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## Resurrecting Congress to Reduce Administrative Chaos

Mohamed Akram Faizer

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# TENNESSEE JOURNAL OF LAW AND POLICY

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## ARTICLE

### **RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE CHAOS REDRESSING ADMINISTRATIVE OVERREACH BY INCREASING THE NUMBER OF CONGRESSMEN AND ENDING SINGLE-MEMBER PLURALITY DISTRICTING**

*Mohamed Akram Faizer\**

#### **Abstract**

*This symposium's title is "Administrative Law in a Time of Chaos." The chaos that is characteristic of today's rich world countries stems from stresses that confront national electorates, including socio-economic immobility, a perceived migratory surge from developing countries, and a sense that the democratic process is rigged in favor of elites and minorities against the*

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TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

*interests of the broader public.<sup>1</sup> Concomitants of these stresses include President Trump's election as U.S. President and a dramatic rise in support for extreme political movements that promise simple solutions to complex problems, usually by scapegoating the courts, religious minorities and migrants. These extreme political movements are, like those of the past, hostile to the procedural constraints imposed by the rule of law and the due process obligations imposed upon the government by administrative law, simply defined as the law of government. The rule of law and due process in government administration have to be seen as non-negotiable and proponents of authoritarianism, including President Trump's former chief strategist, Steve Bannon, who advocate for "deconstruction of the administrative state," must be opposed as a matter of principle to the degree their position is antithetical to pluralism and the rule of law.<sup>2</sup> However, it is important to differentiate objections to administrative overreach and a principled belief in the separation of powers from reflexive illiberalism. One of the driving reasons for separation of powers transgressions by the Executive Branch is that the government branch responsible for drafting legislation*

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<sup>1</sup> See generally Adam Gopnik, *The Yellow Vests and Why There are So Many Street Protests in France*, NEW YORKER (Dec. 6, 2018), <https://www.newyorker.com/news/daily-comment/the-yellow-vests-and-why-there-are-so-many-street-protests-in-france> (detailing contemporary and historical protests in France) [<https://perma.cc/E4UG-GMHL>].

<sup>2</sup> Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for Deconstruction of the Administrative State*, WASHINGTON POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html?utm\\_term=.268a84960f13](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.268a84960f13) [<https://perma.cc/75T4-ZMXL>].

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

*and holding administrative agencies to account, Congress, is overmatched, starved of resources, hyper-polarized and incapable of taking its proper role under the U.S. Constitution.*

*I recommend two simple changes. The first is to statutorily increase the number of representatives from the current 435 to 1250 with a minimum of three per state.<sup>3</sup> The second is to have Congress change our system of electing representatives from the current single member plurality paradigm to a statewide-proportional representation system with a vote threshold requirement for representation.<sup>4</sup> These changes will enable Congress to take its proper role in the U.S. Constitutional structure by providing it with greater resources to better anticipate and address issues of broader public concern and legislate and oversee administrative agencies.*

*Should it do so, the U.S. will, ideally, minimize the chaos that characterizes today's political climate and, over time, engender a more cohesive, capable and less partisan political culture.*

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<sup>3</sup> The statutory authorization would be consistent with U.S. Constitution, Article I, Section 2, Clause 3 that provides, in relevant part, that “the Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.” U.S. CONST., art. I, § 2, cl.3.

<sup>4</sup> Changing to a proportional representation system would be authorized by U.S. Constitution, Article I, Section 4, Clause 1 that provides the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” U.S. CONST., art. I, § 4, cl. 1.

I. Introduction	22
II. The U.S. Today: Sclerotic and Ineffective Government	25
III. Increase Membership in the House of Representatives	29
IV. Change from Single Member Plurality Districting to Proportional Representation	37
V. Increasing the Size of the House of Representatives and Changing to Proportional Representation Will Facilitate Administrative Oversight	50
VI. Conclusion	61

### I. Introduction

America in 1929 was a different country. Its population was less ethnically and racially heterogeneous and, at 122 million, was a fraction of today's 329 million.<sup>5</sup> The national economy, though booming, was \$105 billion,<sup>6</sup> and the federal government had a modest role both at home and abroad.<sup>7</sup> Notwithstanding the fact Congress had historically increased the number of representatives in proportion to population throughout American history, President Hoover signed the Reapportionment Act into law in 1929,

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<sup>5</sup> U.S. Census Bureau, U.S. and World Population Clock, <https://www.census.gov/popclock/>[<https://perma.cc/852T-HZWG>].

<sup>6</sup> See Kimberly Amadeo, *US GDP by Year Compared to Recessions and Events: The Strange Ups and Downs of the U.S. Economy Since 1929*, BALANCE (June 8, 2019), <https://www.thebalance.com/us-gdp-by-year-3305543> [<https://perma.cc/4UTG-JUCL>].

<sup>7</sup> The federal workforce remained small, the New Deal Era had not commenced, federal agencies had modest powers, and the size of the national defense budget was relatively small. See generally, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2005).

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

which legislatively capped the number of representatives at 435.<sup>8</sup> In view of the massive growth in population and government that followed the Great Depression, the New Deal, World War II, and the Cold War, it is altogether puzzling that Congress has failed to amend the Reapportionment Act such that the number of representatives has remained fixed at 435.<sup>9</sup>

American elites bemoan the problems of political polarization in conjunction with the paradoxical problem of voter apathy, both of which bedevil U.S. politics. Unfortunately, polarization and apathy are an inherent concomitant of the U.S.'s reliance on single member plurality districts. A relic from the early days of democracy, single member plurality districts have been replaced by various forms of proportional representation in other mature democracies.<sup>10</sup> The U.S.'s continued reliance on this model, in conjunction with technological and other advances in the districting process, has made Congress an excessively partisan and ineffective institution.<sup>11</sup>

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<sup>8</sup> Reapportionment Act of 1929, ch. 28, 46 Stat. 21, 2 U.S.C. § 2a.

<sup>9</sup> Id.

<sup>10</sup> See *Proportional Representation*, BRITANNICA, <https://www.britannica.com/topic/proportional-representation> (listing "Belgium, Denmark, Finland, Greece, Hungary, Israel, Italy, Luxembourg, Norway, Russia, Spain, Sweden, and Switzerland" as countries with proportional representation) [<https://perma.cc/TU64-BUPZ>].

<sup>11</sup> Gill v. Whitford, 138 S.Ct. 1916, 1929–30 (2018); see also Ariane de Vogue & Eli Watkins, *Supreme Court Allows Most Disputed Maps in Texas, NC Gerrymandering Cases To Be Used*, CNN POLITICS (June 25, 2018, 3:06 PM), <https://www.cnn.com/2018/06/25/politics/supreme-court-north-carolina-gerrymandering/index.html> (discussing recent gerrymandering decisions) [<https://perma.cc/8E4B-JR65>].

*TENNESSEE JOURNAL OF LAW AND POLICY*  
VOLUME 14 | SUMMER 2019 | ISSUE 1

Recognizing the tension between representative democracy and administrative expertise in all industrialized countries, my thesis is that this problem is exacerbated by an inadequately sized legislature that is undermined by an outdated and harmful election framework.

My proposal is twofold: 1) increase the size of the House of Representatives, from 435 to 1250, with a minimum of three per state, to create a legislative body that is of sufficient size to effectively legislate and oversee a continent-sized superpower; and 2) replace single member plurality districting with proportional representation as a means of engendering greater voter participation and reducing political polarization.

These two changes will, over time, reapportion the balance of capabilities and powers between the legislative and executive branches and enable the federal courts to reevaluate their approach to administrative agency deference doctrines. It will eventually engender greater public confidence in the administrative state and reduce administrative overreach.

The administrative state will always frustrate separation of powers purists because the Constitution speaks to all legislative power emanating from Congress and is silent as to the power of administrative agencies.<sup>12</sup> While the broader legal culture focuses on complex solutions to legitimize the administrative state,<sup>13</sup> my

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<sup>12</sup> See U.S. CONST., art I, § 1 (providing that “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”).

<sup>13</sup> What I mean by this is the obvious tension between democratic accountability and administrative competence in a technologically advanced country. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 84 (7th

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

thesis is that finding even more innovative means of legitimizing the administrative state is premature when much of the purported administrative overreach can be addressed by fixing obvious defects within the legislative branch.

**II. The U.S. Today: Sclerotic and Ineffective Government**

The chaos that characterizes today's political environment is caused by the political culture's increasing illiberalism and authoritarianism, including its hostility towards migrants and recalcitrant attitude towards America's leadership role in the international system.<sup>14</sup> This illiberalism is caused by many factors, including socio-economic and demographic insecurity; unequal public schools; unaffordable housing, higher education, and health insurance; and the perception that democratic institutions are hostage to special interests and therefore incapable of remediating these concerns.<sup>15</sup>

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ed. 2011) (outlining the tension between democratic legitimacy and administrative competence and flexibility).

<sup>14</sup> See Jennifer Rubin, Opinion, *Lawlessness and Chaos Go Hand In Hand*, WASH. POST (April 9, 2019), <https://www.washingtonpost.com/opinions/2019/04/09/lawlesslawl-chaos-go-hand-hand/?noredirect=on> (“Chaos is an authoritarian’s best weapon, allowing him to distract some and to make others pine for ‘order.’”) [<https://perma.cc/UB4D-W24H>]; see also PEW RESEARCH CTR., PUBLIC SEES U.S. POWER DECLINING AS SUPPORT FOR GLOBAL ENGAGEMENT SLIPS: AMERICA’S PLACE IN THE WORLD 2013 5 (2013) (discussing American opinions related to declining international respect for America).

<sup>15</sup> See M. Akram Faizer, *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PENN. ST. L. REV. 61, 92 (2016) (discussing the intersection of socio-



TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

The journalist and public intellectual George Packer has named this phenomenon the “unwinding” of American institutions, in that the U.S government is increasingly incapable of addressing its people’s problems and concerns.<sup>16</sup>

In his book *Political Order and Political Decay*, the highly regarded political scientist Francis Fukuyama effectively demonstrates that, while the U.S. dominates the international system, its electorate is increasingly illiberal and authoritarian due to institutional decay and sclerosis.<sup>17</sup> Fukuyama’s thesis is that political order in liberal democracies, such as the United States, rests on three pillars: namely, political accountability, a strong effective state, and the rule of law.<sup>18</sup> Accountability

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economic issues and education issues); Dalibor Rohac et al., *Drivers of Authoritarian Populism in the United States: A Primer*, CTR. FOR AM. POL. (May 10, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/05/10/450552/drivers-authoritarian-populism-united-states/> (stating that “the government is seen as unresponsive to citizens’ concerns and captured by well-organized special interests” and that, “[a]lthough the U.S. economy has recovered from the 2008 financial crisis, it is still characterized by sluggish productivity growth and looming structural change that threatens jobs at the lower end of the education and skills ladder.”) [<https://perma.cc/4YVW-KNCS>].

<sup>16</sup> George Packer, *The Unwinding: An Inner History of the New America* 3–4 (Farrar, Straus and Giroux, reprint ed. 2014).

<sup>17</sup> See FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 470–71 (Farrar, Straus and Giroux, reprint ed. 2015) (discussing the “decay” of American institutions, including the courts and Congress).

<sup>18</sup> See *id.* at 37 (“I believe that a political system resting on a balance among state, law, and accountability is both a practical and a moral necessity for all societies.”).

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

involves making rulers responsive to electorates, which means not only “free and fair multiparty elections,” but, according to Fukuyama, institutions of accountability supplemented by a central government that can get things done with rules and regulations that apply equally to everyone.<sup>19</sup> U.S. political development has gone into reverse because the state has become weaker, less efficient, and more corrupt.<sup>20</sup> One cause is growing economic inequality and the geographic concentration of wealth, which has allowed elites to purchase immense political power and manipulate the system to further their own interests.<sup>21</sup> Another cause is the permeability of American political institutions to interest groups, allowing an array of factions that “are collectively unrepresentative of the public as a whole” to exercise disproportionate influence and, in effect, control the government.<sup>22</sup> The result, according to Fukuyama, is a vicious cycle whereby the government is rendered incapable or unwilling to deal with national problems in a way that breeds a cynicism in the electorate that, in turn, leads to the state being starved of resources and authority, which furthers the incapacity problem.<sup>23</sup> Fukuyama’s thesis is that, although liberal democracy is the best form of government, it is, absent continuous reform, susceptible to the institutional decay and sclerosis.<sup>24</sup> This is what currently bedevils the U.S.

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<sup>19</sup> *Id.* at 24–25.

<sup>20</sup> *See id.* at 486–87.

<sup>21</sup> *Id.* at 465–66.

<sup>22</sup> *Id.* at 35–36.

<sup>23</sup> *Id.* at 503–04.

<sup>24</sup> *See id.* at 487 (“The underlying sources of political decay – intellectual rigidity and the influence of elite groups – are generic to democracies as a whole.”).

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

government.<sup>25</sup> Examples of such sclerosis include the hyper-partisan paradigm that characterizes today's Washington,<sup>26</sup> the systematic inability of Congress to enact substantive legislation to address public needs,<sup>27</sup> and the executive branch's tendency to compensate for legislative immobility by means of presidential executive orders,<sup>28</sup> broad agency rulemakings that are democratically illegitimate and, of course, current attacks on the administrative state and rule of law.<sup>29</sup>

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<sup>25</sup> *Id.* at 7, 37.

<sup>26</sup> See Richard H. Pides, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277 (2011) (“[M]ost of twentieth century American politics, while driven by its own conflict, had nothing like the political-party polarization that arose and has endured throughout our era.”).

<sup>27</sup> See, e.g., Drew Desilver, *A Productivity Scorecard for the 115th Congress: More Laws than Before, But Not More Substance*, FACT TANK: NEWS IN THE NUMBERS (Jan. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/> (providing a brief historical look at recent trends in substantive lawmaking) [<https://perma.cc/AT7V-5SEC>].

<sup>28</sup> See, e.g., Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOBAL L. STUD. 369, 387–88 (2017) (“These executive orders [related to stem cells] have expanded the power of the presidency by unilaterally implementing policy on a controversial issue without the participation of Congress. With Congress failing to take decisive action on this issue, recent presidents have used executive authority to further their policy preferences.”).

<sup>29</sup> See, e.g., Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 688–89 (“As rulemaking surged in the 1960s and 1970s and we *turned from an age of statutes to an era of regulation*, Presidents quickly recognized

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

How is this related to administrative law in a time of chaos? Because, the chaos that characterizes today's politics is due to broader trends in the U.S economy and society that destabilize American households in ways the government cannot address. The increased salience of controversies surrounding the administrative state in recent years are a symptom of a far broader problem of governmental incapacity. The goal for administrative law scholars should be to propose solutions to the problems of institutional decay and incapacity. My proposal is to resuscitate U.S. democracy by increasing the number of representatives in Congress and changing the way they are elected.

**III. Increase Membership in the House of Representatives**

The U.S. Constitution, Article I, Section 2, Clause 3 provides that the "Number of Representatives shall not exceed one for every thirty Thousand . . . ." <sup>30</sup> As such, based on a current population of 329 million, the Constitution would allow for 10,800 or so representatives. Although this number would be too large and unwieldy, the fact that the founders allowed for such an increase evidences their recognition that the legislative branch's size should increase over time with population growth and development. When Congress legislatively capped the number of representatives in 1929 via the Reapportionment Act, neither Alaska nor Hawaii were states entitled to Congressional

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that unelected officials were making inherently political policy judgments . . . ." (emphasis added).

<sup>30</sup> U.S. CONST., art. I, § 2, cl. 3.

*TENNESSEE JOURNAL OF LAW AND POLICY*  
VOLUME 14 | SUMMER 2019 | ISSUE 1

representation,<sup>31</sup> the nation's population was only 121.8 million and the federal government had yet to respond to the major challenges it has since confronted as the world's preeminent nation, namely the Great Depression, World War II, and the Cold War. The number of representatives has stayed the same, notwithstanding further challenges to national cohesion since the Cold War, including the 9/11 Terrorist Attacks, the U.S. invasions of Iraq and Afghanistan, the rise of China as an economic and geopolitical competitor, and the Financial Crisis that followed Lehman Brothers' collapse in September 2008.

James Madison, writing under the pen name Publius, outlined that the House of Representatives should have a high representation rate to properly manifest public opinion and this explains why Article I allows for legislative increases in the number of representatives.<sup>32</sup> The highly regarded economist, Bruce Bartlett, writes as follows:

Article I of the Constitution says that no congressional district should have more than 30,000 people. In the first Congress there were 65 members of the House, based on an estimate of the population in 1787. In the 1790 census the U.S. population was 3,929,214, and the size of the House was increased to 106--meaning that each congressman represented about 37,000 people. The voting population was much smaller because women and African

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<sup>31</sup> Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). Notice that Alaska became a state in 1958 and Hawaii became a state in 1959.

<sup>32</sup> THE FEDERALIST NO. 55 (James Madison).

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

Americans could not vote. Consequently, a member of the House knew a high percentage of voters personally, and they knew him.

As the nation grew and its population rose, the number of House members also increased, although Congress never even tried to maintain a ratio close to one member per 30,000 of population. After the 1910 census, the size of the House was increased from 394 to 435, at which point each congressman represented 211,000 people.<sup>33</sup>

To illustrate the scope of the challenge facing Congress today, the Reapportionment Act was signed into law when gross domestic product was \$105 billion and the size and scope of the federal government was negligible.<sup>34</sup> Today, that same number of representatives legislate for, fund, and oversee administrative agencies in a country with a gross domestic product of over \$21 trillion, a population that will soon reach 350 million and a network of global economic and military alliances that makes it the leading guarantor of international

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<sup>33</sup> Bruce Bartlett, *The Ultimate Congressional Reforms*, FORBES (Apr. 30, 2010, 10:00 AM), <https://www.forbes.com/2010/04/29/congress-constitution-voting-opinions-columnists-bruce-bartlett.html#2363a5247c7a> [https://perma.cc/DQZ9R4 B3].

<sup>34</sup> Josh Barro, *Lessons from the Decades Long Upward March of Government Spending*, FORBES (Apr. 16, 2012, 12:45 PM), <https://www.forbes.com/sites/joshbarro/2012/04/16/lessons-from-the-decades-long-upward-march-of-government-spending/#282bf16a2720> [https://perma.cc/2ZCF-YS5M].

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

prosperity and stability.<sup>35</sup> The federal government currently raises more than \$3.4 trillion in revenue and spends more than \$4.1 trillion a year.<sup>36</sup> The fact that Congress has failed to repeal or update the Reapportionment Act,<sup>37</sup> evidences a legislative branch that has failed to acknowledge both the absolute growth of government, both in terms of personnel and budgets, as well the increased complexity of all areas of American life. Dramatically increasing the number of representatives from 435 to 1250, such that each American would see their effective congressional representation triple, is a necessary first step towards

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<sup>35</sup>See Int'l Monetary Fund, Report for Selected Countries and Subjects (Oct. 2018), <https://www.imf.org/external/pubs/ft/weo/2018/02/weodata/weorept.aspx?pr.x=57&pr.y=14&sy=2017&ey=2018&scsm=1&ssd=1&sort=country&ds=.&br=1&c=111&s=NGDPD%2CPPPDP%2CNGDPDPC%2CPPPPC&grp=0&a=> (for information on the United States GDP) [<https://perma.cc/WT6Y-U8L4>]. The world's second largest economy, China, has a GDP of approximately \$12 trillion at market exchange rates, and the world's second largest developed economy, Japan, has a GDP of approximately \$5 trillion. *Population Comparison: China, EU, USA, and Japan*, WORLDOMETERS (2014), <http://www.worldometers.info/population/china-eu-usa-japan-comparison/> [<https://perma.cc/6869-4CBE>].

<sup>36</sup>USASpending.gov, <https://www.usaspending.gov/> [<https://perma.cc/6F3C-NFT2>]; *SOI Tax Stats – IRS Data Book*, INTERNAL REVENUE SERV., <https://www.irs.gov/statistics/soi-tax-stats-irs-data-book> [<https://perma.cc/JB93-JXZ3>].

<sup>37</sup> See Reapportionment Act of 1929, ch. 28, 46 Stat. 21, 2 U.S.C. § 2a; see also *The Permanent Apportionment Act of 1929*, HIST., ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1901-1950/The-Permanent-Apportionment-Act-of-1929/> (discussing how the 1929 Act capped the number of seats at 435) [<https://perma.cc/H43A-B7FG>].

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

effectively combating institutional sclerosis and government incapacity because increasing the number of available congresspersons for administrative oversight and the development of legislative expertise, enables Congress to be better positioned to effectively act in the public interest.<sup>38</sup>

Increasing House membership to 1250 would provide Americans with one representative per 250,000 inhabitants, which more closely approximates the rate found in other mature democracies.<sup>39</sup> For example, Canada has 338 commons members for a population of 36.3 million, which translates into one Member of Parliament for every 107,000 inhabitants.<sup>40</sup> France has 577 National Assembly deputies for a population of approximately 66.9 million, or approximately one for every 116,000 inhabitants,<sup>41</sup> and the United Kingdom has 650 House of Commons members<sup>42</sup> for a population

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<sup>38</sup> Ryan Grim & Sabrina Siddiqui, Call Time for Congress Shows How Fundraising Dominates Bleak Work Life, HUFFPOST (Dec. 6, 2017, 7:30 AM), [https://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising\\_n\\_2427291.html](https://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html) (showing how Congress members are expected to spend the vast majority of their workdays on fundraising) [<https://perma.cc/6L26-3PPM>].

<sup>39</sup> Bartlett, *supra* 34.

<sup>40</sup> Bill Freeman, Democracy Rising: Politics and Participation in Canada 163 (2017).

<sup>41</sup> Bartlett, *supra* note 34; *Demographic Balance Sheet 2018*, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES (Jan. 15, 2019), <https://www.insee.fr/en/statistiques/2382601?sommaire=2382613> [<https://perma.cc/778R-GU8Q>].

<sup>42</sup> *Electoral Statistics, UK: 2013*, OFFICE FOR NAT'L STATISTICS, <https://www.ons.gov.uk/peoplepopulationandcommunity/elections/electoralregistration/bulletins/electoralstatisticsforuk/2014-05-01> [<https://perma.cc/86UL-9Y72>].



of 66 million, which translates into one member for every 101,500 inhabitants.<sup>43</sup> Western Europe's most economically powerful state,<sup>44</sup> Germany, has 709 representatives<sup>45</sup> in its lower house, or Bundestag, for a population of 83 million, which translates into one representative per 116,600 inhabitants.<sup>46</sup>

By increasing the size of the House of Representatives, U.S. congresspersons would immediately have more manageable districts that would enable them to better satisfy constituency obligations and still have time for administrative oversight, public policy analysis, and legislation.<sup>47</sup>

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<sup>43</sup> See *Population Estimates for the UK, England and Wales, Scotland and Northern Ireland: Mid-2017*, OFF. FOR NAT'L STAT. (June 28, 2017), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2017#uk-population-reaches-66-million> [https://perma.cc/3MHW-R7FG].

<sup>44</sup> See *Germany Country Profile*, BBC NEWS (Sept. 17, 2018), <https://www.bbc.com/news/world-europe-17299607> (referring to Germany as Europe's "economic giant").

<sup>45</sup> *Distribution of Seats in the 19th German Bundestag*, DEUTSCHER BUNDESTAG (Feb. 1, 2019), <https://www.bundestag.de/en/parliament/plenary/19thbundestag-245692>.

<sup>46</sup> See Thomas Seythal, *Migration Pushes German Population to Record High of 83 Million*, REUTERS (Jan. 25, 2019, 3:38 AM), <https://www.reuters.com/article/us-germany-population/migration-pushes-german-population-to-record-high-of-83-million-idUSKCN1PJ0PA> ("Germany's population last year reached a record high of 83 million people due to positive net migration that easily offset a chronic deficit in births . . .") [https://perma.cc/9D2L-TNZL].

<sup>47</sup> See DANA MASON & ADAM LIOZ, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY 46 (2005) (discussing unsuccessful campaigns that trace that lack of success to Congressional districts that tend to be so large, congressmen tend to spend inordinate amounts

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

Indeed, contrary to popular perception, congresspersons are extremely hardworking individuals who do their best for their constituents and country.<sup>48</sup> Members typically work more than 70 hours per week when Congress is in session, 59 hours per week when not in session and sacrifice family time to fulfill work responsibilities, which include typically spending 40 weekends per year in their home districts.<sup>49</sup> Congressmen begin their day at 6 or 7 a.m. and end their workday at around 8 p.m., with bedtime reading required to prepare for the next day.<sup>50</sup> These work hours are often increased because congresspersons, who typically have their families reside in their home districts as opposed to relocating with them to pricey Washington, D.C., do not have the normal work-life balance challenges.<sup>51</sup> This dynamic furthers political polarization because congresspersons who live apart from their families tend to spend time either with fellow-caucus members when in Washington or within their own relatively politically homogeneous constituencies when the House is not in session.<sup>52</sup> Members are also required to juggle conflicting committee meetings in view of their large and time-consuming committee obligations.<sup>53</sup> They spend only 35% of their time on legislative and policy work during

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of time on campaign related activities, with the recognition that freshman congressman will have to spend many hours each day “cold calling” donors for re-election purposes).

<sup>48</sup> Cong. Mgmt. Found. & Soc’y for Human Res. Mgmt., *Life in Congress: A Member’s Perspective* 4–5 (2013).

<sup>49</sup> *Id.* at 4–5.

<sup>50</sup> *Id.* at 11.

<sup>51</sup> *Id.* at 12–13.

<sup>52</sup> *See id.* at 18.

<sup>53</sup> *Id.* at 11.

session.<sup>54</sup> A study on the life of the typical congressman concludes as follows:

While few Members of Congress expressed satisfaction with the amount of time they spend with their families, most accepted their prioritization of work over personal life and the extraordinary long hours in their work week. As noted in this and other research, this kind of persistent behavior and attitude in a workforce can have negative consequences. In a normal job setting, this could lead to underperformance or job burnout. In Congress, this also could lead to inefficient legislative processes, poorer constituent services, and ineffective public policymaking.<sup>55</sup>

Increasing the size of Congress would enable more congressmen to serve sparsely populated, hard to reach states in the West. For example, Wyoming is currently represented by one representative because its population is low and the current apportionment formula provides,<sup>56</sup> in effect, for one representative for every 750,000 inhabitants.<sup>57</sup> Were my proposal adopted, Wyoming's

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<sup>54</sup> *Id.* at 6, 18.

<sup>55</sup> *Id.* at 37.

<sup>56</sup> For how apportionment is calculated, see *Congressional Apportionment: Computing Apportionment*, U.S. CENSUS BUREAU (Feb. 4, 2013), <https://www.census.gov/population/apportionment/about/computing.html> [<https://perma.cc/WZF5-49VW>].

<sup>57</sup> See Stephen Caruso, *750,000-to-1: The Ratio at the Heart of America's Electoral Issues*, PITT NEWS (Nov. 20, 2015), <https://pittnews.com/article/65712/opinions/750000-to-1-the->

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

congressional representation in the House would triple, which would enable its congressional delegation to effectively share the burden of constituency service in a large state that is difficult to access by commercial flight from Washington.<sup>58</sup> It would also concomitantly reduce fundraising demands for each representative and make time available for other aspects of the job including legislative drafting, public policy specialization, administrative oversight and committee work.<sup>59</sup> While Congress cannot possibly be expected to match the staffing or expertise of specialists within administrative agencies, Congress is needlessly hamstrung by the lack of available personnel.

**IV. Change from Single Member Plurality  
Districting to Proportional Representation**

Single-member plurality districting worsens this problem. Paradigmatic in much of the English-speaking world, single-member plurality districts have the advantage of simplicity and historical pedigree. They also engender a proximity between legislators and their constituents because each representative is responsible

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ratio-at-the-heart-of-americas-electoral-issues/ (stating that “the average congressman represents 733, 104 citizens”) [<https://perma.cc/EAD3-WURJ>].

<sup>58</sup> Flights to Wyoming from Washington, D.C. typically require two or more transfers at hub airports.

<sup>59</sup> *E.g.* Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFPOST (Jan. 8, 2013), [https://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising\\_n\\_2427291.html](https://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html) (the Democratic Congressional Campaign Committee advises freshman congressmen to spend at least 4 hours each day “cold-calling” potential donors to solicit re-election funds.) [<https://perma.cc/4TGE-2QXJ>].

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

for a defined geographical space.<sup>60</sup> The U.S. Constitution does not require single-member plurality districting. Article I, Section 2 provides that the “House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature” and Article I, Section 4 provides “[T]he manner of elections are to be determined by the State legislature.”<sup>61</sup> Congress, for the first time, required single-member plurality districting via the Apportionment Act of 1842,<sup>62</sup> which set House membership at 223 and contained a requirement of single-member districts.<sup>63</sup> The only requirement of single-member districts was, at the time, seen as an improvement over at-large districts, because at-large districts deprived minority perspectives from representation, and proportional representation was first introduced in mid-19<sup>th</sup> century Denmark.<sup>64</sup>

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<sup>60</sup> This is because single member plurality districts provide constituents with one directly elected Representatives in a defined geographical area that they can turn to for constituency services.

<sup>61</sup> U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 4, cl. 1.

<sup>62</sup> See Royce Crocker, CONG. RESEARCH SERV., R42831, CONGRESSIONAL REDISTRICTING: AN OVERVIEW 4 (2012) (discussing the provisions of the Act).

<sup>63</sup> See *Apportionment Legislation 1840-1880*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/reference/apportionment/apportionment\\_legislation\\_1840\\_-\\_1880.html](https://www.census.gov/history/www/reference/apportionment/apportionment_legislation_1840_-_1880.html) [https://perma.cc/FJ6J-AGRA].

<sup>64</sup> See, e.g., Kenneth E. Miller, *The Danish Electoral System*, 18 PARLIAMENTARY AFF. 71, 71 (1964) (stating that the first elections in Denmark to feature proportional representation occurred in 1856); see also Voting Rights Act, § 2, codified as 52 U.S.C. § 10508 (2012 & Supp. V 2017) (for an example of how Congress addressed voter assistance); Crocker, *supra*

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

Congressional apportionment acts, which historically followed the decennial census, initially gave states some leeway to use at-large districts, but Congress, in 1967, enacted the Uniform Congressional District Act allowing only for single member plurality districting.<sup>65</sup> This legislation supplemented the 1929 Reapportionment Act, and was enacted in response to a concern that the Supreme Court's decisions in *Baker v. Carr*,<sup>66</sup> *Wesberry v. Sanders*,<sup>67</sup> and *Reynolds v. Sims*,<sup>68</sup> mandating equally sized legislative districts based on the Fourteenth Amendment's Equal Protection Clause as well as the Voting Rights Act of 1965's mandate of ending racial discrimination in franchise rights, could be undermined by recalcitrant states resorting to the use of at-large districts as a second-generation voting barrier.<sup>69</sup> The

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note 63, at 3–5 (detailing the history of congressional redistricting); Douglas J. Amy, *A Brief History of Proportional Representation in the United States*, FAIR VOTE, [https://www.fairvote.org/a\\_brief\\_history\\_of\\_proportional\\_representation\\_in\\_the\\_united\\_states](https://www.fairvote.org/a_brief_history_of_proportional_representation_in_the_united_states) [https://perma.cc/73UD-LSJK].

<sup>65</sup> See Act of Dec. 14, 1967, Pub. L. No. 90–196, 81 Stat. 581 (providing for single-member apportionment for the House of Representatives); *Congressional Apportionment*, HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Apportionment/Apportionment/> [https://perma.cc/M68R-DU9B].

<sup>66</sup> *Baker v. Carr*, 369 U.S. 186 (1962)

<sup>67</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964)

<sup>68</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964)

<sup>69</sup> See Crocker, *supra* note 63, at 4 (stating that the 1967 legislation was the first legislation since 1929 to address congressional districting); *see also* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (concluding that legislative districts must be roughly equal in population to satisfy the Fourteenth Amendment's Equal Protection Clause); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (mandating equal apportionment of House of Representatives districts); *Baker v. Carr*, 369 U.S.

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

reason at-large districting was, at the time, seen as an effective means of undermining racial minority suffrage rights is straightforward. Assume a state is allotted five representatives and that its population is 60% white and 40% black with complete racial polarization in living patterns and political preference. Under single member plurality districting, whites would elect three white representatives while blacks would elect two. Under an at-large system, all voters in the state would vote for five candidates, resulting in white-preferred candidates winning all five seats, presumably by a 60 to 40 percent margin.

Unfortunately, single member plurality districting has become, with advances in technology and our greater understanding of voting patterns, a means of distorting election results and depressing voter turnout, especially in “safe districts.”<sup>70</sup> To illustrate the scale of the problem, according to the Cook Political Report, only 50 of 435 House districts can be characterized as “toss up or worse” for the incumbent office holder.<sup>71</sup> This

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186, 237 (1962) (concluding legislative districting is justiciable under the Fourteenth Amendment’s Equal Protection Clause).

<sup>70</sup> See Bernard Grofman & Peter Selb, *Turnout and the (Effective) Number of Parties at the National and District Levels: A Puzzle-Solving Approach*, 17 PARTY POLITICS 93, 94 (2011) (although the authors seek to partially refute this assertion throughout the article, it is an expectation the authors highlight).

<sup>71</sup> *2018 House Race Ratings*, COOK POL. REP. (Nov. 5, 2018), <https://cookpolitical.com/ratings/house-race-ratings/187562> [<https://perma.cc/7CXY-YXV7>]; see also Jasmine C. Lee & Alexander Burns, *2018 Midterm Elections: House Races to Watch Right Now*, NY TIMES (Nov. 5, 2018), <https://www.nytimes.com/interactive/2018/us/elections/house-race-ratings.html> [<https://perma.cc/4UUN-LL6L>].

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

exacerbates partisanship by incentivizing members to fear partisan primary challengers from their same party over general election opponents.<sup>72</sup> Single member districting also encourages regionalism to the detriment of national cohesion by exaggerating regional political culture differences and blanching the political diversity found within states and regions.<sup>73</sup>

Single member districting leads inexorably to partisan gerrymandering, which is defined as the creation of Congressional districts that are politically uncompetitive at general election based on voter demographics and historical voting patterns.<sup>74</sup> It has

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<sup>72</sup> See Fred Dews, *A Primer on Gerrymandering and Political Polarization*, BROOKINGS NOW (July 6, 2017), <https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/> (“[P]artisan attachments powerfully shape political perceptions, beliefs and values, and *incumbents* enjoy advantages well beyond the way in which their districts are configured.” (emphasis added)) [<https://perma.cc/7MBH-4FXY>].

<sup>73</sup> *Id.* (“Most voters have sorted themselves into a party by their ideological views, and their decisions on where to reside have promoted a geographical segregation of like-minded citizens.”).

<sup>74</sup> Nina Totenberg, *Partisan Gerrymandering: How Much is Too Much?*, NPR (Oct. 3, 2017), <https://www.npr.org/2017/10/03/555425809/supreme-court-set-to-consider-partisan-gerrymandering>(defining “partisan gerrymandering” as “the practice of drawing legislative and congressional district lines to maximize and perpetuate the power of an incumbent political party.”) [<https://perma.cc/T3CS-ZVKD>]; see *Vieth v. Jubilerer*, 541 U.S. 267, 281 (2004) (plurality opinion by Justice Scalia concluding partisan gerrymandering claims are per se non-justiciable and concurring opinion by Justice Kennedy that leaves room for partisan gerrymandering claims to be adjudicated on equal protection grounds). With Justice Kennedy being replaced by



TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

created a bizarre, quasi-democratic world where politicians choose which voters they represent.<sup>75</sup> Partisan gerrymandering has indeed become exceedingly problematic and is being used to effectively gut minority franchise rights by enabling state legislatures to hire election experts to create legislative districts that, in effect, “game the system” to predetermine election outcomes and dilute the political power of racial minority voters through the creation of racially and politically homogeneous constituencies.<sup>76</sup> Just this summer, the U.S. Supreme Court concluded that partisan gerrymandering claims are non-justiciable political questions that are beyond the reach of the federal courts.<sup>77</sup> A concomitant of this process is voter apathy, brought about due to the “wasted vote” phenomenon

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Justice Brett Kavanaugh, my expectation is that partisan gerrymandering claims will now be treated as nonjusticiable.

<sup>75</sup> Wayne Dawkins, *In America, Voters Don't Pick Their Politicians. Politicians Pick Their Voters*, GUARDIAN (Oct. 9, 2014), <https://www.theguardian.com/commentisfree/2014/oct/09/virginia-gerrymandering-voting-rights-act-black-voters> [<https://perma.cc/UQ67-4VF7>].

<sup>76</sup> This is especially so since the U.S. Supreme Court invalidated Voting Rights Act Section 4, which had provided the coverage formula for determining the jurisdictions needing to obtain federal preclearance before implementing voting procedure changes. See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). See generally M. Akram Faizer, *Reinforced Polarization: How the Roberts Court's Recent Decision to Invalidate the Voting Rights Act's Coverage Formula Will Exacerbate the Divisions that Bedevil U.S. Society*, 45 CUMB. L. REV. 303, 303, 317 (2014) [hereinafter *Reinforced Polarization*].

<sup>77</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (two cases that were merged by the Court, concluding partisan gerrymandering claims present political questions that are beyond the reach of federal courts).

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

within each district. To explain, because there is little to no chance of a Democrat winning my East Tennessee Congressional District or the state for U.S. Senate or Electoral College purposes, many Democratically-inclined voters in the constituency choose not to vote or vote in the Republican primary.<sup>78</sup> Studies evidence that geographical polarization, in conjunction with partisan districting, has created a phenomenon whereby Democratic congressional candidates would have to win the nationwide popular vote by at least seven percentage points to form a majority in the House of Representatives.<sup>79</sup> The inequity of this outcome is evidenced by the fact the Republicans formed sizeable majorities after the 2010, 2012, 2014, and 2016 elections, although they won a bare plurality of the national popular vote.<sup>80</sup> Democrats retook the House after the 2018 mid-term elections but needed a popular vote

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<sup>78</sup> See Peter Soderlund, *Candidate-Centred Electoral Systems and Voter Turnout*, 40 WEST EUR. POL. 516, 517 (2017) (arguing that empirical evidence proves that voter turnout decreases when campaigns are “candidate-centered”).

<sup>79</sup> Elia Nilsen, *A New Report Says Democrats Need to Win the Popular Vote by 11 Points to Retake the House*, VOX (Mar. 27, 2018, 10:30 AM), <https://www.vox.com/policy-and-politics/2018/3/27/17144198/gerrymandering-brennan-center-report-midterms-democrats-house-2018> [<https://perma.cc/69ZW-78MW>].

<sup>80</sup> See *America’s Electoral System Gives the Republicans Advantages Over Democrats*, ECONOMIST (July 12, 2018), <https://www.economist.com/briefing/2018/07/12/americas-electoral-system-gives-the-republicans-advantages-over-democrats> [<https://perma.cc/82R4-ZEAP>]; see also Molly E. Reynolds, *Republicans in Congress Got a “Seats Bonus” This Election (Again)*, BROOKINGS (Nov. 22, 2016), <https://www.brookings.edu/blog/fixgov/2016/11/22/gop-seats-bonus-in-congress/> [<https://perma.cc/3EFQ-SVZT>].

majority of 8.6% to produce this result.<sup>81</sup> This asymmetry undermines democratic accountability. According to a detailed study on the negative consequences of plurality districting:

The chances of any one vote affecting the outcome are small in all mass elections. However, in plurality systems there is noticeably less incentive to vote because in many places it is obvious who will win locally. In contrast under proportional representation it is never clear who will be allocated the final seat in any particular district. Meanwhile, across a country as a whole, the tendency for plurality rule to manufacture a majority for the largest party in the legislature makes ‘landslides’ more likely. It may be particularly disheartening for those with little knowledge or interest in politics to face an uncompetitive election.<sup>82</sup>

To illustrate, North Carolina, even after the 2018 Democratic wave election, currently has thirteen Representatives,<sup>83</sup> eight of whom are Republicans, notwithstanding the fact the Governor is a Democrat and

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<sup>81</sup> *2018 House Popular Vote Tracker*, COOK POL. REP. (Jan. 10, 2019), <https://cookpolitical.com/analysis/house/house-charts/2018-house-popular-vote-tracker> [<https://perma.cc/PP3U4-LVG>].

<sup>82</sup> Fisher, et al., *Disengaging Voters: Do Plurality Systems Discourage the Less Knowledgeable from Voting?*, 27 *ELECTORAL STUD.* 89, 90–91 (2008).

<sup>83</sup> *North Carolina*, GOVTRACK, <https://www.govtrack.us/congress/members/NC#representatives> [<https://perma.cc/R4TW-6UST>].

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

the aggregate vote count is typically evenly divided between the major parties.<sup>84</sup> This inequitable result engenders voter apathy<sup>85</sup> and distorts North Carolina's political culture to the right notwithstanding the fact voter preferences are more nuanced. The end result is a relatively monographic representation paradigm that masks not only North Carolina's, but the entire southeast region's political diversity. The same holds true in more conservative states. South Carolina, for example, currently elects seven Representatives, five of whom are Republican.<sup>86</sup> This incorrectly creates a perception that South Carolina is a politically homogeneous state when, in reality, more than 40% of South Carolinians voted Democratic.<sup>87</sup> Under a proportional representation paradigm, where political parties would be awarded seats based on the proportion of the two-party vote, Democrats would potentially hold three of South Carolina's seven House seats. The reverse would obviously apply in majority Democratic states such as California, Maryland, New York, and New Jersey.

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<sup>84</sup> See *Who's Winning in North Carolina*, WASH. POST (Dec. 5, 2018, 12:37 PM), [https://www.washingtonpost.com/2016-election-results/north-carolina/?utm\\_term=.722d7897bfc3](https://www.washingtonpost.com/2016-election-results/north-carolina/?utm_term=.722d7897bfc3) (<https://perma.cc/8G32-D9DC>).

<sup>85</sup> See Soderlund, *supra* note 79, at 517 (discussing lower voter turnout rates in "candidate-centered" elections).

<sup>86</sup> *South Carolina*, GOVTRACK, <https://www.govtrack.us/congress/members/SC#representatives> [<https://perma.cc/JT2Q-WX8Z>].

<sup>87</sup> See *Who's Winning South Carolina*, WASH. POST (Nov. 8, 2018, 11:05 PM), [https://www.washingtonpost.com/2016-election-results/south-carolina/?utm\\_term=.6e3601c59c01](https://www.washingtonpost.com/2016-election-results/south-carolina/?utm_term=.6e3601c59c01) [<https://perma.cc/W2G9-FF3Z>].

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

Because of the country's lamentable correlation between race and partisanship,<sup>88</sup> the districting process has been used as an effective means of diluting racial minority voting power as state legislatures "crack" and "pack" minority voters to predetermine the results of most House election races.<sup>89</sup> Indeed, single member plurality districting, as applied, is now an effective "second generation barrier" to voting that nullifies the Voting Rights Act's effectiveness after *Shelby County v. Holder* invalidated the VRA's preclearance provision, which had been its most effective provision.<sup>90</sup> Thomas Edsall writes:

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<sup>88</sup> Over the past twelve Presidential elections, African Americans voted for the Democratic Party candidate by an average margin of 87% to 13%. Perry Bacon, Jr. & Dhrumil Mehta, *The Diversity of Black Political Views*, FIVETHIRTYEIGHT (Apr. 6, 2018, 5:56 AM), <https://fivethirtyeight.com/features/the-diversity-of-black-political-views> [<https://perma.cc/49NS-QKML>]. Fifty-four percent of whites favor the Republican Party. *Party Affiliation Among Voters: 1992-2016*, PEW RESEARCH CENTER (Sept. 13, 2016), <http://www.people-press.org/2016/09/13/2-party-affiliation-among-voters-1992-2016/> [<https://perma.cc/YD63-YFTE>].

<sup>89</sup> "Cracking" involves spreading minority or ideologically cohesive voters over many districts, while "packing" involves artificially concentrating these voters into a single district to reduce their influence in other districts. See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 551–53 (2004) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 286 n.7 (2004) (plurality opinion)).

<sup>90</sup> See *Reinforced Polarization*, *supra* note 77, at 306, 326–27. In *Shelby County v. Holder*, 570 U.S. 529 (2013), the U.S. Supreme Court invalidated the Voting Rights Act's coverage formula for determining the states that needed preclearance before implementing voting procedure changes. *Holder*, 570 U.S. at 557. This had been the VRA's most effective provision because it required jurisdictions that had a pattern and

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

Republicans in control of redistricting have two goals: the defeat of white Democrats, and the creation of safe districts for Republicans. They have achieved both of these goals by increasing the number of districts likely to elect an African-American. Black voters are gerrymandered out of districts represented by whites of both parties, making the Democratic incumbent weaker and the Republican incumbent stronger.<sup>91</sup>

In short, since the Voting Rights Act's effective demise, Republicans nationwide have used the districting process to effectively dilute Democratic power by making it a racial minority party.<sup>92</sup> Edsall writes:

The long-term importance of Republican success controlling the redistricting process is that it provides the party with a tool to counter the growing strength of black, Hispanic and Asian-American voters. Republican control of

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practice of discrimination in the provision of franchise rights to seek preclearance from either the U.S. Attorney General or the U.S. District Court for the District of Columbia before implementing voting procedure changes. With this preclearance no longer applicable, victims of franchise discrimination, who typically lack financial resources, must commence suit at their own expense to police voting rights in a country with over four thousand voting jurisdictions.

<sup>91</sup> Thomas B. Edsall, Opinion, *The Decline of Black Power in the South*, N.Y. TIMES (July 20, 2013, 9:34 PM), <https://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/> [https://perma.cc/7ZDR-N9V9].

<sup>92</sup> *Id.*

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

Congressional district lines in 2012 allowed the party to maintain a 34-seat majority in the United States House of Representatives while winning one million fewer votes than the Democrats over all.

As the United States moves inexorably toward becoming a minority majority country, the Republican Party needs every available weapon to survive what it perceives as a siege. The *Shelby County v. Holder* decision issued by the five conservative members of the Supreme Court gives Republicans even wider latitude to use the manipulation of district lines through “bleaching,” “packing” and “cracking,” in order to maintain its control over state legislatures. This, in turn, grants Republicans control of the House of Representatives.<sup>93</sup>

Edsall concludes:

Democrats often sound gleeful about the idea of Republicans’ becoming the white party. They have successfully elected and re-elected the nation’s first black president. But in the South and in some Northern states, the Republican takeover of state legislatures has left black and Hispanic citizens without effective representation – representation that can come only from the majority party. The racialization of the two parties, most noticeable in the South, will work to keep

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<sup>93</sup> *Id.* (emphasis added).

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

minority Americans at the margins of power, hindered from shaping the policies that determine social and economic mobility and the overall quality of life.<sup>94</sup>

The result is that there are currently only five African American chairs of any congressional committees or subcommittees in the House of Representatives.<sup>95</sup> At the state level, although the number of African Americans legislators in the South has increased “from fewer than five to 313,” nearly all of these elected officials are Democrats, which, because it is the South’s minority political party, deprives African Americans of real political power.<sup>96</sup> Single member plurality districting effectively denies political representation to many Americans, encourages political cynicism and apathy within the broader electorate, and exacerbates regional and political polarization by masking the diversity found within each state and region.<sup>97</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> See *Black Americans Who Have Chaired Standing Committees in the U.S. House, 1949-Present*, HISTORY, ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Chairs-of-Congressional-Committees/> [<https://perma.cc/Q6QP-DZTA>].

<sup>96</sup> Thomas B. Edsall, Opinion, *The Decline of Black Power in the South*, NY Times (July 10, 2013, 9:34 PM) [<https://perma.cc/7376-5YXW>]

see also Joshua Zingher, *Whites Have Fled the Democratic Party. Here’s How the Nation Got There*, Wash. Post (May 22, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/22/whites-have-fled-the-democratic-party-heres-how-the-nation-got-there/?noredirect=on&utm\\_term=.6354a6285815](https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/22/whites-have-fled-the-democratic-party-heres-how-the-nation-got-there/?noredirect=on&utm_term=.6354a6285815) [<https://perma.cc/H8RH-J5TP>].

<sup>97</sup> Reinforced Polarization, *supra* note 77, at 315.



Changing our election framework from a single-member plurality paradigm to a proportional representation framework would, in the end, dramatically increase voter participation rates and reduce political and racial polarization.<sup>98</sup> It would also reveal the political heterogeneity within states that are currently perceived to be politically monographic, i.e. either safely “red” or “blue.” This will result in better, more bipartisan lawmaking and administrative oversight by legislators who are incentivized to focus on the public interest as opposed to the parochial and partisan.

#### **V. Increasing the Size of the House of Representatives and Changing to Proportional Representation Will Facilitate Administrative Oversight**

Much of the instability in administrative law stems from a crabbed reading of the Constitution and the federal courts’ refusal to countenance innovative means of holding administrative agencies accountable.<sup>99</sup> Although administrative agencies’ consistent pattern of enacting legislative rules based on broad congressional delegations, is partially necessitated by the inherent difficulty of legislating for a continent-sized market economy that is subject to rapid technological changes, it must also be recognized that legislative immobility and the lack of legislative guidance to agencies is facilitated by an institutionally understaffed and hyper-polarized

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<sup>98</sup> *See id.* at 326–27.

<sup>99</sup> *See generally* *INS v. Chadha*, 462 U.S. 919, 956 (1983) (precluding use of the legislative veto to hold administrative agencies to account on separation of powers grounds).

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

legislative branch.<sup>100</sup> A better resourced and more cohesive Congress will more effectively write legislation that provides guidance to agencies and hold them to account by way of administrative oversight, i.e. by providing Congress with greater resources, agencies will, in the end, be more responsive and accountable.

It is a paradox of American history that before the Executive Branch grew geometrically as a result of the Progressive Era and New Deal, membership in the House of Representatives was artificially capped at 435.<sup>101</sup> This limitation has become malignant over time, especially when conjoined with the baneful effects of single-member plurality districting. Increasing the number of representatives and changing our method of electing legislators to proportional representation will increase legislative effectiveness and therefore decrease the likelihood of administrative overreach.<sup>102</sup>

Congress's attempts to hold agencies to account via legislative innovations have been ineffective. In *INS v. Chadha*,<sup>103</sup> the Supreme Court, citing an ostensible separation of powers transgression by the legislative branch, invalidated Congress's use of a unicameral legislative veto to nullify an administrative action by majority vote. The Congressional Review Act (CRA)<sup>104</sup> was enacted in 1996 and requires agencies to submit all

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<sup>100</sup> See generally *Congress's Authority to Influence and Control Executive Branch Agencies*, CONG. RESEARCH SERV. (Dec. 19, 2018), <https://crsreports.congress.gov/product/pdf/R/R45442> [<https://perma.cc/Q3VN-VXP5>].

<sup>101</sup> See generally Reapportionment Act of 1929, ch. 28, 46 Stat. 21, 2 U.S.C. § 2a.

<sup>102</sup> See Reinforced Polarization, *supra* note 77, at 350.

<sup>103</sup> 462 U.S. 919 (1983).

<sup>104</sup> 5 U.S.C. §§ 801-808 (2012).

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

major regulations to Congress before implementation.<sup>105</sup> The evidence, though, demonstrates that agency behavior has been unaffected by the CRA.<sup>106</sup> To demonstrate why, Congress, under the CRA, has only 60 legislative days to pass a joint resolution of disapproval to keep a particular regulation from going into effect.<sup>107</sup> This is a manifestly illegitimate and unworkable paradigm, largely because the congressional coalition that enacted the original legislation may not be in place to disapprove of an illegitimate final rulemaking. It is also entirely infeasible for Congress to review all 4,000 plus annual rulemakings to effectively preclude administrative overreach.<sup>108</sup> Between 1996 and 2008, federal agencies submitted nearly 48,000 final rules for Congressional review, and a mere 47 joint resolutions of disapproval, regarding 35 rules, were introduced.<sup>109</sup> “A grand total of one regulation has been disapproved,” and this was the Occupational Safety and Health Administration’s “ergonomics rule,” which was “finalized at the end of the Clinton Administration” and jointly disapproved by both Houses of the subsequent Congress

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<sup>105</sup> *Id.* § 801. Major regulations are those with an annual impact of at least \$100 million to the U.S. economy. *Id.* § 804.

<sup>106</sup> *Id.* (quoting Cornelius M. Kerwin & Scott R. Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy* 141 (3d ed. 2003)).

<sup>107</sup> *Id.* § 801

<sup>108</sup> See Clyde Wayne Crews, Jr., *How Many Rules and Regulations Do Federal Agencies Issue?*, FORBES (Aug. 15, 2017, 12:48 PM), <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/#7e8ac24c1e64> [https://perma.cc/QYN6-JU5F]. By contrast, Congress typically enacts only 250 or so pieces of legislation on an annual basis.

<sup>109</sup> BREYER, ET AL., *supra* note 14, at 84.

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

and an incoming President of a different political party, namely George W. Bush.<sup>110</sup>

Requiring joint resolutions of approval such as the proposed Regulations from the Executive in Need of Scrutiny (REINS) Act<sup>111</sup> is similarly unworkable. Unlike the CRA which requires joint disapproval of a proposed major regulation<sup>112</sup>, REINS would reverse this presumption and instead require joint bicameral approval of all proposed rulemakings prior to finalization.<sup>113</sup> The problem, once again, is that Congress would be overwhelmed by the task of approving 4,000 or so annual rulemakings,<sup>114</sup> thereby creating a bottleneck to preclude agencies from timely action. Rather than implement novel and infeasible means of holding agencies to account, increasing the number of and improving the method of electing representatives will free resources to facilitate administrative oversight in three ways. First, it would enhance congressional resources to properly draft and enact legislation with proper instruction given to adequately guide agencies as they undertake the rulemaking process. Second, a better staffed and less partisan Congress will better oversee agencies to deter overreach. Finally, it increases the likelihood of Congress enacting, amending, or repealing legislation as needed. This would take pressure off agencies to, in effect, “fill” the legislative void by way of agency rulemakings and guidance memos that, at their

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<sup>110</sup> *Id.*

<sup>111</sup> *See* BREYER ET AL., *supra* note 14, at 85. Regulations from the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. (2011).

<sup>112</sup> *See generally* 5 U.S.C. §§ 801-808 (2012).

<sup>113</sup> H.R. 10.

<sup>114</sup> *See* Crews, Jr., *supra* note 109 (internal citations omitted) (the “Public Laws vs Agency Rules by Category” chart shows the number of rules adopted per year).

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

core, test separation of powers principles and erode trust in government. Two examples of congressional paralysis leading to administrative overreach are Congress's: 1) failure to adequately draft the Patient Protection and Affordable Care Act of 2010 (ACA),<sup>115</sup> which has resulted in perceived administrative overreach; and 2) failure to reach a bipartisan compromise on immigration, which precipitated President Obama's Deferred Action for Childhood Arrivals (DACA) Executive Order.<sup>116</sup>

With respect to the ACA, a Democratic Congress drafted and enacted the legislation without any Republican support in the House of Representatives which, at the time, had lopsided 257-199 Democratic majority.<sup>117</sup> This margin was largely because of the 2006 and 2008 "wave" elections that were based on, among other things, public disapproval of the Bush Administration's response to Hurricane Katrina, its handling of the Iraq and Afghan wars and the Financial Crisis that followed Lehman Brothers' bankruptcy in September 2008. Unfortunately, these wave elections came at the expense of moderate Republicans who might have cooperated with Democrats to enact an effective

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<sup>115</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148., 124 Stat. 119 (2010).

<sup>116</sup> Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. DEPT. HOMELAND SEC. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/3ZR3-HA5K>].

<sup>117</sup> Gary Price & Tim Norbeck, *A Look Back at How the President was Able to Sign Obamacare Into Law Four Years Ago*, FORBES (Mar. 26, 2014, 1:27 PM), <https://www.forbes.com/sites/physiciansfoundation/2014/03/26/a-look-back-at-how-the-president-was-able-to-sign-obamacare-into-law-four-years-ago/#113dd648526b> [<https://perma.cc/MLA3-CUDU>].

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

health care compromise because bipartisan-inclined moderates in “swing” districts lost their reelection bids.<sup>118</sup> Eventually, 219 Representatives voted for the ACA, while 212 voted against, with no Republicans voting for the measure.<sup>119</sup> This, along with the fact the law was enacted via reconciliation to avoid a Senate filibuster,<sup>120</sup> created a perception that the ACA was a hyper-partisan piece of social welfare legislation that was, to paraphrase a Republican talking point, “shoved down the throats” of the American public.<sup>121</sup> Notice, however, that if a larger House had been elected via proportional representation, many more moderate Republicans would have been elected after the 2006 and 2008 elections to constructively cooperate with Democrats to arrive at a more nuanced, bipartisan and less mistake-prone piece of legislation. Two obvious errors are worthy of mention. First, Speaker Pelosi, her caucus, and the Obama Administration never anticipated states would refuse to cooperate with federal officials in effectuating the Medicaid expansion<sup>122</sup>

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<sup>118</sup> See Bradley Jones, *House Republicans Who Lost their Reelection Bids were More Moderate than Those Who Won*, PEW RES. (Dec. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/12/07/house-republicans-who-lost-re-election-bids-were-more-moderate-than-those-who-won/> [https://perma.cc/J5QT-BB8T].

<sup>119</sup> Shailagh Murraray & Lori Montgomery, *House Passes Health-Care Reform Bill Without Republican Votes*, WASH. POST (Mar. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html> [https://perma.cc/RP8E-KPMX].

<sup>120</sup> Id.

<sup>121</sup> See Price & Norbeck, *supra* note 118.

<sup>122</sup> See Mark Hall, *Do States Regret Expanding Medicaid?*, BROOKINGS (Mar. 26, 2018), <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2018/03/26/do->

because it was almost entirely paid for by the federal government.<sup>123</sup> As such, neither congressional Democrats, nor the Obama White House, anticipated that the provision requiring states to expand their Medicaid rolls to cover all individuals whose incomes are below 138% of federal poverty guidelines would be: a) objected to by state attorneys general in “red” leaning states; and b) eventually found, by the U.S. Supreme Court, to be improperly coercive of state sovereignty as confirmed by the U.S. Constitution’s Tenth Amendment.<sup>124</sup> The Supreme Court’s decision to remedy this defect by allowing recalcitrant states to opt-out of the Medicaid expansion while leaving the rest of the law intact, led most “red state” legislatures to refuse federal funding to expand their Medicaid programs due to political polarization on the issue.<sup>125</sup> This, in turn, created an adverse selection phenomenon in the ACA’s healthcare exchanges that caused insurance companies to cease participation and exit the insurance marketplaces or dramatically raise premiums because high-risk, low-income individuals that the ACA’s framers

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states-regret-expanding-medicaid/ [https://perma.cc/F7XF-FU2F].

<sup>123</sup> See 42 U.S.C. §. 1396(c) (2012), *invalidated by Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148., 124 Stat. 119 (2010).

<sup>124</sup> See *Sebelius*, 567 U.S. at 580–81; see also *ACA Frequently Asked Questions*, AM. PUB. HEALTH ASS’N, <https://www.apha.org/topics-and-issues/health-reform/aca-frequently-asked-questions> (discussing the efforts to increase the new minimum to 138%) [https://perma.cc/6C8Q-4MQZ].

<sup>125</sup> See *id.* at 585–86. As of November 2018, 14 states had not expanded their Medicaid programs. *Infographic: A 50-State Look at Medicaid Expansion*, FAMILIESUSA (Nov. 2018), <https://familiesusa.org/product/50-state-look-medicaid-expansion> [https://perma.cc/6UMC-D2DF].

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

anticipated would be covered by the Medicaid expansion, instead sought coverage under the exchanges.<sup>126</sup>

The ACA also was mistakenly drafted such that it textually authorized tax credits to be provided for insurance plans purchased “through an Exchange established by the State” when Congress’s intent was to authorize tax credits for policies purchased on both state and federal exchanges.<sup>127</sup> When petitioners-taxpayers subsequently challenged an IRS Rule that authorized the provision of tax credits for policies purchased on both exchanges, the Supreme Court, in *King v. Burwell*,<sup>128</sup> concluded that the term “Exchange established by the State” was sufficiently ambiguous to merit the IRS granting tax credits for insurance policies purchased on both the federal and state exchanges because doing otherwise would lead to a “death spiral” in the insurance marketplaces that is inconsistent with Congress’s intent under the ACA to provide universal health care coverage.<sup>129</sup> It is noteworthy, however, that the Chief Justice set forth the following indictment of the ACA’s drafters:

The Affordable Care Act contains more than a few examples of inartful drafting . . . Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors,

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<sup>126</sup> See Olga Khazan, *Why So Many Insurers Are Leaving Obamacare: How Rejecting Medicaid and Other Government Decisions Have Hurt Insurance Markets*, ATLANTIC (May 11, 2017), <https://www.theatlantic.com/health/archive/2017/05/why-so-many-insurers-are-leaving-obamacare/526137/> [https://perma.cc/5QUU-KNEV].

<sup>127</sup> 26 U.S.C. § 36B(a) (2012).

<sup>128</sup> *King v. Burwell*, 135 S. Ct. 2480 (2015).

<sup>129</sup> *Id.* at 2482–83.



TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

rather than through the “traditional legislative process.” And Congress passed much of the Act using a complicated budgetary procedure known as “reconciliation,” which limited opportunities for debate and amendment, and bypassed the Senate's normal 60–vote filibuster requirement. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.<sup>130</sup>

The response to the Court’s decision to uphold the IRS Rule was widespread conservative hostility to the Chief Justice, who was accused of illegitimately protecting the ACA.<sup>131</sup> It also, once again, raised the issue of administrative overreach and the illegitimacy of judicial agency deference doctrines.<sup>132</sup>

The ACA is a paradigmatic example of the difficulties in passing well-drafted social welfare

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<sup>130</sup> *Id.* at 2492 (internal citations and quotations omitted).

<sup>131</sup> See Stephen Dinan, *Roberts Saves Obamacare for 2nd Time: Scalia Chides: “Words Have No Meaning,”* WASH. TIMES (June 25, 2015), <https://www.washingtontimes.com/news/2015/jun/25/chief-justice-roberts-saves-obamacare-second-time/> [<https://perma.cc/CCJ2-KNKV>]. See generally Sarah Kliff, *Chevron Deference: The Legal Principle that Could Save Obamacare*, VOX (June 20, 2015, 10:00 AM), <https://www.vox.com/2015/6/20/8815097/king-v-burwell-chevron-deference> (explaining Chevron Deference and its application to the ACA) [<https://perma.cc/ZC6F-RN9L>].

<sup>132</sup> See Jonathan Adler & Michael F. Cannon, *Halbig and King: A Simple Case of IRS Overreach*, HEALTHAFFAIRS (May 22, 2014), <https://www.healthaffairs.org/doi/10.1377/hblog20140522.039151/full/> [<https://perma.cc/D46X-9BGA>].

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

legislation in a hyper-polarized Congress. Notice, however, that had there been more representatives elected via proportional representation, the first casualties of the Democratic 2006 and 2008 “wave” elections would not have been the moderate Republicans who would have been feasible partners in a healthcare compromise. The Democratic leadership would also have been less partisan and more inclined to work with Republican moderates to craft a bipartisan, and less error-prone piece of legislation. Finally, the legislation would have benefitted from more members available for both drafting and review purposes. Were this to have been the case, the issue of administrative overreach may never have arisen.

Another paradigmatic example of administrative overreach by Executive Order is DACA, which purported to defer deportation and grant work authorization to unauthorized migrants who were brought to the U.S. as minors.<sup>133</sup> Recognizing that the immigration laws nowhere authorize the use of Executive Orders to either defer deportation to an entire group of illegal migrants or grant work authorization and other U.S. lawful presence benefits to these same individuals, it must be remembered that mass unauthorized migration to the U.S. stems from the development of an international migration route from Central America to the U.S. Southwest that was largely non-existent when the Immigration and Nationality Act of 1965 was enacted.<sup>134</sup> DACA was issued only after Congress had failed to act on the perceived problem of illegal migration for more than a generation and, most recently, after the House of Representatives repeatedly failed to act on a bipartisan

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<sup>133</sup> Napolitano, *supra* note 117.

<sup>134</sup> *See* Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

TENNESSEE JOURNAL OF LAW AND POLICY  
VOLUME 14 | SUMMER 2019 | ISSUE 1

Senate “Gang of Eight” compromise that would have provided permanent residency and an earned pathway to citizenship for certain unauthorized migrants.<sup>135</sup> The House’s failure to act was largely a concomitant of districting-facilitated political polarization that has led House Republicans to effectively veto necessary immigration compromises that were proposed during both the second Bush and Obama Administrations.<sup>136</sup> Of course, partisanship also explains why congressional Democrats have systematically refused to support measures to either enhance border security or expand a temporary guest worker program.<sup>137</sup>

An immigration compromise, such as the one proposed by the Senate Gang of Eight,<sup>138</sup> might have

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<sup>135</sup> For examples of proposed immigration reform from the Senate, see *Key Provisions in “Gang of Eight” Senate Proposal*, WASH. POST (Apr. 15, 2013), <http://www.washingtonpost.com/wp-srv/special/politics/senators-immigration-legislation-provisions/> [<https://perma.cc/XK5D-3Y6G>]; see David Nakamura, *Senators to Release Immigration Plan, Including a Path to Citizenship*, WASH. POST (Apr. 16, 2013), [https://www.washingtonpost.com/politics/senators-to-release-immigration-plan-including-a-path-to-citizenship/2013/04/15/67914cee-a5e2-11e2-8302-3c7e0ea97057\\_story.html?utm\\_term=.0d1a336806d4](https://www.washingtonpost.com/politics/senators-to-release-immigration-plan-including-a-path-to-citizenship/2013/04/15/67914cee-a5e2-11e2-8302-3c7e0ea97057_story.html?utm_term=.0d1a336806d4) [<https://perma.cc/9D8X-LKYH>].

<sup>136</sup> *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014, 9:09 AM), <https://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276> [<https://perma.cc/57CL-ZXNC>].

<sup>137</sup> See Peter Beinart, *How the Democrats Lost Their Way on Immigration*, ATLANTIC (Jul./Aug. 2017), <https://www.theatlantic.com/magazine/archive/2017/07/the-democrats-immigration-mistake/528678/> (discussing the shift in the Democrat perspective of immigration)[<https://perma.cc/VD69-8N89>].

<sup>138</sup> See *Key Provisions in “Gang of Eight” Senate Proposal*, supra note 137.

*RESURRECTING CONGRESS TO REDUCE ADMINISTRATIVE  
CHAOS*

14 TENN. J.L. & POL'Y 21 (2019)

been feasible were there to have been a larger, less partisan House of Representatives that was elected in a manner to protect, as opposed to, undermine moderates. Such a compromise would have, of course, preempted DACA, any discussion of administrative overreach on the immigration issue, and prevented the current “crisis” at the U.S.-Mexico border that, according to President Trump and his supporters, requires the construction of a massive 2,000 mile long border wall.<sup>139</sup>

## **VI. Conclusion**

My proposal is twofold. First, the House of Representatives should increase in size from 435 to 1,250 members such that each state will have a minimum of three Representatives. Second, House Members should be elected via a proportional representation paradigm. This will, over time, lead to a more effective, less polarized, and more effective legislative branch that has sufficient staffing and incentive to enact needed bipartisan legislation and more effectively oversee administrative agencies and the rulemaking process. It will also reduce the chaos to engender a more cohesive and better governed nation.

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<sup>139</sup> See Lucy Rodgers & Dominic Bailey, *Trump Wall – All You Need to Know About the US Border Wall in Seven Charts*, BBC NEWS (June 26, 2019), <https://www.bbc.com/news/world-us-canada-46824649> [<https://perma.cc/ZQ5M-WU4L>].