideas like liberty and citizenship. History has a way of

¹⁷ Hinkhouse, 81.

keeping its secrets – as there are too many particulars – but to acknowledge the flaws of the founders is not to discard what they left us. They didn't leave perfection, as that was and is impossible; they left a process instead.

4

Well, there was nothing virtual about fighting the war. After Lexington and Concord, the British were stuck in Boston and the colonial militias had them under siege. Washington, who took command on 3 July 1775, had never before led an army.

In March 1776, with the British holding their positions but under duress inside of Boston, Washington got his first victory. The cannon from Fort Ticonderoga in New York had been hauled hundreds of miles through the winter countryside; once outside Boston, the cannon were placed, overnight, on Dorchester Heights. The British were surprised and outmaneuvered, not suspecting until it was too late that the rebels even had cannon to put on the high ground. With Boston now under threat of bombardment, the British forces evacuated by sea.

That did not mean they were leaving the colonies. The fleet sailed for New York City and its harbor. There they also met reinforcements sent by the King and Parliament after declaring the colonies in rebellion. During the summer of 1776, Washington kept losing battles. First, the British took over New York City; they captured the forts Washington had ordered built to protect the Hudson River; then, in the fall of 1776, they chased the rebels across New Jersey and out of the state, a state where roughly two-thirds of the population had remained loyal to British law. Even the Declaration of Independence on 4 July 1776 did little to rally the troops, as enlistments kept dwindling and the *Spirit of '76* was dying.

Then a victory – the famous one at Trenton – where Washington and “the army” of 2,500 crossed the icy Delaware River, marched through the night, and attacked the Hessians in the morning during a snowstorm. The Hessians were German soldiers brought to the colonies to fight, and were well respected or despised – depending on your perspective – and

defeating them brought a needed surge of patriotism. Outside of Trenton, Washington, with his sword in hand, shouted to the citizen-soldiers: “There, my brave fellows, are the enemies of your country. Remember now what you are about to fight for!”¹⁸

Washington followed the victory at Trenton with another at Princeton, New Jersey, on 3 January 1777. McCullough tells us how Washington and some of his staff – General Nathaniel Greene and a commander of the Pennsylvania militia, John Cadwalader – were caught up in the battle:

More Americans rushed forward, many of them Pennsylvania militia with little or no training, who refused to yield, as Washington, Greene, and Cadwalader rode among them to lead the way. The sight of Washington set an example of courage such as he had never seen, wrote one young officer afterward. “I shall never forget what I felt . . . when I saw him brave all the dangers of the field and his important life hanging as it were by a single hair with a thousand deaths flying around him. Believe me, I thought not of myself.”

“Parade with us, my brave fellows,” Washington is said to have called out to them. “There is but a handful of the enemy, and we will have them directly!”¹⁹

While Washington was chasing the retreating British redcoats that day outside of Princeton, a young artillery officer named Captain Alexander Hamilton was also busy:

¹⁸ Richard Hanser, *The Glorious Hour of Lt. Monroe*, (New York: Atheneum, 1976), 150. Lieutenant James Monroe served under Washington at Trenton and later served as the fifth President of the United States (1817-25).

¹⁹ McCullough, 289.

By the time Washington had reigned in his horse and called off the pursuit, another part of the army had entered the town, where some 200 of the British garrisoned there had barricaded themselves inside the large stone main building of the college, Nassau Hall. When Captain Alexander Hamilton and his artillerymen fired a few rounds into the building, the redcoats gave up.²⁰

This hall, Nassau Hall in Princeton, New Jersey, would host the Continental Congress in the summer of 1783. The Congress would be sitting in the hall when they learned of the Treaty of Paris – the treaty that ended the war. General Cornwallis was one of the British commanders involved in the Battle of Princeton and, in one of those ironies of time and place, it would be General Cornwallis who would surrender in defeat at the siege of Yorktown, Virginia 1781, sealing the fate of the war.

5

In his book *1776*, McCullough gives us an idea of the dire straits the thirteen colonies were in – open rebellion against the law. The founders were there, Washington and Hamilton for example, and it is unrealistic to think that they would later leave the “for the duration” citizen-soldiers out of the political system. It is hard to imagine Washington at the Constitutional Convention or during his eight-years as president not thinking of those who fought with him.

The historians are aware of the significance of the revolutionary spirit, but when it comes to political science and citizenry, we have forgotten what they bequeathed us. McCullough provides a summary of what we may have forgotten:

²⁰ Ibid.

From the last week of August to the last week of December, the year 1776 had been as dark a time as those devoted to the American cause had ever known – indeed, as dark a time as any in the history of the country. And suddenly, miraculously it seemed, that had changed because of a small band of determined men and their leader.

A century later, Sir George Otto Trevelyan would write in a classic study of the American Revolution, “It may be doubted whether so small a number of men ever employed so short a space of time with greater and more lasting effects upon the history of the world.”²¹

War is real and not virtual. The soldiers shooting at you don’t use virtual bullets and the friend who dies next to you in battle doesn’t die a virtual death. You can see how life and representation come together in battle – they come to mean nearly the same thing: what you are fighting for, you also become. To win *independence* from the King of England, they had to *depend* on each other.

If there are still doubts about the significance of those who served the cause of We the People and constitutionalism, here are a few words from Madison speaking as Representative James Madison. This quote was delivered in the first House of Representatives in the First Congress under the new constitution. Madison is often described as the political theorist of our Constitution, and he spoke to the question of the people and sovereignty:

²¹Ibid., 291.

My idea of the sovereignty of the people is, that the people can change the constitution if they please, but while the constitution exists, they must conform themselves to its dictates:²²

That is and was our revolution; it is what they were fighting for – *a new rule of law* – a written constitution that the people can change and live by. The right to representation inspired the formation of the United States. Beginning with the Stamp Act Congress and the Declaration of Rights and Grievances, to the Declaration of Independence, and to the citizen-soldiers who fought the battles that won the war, the essence and heritage of citizenship is *constitutional representation*.

²² James Madison, *Writings*, (New York: Literary Classics of the United States, Inc.), 469. Remarks in Congress on Proposed Constitutional Amendments, the future Bill of Rights, 15 August 1789.

2

Representation and our Constitution

1

The ratio as a measure of constitutional representation was created out of the belief that a strict democracy, with every citizen voting on every proposed law, was impractical for a large nation. The ideal of all voting for all is not functional. Our reality would be all politics. Given this un-enthusiasm for continual politicking, the idea of “a representative” for the group was adopted.

Constitutional representation was not a colonial government invention, but it did fuel the well-named *Spirit of '76*. One of the most popular slogans during the revolution was “No Taxation Without Representation.” As discussed in the first chapter, one of the main issues was that the colonies were being taxed by London, but, through the theory of virtual representation, the colonies did not send a representative to Parliament. The more London attempted to control policy, the more the colonists grew irritated. Patrick Henry declared the common sentiment in simple terms – “*Taxation without Representation is Tyranny.*”

However, as the Constitutional Convention began in Philadelphia on 25 May 1787, such revolutionary slogans had fallen aside and into disuse. Instead there was an unease and even pessimism of revolutions. After winning one, they wanted things to calm down, and taxation *without* representation

became a necessity for those concerned with wealth, property, citizenship, and all the other questions created by a republican form of government.

In *Public and Republic: Political Representation in America*, Alfred de Grazia used the terms “aristocratic-democratic and mass-democratic” to explain the evolution in representation. This political tension, rather than revolutionary tension, led to differing views of representation after the war. It was apparent that “We the People” held a different meaning depending on who was talking. But, as de Grazia pointed out, they still shared their opposition to virtual representation:

A summary of the currents of thought on representation during the Revolutionary-Constitutional Period shows a vigorous conflict growing up between the *aristocratic-democratic* and *mass-democratic* ideas. Originally both parties agreed that the essential element in representation was to be found in the relationship between the representative and his constituents. They agreed that that relationship must be direct and must contain as much of the contractual connection of agent with principal as possible. The chief reason for this agreement was that the major objects of attack were similar in both cases – the unrepresentative monarchy, a lack of consensus between American and British political conditions, and the theory of *virtual representation*.¹

Shared opposition to unrepresentative monarchy and virtual representation fueled the revolt. In the transformation from a revolutionary to a constitutional period, the most famous slogan did survive to animate the Constitutional Convention: Life, Liberty, and the Pursuit of Happiness.

¹ De Grazia, 110-111. Italics added.

2

In the early days of the convention, 16 June 1787, James Wilson, an influential delegate from Pennsylvania, spoke about a common human question:

*With regard to the sentiments of the people, he conceived it difficult to know precisely what they are. Those of the particular circle in which one moved, were commonly mistaken for the general voice.*²

His characterization is still true today: we often take the familiar for the general, which is not always the case. The founders were aware of this problem and attempted to build a system that addressed the localization of knowledge and the sentiments of the people. Their solution was the representation ratio and the House of Representatives.

Wilson also discussed Britain's form of representation, referring to it as "a poison contaminating every branch of" Britain's government, and the poison was most apparent in small gatherings:

The political liberty of that Nation, owing to the inequality of representation is at the mercy of its rulers. He means not to insinuate that there is any parallel between the situation of that country & ours at present. But it is a lesson we ought not to disregard, that the smallest bodies in Great Britain are notoriously the most corrupt.³

Wilson's point is timeless: small gatherings of power are more easily corrupted. The concept is based on the premise that it is easier to control many by controlling a few. Wilson also pointed out that the new Congress would *not* be a guarantee against despotism:

² *Farrand's Records* 1:253.

³ *Ibid.*, 254.

Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.⁴

During this time period, as the founders were discussing terms for a new government, there was a particular momentum to the talks. Imagine, all at once, a group of independent states – diverse in almost all ways but a shared rebellion against Britain – discussing a whole new form of government, and you can see the dynamic. Today with fifty states, it might be impossible. And a look to Afghanistan or Iraq, and you can sense how complex constitutional change can be. Constitutionalism, as a virtue, is not easily adopted.

As mentioned, the thirteen colonies had become the thirteen independent states. Under their first government, *The Articles of Confederation and Perpetual Union*, each state had been equal and had one vote: this was called “equal representation.” This meant there was no difference in voting power between large population states, such as Virginia, and small population states, such as Delaware. The states were represented equally.

The Articles of Confederation were in effect from 1 March 1781, when Maryland became the final colony to ratify the Confederation, until 4 March 1789, when the first Congress met and the ratified Constitution took effect. During this time, the assembly of states referred to themselves as “The United States In Congress Assembled.” The Congress was considered

⁴ Ibid., 254.

ineffective, and, over time, there grew a call for reform. This call for reform became the Constitutional Convention of 1787.

The gathering in Philadelphia took a turn that some thought too much: instead of working on “fixing” or reforming the current government – the Articles of Confederation – the mood and momentum turned toward a new form of government altogether. You can see this change in the records from the convention. The convention began on 25 May. By 11 June, the first major change was underway. That was when the founders first passed a resolution on changing from the old system, equal representation and one state, one vote, to a new system and the “ratio of representation”:

Resolved that the right of suffrage in the first branch of the national Legislature ought not to be according to the rule established in the articles of confederation; *but according to some equitable ratio of representation.*⁵

The resolution passed. Seven states were for the change, three against, and the Maryland delegation divided. (That accounts for 11 of the 13 votes – as Rhode Island and New Hampshire did not have delegates present on this day.) In less than three weeks, the convention had made a fundamental change in the distribution of power: the new government would be based on “*some equitable ratio of representation.*”

This was not the first time a ratio had been proposed in the colonies for representation. On 7 October 1777, the Continental Congress, discussing the terms of the Articles of Confederation, had voted against two proposed representation ratios. One proposed ratio was one representative for every 50,000 inhabitants; the other was one for every 30,000 inhabitants. On this day, the newly independent states agreed to a third proposal for representation – the one state, one vote compromise – with only Virginia in dissent.⁶ So the concept of a ratio for representation was familiar to the founders in 1787.

⁵ *Farrand's Records*, 1:192. Italics added.

⁶ See de Grazia, 84.

Two other votes of interest that day included one on ‘who was to be counted and how?’ as well as ‘what to do with the second branch of the national legislature?’ On the first question – Who counted and how? – They passed a resolution stating, “that the right of suffrage in the first branch be according to the whole number of white and three fifths of the other inhabitants.” This passed with nine for and two against – the states voting against were Delaware and New Jersey. The “three fifths” concept was also familiar to the founders: it had appeared in the Second Continental Congress, 18 April 1783, in an act to amend the Articles of Confederation. They used the measure to tax slaves as property. In effect, they created a 40 percent exemption by allowing “two fifths” of a slave to not be taxed as property.⁷

At the time, the influential Elbridge Gerry of Massachusetts offered a clear criticism of counting slaves in representation. Many other northerners would do the same. The slave representation, until its removal by the Fourteenth Amendment, would play the pivotal role in the federal government. From the beginning, some saw the problem. Here Gerry was forthright:

The idea of property ought not to be the rule of representation. Blacks are property, and are used to the southward as horses and cattle to the northward; and why should their representation be increased to the southward on account of the number of slaves, than horses or oxen to the north?⁸

This is a concise critique: the convention did address slavery even if the word is absent from the final document. Gerry and others were openly critical of counting property, slaves, in representation. In terms of power, this was a clear

⁷ Joseph Story, ed., *Commentaries on the Constitution of the United States*, (Boston: 1833; rev. ed. 1991.), 2:641. Available online on The Founders’ Constitution website: Philip B. Kurland and Ralph Lerner, eds., University of Chicago Press, 2000.

⁸ *Farrand’s Records*, 1:205-206.

benefit to the slave states. It added “three fifths”, or 60 percent, to their total state representation. In terms of representation, slaves meant more power.

After Gerry spoke, it was Madison’s turn: he deflected. Madison, a slave owner, as were many others in the room, said he was of the “opinion at present, to fix the standard of representation, and let the detail be the business of a subcommittee.”⁹

On the second question – How to represent the second branch? – They voted for a resolution making the right of suffrage in the second branch just like the first – based on an equitable ratio. It passed with a vote of six for and five against. The equitable ratio for the second branch, the future Senate, became the one we are familiar with – two Senators per each state in the Union.

3

Once the decision had been made to change the system of representation, the convention had a new direction. For instance, they discussed in detail what a constitution was intended to do. In a report from that summer, the Committee of Detail found two things that deserve the most attention in drafting a constitution:

1. To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events, and
2. To use simple and precise language, and general propositions, according to the example of the (several) constitutions of the several states.¹⁰

⁹ Ibid.

¹⁰ *Farrand’s Records*, 2:137.

We can see examples of these items in the Constitution. An essential principle would be the ratio of representation. An example of simple and precise language would be “one for every thirty Thousand.”

We will discuss in chapter 4 why this was not enough – why words alone do not possess power. Even when President Washington tried to enforce the representation ratio, he lost the political battle. His loss in 1792 was the first of many losses for the ratio. But the principle and means to represent We the People, the ratio itself, remains. The power is not gone, just forgotten. The United States is a powerful government. The question, constitutionally, is how the power of We the People is divided. The only constitutional means is the ratio. Power, as all republican forms of government agree, comes from the people. Power may be wielded by others, but it begins and ends with the people. The Constitution is the designed process for that power to be expressed through representation. Until replaced or amended, a constitution, with its general principles and simple and precise language, is supreme.

By 6 August 1787, the convention, following a report from the Committee of Detail, had decided on an equitable ratio. The committee proposed that the ratio for representation be “at the rate of one for every forty thousand.”¹¹ That was the ratio – one for every forty thousand – until the last day of the convention – at which time George Washington weighed in on the issue.

4

On the last day of the convention, 17 September 1787, the founders were ready to wrap things up.¹² The Constitution was complete. It was read to the convention. Benjamin Franklin then presented a speech that was also read aloud, asking for unanimous support for the new form of government.

After Franklin’s speech was read, something remarkable happened, though history has not given it much notice.

¹¹ *Farrand’s Records*, 2:178.

¹² See *Farrand’s Records*, 2:641-650 for the complete proceedings of 17 September 1787. They are available online on the Library of Congress website “A Century of Lawmaking.”

Nathaniel Gorham, a delegate from Massachusetts, rose and made a proposal. Gorham had been the 8th president under the Articles of Confederation and had served during the convention as Chairman of the Committee of the Whole. At this time, the last day, he proposed a change in the representation ratio, the key constitutional compromise from early June. Here is how Madison recorded it:

Mr. Gorham said if it was not too late he could wish, for the purpose of lessening objections to the Constitution, that the clause declaring “the number of Representatives shall not exceed one for every forty thousand – ” which had produced so much discussion, might be yet reconsidered, in order to strike out 40,000 & insert “thirty thousand.” This would not he remarked establish that as an absolute rule, but only give Congress a greater latitude which could not be thought unreasonable.¹³

Gorham stated two points of interest. First, that lowering the ratio would help pass the Constitution. By lowering the ratio to thirty thousand, he was proposing a 25 percent *increase* in representation: in effect, a better representation of We the People. For perspective: if the current House of Representatives, with 435 members, increased representation by 25 percent, they would have to add 109 new Representatives.

Second, Gorham noted the ratio was not an absolute rule. This implies two things: it is a rule, but not absolute. As a rule, it is something you can change (or break). As a constitutional number, it is amendable but not absolute.

Gorham also counsels that the increased representation would, “give Congress a greater latitude.” Here latitude is interpreted to mean extent (magnitude, range) and breadth. In this context, Gorham’s motion increased the extent of representation.

¹³ *Farrand’s Records*, 2:643-644.

Then, without discussion, two other delegates seconded Gorham's motion.

The next thing that happened is the remarkable moment: Washington addressed the convention, something he had not done all summer. This was no small matter. As one scholar has put it, "Everyone at Philadelphia understood that Washington's name alongside Franklin's on the bottom of the proposed Constitution might be the key to ratification."¹⁴

Instead of just asking the delegates to vote, he spoke to them of his opinions regarding Gorham's proposal. Here is how Madison recorded the moment:

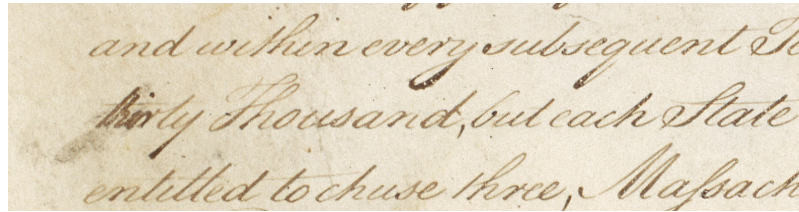
When the President rose, for the purpose of putting the question, he said that although his situation had hitherto restrained him from offering his sentiments on questions depending in the House, and it might be thought, ought now to impose silence on him, yet he could not forbear expressing his wish that the alteration proposed might take place. It was much to be desired that the objections to the plan recommended might be made as few as possible – The smallness of the proportion of Representatives had been considered by many members of the Convention, an insufficient security for the rights & interests of the people. He acknowledged that it had always appeared to himself among the exceptionable parts of the plan; and late as the present moment was for admitting amendments, he thought this of so much consequence that it would give much satisfaction to see it adopted.¹⁵

¹⁴ Akhil Reed Amar, *America's Constitution: A Biography*, (New York: Random House, 2005), 134. See also 76-81.

¹⁵ *Farrand's Records*, 2:644. See also Amar, *The Bill of Rights: Creation and Reconstruction*, (New Haven & London: Yale University Press, 1998), 12-13.

This is not the first time Washington took advantage of big moments. From his years at war, to the drafting of a new government, he acted in big moments. And this wasn't just a random act, as we will see, he shows this same commitment to the ratio during his first presidency – and his and the nation's first veto. That should be expected, as he said, he considered it “among the exceptionable parts of the plan.”

The motion to change the ratio to thirty thousand passed unanimously, with no debate recorded. The word *thirty* replaced the word *forty* in the Constitution. If you look closely at the original, you can see the smudge on the Constitution from the change. There, in Article 1, Section 2, Clause 3, someone (Madison or the secretary of the convention, William Jackson) erased the “fo” in the word *forty*. Then “*thi*” is attached to the “*rty*” remaining from the original word *forty*. In the image below of the US Constitution, it reads *thirty*:



This is an interesting moment. The future first president of the United States, the one referred to as His Excellency, speaking on “his wish” to see the people better represented – 25 percent better. Given Washington’s skill for performing on a grand stage – in war and now in peace – this is no small moment for him and our country. According to his sentiments, some delegates in the room felt “the smallness of the proportion of Representatives” to be an “insufficient security for the rights & interests of the people.” Washington said of the representation ratio “that it had always appeared to himself among the exceptionable parts of the plan.”

This day, 17 September 1787, is portrayed in two Howard Chandler Christy paintings. The first, completed in Independence Hall in 1937, is called *Signing* (Picture 1). The five by seven foot painting shows Washington addressing the

convention with the spirit of “Liberty, Peace, and Justice” allegorically portrayed over the signing.

With the critical success of his first painting, the federal government commissioned Christy to paint a second interpretation of 17 September. The second painting, *Signing of the Constitution*, is 20 by 30 feet and considered one of the best portrayals of the founding (Picture 2). It hangs in the east stairway of the House wing in the US Capitol and again highlights the signing with Washington standing before the convention.



Picture 1. *Signing*, by Howard Chandler Christy



Picture 2. *Signing of the Constitution*, by Howard Chandler Christy¹⁶

We, the citizenry, read ourselves into or out of such historical moments. If, for example, we only see the mistake of the three-fifths compromise in a moment like the signing on 17 September, then that is what we will see. Or we can see the increase in representation as a signal to the importance of We the People. On that day, the representation ratio worked in favor of the slave states and gave them more power: today, the ratio, if adhered to, would work in favor of We the People, constitutionally speaking, by giving the people more power.

5

Given how history turned out, with the ratification of the Constitution, it is easy to see the victors. But at the time, it was not clear the people would ratify the Constitution. Edmund Randolph, a delegate from Washington's home state, Virginia, predicted defeat for the Constitution minutes after Washington had spoken: Randolph warned that "Nine States will fail to ratify the plan and confusion must ensue."¹⁷

¹⁶ The Christy paintings are online on the "Teaching American History" website.

¹⁷ Ibid., 2:645.

To Randolph's pessimism, Alexander Hamilton spoke the language of realism: he did not see any alternative to supporting ratification of the Constitution. Hamilton questioned whether it is "possible to deliberate between anarchy and Convulsion on one side, and the chance of good to be expected from the plan on the other."¹⁸

The convention was a lesson in compromise. Compromise involves necessity by creating its own demand. To the founders, this final day of the Constitutional Convention was important. They knew this would be their last best chance to send a message. To use some modern language for an 18th century event, the closing of the Constitutional Convention was a media event. Individual founders were delivering messages for the stories that would be told about the signing. These 18th century leaders knew how people communicate: through stories. In the ratification debates immediately following, the stories from the convention would enter the newspapers and then the "talk" of the people. Americans have always talked politics, and what happened on 17 September 1787, was a political event, 18th century style. The founders, as representatives of We the People, knew the importance of what was being said and why.

With compromise, it is rare to find all sides happy. That was true even at the founding. At the end of the convention, on the last day, we have Franklin's speech regarding unanimity, Gorham's motion to increase representation by 25 percent, Washington's acknowledgement of the "exceptionable part" of the representation ratio and "his wish" to see the amendment adopted, and then a discussion of the meaning of signing the Constitution and its possibility of success. Even after the actions of Franklin, Gorham, and Washington, and the speeches from distinguished others, there were three delegates who, as Madison put it, "declined giving it the sanction of their names."

The three were Randolph and George Mason of Virginia, and Gerry of Massachusetts. Their declining to sign was significant. Mason would campaign for a "declaration of rights" after the convention and is credited with developing Virginia's

¹⁸ Ibid., 2:645-646.

Bill of Rights. Mason would also have a falling out with Washington because of their differing positions – one working for a bill of rights, the other as soon-to-be chief executive.

Gerry went on to serve in the federal government that he withheld his signature from. He served Massachusetts in the First Congress in the House of Representatives (1789-1793); then years later as Vice President of the United States under President Madison (4 March 1813 to 23 November 1814). He died in office and is buried in the Congressional Cemetery.

He is also the “Gerry” from the political term “gerrymandering.” Gerrymandering is when the political party in power draws oddly shaped districts in order to keep or gain power. This term developed because of his support for a redistricting plan while governor of Massachusetts (1810-1812). In noting his reasons for not signing the Constitution, Gerry spoke of the fear of civil war – which is what happens when representation fails. Madison recorded his dissent:

Whilst the plan was depending, he had treated it with all the freedom he thought it deserved – He now felt himself bound as he was disposed to treat it with the respect due to the Act of the Convention – He hoped he should not violate that respect in declaring on this occasion his fears that a Civil war may result from the present crisis in the U.S. – In Massachusetts, particularly he saw the danger of this calamitous event – In that State there are two parties, one devoted to Democracy, the worst he thought of all political evils, the other as violent in the opposite extreme. From the collision of these in opposing and resisting the Constitution, confusion was greatly to be feared.¹⁹

Well, Gerry was correct about the forces of civil war, just that it was to be south against north and some seventy years

¹⁹ *Farrand's Records*, 2:646-647.

later. He was also correct in pointing out the conflicting values. Note his fear of “*Democracy, the worst he thought of all political evils.*”

In his wording, one can parse out the future political problem. It is an inherent problem of constitutional theory: mob below, mob above. To Gerry, the mob below, democracy, was tempered by the fear of the mob above – mainly, monarchy and all its trappings. He saw a tension, a compromise, and an accommodation that he did not foresee as viable.

Today’s world is little different: citizens do not worry about a monarchy, but the United States does have a ruling elite. The same political force, power, is at work – now modernized and sophisticated. Our federal government has never been larger or more expensive or more entwined in our everyday lives. The simple process put into place on 17 September 1787, the one premised on constitutional representation, has been forgotten.

3

Ratification

1

Ratification is the act of giving formal sanction to. It is to approve and make valid.

Contrary to Edmund Randolph's prediction of defeat at the closing of the convention, nine states did ratify the Constitution – and did so in nine months. This made the Constitution the new form of government for those nine states. The others would come along, as all thirteen independent states would eventually ratify the Constitution – Rhode Island being the final one.

Here are the states listed by date of ratification:

1. Delaware	12.07.1787
2. Pennsylvania	12.12.1787
3. New Jersey	12.18.1787
4. Georgia	01.02.1788
5. Connecticut	01.09.1788
6. Massachusetts	02.06.1788
7. Maryland	04.28.1788
8. South Carolina	05.23.1788
9. New Hampshire	06.21.1788

At this point, the Constitution became legally binding on these states and a new government was formed. Next are the ratification dates for the remaining four original states:

10. Virginia	06.25.1788
11. New York	07.26.1788
12. North Carolina	11.21.1789
13. Rhode Island	05.29.1790

That they achieved ratification in nine months and full support in less than three years is quite an accomplishment. Some of their success can be explained by the need for a new government (simple expedience and necessity), and some by the prestige of those who wrote it.

Two groups developed during ratification – Federalists and AntiFederalists. In basic terms, the Federalists supported the new constitution and the AntiFederalists did not. Their disagreements tended to focus on power and process. For one, they discussed the representation ratio in detail.

This is clearly a post-revolutionary divide. Federalists and AntiFederalists were on the same side during the revolution, but now had differing opinions on how to proceed. The pros and cons of the proposed Constitution were debated in the newspapers, in pamphlets, collections of op-eds, such as *The Federalist Papers*, and in the debates within the state ratifying conventions. In a short time there was a lot of discussion.

One of the more important developments, following the Massachusetts ratifying convention, was the call for amendments and a bill of rights – something many state governments had at the time. This debate is discussed in detail in chapter 4, as it forms the beginning of the proposed Bill of Rights and *Article the first*. For now, let us focus on the representation ratio and what Article 1, Section 2, and Clause 3 meant to the Federalists and AntiFederalists, as well as what fears and safeguards were discussed.

2

In the same month that Massachusetts ratified the Constitution with a call for amendments, in New York there were op-eds being published in support of the new form of government. These op-eds became known as *The Federalist Papers*. They

were written by Hamilton, Madison, and John Jay, but signed with the penname “Publius.” They were written to explain and argue for ratification and are detailed opinions on how the Constitution was designed to work. The essays are like an owner’s manual to a new vehicle: they tell us how the Constitution was supposed to work – according to Publius.

The Constitution specified that the first House in the first Congress would have 65 Representatives. Then, within three years, they were to take a census and, based on the constitutional ratio of one for every thirty thousand, add members.

In the initial debates in the ratifying conventions – most notably, Pennsylvania in December 1787 – the arguments concerning the system of representation in the proposed Constitution began to coalesce. By February 1788, Publius was writing in defense of the Constitution regarding four critiques, or “charges,” against the proposed House of Representatives. Of the 85 essays in *The Federalist Papers*, numbers 55 through 58 focus on the House of Representatives and the representation ratio. The four charges are described in Federalist 55:

first, that so small a number of representatives will be an unsafe depositary of the public interests;

secondly, that they will not possess a proper knowledge of the local circumstances of their numerous constituents;

thirdly, that they will be taken from that class of citizens which will sympathize least with the feelings of the mass of the people, and be most likely to aim at a permanent elevation of the few on the depression of the many;

fourthly, that defective as the number will be in the first instance, it will be more and more disproportionate, by the increase of the people, and the obstacles which will prevent a correspondent increase of the representatives.¹

¹ Madison, 315: Federalist 55, 13 February 1788.

These four charges – the House and representation was too small, not local, wrong class (oligarchy), and that Congress will fail to increase representation in the future – form a precise 21st century critique of the House of Representatives.

For representing We the People, the fears from 1788 have become the facts of 2006. Representation forms the foundation of our republic and Constitution. It was the key to the famed Connecticut Compromise – the plan from the Constitutional Convention that gave us “unequal” representation: a House of Representatives based on population and the ratio one for every thirty thousand, and a Senate to represent the states at the ratio of two per state. It is referred to as unequal because the system was no longer one state, one vote, or equal. Representation was now to be based on a ratio.

To the citizens of the states asked to ratify our Constitution, representation was of primary importance. In Federalist 55 we can see why: many state constitutions had ratios that we would consider outrageous. For example, in Pennsylvania the ratio was “one for every four or five thousand”; in Rhode Island it was “at least one for every thousand”; and in Georgia, “the proportion may be carried to one for every ten electors.”² Such ratios may have worked at the state level, Publius argued, but would be too small, and create too large of a House, to be effective at the national level.

It was also commonly understood that as the nation grew, so would membership and representation in the House. There is no magical way to secure liberty forever. In other words, there is no perfect ratio. Publius knew this: “Nothing can be more fallacious than to found our political calculations on arithmetical principles.”³ Publius argued that sometimes “Sixty or seventy men” could be better trusted “than six or seven,” but “if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed.”⁴

This number, “six or seven thousand,” is the largest House membership I have found mentioned by the founders, and it is

² Ibid., 316.

³ Ibid.

⁴ Ibid.

of interest. It is interesting because if the House was apportioned based on the constitutional representation ratio, there would be thousands more than Publius imagined feasible. The US population is 300 million. If you divide 300 million by the representation ratio of 30,000, the answer is 10,000 Representatives. That would be a large meeting of We the People.

If instead of 30,000 we based representation on the unratified *Article the first*, at the maximum rate of one for every 50,000 persons, House membership would be 6,000 Representatives for a nation of 300 million. That is in the uppermost range mentioned by Publius.

It is also clear that today's districts, with one Representative for every 650,000 people, would not have been called representation in the 18th century. They would refer to our political system as oligarchy – rule by the few. The highest ratio ever proposed by the founders was the 50,000 in *Article the first*. Nothing higher than 50,000 was ever proposed and nothing but 30,000 has ever been ratified. But here is the point, according to Publius:

The truth is, that in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for *improper purposes*: As on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.⁵

The phrase “improper purposes” points to the truth that Publius is discussing. It is not the number, but the principle, that is of constitutional importance. The ratio is our security to keep the system open to We the People. If the ratio is ignored, than the people have a constitutional right taken from them.

⁵ Ibid. Italics added.

There are many historical and modern examples of how the House does not “guard against too easy a combination for improper purposes.” Also, it certainly is not a place of “free consultation and discussion.” Our current system is based on wealth: money buys access. Citizens have to pay for the consultation and discussion. That is not what was intended.

The two sides, Federalists and AntiFederalists, did not disagree on growth in House membership. Publius and the others expected immediate growth in the House of Representatives based on the ratio:

It will not be thought an extravagant conjecture, that the first census will, at the rate of one for every thirty thousand, raise the number of representatives to at least one hundred. Estimating the negroes in the proportion of three-fifths, it can scarcely be doubted that the population of the United States will by that time, if it does not already, amount to three millions. At the expiration of twenty-five years, according to the computed rate of increase, the number of representatives will amount to two hundred; and of fifty years to four hundred. This is a number which I presume will put an end to all fears arising from the smallness of the body.⁶

Clearly, the representation ratio was to be used to increase membership in the House of Representatives; the constitutional theory in support of this was a small ratio. The founders anticipated our country’s growth in both land and population and built a solution into our Constitution. Unfortunately, for representing the sentiments of the people, politics took over instead of constitutionalism. It would take 125 years, and not 50 like Madison projected, to reach 400 Representatives in the House. The year would be 1913 and the US population was more than 92 million people.

⁶ Ibid., 317.

3

In Federalist 56, Publius addressed the second charge: the House “will be too small to possess a due knowledge of the interests of its constituents.”⁷ Regarding this “due knowledge,” he wrote, “Those which are of most importance, and which seem most to require local knowledge, are commerce, taxation and the militia.”⁸

Here are some defined interests of the represented – commerce, taxes and defense. The premise of our constitutional theory of representation is this: the representatives will have ‘due knowledge’ of the interests of the constituents. The ratio provides this method of measurement. Publius argues for a House of Representatives with “a representative for every *thirty thousand inhabitants*” as “a safe and competent guardian of the interests which will be confided to it.”⁹

A House of Representatives as the “guardian of interests which will be confided to it” was (and still is) the goal. To accomplish this goal, the plan was to represent We the People in groups of 30,000. This is the essence of Madison's constitutional theory: bring the factions into the republican sphere, represent their due knowledge, and you create the opportunity for the House to be a safe and competent guardian of the interests of the United States.

For example, imagine a new US House of Representatives where groups (factions) are represented by an equitable ratio. At first the factions might oppose each other because they do not have due knowledge of each other. A new House would reflect our population; it would actually have hundreds of gays, lesbians, and evangelical Christians. If they were represented to the degree of their numbers across our country, then there would be a well-represented debate in our House of Representatives about any supposed differences. No one knows how that debate might end, but groups – factions – would be represented with due knowledge of differing views.

That is representation.

⁷ Madison, 321: Federalist 56, 16 February 1788.

⁸ Ibid.

⁹ Ibid., 325.

Today, there is only one openly gay male in the US House of Representatives, Representative Barney Frank. But the US has 300 million people. Why do we fear hundreds of homosexuals being represented? – Or hundreds of evangelicals? The point is representation. That makes it constitutional and would provide the House with due knowledge of citizens and their lives.

The founders understood what constitutional representation would look like. They even discussed which “classes” would be represented in the House. In Federalist 57, the charge is “pretended oligarchy” and “the principle of it strikes at the very root of republican government.”¹⁰ To the charge of pretended oligarchy, Madison lays it on the line concerning the people, asking rhetorically –:

Who are to be the electors of the federal representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.¹¹

From the people comes constitutional representation. The people can only choose wisely – but there is no guarantee they will choose wisely. The founders did not believe in a mathematical solution to the issue. They did agree that a small ratio and a large House would represent the people. As Publius argued, the system did not favor the rich, learned and haughty when it came to representation. Instead, the poor, ignorant and humble were also to have their representation. Remember the Senate and the role it was to play: it is not as if the House of Representatives could control the government. The process is based on a Congress and not one chamber.

There would be no qualification for office: “No qualification of wealth, of birth, of religious faith, or of civil

¹⁰ Madison, 326: Federalist 57, 19 February 1788.

¹¹ Ibid.

profession, is permitted to fetter the judgment or disappoint the inclination of the people.” The people in the small districts would choose someone they could “confer the representative trust.”¹²

Publius anticipated the relationship between the representative and constituent to be based on “Duty, gratitude, interest, and ambition itself.” Frequent elections, every two years, would create a “dependence on the people.” With small districts, districts not to exceed one for every 30,000, the relationship was designed to be one of conferring trust by being familiar with what is important locally.

And they really did mean one representative for every thirty thousand:

The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of federal representatives.¹³

Today, with an approximate population of sixty thousand souls, Dubuque, Iowa would be equal to the population of Philadelphia in 1788. Today, Philadelphia has about 1.5 million souls and under constitutional representation would warrant more than fifty federal representatives.

That brings us to the fourth charge and Federalist 58. It has a long but accurate title: “*The Objection That The Number Of Members Will Not Be Augmented As The Progress Of Population Demands Considered.*”

The title introduces one of the clearest commentaries concerning “a gradual augmentation of the number of representatives.”¹⁴ In defending the proposed Constitution, Publius also shows us, the future, how to fix the very problem we face – an un-augmented House and unconstitutional representation.

¹² Ibid., 327.

¹³ Ibid., 330.

¹⁴ Madison, 332: Federalist 58, 20 February 1788.

Publius argues that Congress will augment because they have always done so at the state level under their state constitutions. But, more important than past events, Publius saw the process of representation as unequivocal:

Within every successive term of ten years, a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to re-adjust from time to time the apportionment of representatives to the number of inhabitants; under the single exception that each State shall have one representative at least: Secondly, to augment the number of representatives at the same periods; under the sole limitation, that the whole number shall not exceed one for every thirty thousand inhabitants.¹⁵

The two “unequivocal objects”: first, to apportion based on the census with each state having at least one Representative, and second, to augment the number based on the representation ratio of “one for every thirty thousand inhabitants.” It was clear to Publius and the citizens at the time of ratification what the representation ratio was designed to do.

The founders expected Congress – any Congress – to follow the Constitution. They also expected the less populated states to oppose augmentation, as many did. Nonetheless, Publius predicted a coalition committed to augmentation from their own interests:

Should the representatives or people therefore of the smaller states oppose at any time a reasonable addition of members, a coalition of a very few states will be sufficient to overrule the opposition; a coalition, which notwithstanding the rivalry and local prejudices which might

¹⁵ Ibid.

prevent it on ordinary occasions, would not fail to take place, when not merely prompted by common interest but justified by equity and the principles of the constitution.¹⁶

Publius claimed that there is a “peculiarity” in the federal constitution that will bring about augmentation of representation in the House:

The peculiarity lies in this, that one branch of the legislature is a representation of citizens; the other of the states: In the former, consequently the larger states will have most weight; in the latter, the advantage will be in favor of the smaller states. From this circumstance it may with certainty be inferred, that the larger states will be strenuous advocates for increasing the number and weight of that part of the legislature in which their influence predominates.¹⁷

This peculiar coalition has yet to develop, but Publius reasoned, “it may with certainty be inferred.” The prediction was that the system would respond with a coalition. This coalition would be twofold. First, from those who respect the Constitution and the compromise on representation. Second, from the interests of the people in the states with large population – Illinois and California, for example. These conditions were to create the coalition for augmentation.

This peculiar coalition has not materialized, politically, but the theory and opportunity are still there, sitting in our Constitution, and therefore still supreme.

4

At the New York ratifying convention, both sides, Federalists and AntiFederalists, entered the debate on representation. The Federalists’ arguments were represented by two members of

¹⁶ Ibid., 333.

¹⁷ Ibid.

Publius, Hamilton and Jay, as well as others. The AntiFederalists position was defended by many; it was distinguished by a delegate named Melancton Smith.

During the New York convention, New Hampshire and Virginia would ratify the Constitution. This made the Constitution valid in the states that had ratified it. By the time it came to a vote for the state of New York, the question had become, “Would New York go it alone or join the others?”

By the summer of 1788, the arguments for and against the Constitution had crystallized. It was understood that the object at hand was not the formation of a perfect government. Smith, speaking for the AntiFederalists position, was not convinced that the proposed Constitution was the way to go at all. He thought it too radical. “Fickleness and inconstancy,” he said, “were characteristic of a free people; and, in framing a constitution for them, it was, perhaps, the most difficult thing to correct this spirit, and guard against the evil effects of it.”¹⁸

He went further: “This fickle and inconstant spirit was the more dangerous in bringing about changes in the government.”¹⁹ Smith, like the other AntiFederalists, did not oppose apportioning and augmenting representation by using the ratio per se; on the contrary, they understood the significance and expressed the basic concerns with clarity.

Smith addressed the New York convention and outlined three objections to Article 1, Section 2, Clause 3 of our Constitution. First, he was against the “rule of apportionment” because it counted slaves:

In the first place, the rule of apportionment of the representatives is to be according to the whole number of the white inhabitants, with three fifths of all others; that is, in plain English, each state is to send representatives in proportion to the

¹⁸ Jonathan Elliot, ed., *The Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution*, (Washington: 1888), 2:225. Available online on the Library of Congress website, “A Century of Lawmaking.”

¹⁹ Ibid.

number of freemen, and three fifths of the slaves it contains. He could not see any rule by which slaves were to be included in the ratio of representation. *The principle of a representation being that every free agent should be concerned in governing himself, it was absurd in giving that power to a man who could not exercise it. Slaves have no will of their own.* The very operation of it was to give certain privileges to those people who were so wicked as to keep slaves. He knew it would be admitted that this rule of apportionment was founded on unjust principles, but that it was the result of accommodation; which, he supposed, we should be under the necessity of admitting, if we meant to be in union with the Southern States, though utterly repugnant to his feelings.²⁰

Well, perhaps that was a better solution – not joining in a “union with the Southern States” – but that did not happen. But here Smith does provide a clear ideal of representation, with the emphasis on governing one’s self: “The principle of a representation being that every free agent should be concerned in governing himself, it was absurd in giving that power to a man who could not exercise it. Slaves have no will of their own.” The slaves, defined as having “no will of their own,” a dehumanizing association, provided a lived example of bondage and of the pathos of distance. To these leaders, there were free people, citizens, and people who were not free. The founders who owned other humans, to include Washington and Madison, had a lived experience of liberty and slavery that is impossible for us to understand. As the owners of others, the founders understood liberty – and men like Smith did not want the two, slavery and representation, to be constitutionally tied together.

His second objection was that the representation ratio was not fixed. Smith argued that it was against “every principle of a

²⁰ Ibid., 2:226-227. Italics added.

free government” to let the rulers set the number of representatives:

In the second place, the number was not fixed by the Constitution, but left at the discretion of the legislature; perhaps he was mistaken; it was his wish to be informed. He understood, from the Constitution, that sixty-five members were to compose the House of Representatives for three years; that, after that time, the census was to be taken, and the numbers to be ascertained by the legislature, on the following principles: 1st, they shall be apportioned to the respective states according to numbers; 2nd, each state shall have one, at least; 3rd, they shall never exceed one to every thirty thousand. If this was the case, the first Congress that met might reduce the number below what it now is – a power inconsistent with every principle of a free government, *to leave it to the discretion of the rulers to determine the number of representatives of the people*. There was no kind of security except in the integrity of the men who were intrusted; and if you have no other security, it is idle to contend about constitutions.²¹

Smith is a champion of representation. He understood you lost freedom by leaving it to the rulers to “determine the number of representatives of the people.” Free government is premised on the power of constitutions and not on the integrity of rulers “intrusted” with power. This free government – with slavery as its pathos of distance and a measure of representation – was to be at the mercy of Congress. That being the case, Smith did not think the proposed representation ratio, one for every thirty thousand, adequate. He described the ratio as “incompetent” because it was *too large*:

²¹ Ibid., 2:227. Italics added.

In the third place, supposing Congress should declare that there should be one representative for every thirty thousand of the people, in his opinion, it would be incompetent to the great purposes of representation. It was, he said, the fundamental principle of a free government, that the people should make the laws by which they were to be governed. He who is controlled by another is a slave; and that government which is directed by the will of any one, or a few, or any number less than is the will of the community, is a government for slaves.²²

The slavery metaphor of “no will” repeats itself, and a lower ratio and larger representation were the keys. According to Smith, smaller districts were the key elements in avoiding “a government for slaves.” By the end of the day Smith proposed an amendment of his own: a ratio of one for every twenty thousand. In doing so, he argued smaller districts lessen corruption. His proposal was later rejected, but in talking of the history of representation in Britain, Smith argued that representation was of the most importance because it controlled the purse and the sword:

. . . power which had both the purse and the sword had the government of the whole country, and might extend its powers to any and to every object. He had already observed that, by the true doctrine of representation, this principle was established – that the representative must be chosen by the free will of the majority of his constituents. It therefore followed that the representative should be chosen from small districts.²³

²² Ibid.

²³ Ibid., 2:228.

Hamilton followed Smith at the convention and defended the proposed Constitution. He pointed to the weaknesses of the Confederation government and the inherent differences in the states as the compelling force for change. Hamilton argued, “the natural situation of this country seems to divide its interest into different classes.” These differing interests had led to the impasse at the Constitutional Convention, and therefore, the compromise over representation and the three-fifths deal on slavery:

The Convention were obliged to appoint a committee for accommodation. In this committee, the arrangement was formed as it now stands, and their report was accepted. It was a delicate point, and it was necessary that all parties should be indulged. Gentlemen will see that, if there had not been a unanimity, nothing could have been done; for the Convention had no power to establish, but only to recommend, a government. Any other system would have been impracticable. Let a convention be called tomorrow; let them meet twenty times, – nay twenty thousand times; they will have the same difficulties to encounter, the same clashing interests to reconcile.²⁴

Hamilton countered the complaint of including slaves in representation. Slaves are also property, he argued, and, “The best writers on government have held that representation should be compounded of persons and property.”²⁵

Hamilton saw the slave as more than property. Human, but in a “degraded” condition:

They are men, though degraded to the condition of slavery. They are persons known to the municipal laws of the states which they inhabit,

²⁴ Ibid., 2:236.

²⁵ Ibid., 2:237.

as well as to the laws of nature. But representation and taxation go together, and one uniform rule ought to apply to both. Would it be just to compute these slaves in the assessment of taxes, and discard them from the estimate in the apportionment of representatives? Would it be just to impose a singular burden, without conferring some adequate advantage?²⁶

Hamilton then questioned who was actually represented in New York. Here we see the death of “No Taxation Without Representation” as just a matter of time:

Another circumstance ought to be considered. The rule we have been speaking of is a general rule, and applies to all states. Now, you have a great number of people in your state, which are not represented at all, and have no voice in your government. These will be included in the enumeration – not two fifths, nor three fifths, but the whole. This proves that the advantages of the plan are not confined to the Southern States, but extend to other parts of the Union.²⁷

Then Hamilton tried to allay the fears that Congress will be able to reduce the number of representatives:

It has been asserted that it will be in the power of Congress to reduce the number. I acknowledge that there are no direct words of prohibition, but contend that the true and genuine construction of the clause gives Congress no power whatever to reduce the representation below the number as it now stands. Although they may limit, they can never diminish the number. One representative for every thirty thousand inhabitants is fixed as

²⁶ Ibid.

²⁷ Ibid., 2:237-238.

the standard of increase; till, by the natural course of population, it shall become necessary to limit the ratio.²⁸

The number was intended to function as the standard of increase. They knew growth was an issue. They all could see the larger nation developing. They recognized a limit might have to be set, but that the ratio as a principle was “fixed as the standard of increase.”

Hamilton then mentioned the Massachusetts ratifying convention, where similar arguments had been raised. Hamilton urged patience. He argued for experience to dictate and not fear:

If the whole number in the United States be, at present, three millions, as is commonly supposed, according to the ratio of one for thirty thousand, we shall have, on the first census, a hundred representatives. In ten years, thirty more will be added; and in twenty-five years, the number will be double. Then, sir, we shall have two hundred, if the increase goes on in the same proportion. The Convention of Massachusetts, who made the same objections, have fixed upon this number as the point to which they chose to limit the representation. But can we pronounce, with certainty, that it will not be expedient to go beyond this number? We cannot. Experience alone must determine. This matter may, with more safety, be left to the discretion of the legislature, as it will be the interest of the large and increasing states of Massachusetts, New York, Pennsylvania, etc., to augment the representation. Only Connecticut, Rhode Island, Delaware, and Maryland, can be interested in limiting it. We may, therefore, safely calculate upon a growing representation, according to the

²⁸ Ibid., 2:238.

advance of population, and the circumstances of the country.²⁹

Here we have the same argument and beliefs found in Federalist 58. Augmentation was a constitutional guarantee. The founders assumed states like Rhode Island and Delaware would be “interested in limiting” representation. But they argued this would be balanced by “the interest of the large and increasing states” such as New York and Pennsylvania.

As we have been noting, this coalition has not materialized. But here Hamilton points to the last factor concerning a growing representation – time: “We may, therefore, safely calculate upon a growing representation, according to the advance of population, *and the circumstances of the country.*”³⁰

5

It really is always the circumstances. That is why humans use the concept compromise – the circumstances will vary. History teaches that some compromises work and some fail; there is no guarantee except change itself. The compromise that kept the Constitutional Convention together was the representation ratio.

A few days after the above exchange, on Monday, 23 June 1788, an AntiFederalist named John Lansing rose and contested the “work of accommodation.” He asked Hamilton why the ratio had been lowered from forty to thirty thousand: “Sir, if it was a system of accommodation, and to remain untouched, how came that number afterwards to be reduced to thirty thousand?”³¹

Hamilton answered by recalling Washington’s speech on the last day of the Constitutional Convention. Hamilton referred to Washington as ‘his excellency’:

I recollect well the alteration which the gentleman alludes to; but it by no means militates against my idea of the principles on

²⁹ Ibid., 2:239.

³⁰ Ibid. Italics added.

³¹ Ibid., 2:274.

which the Convention acted, at the time the report of the committee was under deliberation. This alteration did not take place till the Convention was near rising, and the business completed; when his excellency, the president, expressing a wish that the number should be reduced to thirty thousand, it was agreed to without opposition.³²

Following Hamilton's reminder that his excellency had spoke in support of changing the representation ratio, Smith drew attention to representing the "middling class" of people. Smith thought the ratio too large, making the House too small; as mentioned, he proposed amending the ratio to one for every twenty thousand to make it more representative of the people.

In an effort to end the debate, John Jay, from *The Federalist Papers*, rose and spoke. No more splitting hairs and arguing about ratios, he counseled:

The Convention who decided this question took all these different opinions into consideration, and were directed by a kind of necessity of mutual accommodation, and by reasons of expediency; it would therefore be unfair to censure them. Were I asked if the number corresponds exactly with my own private judgment, I should answer, No. But I think it is best, under our present circumstances, to acquiesce. Yet, sir, if I could be convinced that danger would probably result from so small a number, I should certainly withhold my acquiescence.³³

But Smith persisted. In the final words of the day, Smith spoke some politically prophetic words: the states with less population would have an interest in setting (and keeping) the

³² Ibid.

³³ Ibid., 2:284.

ratio *high* – like Delaware. This is exactly what has happened. Here is how it was recorded:

The Honorable Mr. Smith rose, and said, it appeared to him probable that it would be the interest of the state having the least number of inhabitants to make its whole number the measure of the representation; that it would be the interest of Delaware, supposing she has forty thousand, and consequently only one vote, to make this whole number the ratio; so if she had fifty thousand, or any number under sixty thousand. The interest also of some other of the small states would correspond with hers; and thus the representation would be reduced in proportion to the increase of Delaware. He still insisted that the number of representatives might be diminished.³⁴

As we will discuss in chapter 6, Delaware still has only one federal Representative based on the 2000 Census, representing almost 800,000 citizens.

In New York, the vote for ratification was close – 30 in favor and 27 against. Seven AntiFederalists abstained and even Smith voted for ratification.

The change in mood was due in large part to the vote from New Hampshire. As the ninth state to ratify the Constitution, New Hampshire's vote set in motion the new government. That made the question for the New York convention: independence or ratification of the Constitution and joining the United States. Those present voted, reluctantly, for the Constitution and for the representation it guaranteed.

³⁴ Ibid., 2:286.

Part Two

Amendments

4

Article the first of the Bill of Rights

1

At the beginning of *The Bill of Rights: Creation and Reconstruction*, Akhil Reed Amar, a Professor of Law at Yale, describes the next phase of our constitutional development in the following manner:

The Bill of Rights stands as the high temple of our constitutional order – America’s Parthenon – and yet we lack a clear view of it. Instead of being studied holistically, the Bill has been broken up into discrete blocks of text, with each segment examined in isolation.¹

Part of that “high temple” was *Article the first*. If we study the Bill of Rights holistically, then the one part of twelve that has not been ratified by three-fourths of the states, would be of interest. We can even think of it as the twelfth column of America’s Parthenon. Here again is *Article the first*:

After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until

¹ Amar, *The Bill of Rights*, xi.

the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.²

If *Article the first* had received the support of three-fourths of the states, the constitutional number for ratification of an amendment, or if it does so in the future, this Article would amend Article 1, Section 2, and Clause 3 of our Constitution. By constitutional law, the ratio would have been increased to “nor more than one Representative for every fifty thousand persons.”

The vote for ratification of the twelve proposed amendments took more than two years to complete. It began when the First Congress submitted twelve Articles to the states on 25 September 1789. This was partially completed on 15 December 1791, with the ratification of Articles three through twelve. Those ten Articles became the first ten amendments to the Constitution.

I said “partially” complete because 201 years later, *Article the second* was ratified as the Twenty-seventh Amendment to the US Constitution (See Appendix B). Only seven states initially ratified *Article the second*: Delaware, Maryland, South Carolina, North Carolina, Rhode Island (and Providence Plantations), Vermont, and Virginia.³

² *Elliot's Debates*, First Congress of the United States, the Bill of Rights, 1789, 1:338. Available online on the Library of Congress website, “A Century of Lawmaking.” See also Amar’s *The Bill of Rights*, 8-19.

³ *Ibid.*, 1:339-340. See also Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution*, (St Paul: 1990), Table 8.1.

Article the first actually did better than *Article the second* in voting during the 18th century, receiving ten votes for ratification. By comparison, the ten Articles ratified as amendments received eleven votes out of fourteen, or one more vote than *Article the first*.

Here are the state votes on *Article the first*:

Ratification Votes on *Article the first*

1. New Jersey	11.20.1789	Yes
2. Maryland	12.19.1789	Yes
3. North Carolina	12.22.1789	Yes
4. South Carolina	01.19.1790	Yes
5. New Hampshire	01.25.1790	Yes
6. Delaware	01.28.1790	No
7. New York	02.24.1790	Yes
8. Pennsylvania	03.10.1790	No
	09.21.1791	Yes
9. Rhode Island	06.07.1790	Yes
10. Vermont	11.03.1791	Yes
11. Virginia	11.03.1791	Yes ⁴

On 15 December 1791, Virginia ratified Articles two through twelve. This was enough to complete the ratification of Articles three through twelve. With eleven out of fourteen states voting in favor of those ten amendments, they became law and part of our Constitution. Of note, three of the original thirteen states did not vote on the twelve Articles. These three were Massachusetts, Georgia and Connecticut. These three states ratified the first ten amendments on their 150th anniversary in the spring of 1939.

Article the first, as mentioned, had ten “Yes” votes out of fourteen, or 71.4 percent. Then –:

12. Kentucky	06.24.1792	Yes
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⁴ Ibid. Also, Virginia ratified *Article the first* six weeks before the other eleven Articles on 15 December 1791.

When Kentucky joined the Union it ratified not only the Constitution, but also all twelve proposed Articles. This boosted *Article the first* to eleven out of fifteen states, or 73.3 percent. This is the closest *Article the first* has come to three-fourths of the states, or 75 percent, and being ratified – missing by just one state vote.

Also, just a couple of notes on the votes. Pennsylvania had initially voted “No” on *Article the first* on 10 March 1790, but changed their vote to “Yes” 18 months later. And, in another voting quirk, Virginia voted for *Article the first* six weeks before passing the other eleven Articles. Since Kentucky’s ratification in 1792, it does not appear that any other state has voted on *Article the first*.

In Amar’s *The Bill of Rights*, he contends that the main purpose of the amendments to the Constitution were to lower “agency costs”:

To borrow from the language of economics, the Bill of Rights was centrally concerned with controlling the “agency costs” created by the specialization of labor inherent in a representative government. In such a government, the people (the “principals”) delegate power to run day-to-day affairs to a small set of specialized government officials (the “agents”) who might try to rule in their own self-interest, contrary to the interests and expressed wishes of the people.⁵

To Amar, the Bill of Rights was an attempt to lower the agency costs of representative government. *Article the first* was a direct effort to control one aspect of the relationship between principals and agents: increase the agents to represent the principals. But this is exactly what has not happened.

Amar’s analysis, in noting the importance of the Bill of Rights, also points to the power in not ratifying *Article the first*:

⁵ Amar, *The Bill of Rights*, xiii.

As I have tried to show throughout, the Bill of Rights can itself be seen as a *Constitution* of sorts – that is, as a document attentive to structure, focused on the agency problem of government, and rooted in the sovereignty of We the People of the United States.⁶

Article the first is about the rule of law. It is an important *failed* attempt in our constitutional history. It points to something undone and amiss. It points to a fundamental forgotten element in a representative government – representing We the People.

2

After ratification of the Constitution and the beginning of the new government, the constitutional question became amendments. The Federalists had agreed in principle to amendments and a bill of rights. Representative Madison introduced amendments during the First Congress.⁷ But how they developed, and the reasons *for* and *against* a bill of rights, began at the end of the Constitutional Convention in Philadelphia.

On 12 September 1787, five days before the convention closed, George Mason of Virginia mentioned the idea of a bill of rights. He said he thought it would “give great quiet” to the people.⁸ Mason did not introduce a motion for a bill of rights, but he said he would second a motion if someone else did. Someone did: Gerry from Massachusetts. With Gerry’s motion, Mason seconded it. The convention voted by states – the motion lost 10 votes to 0.

The prevailing idea of the convention was that a bill of rights was not needed. The government was to be limited in

⁶ Ibid., 127.

⁷ Madison, 437-452. Specifically, see 441-442 for Madison’s discussion of amending representation in Article 1, Section 2, and Clause 3. See also Amar, *The Bill of Rights*, 16.

⁸ Levy, 13.

power; therefore rights would already be protected. But the idea of a bill of rights caught on.

As the ratification process began, some old and familiar fears kept surfacing. One fear, for example, was that Congress would not augment the House of Representatives as dictated. Simply put, many people did not trust Congress to keep giving them their representation every 10 years, and, as history shows, this fear was well founded.

This fear surfaced in Pennsylvania three months after the Constitutional Convention. In December 1787, the state of Pennsylvania ratified the Constitution. The vote was 46 to 23. The dissenters published their opinions in *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania*. Concerning constitutional representation, the dissenters argued that the new constitution was “deficient in every essential quality of a just and safe representation.” They noted that the new House of Representatives would begin with 65 members. Of that, 33 would make a quorum. And of that quorum, 17 would make a majority. This, they argued, made the representation too small.

Then the dissenters noted the Senate would begin with 26 members. Of that, 14 would make a quorum. And of that quorum, 8 would make a majority. At this point the suspicion of the dissenters doubled. They sarcastically noted who would be representing We the People – and this was with the ratio set at one for every thirty thousand:

Thus it appears that the liberties, happiness, interests, and great concerns of the whole United States, may be dependent upon the integrity, virtue, wisdom and knowledge of 25 or 26 men – How inadequate and unsafe a representation! Inadequate, because the sense and views of 3 or 4 millions of people diffused over so extensive a territory comprising such various climates, products, habits, interests, and opinions, cannot be collected in so small a body; and besides, it is not a fair and equal representation of the people

even in proportion to its number, for the smallest state has as much weight in the senate as the largest, and from the smallness of the number to be chosen for both branches of the legislature; and from the mode of election and appointment, which is under the controul of Congress; and from the nature of the thing, men of the most elevated rank in life, will alone be chosen. The other orders in the society, such as farmers, traders, and mechanics, who all ought to have a competent number of their best informed men in the legislature, will be totally unrepresented.⁹

According to this argument, the House was too small at one for every 30,000 and would leave the likes of “farmers, traders, and mechanics” without representation. They feared that “Congress may not only controul the choice of the people, but may so manage as to divest the people of this fundamental right, and become self-elected.”¹⁰ Lastly, the dissenters foreshadowed the counter to Madison’s argument in Federalist 58 regarding adding members to the House. They noted that “the house of representatives may be increased to one for every 30,000 inhabitants,” but they did not believe the Senate would consent to the increase. They argued that an increasing representation in the House would limit the weight and dominance of the Senate. They were certain this would be the case – “unless a revolution should effect a change.”¹¹

Well, looking back from today, the dissenters gave a precise critique: no Congress has ever followed the ratio. We will discuss this historical fact in detail over the next couple of chapters. But note this: as we near 2010, the population in the United States is 300 million, or roughly 100 times what it was in 1787, and yet House membership has only increased six fold – from 65 to 435 members in nearly 220 years.

⁹ Herbert J. Storing, ed., *The Complete Anti-Federalist*, (Chicago: University of Chicago Press, 1981), 3:34-37.

¹⁰ Ibid.

¹¹ Ibid.

And, recall, that removing fear from the system was why the amendments to the Constitution were proposed in the first place. For example, such rights as freedom of speech, to bear arms, and to be free from unreasonable searches. These rights were proposed, like *Article the first*, to protect us. Out of the realization (and fear) that Congress would have an interest in keeping House membership low, if for no other reason than to keep power, we see the key elements of *Article the first* develop. Specifically, it would have increased the ratio, first to one for every forty thousand when membership reached 100 Representatives, and then to one for every fifty thousand persons when membership reached 200 Representatives. But the difference is time. While discussing and ratifying the Constitution, it was a period of theoretical representation. Post-ratification, it became political representation. The former is a discussion of power – the latter is power.

Our 18th century American citizens had a fear that Congress would not augment the House as the Constitution guarantees. This is a fear that has proven real. We can also see their effort to guard against that fear by amending the Constitution with *Article the first*.

In theoretical and practical terms, the concept of citizen has been greatly diminished. We expect much less from the concept. Take a look at US history, and then imagine how things might have been different if the House of Representatives had represented the people. From a historical sense, the values and laws from constitutional representation would have changed our history. For example, would we have fought a Civil War over slavery? Suffered Reconstruction? Or would it have taken 99 years to pass the Civil Rights Act of 1964 if blacks had received their constitutional representation of one for every 30,000 in 1865?

To move from the historical to the political, one has to focus on the parts of our Constitution that are supreme. This means Article 1, Section 2, and Clause 3 of the US Constitution and *Article the first* from the Bill of Rights. Both are viable political representation solutions. And both are constitutional.

3

The number “200” Representatives first appears in the packet from the Massachusetts ratifying convention in February 1788. They noted in their response that they accepted the Constitution but – “. . . it is the opinion of this Convention that certain amendments & alterations in the said Constitution would remove the fears & quiet the apprehensions of many of the good people of this Commonwealth & more effectually guard against an undue administration of the Federal Government.”

The second amendment proposed by the Massachusetts convention focused on the representation ratio and House size. It proposed a clear maximum of 200 Representatives:

Secondly. That there shall be one representative to every thirty thousand persons, according to the census mentioned in the Constitution, until the whole number of representatives amounts to two hundred.¹²

This proposal would have left the representation ratio at one for every thirty thousand, but capped membership at 200 – or when the population reached approximately six million. This proposal had no solution after that – meaning, if you limit membership, what happens to the ratio? This proposal also appeared, word for word, in the comments from the New Hampshire ratifying convention.

From the Virginia and North Carolina ratifying conventions, we get a slightly different proposal – one that would look more like the final version. This one said that after membership reached 200, Congress could then set a new ratio. Here is the proposal from the Virginia and North Carolina ratifying conventions:

2nd. That there shall be one representative for every thirty thousand, according to the enumeration or census mentioned in the

¹² *Elliot's Debates*, 2:177.

Constitution, until the whole number of representatives amounts to two hundred; after which, that number shall be continued or increased, as Congress shall direct, upon the principles fixed in the Constitution, by apportioning the representatives of each state to some greater number of people, from time to time, as population increases.¹³

Madison participated in the Virginia ratifying convention as they debated the Constitution. He spoke on 24 June 1788 in support of what he called a “great republican principle.” Mainly, virtue, or the good, can come only from We the People and not from our rulers. As a republican virtue, we, the citizenry, should not expect “exalted integrity and sublime virtue” from our rulers. Instead, we should base our virtue on – :

. . . *this great republican principle*, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks – no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men. So that we do not depend on their virtue, or put confidence in our rulers, but *in the people who are to choose them*.¹⁴

Here, in the first efforts regarding the ideas behind *Article the first*, the focus is a safeguard against Congress not doing what the Constitution dictates concerning representation and the ratio. It was built on the idea that “if there be sufficient virtue

¹³ Ibid., Virginia 3:659; North Carolina, 4:249.

¹⁴ Madison, 398. Italics added.

and intelligence in the community,” then that virtue (whatever it is) will select the best representation. Not perfect, as that is not the point. There is no magical number for representation, but in the idea of virtue and the people and representation, the relationship is one of deliberation.

One cannot deliberate in large districts, and that virtue that the founders thought necessary must come from the people. This is a fundamental scenario. Virtue and *un-virtue* can come only from the people, that much was clear. The point being, the people are not perfect, but they are the only group that can give legitimacy to the governing power. Representation is the measure of We the People. Diminish representation and you diminish the people.

4

As the state ratifying conventions voted, the call for amendments and a bill of rights grew louder. The end result of this chorus was the twelve proposed Articles.

The First Congress, after much debate, settled on twelve Articles. In doing so, they also were specific as to the intent of the amendments. In sending the twelve Articles to the states for a vote, the First Congress, with “two thirds of both Houses concurring,” stated why they felt the amendments to be necessary:

The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution.¹⁵

¹⁵ *Elliot's Debates*, 1:338. See also Appendix B.

In this intention we can also see the important role *Article the first* played in the Bill of Rights: a check on the members of Congress itself.

As Congress debated what to submit to the states as a final product, they edited many of the suggestions from the states. One proposal that was *edited out* was the concept of “instructions,” which meant the electorate had a right to instruct a representative how to vote. This idea also grew out of the state ratifying conventions, most notably Virginia and North Carolina. While debating the proposed Articles in the First Congress, it was noted that the right of instruction had been taken out. During the debate of what would become *Article the third* of the proposed amendments, and thus the First Amendment to the US Constitution, there was a proposal to insert the words – “to instruct their Representative.”¹⁶ In essence, like the right to assemble and petition the government, the proposal would have made it a constitutional right to “instruct” your representative on how to vote. Could the people instruct their representative to vote a certain way? And if so, how would it be enforced?

Instructions, so the one side argued, would allow the people to better control the representative. The other side countered that elections every two years would provide the necessary control. They also pointed out that the House was to be a deliberative body – a place where representatives gathered to discuss the whole by knowing the particular. The opposition questioned how discussing national issues would be possible when each representative had ‘instructions’ on how to vote?

On 15 August 1789, during the debate on adding the right to instruct to *Article the third*, a Representative Hartley gave a history lesson and questioned the effect of a right to instruct:

Representation is the principle of our Government; the people ought to have confidence in the honor and integrity of those

¹⁶ *Annals of Congress*, House of Representatives, 1st Congress, 1st Session, 761. Available online on the Library of Congress website, “A Century of Lawmaking.”

they send forward to transact their business; their right to instruct them is a problematical subject. We have seen it attended with bad consequences, both in England and America. When the passions of the people are excited, instructions have been resorted to and obtained, to answer party purposes; and although the public opinion is generally respectable, yet at such moments it has been known to be often wrong; and happy is that Government composed of men of firmness and wisdom to discover, and resist popular error.¹⁷

The representatives of the people were to come together and talk. They were not simply agents of the people – they were (and still are) to be a representative. Hartley and others saw that the House had to be accommodating and a place of deliberation. During the debate, he questioned how a particular could know the whole:

It appears to my mind that the principle of representation is distinct from an agency, which may require written instructions. The great end of meeting is to consult for the common good; but can the common good be discerned without the object is reflected and shown in every light. A local or partial view does not necessarily enable any man to comprehend it clearly; this can only result from an inspection into the aggregate. Instructions viewed in this light will be found to embarrass the best and wisest men.¹⁸

And it is not that they were afraid the people wouldn't give good instructions. They had seen most evils, so that was not their concern. As Hartley closed, his concern was limiting debate:

¹⁷ Ibid.

¹⁸ Ibid., 762.

I have known within my own time many inconveniences and real evils arise from adopting the popular opinions on the moment, that although I respect them as much as any man, I hope this Government will particularly guard against them, at least that they will not bind themselves by a constitutional act, and by oath, to submit to their influence; if they do, the great object which this Government has been established to attain, will inevitably elude our grasp on the uncertain and veering winds of popular commotion.¹⁹

A few moments later in the debate, Representative Gerry spoke in favor of instructions. This is the same Gerry who refused to sign the Constitution on 17 September 1787. He is now a US Representative for the state of Massachusetts. In the House debate, he defended the right to give instructions as an additional check on the abuse of power. Gerry argued:

By the checks provided in the constitution, we have good grounds to believe that the very framers of it conceived that the Government would be liable to mal-administration, and I presume that the gentlemen of this House do not mean to arrogate to themselves more perfection than human nature has as yet been found to be capable of; if they do not, they will admit an additional check against abuses which this, like every other Government, is subject to. Instruction from the people will furnish this in a considerable degree.²⁰

Gerry agreed with the opposition. With liberty and free elections every two years, the representatives will be held

¹⁹ Ibid.

²⁰ Ibid., 764.

accountable. Therefore, what harm could come from instructions:

It has been said that the amendment proposed by the honorable gentleman from South Carolina (Mr. Tucker) determines this point, “that the people can bind their representatives to follow their instructions.” I do not conceive that this necessarily follows. I think the representative, notwithstanding the insertion of these words, would be at liberty to act as he pleased; if he declined to pursue such measures as he was directed to attain, the people would have a right to refuse him their suffrages at a future election.²¹

In conclusion, Gerry’s concept of a right to instructions was not binding on the representative. He thought elections would hold the representatives accountable.

5

Madison spoke after Gerry, and he wanted to keep things clear. He reminded the Representatives that a committee had brought the amendments to the House. He did not want to make the amendments too cumbersome or hard to understand:

I think the committee acted prudently in omitting to insert these words in the report they have brought forward; if, unfortunately, the attempt of proposing amendments should prove abortive, it will not arise from the want of a disposition in the friends of the constitution to do what is right with respect to securing the rights and privileges of the people of America, but from the difficulties arising from discussing and proposing abstract propositions, of which the

²¹ Ibid., 765.

judgment may not be convinced. I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty. Amendments of a doubtful nature will have a tendency to prejudice the whole system; the proposition now suggested partakes highly of this nature.²²

In his attempts to keep out amendments of “a doubtful nature” and from “proposing abstract propositions,” you can see that the twelve proposed Articles that made it through this process were not of a doubtful nature or abstract propositions. Madison and Gerry knew the Constitution well – they helped write it and brought it to life – and Madison feared this “tendency to prejudice the whole system.”

He commented on the beauty of the amendment process and what role he felt the sovereignty of the people played in a constitutional government:

The honorable gentleman from Massachusetts [Mr. Gerry] asks if the sovereignty is not with the people at large. Does he infer that the people can, in detached bodies, contravene an act established by the whole people? *My idea of the sovereignty of the people is, that the people can change the constitution if they please; but while the constitution exists they must conform themselves to its dictates.* But I do not believe that the inhabitants of any district can speak the voice of the people; so far from it, their ideas may contradict the sense of the whole people; hence the consequence that instructions are binding on the representative is of a doubtful, if not of a dangerous nature. I do not conceive, therefore, that it is necessary to agree to the proposition now made; so far as any real good is

²² Ibid., 766.

to arise from it, so far that real good is provided for; so far as it is of a doubtful nature, so far it obliges us to run the risk of losing the whole system.²³

The idea here is that small districts and a large House afforded the people a chance to control representatives through frequent elections. Instructions, as a constitutional right, were thought by Madison to be of a doubtful (and dangerous) nature because they were unnecessary.

Notice how “the sovereignty of the people” is that “the people can change the constitution.” That is the point: sovereignty means you can change the law.

The words “to instruct their Representative” were not included in the proposed *Article the third* – the future First Amendment.

Out of this debate in Congress about the Bill of Rights came the final version of the twelve proposed Articles. *Article the first*, as mentioned, is the only one of the twelve not to become part of the Constitution – the only part of America’s Parthenon not to become law.

Here are the three main parts of *Article the first*:

1. First, representation would have been proportioned at one for every thirty thousand until the number of Representatives reached 100 members.
2. Second, representation would have increased to one for every forty thousand, which was the original ratio until Gorham’s motion and Washington’s speech on 17 September 1787. House membership would have ranged from 100 to 200 Representatives.

²³ Ibid., 767; Madison, 469. Italics added.

3. Once the threshold of 200 Representatives was reached (“that there shall not be less than two hundred Representatives”), the representation ratio would have been “nor more than one Representative for every fifty thousand persons.”

Article the first was specific as to what role Congress should play: “the proportion shall be so regulated by Congress.” They were to follow the ratio, as that was the fear *Article the first* was designed to protect the people from – that Congress would not augment representation. No upper-limit for House membership was ever set by our Constitution nor recommended by the First Congress in *Article the first*. The only limit in the unratified *Article the first* is a minimum membership limit of 200.²⁴

Congress, beginning in 1929, did just the opposite. They capped membership in the House at 435. The impact of limiting membership in the House is discussed in detail in chapter 6. Note for now that with a capped membership, every ten years, because of the growth in population, every citizen is *less* represented. Under-representation is now the congressional standard of We the People.

Also, the 200 Representative threshold was for a nation of ten million people: by comparison, we now have 435 Representatives for 300 million people.

The founders’ feared that Congress would usurp power *from* We the People. Today’s disparity in representation is modern evidence of this old fear. *Article the first* of the Bill of Rights, as part of America’s Parthenon, was designed to protect us from congressional usurpation.

²⁴ See Amar, *The Bill of Rights*, 15. Amar’s interpretation of the phrase “that there shall not be less than two hundred Representatives” differs from mine. He interprets it to set “a maximum, not a minimum, on congressional size.” I think the opposite is true. The phrase “that there shall not be less than two hundred” simply means there shall not be less than 200. In other words, membership cannot be 199 or less. This means it shall be 200 or more. This would have been a minimum threshold on congressional size, after which the ratio was to be one for every fifty thousand persons.

5

A census and a veto

1

As we've noted, history is never standing still. While the states were voting on ratification of the twelve proposed Articles to the Constitution, the nation's first census was being conducted in 1790. This was specified in the Constitution (See Appendix A). Federal marshals went door to door throughout the states and the districts of Maine, Vermont, Kentucky and the territory that would become Tennessee. The census counted 3,929,214 people: of that, 694,207 were slaves. The conclusion of the census brought Article 1, Section 2, Clause 3 of the US Constitution into effect – the representation ratio of one representative for every thirty thousand.

But guess what? The year 1792 was no longer the world of talk and discussion. The fears that were only discussed before, well, now they had an opportunity to grow – and grow they did.

With the implementation of the new government, old regional differences solidified and factions developed. As early as 1791, politics had muddled old relationships. Even Madison and Hamilton, who wrote together as Publius, parted ways over a controversial banking bill that President Washington signed – making a federal paper currency and federal bank. The division was so pronounced that Jefferson, Madison, and others started a newspaper, the *National Gazette*, to counter the editorial support Hamilton had in the *Gazette of the United States*.

This breakdown of old alliances changed everything involving politics at the national level. In James Roger Sharp's *American Politics in the Early Republic – The New Nation in Crisis*, there is a detailed discussion on this topic. In a section about the breakdown of elite consensus, Sharp notes Madison's shift in thinking – and his shift away from Hamilton.

Madison saw the divisions during the revolution between Patriots and Loyalists; then between Federalists and AntiFederalists, which he felt ended with the ratification of the Constitution. But the third split was going to last longer – much longer. Writing in the newspaper the *National Gazette*, 26 September 1792, Madison described the new split. He said one party was “more partial to the opulent than to the other classes of society; and having debauched themselves into a persuasion that mankind are incapable of governing themselves, it follows with them, of course, that government can be carried on only by the pageantry of rank, the influence of money and emoluments, and the terror of military force.”¹

This new group, the party of wealth and military force, also favored the few – preferring power to “be narrowed into fewer hands, and approximated to an hereditary form.” The other party, the one with republican virtue, thought “that mankind are capable of governing themselves.”²

Madison published a description of the two sides, calling one “Republican” and the other “Anti-republican,” in the *National Gazette* on 22 December 1792. Here are two excerpts from Madison's *Who Are the Best Keepers of the People's Liberties?*:

Republican. – The people themselves. The sacred trust can be no where so safe as in the hands most interested in preserving it.

Anti-republican. – The people are stupid, suspicious, licentious. They cannot safely trust themselves. When they have established

¹ Madison, 531. See also Sharp, 46-47.

² Ibid.

government they should think of nothing but obedience, leaving the care of their liberties to their wiser rulers.³

And with these two excerpts, focusing on the old identification “subject” as opposed to citizen, Madison ended his political assessment:

Anti-republican. – You are destitute, I perceive, of every quality of a good citizen, or rather of a good *subject*. You have neither the light of faith nor the spirit of obedience. I denounce you to the government as an accomplice of atheism and anarchy.

Republican. – And I forbear to denounce you to the people, though a blasphemer of their rights and an idolater of tyranny. Liberty disdains to persecute.⁴

Madison’s depiction of the times is still true today – only the names and values seem to have changed. In ending his article with, “Liberty disdains to persecute,” he imagined a government without tyranny. But by the end of 1792, the discussion was no longer about the theory of power, but power itself, and politics had taken over. Which is exactly to the point. That is why citizens (not subjects) created the US Constitution in the first place. Madison mocked this development in the article: “What a perversion of the natural order of things! To make *power* the primary and central object of the social system, and Liberty but its satellite.”⁵

To talk about democracy and republican forms of government is to talk about We the People. *Article the first* focused on ensuring augmentation in the House of Representatives. It was also, as discussed in chapter 4, a check

³ Madison, 532-533.

⁴ Ibid., 534.

⁵ Ibid., 533.

on “agency costs.” It was drafted out of the fear that Congress – any Congress – would not follow the ratio. As history shows, they have not.

The same kind of political change taking place in the United States was also taking place in Europe, in particular, France, but with differing results. For one, the violence was horrendous. War would rule Europe from 1792 until 1815 – led by the people’s Republic of France. One French period, from 1793-1794, is called the “Reign of Terror” – some citizens executed thousands of their fellow citizens.

The French Revolution showcased an abhorrent side to the concept of “the people” or “the masses.” A biographer explained how Napoleon Bonaparte, the future dictator of France, spent the summer of 1792. Napoleon watched the masses storm Paris in June and August and found them loathsome:

Throughout the summer of 1792 Napoleon, along with Louis de Bourrienne, his old classmate from Brienne, observed the bizarre events taking place in Paris, including the storming of the Tuileries Palace by the masses on June 20 and then again on August 10, resulting in the public humiliation of Louis XVI and the slaughter of the Swiss Guards. Napoleon, witnessing the events from across the Carrousel and the Tuileries Palace at Bourrienne’s brother’s shop, felt as furious as he was hopeless to prevent the thousands of Parisians running amok, tearing through the palace. The experience further instilled in him an absolute loathing and fear of the masses, which he carried with him to his death.⁶

Napoleon and the forces of the French Revolution would lead Europe to war. Those forces came into full-view during the

⁶ Alan Schom, *Napoleon Bonaparte*, (New York: HarperCollins Publisher, 1997), 15.

summer of 1792. What began with “thousands of Parisians running amok,” became the Reign of Terror the next year. This was followed by more than two decades of war, mostly in Europe, but also around the globe. Washington DC was even burned in 1814 because of the events of the French Revolution.

The history of “the people” as a concept has always been an evolving idea. In republican government, the definition of this concept, the people, is also the definition of representation. The two do not just go together: they define each other.

2

After the first census, the House began the process of apportioning representation. The bill was called *An Act for an apportionment of Representatives among the several States according to the first enumeration*. The Second Congress used the ratio of one representative for every 30,000 and also used the three-fifths fraction for slave representation.

Joseph Story published an analysis of the Constitution in 1833 called *Commentaries on the Constitution*. He was an Associate Justice of the Supreme Court and Professor of Law at Harvard. Before being appointed to the court by President Madison in 1811, Story served one term in the House of Representatives (1808-09), representing Massachusetts.

In his *Commentaries*, Story discussed the history of the apportionment bill, the first one under the new constitution:

A bill was introduced into the house of representatives, giving one representative for every thirty thousand, and leaving the fractions unrepresented; thus producing an inequality, which was greatly complained of. It passed the house; and was amended in the senate by allowing an additional representative to the states having the largest *fractions*. The house finally concurred in the amendment, after a warm debate.⁷

⁷ Story, 2:678.

Here is the first example of what becomes a debate over fractions and representation instead of We the People and representation. As we will discuss in the next chapter, constitutional law and politics have focused on the fraction and not the whole number. But *constitutional representation* is found in the ratio itself, in the whole number, and not the remaining fraction.

Washington, after talking the matter over with his cabinet, in particular, Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, Secretary of Treasury Alexander Hamilton, and Secretary of War Henry Knox, vetoed the bill. Randolph and Jefferson supported the veto, Hamilton and Knox did not. Here is Washington's veto message from the *Journal of the House of Representatives*:

United States, [Philadelphia] April 5th, 1792.

Gentlemen of the House of Representatives:

I have maturely considered the act passed by the two Houses, entitled "An act for an apportionment of Representatives among the several States, according to the first enumeration;" and I return it to your House, wherein it originated, with the following objections:

First. The Constitution has prescribed that Representatives shall be apportioned among the several States according to their respective numbers: and there is no one proportion or divisor, which, applied to the respective numbers of the States, will yield the number and allotment of Representatives proposed by the bill.

Second. The Constitution has also provided, that the number of Representatives shall not exceed

one for every thirty thousand; which restriction is, by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the States: And the bill has allotted to eight of the States more than one for every thirty thousand.

G. Washington.⁸

Neither the Senate nor the House could muster the two-thirds majority to override Washington's veto. In effect, *An Act for an apportionment of Representatives among the several States according to the first enumeration*, failed and was the nation's first successful veto.

In the *Commentaries*, Story tells of the proceedings by quoting from a biographer of Washington:

Construing . . . the constitution to authorize a process, by which the whole number of representatives should be ascertained on the whole population of the United States, and afterwards apportioned among the several states according to their respective numbers, the senate applied the number thirty thousand, as a divisor, to the total population, and taking the quotient, which was one hundred and twenty, as the number of representatives given by the ratio, which had been adopted in the house, where the bill originated, they apportioned that number among the several states by that ratio, until as many representatives, as it would give, were allotted to each. The residuary members were then distributed among the several states having the highest fractions.⁹

⁸ *Journal of the House of Representative*, 1:563-564.

⁹ Story, 2:678.

Story, in discussing how Congress was to act, mentions *Article the first*:

This amendment was never ratified by a competent number of the states to be incorporated into the constitution. It was probably thought, that the whole subject was safe, where it was already lodged; and that congress ought to be left free to exercise a sound discretion, according to the future exigencies of the nation, either to increase, or diminish the number of representatives.¹⁰

Here discretion was left to the Congress to set the number of representatives, but Story did not mean Congress could ignore the Constitution and the representation ratio:

The only constitutional limitation seems to be, that no state shall have more than one representative for every thirty thousand persons. Subject to this, the truest rule seems to be, that the apportionment ought to be the nearest practical approximation to the terms of the constitution; and the rule ought to be such, that it shall always work the same way in regard to all the states, and be as little open to cavil, or controversy, or abuse, as possible.¹¹

As Story argued, the rule should be to follow the ratio to the nearest practical approximation to the terms of the Constitution.

Story also tells us, not surprisingly, that debate over the representation ratio was political: “The debate in the two houses, however, was purely political, and the division of the votes purely geographical; the southern states voting against it, and the northern in its favour.”¹²

¹⁰ Ibid., 2:673.

¹¹ Ibid., 2:676.

¹² Ibid., 2:679.

3

Washington won a lot of battles by knowing when to wait, press, and retreat. At the siege of Boston in 1775, he had to wait. He only pressed on when opportunity arrived – literally. This happened at the end of the siege in a non-battle called Dorchester Heights. It ended as a non-battle because of an improbable feat. In one night, militias under Washington's command moved cannon and placed pre-built fortifications on Dorchester Heights overlooking Boston. Within a few days, the British surrendered the city and the rebels had their first victory.

Washington also knew of retreat. By the fall of 1776, the same Continental Army was falling apart as it retreated across New Jersey. New York City was lost, and New Jersey was two-thirds Loyalist – meaning they supported the law of King George III and not Washington and his peasant army. The Continental Army's second win came late that year with Washington's crossing of the Delaware River and the victory at Trenton, New Jersey on 26 December 1776.

General Washington knew patience and when to press. One may also surmise President Washington would display some of the same characteristics. Here we have him with a constitutional victory, defending the representation ratio with the nation's first veto, but a later political defeat. Congress, instead of seeing President Washington as an instructor of the Constitution, flexed its power. It is also here that we see the charges of the AntiFederalists come true. They had said *any Congress* could change the limit – and the Second Congress did. Here is how it was recorded in the *Journal of the House of Representatives*, 9 April 1792:

The House, according to the order of the day, resolved itself into a Committee of the Whole House on the bill for an apportionment of Representatives among the several States according to the first enumeration, at the ratio of one for every _____ thousand persons, in the respective States; and, after some time spent therein, Mr. Speaker resumed the chair, and Mr.

Muhlenberg reported that the committee had, according to order, had the said bill under consideration, and agreed to an amendment thereto; which he delivered in at the Clerk's table, where the same was twice read, as followeth:

Line fifth, fill up the blank with the words
“*thirty-three*.”¹³

There it is, the moment the Constitution and Article 1, Section 2, Clause 3 began to slip away. Just as the AntiFederalists had argued, most eloquently, Melancton Smith at the New York ratifying convention, the representatives themselves would change the representation ratio. Here is the vote for the initial congressional (and not constitutional) change in the ratio from thirty to “thirty-three” thousand:

For: 34

Fisher Ames
Robert Barnwell
Egbert Benson
Elias Boudinot
Shearjashub Bourne
Benjamin Bourne
Abraham Clarke
Jonathan Dayton
Thomas Fitzsimons
Elbridge Gerry
Nicholas Gilman
Benjamin Goodhue
James Gordon
Andrew Gregg
Thomas Hartley
Daniel Heister
James Hillhouse

Against: 30

John Baptist Ashe
Abraham Baldwin
John Brown
William Findley
William B. Giles
Samuel Griffin
William Barry Grove
Philip Key
John Lawrence
Richard Bland Lee
Nathaniel Macon
James Madison
John Francis Mercer
Andrew Moore
Frederick Augustus Muhlenberg
William Vans Murray
John Page

¹³ *Journal of the House of Representatives*, 1:570.

Daniel Huger	Josiah Parker
Israel Jacobs	Cornelius C. Schoonmaker
Aaron Kitchell	Joshua Seney
John W. Kittera	Upton Sheridine
Amasa Learned	John Steele
Samuel Livermore	Samuel Sterrett
Nathaniel Niles	Thomas Sumpter
Theodore Sedgwick	Thomas Tredwell
Jeremiah Smith	Thomas Tudor Tucker
Israel Smith	Abraham Venable
William Smith	Alexander White
Jonathan Sturges	Hugh Williamson
Peter Silvester	Francis Willis
George Thatcher	
John Vining	
Jeremiah Wadsworth	
Artemas Ward. ¹⁴	

The bill was read for the third time on Tuesday, 10 April, making the vote for “the ratio of one for every thirty-three thousand persons” official. It was then forwarded to the Senate, where they took swift action. The Senate received the bill on Tuesday the 10th and voted on it immediately. Here is how it was recorded in the *Journal of the Senate*:

The bill sent from the House of Representatives, entitled “An act for apportioning representatives among the several states according to the first enumeration,” was read the first time.

On motion, it was agreed, by unanimous consent, that this bill be now read the second time.

On motion, it was agreed, by unanimous consent, that this bill be now read the third time.

¹⁴ Ibid.

Resolved, That this bill pass.

Ordered, That the Secretary acquaint the House of Representatives therewith.¹⁵

Unable to override the first veto, Congress passed a new law. They set the ratio at one for every 33,000 by act of the Second Congress, and not by changing the Constitution.

Washington did not veto the second bill.

4

The first bill, the one vetoed by Washington, had apportioned the new House membership to be 120 Representatives. Instead, the next bill, the one that became law, apportioned the new House to 105 Representatives – or 15 less than the original bill that Washington vetoed.

Of that, the slave states were receiving almost 14 representatives for their 694,207 slaves. Constitutionally, the effect of the three-fifths ratio for representation worked like this: every 50,000 slaves equaled 30,000 for representation, or one federal representative for a slave state. For example, in the fall election of 1792, the slave states would have received nearly 14 representatives in the new House because of slave representation. That also added 14 votes to the Electoral College for the presidential contests of 1796 and 1800 – all of which impacted national politics. By the second census taken in 1800, the slave population had grown to 887,612, or equal to nearly 18 representatives in the US House.¹⁶ By the eighth census in 1860, the slave population had reached 3,949,557, or the equivalent constitutional representation of 79 representatives. That was real power, and it impacted our history.

In the spirit of self-interest, the Northern states did not want the Southern states to have the benefits of slave representation. The vote for the new ratio, “thirty-three” thousand persons, was

¹⁵ *Journal of the Senate*, 1:423.

¹⁶ Amar, *America's Constitution*, 346.

geographical. Of the 34 Yes votes, 31 came from Northern states; of the 30 No votes, 25 were from Southern states.

This is the unraveling of the compromise that kept the Constitutional Convention together. From a small change, beginning with the move to 33,000, the ratio today is more than 650,000 – or nearly 22 times greater (making representation 22 times less).

This is a political problem. When you move from constitutional to congressional representation, *and* from theory to practice, it becomes only about power. That is why We the People were to be represented according to our numbers, one for every thirty thousand. In a bit of commentary on the times, James Roger Sharp, a historian, wrote that, “The election of 1792 prompted a vigorous discussion, which continued for most of the decade, exploring the nature of representation and defining and justifying the role of a political opposition in the federal republic.”¹⁷ Over the next few years, and subsequent elections, the battle lines would harden. Sharp also discusses an essayist named John Taylor. Taylor wrote about these political divisions and influenced Jefferson and Madison, who read and commented on his pamphlets:

Taylor argued that the Constitution had established a republican form of government “flowing from and depending on the people.” And although the people retained the ultimate “right of legislation,” they “periodically delegated” this “right” by electing representatives to exercise this function for them. This “right of election” was a *substantive* right and not merely a form, it was maintained, for “legitimate representation” implied “an existing operative principle” impelling representatives to work “for the good of the represented.” Therefore, when elections became merely a form or sham and representatives no longer depended upon the

¹⁷ Sharp, 60.

people nor legislated “for the good of the governed,” government was “converted to usurpation.”¹⁸

The Constitution does not protect from usurpation if the people are not vigilant regarding substantive, or not subordinate, rights. When elections become “merely a form or sham” they no longer provide a reason for people to care and representation fails.

A recent analysis of the national debt claims that every American citizen, regardless of age, owes approximately \$30,000 on the national debt. Our representatives have indebted every citizen to the federal government, but will not provide the citizenry its constitutional representation, “one for every thirty Thousand.” They have us, the citizenry, believing they can spend our \$30,000 and go into debt, but not represent us at one for every 30,000.

That is what usurpation looks like.

5

Justice Story, in relating this episode to constitutional law, sides with Washington fully in holding the Congress to the ratio. He is less sure Washington was correct on the first concern – what role the fraction plays. Story concludes his comments on this topic with a declaration for a legal concept called *cy pres* (pronounced ‘see-pray’). This means to “come as nearly as possible” to the rule of the constitution:

The second reason assigned by the president against the bill was well founded in fact, and entirely conclusive. The other, to say the least of it, is as open to question, as any one, which can well be imagined in a case of real difficulty of construction. It assumes, as its basis, that a common ratio, or divisor, is to be taken, and applied to each state, let the fractions and

¹⁸ Ibid., 61. Italics added.

inequalities left be whatever they may. Now, this is a plain departure from the terms of the constitution. It is not there said, that any such ratio shall be taken. The language is, that the representatives shall be apportioned among the several states according to their respective numbers, that is, according to the proportion of the whole population of each state to the aggregate of all the states. To apportion according to a ratio, short of the whole number in a state, is not an apportionment according to the respective numbers of the state. If it is said, that it is impracticable to follow the meaning of the terms literally, that may be admitted; but it does not follow, that they are to be wholly disregarded, or language substituted essentially different in its import and effect. If we must depart, we must depart as little as practicable. We are to act on the doctrine of *cy pres*, or come as nearly as possible to the rule of the constitution. If we are at liberty to adopt a rule varying from the terms of the constitution, arguing *ab inconvenienti*, then it is clearly just as open to others to reason on the other side from opposing inconvenience and injustice.¹⁹

The legal concept of *cy pres* would bring us back to constitutional representation. As the concept points out, it is not about the fraction, but the whole – the whole people and representation.

Things began to go wrong in 1792, and, as we'll see in the next chapter, they have continued down that path. Representation is nearly 22 times less than is mandated in the Constitution. That means We the People are 22 times removed from a constitutional, or substantive, right.

¹⁹ Story, 2:680.

Two firsts, a census and a veto, set the pattern we still follow today. A Congress can impose its will on the Constitution. It established the power to ignore the representation ratio by passing an act of Congress.

This was predicted. Even Madison, who was on the losing side of the vote 34 to 30, knew this could happen. In a letter to a colleague in June 1789, Madison thought the House would “decidedly predominate” in the new government. This would happen, he wrote, unless the power was taken by another part of the government, which he thought might be the Senate. The House, he felt, would be the most powerful based on “the numerous and immediate representatives of the people”:

In truth the Legislative power is of such a nature that it scarcely can be restrained either by the Constitution or by itself. And if the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the encroachments of the Legislative department. If the possibility of encroachments on the part of the Executive or the Senate were to be compared, I should pronounce the danger to lie rather in the latter than the former. The mixture of Legislative Executive & Judiciary authorities lodged in that body, justifies such an inference; *At the same time I am fully in the opinion, that the numerous and immediate representatives of the people, composing the other House, will decidedly predominate in the Government.*²⁰

The House was to predominate, according to Madison, and representation was the reason it would dominate. This line of analysis also explains why Congress has had an interest in under-representing the numerous groups of 30,000 per each successive census.

²⁰ Madison, 466-467. Italics added.

Remember that power is always limited. There is only so much of it. Power does not come from Congress. Power comes from *We the People* represented in Congress. That is undeniable and constitutional. But for more than 200 years now, Congress has usurped our right to representation.

6

Any Congress?

1

According to the Constitution: the legislature makes the laws, the executive enforces them, and the judiciary rules on their constitutionality.

In our legislature, Congress is composed of two houses. A law can be made only by the consent of both. The two houses were designed to be a check on each other: one representing the people according to their numbers, and the other representing the states. Concerning the dynamics of a Congress composed in this manner, Washington supposedly quipped to Jefferson about the “cooling” effect the Senate supplied to the House:

“Why did you pour that coffee into your saucer?”
Washington is said to have asked Jefferson.

“To cool it,” Jefferson answered. To which
Washington said, “We pour legislation into the
senatorial saucer to cool it.”

Fair enough, but what the Senate could not cool was sectarianism. As discussed in chapter 5, the Congress divided early in our history based on geography. This tension had a constitutional basis: the counting of slaves in representation. That controversial beginning generally accounts for the under-

representation of We the People until the Civil War. After the war, the political problem of engaging over four million newly freed slaves into the process dominated the south (and north) for the next 100 years – and in many ways still impacts us today. There was also another shift in citizenship, as women began to transform political institutions. From their role and influence in the abolition and temperance movements to the fight for the right to vote, women have been challenging American political institutions for more than 150 years. There was also the expansion west in the 19th century, the addition of 29 states to the Union, and the demise of native cultures.

In the 20th century, Congress and the nation were transformed by its new world role. Along with this came new national concerns: a federal income tax, a world war, women's suffrage, alcohol prohibition, the great depression, marijuana prohibition, another world war, the civil rights movement, feminism, lesbian-gay rights, and any and all other items in our history. The story of any nation-state is the story of change, and the United States is no exception. Ours is also, constitutionally speaking, an ongoing revolution in *who* represents a US citizen. Every ten years, based on the census, the nation is to have a new Congress, one that reflects the people. This is a constitutional principle, that when forgotten, undermines the legitimacy of our government. Representing the sovereignty of the people is a primary constitutional principle. As Madison said in the First Congress as they discussed the proposed amendments to the Constitution – the Bill of Rights:

The honorable gentleman from Massachusetts [Mr. Gerry], asks if the sovereignty is not with the people at large; does he infer that the people can, in detached bodies, contravene an act established by the whole people? My idea of the sovereignty of the people is, that the people can change the constitution if they please; but while the constitution exists, they must conform themselves to its dictates:¹

¹ Madison, 469.

But that has not happened. Instead, we have inherited something other than the guarantee of constitutional representation. The table on the next page shows how many Representatives were added after each census. In twenty-two national censuses, Congress failed to add members on ten occasions. The table also shows the effect this lack of added members has had on the ratio, which is now approximately one representative for every 650,000 people.

This history is emphasized differently on the website of the Office of the Clerk, US House of Representatives. On the website the focus is on the power of Congress and not the constitutional principle of representation. They do point out that membership was capped at 435 in 1929 and also highlight the increase in the ratio:

After each census up to and including the Thirteenth in 1910, Congress would enact a law designating the specific changes in the actual number of Representatives as well as the increase in the ratio of persons-per-Representative. After having made no apportionment after the Fourteenth census in 1920, Congress by statute in 1929 fixed the total number of Representatives at 435 (the number attained with the apportionment after the 1910 census), and since that time, only the ratio of persons-per-Representative has continued to increase, in fact, significantly so. Since the total is now fixed, the specific number of Representatives per state is adjusted after each census to reflect its percentage of the entire population.²

² *Office of the Clerk, US House of Representatives*, Congressional Apportionment, June 2006, Note 1. Available online on The Office of the Clerk website, Historical Highlights.

Table #1 US House of Representatives Representation Increase and Ratio Effect ³			
<u>Census Year</u>	<u>Representatives</u>	<u>Increase</u>	<u>Rep-Ratio</u>
1787	65	~	~
1790	105	40	1/33,000
1800	141	36	1/36,000
1810	181	40	1/37,000
1820	213	32	1/44,000
1830	240	27	1/52,000
1840	223	(-17)	1/75,000
1850	234	11	1/96,000
1860	241	7	1/119,000
1870	292	51	1/132,000
1880	325	33	1/154,000
1890	356	31	1/177,000
1900	386	30	1/197,000
1910	435	49	1/212,000
1920	435	0	1/244,000
1930	435	0	1/283,000
1940	435	0	1/304,000
1950	435	0	1/348,000
1960	435	0	1/412,000
1970	435	0	1/467,000
1980	435	0	1/521,000
1990	435	0	1/572,000
2000	435	0	1/647,000
2010	?	?	1/?

³ Ibid. The “Rep-Ratio” approximations from 1870 to the present were calculated by dividing the national census total by the number of representatives. Prior to 1870, because of the impact of the three-fifths rule and the counting of slaves, the ratio was continually set higher by an act of Congress.

How we got here is clear. Power flows to those who want it – and Congress has wanted it. That does not mean it will stay that way. Constitutional representation is a story of forgotten power – the power of who represents We the People.

As mentioned, the Senate, in its own way, was to filter whatever ill passions might form in a large House of the people. This same fear was used at the Constitutional Convention and during the state ratification debates. Even as early as in *The Federalist Papers*, we find that Publius was no friend of the mob: “Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”⁴

In chapter 4 we discussed the first census and Washington’s veto of the first apportionment bill. Recall that the House of Representatives voted in April 1792 to change the representation ratio to “thirty-three” thousand instead of the constitutional number of “thirty” thousand. This initial way of ignoring the Constitution and assigning representation by congressional act became known as the “fixed ratio” method.

Congress used the fixed ratio method until 1850. Then, under pressures built into the constitutional system by slave representation, Congress began setting a limit for membership in the House of Representatives. They stopped using the ratio altogether. They called this method “fixed house size.”

Then, in a first for Congress, they did not address House membership and the census in 1920. This coincides with the Nineteenth Amendment to the US Constitution, women’s suffrage, and the obvious challenges women posed to institutional power. But the big change came nine years later, in 1929. During that summer, only months before the nation plummeted into the great depression and less than a year before the next census, the 70th Congress passed a law setting the number of Representatives at 435. This congressional law, passed by a Congress in regards to itself, is known as 2 U.S.C. Sec. 2, *Election of Senators and Representatives*:

⁴ Madison, 316.

Section, act Aug. 8, 1911, ch. 5, Secs. 1, 2, 37 Stat. 13, 14, fixed composition of House of Representatives at 435 Members, to be apportioned to the States therein enumerated.⁵

That is where things stand. Our Constitution has never been amended to reflect this usurpation, this change in power. One Representative for every thirty thousand is the *constitutional* standard. Four hundred and thirty-five Representatives for a nation of 300 million is the *congressional* standard based on the census of 1910 and the Congress of 1929.

Over the years, Congress has devised five ways to apportion and account for the fractional remainder. First, beginning in 1792 and until 1830, they used the “Jefferson method.” This used a fixed rate like one for every 33,000. If there was a fraction remaining, no matter how large, no representation was given.⁶

Second, in 1840, Congress used the “Webster method” of major fractions. This worked the same as the previous method (Jefferson method), except that the fraction counted if it was greater than half (more than 0.5). For example, in the 1840 census the state of Delaware had a population of 78,085. When you divide the state’s population of 78,085 by the congressional ratio, set in 1840 at 75,000, the quotient equals 1.04. This meant Delaware received one federal representative for more than 78,000 citizens. The fraction of 0.04 was ignored as it concerned representation, even though the difference, in human terms, is large – more than 3,000 people.⁷

Third, from 1850 to 1900, Congress used the “Vinton/Hamilton method” to apportion the representation fraction. This continued the trend of making the process more and more complicated. In this method, a predetermined number of representatives is set. Then each state’s population is divided by a ratio, which created a whole number used for

⁵ 2 USC Sec. 2, *Election of Senators and Representatives*.

⁶ US Census Bureau, *Congressional Apportionment, Historical Perspective*, March 2006, I-1. Available online on the US Census website.

⁷ Ibid, I-2.

representation. The fractions were then ranked and an additional seat added until the predetermined number was reached. This method created the “Alabama paradox”: a state could receive fewer representatives if the size of the House was increased.⁸

Fourth, in 1910 and 1930 (there was no apportionment after the 1920 census), they used “the method of major fractions.” This was similar to the earlier Webster method and used a predetermined number of 433. They also included two new seats, one for Arizona and one for New Mexico, bringing the total to 435 after the 1910 census – the same place membership is at nearly 100 years later.⁹

Fifth, from 1940 until the present, Congress has used the “Hill method of equal proportions.” Here the math reaches abstraction for most of us. The Census Bureau explains it this way: “With this method, an additional seat is assigned if the fraction exceeds the difference obtained by subtracting the integer part of the quotient from the geometric mean of this integer and the next consecutive integer.”¹⁰

Clear to you?

Representation was designed, as President Washington emphasized in the nation’s first use of the veto, to be clear: “*The Number of Representatives shall not exceed one for every thirty Thousand.*”

That is how the founders gave it to us – we have not received it well.

2

From the Third Congress in 1793 to the 109th Congress in 2006, many things have changed. One thing that has not changed is the constitutional theory and law for representing We the People.

The idea being developed in this chapter is that yes, *any Congress* can apportion the House, but they are bound by oath to obey the Constitution. The Constitution dictates the use of a ratio. We the People, and the states, agreed to the ratio in the

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

Constitution. Congress is to follow it; the constitutional legal term is *cy pres* – come as nearly as possible to the constitution.

In simple terms, federal institutions and state governments are not sovereign. Sovereignty is in We the People, constitutionally represented according to numbers. Nothing more or less.

Sovereignty is a clear concept that our congressional history has made cloudy on purpose – to the advantage of the few and not the people. This obfuscation, this murkiness, is not necessary. To the founders, we were to count the people and divide by a constitutionally guaranteed number. But the accommodation with slavery and the counting of slaves as “three-fifths” in representation created a powerful political force. This power was measurable:

The election of 1800-01 had also drawn the nation’s attention, in the most dramatic fashion possible, to the Philadelphia plan’s proslavery bias. In 1787-89, many Northern ratifiers had failed to understand the full significance of the words “three fifths.” . . . By contrast, the hard-fought and razor-close election of 1800-01 had made the three-fifths clause’s electoral significance obvious to anyone with eyes and a brain.

*For without the added electoral votes created by the existence of Southern slaves, John Adams would have won the election of 1800 – as everyone at the time plainly understood. . . . Had the electoral college been apportioned on the basis of free population – with no three-fifths bonus – Jefferson would have ended up with about four electoral votes less than Adams rather than eight votes more. As one New England paper sharply put the point, Jefferson was riding “into the TEMPLE OF LIBERTY, upon the shoulders of slaves.”*¹¹

¹¹ Amar, *America’s Constitution*, 345-346.

Slavery, just as it had at the Constitutional Convention, was creating tension where none need to exist – in representing We the People according to numbers. We the People is a moral concept – one based on inclusion and exclusion. To combine it with the (im)morality of slavery was a fatal flaw. “We the People” is complicated enough. It did not need the burden of slavery.

In the previous chapter we discussed Joseph Story, Associate Justice of the Supreme Court and Professor of Law at Harvard. He published the analysis called *Commentaries on the Constitution*.

Charles Wiltse, author of *Expansion and Reform, 1815-1850*, discusses Story’s *Commentaries* and the constitutional controversies of the early 19th century. In particular, federal power, states’ rights, and averting a civil war in 1832:

Story’s *Commentaries* first appeared in 1833, immediately after the Constitutional controversy had been pushed to the brink of rebellion. A series of nationalistic Supreme Court decisions, the Missouri Compromise, and disagreement over tariff policy were all factors in a debate that reached its climax late in 1832. In November of that year South Carolina forbade the collection of import duties within the state on the ground that the tariffs of 1828 and 1832 were unconstitutional and therefore void. President Jackson upheld the law and Congress backed him up by authorizing the use of force to collect the duties. The particular episode was compromised before any blood was spilled, but there was one casualty: the doctrine of states’ rights.¹²

Here the nation almost went to war with itself. This was 29 years before the state of South Carolina fired on the federal

¹² Charles Wiltse, *Expansion and Reform, 1815-1850*, (New York: The Free Press, 1967), 93.

garrison at Fort Sumter to begin the Civil War, but the principle had been established: the federal government would use force against states.

Not until 1860 and the election of Abraham Lincoln would there be such a dramatic challenge to slave representation. In a twist of history, the Twelfth Amendment to the Constitution in 1804 set the stage for someone like Lincoln. The Twelfth Amendment changed how ballots were counted in the Electoral College to lessen the chance of deadlocks in presidential and vice-presidential elections. Amar credits the Twelfth Amendment with “refashioning” the presidency:

In short, whereas Article II [US Constitution] originally created the presidency in the image of George Washington, Amendment XII refashioned the office in the likeness of Thomas Jefferson and in a manner that prefigured Andrew Jackson. After the adoption of this amendment, America’s presidential-election rules – and thus America’s presidents – would generally be more democratic, more partisan, and more openly slavocratic.¹³

Our Civil War lasted from April 1861 to April 1865. More than 600,000 citizens died in a war spawned in large part by a constitutional compromise over the counting of slaves. Without the added value of the slave representation, our pre-civil war history would have been fundamentally different. The war, as all wars, was not inevitable. Given different circumstances, it may have never happened at all.

In 1865, the Thirteenth Amendment ended the institution of slavery: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly

¹³ Amar, *America’s Constitution*, 346-347. He also notes another irony involving this amendment: “Surely no one at the turn of the nineteenth century could have foreseen the long and twisting path that would lead from a proslavery Twelfth Amendment to an abolitionist Thirteenth. Yet lead it did.”

convicted, shall exist within the United States, or any place subject to their jurisdiction.” This amendment did, however, leave a slavery exception for criminals (“except as a punishment for crime . . .”).

The Fourteenth Amendment (1868) ended slave representation by amending part of Article 1, Section 2, and Clause 3 of the Constitution. But it did so without changing the ratio of representation (See Appendix A). This amendment removed the “three-fifths” fraction from the Constitution, without amending or deleting the ratio:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.¹⁴

This was the most likely time to amend the ratio. But that would have meant discussing the theory of representation, the historical significance of not following the ratio, and the significant under-representation already apparent by 1870. But there was no discussion of changing the ratio or following the Constitution. They remodeled the Capitol and added room for more seats in the House of Representatives during the Civil War. In 1870 they apportioned the new House to 292 Representatives by adding 51 new seats. This is the largest augmentation in the history of our Congress. It brought the ratio to approximately one Representative for every 130,000 citizens.

The next series of amendments to the Constitution also brought changes to voting and representation. In 1870, the Fifteenth Amendment guaranteed, on paper, the right to vote would not be denied on account of “race, color, or previous condition of servitude.” The right itself would not be fulfilled in earnest until nearly 100 years later, with the Civil Right Act of 1964 and other legislation. But take a moment and think beyond

¹⁴ *US Constitution, Fourteenth Amendment*. See also, US Census Bureau: Congressional Apportionment – Historical Perspective. It was determined in 1940 that there are no more untaxed Indians (39 Op. Attorney General 518, 1940).

voting. Think about how black male citizens in 1870 did not receive their constitutional representation. And then think how powerful and influential that representation might have been. It does not take much to imagine how 140 years of constitutional representation would have made the United States of America a different place for the newly freed citizens and their families.

In the 20th century, four amendments to the Constitution were added between 1910 and 1920. All four have had a profound impact on government:

- | | |
|------|--|
| 1913 | Sixteenth Amendment:
Congress could collect an income tax |
| 1913 | Seventeenth Amendment:
Senators elected by the people |
| 1919 | Eighteenth Amendment:
Alcohol prohibition (repealed 1933) |
| 1920 | Nineteenth Amendment:
Women's suffrage |

Then, as noted above, Congress did not apportion representation as dictated by the Constitution after the 1920 census. There was no action until 1929, when the 70th Congress created the law we now use.

During this time the physical presence of women on national politics was beginning to be felt. From 1917-1919, Montana sent the first female Representative to the US House, Jeannette Rankin.

As we did for the newly freed slaves, think of the effect of not apportioning new seats in the House after the 1920 census, and capping membership in 1929. In fact, women received the right to vote in 1920 but have never received their representation according to their numbers. In other words, the nation allowed women to vote, but never gave them representation.

In 1941, Congress made the practice of under-representing We the People a simple bureaucratic procedure. There is a self-executing provision involved in representation today – that way the current federal representatives never have to vote on this issue. The law is *2 U.S.C. Sec. 2a, Election of Senators and Representatives*:

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

(b). . . It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section.¹⁵

This type of bureaucratic language was not the goal of a revolution animated by “certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” Representation is *for* We the People – not *against* us. Our current system of capped membership, by design, promotes and supports the under-representation of We the People.

¹⁵ *2 USC Sec. 2a, Election of Senators and Representatives.*

3

Think of the difference constitutional representation would have meant to the power and influence of various groups – what Madison referred to as factions. One could take any major US political theme, for example, slavery, Reconstruction, or voting, and easily imagine a different history. Or speculate how every presidential election would have been effected? Or imagine a constitutionally functioning Electoral College – which is the sum of Representatives and Senators. More representatives would better represent the nation's choice for the executive office. No matter the outcome of such historical imaginations, the point is things would have been different.

Here are three states, Delaware, Illinois, and California that we can use to see how things may have been different. The three provide a glimpse of a growing nation – from sea to shining sea, as they say: Delaware, the first to ratify; Illinois, the twenty-first; and California, the thirty-first and most populous state.

In Table 2, in the column *Congressional Representation*, you will note that Delaware has had only one federal representative in the US House since it joined the Union. The only exception was from 1810-1819, at which time it had two. The table also shows that Delaware's population has grown from 59,096 to 783,600. That is thirteen times greater in numbers, but the same representation. The ratio in 2000 for Delaware: one representative for every 783,600 citizens. Under constitutional representation, Delaware should have 27 representatives for 783,600 citizens. The state would also have had an increase in representation every ten years since 1930.

In Table 3, with the state of Illinois, we find that growth in population does bring more representatives – at least for a while. After becoming a state in 1818, Illinois voted to ban slavery in 1823. The native populations were finally removed from the state in 1832. The war was called The Black Hawk War and a young Abraham Lincoln served in the campaign.

The citizens of Illinois presently have 19 federal representatives. This is the same number the state had in 1870 when the population was only 2.5 million people. The highest

number of federal representatives, 27, peaked from 1910-1930. Beginning in 1940, the number of representatives has declined from 27 to the current 19. Population, meanwhile, has increased from less than 8 million to almost 12.5 million. Under the column marked *Constitutional Representation*, the number of representatives for Illinois should have increased every 10 years. The only exception would have been in 1980 and 1990, when the number of representatives would have remained at approximately 381.

Table #2			
Delaware representation in the US House 1787-2010			
<u>Year</u>	<u>Population</u>	<u>Congressional Representation</u>	<u>Constitutional Representation</u>
1787	estimated	1	1
1790	59,096	1	2
1800	64,273	1	3
1810	72,674	2	3
1820	72,749	1	3
1830	76,748	1	3
1840	78,085	1	3
1850	91,532	1	4
1860	112,216	1	4
1870	125,015	1	5
1880	146,608	1	5
1890	168,493	1	6
1900	184,735	1	7
1910	202,322	1	7
1920	223,003	1	8
1930	230,380	1	8
1940	266,505	1	9
1950	318,085	1	11
1960	446,292	1	15
1970	548,104	1	19
1980	594,338	1	20
1990	666,168	1	23
2000	783,600	1	27
2010	?	?	?

Table #3
Illinois representation in the US House 1818-2010

<u>Year</u>	<u>Population</u>	<u>Congressional Representation</u>	<u>Constitutional Representation</u>
1818	12,282	1	1
1820	55,211	1	2
1830	157,445	3	6
1840	476,183	7	16
1850	851,470	9	29
1860	1,711,951	14	58
1870	2,539,891	19	85
1880	3,077,871	20	103
1890	3,826,352	22	128
1900	4,821,550	25	161
1910	5,638,591	27	188
1920	6,485,280	27	217
1930	7,630,654	27	255
1940	7,897,241	26	264
1950	8,712,176	25	291
1960	10,081,158	24	337
1970	11,110,285	24	371
1980	11,427,409	22	381
1990	11,430,602	20	381
2000	12,419,293	19	414
2010	?	?	?

As noted, California is the nation's most populous state, and would have great influence in a new House of Representatives. Based on the Constitution and the 2000 census, California has a constitutional right, *cy pres*, of 1,130 Representatives.

Table #4 California representation in the US House 1840-2010			
<u>Year</u>	<u>Population</u>	<u>Congressional Representation</u>	<u>Constitutional Representation</u>
1840	Est.	2	-
1850	92,597	2	4
1860	379,994	3	13
1870	560,247	4	16
1880	864,694	6	29
1890	1,213,398	7	41
1900	1,485,053	8	50
1910	2,377,549	11	80
1920	3,426,861	11	115
1930	5,677,251	20	190
1940	6,907,387	23	231
1950	10,586,223	30	353
1960	15,717,204	38	524
1970	19,971,069	43	666
1980	23,667,764	45	789
1990	29,760,021	52	993
2000	33,871,648	53	1,130
2010	?	?	?

4

Well, the power of the general population has been transferred to the power of incumbency. The peculiarity that Madison talked about, the coalition of the constitutionally willing, has not materialized from the citizens or the large population states. One can easily find fault in the people for not knowing; but recall, the representatives themselves know – they take the oath.

Let us take a moment and think of some of the issues that would appear with regularly augmented House districts – districts based on the ratio found in the Constitution. One might think that 10,000 Representatives would lead to more power for a bureaucracy. True, this may be the case. Or one could counter that it cannot get much worse. For example, we already have

over 1,900 employees assigned to the federal Drug Enforcement Administration (DEA). Would a larger House ask to increase it? Maybe some of the representatives would be informed about the drug war and the federal role. Maybe some of them would talk about DEA raids in their communities. Maybe the House would actually have a debate on something as real as the drug war.

Some will suggest that because of technology we can work the representatives more. Now, some might argue, with faxes and phones, e-mail and form letters, answering machines and polling data, that larger districts can still represent the people. Hogwash, I say. That does not make representation better or more responsive. It makes power bigger, for those who have it, the few, and that's all.

We have lost touch with our government. We've lost interest in it. Our (the citizenry) lack of supervision has created an oligarchy, something term limits or the occasional defeat of an incumbent will not fix. I'm not a democratic idealist, I just like defending the Constitution. I also see something that can be re-formed, constitutionally, which will revolutionize our politics – like Washington and Madison intended – in a large House of Representatives. What we have now is oligarchy. It will continue to do what it does – use power. A large House would do the same. The difference would be who owns the problems: We the People or the oligarchs? So our problems, like going to war and never declaring it, or like waiting for war to arrive instead of working on peace, become our own. Think of it like this: for all the military personnel we place in harm's way, they deserve the respect of serving under a constitution as it is written. We lose something when we don't live by a constitution. What we lose is hard to name. Respect sounds good; we lose respect for our country and all that it has been when we willfully neglect our political heritage.

Why not a big House? Why not a big loud place where factions gather and yell if they want to, hear each other out, and vote? Let us speak: let it all out, from the war in Iraq to every damn issue we face today – a national venting. Let the gays and evangelicals work it out, in a new House, one where their numbers are reflected along with their values.

Perhaps most citizens prefer the status quo – a majority may think this is good.

But let us also look at what a constitutional House would look like. Since the only constitutional number is 30,000, what would the House of Representatives look like with 10,000 Representatives, given a US population of 300 million?

It would still have those intent on political careers, and good for us. It would also have farmers, bankers, nurses, and mechanics from small towns. There would be teachers and local chamber of commerce types. There would be retired Army Colonels and ex-CEOs – 10,000 instead of 435. Ten thousand represented interests instead of 435 – thousands of voices instead of only 435.

In math terms, our representation is worth one-third of what it was when it was set at 435 in 1910. But it is even worse than that: the only *full* citizens at that time were white men. The fact is, as the United States gave the vote to more and more citizens, it continually diluted their representation when the House was not augmented. For example, women were constitutionally guaranteed the right to vote by the Nineteenth Amendment, but that amendment did not guarantee them representation. That has never been recognized, according to their numbers. Because Congress has not added any seats since women won the right to vote, that explains why the House has only 16 percent women, and yet women are more than 50 percent of the citizenry.

When it comes to representation, it is pointless to increase the right to vote without a corresponding increase in representation. But that is what we have been doing. If you increase the amount of voters, but do not adjust the number of representatives, you weaken representation and consolidate power in the few. This is irony, as you can note the disingenuous effect: the *more* we allowed groups to vote, the *less* we made their representation, their vote, worth anything.

5

Madison and the founders understood power was something you had – it is a possession. At the Constitutional Convention, in July 1787, Madison spoke of power and representation.

While discussing how the constituents would control the representatives, some delegates wanted to “bind” the representative to the constituent by issuing instructions. The hope was that the people could “make” the representative vote a certain way by sending them to Congress with no alternative to change their mind. This, as we discussed in chapter 4, many thought absurd on two levels. First, Congress was to be a deliberative body – a place to discuss things – and not just a place to vote. Second, that is what elections were for – to take note of our elected officials. Madison’s concern was that instructions would not protect the people from representative power. “The truth was,” he said, “that all men having power ought to be distrusted to a certain degree.”¹⁶

So if power “ought to be distrusted,” that is, “to a certain degree,” the way to implement that concept into a political blueprint is to have representatives that represent the people. That means they should live like the people do. The founders’ idea of representation was not simply based on wealth. That is something not commonly understood today – we have completely combined the two – wealth and representation. But there is a distinction, as they are not the same.

Representation of We the People is 22 times less than the founders intended, and growing more so every day. Over time, wealth has become the measure of representation and not the people. What is not represented in today’s Congress is *the value of people*. Madison and the founders did not draft our Constitution by forgetting to represent the value of people. We have done that to ourselves.

¹⁶ Madison, 122.

7

A new US House of Representatives

1

As a citizen of the United States, do you feel represented by your federal Representative?

If you do, then enforcing constitutional representation and building a new House of Representatives might not interest you. Your interests are being met.

Or, if the current House does not represent you, then enforcing constitutional representation and building a new House of Representatives might interest you. Your interests are not being met.

Self-government and representation are built upon *ongoing change*, if I may use two words with similar meanings. When it is suggested that the world is going democratic, what is meant is constitutional; and constitutions are about ongoing change. Democracy is the world of law, and all law has a supreme law. We have to look no further than Iraq to see the difficulties involved in forming a constitutional government of the people.

When tradition is codified into law, it is the work of many individuals. When the new way looks to the old and finds a way – a constitutional way – then an ongoing revolution continues anew. When you take account of all that is at our disposal today, we citizens of the United States are a rich people. But more than riches, we have some special words: George

Washington's words, James Madison's words, and the 50-times ratified words of the US Constitution.

And we have *Article the first* of the Bill of Rights.

Here are three constitutional approaches to the problem of representation. First, we could enforce the ratified representation ratio in the Constitution as it is – “The Number of Representatives shall not exceed one for every thirty Thousand.”

Second, twenty-seven states could ratify *Article the first*. This, along with the eleven votes from the 18th century, would bring *Article the first* to the constitutional requirement for ratification of three-fourths of the states, or 75 percent. This would complete the Bill of Rights, making *Article the first* the Twenty-eighth Amendment to our Constitution. As Publius theorized in Federalist 58, inherent in our Constitution is the right of population to claim representation. Because New York ratified *Article the first* on 24 February 1790, that leaves California, Texas, Florida, and Illinois as the other four most populous states.¹ Based on their numbers, with 100 million citizens, or one-third of the representation, the large population states will be the deciding factor in building a new House. And remember, all state officials – in any state – are oath-bound to the US Constitution. What the Constitution needs are people who keep their word – defenders they might be called.

Third, we could amend Article 1, Section 2, and Clause 3 of the Constitution with a new ratio. Congress could reform itself. A congressional reform committee could counter the words, wishes, and acts of George Washington, as well as the theories of James Madison. Congress could set a new ratio, amend the Constitution, and give the people their constitutional representation. This would involve an act of Congress and ratification by three-fourths of the states.

And there is a fourth option, the status quo: 435 Representatives for a nation of 300 million.

¹ Here are the numbers from the US Census Bureau, 2000, for the top five states in population: California, 33,871,648; Texas, 20,851,820; New York, 18,976,457; Florida, 15,982,378; Illinois, 12,419,293. The total for the five is 102,101,596.

Today, even if the United States had small federal districts, citizens would have little time or energy to keep a watchful eye on their representative. But when the districts are the size they are today, 650,000 people or more, it is impossible. The number of represented is simply too big for the purpose of representing We the People.

Over the years we have learned to believe that politicians are bad, that being political is the same thing as being a crook. We are told that our measly little amount of time, energy and money cannot make a difference. And they, whoever says things like that, they are often right. Why would anyone be political in this system? You must have numbers, large numbers, and . . . and lots of money helps.

So, how to work with the power of money without hurting free speech? Increase representation according to numbers – just like the Constitution says. In doing so, we make a dollar stretch. If money doesn't buy votes but it does buy access, the general assessment of political science, then spread the access thinner. For example, smaller districts, districts of 30,000 instead of 650,000, would lead to a greater local media influence, as well as a host of other changes.

As one might expect, at times this will be noisy and perhaps even ugly. We will hear all kinds of crazy things in this new House of representation. (We will have to build a *new* US House of Representatives if we are going to have enough seats for everyone.) A reading of *The Federalist Papers* shows it was designed to be noisy. Today factions are not properly, that is constitutionally, represented. We have become a nation of polls rather than citizens. It appears that the general population, the citizenry, has surrendered its *voices*. Instead of moving into a bigger House to accommodate the growing population, the growing factions, the congressional leaders of the United States settled for keeping factions out. But there is no constitutional theory, not in our Constitution, to support that logic.

One representative for every 30,000 makes everything a little smaller, bridging distances in ways that newspaper editorials and Simpson episodes cannot. It may not make us

neighbors, but it does change the conversation by changing who gets to speak.

The representatives themselves, how different they would look if their districts were 22 times smaller than they are today. There would still be your media stars and party positions, but everything would be different. One for every 30,000 would challenge the two-party system, most definitely, and, by their nature, the parties would adapt. A new House would allow for open, non-affiliated, that is non-party, candidates. For example, the county I grew up in, little Jo Daviess County in Illinois, a county where general and 18th President Ulysses S. Grant called home the years preceding the Civil War, that county today, according to the 2000 census, has 22,289 inhabitants. Because it is bordered to the north by Wisconsin, and to the west by Iowa, that means, using the constitutional number of 30,000, that someone local would be going to Washington DC as a federal representative. That doesn't appear to be a bad thing. In fact, local interests would be represented, just like the Constitution says. Local ideas and knowledge would get a public hearing. That is not a bad idea either. Their voices, the voices of the general population, the voices of the people of Jo Daviess County, they have things to contribute.

Or, think of it like this: let the gays and evangelicals debate it out, with words, face to face, with their fellow citizens looking on and voting. And if the passions of the people become inflamed, and a poor piece of legislation is passed, then the system can be checked by the Senate, as designed. The Senate, the states' bearer of time, remains at two per state – just like the Constitution says. The Senate stands for the few, for the states, for a little oligarchy. In theory, oligarchy is not inherently bad – it is just that the Constitution did not intend for it to be everywhere.

With a new House, the media would be deepened and dispersed. With 10,000 Representatives for a population of 300 million, there would be more to cover and more to understand. With so many representatives, they would tend to reflect their communities, thus fragmenting and strengthening the definition of citizenship. There would actually be different kinds of

people, Arab-Americans, for example, in the House, so we would have some human intelligence on cultures and religions. You also might see your representative getting his or her coffee in the morning, or not going to church on Sunday, or taking in a local Blue Grass festival. Or smoking some cannabis. You might have the occasion to see your representative at the grocery store buying red potatoes and an inexpensive Merlot. In theory and spirit, citizens would have a much easier time getting to know their federal representative, and vice versa.

Corporations and individuals would still try to influence the process with money, and so be it. But the money is spread differently. Because of the increase in variables, influencing one in a House of 10,000 members would be much more difficult than controlling one in 435. Most likely you would notice this change first in the two parties, Democrat and Republican, as they mobilize and evolve. Parties will not disappear, as they add a degree of familiarity, and are themselves a gathering of factions. Who knows? – They may even be the basis for the coalition of the constitutionally willing.

A new and representative House would move factionalism, over such diverse issues as racism and religion, and move that factionalism into the realm of politics. In politics, value judgments can be discussed, debated, and resolved – yes, resolved. For example, and almost by definition, the more you know about someone the less likely you are to be ignorant or prejudiced. And, as Madison mentioned in Federalist 55, our representatives were to take knowledge back to their home district and the communities therein. They were to speak as and for American citizens. Perhaps they would report things like “Arab-Americans aren’t . . .” and perhaps they would speak of things the television will not discuss because it does not sell advertising or bring in revenue.

Members of Congress take an oath to uphold the Constitution. In doing so, they accept responsibility for the handling of power. As incumbents, they have special knowledge and relationships. That is why a return to small House districts, which would mean a large increase in House membership, is one way to regain this constitutional balance in

power. The few, the incumbents, they are doing what humans have always done: use power. We, as citizens, can do the same.

Apparently, the most effective way for We the People to respond is to use what is at hand. The words ratified in the Constitution are a good place to start. In fact, the Constitution is designed to be our trump card – so that if we were playing a card game, it would be the highest card in the deck. But, like card games, constitutions only work when you know and follow the rules.

2

To build a new House of Representatives, we need leaders who will keep their word and follow the Constitution. If we did so, such an activity would redeem one of the more recent complaints regarding Madison and his political theories. Robert A. Dahl, a political scientist from Yale University and past president of the American Political Science Association, recently discussed the question of Madison. In a 2005 article titled *James Madison: Republican or Democrat?*, Dahl offered a summary and “three serious” flaws of Madison’s post-1787 constitutional views:

1. as an empirical proposition, his conjecture that increased size reduces the danger of factionalism is contradicted by subsequent experience;
2. in his conception of basic rights, Madison excluded more than half the adult population: women, African Americans, and American Indians; and
3. he actively supported the provision in the Constitution that gave to slave states an increase in representatives amounting to three-fifths of the slave population.²

² Robert A. Dahl, *James Madison: Republican or Democrat?*, American Political Science Association: Perspectives on Politics, September 2005, Vol. 3/No. 3, 439.

Dahl's analysis is only two-thirds correct. I agree with him on numbers two and three: Madison did exclude whole groups and actively supported the three-fifths provision. That is not a critique of Madison though, but of the times. Recall that every state ratified the Constitution, thus accepting the exclusion of women and American Indians and the counting of slaves as a fraction of other humans. But, as I've been discussing the issue, Dahl's first flaw is not correct. The representation ratio, as an empirical proposition, has been made a historical distortion. As a theory, it has never been put into practice. We are a nation of under-represented factions. No one can predict what we will do once represented, but such a system would then reflect the compromise in our Constitution, and therefore Madison's theories. Dahl approaches this supposed flaw by quoting Madison from Federalist 10:

But Madison's most original contribution, the one for which he is probably best known and for which he has been cited endlessly, was to enlarge the size of a republic. "Extend the sphere," he asserted, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other." Increasing the size of the system, then, was "a republican remedy for the diseases most incident to republican government."³

This part is correct. Madison argued that if you increase "the size of the system" by extending the sphere, it does become "less probable that a majority of the whole will have a common motive to invade the rights of other citizens." That sounds exactly like the US House of Representatives as designed by

³ Dahl, 443.

our founders. It is here that Dahl critiques Madison's theory of representation, when in fact, as we have been developing the idea, the theory has never been put into practice.

Here is a lived example: I am a cannabis consumer. No one represents my interests in the research of cannabis and cannabinoids in the US House of Representatives, which was designed for new and old ideas to be discussed. Instead, we have federal "marijuana" prohibition. I (we) live under a prohibition passed in 1937. The age requirement for membership in the House of Representatives is 25 years old, and it is another number that is always enforced. That means marijuana prohibition was passed by white men born prior to 1912. Things have changed a great deal since then, but cannabis, the plant with many qualities, that I can consume in the privacy of my home, in my kitchen, for example, is federally prohibited as felonious behavior. Like Louis Armstrong, the jazz-genius, who also was a regular cannabis consumer, I live under the threat of arrest, in my home, for receiving the benefits of a plant.

My thought is that in a new House of Representatives, one representing the people according to their numbers, things like the war on some drugs would have ended *decades* ago – and they may never have been started. Could be a dream, I know, but what we have is not getting it done either. What we have is under-representation. Where Dahl sees a flaw in Madison's theory, I see an experiment run amuck. We should no longer assume representation is as Madison and the other founders set it up to be. In constitutional terms, it is nothing of the sort.

In trying to figure out what to call today's government, and to place Madison's theory in context, Dahl wonders –:

. . . if the United States is not, and should not be, a democratic republic, then what kind of republic is it or should it be? An aristocratic republic? An oligarchical republic?⁴

⁴ Dahl, 441-442.

How about *representative republic*? That would be in accordance with Madison and the blueprint, the Constitution and its small districts and large House. Dahl mentions the concept of a representative republic a few paragraphs later. In doing so, he points to Madison's theories without emphasizing how a system of representation, with one representative for every 30,000, would impact our government:

A crucial advantage of a *representative republic* over direct or assembly democracy, Madison asserted, is that the requisite wisdom and virtue are more likely to exist among the elected representatives than among the people who elect them.⁵

In his article, Dahl does not note that representation is based in the Constitution on those twelve words we have been citing in Article 1 – *The Number of Representatives shall not exceed one for every thirty Thousand*. Dahl does not mention one for thirty thousand or the current membership level, 435 members. This blind spot, this blinding, is similar to Madison's exclusion of half of the population from representation – it is human to not see what is often the most apparent. – Myself included. I recognize his blind spot because I had it for the longest time myself. The clearest way to define Madison's theory of the people, the states, and our constitutional system, is to call it a representative republic. Madison, I suspect, would call today's government an oligarchy – rule by the few. When the founding legal document of the nation dictates 10,000 Representatives, and there are only 435, or 4.35 percent of our constitutional guarantee, then that is rule by the few, or, in a word – oligarchy.

In arguing that Madison's "conjecture that increased size reduces the dangers of factionalism," Dahl cites as evidence immigration in Sweden, which he says disrupted their homogeneity, and the difficulties of forming a constitution for

⁵ Ibid. Italics added.

the European Union. The European Union, the argument goes, is an example of too much diversity, what Dahl refers to as heterogeneity. Dahl said this of Madison's supposed flawed conjecture:

Madison was right in thinking that diversity tends to increase with size. But he overlooked the costs of heterogeneity and the advantages of homogeneity.⁶

This is an inaccurate critique. The purpose of the ratio in the Constitution, and of *Article the first*, are to reduce the costs of heterogeneity – of factionalism. By ignoring the ratio, the power of We the People, through representation, has been usurped. The Constitution and *Article the first* are Madison's theories put into constitutional solutions – his fingerprints are all over them. The representation ratio certainly addresses the issues of homogeneity and heterogeneity, while – to use Dahl's quote from Federalist 10 – extending the sphere of representation – which is another way of defining both homogeneity and heterogeneity. As Madison said, “*you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.*”

Ironically, most Americans find they are not represented in Congress, the very place where We the People are to convene. We were bequeathed a system designed to represent homogeneity and heterogeneity – but we have either forgotten or don't understand it. In doing so, we have lost track of where power actually comes from – the sovereignty of the people through a representative republic – just like the Constitution says. We can argue about what we have created today, but not what we have been bequeathed. Those twelve words and the debates of the founding period are clear – small ratio, large House.

Disbelief is common when what is being said is hard to believe. The founders wanted and designed a system with large

⁶ Dahl, 445.

representation and small districts, and they did it intentionally – just like it is written in the Declaration of Independence: “We hold these Truths to be self-evident, that all Men are created equal.” When those words were first published, some in the slave states thought they went too far – that words like that would lead to the end of slavery.

Today we would humanize the concept, perhaps edit it to say “all Humans are created equal” – or some such language. Nonetheless, the words from the declaration are striking for the implications they raise. The same is true of the theory of representation in our Constitution. What would the United States look like with constitutional representation? What different course would history have traveled? And what a different historical sense we might have, if we had had constitutional representation? Some will speculate worse, some better. It would be better in one regard – it would be constitutional.

Madison made the conjecture in 1788 that Congress *would* augment the House:

It will not be thought an extravagant conjecture, that the first census will, at the rate of one for every thirty thousand, raise the number of representatives to at least one hundred. Estimating the negroes in the proportion of three-fifths, it can scarcely be doubted that the population of the United States will by that time, if it does not already, amount to three millions. At the expiration of twenty-five years, according to the computed rate of increase, the number of representatives will amount to two hundred; and of fifty years to four hundred. This is a number which I presume will put an end to all fears arising from the smallness of the body.⁷

⁷ Madison, 317.

In fact, to Madison, it was not “an extravagant conjecture” at all. He argued for the ratio of 30,000 and presumed a House of 400 would represent a people of 12 to 14 million (depending on how many slaves were counted at three-fifths for representation). That was Madison’s opinion on the matter, but it is a theory of representation that has been forgotten.

3

In chapter 2 we discussed how at the Constitutional Convention in the summer of 1787, the Committee of Detail found two items that deserve the most attention in drafting a constitution:

1. To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events, and
2. To use simple and precise language, and general propositions, according to the examples of the (several) constitutions of the several states.⁸

For us, their focus is our law. In the blueprint, with its essential principles and simple and precise language, there was designed a constitutional House of Representatives. On paper, it is a constitutional House where American citizens come face to face and talk and learn. A place where gays and evangelicals, cannabis consumers and prohibitionists, and all and every group according to their numbers (not their wealth) – a House where factions have the opportunity to gather, in representation, and have their voices heard. Then build it, as they say. Augment the House based on the words and intent in the Constitution, and use the House of Representatives the way it was designed – as a place for all factions to be represented, one representative for every 30,000 people.

⁸ *Farrand’s Records*, 2:137.

There is no rule of law where the rulers do not have to obey the law. A representative republic demands otherwise. And one built on small districts that develop such political values as a “diffusive sympathy with the whole.” Our current system is set up to not let this happen. It also was not built to be an oligarchic republic, one run by the few. A representative republic, like the one we have on paper, one of small districts and large representation, was supported and ratified by the founders. Recall that the Federalists and AntiFederalists were in agreement on this issue. During the ratification debates the issue was not whether the districts were too large at one for every thirty thousand, but that they were not small enough.

That is also what Washington was speaking to on the last day of the convention – “the smallness of the proportion of Representatives had been considered by many members of the Convention, an insufficient security for the rights & interests of the people.” Washington, in a moment of political will, was clearly on the side of smaller districts. Literally, he opened his mouth and spoke in favor of a lower ratio – the switch from forty to thirty thousand on 17 September 1787.

This is a clear indication that today’s large districts, which represent more than 650,000 people, or 22 times greater than what is specified in our Constitution, do not create constitutional representation. We, the citizens, get whatever any Congress decides we get – and that is not what the Constitution intended. If they had had a theory for capping House membership, they would have used it to build our government. But they did not have an alternative theory to the representation ratio. And the highest ratio ever proposed at the national level was the one for every fifty thousand found in *Article the first*.

Today’s representation is the same as virtual representation. With large districts, whole groups of people go unrepresented. That was the essence of what Britain called virtual representation. You did not have to be “from” the place as long as you were from the same group. Just as in virtual representation, with extremely large districts, the represented and representative lose touch – which is what we have today. Think of women and representation. Women are more than 50

percent of the population, but represented in the 109th US House of Representatives by 70 members or only 16 percent. The representation of women would be different in a House with smaller districts, and it is not very difficult to imagine – in fact, it is the law.

Since the supreme law of the land says one representative for every thirty thousand, it does not matter, in theory, what the Congresses have done. It is generally accepted that constitutional law beats congressional law. I was taught, and have taught others, that constitutional law is supreme. One of the biggest issues facing the US Supreme Court, the Constitution, and abortion, is the right to privacy – a right to your body. It seems Lockean to me, and supported by the Constitution, according to Chief Justice nominee John Roberts, who said at his confirmation hearing that “The right to privacy is protected under the Constitution in various ways” – he then cited both the First and Fourth amendments. But the words “the right to privacy” are not in those amendments or the Constitution. They are implicit, as many feel, but not explicit. One would have to conclude, on the other hand, that the representation ratio is explicit. Before any right to privacy, there was a right to representation to guarantee all other rights, like the one to privacy. With representation, well, it is as explicit as twelve words can be: *The Number of Representatives shall not exceed one for every thirty Thousand.*

As we have been discussing, representation was clear to the founders and ratifiers. Then came the politics and the great mistake began. But they did not ever bother to change the words, the Constitution, and that means those words are law.

4

Here is another way to look at it – in the metaphor of a car and its engine. Cars run on energy, and we have been using gasoline for that purpose. If you put another kind of fuel in an engine designed for gasoline, you will ruin the engine. That is the quick way to ruin an engine. Another way is to dilute the fuel, and that is what has happened to constitutional representation. From a little dilution beginning in 1792 – when “thirty-three”

thousand was used instead of thirty thousand – we end up creating a diluted system. A system based on a theory of small districts and a large House will not function as intended when it is composed of large districts and a small House. The constitutional theory in Article 1, Section 2, and Clause 3 is clear. The only representation principle preceding this section in the Constitution is the phrase *We the People*. Based on those two revolutionary concepts we founded this experiment in self-government, we have just never built the House to represent *We the People*.

Not yet, at least, but the theory and law are already in place – now we just need to build the house.

Here is a summary of constitutional representation:

- The Constitution dictates small districts and large representation;
- After 22 censuses and 109 Congresses, we have the opposite – large districts and small representation;
- To create constitutional representation:
 - Enforce Article 1, Section 2, Clause 3 of the US Constitution;
 - Ratify *Article the first*;
 - Or, propose a new representation ratio.

Following a constitution is a fundamental of power. The constitutional theory and practice of representation should be brought under the rule of constitutional law and taken away from the whims of Congress. As Representative Madison said long ago – *“the people can change the constitution if they please; but while the constitution exists, they must conform themselves to its dictates.”*

And Madison was unfeigned concerning these matters. In 1785, two years prior to the federal convention and the writing of the Constitution, he wrote to the Virginia General Assembly. He was writing against a proposed law entitled “A Bill

establishing a provision for Teachers of the Christian Religion.” He was strongly opposed to the bill, characterizing it as “a dangerous abuse of power.”⁹ If the rulers exceed their authority, he wrote, then they are tyrants and the people, slaves:

The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariable maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.¹⁰

Madison did not counsel patience when confronting usurpation. Instead, as he continued his letter, he reminded the Virginians how the revolutionaries had responded to usurpation:

We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.¹¹

Usurpation is best dealt with *before* it has “strengthened itself by exercise, and entangled the question in precedents.” Unfortunately, we are well past that point.

⁹ Madison, 9.

¹⁰ Ibid., 30-31.

¹¹ Ibid., 31.

5

In 1829, forty-four years after his above remonstrance to the Virginia General Assembly, Madison, now a former Representative and President, participated in the framing of a new constitution for Virginia. Now at the end of his public life, he was still a champion of the people and representation. As they debated during the convention, Madison spoke in support of setting representation along the lines of what he called, “The Federal number.” In his speech he said the ratio “is particularly recommended to attention in forming a basis of Representation, by its simplicity, its certainty, its stability, and its permanency.”¹² Madison was clear, even late in life, about the ratio: it makes a difficult subject like representation easily understood. That is the essence of constitutional theory.

Madison knew this, and after nearly 50 years of political work, he closed his speech in 1829 still a revolutionary:

In framing a Constitution, great difficulties are necessary to be overcome; and nothing can ever overcome them, but a spirit of compromise. Other nations are surprised at nothing so much as our having been able to form Constitutions in the manner which has been exemplified in this country. Even the union of so many States, is, in the eyes of the world, a wonder; the harmonious establishment of a common Government over them all, a miracle. I cannot but flatter myself, that without a miracle, we shall be able to arrange all difficulties. I never have despaired, notwithstanding all the threatening appearances we have passed through. I have now more than a hope – a consoling confidence, that we shall at last find, that our labours have not been in vain.¹³

¹² Madison, 826.

¹³ *Ibid.*, 827.

Madison found consoling confidence in constitutional law. He felt, sooner or later, given the concept and system of a small ratio and a large House, that he had left us more than hope. He and the founders left us a plan of action.

The census in 2010 is our next best chance for augmenting the House and building a new one. And this is not the type of situation that calls for minor adjustments. Adding a few desks and chairs to the present chamber will not correct representation or make the current system constitutional in spirit or word. After nine decades of declining representation, and in correlation and causation, an increase in federal power, it is the ratio that should be amended or followed. It appears likely that the United States will remain a divided and factioned nation as long as the power of the general population is maintained in a small, unconstitutional House of Representatives.

Washington and his band of revolutionaries believed a large House would keep the people and states free and secure – and, as all revolutionaries learn, sooner or later, time has the last word.

Cy pres.

Appendix A

US Constitution: the ratio

Article 1, Section 2, Clause 3

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. **(This part was amended by the Fourteenth (1868) and Sixteenth (1913) Amendments.)**

The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. **(This is enforced every 10 years.)**

The Number of Representatives shall not exceed one for every thirty Thousand, **(This is the unenforced ratio of representation.)**

- but each State shall have at Least one Representative; **(This is enforced every 10 years.)**

- and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three. **(Used to assemble the First Congress.)**

Appendix B

The Bill of Rights

**CONGRESS of the UNITED STATES,
Begun and held at the City of New-York, on Wednesday,
The Fourth of March, One Thousand Seven Hundred
Eighty-nine.**

The Conventions of a Number of the States having at the Time of their adopting the Constitution, expressed a Desire, in Order to prevent Misconstruction or Abuse of its Powers, that further declaratory and restrictive Clauses should be added: And as extending the Ground of public Confidence in the Government will best insure the beneficent Ends of its Institution,

RESOLVED, by the Senate, and House of Representatives, of the United States of America, in Congress assembled, Two Thirds of both Houses concurring, That the following Articles be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States: All, or any of, which Articles, when ratified by Three-Fourths of the said Legislatures, to be valid to all Intents and Purposes as Part of the said Constitution, viz. ARTICLES in Addition to, and Amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the Fifth Article of the original Constitution.

Article the first *[Not Ratified]*

After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after

Article the first

which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the second *[27th Amendment - Ratified 1992]*

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Article the third *[1st Amendment]*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article the fourth *[2nd Amendment]*

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Article the fifth *[3rd Amendment]*

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Article the sixth *[4th Amendment]*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article the seventh *[5th Amendment]*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article the eighth *[6th Amendment]*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article the ninth *[7th Amendment]*

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article the tenth *[8th Amendment]*

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article the eleventh *[9th Amendment]*

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the twelfth *[10th Amendment]*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FREDERICK AUGUSTUS MUHLENBERG,
Speaker of the House of Representatives

JOHN ADAMS,
Vice-President of the United States, and President of the Senate

Attest, John Beckley,
Clerk of the House of Representatives

Sam. A. Otis,
Secretary of the Senate

Appendix C

US Constitution: the oath

US Constitution, Article VI

1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; and no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

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*Bryan W. Brickner
Chicago, Illinois
31 July 2006*

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