The Minimum and Maximum Size
of the
U. S. House of Representatives

Per the Constitution and
pursuant to all three versions of the proposed
“Article the first”

The Story of Article the first

Population and Representation

Article the first

House, Senate and Final Versions

Plotted to 25 million

Number of Representatives per the

House Version
(Aug. 24 1789)

Possible Number of Representatives per the

Senate Version
(Sept. 2, 1789)

Possible Number of House Seats per the

Final Version
(Sept. 25 1789)

Quantitative Historical Analysis #4
http://www.thirty-thousand.org/pages/QHA-04.htm

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Thirty-thousand.org believes the data contained herein to be correct; however, we would greatly appreciate any errors being brought to our attention.
1. **INTRODUCTION**

How many Representatives shall we have in Congress? Though the Constitution explicitly sets the size of the Senate at *two per state,* there is no corresponding formulation for determining the size of the House of Representatives. In 1789, this omission was considered to be a significant deficiency that needed to be corrected. As a result, the very first amendment ever proposed by Congress would have mandated a *minimum* number of Representatives as a function of the population. That proposal is the subject of this report; but first, the reader is encouraged to carefully examine the amendment which was proposed in the twelve *Bills of Rights*¹ as *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.

Does this amendment appear to be easy to understand? If so, then how obvious is the mathematical defect that renders it inexecutable at certain population levels? How apparent is the spectacularly illogical discontinuity in its formulation? As shown in this report, these significant deficiencies have generally been ignored, if not undetected, for over two centuries.

After providing a thorough analysis of *Article the first,* this report argues that most of the state legislators who voted on that amendment did not actually understand it. The hypothesis proposed is that this amendment initially was mistaken for the original House version which it clearly resembles; more specifically, the legislators could not have easily detected the subtle last-minute alteration that had been made in the haste of an adjourning Congress. To the extent that any legislators did understand the amendment’s anomalies, then there were a variety of reasons for them to allow the prevailing misperception to persist. In order to provide a historical context for this analysis, a timeline identifying the relevant events is provided on the following page.

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¹ The “Bill of Rights” is customarily a reference to the first ten amendments to our Constitution. However, throughout this report the “Bill of Rights” refers to all twelve bills proposed by the first Congress (on September 25, 1789) as a single charter document. This document is on display in the National Archives in Washington, D.C., which also provides an image at [http://www.archives.gov/national-archives-experience/charters/bill_of_rights.html](http://www.archives.gov/national-archives-experience/charters/bill_of_rights.html). A transcript of the twelve amendments can be found at: [http://www.thirty-thousand.org/pages/BoR_text.htm](http://www.thirty-thousand.org/pages/BoR_text.htm).
The Minimum and Maximum Size of the U. S. House
Section 1 — Introduction

The Story of Article the first

The Constitution is proposed
Sept. 17, 1787

The Constitution specifies that the maximum number of Representatives shall be equal to the total population divided by 30,000. No minimum number is proscribed (other than one per state). Section 2

The Constitution is ratified by the states
Dec. 7, 1787 to May 29, 1789

The states’ ratification of the Constitution was induced by promises to eliminate its most significant shortcomings with amendments to be proposed by the first Congress. Of the many objections raised, perhaps the most contentious one was the Constitution’s failure to require a minimum number of Representatives proportionate to the nation’s growing population. Section 3

Bill of Rights
draft proposed
June 8, 1789

Led by James Madison in the House, Congress begins to develop the amendments for the widely-expected Bill of Rights. Section 4.1

Article the first proposed by the House
August 24, 1789

The first of the House’s 17 proposed amendments, Article the first, mandated that the total number of Representatives increase proportionally with the population (pursuant to mathematical formulae specified within the amendment). Section 4.2

Article the first proposed by the Senate
(Sept. 2, 1789)

Though formulated somewhat differently than the House version, the Senate’s Article the first is easier to understand and would have produced essentially the same result. Section 4.3

Article the first proposed by the joint committee and adopted by Congress
Sept. 24, 1789

On September 21, both versions of this bill were sent (along with numerous other amendments) to a joint House-Senate committee to resolve their differences. During this four-day conference a single word was supplanted in the House’s Article the first thereby transforming it into the defective and inconsequential first amendment proposed in the Bill of Rights. Section 4.4

Ratification of Article the first and Articles third through twelfth by the states
Nov. 20, 1790, to Dec. 15, 1791

With the exception of Delaware, every state which ratified articles three through twelve (to become the first ten amendments) also ratified Article the first. This report shows why it is probable that many state legislators believed they were voting on Article the first as it had been originally proposed (by the House) and did not initially understand what had been finally drafted. Section 5

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By providing this report, thirty-thousand.org (TTO) hopes to spur debate on the forgotten Article the first and its intended purpose: to ensure that the number of Representatives grows proportionately with the nation’s population. The significance of the proposed amendment can not be dismissed simply because it barely failed to be ratified, especially given the considerable commentary and debate that led to its creation.

Despite the immense amount of scholarship available on every other aspect of the Constitution, the Bill of Rights, and the supporting historical documents, there appears to be no credible scholarship regarding Article the first. Even books devoted to the Bill of Rights ignore, superficialize or misconstrue the would-be first amendment.²

This report first explains how the Constitution proscribes the allowable number of Representatives and graphically illustrates the results that would have been produced by the following proposed amendments:

- Article the first as passed by the House (on August 24, 1789);
- Article the first as passed by the Senate (on September 2, 1789);
- The final version of Article the first as proposed in the Federal Bill of Rights (on September 25, 1789).

Next, an account of Article the first’s ratification by eleven states is provided along with a brief commentary on the relevant historical context.

The questions explored in this report include:

- What was the intended purpose of the amendment?
- Why was it the very first amendment proposed in the Bill of Rights?
- How did the coherent version originally passed by the House become the defective final version proposed as part of the Bill of Rights?
- Did the states’ actually understand the amendment as it was finally drafted?
- Why did one state refuse to ratify it after so many others had?
- Why was it abandoned after being ratified by eleven states?
- Why has so little scholarship been devoted to the very first amendment proposed in the Bill of Rights?

The focus of this report is to provide a historical and quantitative analysis of the amendment itself; a review of the arguments for or against a more populous House is outside this scope.

² Examples are provided in Appendix 4 of this report.
Ratification of the Constitution by the states was completed in July of 1788. Article I establishes the legislative branch. Section 2 therein establishes the House of Representatives, the third paragraph of which specifies that, every ten years, the “Representatives ... shall be apportioned among the several States ... according to their respective Numbers”. With respect to how many Representatives there should be, the Constitution only proscribes a maximum: “The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative;”

By setting the minimum House district population size (at 30,000) the Constitution thereby proscribes the formula for determining the maximum number of Representatives. This maximum (also called the “ceiling” in this report) is equal to the total population divided by 30,000 (i.e., population ÷ 30,000). However, though the Constitution specifies a minimum district size, it does not specify a corresponding maximum. Consequently, there is no proscribed minimum number of Representatives (also called the “floor” in this report) other than the nominal requirement of one per state.

The chart below illustrates the number of Representatives allowed by the Constitution for a population range up to 300 million people.

---

3 See Appendix 1 for the full text of the relevant section of Article 1, Section 2 of the Constitution.
4 Though the minimum is one Representative per state, the Constitution also stipulated that the first Congress be comprised of 65 Representatives from the 13 states (or five times this nominal minimum).
The shaded area in the chart above indicates the range of House sizes permissible at various population levels (as indicated along the horizontal “x-axis”). The ceiling is determined by the Constitution’s one for every thirty Thousand and the floor is simply that each State shall have at Least one Representative. In contemporary terms, at a total population of approximately 300 million people, the number of Representatives allowed by the Constitution is anywhere between 50 and 10,000 (inclusive). Of course, the number of Representatives currently authorized by Congress, 435, falls within that very broad range.

Could we have as few as fifty Representatives in the House? This theoretical minimum would not meet the requirement that the representation be “apportioned among the several states ... according to their respective Numbers”. In other words, it would not provide the proportional representation (relative to the states’ populations) that was presumed by the framers of the Constitution and the states which ratified it. However, absent any additional guidance, the minimum number of Representatives required to enable an apportioning would certainly be a matter of debate; after all, some degree of proportionality can be achieved with as few as 100 (if not fewer).

As explained in this report, the Constitution’s failure to specify a maximum district size (i.e., a House floor) was one of the most contentious issues raised during the ratification debates. Regarding this omission — the absence of a proportional floor to complement the ceiling — James Madison later stated that he had “always thought this part of the Constitution defective.” Ironically, the solution Madison proposed to remedy this defect eventually became the defective — and never ratified — first amendment proposed in the Bill of Rights.

Because this part of the Constitution is still “defective”, Congress can choose to grant its constituents virtually any number of Representatives it deems appropriate. In fact, Congress can choose both the number of Representatives and the algorithm by which they are allocated among the states. In contrast, the role of the Census Bureau is limited to conducting the decennial census and applying, to that result, the apportionment algorithm specified by Congress in order to calculate the allocation of House memberships.

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5 For this chart, the minimum House size is simply equal to the total number of admitted states historically coincident with the various population levels. For example, when the population reached 150 million there were 50 states.

6 Specifically, at 435 Representatives, Congress has authorized less than 4% of the allowable number of Representatives (in excess of the minimum of one per state).

7 The prevailing expectation of proportional representation is the subject of section 5.4.1.b (infra).

8 The full quote is provided in section 3.2 (infra).
3. **The Federal Bill of Rights and Article the First**

3.1. Twelve Articles Proposed

Though the Constitution was proposed on September 17, 1787, it was not until nine months later that it was ratified by enough states to form the nation. During those intervening months, numerous arguments were advanced against the Constitution, the eventual ratification of which was (at that time) far from certain. Ultimately, the states’ ratification of the Constitution was induced by promises to eliminate many of its shortcomings with amendments to be proposed by the first Congress which, on September 25, 1789, attempted to fulfill that promise with a set of twelve Bills of Rights. As was affirmed in its preamble:

> 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 ensure the beneficent ends of its institution.

The twelve articles proposed are listed below; note that only the third through the twelfth articles were ratified as the first ten amendments to the Constitution.

<table>
<thead>
<tr>
<th>Article</th>
<th>Ratification</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article the first...</td>
<td>Never Ratified</td>
<td>Establishes a minimum size for the House of Representatives</td>
</tr>
<tr>
<td>Article the second...</td>
<td>27th Amendment (June 26, 1992)</td>
<td>Legislated pay increases for Congressmen can not take effect until “an election of Representatives shall have intervened”</td>
</tr>
<tr>
<td>Article the third...</td>
<td>First Amendment (December 15, 1791)</td>
<td>Freedom of religion, speech and the press; Rights of assembly and petition</td>
</tr>
<tr>
<td>Article the fourth...</td>
<td>Second Amendment (December 15, 1791)</td>
<td>Militia Amendment (“the right of the people to keep and bear Arms”)</td>
</tr>
<tr>
<td>Article the fifth...</td>
<td>Third Amendment (December 15, 1791)</td>
<td>Prohibition against quartering soldiers in private homes</td>
</tr>
<tr>
<td>Article the sixth...</td>
<td>Fourth Amendment (December 15, 1791)</td>
<td>Prohibition against unreasonable searches and seizures</td>
</tr>
<tr>
<td>Article the seventh...</td>
<td>Fifth Amendment (December 15, 1791)</td>
<td>Indictment by Grand Jury; Prohibits Self-Incrimination and Takings</td>
</tr>
<tr>
<td>Article the eighth...</td>
<td>Sixth Amendment (December 15, 1791)</td>
<td>Specifies minimum rights of accused in criminal prosecutions</td>
</tr>
<tr>
<td>Article the ninth...</td>
<td>Seventh Amendment (December 15, 1791)</td>
<td>Specifies civil trial rights (e.g., preserves the right to a trial by jury)</td>
</tr>
<tr>
<td>Article the tenth...</td>
<td>Eighth Amendment (December 15, 1791)</td>
<td>Prohibits excessive bail, fines, and cruel &amp; unusual punishments</td>
</tr>
<tr>
<td>Article the eleventh...</td>
<td>Ninth Amendment (December 15, 1791)</td>
<td>Unspecified rights (not enumerated in the Constitution) are reserved by the people</td>
</tr>
<tr>
<td>Article the twelfth...</td>
<td>Tenth Amendment (December 15, 1791)</td>
<td>Unspecified powers (not specifically delegated to the government or otherwise prohibited) are reserved to the states or the people.</td>
</tr>
</tbody>
</table>
3.2. The first of twelve

As noted in the prior section, the ten amendments traditionally identified as the Bill of Rights are the last ten (of the twelve) proposed in the original charter document. Less well known are the first two articles proposed therein. Article the first, which is the subject of this report, was never ratified. Article the second was ratified over 200 years later as the 27th amendment.9

At 99 words in length, Article the first is the second longest amendment inscribed in the Bill of Rights and the only one proposed requiring the application of mathematical formulae to be comprehended. The purpose of this amendment was to require a minimum number of Representatives as a function of the total population. The image below shows how the amendment appears in the Bill of Rights (the transcript of which is provided on the first page of this report and repeated again later).

Why this amendment was the very first proposed in the Bill of Rights is a matter of scholarly debate. However, the Constitution’s failure to specify a maximum district size (ergo, a minimum House size) was a central issue during the ensuing ratification debates. For example, at the New York constitutional convention, 30% of their 85,000-word debate was devoted exclusively to this issue. In addition, of the six state conventions that endorsed various amendments to the Constitution — Massachusetts, South Carolina, New Hampshire, Virginia, New York and North Carolina — all but one (South Carolina) proposed a secure minimum size for the House of Representatives.10

In order to understand the objection to the Constitution’s failure to proscribe a minimum size for the House, consider the following two quotes from Melancton Smith:11

…[it 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

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9 The second article governs the compensation of Representatives and Senators. A full description is provided in section 5.8 (infra).
11 Melancton Smith made these remarks as a delegate to New York’s Constitutional convention (which began on June 17, 1788, and lasted six weeks).
To me it appears clear, that the relative weight of influence of the different states will be the same, with the number of representatives at sixty-five as at six hundred, and that of the individual members greater; for each member’s share of power will decrease as the number of the House of Representatives increases. If, therefore, this maxim be true, that men are unwilling to relinquish powers which they once possess, we are not to expect the House of Representatives will be inclined to enlarge the numbers.

This objection was later affirmed in the first Congress by James Madison:

In the next place, I wish to see that part of the constitution revised which declares, that the number of Representatives shall not exceed the proportion of one for every thirty thousand persons, and allows one Representative to every State which rates below that proportion. If we attend to the discussion of this subject, which has taken place in the State conventions, and even in the opinion of the friends to the constitution, an alteration here is proper. It is the sense of the people of America, that the number of Representatives ought to be increased, but particularly that it should not be left in the discretion of the Government to diminish them, below that proportion which certainly is in the power of the Legislature as the constitution now stands; and they may, as the population of the country increases, increase the House of Representatives to a very unwieldy degree. I confess I always thought this part of the constitution defective, though not dangerous; and that it ought to be particularly attended to whenever Congress should go into the consideration of amendments. [Emphasis added.]

James Madison is stating that it “should not be left in the discretion of the Government to diminish” the number of representatives below the constitutional proportion (of one for every thirty thousand). Further, as the population increases that “they may … increase the House of Representatives to a very unwieldy degree.” As explained in the next section, this last statement has been consistently misconstrued by historians to mean that Madison wished to prohibit such a possibility. Quite the contrary, Madison was advocating the people’s right to increase the number of Representatives to an even greater extent (than allowed by the Constitution) despite the risk that the House may become “unwieldy”.

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12 *Annals of Congress, House of Representatives*, 1st Congress, 1st Session, 8-June-1789, (Page 457)
4. **ARTICLE THE FIRST: FROM CONCEPTION TO ADULTERATION**

In order to understand *Article the first* it is necessary to first analyze its progenitors: Madison’s proposal, the House’s *Article the first*, and the Senate’s *Article the first*.

Though the computations presented in this section are extremely simple, the reader needs to be alert to the disorientation produced by the resulting discussion. The computations are simple in that only an understanding of proportions is required (such as *one for every thirty thousand*). This simplicity is made confusing by the inverted relationships that result. For example, a *minimum* district size of 30,000 also defines the *maximum* size of the house (“ceiling”) as population ÷ 30,000. Further confounding the discussion is the need to keep track of the corresponding *maximum* district sizes (e.g., 50,000) which also define a *minimum* House size (“floor”); for example, population ÷ 50,000.

4.1. **Madison’s Draft (June 8, 1789)**

On June 8, 1789, James Madison proposed a list of amendments for the Bill of Rights which “were a distillate of the proposals emanating from the state conventions”. Madison’s second proposal in that long list was to expunge the following text from the Constitution: “The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made” in order to replace it with the following language:

> After the first actual enumeration, there shall be one Representative for every thirty thousand, until the number amounts to *[first blank]*, after which the proportion shall be so regulated by congress, that the number shall never be less than *[second blank]*, nor more than *[third blank]*, but each State shall after the first enumeration, have at least two Representatives;  

Though Madison was proposing a formulation for ensuring that the size of the House would grow proportionally with the population, its parameters remained open for negotiation (as indicated by the blanks). Note that Madison specifies the *proportion*, not the *number*, shall be “so regulated by Congress”. With respect to the floor size, Madison asserted that “It is the sense of the people of America that the number of representatives should not be left in the discretion of the government to diminish them, below that proportion” — “that proportion” refers to *one for every thirty thousand*. In other words, *one for every thirty thousand* should be

15 The full quote is provided in section 3.2 (supra).
re purposed to define the minimum size of the House rather than its ceiling. This is not surprising since it is consistent with the assertions previously made in the Federalist Papers regarding the representational ratio (as described in section 5.4.1.a infra). Madison’s proposal was clearly understood by his fellow Representatives as evidenced by a letter from Abraham Baldwin written six days later:

A few days since, Madison brought before us propositions of amendment agreeably to his promise to his constituents. Such as he supposed would tranquilize the minds of honest opposers without injuring the system. viz. “That what is not given is reserved, that liberty of the press & trial by jury shall remain inviolable, that the representation shall never be less than one for every 30,000[“] &c. ordered to lie on the table. [Emphasis added.]

Complementing that floor size, Madison also proposes that the people be able to “increase the House of Representatives to a very unwieldy degree.” Evidently, Madison believed that the existing constitutional maximum of one for every thirty-thousand did not pose a risk of allowing an “unwieldy” number of Representatives. Therefore, if the minimum district size of 30,000 is too large to permit an unwieldy house, then it would have to be reduced despite his apprehension that an “unwieldy” House might result. Madison’s flexibility on this point is confirmed by his comments on August 14, 1789:

I do not consider it necessary, on this occasion, to go into a lengthy discussion of the advantages of a less or greater representation. I agree that after going beyond a certain point, the number may become inconvenient; … but it is necessary to go to a certain number, in order to secure the great objects of representation. Numerous bodies are undoubtedly liable to some objections, but they have their advantages also; if they are more exposed to passion and fermentation, they are less subject to venality and corruption; and in a Government like this, where the House of Representatives is connected with a smaller body [the Senate], it might be good policy to guard them in a particular manner against such abuse. [Emphasis added.]

With respect to Madison’s original proposal which contained the three blanks, it is commonly assumed that the last two parameters were intended to be fixed values rather than proportional ones. If it had been Madison’s intent to use fixed

16 Abraham Baldwin was a member of the Constitutional Convention and a Representative from Georgia to the first five Congresses. (See also: http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000084)
18 Annals of Congress, House of Representatives, 1st Congress, 1st Session, 14-August-1789, (Page 749)
19 Madison’s statement is confirmed in three other accounts provided by Veit, Helen, and K. Bowling, and C. Bickford. Creating the Bill of Rights — The Documentary Record from the First Federal Congress. Baltimore: Johns Hopkins University Press. 1991. (Pages 131, 135, 143)
minimum and maximum values, then his original proposal could have been more concisely worded.\textsuperscript{20} As explained above, his subsequent elaboration made clear his expectation that proportional parameters should be used. The notion of employing fixed values was introduced later (on August 13, 1789) by the “Select Committee of Eleven” when they proposed the following:

\begin{quote}
...after the first enumeration, there shall be one representative for every thirty thousand, until the number amounts to \textit{one hundred}. After which the proportion shall be so regulated by Congress, that the number of Representatives shall never be less than \textit{one hundred}, nor more than \textit{one hundred and seventy-five}; but each State shall always have at least \textit{one} representative; \textsuperscript{21}
\end{quote}

Notice also that the select committee replaced Madison’s \textit{per state} minimum of \textit{two} with \textit{one}; this diminishment is consistent with having supplanted Madison’s potent proportional parameters with relatively modest fixed values. As explained in the next section, the House rejected the notion of fixed parameters in favor of proportional ones.

\section*{4.2. As Passed by the House (August 21, 1789)}

The amendment proposed by Madison on June 8 was then forged, after debate and deliberation, into the \textit{Article the first} passed by the House on August 21.\textsuperscript{22} It not only provided the parameters omitted in Madison’s draft but also framed the solution somewhat more practically. As explained in the preceding section, Madison had proposed replacing the corresponding language of the Constitution with a revised minimum \textit{and} maximum. However, perhaps sharing Madison’s apprehension of the possibility of an unwieldy number of Representatives, the House’s solution was to preserve the Constitution’s language (proscribing the ceiling) in order to complement it with a floor defined by a new set of formulations. In other words, the House’s \textit{Article the first} added a \textit{maximum} district size (minimum House size) to the \textit{minimum} district size (maximum House size) already specified in the Constitution. Their amendment is worded as follows:

\begin{quote}
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,
\end{quote}

\textsuperscript{20} This point can be better understood by comparing the precursor amendments that had been proposed by the states (see section 5.7.3). There had never been the notion of regulating the proportion between fixed minimum and maximum parameters.\textsuperscript{21} Annals of Congress, House of Representatives, 1st Congress, 1st Session. June 8, 1789 (Page 747).\textsuperscript{22} Excerpts from the relevant transcripts of the deliberations are available at: \url{http://www.thirty-thousand.org/pages/A1LegHistory.htm}. 
after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor less than one Representative for every fifty thousand persons.  

Though the House version appears identical to the final version (shown on page 1) the two versions are, in fact, profoundly different; this disparity will be shown later in this report. The House’s amendment is comprised of three clauses which, for this report, are called “tiers”. These three tiers can be parsed as follows:

1) A minimum of one Representative for every 30,000 people until there are 100 Representatives; after which,

2) A minimum of one Representative for every 40,000 people until there are 200 Representatives, after which,

3) A minimum of one Representative for every 50,000 people.

Once parsed, these tiers can be expressed mathematically as shown below.

<table>
<thead>
<tr>
<th>Tier</th>
<th>Total Population</th>
<th>Number of Members</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Minimum</td>
</tr>
<tr>
<td>U. S. Constitution (July 1788)</td>
<td>1 per state</td>
<td></td>
</tr>
<tr>
<td>House Version August 24, 1789</td>
<td>1 Population ≤ 3 million</td>
<td>Population ÷ 30,000</td>
</tr>
<tr>
<td></td>
<td>“one Representative for every thirty thousand until the number shall amount to one hundred”</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>3 million &lt; Population ≤ 8 million</td>
<td>Population ÷ 40,000 (but no less than 100)</td>
</tr>
<tr>
<td></td>
<td>“thereafter ... not less than ... one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred”</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>8 million &lt; Population</td>
<td>Population ÷ 50,000 (but no less than 200)</td>
</tr>
<tr>
<td></td>
<td>“after which ... there shall not be less than two hundred Representatives, nor less than one Representative for every fifty thousand persons”</td>
<td></td>
</tr>
</tbody>
</table>

Quite simply, the tiers are triggered as follows: when the (minimum) number of Representatives required by Tier 1 reaches 100, Tier 2 is triggered; at which point there would be a total population of three million (i.e., 100 x 30,000). Subsequently, when the number required by Tier 2 reaches 200, then Tier 3 is triggered; at which point there would be a total population of eight million (i.e., 200 x 40,000).

As a result, the House’s Article the first required that the size of the House be readjusted (at the time of each decennial reapportionment) to a number that falls between the floor and ceiling values illustrated by the shaded area in the chart below.

\[23\] The Founders’ Constitution, Chapter 14, Document 54.
For reasons that will become more apparent later, the graphical analyses of *Article the first* in this report are illustrated on two different scales. The small scale, shown above, extends only to a total population of 25 million in order to provide visibility from “Tier 1” through to the outset of “Tier 3”. The large-scale chart (below) “zooms out” to provide visibility to the current population level of 300 million. (The small outline box in the lower left corner corresponds to the preceding small-scale chart.)
As illustrated by the large-scale chart above, at the current population level of approximately 300 million, the House’s amendment would require a minimum of 6,000 Representatives.

As a point of reference, both of the charts above also indicate the total number of Representatives that were actually authorized at the corresponding population levels used for the apportionments. The significance of this is explained in Section 5.5 (infra).

4.3. As Passed by the Senate (September 2, 1789)

Eight days after the House passed their version of the Bill of Rights the Senate undertook debate on the House’s proposed amendments starting with Article the first. On September 2, 1789, the U. S. Senate resolved that Article the first should be worded as follows:

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, to which number one representative shall be added for every subsequent increase of forty thousand, until the representatives shall amount to two hundred, to which one representative shall be added for every subsequent increase of sixty thousand persons.\(^{24}\)

The reader may notice that the Senate’s version is easier to understand than the House’s. Though the two versions are worded somewhat differently they produce approximately equivalent solutions. Like the House’s version, the Senate’s amendment would mandate that the total number of Representatives increase proportionately with the population (every ten years).

<table>
<thead>
<tr>
<th>Number of Representatives (R)</th>
<th>House Version (Aug. 24, 1789)</th>
<th>Senate Version (Sep. 2, 1789)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 1 (R ≤ 100)</td>
<td>Ceiling: P ÷ 30,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Floor: P ÷ 30,000</td>
<td></td>
</tr>
<tr>
<td>Tier 2 (100 &lt; R ≤ 200)</td>
<td>Ceiling: P ÷ 40,000</td>
<td>Ceiling: P ÷ 40,000</td>
</tr>
<tr>
<td></td>
<td>Floor: P ÷ 40,000</td>
<td>Floor: P ÷ 60,000</td>
</tr>
<tr>
<td>Tier 3 (200 &lt; R)</td>
<td>Ceiling: P ÷ 50,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Floor: P ÷ 50,000</td>
<td></td>
</tr>
</tbody>
</table>

\(P = \text{Population}\)

As shown in the table above, the only consequential difference between the two versions is that the Senate’s formulation allows no leeway in its implementation: it replaces the notion of a range with a precise requirement (whereby the minimum

\(^{24}\) The drafting of the Senate’s version is explained in Appendix 2 to this report.
equals the maximum). Whereas the House proposed a floor formulation to complement the ceiling already proscribed by the Constitution, the Senate’s amendment (in Tiers 2 and 3) would have completely superseded that provision in the Constitution. The chart below compares the Senate’s version of *Article the first* with the one passed by the House.

Though the Senate’s version is less convoluted (and easier to understand) it would be far less practical to achieve compliance with such a precise requirement. That is, given the inherent imprecision of census data and its statistical margin of error, it would be more sensible to require compliance within a specified range rather than compel equivalency to a single, if not fractional, value.

In proposing their amendment, did the Senate also intend to *prevent* the House from ever becoming as large as would be permitted by the Constitution? Though it would have halved the maximum number of Representatives allowed by the Constitution, it is not likely that this was a driving motivation since none of the states had called for reducing the maximum possible number of Representatives. Consequently, it seems most likely that the primary, if not only, goal of the Senate’s revision was to simplify the amendment already passed by the House without altering its essential purpose. Therefore, the only *practical* difference between the two is that the Senate’s version allows slightly *smaller* House sizes at population levels greater than 25 million.\(^{25}\) In relative terms the difference is not

\(^{25}\) To be precise: the Senate’s formulation actually requires *more* Representatives (than the House’s version) for population levels between three million and 25 million, at which point they converge upon a solution of 500 Representatives. Thereafter, the number required by the Senate’s version gradually declines below the minimum allowed by the House version. For clarification of the underlying calculations see Appendix 3, Reference #1.
trivial since the Senate’s parameter (60,000) is 20% larger than the maximum
district size specified by the House (50,000). However, when viewed against
current House district sizes of approximately 700,000, the two versions seem
nearly indistinguishable: at a population level of 300 million, the two versions
would specify exactly 5,083 Representatives\(^{26}\) whereas the House version would
allow anywhere between 6,000 and 10,000.

4.4. The Final Version (September 25, 1789)

On September 21, the House and Senate agreed to establish a conference
committee to resolve numerous differences between the two chambers with respect
to the prospective Bill of Rights. The extent of these differences is reported by the
House Journal:

> Resolved, That this House doth agree to the second, fourth, eighth, twelfth,
thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth
amendments; and doth disagree to the first, third, fifth, sixth, seventh, ninth,
tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first,
twenty-second, twenty-third, and twenty-fourth amendments proposed by the
Senate to the said articles;\(^{27}\)

Even though the House and Senate had, by September 21, agreed on ten of the
proposals, they still disagreed on Article the first plus fifteen additional amend-
ments! As explained later in this report, the joint committee then had less than four
days to resolve all these momentous issues during which time they also culled and
consolidated the 26 amendments into twelve.

With respect specifically to Article the first, how might the joint committee find a
compromise between the House and Senate versions? The most obvious solution
would be to modify the House’s version (in Tier 3) by increasing the maximum
district size from 50,000 to some higher number (not to exceed 60,000). Alterna-
tively, the House could acquiesce to the Senate’s version which would ultimately
ensure one Representative for every 60,000 people (but without the administrative
flexibility afforded by the minimum and maximum parameters). So where
between the House and Senate versions was a compromise found? The answer is,
curiously, nowhere.

What the joint committee proposed to both the House and Senate chambers on
September 24, as part of a package of modifications to the Bills of Rights, was the
following:

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\(^{26}\) For a description of the underlying math see Appendix 3, Reference #2.

\(^{27}\) *Journal of the House of Representatives of the United States*, Volume 1, September 21, 1789 (Page 115)
That the first article be amended by striking out the word “less,” in the last place of the said first article, and inserting in lieu thereof the word “more.” 28

In case their proposal somehow is not clear to the reader, below is a side-by-side comparison of the original House version (left) and final version from the Bill of Rights (right). Note that, with the exception of a single word, the final version was identical to the one passed by the House 31 days earlier.

<table>
<thead>
<tr>
<th>Passed by the House of Representatives</th>
<th>Bill of Rights Proposed by Congress</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 24, 1789</td>
<td>September 25, 1789</td>
</tr>
</tbody>
</table>

Both versions are identical except for one word.

Absent the explicit highlighting provided in the illustration above, even the most careful reader may not have be able to detect the modification and, even upon doing so, would probably not anticipate its significant effect. Though it appears subtle, this change profoundly adulterated Tier 3 of the original amendment in such a way as to betray its essential purpose.

4.4.1 The Mathematically Defective Amendment

In order to understand the impact of this alteration, it is necessary to revise the previous parsing of Article the first. As shown in the table below only Tier 3 was altered; the first two tiers are identical to the original House version. Given the small population levels contemplated in the first two tiers of Article the first (in comparison to current population levels) it may seem unnecessary, if not irrelevant,

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28 Journal of the House of Representatives of the United States, Volume 1; September 21, 1789 (Page 121); and the Journal of the Senate of the United States of America, Volume 1; September 21, 1789 (Page 87).
to dwell on them in this evaluation. However, understanding the first two tiers is essential for evaluating Tier 3 and the overall purpose of the amendment.

<table>
<thead>
<tr>
<th>Tier</th>
<th>Total Population</th>
<th>Number of Members</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Minimum</td>
<td>Maximum</td>
</tr>
<tr>
<td><strong>Constitution (July 1788)</strong></td>
<td>1 per state</td>
<td></td>
</tr>
<tr>
<td><strong>House Version</strong>&lt;br&gt;August 24, 1789</td>
<td>1</td>
<td>Population ≤ 3 million&lt;br&gt;&quot;one Representative for every thirty thousand until the number shall amount to one hundred&quot;</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>3 million &lt; Population ≤ 8 million&lt;br&gt;“thereafter ... not less than ... one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred”</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>8 million &lt; Population&lt;br&gt;“after which ... there shall not be less than two hundred Representatives, nor less than one Representative for every fifty thousand persons”</td>
</tr>
<tr>
<td><strong>Joint Committee</strong>&lt;br&gt;September 25, 1789</td>
<td>3</td>
<td>8 million &lt; Population&lt;br&gt;“after which ... there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons”</td>
</tr>
</tbody>
</table>

By changing “less” to “more”, the floor that was formulated in the House’s Tier 3 (population $\div 50,000$) becomes the final version’s ceiling. At population levels above 8 million, this would have replaced the higher ceiling already established by the Constitution. More insidiously, the Tier 3 trigger value of 200 becomes, by default, the revised Tier 3 floor. Consequently, whereas before all three tiers had population-based formulae for determining the floor size, the revised Tier 3 now references a fixed number. The absurdity that results from supplanting more for less is illustrated below.
Note the irresolvable contradiction that occurs at the outset of Tier 3: when the population total is between eight and ten million the mandated floor exceeds the ceiling. In other words, the final version of *Article the first* specifies a minimum number of House seats greater than the maximum! This defect is not merely theoretical; the amendment would have been inexecutable when the 1820 census counted nearly nine million people.

### 4.4.2 The Illogical Discontinuity: More is Less

Not only is the revised Tier 3 formulation incongruous with the first two tiers, but consider the absurdity of forcing the House ceiling to suddenly decrease (as illustrated in the preceding chart) from 266 at the end of Tier 2 (when the total population is 8,000,000) to 160 at the beginning of Tier 3 (when the population totals 8,000,001). As a result, a level of representation which is Constitutional at a census population of eight million becomes — with the addition of a single person — unconstitutional until the population later reaches 13,330,000. Nor would this illogical discontinuity be eliminated by supposing that the ceiling at the inception of Tier 3 would somehow be 200 (rather than 160).

### 4.4.3 The Non Sequitur Amendment

As pointed out above, substituting *more* for *less* subtly replaced the requirement of proportionality (in Tier 3) with a fixed and disproportionate floor size. To help put this in perspective, the table below compares the three versions’ parameters.

<table>
<thead>
<tr>
<th>Number of Representatives (R)</th>
<th>House Version (Aug. 24, 1789)</th>
<th>Senate Version (Sep. 2, 1789)</th>
<th>Final Version (Sep. 25, 1789)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tier 1</strong> (R ≤ 100)</td>
<td>Ceiling P ÷ 30,000</td>
<td>P ÷ 30,000</td>
<td>P ÷ 30,000</td>
</tr>
<tr>
<td></td>
<td>Floor</td>
<td>P ÷ 40,000</td>
<td>P ÷ 40,000</td>
</tr>
<tr>
<td><strong>Tier 2</strong> (100 &lt; R ≤ 200)</td>
<td>Ceiling P ÷ 30,000</td>
<td>P ÷ 30,000</td>
<td>P ÷ 30,000</td>
</tr>
<tr>
<td></td>
<td>Floor</td>
<td>P ÷ 40,000</td>
<td>P ÷ 40,000</td>
</tr>
<tr>
<td><strong>Tier 3</strong> (200 &lt; R)</td>
<td>Ceiling P ÷ 30,000</td>
<td>P ÷ 60,000</td>
<td>P ÷ 50,000</td>
</tr>
<tr>
<td></td>
<td>Floor</td>
<td>P ÷ 50,000</td>
<td>200</td>
</tr>
</tbody>
</table>

Note that Tier 1 is absolutely identical across all three versions. In Tier 2 (where the number of Representatives is between 100 and 200) the House and final versions are also identical. Though not identical, the Senate’s Tier 2 is virtually equivalent in that it produces a set of values that lie within the solution circumscribed by the House’s formulation. The results that would have been produced by all three versions of *Article the first* is graphically compared in the chart below.

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29 For a description of the underlying math see Appendix 3, Reference #3.
29 For all three versions of *Article the first*, the trigger points for Tier 2 and Tier 3 are 100 and 200 Representatives, respectively. For a description of the underlying math see Appendix 3, Reference #1.
Not only would the House and Senate versions produce essentially equivalent results in the first two tiers, as shown in the preceding chart and the one below, they would also produce comparable results in Tier 3. In contrast, the joint committee’s version produces a level of representation entirely below that provided by the House and substantially less than that afforded by the Senate.
A comparison of these three versions is easier to consider when applied to an actual population value. The example below is based upon a total population of 18,000,000.\footnote{This population projection can also be inferred from a prediction made by James Wilson (a member of the Constitutional Convention) in November 1787; see section 5.4.1.a. The supporting math for this table is provided in Appendix 3, Reference #4.}

<table>
<thead>
<tr>
<th>Number of Representatives (R)</th>
<th>House Version (Aug. 24, 1789)</th>
<th>Senate Version (Sep. 2, 1789)</th>
<th>Final Version (Sep. 25, 1789)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 3 (200 &lt; R)</td>
<td>Ceiling</td>
<td>600</td>
<td>383</td>
</tr>
<tr>
<td></td>
<td>Floor</td>
<td>360</td>
<td>383</td>
</tr>
</tbody>
</table>

Relative to this scenario, one could reasonably expect that a compromise reached between the Senate and House versions would result in a minimum (and proportional) House size \textit{between} 300 and 383, but certainly not the \textit{fixed} minimum value of 200 as indicated by the final version.\footnote{Note that the Senate’s Tier 3 implements the proportions in a slightly different manner than do the other two versions. An explanation of how these values are calculated is provided in Appendix 3, Reference #1.}

As illustrated in the example above, by attempting to establish a \textit{fixed} (non-proportionate) floor size in Tier 3, the final \textit{Article the first} circumvents the well-established expectation that the size of the House would be required to grow proportionally with the population.\footnote{The widespread presumption of ever proportional representation is addressed in section 5.4.1.b (infra).} Instead, the size of the House would be asymmetrically circumscribed — just as it is in the Constitution — thereby returning to the arrangement that Madison had deemed “defective”.

4.4.4 \textbf{How did this happen?}

How could the joint committee have produced a proposal that was so unfaithful its two prototypes? It could be argued that the Congress had suddenly reversed its position and decided — without \textit{any} apparent discussion or debate — to discard the principle of a proportional floor size after the population reaches eight million. However, had that truly been the avowed intent, then the phrasing of \textit{Article the first} could have more sensibly ended at “two hundred Representatives” and \textit{not} included the remaining language (i.e., “nor more than one Representative for every fifty thousand persons”) which not only vitiates the proposed amendment but is also clearly superfluous given the accepted ceiling already established by the Constitution.\footnote{Alternatively, a similar result could have been achieved by simply replacing the last fifteen words of the Senate’s version of \textit{Article the first} with “after which the number shall not be less than 200.”} It is reasonable, therefore, to consider alternative explanations that do \textit{not} presume the alteration was the result of careful deliberation.

If there are two theories of history — \textit{happenstance} vs. \textit{conspiracy} — either of those may be applicable here, but we will probably never know which. Consistent
with the *happenstance* view of history, constitutional law expert Akhil Reed Amar suggests what may have happened during the joint conference:

So worded, the [House’s amendment] was sent to the Senate, along with all the other amendments proposed by the House. When the Senate adopted a Bill of Rights whose wording and substance diverged from the House version, the two chambers convened a joint committee to harmonize the proposed Bills. At this conference, the word *more* was inexplicably substituted for *less*, and the conference paste-job was hurriedly adopted by both houses under the shadow of imminent adjournment, apparently without deep deliberation about the substitution’s (poor) fit with the rest of the clause. Thus it is quite possible that the technical glitches in the First Amendment’s formula became evident only during the later process of ratifying Congress’ proposed amendments.  

35

Regarding the “shadow of imminent adjournment” referenced above, consider that the joint committee was established on Monday, September 21, at which time Congress was scheduled for adjournment the following Thursday. The next day the House and Senate agreed to delay adjournment by two days (to Saturday). Given that the committee was created on Monday and it reported back on Thursday, then they had less than four *working* days to resolve a large number of truly momentous issues in order to produce the twelve *Bills of Rights*. And certainly by then the congressmen were eager to return home (having been in New York since the beginning of April). Given all of the foregoing, the possibility that a mistake could have been made in haste, during those hectic four days, seems quite plausible.

However, if we wished to speculate on devious motives to explain the sudden adulteration of *Article the first*, then we must begin by identifying the lead suspects among those who comprised the six-member joint conference committee.  

36 With respect to the *Representatives*, suspicion would have to focus on both John Vining and Roger Sherman. During the debates leading to its drafting, Vining (Delaware) had unsuccessfully attempted to modify the amendment so as to forestall the diminution of little Delaware’s representation. Sherman (Connecticut) had, on August 14, unsuccessfully opposed increasing the eventual minimum to 200, expressing instead a preference for a number smaller than 175. Sherman believed that “a small body deliberated to better purpose than a greater one”  

37 and “the rights of the people are less secure in a large, than in a small assembly.”  

38


36 The conference committee was comprised of six members. Three were from the House: Madison (Virginia), Sherman (Connecticut) and Vining (Delaware); and three from the Senate: Ellsworth (Connecticut), Carroll (Maryland), and Paterson (New Jersey).

37 *Annals of Congress, House of Representatives*, 1st Congress, 1st Session; August 14, 1789. (Page 753-754)

Moreover, both Vining and Sherman (along with Madison) had been on the “Select Committee of Eleven” (with Vining as its Chairman) that had first proposed the fixed values for the minimum and maximum parameters (that were later rejected by the full House).

With respect to which Senators may have collaborated with any possible subterfuge, suspicion should focus on Oliver Ellsworth (Connecticut) and William Paterson (New Jersey). These gentlemen are indirectly implicated in a comment made by Representative John Laurance (New York):

…the Senators from New Hampshire, Rhode Island, Connecticut, Jersey, and Delaware would ever oppose an augmentation of the number of representatives; because their influence in the House would be proportionally abated. These states were incapable of extending their population beyond a certain point, inasmuch as they were confined with respect to territory.37

In addition, Senator Ellsworth had clearly stated his opposition to a populous House on January 7, 1788, during Connecticut’s Constitutional Convention:

As to the subject of representation, at the first view it appears small; but, on the whole, the purposes of the Union could not be so well answered by a greater number. It is impracticable to have the number of the representatives as great, and times of election as frequent, as they are in our state governments. Nor is this necessary for the security of our liberty.39

We will never know exactly what happened during those four days in September, but we can take little comfort from an observation later made by Thomas Tucker (Representative from South Carolina) in a letter to his nephew:

You will find our Amendments to the Constitution calculated merely to amuse, or rather to deceive.40

Representative Tucker was one in the minority who had voted against the package of changes proposed by the joint committee.

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37 Elliot’s Debates. Volume 2. (Page 199)
5. **AFFIRMING ARTICLE THE FIRST**

The story of *Article the first* presents two interesting mysteries. The first, as explained in section 4.4, is the last-minute substitution of “more” for “less” during the joint-committee conference. The second mystery is why did eleven states then ratify this amendment before it was so utterly abandoned?

5.1. **Eleven States Ratified**

With the exception only of Delaware, every state that ratified articles three through twelve (as the first ten amendments to the Constitution) also ratified *Article the first*. The table below summarizes the ratification history of all twelve articles relative to the first twelve states to do so.\(^{41}\)

<table>
<thead>
<tr>
<th>State</th>
<th>Ratification Date</th>
<th>Article the First</th>
<th>Article the Second</th>
<th>Articles the Third — Twelfth</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td>Nov. 20, 1789</td>
<td>Ratified</td>
<td>Not Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>Maryland</td>
<td>Dec. 19, 1789</td>
<td>Ratified</td>
<td>Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Dec. 22, 1789</td>
<td>Ratified</td>
<td>Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Jan. 19, 1790</td>
<td>Ratified</td>
<td>Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Jan. 25, 1790</td>
<td>Ratified</td>
<td>Not Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>Delaware</td>
<td>Jan. 28, 1790</td>
<td>Not Ratified</td>
<td>Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>New York</td>
<td>Feb. 27, 1790</td>
<td>Ratified</td>
<td>Not Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Mar. 10, 1790</td>
<td>Ratified: Sep. 21, 1791</td>
<td>Not Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Jun. 7, 1790</td>
<td>Ratified</td>
<td>Not Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>Vermont</td>
<td>Nov. 3, 1791</td>
<td>Ratified</td>
<td>Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>Virginia</td>
<td>Dec. 15, 1791</td>
<td>Ratified: Nov. 3, 1791</td>
<td>Ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Jun. 24, 1792</td>
<td>Ratified</td>
<td>Ratified</td>
<td>Ratified</td>
</tr>
</tbody>
</table>

On December 15, 1791, when 14 states comprised the Union, Virginia became the eleventh state to affirm the *third* through *twelfth* articles thereby ratifying them as the first ten amendments to the Constitution. During that same time, ten of those eleven states had also affirmed *Article the first*; one less than needed for ratifica-

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\(^{41}\) Connecticut, Georgia, and Massachusetts did not ratify any of the twelve amendments during this time frame. It was not until 1939 that these three states ceremonially ratified the third through twelfth articles to mark the 150th anniversary of the passage of the Bill of Rights.  

\(^{42}\) These ratification dates are derived from the *Documentary History of the Constitution* (Bulletin of the Bureau of Rolls and Library of the Department of State). Washington: Department of State. 1895
tion. On June 4, 1792, Kentucky became the eleventh (and final) state to affirm Article the first but, by that time, amending it to the Constitution would have required ratification by one additional state.

5.2. Why did they Ratify Article the first?

What should we conclude from the affirmation of Article the first by so many states? Though this question demands an answer, it appears to have been neglected by historians. It would be very helpful to know when any of the amendment’s anomalies were first publicly identified; perhaps future research will uncover such information. Given the prominence of these matters at the time, as well as the many controversies attendant to the Bill of Rights, it is very likely that Article the first’s peculiarities, once identified, would have surfaced in contemporaneous newspaper articles and correspondence. As it turns out, we know very little about what transpired during the states’ deliberations on the twelve amendments proposed by Congress. One constitutional historian observed that:

> It is amazing, considering the crucial significance of the Bill of Rights, that we know practically nothing about what went on in the state legislatures during the ratification process. At the time, there was nothing in the states comparable even to the Annals of Congress, ... Even the contemporary newspapers are virtually silent on the ratification debates in the states.\(^4\)

The inadequacy of the historical records will probably prevent us from ever knowing what actually transpired in the state assemblies; consequently, we are left to speculate. The fundamental question is: how well did the states’ legislators actually understand Article the first as it was finally worded? In other words: what exactly were they affirming?

There are two fundamental facts which must guide our exploration of this area. The first is that the deficiencies in Article the first are not manifestly obvious. The second factor is that, long before the amendment was finally proposed, the public mind (or paradigm) had been well preformed to expect an entirely different proposition. The synergy of these two factors appears to have produced an enduring mystery.

5.3. Hidden Meaning

At the beginning of this paper the reader was encouraged to carefully examine the final version of Article the first. Given its nearly impenetrable, if not deceptive, prose then this examination may have failed to reveal its true meaning. Regardless of whether the inexplicable alteration was due to carelessness or guile (or careless

guile) it does not seem likely that those responsible for creating the defect would have energetically proclaimed its existence. In fact, even when the anomalies are clearly explained, as in this report, this subject may still not lend itself to being easily understood. In any case, the states’ legislators could not have fully understood the amendment on September 25, 1789, since it had been drafted only the day before. In the absence of historical records it may never be possible to determine the extent, if any, that the legislators voting on Article the first, actually comprehended its true effect rather than its ostensible purpose.

There was no shortage of critics at that time — among both Federalists and Anti-Federalists — who would have been quite keen to point out any anomalies found in the proposed amendments:

The Federalists did not wish amendments at all; the Anti-Federalists desired more than Madison offered, and knew that the adoption of this amendments would kill the prospect of any radical changes in the future.44

Many federalists believed that the Bills of Rights were largely unnecessary if not detrimental (as they may bestow powers upon the federal government that had not been explicitly granted by the Constitution). The anti-federalists, vociferous opponents of the Constitution, had been inciting interest in convening an additional convention to draft a replacement constitution. Many of the anti-federalists feared that the proposed Bill of Rights would obviate this effort (as indeed it did).

Though it may never be possible to conclusively determine how pervasively understood or misunderstood was Article the first, we can look to subsequent accounts to verify its ability to deceive educated and competent persons. A review of the literature on Article the first (during the two centuries since) reveals extremely little with respect to its purpose or why it was not ratified; if it is mentioned at all it is usually only in passing.45 In and of itself, the scholarly neglect of the very first amendment proposed in the Bill of Rights is puzzling.

More significantly, in the few cases where some commentary is provided, the authors completely failed to understand the amendment. They instead perceived its ostensible purpose (rather than its true meaning) and therefore presumed it would require (in Tier 3) a minimum of one for Representative for every 50,000 people.46 This persistent misunderstanding in the literature attests to how effectively the wording of Article the first cloaks the result it would have actually produced. It also suggests the further absence of extant historical records or other clues that

45 For a complete survey see Appendix 4 of this report.
46 This point is more fully addressed in Section 6 (infra).
would have alerted these authors to the amendment’s interesting anomalies. It is therefore reasonable to assume that many state legislators (in 1789 and 1790) could have similarly misunderstood the amendment, especially in the absence of any accompanying elaboration regarding its meaning.

5.4. The Popular Understanding

In order to understand how easily this amendment could have been misperceived, its lack of clarity must be considered in combination with the public’s *preformed perceptions*. By the time the Bills of Rights were proposed, the Constitution’s failure to proscribe a minimum number of Representatives had long been considered a significant deficiency. The evidence for this is provided by the states’ constitutional ratification debates and the *raison d’etre* for Article the first as proposed by Madison, the House and the Senate. The fundamental similarity of the House and Senate versions of *Article the first* (even in Tier 3) demonstrate that there was a commonly prevailing understanding of the nature of the problem *and* how it could best be resolved. Moreover, there was considerable advance publicity of what Madison and the House had proposed for *Article the first*.

5.4.1 The Historical Context

Despite the lack of records relative to the states’ deliberations on the Bill of Rights, the historical information that is available clearly depicts the popular expectations.

5.4.1.a The Framers’ Assurances

Eighteen months before Congress proposed the twelve bills of rights the Federalist Papers asserted:

*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. … 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.*  

In other words, this Federalist Paper assures us that it would be entirely reasonable to expect there to be 400 Representatives by 1838 (only 35 fewer than what we have today). Note that this was not indicated to be a *maximum* value as it unambiguously affirms “at the rate of one for every thirty-thousand”. This is not the only instance in the Federalist Papers where the ratio of *thirty-thousand* is presented as an *absolute* requirement (rather than the upper boundary).  

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47 Federalist Paper No. 55; February 15, 1788.
48 Federalist Paper No. 56 (February 19, 1788): “…it seems to give the fullest assurance, that a representative for every THIRTY THOUSAND INHABITANTS will render the [House of Representatives] both a safe and competent guardian of the interests which will be confided to it.”
Could this prediction (of 400 Representatives) have been predicated upon an unrealistically high population forecast? That possibility can be dismissed. Given the ratio as explicitly stated, the population projection implicit therein is 12 million people by 1838 (i.e., $400 \times 30,000$). Though this forecast fell short of the actual total — 16.6 million people per the 1840 census — it was a fairly prescient prediction given the quality of the data at the time. Consequently, the forecast of 400 Representatives was indeed not “an extravagant conjecture”. However, upon that apportionment (in 1840) Congress only authorized 223, far short of the 400 promised. Indeed, it would not be until 1910 that Congress would finally authorize over 400 Representatives.

Additional predictions can be found outside of the Federalist papers. James Wilson, a highly respected member of the Constitutional Convention in Philadelphia, stated in November 1787 that “…the House of Representatives will, within a single century, consist of more than six hundred members.” By multiplying 600 against the minimum district size of 30,000, we can infer a population forecast of at least 18 million people by the year 1887.\footnote{An even larger population projection than 18,000,000 can be inferred by taking into account the fact that the Constitution’s formulation for determining the apportionment of representation (and direct taxes) would have excluded native American “Indians” and fractionally included only three fifths of all others who were not “free Persons”. (See Appendix 1.)}

This implicit projection proved to be conservative; the population reached 18 million by the year 1845. Perhaps it could be cynically argued that these assurances were a ruse to obtain the popular support needed to ratify the Constitution. Nonetheless, they would have helped shape the general expectation that representation would always increase proportionately with the population. This would have contributed to the tendency to misperceive the confusingly-worded amendment that was finally drafted. In any case, their effect as a representation to the general public — at a time that only six states had ratified the Constitution — cannot be ignored.

5.4.1.b The Presumption of Proportionate Representation

The framers of the Constitution (and the states that ratified it) fully expected that representation in the House would always be proportional with the population and that there would be relative equality among the congressional districts across the states.\footnote{For substantiation of this point, see Yates, Christopher, et al. “A House of our Own or A House We’ve Outgrown? An Argument for Increasing the Size of the House of Representatives” Columbian Journal of Law and Social Problems, Volume 25, Number 2. 1992. (Pages 157 – 196)} Towards that end, apportionment was expected to be determined in two steps. First, the House decides upon a common proportion be divided into the total population (as per the most recent Census) in order to arrive at the total number of Representatives. Second, that total number is then allocated to the respective
As long as an appropriate proportion was originally selected, the result would be approximate equivalency of district sizes across the states.

The inherent presumption of proportionate representation was further reinforced by Madison’s initial draft of the amendment in which he stated that “the proportion shall be so regulated...” rather than the number shall be so regulated (the full quote is provided in section 4.1 supra).

The first presidential veto provides further evidence of the widespread inherency of the presumption of proportional representation. In April of 1792, President Washington vetoed an apportionment bill proposed by Congress primarily on the grounds that “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.”

5.4.2 The Anticipated Amendment

Many weeks before being passed in their final form, full accounts of the proposals made by Madison on June 8 as well as copies of the original draft amendments were being provided by various newspapers, for example:

Madison’s proposed amendments were widely publicized. Four days after his House speech, the amendments were printed in the New York Daily Advertiser. Other newspapers quickly followed suit. The ubiquitous Thomas Lloyd published them in his Congressional Register, a weekly report of the House debates. News of the proposals thus was spread across the Republic in a comparatively short time...

Moreover, Representatives in Congress frequently mailed copies of the draft amendments (to their friends and associates back home) as early as July of 1789.

It can therefore be safely assumed that the public, or at least their leadership, had well established expectations regarding the forthcoming Bill of Rights prior to their final proposal. Moreover, of all the amendments proposed in the Bill of Rights, Article the first is probably the only one that truly resembles its original precursor. Absent any announcement to the contrary, it could have been reasonably assumed

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51 This second step can not be calculated on a state-by-state basis due to an arithmetical byproduct known as the fractional remainder. As a result, the allocation solution has to be derived by applying a specialized mathematical algorithm to the aggregate total number of seats. This subject comprises its own arcane branch of mathematics that is well outside the scope of this report. For additional information see: http://www.thirty-thousand.org/pages/Apportionment.htm

52 For additional information, see “The First Presidential Veto” at http://www.thirty-thousand.org/pages/first_veto.htm


that what Congress finally issued was fully consistent with what had been previously proposed by Madison, the House, and the Senate. Consequently, this amendment’s discrepancy with what was originally intended could have been easily overlooked (at least initially) by many busy legislators, especially given the insidious subtlety of the alteration and the primitive communications at the time.\footnote{Consider that the invention of the first major communications technology, the telegraph, occurred several decades later and did not become operational until 1844.} This oversight would be further perpetuated if those responsible for creating (or approving) the defect were either incognizant of its effect or cognitive of its effect but disinclined to avow their role in the matter.

5.5. The Number of Representatives Actually Authorized

In the absence of Article the first, how did Congress actually determine the size of the House in the nascent republic? As shown in this section, though it was not ratified, the amendment certainly had not been forgotten. The chart above indicates the total number of Representatives that were actually authorized by Congress (decennially) at the corresponding population levels. (This is also indicated in both charts in Section 4.2.) The initial plateau, “C”, is the total number specified by the Constitution (i.e., 65). The subsequent plateaus indicate the number authorized by Congress upon each of the succeeding apportionments.

As shown in the chart above, Congress complied with the House’s version until the 1830s. The totals authorized upon the first three apportionments were in compliance with the proposed amendments’ Tier 2 parameters (identical for both the House and final versions). More significantly, the number authorized upon the
fourth and fifth apportionments exceeded the House’s Tier 3 floor (which was even larger than the floor required by the final version). However, Congress’s willingness to avail itself to that smaller House size was clearly demonstrated upon the next apportionment.

Upon the sixth apportionment (1840) the actual number of Representatives begins diverging conspicuously away from the would-be floor (of the House’s Article the first) as a result of Congress actually reducing the number of Representatives from 242 to 223 despite the addition of two states to the Union during the 1830s. This reduction — after the death of James Madison in 1836 — creates the appearance of Congress finally abandoning the amendment’s original intent in order to take advantage of the lower fixed limit (200) provided by the defective final version. Viewed critically, it would seem that the previous notion of more Representatives good, few Representatives bad was being replaced by more Representatives good, few Representatives better!

Though the modest increase provided by the seventh apportionment (1850) may appear to reverse this trend, consider that four additional states had joined the Union during the 1840s (plus a fifth in 1850). Ever since then, the actual number of Representatives has continued well below the would-be minimum (relative to the House or Senate versions). The converse effect of these House sizes is the resulting district population sizes as illustrated in the chart below.

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56 Arkansas (1836) and Michigan (1837).
57 To paraphrase Squealer.
58 Florida (1845), Texas (1845), Iowa (1846), Wisconsin (1848), and California (1850).
Upon the 13th census in 1910, Congress authorized 435 Representatives; a size it has remained ever since.\(^{61}\) This “fixing” of the size of the house also resulted in the unmitigated population growth of House districts. During the 18th Congress (1823-1824) a member of the House represented approximately 48 thousand people. Today, each House district encompasses approximately 700,000 residents.\(^{62}\)

Ever since the 1820 Census triggered the Tier 3 formulations, *Article the first* (as it was finally worded) has been effectively obsolete. Unless the prospect of Congress reducing the number of Representatives below 200 seems possible, there would be no reason to ratify the amendment as it was finally worded. So, absent the remedy proposed by Madison, the premise of basing the size of the House on a common proportion has been completely abandoned; instead, Congress has selected the arbitrary number of 435. To this number an apportionment algorithm is applied (every ten years) to arrive at whatever solution that happens to occur. Currently, this results in a significant disparity in House district sizes across the nation.\(^{62}\)

5.6. An Informed and Impartial Decision?

Given all the background and context provided above, it is clear that the states’ legislators could not have understood *Article the first* when it was first proposed since it had been drafted only the day before. And though the final proposal appeared identical to the well-known version previously passed by the House it was, in fact, quite different. This begs two questions. First, by what process would the state legislators across the Union have become aware of the amendment’s several anomalies? Second, how long did it take for the states’ legislators to become cognizant of the amendment’s true effect?

Two things are known. First, there was no communiqué explaining *Article the first* or how it had been altered. The Bill of Rights document was unceremoniously dispatched to the various state legislators without any elaboration on the amendments. Second, there appears to be no historical record whatsoever of references to any of the amendment’s noteworthy anomalies either in the press or private correspondence. This lack of collateral discussion is certainly consistent with the amendment’s anomalies escaping detection. Even to the extent they may have been identified at the time, communication in the 1790s was an extremely slow and cumbersome process.

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\(^{60}\) In order to index the House size against these formulations, the corresponding population levels used is the “Apportionment Population” rather than the total census population. These calculations are fully explained in Appendix 3, Reference #5 (infra).

\(^{61}\) It has remained at 435 since 1913 except for a four-year period after the admission of Hawaii and Alaska. For an explanation of how the number of Representatives became constrained at 435 see: [http://www.thirty-thousand.org/pages/Why_435.htm](http://www.thirty-thousand.org/pages/Why_435.htm).

Given the foregoing, the awareness of the amendment’s true effect (relative to Tier 3) could not have occurred quickly or uniformly. If it had, then undoubtedly it would have generated considerable debate at the time. However, we can not know the extent of this incognizance, if any, during the time the proposed Bill of Rights was being considered by the states’ legislatures. Relative to the affirmation of Article the first our hypothesis supposes that any given state legislature could have been comprised of any combination of the following types of legislators:

A) Cognizant Legislators fully understood the amendment’s true meaning.

B) Incognizant Legislators misperceived the amendment as being identical to the original House version that it resembles.

C) Bewildered Legislators do not comprehend the amendment. Perhaps averse to mathematical formulations, these gentlemen could have been confused as to its intended purpose or by any of its anomalies.

D) Uninterested Legislators are entirely indifferent to the issue and so did not take time to consider it.

E) Compromised Legislators are those who are more concerned about the amendment’s consequences with respect to the allocation of federal taxes.

The last type, the Compromised Legislator, requires further explanation. The Constitution required that the federal tax burden be allocated to the states on exactly the same basis as representation. Prior to this Constitution, no external sovereignty had imposed an enforceable taxing authority upon the states (other than Britain before the revolution). The impact of Article the first on the interstate and intrastate allocation of federal taxes would have quickly become apparent to the state legislators; therefore, its potential impact on their decisions can not be disregarded. First, the interstate effect: under either the House’s or Senate’s Article the first, as Delaware’s share of representation diminished so, conversely, would Virginia’s share of the federal tax allocation increase. However, the final version’s Tier 3 fixed floor ensured that this outcome would not be required.

Second, the intrastate effect: though no mechanism existed yet for distributing this new direct federal tax, under any implementation, it would have fallen heavily on a relatively small number of citizens (i.e., those with substantial assets that could be identified for taxation).

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63 For an explanation of this, see Appendix 1 (infra).

It is not unreasonable to assume that the foregoing tax implications would have caused some legislators to compromise their view on representational apportionment, especially if those legislators believed that either their own personal financial interests or that of their constituents might be adversely affected by the imposition of additional federal taxes. As a result, those in the small states who feared having their federal representation diminished would have an ally in those in the large states who wished to avoid the full tax consequence of proportionally-determined representation. Nonetheless, it would have been some consolation to any compromised legislators in the large states that their state would continue to enjoy majority control of the House even if proportional allocation were abandoned (in Tier 3).

Complicating the five types of legislators posited above is the *perception-versus-reality* factor: each Representative would be voting *for* or *against* the amendment as *they perceived it*. As explained in section 5.7.1 (infra), a Cognizant Legislator may *favor* the defective amendment whereas an Incognizant Legislator may oppose the ostensible amendment (i.e., oppose the amendment as they incorrectly perceive it to be).

It is also reasonable to assume that, relative to this matter, there was imperfect communication among the legislators even within the same legislature. The reasons for this may range from simple inattention to Machiavellian motivations. This factor could have contributed greatly to the lack of uniformity relative to a common understanding.

Furthermore, it is not possible to know how many *federal* Representatives and Senators actually understood the true effect of the final version. Consider the obliquely-worded proposal made by the joint committee, to wit: *That the first article be amended by striking out the word “less,” in the last place of the said first article, and inserting in lieu thereof the word “more.”* Neither the House nor Senate journals indicate that any further elaboration was provided or that any discussion ensued. Would the result have been the same had they prefaced their proposal thusly: “After the number amounts to 200 in the second clause there shall be no less than 200 Representatives and no more than one for very fifty thousand’’?

Finally, it can not even be assumed that all six members of the joint committee understood what they had wrought relative to *Article the first*. In fact, it is possible that none of the six men *fully* comprehended the consequences of the alteration other than simply knowing that the proportional minimum had been supplanted by a fixed value. The apparent lack of *any* substantive commentary on the final version of *Article the first*, either in the press or available correspondence, would certainly suggest a prevailing *scotoma*, or blind spot, relative to this matter.
Given the assumptions stated above consider two possible scenarios. The first scenario posits that most or all of the legislators comprising any given legislature were fully cognizant of the amendment’s true meaning at the time they voted on it. The second scenario posits that most or all of them were initially incognizant of its intention and, instead, mistook the amendment for the one previously proposed by the House. These two scenarios are further described below.

5.6.1 **Cognizant Scenario**

If the state legislators that affirmed *Article the first* did so with a full understanding of its actual consequence then we would be forced to conclude that they had become opposed to mandating proportional representation at population levels above eight million and that, further, they wished to increase the minimum district size from 30,000 to 50,000. However, there is no logical reason for the larger states to adopt this view, nor does anything in the historical record suggest that they would have. Further, if there truly was that much support for the amendment (as it was finally worded) then presumably the first eleven states affirming it would have continued to press for its ratification by the states that subsequently joined the Union. Under this scenario, why didn’t the momentum for *Article the first* continue given the nearly unanimous affirmation it had received?

The best argument that can be made for this scenario is that though they understood the deficiencies in Tier 3, they were willing to overlook those in order to secure the representational protection afforded by the first two tiers. In other words, to the extent that the state assemblies may have fully understood the amendment and its shortcomings, then perhaps they believed that an ultimate minimum of 200 was better than none. However, it is difficult to believe that this disposition would prevail widely, especially in those states that had previously taken strong stands on this matter; for example: Virginia and New York.

Upon Virginia’s ratification of the Constitution on June 27, 1788, the second of 20 amendments that they proposed focused on this issue, specifically stating “that number [of Representatives] shall be continued or encreased … upon the principles fixed by the Constitution by apportioning Representatives of each State to some greater number of people from time to time as population increases.” 65 The first of 32 amendments proposed by New York (when they ratified the Constitution) makes a similar requirement. 66 Having shown this to be a paramount concern, it is difficult to imagine that both of these states would knowingly accede to an amendment that so betrayed the principle of maintaining proportional representa-

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65 The full amendment proposed by Virginia is provided in section 5.7.3.e (infra).
66 The amendment proposed by New York is provided in section 5.7.3.d (infra).
tion, at least not without engendering a significant amount of debate which hopefully would have been documented in the historical record.

Alternatively, perhaps some of the states were altogether indifferent about the eventual size of the House and so acquiesced to an amendment which appeared to be inevitable (despite its defects). However, anyone who has read the available transcripts of their deliberations is likely to conclude that most of these legislators were exceedingly conscientious, thorough and diligent. They had a profound sense of responsibility to their constituents and were aware of the historical significance of their decisions. It is inconceivable that a majority of these men would ratify Article the first knowing that it contained a material defect.

5.6.2 Incognizant Scenario

If some (or all) of the state legislators that affirmed the amendment had incorrectly believed that Article the first would fulfill the purpose originally intended for Tier 3 (as per the House and Senate versions), then we are to conclude that they did indeed wish to compel proportional representation (at all population levels). In this case, the subsequent lack of support for Article the first, despite its initial momentum, could logically be attributed to a gradually emerging awareness of the amendment’s inadequacies. This growing awareness, in conjunction with expected population growth, would have eventually obsoleted the amendment.

5.6.3 Proposed Hypothesis

The hypothesis proposed here is that most or all of the state’s legislators were initially incognizant and believed (incorrectly) that Article the first was identical to the original House version. Over time, these legislators (or their successors) would have gradually become aware of some or all of the amendment’s anomalies. As the legislators became cognizant of the amendment’s true effect, then to the extent they desired to implement proportional minimums they would have realized that the amendment was becoming irrelevant, if not contraindicated, as the total population neared eight million. This realization would have occurred by the third census (in 1810) when the total population was nearing the upper limit of Tier 2 (as illustrated by the chart in section 5.5).

This hypothesis also posits that any prevailing misperceptions would have been further perpetuated by the complicity of some of the legislators who first became cognizant of the amendment’s true effect. If any legislators knowingly affirmed the amendment (because they were opposed to the prospect of a populous House), then they may have been disinclined to either announce their true motives or otherwise publicize the amendment’s deficiencies (except perhaps among similarly minded colleagues). Alternatively, those legislators who later realized that they had
affirmed the wrong Article the first would not be likely to increase their embarrassment by calling attention to their carelessness.

Finally, this hypothesis supposes that there was very little uniformity among the legislatures with respect to these various types of legislators (i.e., cognizant, incognizant, bewildered, uninterested or compromised). The fundamental supposition is that there was a complex political stew of collusion, subterfuge, confusion, misperception and unwitting misrepresentation which created this enduringly overlooked mystery.

5.7. Applying the Hypothesis

As stated above, the working hypothesis proposed herein is that there was initially widespread incognizance of the amendment’s true effect and, over time, most of the legislators would have gradually become cognizant of its anomalies. This confusion would have been further exacerbated by any ulterior motives that may have existed. In order to evaluate this hypothesis it is instructional to consider the timing of each of the state’s ratifications.

5.7.1 The Timing of the Ratifications

The chart below lists the first fifteen states to join the Union along with a timeline indicating when any of the twelve articles was affirmed by each state. Only the states indicated with an asterisk (*) affirmed Article the first.
For obvious reasons, the principle of proportional representation was generally favored by the larger states (e.g., Virginia) and opposed by the smaller states (e.g., Delaware). With this in mind, the states in the table above are arranged in order of land area from smallest to largest. 67

The ratifications appear to have occurred in three distinct waves. Six ratifications occurred during the initial wave between October 27, 1789, and March 10, 1790. Then a second wave of four ratifications occurred between June 7 and December 17, 1791; followed by a fifth on June 24, 1792. The third wave was those three states (Connecticut, Massachusetts and Georgia) that refused, for various reasons, to ratify the Bill of Rights (until doing so ceremonially 150 years later as part of a commemoration). It is posited here that most of the state legislators who ratified during the first wave were incognizant of Article the first’s actual meaning (relative to Tier 3).

If the legislators ratifying during the first wave were largely incognizant, then it seems likely that many of the remaining legislators would have become cognizant by the time the second wave of ratifications occurred. If so, why would they have then affirmed the defective amendment? The second wave of ratifications was spurred, at least in part, by the pending first apportionment following the completion of the 1790 Census. Some of the states that had not yet ratified were concerned about being shortweighted in the absence of Article the first. In those cases, the expediency dictated by the impending apportionment may have compelled these states to affirm Article the first regardless of the deficiencies it would later manifest when the nation’s population exceeded eight million.

The reasonableness of this hypothesis becomes more apparent when considering, in their totality, the facts and circumstances surrounding the states’ ratification of Article the first — as described in the following sections.

5.7.2 The Three Smallest States

5.7.2.a Small Wonder that Delaware Defers

Delaware was the smallest state in the Union when it deliberated on the twelve amendments in January of 1790. (This distinction passed to Rhode Island four months later). As indicated in the table above, among all the states that passed on the amendments, Delaware was the first and only state to specifically reject Article the first. 68 Amar offers the following explanation for Delaware’s decision:

67 The land area is in square miles. The data are provided by the U. S. Geological Service at USGS.gov.

68 More precisely, the Delaware state legislature resolved “that the First Article be postponed” according to the records provided by Documentary History of the Constitution of the United States of America 1786-1870.
A final, more obvious explanation for the failure of the First Amendment [to be ratified] focuses on Delaware, the only state that ratified the last ten amendments while rejecting the first. The Constitution guaranteed each state at least one seat in the House of Representatives, and Delaware in 1789 had only that one seat. With its tiny population and limited room for growth, the state had selfish reasons to favor as small a House as possible — indeed to endorse the hypothetical bill that Patrick Henry had conjured up in the Virginia ratifying debates decreasing the size of the House from sixty-five members to thirteen.69

Considering the foregoing, is it possible that the Delaware legislature had perceived Article the first as it had been originally drafted by the House? This is suggested by one historian: 70

Late in October 1789 Delaware President Joushua Clayton laid before the state legislature twelve constitutional amendments adopted… On January 20, 1790, the Council reported to the Assembly that it had accepted all of the amendments except the first, which was concerned with increasing the size of the U. S. House of Representatives. The council recommended that this amendment be “postponed” since it was “not satisfied of the Propriety of it.” Reasons were not given, but apparently the Council believed that the amendment’s formula for raising the population requirement for each representative from 30,000 inhabitants to 40,000 and then to 50,000 would make it more difficult for Delaware — a small state, with limited growth potential — to increase its federal representation.

Note that the author’s conclusion presupposes proportional representation would be mandated in Tier 3 (rather than merely requiring a minimum of 200).

Alternatively, could Delaware have actually been cognizant of the amendment’s true effect and, therefore, objected to the prospect of the then 65-member House growing to 200 when the nation’s population reached ten million? Given the prevailing sentiment, an eventual size of 200 — only three times larger than the existing House — probably seemed all but inevitable with or without Article the first, so it seems unlikely that Delaware could have hoped to prevent this.

Moreover, even if this were the case, then it would seem plausible that Delaware would have instead attributed their opposition (ostensibly) to the amendment’s significant deficiencies.

5.7.2.b  Littler Rhode Island Affirms

Rhode Island did not ratify the Constitution until May 29, 1790, eight months after the Bill of Rights had been proposed. Consequently, they had plenty of time to consider the matter. If Article the first was so objectionable to little Delaware, then why did even littler Rhode Island later affirm it? With 40% less land area than Delaware, it certainly would have been quite rational for Rhode Island to join in opposition. Rhode Island’s simultaneous rejection of Article the second confirms their willingness to pick and choose among the twelve articles. If Rhode Island had incorrectly believed that Article the first would require proportional representation (in Tier 3), then their affirmation of it would attest to the magnanimity of the state legislature. Alternatively, consider that Rhode Island’s ratification occurred on June 7, 1790, nearly five months after Delaware’s ratification. It is plausible that by this time Rhode Island had become cognizant of the amendment’s dissimulation and accepted that the House would eventually total 200. If tiny Rhode Island was agreeable to 200 Representatives, then why would not have been larger Delaware? Perhaps because, five months earlier, Delaware was not cognizant of the amendment’s true effect.

5.7.2.c  Connecticut Vacillates

In 1789, Connecticut was the second smallest state in the Union (later becoming third after the admission of Rhode Island). Though Connecticut refused to ratify any of the twelve articles (until 150 years later), the events which transpired in their lower house were consistent with the hypothesis of initial incognizance being later replaced by cognizance.

…on October 27 [1789] the lower house passed a bill ratifying all but the second amendment [Article the second]… The upper house merely voted to postpone consideration until the next session. In May 1890, the House again passed a bill ratifying proposed amendments three through twelve, omitting this time also the first which regulated the size of the House and ratio of Representatives to population. The upper House a week later passed all twelve proposals. Thus each House did actually pass the ten that become the Bill of Rights. But this time the lower house dissented, presumably because they still opposed the first and second of the twelve submitted. … The House refused to change its stand, and the matter was held over to the next session when, on October 16, 1790, the lower house “Negatived the articles of amendment” 71

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In other words, only one month after the twelve articles were proposed by Congress, the Connecticut lower house favored Article the first then, seven months later, rejected it. Though we will never know why they reversed their position, it seems most likely that they would have gone from incognizant-affirm to cognizant-reject rather than from cognizant-affirm to cognizant-reject. In other words, they probably initially perceived it incorrectly — as if it were the original House amendment — and later realized its flaws and concluded they were unacceptable.

Had they originally affirmed Article the first while cognizant of its true effect, then they would have been likely to continue supporting it on that basis. Connecticut was a relatively small state that, like Rhode Island, could have been amenable to the eventual minimum of 200.

5.7.3 The Five Instigating States

Upon ratifying the Constitution, the legislatures of five states — North Carolina, New Hampshire, Massachusetts, New York, Virginia, — separately proposed amendments which they expected to be included in the Bill of Rights. Of these five, only Massachusetts later rejected Article the first.

5.7.3.a North Carolina

North Carolina did not ratify the federal Constitution until November 21, 1789, three months after the Bill of Rights had been proposed. However, on August 2, 1788, the state, in effect, provisionally ratified the Constitution by agreeing to raise the tax revenue for the federal government that would be required had they joined the Union. At the same time they proposed six amendments for inclusion in the expected Bill of Rights, the second of which was:

> There shall be one representative for every thirty thousand, according to the enumeration or census mentioned in the Constitution, until the whole number of representatives amounts to two hundred; after which, that number shall be continued or 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 the population increases. [Emphasis added.]

North Carolina ratified Article the first on December 22, 1789. Given the amendment they had proposed, their affirmation would be consistent with being incognizant of the amendment’s true formulation (in Tier 3).

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72 Rhode Island also proposed a set of amendments (none of which dealt with the size of the House). However, these amendments were not proposed until eight months after Congress had drafted the Bill of Rights.

5.7.3.b  New Hampshire

When New Hampshire ratified the federal Constitution on June 21, 1788, they proposed *twelve* amendments for inclusion in the expected Bill of Rights. The *second* of these was as follows

*There shall be one Representative to every Thirty thousand Persons according to the Census mentioned in the Constitution, until the whole number of Representatives amount to Two hundred.*

New Hampshire ratified *Article the first* on January 25, 1790. It does not appear that either the amendment’s ostensible or actual meaning would have conflicted with what the state had proposed. Therefore, it is difficult to speculate on the legislators’ level of cognizance based on their decision.

5.7.3.c  Massachusetts

When Massachusetts ratified the federal Constitution on February 6, 1788, they proposed *nine* amendments for inclusion in the expected Bill of Rights. The *second* of these was as follows

*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.*

On January 29, 1790, Massachusetts’ Senate rejected the first two articles and affirmed articles *three* though *twelve*. Four days later, their House rejected the first two articles as well as the *twelfth*, only affirming *three* through *eleven*. Despite that, it was never formally recognized that Massachusetts had ratified *any* amendments at that time.

What would explain their outright rejection of *Article the first* given that they had previously called for such an amendment? It does not appear that *either* the amendment’s ostensible or actual meaning would have conflicted significantly with what the state had previously proposed. Misperceiving the amendment, had they objected to the prospect of a House eventually larger than 200? If so, it seems unlikely that they would have supported the original proposals of same in both houses of Congress. Consequently, it seems most likely that they objected to the amendment having become cognizant of its deficiencies.

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5.7.3.d New York

When New York ratified the federal Constitution on July 26, 1788, they proposed 32 amendments for inclusion in the expected Bill of Rights; the first of these was as follows:

That there shall be one Representative for every thirty thousand Inhabitants, according to the enumeration or Census mentioned in the Constitution, until the whole number of Representatives amounts to two hundred; after which that number shall be continued or increased but not diminished, as Congress shall direct, and according to such ratio as the Congress shall fix, in conformity to the rule prescribed for the Apportionment of Representatives and direct Taxes. [Emphasis Added.]

New York ratified Article the first on February 27, 1790. The amendment proposed by New York is more consistent with the original House version of Article the first rather than its final version. And, in fact, both of its federal Senators had voted in favor of increasing the size of the floor. It therefore seems possible that they had affirmed the final version incognizant of its true effect.

5.7.3.e Virginia

When Virginia ratified the federal Constitution on June 27, 1788, they proposed twenty amendments for inclusion in the expected Bill of Rights. The second of these was as follows:

That there shall be one representative for every thirty thousand, according to the enumeration or census mentioned in the Constitution until the whole number of representatives amounts to two hundred; after which, that number shall be continued or increased, as the 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. [Emphasis added.]

Virginia ratified Article the first on November 3, 1791, by which time it seems highly likely that Virginia would have been cognizant of the amendment’s deficiencies. As explained in the next section, Virginia finally ratified the amendment in order to ensure their proper share of representation in the impending apportionment.

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76 A proposal made in the Senate on September 2 would have extended the minimum district size of 30,000 to a larger range of population. The proposal lost. The following Senators voted in favor: VA: 2, NY: 2, MA: 1, GA: 1; voted against: DE: 2, SC: 2, MD: 2, CT: 2, NJ: 2, PA: 1, NH: 1. See: Annals of Congress, Senate, 1st Congress, 1st Session; September 2, 1789 (Page 76)
5.7.4  The Impending First Apportionment

Two states affirmed Article the first separately from their ratification of the remaining amendments. The first was Pennsylvania which initially rejected Article the first on Mar. 10, 1790 (when it ratified the last ten articles) only to ratify it 19 months later on September 21, 1791. Just a few weeks later Virginia affirmed only Article the first, on November 3, 1791, then affirmed the remaining eleven on December 15, 1791. Perhaps Pennsylvania’s belated ratification occurred for the same reason as Virginia’s preludious one: the impending apportionment. As explained below:

Early in 1791 Congress debated the reapportionment of the House of Representatatives based on the first federal census of 1790. Fearing that Virginia might suffer in the new apportionment, the state legislature on November 3, 1791, adopted the first proposed amendment dealing with the apportionment of the House of Representatives. 77

In addition to Virginia, three other states ratified during the second wave: Pennsylvania, Rhode Island and Vermont (also Kentucky the following year). Perhaps, like Virginia, these other states decided to affirm Article the first (despite its deficiencies) in order to ensure that they did not “suffer in the new apportionment”. Why then had Pennsylvania rejected Article the first nineteen months earlier? Perhaps being the last state in the first wave to ratify the amendments, they had by then become cognizant of the amendment’s true effect.

5.7.5  Unexpected Affirmations

New Jersey and South Carolina are two states that ratified Article the first during the first wave despite their apparent lack of enthusiasm for it (relative to its original intent). It is very difficult to speculate on the true motivations of these states with respect to their affirmation of the amendment.

As explained in section 4.4.4 (supra) Senator Ellsworth (New Jersey), a member of the joint conference committee, had clearly opposed a populous House. If the Senator was cognizant of the amendment’s true language, could that explain why, despite being the third smallest state at that time, New Jersey was the first state to ratify Article the first (along with the last ten). Could their legislature have been tipped off to the amendment’s hidden meaning?

With respect to South Carolina, the size of the House was not an issue raised during its Constitutional Convention. Of all the states that formally proposed

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amendments for the Bill of Rights, only South Carolina did not include one addressing this matter. Perhaps it was indifferent to this issue; however, both of its Senators had rejected more aggressive language for Article the first in the federal Senate. Though it may only be coincidental, note that the state’s federal Representative observed that the Bill of Rights was “calculated … to deceive” (section 4.4.4).

It is also interesting to consider Kentucky’s ratification of all twelve articles — upon joining the Union in June of 1792 — as they were the last state to ratify any of the twelve articles of the Bill of Rights. Given the slow communications at that time, it is possible that the Kentucky legislature was unaware that articles three through twelve had been fully ratified six months earlier (by Virginia). In any case, it may not be possible to determine what their expectation was in also affirming the first article.

5.8. The Matter of Article the second...

Is it only an interesting coincidence that both of the first two amendments proposed were rejected? As it turns out, the story of Article the second may also provide insight relative to the first article.

Article the second authorizes Congress to vote itself a pay increase only in the following manner: “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” Though simple and straightforward, two hundred years elapsed before this was finally ratified as the 27th Amendment.

At first glance, it might appear that Article the second has nothing in common with the one preceding it (other than failing to be ratified). However, of the twelve amendments, the first two are the only ones that proscribe limitations specific to the individual Representatives. Whereas the last ten articles imposed broad constraints upon federal authority, the first two would limit the Representatives’ ability to enlarge the size of either their constituency or their compensation.

Did the initial rejection of Article the second mean that the states did not want to limit the Congressmen’s ability to increase their compensation? That would defy both common sense and the historical record; for example, Madison stated on June 8, 1789, that

…there is a seeming impropriety in leaving any set of men without control to put their hand into the public coffers, to take out money to put in their

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78 Except for the ceremonial ratification of articles three through twelve in 1939 by Connecticut, Massachusetts, and Georgia; and the subsequent ratification of the second article as the 27th amendment.
pockets; there is a seeming indecorum in such power, which leads me to propose a change. We have a guide to this alteration in several of the amendments which the different conventions have proposed.  

Under the existing and previous confederations, the states set and paid compensation directly to their respective delegations. Though it is difficult to imagine today, the notion of actually authorizing the Representatives to determine their own compensation (from the new federal government) was quite objectionable to many state legislators. Of course, the pressing need to compensate the Congressmen would not wait for the states to concede to this reality and therefore became implemented in practice, but without the limitation provided by this amendment.

Consider again the analogy between the first two articles: whereas the second article would have explicitly authorized Congress to determine the amount of their own compensation (subject only to a delay in its taking effect), the first article would have explicitly authorized Congress to determine the size of the House districts. The critical difference between the two is that the solutions allowed by Article the first are constrained by minimum and maximum parameters. That distinction could explain the initial success of Article the first to be ratified, especially to the extent it was misperceived as being identical to the House version.

There was an additional reason for opposing Article the second which provides an alternative analysis for the analogy between the first and second articles. This objection was that men who are relatively affluent might suppress their compensation so as to discourage the participation of (and opposition from) those of lesser means. In opposing the second article, Theodore Sedgwick (Representative from Massachusetts) explained that:

… it might serve as a tool for designing men; they might reduce the wages very low, much lower than it was possible for any gentleman to serve without injury to his private affairs…in order to prevent men of shining and disinterested abilities, but of indigent circumstances, from rendering their fellow-citizens those services they are well able to perform, and render a seat in the House less eligible than it ought to be.

If there is an analogy to be drawn between this objection and the first article, it would be that Congress should not be allowed to so enlarge the House districts that it prevents those of “indigent circumstances” to seek office due to the inherently greater cost of campaigning in a larger district.

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79 Annals of Congress, House of Representatives, 1st Congress, 1st Session; June 8, 1789 (Pages 457-458).
80 Annals of Congress, House of Representatives, 1st Congress, 1st Session; August 14, 1789, (Page 756).
Of the first eleven states to vote on the Bill of Rights, ten ratified *Article the first* while only six ratified *Article the second*. Significantly, all five states that rejected the *second* had also ratified the *first*; this poses a dilemma. If one assumes that the state legislators had correctly understood *Article the first* in its final form (rather than as it had been originally intended) then the question to be answered is: why would all five states that opposed *Article the second* (i.e., opposed allowing the Representatives to authorize their own pay) be willing to grant those same Representatives free reign to establish districts as large as they may wish (once the nation’s population reached eight million)? That result is far from correlative.

Returning to the story of *Article the second*, interest in this amendment was revived from time to time, usually as a result of Congress voting themselves a retroactive pay increase and thereby illuminating the wisdom of the proposal in the first place. However, it remained all but forgotten on the parchment until one enterprising citizen launched a campaign to complete its ratification; leading to its becoming the 27th amendment in 1992. Apparently, as a result of being tardy in its ratification, *Article the second* doesn’t get to enjoy the classy distinction of being one of the *Bills of Rights*. Perhaps the notion of “ten” amendments has become dogma and, besides, it does have a nice ring to it (like the “ten commandments”). The number “eleven” may seem rather awkward being three syllables and a prime number. Now “twelve amendments” would sound catchy and that is just what the first Congress had proposed.

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6. **A HOLE IN THE SCHOLARSHIP**

Given the history of *Article the first*, its cardinal placement in the Bill of Rights, and the substantive (and still relevant) issue it was intended to address, the paucity of scholarly commentary on this subject in relevant historical texts is truly remarkable. One might expect *Article the first* to receive at least as much attention as, for example, the “Titles of Nobility” amendment which was proposed in 1810 (evidently by those who thought the matter had not been resolved adequately by the Constitution). On this latter topic there appears to be more than enough information available from scholarly texts and otherwise.\(^{82}\)

For this report, several authoritative sources were examined to ascertain how *Article the first* has been addressed historically (a summary of which is provided in Appendix 4). In most instances, the reference to *Article the first* is merely perfunctory — consistent with something that is perceived to be a curious but irrelevant historical artifact. In very few cases does the author provide any commentary and, in every instance except one,\(^{83}\) the author incorrectly perceives the amendment as if it were the one originally proposed by the House. In these cases, the commentator then proceeds to dismiss the amendment on the unquestioned *presumption* that increasing the number of Representatives is a bad thing. Even so, sound scholarship would require that a rationale be provided to support this more-is-bad assumption and, given that view, to explain why the first Congress and eleven states were so misguided as to want to compel a populous House. In addition, those who oppose *Article the first* (as misperceived) should justify why Congress should have unlimited discretion in determining how few Representatives there may be. If, for example, the Congress decided to reduce the number of Representatives to 235 (for the sake of “efficiency”), is there any rationale for opposing this? Or should we accept whatever number of Representatives that Congress deems best?

In this context, the purpose of the foregoing questions is not to explore the arguments for or against a more populous House. Instead, the point is to show that regardless of how the amendment is perceived it should have engendered a vigorous scholarly debate on its merits and why, after being initially ratified by so many states, it was subsequently abandoned. The absence of such scholarship can only be explained by either befuddlement as to the amendment’s actual meaning or an unquestioning *group think* as to the merits of the amendment’s *perceived* purpose. As a result, the story of *Article the first*, has been quite effectively swept

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\(^{82}\) Google: “Titles of Nobility Amendment” or “missing thirteenth amendment”.

\(^{83}\) The notable exception is provided by Akhil Reed Amar: Bill of Rights, Creation and Reconstruction. (See Appendix 4, Reference #20, infra.)
under history’s rug along with the debate on how the size of the House should be determined.

The first example of misperception comes from one frequently cited work on the Bill of Rights entitled “Proposed Amendments to the Constitution of The United States 1789-1889” by Herman Ames. Published in 1896, it provides a comprehensive review of the relevant documentation that was available at the time. Though a few pages are devoted to Article the first, there is no mention of any of the issues identified in this report. Moreover, in discussing the amendment, the author clearly demonstrates that he does not comprehend the actual effect it would have produced.84

A more recent example is provided in an article about Article the second in which the author, a very knowledgeable attorney, describes Article the first according to its ostensible purpose (in Tier 3) which is the opposite of what it would have actually effected.85

The purpose of making these observations is not to disparage these authors’ acumen. Instead, it underscores the inherent difficulty of comprehending the amendment which, though its intent may seem clear, proves to be enduringly enigmatic.

84 See Appendix 4, Reference #4, regarding “Proposed Amendments to the Constitution of The United States 1789-1889”.
85 See Appendix 4, Reference #21, regarding “The Telling Tale of the Twenty-Seventh Amendment”.
7. **CONCLUSION**

The Constitution does not require that the size of the House increase along with the population. In fact, there is nothing in the Constitution that would prevent Congress from significantly *reducing* the number of Representatives to fewer than the 435 there are today. This omission was identified as a critical problem when the question of whether to ratify the proposed Constitution was being hotly debated. The importance of this issue is well substantiated by the historical records, how *Article the first* was originally proposed, and its cardinal placement in the Bill of Rights.

By proscribing a mathematically coherent formulation, either the House or the Senate version of *Article the first* would have logically resolved this “defect” in the Constitution. However, by inverting a single word — *less to more* — the House’s *Article the first* was transformed into the inconsequential first amendment inscribed on the Bill of Rights.

Taken at face value and disregarding its mathematical defect, *Article the first* would have produced little, if any, beneficial effect relative to the critical issues identified at the time. Considering the wisdom of the Bill of Rights and the profoundly significant implications of its other amendments, it is difficult to imagine that our first Congress would have *deliberately* placed such an inconsequential, questionable and embarrassing proposal at the top of the long-expected set of amendments. Instead, it is reasonable to assume that the amendment’s paramount placement in the Bill of Rights is commensurate with the profound effect it was expected to have on the breadth of representation (pursuant to its intended purpose).

7.1. **The Amendment’s Significant Deficiencies Defy Logic**

As finally worded, *Article the first* presents the following problems:

a) **The Non Sequitur**

For all practical purposes, it is a complete *non sequitur* to the lengthy debates and legislative actions which were its provenance. In particular, relative to House sizes greater than 200 (i.e., Tier 3) the amendment does not even remotely resemble a compromise between the two Congressional amendments from which it was begotten. Instead, it clearly *betrays* the objective of those predecessor amendments: to ensure that the number of Representatives increase proportionately with the total population and, furthermore, that there be relative equality among the congressional districts across the states.
b) The Illogical Discontinuity

A stunningly illogical discontinuity occurs in the transition from Tier 2 to Tier 3. As illustrated by the chart on page 18, the maximum size at the end of Tier 2 is 266 Representatives (when the total population is 8,000,000). However, with the addition of a single person (a total of 8,000,001), Tier 3 is triggered and the allowable ceiling is decreased by 40% to 160. Even if a subsequent legal repair (e.g., via a Supreme Court ruling) were to cause the conflicting minimum of 200 to prevail, that would still force an indefensible 25% decrease in the number of Representatives allowed.

c) The Mathematical Defect

Specifying a minimum number of Representatives that exceeded the corresponding maximum clearly would have defied any sense of reason had it been detected at the time. This defect would have only occurred when the total population was between eight and ten million people. When viewed from today, this may appear to be a small range in which to suffer such a discrepancy. However, at a time when the total population was approximately 3½ million people, a defective range of two million could not have been easily overlooked.

Putting this in historical context, the 1810 Census counted 9.1 million people. Resulting from that was the fourth apportionment regime in which Congress increased the number of Representatives to 213 (from 187). That number of Representatives would not have been allowable had this amendment been in effect. Instead, the defective language would have specified a maximum of approximately 182 and a conflicting minimum of 200.

d) The Inconsequential Amendment

The amendment, as finally worded, would not have produced any practical effect or benefit in the longer term (beyond the first two tiers) unless it were argued that the final version’s Tier 3 may have actually been intended to prevent the House from becoming as large as allowed by the Constitution. However, the prospect of an overly populous House was not one of the issues raised by the states’ ratification conventions or the Constitution’s critics. In fact, Madison had proposed converting the constitutional formulation of 1:30,000 from a ceiling to a floor.

Alternatively, with respect to the floor size, it may be argued that this amendment would have ultimately established a minimum size of 200 whereas before there was none. However, had that truly been the avowed intent, then Article the first could have more sensibly ended at “two hundred
Representatives” and not included the remaining language (i.e., “nor more than one Representative for every fifty thousand persons”).

7.2. Why did Eleven States Ratify Article the first?

During the first wave of ratifications most (if not all) of the states’ legislators probably perceived Article the first not as it actually was, but instead, as it had been originally intended (i.e., as framed by the preceding House and Senate versions). There is otherwise no satisfactory explanation for why so many states would have affirmed an amendment which was only effective while the population was below eight million and, thereafter, became defective, then ineffective.

It is further argued that the legislators may have gradually become cognizant of the amendment’s deficiencies by the second wave of ratifications. This would explain, for example, Delaware’s opposition to the amendment (during the first wave) in contrast to Rhode Island’s affirmation of it during the second wave. The second wave of ratifications may be due to the expediency of ensuring a proper apportionment in the immediate future regardless of the amendment’s long-term deficiencies. The fact that six states had already ratified the flawed amendment (during the first wave) could have helped justify the latter ratifications.

Finally, it is necessary to explain why all five states that had rejected Article the second had also ratified Article the first. Note that four of these five occurred during the first wave of ratifications. It is reasonable to conclude that those state legislators who opposed granting virtually unlimited self-remuneration authority to the Congress would have accepted an analogous authority for the Representatives to determine the size of their own districts as long as they were subject to consequential minimum and maximum boundaries.

7.3. Proposed Hypothesis

The hypothesis proposed here is that most or all of the state’s legislators initially believed (incorrectly) that Article the first was identical to the original House version. Over time, these legislators (or their successors) would have gradually become aware of the amendment’s shortcomings. As the legislators became cognizant of the amendment’s true effect, then to the extent they desired to implement proportional minimums they would have realized that the amendment was becoming irrelevant, if not contraindicated, as the population levels neared eight million.

7.4. Where is the scholarship on Article the first?

Why does the first amendment proposed for the Bill of Rights contain several significant anomalies? And why, despite those anomalies, did it nearly become ratified to the Constitution? Though these subjects are certainly worthy of
scholarship there appears to be none. Perhaps historically, for some commentators, this may have been an awkward subject. That notwithstanding, these matters are certainly interesting enough to warrant identification, if not investigation, by intrepid historians. Because this apparently has not happened, then we are forced to conclude that the amendment’s anomalies have generally remained undetected. In those few instances where the commentator does address the topic their analyses have revealed their misunderstanding of the amendment. These commentators have consistently believed that the amendment’s effect would be to require the number of Representatives to increase with the population (indefinitely) pursuant to the two predecessor versions proposed in Congress. These observations are not made merely to criticize the historical accounts. Instead, they serve to illustrate the inherent perplexity of Article the first (as finally worded) and its persistent ability to either baffle or mislead.

7.5. **In closing**

As originally proposed by the House and Senate, Article the first ambitiously endeavored to resolve the question of how representation should be linked with population. Though this issue is easy to understand in the abstract, it is more difficult to communicate mathematically even with the benefit of charts and illustrations. Further, when the mathematics are embedded within dense and convoluted prose, as in the case of Article the first, then the potential for being misunderstood becomes great, especially if perhaps the men deliberating on this were reluctant to express either their bewilderment or their ulterior motives.

Given its now apparent deficiencies, there could be no rational defense of Article the first (as it was finally worded) other than to forestall a populous House of Representatives. We will never know whether the spontaneous revision that spawned this ineffective amendment resulted simply from carelessness or reasons less benign. Either way, the result is the same: that part of the Constitution which Madison considered “defective” remains so and, consequently, there is no process in place that requires Congress to justify any number of Representatives it wishes to authorize.86

Now that the amendment’s intended purpose and subsequent adulteration has been fully illuminated by this report, it may seem unlikely that these deficiencies could have been overlooked for so many months by the esteemed and extremely knowledgeable gentlemen who comprised the various state legislatures. Though they did not have calculators and analytical software, many were highly capable with respect to the application of mathematics to practical problems. Nonetheless,

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86 The application of the one person one vote principle to the U. S. House would quite effectively mandate a minimum number of Representatives; however, Congress is the only representational body in the nation which is circumventing this Constitutional requirement.
it can not be guessed how long this anomaly may have remained generally undetected and even upon detection, how long before it became correctly understood. The paucity of analyses of *Article the first* (comparable to this one) in the 217 years since suggests that this subject does not lend itself to being readily comprehended.

Finally, despite the many unresolved issues raised in this report, there is one indisputable truth relative to *Article the first*: we can not declare the states’ final verdict on the need to mandate proportional representation in the federal House. Of the first eleven states that affirmed the amendment, we can not conclude with certainty what representational principle they were endorsing. Similarly, we do not know why the remaining states subsequently disregarded the amendment. Presumably, having become cognizant of the amendment’s true meaning, it would have been perceived as irrelevant unless the states anticipated that Congress might reduce the number of Representatives below 200.

In light of all the foregoing, thirty-thousand.org believes that it would be appropriate for Congress to reconvene a joint House-Senate committee to develop a coherent *compromise* to the House and Senate versions of *Article the first* (as they were proposed in 1789). The resulting amendment should be consistent with what originally had been intended and not impugned by questions of subterfuge or chicanery. Once the amendment is properly worded, the states and the people will be able to finally and unambiguously declare their position on this matter, especially since the question of proportional representation can now be considered on its own merits and apart from the issue of allocating the federal tax.
Appendix 1 — Constitution, Article I, Section 2

Below is the section of the Constitution which is relevant to this report:\(^87\)

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

The very first sentence of this paragraph (highlighted above) was superseded by Section 2 of the Fourteenth amendment\(^88\) (when it was ratified on July 9, 1868), the effect of which was to modify the Constitution’s apportionment clause in the manner shown below:

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 in each state, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

However, the later version (as revised by the 14\(^{th}\) Amendment) is not relevant to this report as the original wording was the governing language during the subject timeframe. As originally worded in the Constitution, that single sentence economically intertwined several disparate and complex areas: proportionate representation, direct taxes, and slavery. However, despite their apparent association, it is important to understand that these are three entirely distinct subjects which were forged together in order to achieve a political compromise. In other words, an analysis of how proportional representation should be implemented is completely unrelated to the issues raised by either taxes or slavery. (This point is further emphasized by the fact that the Fourteenth amendment later expunged the latter two considerations from this clause without affecting apportionment). That notwithstanding, the forced combination of these three areas is the inescapable historical context for proportional representation; therefore, a brief review of this matter is in order.

The Constitution required that the federal tax burden be allocated to the states in the exact same proportion as representation. For example, a state with 10% of the Representatives would bear 10% of the taxation.\(^89\) Of course, there is little to merit this solution other than the fact it

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\(^87\) The complete text of the Constitution is available from the National Archives at: http://www.archives.gov/national-archives-experience/charters/constitution_transcript.html

\(^88\) The complete text of the Fourteenth Amendment is available from the National Archives at: http://www.archives.gov/national-archives-experience/charters/constitution_amendments_11-27.html#14

\(^89\) This mechanism for collecting federal taxes was ultimately superseded by the 16\(^{th}\) Amendment (in 1913) which authorized the taxation of income.
provides a straightforward and unambiguous mechanism for distributing the costs of the federal government. All things considered, this was probably the only reliable method for allocating taxes that could have been implemented at that time. And, perhaps it also appealed to a visceral sense of fairness as it is analogous to requiring corporate shareholders to meet a call for additional capital according to their pro rata equity interests (if they wished to avoid dilution).

Understandably, many of the states were loath to empower a new central government with an enforceable taxing authority. Neither the extant or preceding state confederations had a true taxing authority. Thus, “no taxation without representation” evolved into the formulation whereby the state’s share of the tax burden was the price for their share of representation.

So, in and of itself, this representation & taxation formulation presents no moral dilemma. However, the vile reality of human slavery in the Southern states would complicate this simple compromise. The essence of the dilemma was that the non-slavery states were loath to allow the slave states to enjoy larger representational proportions (that would result from the number people who were not “free persons”). On the other hand, those same states insisted that the slave states bear their share of the costs of the federal government. Without a compromise there would be no United States of America, and the compromise reached was analogous to dividing the baby in two or, in this case, two-fifths and three-fifths. Though the northern states would have been content with allocating representation according to the number of “free persons” and taxation according to the total number of all persons, the slave states obviously would not have accepted that arrangement.

Absent the strong union promised by the Constitution, the individual states may have continued indefinitely as they were already: as virtually independent nations, some of which were participating in the loose coalition defined by the “Articles of Confederation”90 whose Congress consisted only of a single chamber in which, like today’s Senate, each state had an equal vote. What this “firm league of friendship” lacked, among other things, was both proportional representation and an enforceable taxing authority.

90 Which was formed in 1777. See: http://www.loc.gov/rr/program/bib/ourdocs/articles.html
Appendix 2 — The Senate’s *Article the first*

Eight days after the House passed their version of the Bill of Rights the Senate undertook debate on *Article the first*. On September 2nd, 1789, the U. S. Senate adopted the following motion:91

On motion to adopt the first article proposed: by the resolve of the House of Representatives, amended as follows: to strike out these words “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 less than one representative for every fifty thousand persons;” and to substitute the following clause after the words “one hundred;” to wit, “to which number one representative shall be added for every subsequent increase of forty thousand, until the representatives shall amount to two hundred, to which one representative shall be added for every subsequent increase of sixty thousand persons:

Applied against the amendment that had been proposed by the House, the effect of the Senate’s proposed revision is illustrated below:

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 less than one Representative for every fifty thousand persons to which number one representative shall be added for every subsequent increase of forty thousand, until the representatives shall amount to two hundred, to which one representative shall be added for every subsequent increase of sixty thousand persons.

Stated more concisely, the result of the Senate resolution on September 2, 1789 can be reduced to the following:

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, to which number one representative shall be added for every subsequent increase of forty thousand, until the representatives shall amount to two hundred, to which one representative shall be added for every subsequent increase of sixty thousand persons.

Appendix 3 — Notes on the Calculations

This amendment provides clarification of various mathematical assertions made in the report.

Reference #1

The table below provides the mathematical formulae (specified by each of the proposed versions of Article the first) to determine the allowable number of Representatives (R) based on the total population size (P) as of the applicable decennial census.

<table>
<thead>
<tr>
<th>Representational Tier</th>
<th>House Version (Aug. 24, 1789)</th>
<th>Senate Version (Sep. 2, 1789)</th>
<th>Final Version (Sep. 25, 1789)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tier 1</strong> <em>(R ≤ 100)</em></td>
<td>Ceiling: P ÷ 30,000</td>
<td>Ceiling: P ÷ 30,000</td>
<td>Ceiling: P ÷ 30,000</td>
</tr>
<tr>
<td></td>
<td>Floor: P ÷ 40,000 or 100 whichever is greater</td>
<td>Floor: 100 + (P_{T2} ÷ 40,000)</td>
<td>Floor: P ÷ 40,000 or 100 whichever is greater</td>
</tr>
<tr>
<td><strong>Tier 2</strong> <em>(100 &lt; R ≤ 200)</em></td>
<td>Ceiling: P ÷ 30,000</td>
<td>Ceiling: P ÷ 30,000</td>
<td>Ceiling: P ÷ 30,000</td>
</tr>
<tr>
<td></td>
<td>Floor: P ÷ 50,000 or 200 whichever is greater</td>
<td>Floor: 200 + (P_{T3} ÷ 60,000)</td>
<td>Floor: 200</td>
</tr>
</tbody>
</table>

P = Population
R = Number of Representatives

P_{T2} = incremental population growth during Tier 2 (per the Senate version) and is equal to the total population (P) less the population at the commencement of Tier 2. The population at the commencement of Tier 2 equals 3,000,000 = (100 x 30,000).

P_{T3} = incremental population growth during Tier 3 (per the Senate version) and is equal to the total population (P) less the population at the commencement of Tier 3. The population at the commencement of Tier 3 equals 7,000,000 = (3,000,000 + (100 x 40,000)).

The results are illustrated in the chart below.
For all three versions, the Tier 2 floor is triggered when the number of Representatives required by Tier 1 reaches 100; and the Tier 3 floor is triggered when the number of Representatives required by Tier 2 reaches 200.

Reference #2
Relative to the Senate’s amendment, the number of Representatives that would be required at a population level of 300 million is $5,083 = 200 \cdot (P_{T3} \div 60,000) = ((300,000,000 - 7,000,000) \div 60,000)$. The calculated result is exactly $5,083.3\overline{3}$.

Reference #3
This is an elaboration of the mathematical discontinuity described in section 4.4.2 (supra). Note that the maximum level of representation which is Constitutional at a census population of eight million (i.e., 266) becomes — with the addition of a single person — unconstitutional until the population later reaches 13,330,000.

<table>
<thead>
<tr>
<th>Census Population</th>
<th>Tier 2</th>
<th>Tier 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ceiling</td>
<td>$8,000,000 \div 30,000 = 266$</td>
<td>$8,000,001 \div 50,000 = 160$</td>
</tr>
<tr>
<td>Floor</td>
<td>$8,000,000 \div 40,000 = 200$</td>
<td>200</td>
</tr>
</tbody>
</table>

Reference #4
The calculation of the number of Representatives required at 18 million people.

<table>
<thead>
<tr>
<th>Number of Representatives (R)</th>
<th>House Version (Aug. 24, 1789)</th>
<th>Senate Version (Sep. 2, 1789)</th>
<th>Final Version (Sep. 25, 1789)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 3 (200 &lt; R)</td>
<td>Ceiling</td>
<td>200 + ((18,000,000 - 7,000,000) \div 60,000 = 383</td>
<td>18,000,000 \div 50,000 = 360</td>
</tr>
<tr>
<td></td>
<td>Floor</td>
<td>18,000,000 \div 50,000 = 360</td>
<td>200</td>
</tr>
</tbody>
</table>

Reference #5
This is an elaboration of the concept of “Apportionment Population” used to index the actual number of Representatives authorized against the various formulations proposed by Article the first, as explained in section 5.5 (supra).

Relative to the population, there are two parallel historical sets of data: total population and apportionment population. The total population is simply the actual, or gross, number of inhabitants (as determined by the U. S. Census Bureau). However, the data actually used for apportioning the Representatives is called the apportionment population; which is equal to the total headcount plus or minus any adjustments required by law. Prior to the Fourteenth Amendment, the adjustments required by the original language of the Constitution (see Appendix 1, supra) would have applied. Specifically, during the subject time frame, the total number of Native Americans (“Indians”) and 20% of the number of those who were “not free” were deducted from the total population numbers to arrive at the apportionment population. With the passage of the Fourteenth Amendment, those adjustments were finally eliminated and, since
then, the two data sets have been approximately equal (except for some distinctions made between resident and non-resident populations such as military personnel stationed overseas).

Relative to this analysis, the table below provides the data associated with the first seven decennial apportionments. The total number of Authorized Representatives is provided in row D. The total Census Population is provided in row E. The net Apportionment Population is provided in row G and resulting Apportionment Tier is indicated in row H.

<table>
<thead>
<tr>
<th>A</th>
<th>Year</th>
<th>1790</th>
<th>1800</th>
<th>1810</th>
<th>1820</th>
<th>1830</th>
<th>1840</th>
<th>1850</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td>Apportionment</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>C</td>
<td>Total Number of States</td>
<td>13</td>
<td>16</td>
<td>17</td>
<td>22</td>
<td>24</td>
<td>26</td>
<td>31</td>
</tr>
<tr>
<td>D</td>
<td>Authorized Number of Representatives</td>
<td>105</td>
<td>142</td>
<td>182</td>
<td>213</td>
<td>240</td>
<td>223</td>
<td>234</td>
</tr>
<tr>
<td>E</td>
<td>Census Population (gross)</td>
<td>3,929,214</td>
<td>5,300,339</td>
<td>7,224,410</td>
<td>9,615,657</td>
<td>12,830,441</td>
<td>17,119,608</td>
<td>23,140,889</td>
</tr>
<tr>
<td>F</td>
<td>Nominal District Size</td>
<td>37,421</td>
<td>37,326</td>
<td>39,694</td>
<td>45,143</td>
<td>53,460</td>
<td>76,769</td>
<td>98,892</td>
</tr>
<tr>
<td>G</td>
<td>Apportionment Population (net)</td>
<td>3,615,920</td>
<td>4,889,823</td>
<td>6,584,255</td>
<td>8,969,878</td>
<td>11,931,000</td>
<td>15,908,376</td>
<td>21,840,083</td>
</tr>
<tr>
<td>H</td>
<td>Tier</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>I</td>
<td>Nominal District Size</td>
<td>34,437</td>
<td>34,435</td>
<td>36,177</td>
<td>42,112</td>
<td>49,712</td>
<td>71,338</td>
<td>93,333</td>
</tr>
</tbody>
</table>

The “Nominal District Size” for both the total and apportionment populations (rows F and I) are the respective population totals divided by the authorized number of Representatives (row D).

Relative to this report, the important point is that the Apportionment Population data (rows G and I) reflect that used by Congress to determine the number of Representatives and the apportionment thereof; therefore, it is the data we must use to evaluate their implementation of same. Row I is the data illustrated in the Maximum District Size chart (section 5.5) as the “nominal” average district size.

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93 Data from the “Estimated Annual Population of the United States” at http://www.thirty-thousand.org/pages/QHA-01.htm

Appendix 4 — Survey of Accounts of *Article the first*

It would be reasonable to expect that historical literature devoted to the first amendments to the Constitution would devote some attention to the *very first* amendment proposed in the Bill of Rights. Certainly we should find complete descriptions of why *Article the first* was proposed, the results it would have produced, and why it was the only one of the twelve never to be ratified. However, this amendment has been consistently neglected or mischaracterized in the historical literature; this fact attests to its ability to befuddle even the most intelligent commentators.

This appendix provides, in chronological order, various accounts of *Article the first* from historians and other commentators. Also provided, where appropriate, is commentary thereon.

**Reference #1**  
Johnson, S.M. *Government in England and America*.  
New York: Carleton. 1864.

The only relevant information provided is as follows:

> Here follow twelve articles, of which all but the first two will be found among the amendments appended to the Constitution at the end of this chapter, where they are numbered from I. to X. included. The first two articles, which were not ratified by the legislatures of the States, were intended to restrict the numbers of the House of Representatives, and to prevent the compensation of members from being varied during the term of the members who might alter it. [Page 523.]

Note the erroneous description that *Article the first* was “intended to restrict the numbers” when, in fact, any of the versions thereof would have ensured a minimum number (unless the author is referring to the smaller ceiling permitted in the final version’s Tier 3). Either way, it is an inadequate description.

Stated in a footnote in the section referenced above with the first ten amendments was the following:

> It may be proper here to state that 12 articles of amendment were proposed by the first Congress, of which but 10 were ratified by the States — the first and second in order not having been ratified by the requisite number of States. [Page 543.]

No further analysis is provided.

**Reference #2**  
New York: Dodd, Mead & Co. 1880 (Revised Edition).

The only reference to this amendment is as follows:

> Out of the twelve amendments which Congress presently submitted, ten by state ratification became part of our fundamental law before 1791; only the two of least importance failing. [Page 115.]

No further elaboration was provided other than the following footnote to the preceding assertion:
Of the two amendments which failed of complete ratification, one fixed the ratio of representation in the House, and the other forbade that any law varying the compensation of Senators and Representatives should take effect until a new election of Representatives had intervened. Matters like these, it was concluded, might fairly be left to the discretion of legislators acting each under a sense of responsibility.

The author states that the amendment would have “fixed the ratio of representation in the House”, which is true only in Tiers 1 and 2; not in Tier 3.

Reference #3

This book is a compilation of relevant historical documents with virtually no commentary. Article the first is referenced only where it happens to occur in the documents.

Reference #4

This is a frequently cited classical work. Published in 1896, it provides a comprehensive review of the available historical documentation. Section 22 of chapter II is entitled “Apportionment of Representatives” and though it devotes pages 42 to 45 to Article the first, it does not mention any of the amendment’s anomalies. In addition to this conspicuous omission, the author appears to have completely misunderstood the amendment. The amendment is correctly introduced by explaining that:

The ratifying conventions of five of the States were not satisfied with the simple provision in the Constitution, but desired that the ratio should be fixed in the organic law itself rather than left to the discretion or the caprice of Congress.

The author explains that “This [the House’s version] made provision for the expected growth in population, and was calculated ‘to prevent a too rapid increase of the number of members.’” The author is quoting a statement made by Fisher Ames when he first introduced the concept (on August 14) of using a tiered approach (that employs an increasing minimum district size) rather than a straight 1:30,000 formulation. This description would be misleading for a reader not well informed on this subject because the House’s amendment would not “prevent” an increase any more rapid that that already allowed by the constitutional formulation. What Fisher Ames clearly had intended is that it would not require “a too rapid increase” relative to the floor size.

The author continues: “The Senate so amended the resolution that a greater increase in the growth of the population was required for additional representation”. This is a reference to the Senate’s proposal to change the Tier 3 proportion from 1:50,000 to 1:60,000 (on September 2, 1789). Because the Senate’s proposal merged the minimum and maximum parameters into a single formulation, that description is accurate. However, it would have been more accurate to state that the Senate’s proposal would have required the representation to increase even less rapidly than would the House’s proposal (while preventing it from becoming as large as the Constitution would have allowed).

The author continues: “A conference committee was appointed, and they reached a compromise which slightly changed the form of the resolution as passed by the House.” This refers to events
that transpired on September 24, 1789 (when “more” was substituted for “less”). The author is obviously unaware how profoundly the amendment was altered when the conference committee “slightly changed” the House version.

Finally, regarding the failure of Article the first to become a Constitutional amendment, the author concludes:

It has been the almost universal opinion of historians that this amendment was most wisely rejected. The decennial apportionment bill is usually settled aside from party grounds. The last apportionment bill, which was passed by the Fifty-first Congress [1901] without serious opposition, is a recent proof of the truth of this statement. [Page 45.]

One might expect there to be some elaboration on why the “universal opinion of historians” weighed against the very first amendment proposed in the Bill of Rights; unfortunately, no substantiation is offered. However, the author does state (in a footnote to this assertion) that: “The proposed amendment would have enabled Congress to limit the number of the House of Representatives.” He apparently believes that, absent the amendment Congress would not have the ability to “limit the number … of Representatives.” Indeed, all three versions of Article the first would have explicitly authorized Congress to set the number of Representatives but only within the range specified. Only the final version (and the Senate’s version) would have limited the number of Representatives relative to what was already allowed by the Constitution. Presumably the author did not expect that 33 years later the Congress would, without a Constitutional amendment, impose this authority nonetheless.

This author, Dr. Herman Vandenburg Ames, PhD (1865-1935) was a historian and educator. After attending Amherst College, where he was graduated in 1888, he pursued graduate work at Columbia and Harvard and obtained the degrees of A.M. (1890) and Ph.D. (1891) in American history at Harvard. In 1896 he became assistant professor of history at Ohio State University. While there he revised and published his doctoral dissertation: “The Proposed Amendments to the Constitution of the United States during the First Century of Its History (1897)”. The work was awarded the first Justin Winsor Prize of the American Historical Association and led directly to his appointment in 1897 as instructor in American history at the University of Pennsylvania, where he later became assistant professor of history and finally professor of American constitutional history (1908-35).

Reference #5

Relative to Article the first, the only meaningful commentary provided by the author is as follows:

The Constitution should be revised in its provision for the apportionment of representatives. It was the sense of the people, as shown by the ratifying conventions, that the number of representatives should be increased, but not subject to decrease, at the will of Congress below a minimum. Congress, as population increased, might make the House of Representatives an unwieldy number. The possibility was a dangerous defect in the instrument and ought to be remedied [Page 219].

The ambiguity of the author’s last sentence confuses Madison’s position. (Madison’s full quote is provided in section 3.2). In his last sentence, the author states that the possibility was a
dangerous defect that ought to be remedied — so what is the antecedent of “the possibility”? He
appears to be referring to that referenced in the third sentence: an unwieldy number of
Representatives. However, the defect to which Madison was referring is that referenced in the
author’s second sentence: that the number of representatives not be subject to a decrease below a
minimum. It is not apparent if the author was himself confused or if he had simply been
imprecise in his wording. Either way, this apparent misconstrual may have helped perpetuate the
misperception of Madison’s proposal.

Reference #6

Produced by the U. S. government, this work probably provides the most conspicuous example
of the hole in the historical record with respect to Article the first. This large reference volume
(885 pages) makes no mention of the proposed amendment or even the fact that twelve
amendments were proposed for the Bill of Rights.

Reference #7
Rutland, Robert Allen. The Birth of the Bill of Rights, 1776-1791.
Boston: Northeastern University Press. 1955

The only relevant commentary is that “both houses had approved the twelve amendments which
emerged from the joint conference” and that the “twelve proposals included … two articles
calling for apportionment of legislators and fixing the pay of congressmen.” [Page 215.] As to the
failure of the first two articles to be ratified, the author provides:

There were sufficient objections to the first and second articles, however, to portend their
defeat. The first amendment which the states rejected had called for a fixed schedule that
apportioned seats in the House of Representatives on a ratio which apparently seemed
disadvantageous. The second rejected amendment prohibited senators and representatives
from altering their salaries “until an election of Representatives shall have intervened.”

Obviously, neither dealt with personal rights.

The author’s description of the amendment — that it would apportion the seats “on a ratio” —
appears to reflect the amendment’s ostensible purpose (as per the original House version) and
does not indicate any awareness of either the amendment’s true effect or its anomalies relative to
Tier 3. His ambiguous explanation for its rejection by the states (that the said ratio “seemed
disadvantageous”) does not provide any insights.

Reference #8

For the most part, the author only recounts the events that transpired as the amendment moved
through Congress and its subsequent failure to be ratified; little commentary is offered. With
respect to Madison’s original proposal, he does correctly describe “that there be one representa-
tive for every thirty thousand population;” [Page 36]. Regarding the Senate’s subsequent revision
of Article the first on September 2, he states only that “Minor changes were made in the articles
relating to the number of representatives and to the salaries of members of Congress.” [Page 44.] Regarding the modification made by the joint conference committee, he states only that “‘more’
was to be substituted for ‘less’ in the original House provision regarding the number of
Representatives in Congress.” There is no mention of any of the amendment’s anomalies or an explanation of why it subsequently failed to be ratified.

**Reference #9**
Brant, Irving. *The Bill of Rights; its origin and meaning.*
Indianapolis: Bobbs-Merrill. 1965

The only relevant commentary is as follows:

> Madison’s second and third amendments fixed the size of the House of Representatives and provided that no law varying the compensation of Congress should take effect until after the next election. Both were submitted to the states and neither one was ratified. [Page 45.]

**Reference #10**

The book includes all the relevant historical documents in which *Article the first* is included. Regarding the alteration made by the joint committee:

> On September 23 [1789], Madison made the Conference Report to the House. It provided that the House would accept all Senate amendments, and provided for three further changes. The first was a minor alteration in the amendment on representation. [Page 1159]

Of course, the alteration referenced was far from “minor” and no additional commentary or analysis is offered on the amendment other than that the first two articles subsequently “failed of state ratification.”

**Reference #11**
New York: Oxford University Press, 1977

The author correctly describes Madison’s original proposal as follows: “there shall be one representative for every thirty thousand people”. [Page 166] Otherwise, there is no additional commentary other than that already provided in this preceding work (in Reference #10 above).

**Reference #12**

This book is a compilation of documents with virtually no commentary. It only references *Article the first* only where it occurs in the various drafts of the Bill of Rights.

**Reference #13**

This book is a compilation of documents with virtually no commentary. It only references *Article the first* only where it occurs in the various drafts of the Bill of Rights.
Reference #14

No mention of Article the first whatsoever.

Reference #15

No mention of Article the first whatsoever.

Reference #16

Includes several references (e.g., as per footnote #70, supra).

Reference #17

No mention of Article the first.

Reference #18

No commentary on Article the first other than to recite its occurrence in the historical records.

Reference #19

This author appears to be the first to identify the flaws contained in Article the first, as shown in the excerpts below.

First, the Amendment’s intricate mathematical formula made little sense. If the population rose from eight to nine million in a decade, the requirement that there be at least 200 Representatives would be inconsistent with the requirement that there be not more than one Representative for every fifty thousand people. In effect, the Amendment required the population to jump from eight to at least ten million in a single decade.

Second, and related, what the First Amendment promised in the short term — increased congressional size — it took back in the long run. Its final clauses established a maximum, not a minimum, on congressional size. Even worse, this maximum was more stringent than that in the existing Constitution. In effect, the Amendment dangled the bait of more “democracy” now in exchange for more “aristocracy” in the future. Some committed democrats may have been wary of snatching that bait. Tellingly, not a single state ratifying convention had proposed a stricter constitutional maximum on the size of the House. [Page 15]
In describing *Article the first*, the author states that the “first of twelve dealt with the relation of the population to the number of representatives from each state” [Page 40]. No further elaboration is provided to explain the amendment’s existence or its failure to be ratified.

Reference #21


In an interesting article about the eventual ratification of *Article the second* as the 27th Amendment (also described in Section 5.8 of this report). The author digresses briefly into the subject of *Article the first* during which his misunderstanding of the amendment is clearly revealed. Under the heading “Why [Article the first] was unwise” he writes:

The first proposed amendment, however, looked to the future. It provided a formula to adjust the size of the House of Representatives to accommodate the nation’s population growth.

Under the proposed amendment, there was to be one Representative for every thirty thousand persons, until the House had one hundred members; then there would be one Representative for every forty thousand, until the House had two hundred members. If and when one Representative would have fifty thousand constituents, Congress was to provide new ratios.

Had this amendment been adopted, the House of Representatives would have become massive. The United States population reached 250,000,000 in 1990. Under the first proposed amendment, the House would have grown to 5,000 members.

By legislation, however, Congress has locked the number of House members at 435, which has worked well. This first proposed amendment for Congressional apportionment is best left sleeping forever.

Like others before, this author did not realize that, in fact, the proposed amendment would have produced the opposite result: the 50,000 ratio redefined the maximum House size against a minimum size of 200. In other words, using the author’s example, at a total population of 250 million, 5,000 would be the maximum allowable number of Representatives, not the minimum. This is a considerably lower maximum than the 8,353 allowed by a Constitution so, given the author’s objection to the prospect of a “massive” House, he certainly would have endorsed the bill had he understood it, especially since the corresponding floor size of 200 would not have jeopardized the author’s preferred size of 435.

The author, John Dean, is well qualified to interpret the proposed amendment: according to his biography he had studied both English Literature and Political Science at the College of Wooster in Ohio from he graduated in 1961. He received a graduate fellowship from American University to study government and the presidency, before entering Georgetown University Law Center, where he received his JD in 1965. Before becoming Counsel to the President of the United States
in July 1970 at age thirty-one, John Dean was Chief Minority Counsel to the Judiciary Committee of the United States House of Representatives, the Associate Director of a law reform commission, and Associate Deputy Attorney General of the United States. He has since written has published a number of books.  

Reference #22
The National Archives (www.archives.gov)

Googling the entire archives.gov web site for “Article the first” returns zero links. Even their transcript of the Bill of Rights makes no mention of its first two articles. The search on “twelve amendments” returns only the following information:

The first article, concerning the ratio of constituents to each congressional representative, was never ratified by the states;

The joint resolution of Congress proposing twelve amendments to the Constitution, like the laws of the first Congress, was engrossed on a single parchment sheet by a congressional clerk, William Lambert, in September 1789. … By 1791 three-fourths of the states had ratified articles three through twelve, and they became the first ten amendments, the Bill of Rights.

Even before the constitution was adopted, delegates to the constitutional convention in Philadelphia repeatedly charged that the Constitution as drafted would open the way to tyranny by the central government. Fresh in their minds was the memory of the British violation of civil rights before and during the Revolution. They demanded a “bill of rights” that would spell out the immunities of individual citizens. Several state conventions in their formal ratification of the Constitution asked for such amendments; others ratified the Constitution with the understanding that the amendments would be offered. On September 25, 1789, the First Congress of the United States therefore proposed to the state legislatures 12 amendments to the Constitution that met arguments most frequently advanced against it. The first two proposed amendments, which concerned the number of constituents for each Representative and the compensation of Congressmen, were not ratified. Articles 3 to 12, however, ratified by three-fourths of the state legislatures, constitute the first 10 amendments of the Constitution. On December 15, 1791, three-fourths of the states ratified ten of the proposed twelve amendments to the Constitution.

Biographical information from http://writ.news.findlaw.com/dean/
Survey as of 5-April-2007.